JUDGMENT OF THE COURT (Second Chamber)

24 September 2009 *

In Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P,

APPEALS under Article 56 of the Statute of the Court of Justice, brought on 1, 2, 5 and 6 March 2007 respectively,

Erste Group Bank AG, formerly Erste Bank der österreichischen Sparkassen AG (C-125/07 P), established in Vienna (Austria), represented by F. Montag, Rechtsanwalt,

Raiffeisen Zentralbank Österreich AG (C-133/07 P), established in Vienna, represented by S. Völcker and G. Terhorst, Rechtsanwälte,

Bank Austria Creditanstalt AG (C-135/07 P), established in Vienna, represented by C. Zschocke and J. Beninca, Rechtsanwälte,

Österreichische Volksbanken AG (C-137/07 P), established in Vienna, represented by A. Ablasser, R. Bierwagen and F. Neumayr, Rechtsanwälte,

appellants,

* Language of the case: German.

the other party to the proceedings being:

Commission of the European Communities, represented by A. Bouquet and R. Sauer, acting as Agents, and by D. Waelbroeck, avocat, and U. Zinsmeister, Rechtsanwältin, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, P. Kūris (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2008,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2009,

gives the following

Judgment

1 By their appeals, Erste Group Bank AG, formerly Erste Bank der österreichischen Sparkassen AG ('Erste'), Raiffeisen Zentralbank Österreich AG ('RZB'), Bank Austria Creditanstalt AG ('BA-CA') and Österreichische Volksbanken AG ('ÖVAG') claim that the Court of Justice should set aside the judgment of the Court of First Instance of the European Communities of 14 December 2006 in Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169 ('the judgment under appeal'), which dismissed their applications for the annulment of Commission Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.571/D-1: Austrian banks — 'Lombard Club' (OJ 2004 L 56, p. 1; 'the contested decision'); in the alternative, reduce the fines imposed on each of them in Article 3 of the contested decision, and, in the further alternative, set aside the judgment of the Court of First Instance and refer the case back to that court.

I — Legal context

A — *Regulation No 17*

2 Article 11(5) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), provides:

'Where an undertaking or association of undertakings does not supply the information requested within the time-limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied.

The decision shall specify what information is required, fix an appropriate time-limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.'

3 Article 15(2) of Regulation No 17 provides:

'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) or Article [82] of the Treaty; 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.'

B — *The Guidelines*

4 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') states in its introductory paragraphs:

'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst 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.'

5 Section 1 of the Guidelines provides that, for calculating the amount of fines, the basic amount is to be determined in accordance with the criteria referred to in Article 15(2) of Regulation No 17, namely the gravity and duration of the infringement. It is also stated in the Guidelines that the assessment of the gravity of the infringement must take account of its nature, its actual impact on the market, where it can be measured, and the size of the relevant geographic market.

C — *The Leniency Notice*

6 In its Notice on the non-imposition or reduction of fines in cartel cases, published in the *Official Journal of the European Communities* of 18 July 1996 (OJ 1996 C 207, p. 4; 'the Leniency Notice'), a draft version of which, entitled 'Information of the European Commission concerning its policy of imposing fines for infringements of the competition rules', had been published on 19 December 1995 (OJ 1995 C 341, p. 13), the Commission sets out the conditions under which undertakings cooperating with it during its investigation into a cartel may, under Section A.3 of the notice, be exempted from fines or be granted a reduction of the fine that would otherwise have been imposed upon them.

7 According to Section A.5 of the Leniency Notice:

'Cooperation by an [undertaking] is only one of several factors which the Commission takes into account when fixing the amount of a fine. ...'

8 Section D of the Leniency Notice, entitled 'Significant reduction in a fine', is worded as follows:

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

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which contribute to establishing the infringement;

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

9 Section E.3 of the Leniency Notice, on procedure, provides, in particular:

'The Commission is aware that this notice will create legitimate expectations on which [undertakings] may rely when disclosing the existence of a cartel to the Commission.'

II — Background to the dispute and to the contested decision

10 In the judgment under appeal, the Court of First Instance summarised the factual background to the proceedings before it in the following terms:

'1 By [the contested decision] … the Commission found that certain undertakings had participated in a series of agreements and concerted practices within the meaning of Article 81(1) EC.

2 In particular, the following eight banks were involved, they being the addressees of the contested decision:

— Erste...;

— [RZB];

— [BA-CA];

— …

— [ÖVAG];

— …

3 In essence, the Commission criticises the addressees of the contested decision for establishing a system of regular meetings ("the committee meetings or "the committees), to which it refers as the "Lombard network, in which they covered every conceivable subject and regularly coordinated their conduct with respect to the essential factors of competition in the Austrian market in banking products and services.

…

15 Having become aware in April 1997 of a document which gave grounds for suspecting the existence in the Austrian banking market of agreements or concerted practices contrary to Article 81 EC, the Commission opened a formal investigation procedure. On 30 June 1997, pursuant to Article 3 of Regulation No 17 …, the Freiheitliche Partei Österreichs, a political party ("the FPÖ), lodged a complaint against eight Austrian credit establishments suspected of participating in agreements and/or concerted practices restricting competition.

16 On 23 and 24 June 1998, the Commission carried out unannounced inspections at several banks, including most of the addressees of the contested decision. On 21 September 1998, the Commission sent a request for information under Article 11(2) of Regulation No 17 to numerous credit establishments suspected of having participated in those agreements or concerted practices.

17 Immediately after receiving the request for information, the main banks concerned offered the Commission their "cooperation in the investigation of the case, and went so far as to suggest that they would state the facts "voluntarily (instead of answering the request for information) and at the same time waive the right to a hearing; in return, the Commission Directorate-General for Competition would cancel its request for information and would impose only a "moderate fine. Whilst acknowledging the banks' promptness in offering their cooperation, the Commission declined to make any agreement in that regard.

18 All the addressees subsequently responded to the request for information. In doing so, some expressed the view that they were under no obligation to reply to most of the questions put to them and that they were therefore submitting the relevant documents and answering the relevant questions voluntarily as part of the abovementioned cooperation. The Commission rejected that interpretation of the law as being incorrect.

19 Soon afterwards, the largest banks concerned, including the applicants, … transmitted to the Commission a 132-page document described as a "joint exposition of the facts in which they set out at length the historical background to their cartel and summarised briefly and assessed from their point of view the content of the individual committee meetings as it appeared from the documents which had been seized and from those which they had been requested to produce. At the same time, they produced 16 binders containing documents, sorted according to committee, with detailed lists of contents. In order that it might assess any added value that the documents submitted with the joint exposition of the facts might represent, the Commission asked the banks to indicate whether any of those documents were not yet known to the Commission, and if so which. The banks, however, considered this to be neither feasible nor necessary.

20 On 13 September 1999, the Commission sent to eight banks a statement of objections dated 11 September 1999. … On 22 November 2000, the Commission sent to the banks a supplementary statement of objections. …

21 On 11 June 2002, the Commission adopted the contested decision.

…

22 In Article 1 of the contested decision, the Commission states that the eight banks to which the decision is addressed infringed Article 81(1) EC by taking part in agreements and concerted practices in respect of prices, charges and advertising, with the object of restricting competition on the market in banking products and services in Austria, from 1 January 1995 to 24 June 1998.

…

24 Article 3 of the contested decision imposes on its addressees the following fines:

— Erste: EUR 37.69 million;

— RZB: EUR 30.38 million;

— BA-CA: EUR 30.38 million;

…

— ÖVAG: EUR 7.59 million;

…

25 The contested decision states that in Austria there is a long tradition of agreements between banks, mainly about interest rates and charges and fees, based in some measure, until the 1980s, on a statute law, though the latter had been repealed by 1 January 1994, when the Republic of Austria joined the European Economic Area (EEA) and the [Law on the banking system (Bankwesengesetz — BWG)] entered into force.

26 Credit establishments nevertheless continued to conclude agreements, in particular on lending and deposit rates, within the network.

27 The contested decision states, in Title 5, that the agreements were comprehensive as regards their content, highly institutionalised and closely interconnected, and covered the entire Austrian territory. For every banking product there was a separate committee on which the competent employees at the second or third level of management of the banks concerned sat. In practice, this separation as regards content was not strictly adhered to: sometimes, substantively related topics which were covered by more than one committee were dealt with in one and the same committee. Finally, the individual committees were part of an organisational whole.

