JUDGMENT OF THE COURT (Second Chamber)

8 December 2011 *

In Case C-272/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 15 July 2009,

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

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

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

represented by M. Siragusa, avvocato, A. Winckler, avocat, G.C. Rizza, avvocato, T. Graf, advokat, and M. Piergiovanni, avvocato,

appellants,

* Language of the case: English.

the other party to the proceedings being:

European Commission, represented by E. Gippini Fournier and J. Bourke, acting as Agents, and by C. Thomas, Solicitor, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2011,

gives the following

Judgment

1 By their appeal, KME Germany AG, formerly KM Europa Metal AG, KME France SAS, formerly Tréfimétaux SA, and KME Italy SpA, formerly Europa Metalli SpA (collectively 'the KME group') seek to have set aside the judgment delivered by the Court of First Instance of the European Communities (now 'the General Court') on 6 May 2009 in Case T-127/04 *KME Germany and Others* v *Commission* [2009] ECR II-1167 ('the judgment under appeal') by which the General Court dismissed their application for annulment or for a reduction of the fines which were imposed on them under Article 2(c) to (e) of Commission Decision C(2003) 4820 final of 16 December 2003 relating to a proceeding pursuant to Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 – Industrial tubes) ('the decision at issue').

Legal context

2 Article 15(2) 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) provided:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the

undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) [EC] or Article [82 EC]; or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1).

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

3 Article 17 of Regulation No 17 provided:

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

4 Regulation No 17 was repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), applicable as from 1 May 2004. Article 31 of that regulation is the equivalent of Article 17 of Regulation No 17.

5 The Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3) ('the Guidelines'), applicable at the time the decision at issue was adopted, states, in its preamble:

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

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

6 According to Section 1 of the Guidelines, '[that] basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'.

7 With regard to gravity, Section 1 A of the Guidelines provides that in assessing the criterion of the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements are put into one of three categories: minor infringements, serious infringements and very serious infringements.

8 According to the Guidelines, very serious infringements are, in particular, horizontal restrictions such as price cartels and market-sharing quotas. The basic amount of the likely fine is 'above [EUR] 20 million'. The Guidelines refer to the need to vary basic amounts according to the nature of the infringement committed; the effective

economic capacity of offenders to cause significant damage to other operators, in particular consumers; the deterrent effect of the fine; and the undertakings' legal and economic knowledge and infrastructures which enable them to recognise that their conduct constitutes an infringement. It is also stated that where infringements involve several undertakings, it might be necessary to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

9 As regards the duration of infringements, the Guidelines make a distinction between infringements of short duration (in general, less than one year), infringements of medium duration (in general, one to five years) and infringements of long duration (in general, more than five years). With regard to the latter, provision is made for an increase in the amount of the fine of up to 10 % per year in the amount determined for gravity. The Guidelines also strengthen the position regarding increases in fines for long-term infringements with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period and increasing the incentive to denounce the infringement or to cooperate with the Commission.

10 Under Section 2 of the Guidelines the basic amount may be increased where there are aggravating circumstances such as, inter alia, repeated infringements of the same type by the same undertaking or undertakings. According to Section 3 of the Guidelines, that basic amount may be reduced where there are attenuating circumstances such as the exclusively passive or 'follow-my-leader' role of an undertaking in the infringement, non-implementation in practice of the agreements or the effective cooperation by the undertaking in the proceedings, outside the scope of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice').

11 The Guidelines were replaced as from 1 September 2006 by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

12 The Leniency Notice sets out the conditions under which undertakings cooperating with the Commission during an investigation which it carries out into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them. According to Section B of that notice, an undertaking which informs the Commission about a cartel before the Commission has undertaken an investigation, provided that it does not have sufficient information to establish the existence of the alleged cartel, or which is the first to adduce decisive evidence of the cartel's existence, will benefit from a reduction of at least 75 % of the fine or from total exemption from the fine. According to Section D of the notice, an undertaking will benefit from a reduction of 10 % to 50 % of the fine if, inter alia, before the statement of objections is sent, it has provided the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement.