28 Each month, apart from August, senior representatives of the largest Austrian banks got together as the top-level body (known as “the Lombard Club). In addition to matters of general interest that were clearly neutral from a competition point of view, they discussed changes in interest rates, advertising measures, and so forth. At some of these meetings, representatives of the Austrian National Bank … were present.

29 One level down were the product-based specialist committees. The most important ones, in that regard, were the lending rates committees and the deposit rates committees which, as their names suggest, dealt with lending and deposit interest rates and they were convened either separately or jointly. A constant flow of information took place in particular between those committees and the Lombard Club.

30 Regional committees, which were diverse and numerous, held regular meetings in every province of Austria. In certain provinces, even the hierarchical structure of the Lombard Club and the specialist committees was replicated.

31 During the federal committee meetings on lending and/or deposit rates, bank representatives from Vienna met their opposite numbers from the provinces and their decisions were in principle valid for the whole of Austria.

32 In addition, there were special committees for, inter alia, corporate banking, retail banking business involving the self-employed, mortgage lending and building loans (named “the Minilombard Committee, “the Key Account Management Committee, “the Liberal Professions Lending Rates Committee, “the Mortgage Committee and “the Building Loans Deposit Rates Committee).

33 Lastly, there were meetings, at regular intervals, of a large number of further committees on matters of relevance from a competition point of view: in the Treasurer Committee (Treasurerrunde), federal financing and interest rate questions were discussed; in the various payments transactions committees (in particular the Payment Transactions Committee, the Cross-Border Transactions Committee and the Organising Committee of Austrian Credit Institution Associations), fees and charges for payment transactions were among the matters discussed; in the Export Financing Committee, matters of export financing were discussed, and in the Securities Committee, minimum fees, charges and interest rates were discussed.

34 Of all those special committees, the most noteworthy is the Controller Committee (Controllerrunde), on which the representatives of the controlling departments of the leading Austrian banks sat. It was at meetings of this committee that, for instance, uniform calculation bases and joint proposals for improved earnings were drawn up. The banks thereby increased the mutual transparency of their respective cost and calculation factors.

35 Between all these committees, concerned primarily with lending and deposit rates and with charges and fees, a regular flow of information took place. Discussions in one committee were often held over pending agreement in another. Lastly, the higher rank of the Lombard Club meant that, in controversial cases, its guidance was awaited.

36 With a view to extensive, countrywide implementation of (or for the purpose of coordination with) the agreements concluded in the abovementioned Vienna committee meetings, there was also a regular flow of information to the various regional committees in the provinces and from the latter to the central committees in Vienna. From time to time, regional committees sent representatives to federal committee meetings on lending and/or deposit rates.

37 The Commission states, in the contested decision, that, during the period covered by its investigation (namely from 1 January 1994 to the end of June 1998), at least 300 meetings took place in Vienna alone, quite apart from the numerous regional committee meetings. …

38 The Commission draws attention to the particular role played by the lead institutions in the Lombard network as coordinators and representatives of their respective bank groupings, namely, in the case of Erste (previously GiroCredit), the savings bank sector; in the case of RZB, the Raiffeisen sector; and, in the case of ÖVAG, the credit union sector. According to the Commission, that role was directly utilised for the smooth functioning of the Lombard network. First, the lead institutions organised the mutual transfer of information between Vienna and the provinces within the respective bank groupings; second, they represented the interests of their grouping vis-à-vis the other groupings in the cartel. According to the Commission, they were thus perceived as representatives of their respective groupings by the other participants. The agreements were therefore reached not only between the individual institutions themselves but also between the groupings.'

III — The actions before the Court of First Instance and the judgment under appeal

11 By applications received at the Registry of the Court of First Instance on 30 August and 2 September 2002, the eight undertakings penalised by the contested decision, including the four appellants herein, Erste, RZB, BA-CA and ÖVAG, brought actions under Article 230 EC for the annulment of that decision, wholly or in part, and, in the alternative, cancellation of the fines imposed on each of them or reduction of the amount thereof.

12 By the judgment under appeal, the Court of First Instance dismissed the applications of, among others, Erste, BA-CA and ÖVAG and ordered those applicants to pay the costs.

13 It also dismissed both RZB's application and the Commission's counterclaim, and ordered RZB to pay its own costs and 90% of those incurred by the Commission.

IV — Forms of order sought by the parties

14 Erste claims that the Court should:

— set aside the judgment under appeal in so far as it dismisses Erste's claim for annulment;

— annul the contested decision to the extent to which it imposes a fine on Erste;

— in the alternative, reduce the amount of the fine imposed on it in Article 3 of the contested decision;

— in the further alternative, set aside the judgment under appeal and refer the case back to the Court of First Instance;

— order the Commission to pay the costs in any event.

15 RZB claims that the Court should:

— set aside the judgment under appeal in so far as it dismisses RZB's action for annulment;

— annul Article 3 of the contested decision in so far as it pertains to RZB;

— in the alternative, reduce the amount of the fine imposed on it in Article 3 of the contested decision;

— order the Commission to pay the costs.

16 BA-CA claims that the Court should:

— set aside the judgment under appeal in so far as it dismisses BA-CA's action for annulment;

— annul Article 3 of the contested decision in so far as it pertains to BA-CA;

— in the alternative, reduce the amount of the fine imposed on it in Article 3 of the contested decision;

— order the Commission to pay the costs.

17 ÖVAG claims that the Court should:

— set aside paragraphs 2 and 4 of the judgment under appeal;

— annul the contested decision in so far as it pertains to ÖVAG;

— in the alternative, reduce the amount of the fine imposed on it in Article 3 of the contested decision;

— in the further alternative, refer the case back to the Court of First Instance;

— order the Commission to pay the costs or reserve the costs if the case is referred back to the Court of First Instance.

18 The Commission contends that the Court should:

— dismiss the appeals;

— order the appellants to pay the costs.

V — The grounds of appeal

19 Erste submits four grounds of appeal:

— breach of the rights of the defence;

— infringement of Article 81(1) EC owing to the absence of any appreciable effect on trade between Member States;

— infringement of Article 15(2) of Regulation No 17 through the imputation to Erste of the conduct of GiroCredit for the period prior to its acquisition; and

— infringement of that article, read in conjunction with the Guidelines for the setting of fines and determination of their amount.

20 RZB submits four grounds of appeal:

— infringement of Article 81 EC, in that the effect on trade between Member States was not established;

— infringement of the Guidelines, in that the meetings of the banks concerned were characterised as 'very serious infringements';

— infringement of Regulation No 17 and of the Guidelines, in that the shares of the entire 'Raiffeisen sector' market were wrongly attributed to it; and

— error of law in the assessment of its cooperation with the Commission.

21 BA-CA submits three grounds of appeal:

— incorrect finding, in connection with determination of the amount of the fine, that the committee meetings brought about economic effects;

— failure to take account of circumstances justifying a reduction of the fine when determining the basic amount; and

— failure to take account of its cooperation in the form of responses to the requests for information, the joint exposition of facts, the voluntary disclosure of additional documents and the response to the statement of objections.

22 ÖVAG submits three grounds of appeal:

— incorrect finding as to the obstruction of trade between Member States;

— incorrect attribution of the decentralised sector in connection with the division into categories; and

— failure to take account of attenuating circumstances.

VI — The appeals

23 By order of the President of the Court of Justice of 25 October 2007, after the views of the parties and the Advocate General had been heard on this point, the four cases were joined for the purposes of the oral procedure and the judgment, pursuant to Article 43 of the Rules of Procedure of the Court of Justice.

24 Since the appellants' submissions largely overlap, it is appropriate to consider them together.

A — *The grounds of appeal alleging infringement of Article 81(1) EC*

1. The ground of appeal alleging an error of law concerning assessment of the requirement that trade between Member States be affected

25 Erste, RZB and ÖVAG all put forward this ground of appeal, which comprises essentially three parts.

(a) The first part: the Court of First Instance erred in law in its assessment of the ability of a cartel operating throughout the national territory to have an appreciable effect on trade between Member States

(i) Arguments of the parties

26 RZB and ÖVAG maintain that the Court of First Instance erred in law by holding, in paragraph 181 of the judgment under appeal, that 'there is, at least, a strong presumption that a practice restrictive of competition applied throughout the territory of a Member State is liable to contribute to compartmentalisation of the markets and to affect intra-Community trade'.