13 The Leniency Notice was replaced as from 14 February 2002 by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3). The Commission nevertheless applied it in the present case, since that is the notice which the undertakings took into consideration when cooperating with the Commission.

Background to the dispute

14 Together with other undertakings – Wieland Werke AG and also Outokumpu Oyj and Outokumpu Copper Products Oy (collectively 'the Outokumpu group') – producing semi-finished products in copper and copper alloys, the appellants took part

in a set of agreements and practices designed to fix prices and share markets in the industrial tubes sector, more particularly copper tubes supplied in level wound coils.

15 Following inspections and investigations, on 16 December 2003 the Commission adopted the decision at issue, a summary of which was published in the *Official Journal of the European Union* of 28 April 2004 (OJ 2004 L 125, p. 50).

16 So far as the present appeal is concerned, the relevant paragraphs of the judgment under appeal in which the General Court summarised the part of the decision at issue that relates to the calculation of the fine are as follows:

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

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

...

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

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

...

19 Fourthly, the Commission classified the duration of the infringement, which lasted from 3 May 1988 until 22 March 2001, as "long". The Commission therefore considered it appropriate to increase the starting amounts of fines on the undertakings concerned by 10 % for each year of participation in the cartel. …

…

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

22 Seventhly and lastly, in accordance with Section D of the … Leniency Notice, the Commission reduced the amount of the fines by 50 % for Outokumpu, 20 % for Wieland [Werke AG], and 30 % for the KME Group (recitals 402, 408 and 423).'

The proceedings in the General Court and the judgment under appeal

17 The appellants put forward five pleas in law, all concerning the determination of the amount of the fine imposed upon them. They alleged, respectively, failure to take sufficient account of the actual impact of the cartel for the purposes of calculating the

starting amount of the fine, inadequate assessment of the size of the sector affected by the infringement, an erroneous increase in the starting amount of the fine by reason of the duration of the infringement, failure to take account of certain attenuating circumstances, and an insufficient reduction in the amount of the fine pursuant to the Leniency Notice.

18 The General Court rejected each of those pleas and dismissed the action in its entirety.

Forms of order sought

19 By its appeal, the KME group asks the Court to:

— set aside the judgment under appeal;

— in so far as possible, having regard to the facts before the Court, partially annul the decision at issue and reduce the amount of the KME group's fine;

— order the Commission to pay the costs of these proceedings and those incurred before the General Court; or

— in the alternative, set aside the judgment under appeal, including with respect to the order of the General Court to the KME group to pay the costs, and refer the case back to that court.

20 The Commission contends that the Court should:

— dismiss the appeal; and

— order the KME group to pay the costs.

The appeal

21 The KME group puts forward give grounds of appeal alleging, respectively, various errors of law relating to the impact of the infringement on the market, to the account taken of turnover, to the duration of the infringement and to the appellants' cooperation, and, lastly, infringement of the right to an effective judicial review.

First ground of appeal: various errors of law relating to the impact of the infringement on the market

Arguments of the parties

22 The appellants state that their first ground of appeal relates to paragraphs 60 to 74 of the judgment under appeal. Those paragraphs are preceded by a summary of the parties' arguments and the General Court's view on the admissibility of two new economic reports produced by the appellants to demonstrate the lack of real impact of the infringement on the market; the General Court concluded in paragraph 59 of the judgment under appeal that those reports were admissible.

23 Paragraphs 60 to 74 of the judgment under appeal are worded as follows:

'60 As for whether the present plea is well founded, it should be noted that, by that plea, the applicants challenge both the Commission's assessment of the seriousness of the infringement... and the differentiated treatment which it carried out on the basis of the market shares of the undertakings concerned...

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

62 The case-law shows that the market share of each of the undertakings concerned in the market which formed the subject-matter of a restrictive practice constitutes an objective factor which gives a fair measure of the responsibility of each of them as regards the potential harmfulness of that practice for the normal operation of competition (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 197).