27 RZB claims, first, that the Court of First Instance oversimplified the requirement of an effect on trade between Member States when it took the view that the Commission was not required to prove the existence of compartmentalisation.

28 In paragraphs 182 to 184 of the judgment under appeal, the Court of First Instance did not take due account of the scope of the judgment of the Court of Justice in Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135.

29 Second, RZB considers that, in holding that the mere fact that the committee meetings covered the entire territory of the Republic of Austria was sufficient to conclude that trade between Member States was affected, the Court of First instance wrongly interpreted the Court of Justice's case-law.

30 In fact, the likelihood of affecting trade between Member States presupposes, in addition to 'territorial cover', the presence of at least one further factor, in this case the effects of compartmentalisation.

31 In addition, RZB states that, in paragraph 181 of the judgment under appeal, the Court of First Instance has reversed the burden of proof by passing it on to RZB, whereas it is incumbent on the Commission to produce evidence of the infringement of Article 81(1) EC and the ability of the cartel to affect trade between Member States.

32 ÖVAG, for its part, alleges that the Court of First Instance understated the scope of the criterion of the effect of market compartmentalisation.

33 It adds that the Court of First Instance did not take account, in paragraph 166 of the judgment under appeal, of the particular features of an assessment, *ex post facto*, of a past infringement. It wrongly failed to assess the specific impact of the agreements on trade between States.

34 ÖVAG also claims that the reasoning of the Court of First Instance is contradictory and insufficient. In paragraph 164 of the judgment under appeal, the Court of First Instance considered that the effect of partitioning the markets was not a strong indication that there was an effect on trade between Member States, whereas in paragraph 181 of that judgment it held, on the contrary, that there was a close link between the effect of a practice of compartmentalisation of the markets and the liability of that practice to affect cross-border trade.

35 The Commission contends that the Court of First Instance did not err in law.

(ii) Findings of the Court

36 First, it must be borne in mind, on the one hand, that the Court of Justice has held that, if an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law there cited).

37 Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess

whether a cartel has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (*Asnef-Equifax and Administración del Estado*, paragraph 35 and the case-law there cited).

38 On the other hand, the Court of Justice has already held that the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected. A cartel extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (*Asnef-Equifax and Administración del Estado*, paragraph 37 and the case-law there cited).

39 It follows that, contrary to the appellants' assertion, the Court of First Instance was right, in paragraph 181 of the judgment under appeal, to take as the starting point of its reasoning of the existence of a strong presumption that trade between Member States is affected, going on to say that '[t]hat presumption can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary'.

40 The Court of First Instance undertook that analysis in paragraphs 182 to 185 of the judgment under appeal. In particular, in paragraph 183, it found that '[t]he concerted practices within the Lombard network involved not only almost all the credit establishments in Austria but also a wide range of banking products and services, in particular deposits and loans and, therefore, they were capable of changing the conditions of competition throughout that Member State'. In paragraph 185, it examined the possibility of an effect of partitioning of the market, taking the view that '[t]he Lombard network may have contributed to maintenance of the barriers to access to the market ... in that it facilitated retention of structures in the Austrian banking market...'.

41 Thus, after describing in detail, in paragraphs 111 to 121 of the judgment under appeal, the aim pursued by each of the committees, the Court of First Instance rightly found, in

paragraph 185 of that judgment, that the very existence of the 'Lombard network' impeded free access to the Austrian market so that the cartel was liable to have a cross-border effect.

42 It therefore correctly concluded, in paragraph 186 of the judgment under appeal, that the agreement in question may have had the effect of compartmentalising the market and was liable to affect trade between Member States.

43 Second, contrary to RZB's contention, the Court of First Instance did not reverse the burden of proof but, exercising its power to assess the facts, found, after analysis, that the applicants had not overturned the presumption that the cartel as a whole, extending as it did to Austria in its entirety, had been capable of affecting trade between States.

44 Third, it must be stated that the reasoning of the Court of First Instance in paragraph 181 of the judgment under appeal does not contradict that of paragraph 164 of the same judgment.

45 In paragraph 164, the Court of First Instance merely rejected the applicants' argument that proof of the compartmentalising effects of a cartel was the only basis for establishing the capability of that cartel to affect trade between Member States.

46 Fourth, it must be borne in mind that, according to settled case-law, Article 81(1) EC does not require that the arrangements referred to in that provision have actually appreciably affected trade between Member States, but requires that it be established that those arrangements are capable of having that effect (*Asnef-Equifax and Administración del Estado*, paragraph 43 and the case-law there cited).

47 Consequently, ÖVAG is wrong to assert that the Court of First Instance should have examined the actual impact of that cartel on trade between Member States.

48 Accordingly, the first part of this ground of appeal must be rejected.

(b) The second part: the Court of First Instance erred in law by holding that the Commission was entitled to undertake an overall examination of the cross-border effects of the committees and by making an incorrect, inadequate and contradictory analysis of what constitutes the relevant market

(i) Arguments of the parties

49 ÖVAG maintains, in its first complaint, that the Court of First Instance erred in law by holding, in paragraph 168 et seq. of the judgment under appeal, that the Commission was entitled to undertake an overall examination of the cross-border effect of the committees instead of examining separately the extent to which each of them was likely to affect trade between Member States.

50 In that regard, the appellant submits, first, that the Court of First Instance erred in law by not examining, in isolation, the effects on intra-Community trade of the committees that related to a separate activity and that, furthermore, it did not correctly interpret the case-law of the Court of Justice represented by the judgment in *Bagnasco and Others*.

51 In its second complaint, ÖVAG criticises the reasoning of the Court of First Instance in paragraph 172 of the judgment under appeal to the effect that 'the definition of the relevant market differs according to whether Article 81 EC or Article 82 EC is to be applied'. It maintains that the Court of First Instance should have appraised the effect

on trade of the agreements concluded within the various committees on the basis of a narrower definition of the relevant markets.

52 ÖVAG also perceives a contradiction between paragraph 174 of the judgment under appeal, in which the Court of First Instance accepts that 'the various banking services covered by the agreements cannot be substituted for each other', and paragraph 175 of that judgment, in which it states that 'the Commission was not required to examine separately the markets for the various banking products covered by the committees'.

53 The Commission contends that the Court of First Instance did not err in law.

(ii) Findings of the Court

— The complaint that the Court of First Instance misinterpreted the case-law

54 When appraising the effects of agreements in the light of Article 81 EC it is necessary to take into consideration the actual context in which they are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (*Asnef-Equifax and Administración del Estado*, paragraph 49 and the case-law there cited).

55 In paragraphs 111 to 126 of the judgment under appeal, the Court of First Instance confirmed the Commission's conclusion that there was an agreement in principle

between all the banks participating in the cartel to eliminate price competition for a wide range of retail and corporate banking services, including the 'key accounts'. It also confirmed the classification of the committees as a single overall cartel.

56 Since, as found by the Court of First Instance, there was an overall cartel involving most of those operating in the financial sector of a Member State and a wide range of financial services and products, the Court of First Instance was right to consider that the agreements in question, based on an overall plan and implemented in the context of separate committee meetings, constituted a single infringement which justified and necessitated an examination of the extent to which that generalised cartel as a whole was likely to affect intra-Community trade.

57 As far as the *Bagnasco and Others* judgment referred to by the appellant is concerned, it must be observed, as the Court of First Instance observed in paragraph 171 of the judgment under appeal, that in that case the Court of Justice did not undertake an overall examination of the effect on trade between Member States of the two clauses in question in the main proceedings, since one of the agreements did not have the object or effect of restricting competition and the other was not liable to affect trade between Member States.

58 Consequently, in contrast to the cartels at issue in the present cases, in that judgment no question arose of an overall examination of the agreements in relation to the requirement of an effect on trade between Member States. It follows that the appellants have no basis for relying on that judgment to challenge the findings in paragraph 56 of the present judgment.

59 In those circumstances, ÖVAG's complaint that a separate examination of the agreements in question was required of the Court of First Instance when it appraised the condition of an effect on trade between Member States must be rejected.