63 Similarly, concerning the assessment of the seriousness of the infringement, it should also be noted that, even if the Commission had not proved that the cartel had had an actual effect on the market, that would have been irrelevant to the classification of the infringement as "very serious" and thus to the amount of the fine.

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

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

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

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

68 The Court of First Instance has held on numerous occasions that actual impact of a cartel on the market must be regarded as sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market (see, in particular, [Case T-241/01] *Scandinavian Airlines System* [v *Commission* [2005] ECR II-2917], at paragraph 122; Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraphs 159 to 161; Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 153 to 155; Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraphs 176 to 178; Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 73 to 75).

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

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

71 As for the applicants' argument that the file contains examples of non-compliance with the collusive agreements, the fact that cartel members did not always comply with the agreements is not sufficient to exclude their having had a market impact (see, to that effect, *Groupe Danone* [v *Commission*]…, at paragraph 148).

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

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

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

24 The appellants submit that the General Court gave an illogical and inadequate statement of reasons for the judgment under appeal and erred in law in holding that the Commission was permitted, in determining the starting amount of the fine, having regard to the gravity of the infringement, to take account of the impact of the cartel on the relevant market without being required to demonstrate that the arrangements actually had such an impact and, in any event, by inferring such an impact from mere indicators. Moreover, by holding that the Commission had demonstrated to the requisite legal standard that the arrangements had an impact on the market, the General Court manifestly distorted the facts and economic evidence which the KME group put before it.

25 The Commission maintains first of all that the first ground of appeal is ineffective. The appellants did not put forward any arguments challenging paragraphs 60 to 65 of the judgment under appeal, in which the General Court held that it was not necessary to demonstrate the actual impact of the infringement on the market, whether as regards the differentiated treatment of the undertakings in question or the seriousness of the infringement. They merely challenged the grounds included by the Court for the sake of completeness, whereby the Court, in paragraph 67 et seq. of the judgment under appeal, held that the Commission had demonstrated to the requisite legal standard that the cartel had an impact on the market concerned.

26 The Commission contends that, in any event, the first ground of appeal is inadmissible since it relates to an appraisal of the facts and the evidence.

27 It goes on to contend that, in its view, the General Court properly examined the evidence.

28 Lastly, it maintains that the General Court provided adequate reasons for the judgment under appeal, in particular in paragraph 72, in which the Court rejected the arguments and the evidence put forward by the appellants.

Findings of the Court

29 The appellants do not contest the General Court's findings concerning the classification of the infringement as a 'very serious infringement' within the meaning of the Guidelines nor the differentiation between undertakings, by reference to the shares held in the market concerned, to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition. They merely contest the General Court's findings concerning the actual impact of the cartel on the market as a factor taken into account in determining the basic amount of the fine.

30 According to Section 1 A of the Guidelines, in assessing the criterion of the gravity of the infringement, account is to be taken of its actual impact on the market only where this can be measured.

31 Determination of the actual impact of a cartel on the market requires a comparison of the market situation resulting from the cartel with that which would have resulted from free competition. Such a comparison necessarily involves recourse to assumptions, given the multiplicity of variables capable of having an impact on the market.

32 In recital 300 of the decision at issue, the Commission emphasised the impossibility of determining what the evolution of prices during the period of infringement of more than 12 years would have been in the absence of the cartel. Having refuted the appellants' arguments, it provided evidence from which it concluded, in recital 314

of that decision, that the anti-competitive scheme had overall had an impact on the market, although it was not possible to quantify it precisely.

33 It thus follows from the decision at issue that, in this instance, the Commission did not consider it possible for the purposes of calculating the fine to take that optional element – the actual impact of the infringement on the market – into account since it could not be measured. That conclusion was not challenged in the judgment under appeal.

34 In paragraphs 68 and 70 of the judgment under appeal, the General Court recalled the case-law relating to the standard of proof of the actual impact of a cartel on the market. In paragraphs 69 and 71 to 73 of its judgment it checked, moreover, that the Commission had demonstrated to the requisite legal standard the actual impact of the cartel on the relevant market. However, it did so for the sake of completeness, as indicated in paragraph 66 of that judgment, and after correctly observing, in paragraph 64, that the actual impact of cartels on the market is not a decisive factor for determining the level of fines. It follows from this that the appellants' plea countering that part of the General Court's reasoning is ineffective.

35 In any event, the General Court's reasoning in relation to the statement of reasons for the decision at issue deals with the appellants' argument, summarised in the last sentence of paragraph 38 of the judgment under appeal, that the reasoning and the conclusion contained in the decision at issue concerning the actual impact of the cartel were erroneous, uncorroborated and contradictory in character. The General Court found that there was evidence to prove the existence of such impact, but did not call in question the impossibility of measuring it precisely.

36 Thus the General Court was not contradicting itself when, on the one hand, it recalled the principle that the actual impact of the infringement on the market is not a decisive factor for determining the level of fines and, on the other, it reviewed the statement of reasons for the decision at issue in relation to that impact.

37 Consequently, as is apparent from the wording of their first ground of appeal, the appellants incorrectly infer from the General Court's review that the actual impact of the infringement on the market must have been taken into account for the purpose of calculating the starting amount of the fine that was imposed on them. That argument is based on a false premiss.

38 With regard to the claim that the General Court distorted the economic evidence adduced by the appellants, it is alleged not that the General Court construed those economic reports in a manner manifestly at odds with their wording (see, to that effect, Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-419, paragraph 57), but that the General Court erred in its assessment of the content of those reports. In any event, the appellants do not indicate precisely which parts of those reports the General Court misconstrued as to their real meaning. Accordingly that argument is inadmissible.

39 It follows from the foregoing considerations that the first ground of appeal must be rejected.

Second ground of appeal: various errors of law relating to the account taken of turnover

Arguments of the parties

40 The second ground of appeal concerns paragraphs 85 to 94 of the judgment under appeal. It relates, in essence, to paragraphs 90 to 94, which are worded as follows:

'90 The applicants argue in that regard, first, that the price of copper is outside the control of industrial tube manufacturers, since it is fixed in accordance with the

[London Metal Exchange] and, secondly, that it is the buyers of industrial tubes themselves who decide at what price the metal is bought. The applicants further emphasise that fluctuations in the metal price have no impact on their profit.

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

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

the equal treatment principle and Regulation No 17, the factors and the detailed figures which it will take into account in order to implement a policy which ensures compliance with the prohibitions laid down by Article 81 EC.

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

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

41 In the appellants' submission, the General Court infringed Community law and provided an inadequate statement of reasons for the judgment under appeal by approving the Commission's reference – in order to assess the size of the market affected by the infringement for the purpose of establishing the gravity element of the fine – to a market value that wrongly included the revenue from sales made in an upstream market separate from the 'cartel' market, despite the fact that the cartel members were not vertically integrated in that upstream market.

42 They explain that the copper transformation industry has specific features. In particular, it is the customer who decides when the metal will be purchased on the London Metal Exchange and hence its price. Even though that price invoiced by the tubes manufacturer to the customer includes the processing margin, to take it into consideration when calculating the undertaking's turnover would be to ignore the economic reality of the market, which is characterised in particular by the important part represented by the raw material in the cost of the product and the very significant fluctuations in the price of that raw material. Those facts were established by the General Court.

43 According to the appellants, the General Court erred in law by failing to hold that the Commission should have taken account of the case-law of the General Court and the Commission's own previous practice in taking decisions, whereby, when the Commission calculates the starting amount of the fine and/or applies the 10 % turnover cap, it is required to take into consideration the specific features of the relevant market.

44 They also claim that, by failing to distinguish the appellants from other undertakings whose turnover is not so greatly influenced by the price of the raw material, the General Court infringed the principle of non-discrimination, which requires that different situations be treated differently.

45 Lastly, the appellants challenge the case-law on which the General Court relied, which is based on the Commission's discretion. They take the view that the General Court failed to examine whether the criteria used by the Commission to establish the gravity of the cartel were pertinent and adequate.