— The complaint that the Court of First Instance's analysis concerning definition of the relevant market was incorrect, inadequate and contradictory

60 As regards, first, paragraph 172 of the judgment under appeal, after pointing out that the definition of the market plays a different role according to whether Article 81 EC or Article 82 EC is to be applied, the Court of First Instance held that the definition of the relevant market was of no consequence provided that the Commission had concluded that the agreement in question distorted competition and was liable appreciably to affect trade between Member States.

61 ÖVAG's objection to that analysis is ineffective, since the Court of First Instance examined, in paragraphs 172 to 174 of the judgment under appeal, the complaint which ÖVAG had raised, challenging the method adopted by the Commission to evaluate the effects on intra-Community trade, and drew no conclusions from its analysis.

62 As regards, second, the reasons given by the Court of First Instance in paragraph 174 of the judgment under appeal, in which it considered that the various banking services covered by the agreements could not be substituted for each other, and in paragraph 175, in which it explained that the Commission was not required to examine separately the markets for those various banking products, ÖVAG's complaint must be rejected since the Court of First Instance duly stated the reasons for which a narrow definition of the market would be artificial, taking the view that most customers of universal banks call for a set of banking services and, moreover, the effect on trade may be indirect and the relevant market may differ from the market for the products and services covered by the cartel.

63 It follows that ÖVAG's complaint that the Court of First Instance's analysis regarding definition of the relevant market was incorrect, inadequate and contradictory must be rejected, and the same applies therefore to the second part of the ground of appeal under review here.

(c) The third part: failure to demonstrate that the cartel had an appreciable effect on intra-Community trade

(i) Arguments of the parties

64 Erste maintains that the Court of First Instance should have found, in paragraphs 153 to 187 of the judgment under appeal, that Article 81 EC was inapplicable since the Commission had not established that the cartel in question had had an appreciable effect on trade. According to that appellant, if the agreement concluded between the banks had cross-border effects, they were limited.

65 The Commission contends that Erste's assertions are incorrect.

ii) Findings of the Court

66 According to settled case-law, Article 81(1) EC does not require that the collusive arrangements governed by that provision should have appreciably affected intra-Community trade but requires that it be established that such arrangements were capable of having such an effect (see *Asnef-Equifax and Administración del Estado*, paragraph 43).

67 In that connection, the Court of First Instance observed, in paragraphs 111 to 121, 179 and 183 to 185 of the judgment under appeal, that the agreement brought together almost all Austrian credit establishments, that it covered a wide range of bank products and services and that it covered the whole of Austria, with the concomitant risk of affecting trading conditions throughout that Member State.

68 Therefore, although it did not expressly adjudicate as to whether the effect on intra-Community trade was appreciable, the Court of First Instance nevertheless identified the evidence supporting the conclusion that the cartel was liable to have an effect on intra-Community trade and did not fail to apply the analysis of the condition set out in paragraph 36 of the present judgment.

69 It follows that the third part of this ground of appeal must be rejected.

70 In view of the foregoing considerations, the ground of appeal alleging an error of law concerning assessment of the requirement that trade between Member States be affected must be rejected in its entirety.

2. The ground of appeal alleging an error of law regarding the attribution of responsibility for the infringement

(a) Arguments of the parties

71 Erste submits that the Court of First Instance was wrong to hold, in paragraph 323 et seq. of the judgment under appeal, that it should be answerable for the infringement committed by GiroCredit before it was acquired by Erste (formerly Österreichische Spar-Casse-Bank AG — EÖ) and that the Commission did not act illegally by attributing that conduct to Erste as the successor in title to GiroCredit.

72 First, Erste complains that the Court of First Instance did not properly assess the economic and legal links between GiroCredit and the BA group. In that regard, Erste recalls that, until a majority holding of its capital was acquired on 20 May 1997,

GiroCredit was mainly owned by the BA group, which itself participated in the 'Lombard Club'. That group controlled GiroCredit not only through its majority holding in GiroCredit's capital but also through the appointment of members of the supervisory board and the management board and the fact that the senior management posts were occupied by employees from the BA group. Consequently, GiroCredit's conduct ought to have been imputed for that period to BA-CA.

73 Furthermore, the Court of First Instance's finding that the legal person responsible for the operation of GiroCredit's banking business before its transfer was 'GiroCredit Bank der österreichischen Sparkassen AG' is wrong in law, since that company was also controlled and directed by the BA group.

74 Second, Erste maintains that the Court of First Instance also erred in law, in paragraphs 328 to 336 of the judgment under appeal, by taking the view that the Commission had the option of penalising either the subsidiary that participated in the infringement or the parent company that controlled it during that period, even in a case where there had been successive changes in economic control, and consequently of attributing to it responsibility for GiroCredit's conduct instead of attributing it to the former parent company.

75 The Commission contends that a clear distinction must be drawn between the determination of the legal person responsible for the undertaking that participated in the infringement and the conditions under which the conduct of a subsidiary with separate legal personality may be attributed to the parent company. The Commission submits that its approach does not entail any injustice in so far as Erste itself participated in the cartel.

(b) Findings of the Court

76 By its two complaints, which it is appropriate to consider together, Erste objects to the fact that the contested decision attributed to it the conduct of GiroCredit before 1 October 1997, the date of its merger with GiroCredit.

77 When an entity infringes competition rules, it falls to that entity, by virtue of the principle of personal responsibility, to answer for that infringement (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145, and Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78).

78 As to the circumstances in which an entity that is not the author of an infringement can nevertheless be penalised for that infringement, this situation arises if the entity that has committed the infringement has ceased to exist in law (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 145).

79 As the Court of Justice has already held, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, that change does not necessarily create a new undertaking free of liability for its predecessor's infringements of the competition rules, when, from an economic point of view, the two are identical (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 9, and 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 59).

80 Moreover, an undertaking's anti-competitive conduct can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other

undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27, and Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 96). The fact that a subsidiary has separate legal personality does not therefore exclude the possibility that its conduct may be attributed to the parent company.

81 Erste argues that, at the time of the infringements with which the contested decision is concerned, GiroCredit's conduct was determined by its parent company, namely the BA group, and that consequently it is the latter company which should have been held responsible for the infringements committed in the past by GiroCredit. Erste thus challenges the finding of the Court of First Instance in paragraph 331 of the judgment under appeal, namely that the Commission is entitled to choose to penalise either the subsidiary that participated in the infringement or the parent company which controlled it during the period covered by the contested decision.

82 In that regard, the Court of First Instance was right to hold that the Commission was not obliged first to verify whether the conditions were fulfilled for attribution of the infringement to the parent company of the undertaking that committed the infringement. The Commission cannot be required, as a matter of principle, first to carry out such verification before being entitled to consider taking action against the undertaking that committed the infringement, even if the latter has undergone changes regarding its status as a legal entity. The principle of personal responsibility, referred to in paragraph 77 of the present judgment, certainly does not prevent the Commission from considering the possibility of penalising the latter undertaking before investigating whether the infringement might be possibly attributed to the parent company. Moreover, as the Court of First Instance observed in paragraph 335 of the judgment under appeal, if the position were otherwise, the Commission's inquiries would be made considerably more laborious by the need to verify, in each case where there were successive controllers of an undertaking, to what extent the latter's acts could be imputed to the former parent company.

83 Moreover, it must be emphasised that Erste, having itself participated in the cartel covered by the contested decision, knew when it took over the business of GiroCredit

that the latter might be the subject of proceedings under Article 81 EC and that, as the holder of rights in respect of that company, it thereby exposed itself to the consequences of such proceedings in terms of fines.

84 Consequently, the second complaint made by Erste in support of the present ground of appeal must be rejected.

85 As regards the first complaint concerning the Court of First Instance's examination of the economic and legal links between GiroCredit and the BA group, it need merely be pointed out that, since the Commission was entitled validly to impose a penalty for infringement of Article 81 EC by the GiroCredit subsidiary and, consequently, attribute that company's liability to Erste as the company which took it over, the Court of First Instance was right to hold, in paragraph 336 of the judgment under appeal, that it was not necessary to verify whether GiroCredit's conduct could be attributed to the BA group. Accordingly, Erste's argument concerning actual control of GiroCredit by the BA group is ineffective.

86 In view of the foregoing considerations, the ground of appeal alleging an error of law regarding the attribution of responsibility for the infringement must be rejected in its entirety.