46 The Commission contends that, in so far as the appellants invite the Court of Justice to make a different appraisal from that of the General Court of whether the industrial tubes industry is unique, the ground of appeal is inadmissible. It also challenges the facts as described by the KME group, namely that tubes manufacturers often act as if

they are agents for their customers in the purchasing of copper, and denies that the General Court gave a ruling on that matter.

47 In any event, the Commission submits that the General Court was correct in stating, in paragraph 91 of the judgment under appeal, that there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which therefore cannot be excluded from its turnover when fixing the starting amount of the fine.

48 Likewise, the General Court was right to find in paragraph 93 of the judgment under appeal that, despite its approximate nature, turnover is currently considered, by the Community legislature, the Commission and the Court, as an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned.

Findings of the Court

49 It has consistently been held that, in assessing the gravity of an infringement, regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 120).

50 While the Court of Justice has concluded from this that it is permissible, for the determination of the fine, to take into account both the undertaking's overall turnover, which is an indication of the size of the undertaking and its economic strength, and that part of the turnover which derives from the goods which are the subject of the infringement and which therefore is capable of giving an indication of the scale of the infringement, it has nevertheless recognised that the overall turnover of an undertaking gives only an approximate and imperfect indication of the size of that undertaking (*Musique Diffusion française and Others* v *Commission*, paragraph 121; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139; 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; Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 100; and Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 74).

51 It has also pointed out on a number of occasions that it is important not to confer on one or the other of those figures an importance which is disproportionate in relation to the other factors to be assessed in relation to the gravity of the infringement (*Musique Diffusion française and Others* v *Commission*, paragraph 121; *Dansk Rørindustri and Others* v *Commission*, paragraph 243; Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 100; and Case C-510/06 P *Archer Daniels Midland* v *Commission*, paragraph 74).

52 The General Court did not, therefore, err in law when it observed in paragraph 93 of the judgment under appeal that turnover, although vague and imperfect, is an adequate criterion for assessing the size and economic power of the undertakings concerned.

53 Nor, moreover, did the General Court err in law when it held, in paragraph 91 of the judgment under appeal, that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Advocate General noted in point 141 of her Opinion, not to take gross turnover into account in some cases but to do so in others would require a threshold to be established, in the

form of a ratio between net and gross turnover, which would be difficult to apply and would give scope for endless and insoluble disputes, including allegations of unequal treatment.

54 Lastly, the General Court provided adequate reasons for the judgment under appeal and carried out the review in the manner required of it. Thus, the appellants having challenged the use of the turnover in the assessment of the size of the relevant market, the General Court, in paragraph 88 of the judgment under appeal, rejected the Commission's argument that the starting amount of the fine imposed on the appellants would not necessarily have been less than EUR 35 million if the copper price had been deducted from the market turnover. It went on to determine, in paragraphs 90 and 91 of the judgment under appeal, whether the Commission was wrong to take the copper price into account when determining the size of the market.

55 It follows from those considerations that the General Court carried out its review in the manner required of it, that it responded to the plea in law put forward by the appellants and that it did not err in law in concluding, in paragraph 94 of the judgment under appeal, that the Commission was right to take the copper price into account for the purposes of determining the size of the market concerned.

56 As regards the allegation that the General Court failed to examine whether the criteria used by the Commission to establish the gravity of the cartel were pertinent and adequate, it should be borne in mind that, in an action on a decision relating to a competition matter, it is for the applicant to formulate his pleas in law and not for the General Court to review of its own motion the weighting of the factors taken into account by the Commission in order to determine the amount of the fine.

57 The second ground of appeal is therefore unfounded.

Third ground of appeal: various errors of law relating to the account taken of the duration of the infringement

Arguments of the parties

58 The appellants state that their third ground of appeal relates to paragraphs 100 to 105 of the judgment under appeal. They claim that the General Court infringed Community law and provided an obscure, illogical and inadequate statement of reasons for that judgment by upholding the part of the decision at issue in which the Commission misapplied the Guidelines, and infringed the principles of proportionality and equal treatment by imposing the maximum percentage increase on the starting amount of the fine on account of the duration of the infringement.

59 According to the appellants, it is apparent from Section 1 B of the Guidelines that the purpose of a fine increase on account of duration of an infringement is to '[impose] effective sanctions on restrictions which have had a harmful impact on consumers over a long period'. The requirement of a link between the infringement's duration and its harmful effect is also clear from the case-law. The General Court, however, failed to enquire whether the Commission, in its assessment of the infringement's gravity, really did give proper weight to the circumstance that the cartel's intensity and effectiveness varied over time. The General Court was therefore wrong in holding, in paragraph 104 of the judgment under appeal, that the 125% increase in the starting amount of the fine is not manifestly disproportionate.

60 The Commission contends that the Court of Justice lacks jurisdiction to substitute its own appraisal of the amount of the fine for that of the General Court. This ground of appeal is therefore inadmissible.

61 In any event, the General Court provided a clear and logical explanation for its appraisal, which responded to all the legal arguments made by the KME group.

Findings of the Court

62 By their third ground of appeal, the appellants challenge both the principle of an increase in the fine to take account of the duration of the infringement and the result of the application of that principle in their particular case, namely the increase in the starting amount of the fine, set at EUR 35 million, by 125 % to take account of an infringement period of 12 years and 10 months, each year of participation corresponding to a 10 % increase. The basic amount was thus increased to EUR 56.88 million.

63 As the Advocate General noted in point 162 of her Opinion, the objection to the result is based on the erroneous assumption that the rate of increase was 125 %, whereas in fact it was only 62.51 % (56.88÷35 = 1.6251).

64 As regards the principle of an increase in the fine to take account of the duration of the infringement, it is not necessary to establish in practical terms a direct relation between that duration and increased damage to the Community objectives pursued by the competition rules.

65 For the purpose of applying Article 81(1) EC, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (see, to that effect, Joined Cases 56/64

and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299). That applies in particular in the case, as in this instance, of obvious restrictions of competition such as price-fixing and market-sharing. If a cartel determines the state of the market at the moment it is agreed, its lengthy duration can make the structures of that market more rigid, reducing cartel participants' incentive for innovation and development. A return to free competition will be all the more difficult and protracted, the longer the cartel continues.

66 Even if the cartel's intensity and effectiveness varies over time, the fact remains that that cartel continues to exist and, therefore, to make the structures of the market all the more rigid.

67 Where an agreement has not been implemented at all, it must be borne in mind that Section 3 of the Guidelines provides that non-implementation in practice of the offending agreements or practices may constitute an attenuating circumstance giving rise to a reduction in the basic amount of the fine. It appears, however, that that has not been the case here, since the appellants have challenged not the implementation of the cartel in so far as it relates to them, but only the failure to take into consideration the variable intensity of that implementation and the actual and objective impact of the cartel on consumers.

68 Furthermore, real damage to the consumer can be difficult to quantify, given the range of variables affecting, in particular, price-setting in relation to a manufactured product.

69 In any event, the duration of the infringement is mentioned by the legislature as a factor to be taken into account as such for the purpose of determining the amount of the fines.

70 In the light of those points, the General Court was right to reject as unfounded, in paragraph 105 of the judgment under appeal, the plea relating to the increase in the amount of the fine for the duration of the cartel.

71 It follows from all of those considerations that the third ground of appeal is unfounded.

Fourth ground of appeal: various errors of law relating to the account taken of the appellants' cooperation

Arguments of the parties

72 The appellants state that their fourth ground of appeal relates to paragraphs 123 to 134 of the judgment under appeal. They submit that the General Court infringed Community law in upholding the part of the decision at issue in which the Commission refused to reduce their fine on account of the fact that they cooperated to an extent not covered by the Leniency Notice, in breach of the sixth indent of Section 3 of the Guidelines and of the principles of fairness and equal treatment.