B — *The grounds of appeal alleging infringement of Article 15(2) of Regulation No 17*

1. The ground of appeal alleging errors of law in the assessment of the gravity of the infringement

87 BA-CA, Erste and RZB dispute the Court of First Instance's findings concerning the gravity of the infringement. This ground of appeal comprises essentially seven parts.

(a) The first part: the assessment was not in conformity with the Guidelines

(i) Arguments of the parties

88 RZB claims that the Court of First Instance contradicted itself by not examining, in particular, in paragraphs 237 and 254 of the judgment under appeal the question whether the infringement must be regarded as 'very serious' in accordance with the rules which it had set out in paragraph 226 of that judgment.

89 The Commission contends that, while the Commission is indeed limited by the Guidelines which it has set for itself, the same does not apply to the Court of First Instance in the exercise of its unlimited jurisdiction. Furthermore, it is clear from the case-law that the Guidelines establish only a 'minimum programme' which does not give rise to an exhaustive list of the factors to be taken into account. It is even possible to depart from that programme where the circumstances justify such a departure.

(ii) Findings of the Court

90 As a preliminary point, it must be borne in mind that, according to the case-law of the Court of Justice, in fixing the amount of the fines, regard must be had to duration and to all the factors capable of affecting the assessment of the gravity of the infringements (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 240).

91 The gravity of an infringement must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines,

although no binding or exhaustive list of the criteria to be applied has been drawn up (*Dansk Rørindustri and Others* v *Commission*, paragraph 241 and the case-law there cited).

92 It is therefore incumbent on the Court of First Instance to review the manner in which the Commission exercised its discretion in relation to those factors.

93 Accordingly, the Court of First Instance did not contradict itself by holding, in paragraph of 237 of the judgment under appeal, that the Commission was entitled to assess overall the gravity of the infringement in relation to all the relevant circumstances, including factors not expressly mentioned in the Guidelines, or by holding, in paragraph 254 of the judgment, that a horizontal price cartel in an economic sector of such importance could not escape the classification of 'very serious' infringement.

94 Therefore, the first part of the ground of appeal must be rejected.

(b) The second part: errors of law regarding the 'true nature' of the infringement

95 The second part comprises essentially four complaints.

(i) Arguments of the parties

96 First, RZB maintains that the Court of First Instance erred in law by holding, in paragraph 240 of the judgment under appeal, that the nature of the infringement plays a major role in characterising very serious infringements, whereas the other criteria, namely the actual impact of the infringement on the market and the geographic scope of the relevant market, are less important

97 Second, the appellant considers that the Court of First Instance also erred in law, in paragraphs 249 to 264 of the judgment under appeal, by basing its assessment on matters not appearing in the Guidelines, namely the importance of the banking sector for the economy, the wide rage of banking products affected by the cartel and the participation of the great majority of the Austrian banks in the meetings.

98 Third, RZB criticises the Court of First Instance for not having taken account of the government's policy of protecting the banking sector from the free play of the market. That court also wrongly considered that the intervention of the State authorities in the conduct caught by Article 81 EC is an aggravating circumstance with respect to calculation of the fine.

99 Fourth, and finally, RZB argues that the Court of First Instance erred, in paragraph 256 of the judgment under appeal, in holding that the deterrent effect of fines should not be taken into account when the intrinsic gravity of an infringement is examined.

100 The Commission contends that RZB's assertions are either inadmissible or unfounded.

(ii) Findings of the Court

101 As regards the first complaint, by taking the view, in paragraph 240 of the judgment under appeal, that the three aspects of assessment of the gravity of the infringement do not carry the same weight in the overall examination of an infringement and that the nature of the infringement plays a major role, the Court of First Instance did not err in law by relying on the Guidelines, according to which horizontal restrictions of the 'price cartel' type, the sharing of markets and other practices affecting the proper functioning of the internal market are placed within the category of 'very serious' infringements.

102 In that regard, it held in particular, in paragraph 121 of the judgment under appeal, that there was an agreement in principle between all the banks participating in the cartel to eliminate price competition in relation to a wide range of retail and corporate banking services, including 'key accounts', typifying a restriction of the kind referred to in the Guidelines.

103 Moreover, it is apparent from the Guidelines that the very nature of the infringement may suffice for it to be classified as 'very serious', regardless of its actual impact on the market and its geographic extent.

104 Finally, in paragraph 241 of the judgment under appeal, the Court of First Instance rightly held that those three criteria were interdependent.

105 Accordingly, the first complaint in the second part of this ground of appeal must be rejected as unfounded.

106 For the same reasons as those set out in paragraph 93 of the present judgment, the second complaint must also be rejected.

107 As regards the third complaint, it must be pointed out that, in paragraph 260 of the judgment under appeal, the Court of First Instance did not state that the intervention of the State authorities had been an aggravating circumstance liable to affect the amount of the fines imposed, to the detriment of the undertakings concerned.

108 The third complaint must therefore also be rejected.

109 As regards the fourth complaint, it must be noted that, concluding an analysis of which paragraph 256 of the judgment under appeal forms part, the Court of First Instance came to the view, in paragraph 264 of that judgment, that the circumstances invoked by the applicants were not such as to call in question the validity of the finding in the contested judgment that the Lombard network agreements by their very nature constituted a very serious infringement. RZB has not shown in what way consideration of the deterrent effect of fines when the intrinsic gravity of an infringement is examined, assuming that such consideration was necessary, could have changed the conclusion reached by the Court of First Instance. The fourth complaint is therefore ineffective.

110 The fourth complaint must therefore be rejected.

111 Therefore, the second part of the present ground of appeal is in part inadmissible and in part unfounded.

(c) The third part: error of law regarding the 'actual market impact' of the infringement

(i) Arguments of the parties

112 RZB maintains that the Court of First Instance erred in law by allowing the Commission to deduce from the mere 'implementation' of the cartel that the infringement had an actual market impact. That assessment runs counter to the wording of the Guidelines and shows that the Court of First Instance is confusing the 'implementation' of the agreements, a precondition for the application of Article 81 EC, with the stricter criterion of the 'actual market impact' of the infringement, which is relevant in explaining the gravity of the infringement. The judgment in *Cascades* v *Commission* goes against that reasoning and the economic report produced by the applicants shows that the agreements concerning essential products had no impact on the conditions actually applied.

113 BA-CA considers that the specific repercussions of the infringement on the market were incorrectly assessed. The abovementioned economic report shows that the meetings did not have such effects on the market.

114 BA-CA also claims that the Court of First Instance breached the rules of evidence in relation to the economic report. By saying that such a report should deal with 'all the potential effects of the agreements on the market', the Court of First Instance exceeded the requirements that it is permissible to impose for an economic report designed to show non-implementation of the agreements and the lack of any causal link between the banks' committee meetings and the free play of competition in the market.

115 The Commission observes that the economic report produced by the banks related to only two banking products and not to the potential effects of the agreement on the

market. In any event, the implementation, even if partial, of an agreement whose object is anti-competitive is sufficient to preclude any finding that that agreement had no impact on the market.

(ii) Findings of the Court

116 It must be noted that the Court of First Instance did not confine itself, in assessing the gravity of the infringement, to a finding that the cartel had been implemented.

117 In paragraph 285 of the judgment under appeal, the Court of First Instance duly found that the price cartel had an actual impact on the market, observing that the cartel members had taken measures to announce the agreed prices to customers, instructing their employees to use them as a basis for negotiation and monitoring the application of them by their competitors and their own sales departments.

118 Next, concluding an examination carried out in paragraphs 289 to 294 of the judgment under appeal, the Court of First Instance came to the view, without erring in law, in paragraph 295 of that judgment, that, '[i]n view of the numerous uncontested examples of implementation of the agreements mentioned in the contested decision, the fact that in certain cases the agreements were not respected by one or more banks, that the banks did not succeed in maintaining the agreed level of rates or increase their profitability or that there was competition between them regarding certain products is not sufficient to undermine the finding that the agreements were implemented and had effects on the market'.

119 It follows that the third part of the present ground of appeal must be rejected in its entirety.

(d) The fourth part: error of law in relation to the assessment of the 'extent of the relevant geographic market'

(i) Arguments of the parties

120 RZB criticises the Court of First Instance for failing to examine, in paragraphs 308 to 313 of the judgment under appeal, the argument that the manifestly and unquestionably limited size of the Republic of Austria precluded classification of the infringement as 'very serious'. Moreover, the reasoning set out in paragraphs 308 to 313 is contrary to the terms of the Guidelines and to the Commission's decision-making policy.