73 In the appellants' view, they alone should have been granted the reduction in the fine, on the ground that they provided evidence of the duration of the infringement, unlike the Outokumpu group, which only provided information on the total duration of the cartel.

74 The Commission contends that, since the KME group is inviting the Court to substitute its own appraisal for that of the General Court, this ground of appeal is inadmissible.

75 That ground of appeal is, according to the Commission, moreover unfounded. The Commission maintains that the General Court provided a clear and logical explanation for its appraisal of when partial immunity should be available, which responded to all the legal arguments put forward by the KME group.

76 As regards the grant of a reduction in the fine for the Outokumpu group, the Commission states that the information which that group provided enabled the Commission to investigate and seek evidence. The appellants facilitated that task by providing evidence, more than 16 months after the Outokumpu group, but nothing more. Contrary to what the appellants imply in their appeal, they would not have been granted partial immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases, since such immunity is granted in respect of evidence relating to 'facts previously unknown to the Commission', which was not the case as regards the full duration of the cartel.

77 The Commission contends, lastly, that the award of partial immunity in the situation described by the appellants would run counter to Section D of the Leniency Notice, which already provides for a reduction in the fine where an undertaking supplies the Commission with information, documents or other evidence which contributes to establishing the existence of the infringement.

Findings of the Court

78 It must be noted that, according to the Leniency Notice, only an undertaking which is the first to adduce decisive evidence of the cartel's existence will benefit from non-imposition of a fine or a very substantial reduction in its amount.

79 The General Court examined the circumstances of the appellants' cooperation and that of the Outokumpu group in paragraphs 144 and 145 of the judgment under appeal. These are, however, observations and findings of fact which it is not for the Court of Justice to review in the context of an appeal.

80 Furthermore, in light of the finding that the appellants' cooperation occurred after that of the Outokumpu group, the General Court correctly concluded, in paragraph 147 of the judgment under appeal, that the appellants were not in a situation comparable to that of the Outokumpu group and, in consequence, that they had not suffered discrimination.

81 Lastly, the appellants do not state in what respect the General Court erred in law in the reasoning set out in paragraphs 130 and 131 of the judgment under appeal, and, in particular, they do not explain how the production of evidence of facts already known to the Commission would justify a reduction in the fine on account of attenuating circumstances any more than the earlier provision of new information to the Commission. It follows that that argument is inadmissible as it is too vague.

82 It follows from all of those considerations that the fourth ground of appeal is, in part, inadmissible and, in part, unfounded.

Fifth ground of appeal: infringement of the right to an effective judicial review

Arguments of the parties

83 The appellants submit that the General Court infringed Community law and their fundamental right to a full and effective judicial review by failing to examine their arguments closely and thoroughly and deferred, to an excessive and unreasonable extent, to the Commission's discretion.

84 They explain that the doctrine of 'margin of appreciation' and 'judicial deference' should now no longer be applied, since Community law is now characterised by the huge fines imposed by the Commission, a development which is frequently described as the de facto 'criminalisation' of European competition law.

85 Furthermore, the direct applicability of the exception provided for in Article 81(3) EC, introduced by Regulation No 1/2003 – replacing the earlier authorisation scheme – excludes, by definition, any margin of appreciation on the part of the Commission in the application of the competition rules and thus mandates only a very limited degree of judicial deference by the Courts when reviewing their application by the Commission in a specific case.

86 The appellants also submit that a justification for the proposition that the Commission enjoys a margin of appreciation should not be sought in the Commission's alleged superior expertise in evaluating complex factual or economic matters. The appellants state in that regard that both the Court of Justice and the General Court have satisfactorily engaged in particularly intense judicial scrutiny of complex cases.

87 Likewise, in view of the unlimited jurisdiction conferred on it under Article 229 EC and Article 31 of Regulation No 1/2003, the General Court should not admit of any margin of appreciation on the part of the Commission, not only as far as the appropriate and proportionate character of the amount of a fine is concerned, but also with regard to the working method followed by the Commission in its calculation. In the appellants' view, the General Court must examine how in each particular case the Commission assessed the gravity and duration of unlawful conduct and is then entitled to substitute its own assessment for that of the Commission by cancelling, reducing or increasing the fine.