121 The Commission contests RZB's assertions.

(ii) Findings of the Court

122 Contrary to RZB's contention, the Court of First Instance did not fail to give its views on the argument concerning the limited extent of the relevant geographic market. It expressly stated, in paragraphs 308 to 313 of the judgment under appeal, the reasons for which the limited size of the territory of the Republic of Austria did not preclude classification of the infringement as 'very serious'.

123 Moreover, according to settled case-law, the Commission enjoys a wide discretion in setting the amount of fines and is not bound by assessments made by it in the past (see *Dansk Rørindustri and Others* v *Commission*, paragraphs 209 to 213, and Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 82).

It follows that the appellant cannot invoke the Commission's decision-making policy before the Community judicature.

124 Finally, there is no rule either in the Guidelines or in Regulation No 17 whereby, when assessing the examination of an infringement, the Court of First Instance may not limit its examination of the relevant geographic market to all or part of the territory of a Member State.

125 Consequently, the fourth part of this ground of appeal must be rejected.

(e) The fifth part: error of law concerning assessment of the effects on the classification of the infringement of the selective nature of the proceedings taken and a breach of the obligation to state reasons

(i) Arguments of the parties

126 RZB puts forward two complaints

127 The first complaint is that the Court of First Instance wrongly rejected its argument that the classification of the infringement as 'very serious' was incompatible with the fact that the Commission chose to institute proceedings against only some of the undertakings that took part in the infringement.

128 The second complaint is that the Court of First Instance failed in its obligation to give reasons by not replying to the arguments that the high level of the fines was inconsistent with the symbolic nature of the proceedings ultimately brought against the entire Austrian banking sector and, since a fine was imposed on only 10% of the banks, also led to distortions of competition.

129 The Commission considers that the appellant's arguments merely repeat those expounded before the Court of First Instance.

(ii) Findings of the Court

130 By its first complaint, RZB merely reproduces the arguments it relied on before the Court of First Instance, without indicating precisely what error of law it considers to have been committed by the Court of First Instance.

131 It must be borne in mind that, according to settled case-law, it is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. Thus, an appeal which merely repeats or reproduces verbatim the pleas and arguments relied on before the Court of First Instance does not satisfy the requirement to state reasons under those provisions (see Case C-499/03 P *Biegi Nahrungsmittel and Commonfood* v *Commission* [2005] ECR I-1751, paragraphs 37 and 38 and the case-law there cited).

132 The first complaint must therefore be rejected.

133 As regards the second complaint, alleging the lack of a statement of reasons, it must be borne in mind that the Court of First Instance's obligation to give reasons for its decisions cannot be interpreted as meaning that it is required to reply in detail to every argument put forward by an applicant (see Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 91).

134 However, by finding, in paragraph 315 of the judgment under appeal, that the Commission had legitimately adopted as a criterion, in order to decide to whom the contested decision should be addressed, their frequent participation in the most important committee meetings — an approach which did not preclude the classification of the infringement as 'very serious' — the Court of First Instance was not required to examine the other arguments, which had as a result become ineffective, and satisfied its obligation to state reasons.

135 Consequently, the second complaint must be rejected.

136 Therefore, the fifth part of the present ground of appeal is in part inadmissible and in part unfounded.

(f) The sixth part: there was no overall assessment of the gravity of the infringement

(i) Arguments of the parties

137 RZB takes issue with the Court of First Instance for not having carried out an overall assessment of the gravity of the infringement, extending to all the aspects mentioned in the Guidelines and of the exogenous factors, namely the economic importance of the Austrian banking sector, the absence of any need for deterrence and the selective nature of the proceedings. If the Court of First Instance had carried out such an analysis, it would then have found that the infringement at issue could not be characterised as 'very serious'.

138 The Commission considers those allegations to be unfounded.

(ii) Findings of the Court

139 Contrary to RZB's contention, the Court of First Instance did not disregard either the importance of the criteria expressly mentioned in the Guidelines or that of the elements not expressly contained in the Guidelines.

140 In its assessment of the gravity of the infringement, the Commission must take account not only of the particular circumstances of the case but also of the context in which the infringement occurs and, with a view to determining the amount of the fine, ensure that

its action has a deterrent effect, above all in relation to types of infringement that particularly undermine the attainment of the Community's objectives (see, to that effect, *Archer Daniels Midland* v *Commission*, paragraph 63).

141 In the judgment under appeal, in particular in paragraphs 249, 250 and 254, the Court of First Instance noted in particular, and correctly, that a horizontal price cartel ranks as a very serious infringement, even in the absence of other restrictions on competition such as partitioning of the markets, and that a cartel of that kind in a sector as important as the banking sector, covering a wide range of banking products and involving the great majority of economic operators, cannot, in principle, escape classification as a very serious infringement, whatever its context (see, to that effect, the judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission*, paragraph 104).

142 Moreover, the Court of First Instance also examined the applicants' other arguments, notably in paragraphs 254 to 264 of the judgment under appeal. It nevertheless concluded, in paragraph 264, that they were not such as to call in question the finding that the Lombard network agreements constituted by their nature a very serious infringement.

143 By so doing, and as has been stated in paragraph 93 of the present judgment, the Court of First Instance certainly did not err in law in that regard. Moreover, it is important to note that, contrary to RZB's contention, in its examination the Court of First Instance did not disregard the abovementioned criteria in the Guidelines, which also classify as very serious horizontal price cartels of the kind set up in this case.

144 Consequently, the sixth part of the present ground of appeal is unfounded.

(g) The seventh part: error of law regarding the allocation of the appellants to the categories of infringement adopted by the Commission

145 In support of the seventh part of this ground of appeal, the appellants essentially put forward five complaints.

(i) Arguments of the parties

146 By a first complaint, alleging the lack of a legal basis, breach of the principles of personal responsibility, proportionality of penalties and equal treatment by reason of the attribution to the central establishments of the market shares of the banks in decentralised sectors, Erste, RZB and ÖVAG call in question, in essence, the way in which the market shares of their respective decentralised sectors were attributed for the purposes of classification into categories.

147 In that regard, they maintain, first, that the Court of First Instance erred in law, in paragraphs 356 and 373 of the judgment under appeal, by taking the view that, by attributing those market shares to them for the purpose of calculating the fine, the Commission did not impute to them the illegal conduct of the banks in decentralised sectors and penalised them only ‘for their own conduct’.

148 That attribution is in practice tantamount to imputing to them responsibility for the infringements committed by the banks in their decentralised sectors since the market position of those sectors was entirely taken into account for calculation of the fine.

149 Erste, RZB and ÖVAG therefore consider that that attribution should have been appraised in the light of the criteria laid down by the Court of Justice regarding the attributability of infringements within a group of companies, namely the possibility of control over the undertaking and the existence of an economic unit.

150 The Commission contends that the decisive criterion for division into categories is comparison of real strength in the market, which is based on the stable relationships between the decentralised banks and the lead institutions.

151 Second, Erste maintains that the attribution to the lead institutions of the market shares of some 70 Austrian savings banks infringes Article 15(2) of Regulation No 17, read in conjunction with the sixth paragraph of Section 1A of the Guidelines. Those provisions do not allow the attribution to an undertaking of the market share of third companies operating in the same business sector.

152 Erste and RZB also claim that such attribution infringes the principle of personal responsibility for breaches of competition law and the principle of proportionality of penalties.

153 Finally, RZB and ÖVAG contend that the Court of First Instance also breached the principle of equal treatment. In that regard, RZB criticises the Court of First Instance for having assimilated the central establishments of the decentralised sectors to the large centralised banks for the purpose of placing them in categories. The Court of First Instance should have considered whether it might not be appropriate to use only a part of the market shares of each sector concerned in order to take account of the fact that, when it participates in committee meetings, a central establishment does no more than transmit information, not being entitled to take action on behalf of the banks or to give instructions for the implementation of any agreements.

154 The Commission states that the allocation of market shares in the contested decision is based not on specific findings concerning the actual participation of the decentralised banks in the infringement but only on the fact that the Commission penalised the lead institutions for their own conduct. It adds that there was no imputation in this case of the conduct of third parties.

155 As regards RZB, the Commission states that the fines imposed on the lead institutions did not exceed the ceiling of 10% of the undertaking's turnover, in accordance with Article 15 of Regulation No 17.

156 The position is thus different from one where it would have been necessary to take account of the entire turnover of the group if the lead institution and the decentralised banks had been regarded as one economic unit.

157 Finally, the Commission submits that the argument that the proportionality of the fine should be reviewed is inadmissible, since the Court of Justice cannot, on grounds of fairness, substitute its assessment for that of the Court of First Instance.

158 By a second complaint, Erste and ÖVAG maintain that the Court of First Instance breached their rights of defence by holding, in paragraph 369 of the judgment under appeal, that the indication in the statement of objections that they were the lead institutions of the savings banks sector and of that of all the credit unions was sufficient to respect their rights of defence.

159 They also maintain that the Commission should not have confined itself to a simple general statement and should have informed the undertaking of the conclusions which it intended drawing from all the factual evidence concerning the infringements and, in particular, its intention to attribute to them the market shares of their decentralised sector.

160 By a third complaint, Erste, RZB and ÖVAG criticise the Court of First Instance for not having correctly appraised their roles and their functions within the bank groupings.

161 Erste contests the Court of First Instance's view, expressed in paragraph 401 of the judgment under appeal, that its task was to 'represent' the savings banks sector at the banking committee meetings.

162 ÖVAG observes that, contrary to the Court of First Instance's finding, it had no way of binding the independent credit unions and does not form an economic entity with them.

163 RZB contends that it did not have 'greater expertise and better information' than the other banks in its decentralised sector, contrary to the statement made in paragraph 405 of the judgment under appeal. In any event, it maintains that the Court of First Instance's findings concerning its links with the decentralised sector precluded the attribution to it, in their entirety, of the market shares of that sector.

164 Finally, it observes that it does not possesses a capability comparable to that of the hierarchically organised big banks to cause harm to individuals and that it is likewise not in a position to take advantage of the practices at issue in the absence of a significant individual market share or participation in the profits of the banks in the sector.

165 By a fourth complaint, Erste maintains that the Court of First Instance was wrong to confirm, in paragraphs 455 and 458 of the judgment under appeal, the Commission's assessment concerning the market shares held before or after its merger with GiroCredit. It considers that it should have been placed in a lower category.

166 The Court of First Instance thus erred in law in paragraph 457 of the judgment under appeal by holding that Erste remained in the first category. The Court of First Instance also breached the principles of equal treatment and proportionality by not making a distinction, for the purpose of categorisation, between holdings of market shares of 30% and 17%.

167 The Commission contends that it was entitled to place Erste in the first category after its merger with GiroCredit, regardless of the precise market share involved. Moreover, it considers the argument that the Commission double-counted market shares and the conduct of EÖ to be inadmissible, in that Erste is in fact merely seeking a review of the facts.

168 By a fifth complaint, ÖVAG maintains that, by holding, in paragraph 401 of the judgment under appeal, that the applicant played 'at the most important committee meetings' a role as a representative of the independent credit unions, the Court of First Instance distorted the facts. As far as it is concerned, no exchanges of information or activities as coordinator and representative of decentralised credit unions have ever been proved.

169 Moreover, the Court of First Instance wrongly invoked a judgment of the Austrian Constitutional Court of 23 June 1993, produced by the Commission, to justify the attribution to ÖVAG of the market shares of the banks in the sector (paragraphs 392 to 401 of the judgment under appeal). It thus either made a finding of fact whose inaccuracy is apparent from the file or else distorted the evidence. In any event, it exceeded the discretion available to it. In its reply, ÖVAG specifically alleges distortion of evidence by the Court of First Instance, claiming that such distortion is reviewable by the Court of Justice.

170 Finally, ÖVAG maintains that the Court of First Instance did not expressly examine its situation, in contrast to its approach regarding Erste and RZB and their respective sectors.

171 The Commission observes that the appellant has given no support for that view and contends that the complaint should be rejected. As regards the reference to the judgment of the Austrian Constitutional Court, the Commission denies any distortion.

(ii) Findings of the Court

172 As far as the first complaint is concerned, and as found by the Court of First Instance in paragraphs 355 to 357 of the judgment under appeal, the Commission's attribution of the market shares of the banks in the decentralised sectors does not constitute imputation of the unlawful conduct of the latter to the lead institutions.

173 The first step must be distinguished from the second, in so far as it is designed to ensure — the view taken by the Court of First Instance — that the level of the fines imposed on the lead institutions should adequately reflect the gravity of their unlawful conduct, in this case the essential role that they played within the various units as representatives of the banks in the decentralised sectors, including action to defend the interests of those banks, and as centres for reciprocal exchange of information, a role which is indicative of their de facto influence on the conduct of the decentralised banks.

174 In order to assess the gravity of that conduct, it is necessary, in accordance with the fourth and sixth paragraphs of Section 1A of the Guidelines, to take account of the actual economic capacity of undertakings to distort competition and their specific weight and therefore the real impact of their unlawful conduct on competition.

175 The Court of First Instance did not err in law by considering that it was necessary for the stable structural links between the lead institutions and the banks in the decentralised sectors, in terms, in particular, of representation and exchange of information, also to

be taken into account because, by virtue of those links, the effective economic strength of those companies, and therefore their capacity to harm competition, was likely to be greater than their own turnover would indicate.

176 If the market shares of the decentralised entities had not been taken into account, the deterrent effect of the fine — a general requirement which, as is apparent from the fourth paragraph of Section 1A of the Guidelines, must guide the Commission in its calculation of the fine — would be likely to be absent.

177 It follows that, in addressing the issue of categorisation, the Court of First Instance did not commit any error of law by holding, in paragraph 357 of the judgment under appeal, that the Commission had relied on the personal conduct of the lead institutions and had not imputed to them the unlawful conduct of the banks in their sectors.

178 Consequently, the appellants have no basis for alleging breach of the principles of personal responsibility, proportionality of penalties and equal treatment, or infringement of the sixth paragraph of Section 1A of the Guidelines.

179 Therefore, the first complaint in the seventh part of the ground of appeal under review must be rejected.

180 As regards the second complaint, it must be rejected outright.

181 The Court of Justice has already held that, where the Commission makes it clear in its statement of objections that it will consider whether it is appropriate to impose fines on

the undertakings concerned and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (see *Dansk Rørindustri and Others* v *Commission*, paragraph 428 and the case-law there cited).

182 As regards the level of the envisaged fines, it is settled case-law that to give indications of the level of the contemplated fines, when the undertakings have not been in a position to put forward their observations on the objections held against them, would be tantamount to anticipating inappropriately the Commission's decision (see *Dansk Rørindustri and Others* v *Commission*, paragraph 434 and the case-law there cited).

183 Therefore, the Court of First Instance was right to consider, in paragraph 369 of the judgment under appeal, that those conditions were satisfied in this case since the Commission had indicated in the statements of objections that Erste, RZB and ÖVAG were lead institutions in their respective sectors and that, as a result, such an indication was sufficient to respect the applicants' rights of defence.

184 As regards the third complaint, it must be pointed out that, in paragraphs 389 to 408 of the judgment under appeal, the Court of First Instance examined the Commission's assessment of the facts in the contested decision regarding the role of the applicant companies' central establishments.

185 The appellants seek in reality merely a re-examination of the facts, which are not open to discussion in an appeal.

186 Consequently, the third complaint must be rejected.

187 As regards the fourth complaint, whereby Erste maintains that the Court of First Instance was wrong to maintain its classification in the first category and thus breached the principles of equal treatment and proportionality, it must be borne in mind that while, in an appeal, the Court cannot substitute, on grounds of fairness, its assessment for that of the Court of First Instance giving judgment in the exercise of its unlimited jurisdiction as to the amount of the fines imposed on undertakings by reason of their infringement of Community law, the exercise of that power cannot give rise, upon determination of the amount of those fines, to discrimination between the undertakings which participated in an agreement or concerted practice contrary to Article 81(1) EC (Case C-411/04 P *Salzgitter Mannesmann* v *Commission* [2007] ECR I-959, paragraph 68 and the case-law there cited).