88 The appellants also observe that the European Court of Human Rights has accepted that the enforcement of administrative law via administrative decision-making and fines is not as such contrary to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). Such enforcement ought, however, to be governed by sufficiently strong procedural guarantees, combined with an effective regime of judicial control with full jurisdiction to review administrative decisions. The right to 'an effective remedy before a tribunal' has also been enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

89 The Commission contends, first of all, that the fifth ground of appeal is too general and imprecise to be assessed by the Court. It goes on to observe that the KME group does not contest the fundamental structure for judicial review of Commission decisions and offers no explanation why the references by the General Court to the Commission's margin of appreciation demonstrate that that Court failed adequately to review the legality of the decision at issue in the light of the KME group's second, third and fourth pleas before it.

90 Lastly, according to the Commission, the KME group merely alludes to 'criminal charges' and to Article 6(1) of the ECHR, but avoids any discussion of what this might imply.

Findings of the Court

91 By their fifth ground of appeal, the appellants challenge both the manner in which the General Court stated that it was obliged to take account of the Commission's broad margin of appreciation and the manner in which it actually reviewed the decision at issue. They rely on Article 6 of the ECHR and on the Charter, but do not establish precisely whether they are challenging the principles of judicial review or the manner in which the General Court carried out that review in the present case.

92 The principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter (see Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49).

93 The judicial review of the decisions of the institutions was arranged by the founding Treaties. In addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.

94 As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-12/03 P *Commission* v *Tetra*

Laval [2005] ECR I-987, paragraph 39, and Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraphs 56 and 57).

95 With regard to the penalties for infringements of competition law, the second subparagraph of Article 15(2) of Regulation No 17 provides that in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

96 The Court of Justice has held that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Community (*Musique Diffusion française and Others* v *Commission*, paragraph 129; *Dansk Rørindustri and Others* v *Commission*, paragraph 242; and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 96).

97 The Court has also stated that objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements (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 91).

98 This large number of factors requires that the Commission carry out a thorough examination of the circumstances of the infringement.

99 In the interests of transparency the Commission adopted the Guidelines, in which it indicates the basis on which it will take account of one or other aspect of the infringement and what this will imply as regards the amount of the fine.

100 The Guidelines, which, the Court has held, form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 91), merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine.

101 It is important to bear in mind the obligation to state reasons for Community acts. That is a particularly important obligation in the present case. It is for the Commission to state the reasons for its decision and, in particular, to explain the weighting and assessment of the factors taken into account (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 87). The Courts must establish of their own motion that there is a statement of reasons.

102 Furthermore, the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

103 The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 692).

104 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.

105 That requirement, which is procedural in nature, does not conflict with the rule that, in regard to infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.

106 The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by

the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.

107 It follows from this that, in so far as it relates to the rules of judicial review in the light of the principle of effective judicial protection, the fifth ground of appeal is unfounded.

108 In so far as it relates to the manner in which the General Court carried out its review of the decision at issue, the fifth ground of appeal is indissociable from the second, third and fourth grounds of the appeal and has thus already been examined by the Court of Justice.

109 It must be noted in that regard that although the General Court repeatedly referred to the 'discretion', the 'substantial margin of discretion' or the 'wide discretion' of the Commission, including in paragraphs 35 to 37, 92, 103, 115, 118, 129 and 141 of the judgment under appeal, such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it.

110 It follows from all of those considerations that the fifth ground of appeal is unfounded.

111 Consequently, none of the grounds that the KME group has put forward in support of its appeal can be accepted, and the appeal must therefore be dismissed.

Costs

112 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the KME group to be ordered to pay the costs and the KME group has been unsuccessful, the latter must be ordered to pay the costs of the present proceedings.

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

1. **Dismisses the appeal;**

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

[Signatures]