188 In paragraph 457 of the judgment under appeal, the Court of First Instance examined Erste's complaint in the following terms:

'As regards the complaint that [the] BA [group]'s market share, which was close to 12 to 13%, was mistakenly included in the figure of 30% attributed by the contested decision to the entity made up of the lead institution and the savings banks, it must be stated that, after deduction of [the] BA [group]'s market share, the remaining market share of 17 to 18% still justified classification in the first category, given that it is much closer to the guide value of 22% than to that of 11%, which related to the second category. That complaint must therefore be rejected in the context of the examination of the legality of the Commission decision, given that, even if it were upheld, it could not call in question the operative part of the contested decision. Moreover, the Court considers, in the exercise of its unlimited jurisdiction, that the placing of Erste in the first category is justified with a view to arriving at a fine of an appropriate amount.'

189 In that regard, it must be pointed out that, in relation to the division of the cartel members into various categories, with uniform starting amounts for undertakings in the same category, the Court of First Instance held as follows in paragraph 424 of the judgment under appeal:

'In this case, the Commission did not set precise thresholds for the five categories which it identified but indicated, in its defence, "guide values" for the market shares of undertakings placed in the same category. The differences between those guide values are coherent and objectively justified as regards the first to fourth categories. The guide value for the second to fourth categories corresponds, in each instance, to one half of that of the category above, and the same applies to the corresponding starting amount.'.

190 It is apparent from the file that, in this case, the categories were determined by reference to the market shares held by each company and the guide values were set respectively at about 22%, about 11%, about 5.5%, about 2.75% and less than 1% for the last category.

191 Consequently, the Court of First Instance was right to hold that, regardless of the market share actually held by Erste, namely 17-18% or 30%, it was in the region of the guide value of 22%, as a result of which the undertaking was placed in the first category.

192 Moreover, the part of the Guidelines concerning the amount of the fines that may be imposed on members of a cartel does not lay down an arithmetical calculation method for such fines (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 266 and the case-law there cited).

193 It follows that the Court of First Instance did not err in law when, in the exercise of its unlimited jurisdiction, it maintained the classification of Erste in the first category.

194 Therefore, the fourth complaint in the seventh part of the ground of appeal under review must be rejected.

195 As regards the fifth complaint, it is necessary, first, to reject ÖVAG's complaint that the Court of First Instance did not examine its situation.

196 In paragraphs 389 to 408 of the judgment under appeal, the Court of First Instance examined in their entirety the relations between the lead institutions and their decentralised sectors and in particular found in ÖVAG's case, in paragraph 400 of that judgment, that the latter had confirmed providing the banks in its sector with services relating to functions that those establishments could not undertake alone because of their smallness and their scant resources.

197 As far as the judgment of the Austrian Constitutional Court is concerned, the Court of First Instance, in paragraph 393 of the judgment under appeal, set out the circumstances in which proceedings were commenced before that court and analysed the latter's description of the role of the central establishments and their relations with the decentralised banks. It pointed out in particular that, according to the Constitutional Court, a closely woven network of rights and obligations had developed over numerous decades; that applied both to the Raiffeisen sector, to which the judgment referred, and to the credit unions and the savings banks.

198 In that context, it must be observed that ÖVAG's allegations of incorrect findings of fact, distortion of evidence and overstepping of the bounds of discretion are tantamount to a challenge of the assessment by the Court of First Instance of facts set out in evidence produced by a party.

199 It is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it, that appraisal not constituting a point of law which is

subject as such to review by the Court of Justice, save where such evidence has been distorted (see Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 83 and the case-law there cited).

200 In that regard, it need merely be stated that ÖVAG has produced no evidence to prove its specific allegation of distortion.

201 The same applies to the distortion which, according to the appellant, was committed by the Court of First Instance in paragraph 401 of the judgment under appeal.

202 Therefore, the fifth complaint in the seventh part of the ground of appeal under review must be rejected in its entirety.

203 Consequently, the seventh part of the ground of appeal must be rejected in its entirety and the same applies, as a result, to the ground of appeal alleging errors of law in the assessment of the gravity of the infringement.

2. The ground of appeal alleging errors of law, failure to state reasons and distortion of evidence in relation to the existence of attenuating circumstances

204 This ground of appeal comprises essentially three parts.

(a) The first part: errors of law, distortion of evidence and contradictory reasoning relating to the passive conduct of ÖVAG

(i) Arguments of the parties

205 ÖVAG criticises the judgment under appeal on the ground that the Court of First Instance rejected all its complaints concerning the failure to take account of attenuating circumstances.

206 By a first complaint, ÖVAG criticises the Court of First Instance for merely reproducing the text of the Guidelines without examining the circumstances of the case and in particular its specific role within the Lombard Club.

207 By a second complaint, ÖVAG submits that the Court of First Instance erred in law, in paragraph 483 of the judgment under appeal, by basing its assessment on the criterion of the banks' participation in the committees, on which it also relied in connection with the division of the banks into categories. By so doing, the Court of First Instance coupled the question of the division of banks into categories according to their strength in the market with that of the recognition of an attenuating circumstance. According to the appellant, the recognition of an attenuating circumstance cannot depend on the 'sporadic' nature of an undertaking's participation in the meetings. The Guidelines require the Commission to undertake a differentiated assessment of the roles and not adopt a Manichaeistic 'all or nothing' approach.

208 By a third complaint, ÖVAG alleges distortion of evidence in the Court of First Instance's treatment of the exposition of facts and other information in the file concerning its participation in the cartel. It never claimed that it had distanced itself from the cartel but consistently emphasised the modest role which it played in the cartel (paragraph 484 of the judgment under appeal).

209 By a fourth complaint, alleging contradictory reasoning, ÖVAG submits that the analysis contained in paragraphs 485 and 486 of the judgment under appeal is contradictory, in so far as it is classified as a 'large bank' and as a 'representative of a sector', even though the Commission did not undertake any investigation at its premises, the appellant did not form part of the 'smaller circle of banks' and it took part in only a few meetings.

210 The Commission considers the above complaints to be irrelevant, if only because it is not for the Court of Justice, on grounds of fairness, to substitute its assessment for that of the Court of First Instance.

(ii) Findings of the Court

211 In its references in paragraphs 482 and 486 of the judgment under appeal to the case-law relating, on the one hand, to evidence likely to disclose the passive role of an undertaking within a cartel and, on the other, to the participation of an undertaking in one or more meetings, and in its examination in paragraphs 483 to 485 and 487 to 489 of the judgment under appeal of the manner in which the Commission took account of the conduct of each of the undertakings, the Court of First Instance did not confine itself to reproducing the Guidelines but, on the contrary, made a detailed examination of the matters raised by ÖVAG.

212 Therefore, the first complaint in the first part of the present ground of appeal must be rejected.

213 As regards the error of law allegedly committed by the Court of First Instance in paragraph 483 of the judgment under appeal, it must be borne in mind that the Court of Justice has held that the responsibility of a given undertaking in respect of an infringement of Article 81(1) EC is properly established where it participated in the meetings with knowledge of their object, even if it did not subsequently implement any

measure or measures agreed at the meetings (see 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 509).

214 By taking the view, in paragraph 483 of the judgment under appeal, that it was because of the banks' frequent participation in the most important committees that the Commission chose to address the contested decision to them, the Court of First Instance did not err in law.

215 Similarly, contrary to ÖVAG's contention, that criterion differs from the one used for the division of the banks into categories. For that division, the criterion applied was the one mentioned in the sixth paragraph of Section 1A of the Guidelines concerning the economic strength of the banks.

216 By holding, in paragraph 487 of the judgment under appeal, that the differences between the banks which might result from their roles within the committee meetings were 'already taken into account when the banks were allocated to different categories', the Court of First Instance did not err in law. Before making that finding, it undertook a comparative examination of the banks that played the most important roles in the committees and their position on the market and came to the conclusion that the same banks were involved.

217 It follows that the second complaint in the first part of this ground of appeal must be rejected.

218 As regards the third complaint, it must be pointed out that the appellant has produced no evidence to show that any distortion of evidence took place.

219 Accordingly, the third complaint in the first part of this ground of appeal must be rejected.

220 As regards the fourth complaint, it must be held, as the Commission submits, that the appellant's allegations in relation to attenuating circumstances appear for the first time in its appeal.

221 According to settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal, the Court's jurisdiction is confined to a review of the findings of law on the pleas argued before the Court of First Instance (see, in particular, *Dansk Rørindustri and Others* v *Commission*, paragraph 165).

222 Those allegations are therefore inadmissible in this appeal.

223 Accordingly, the first part of the ground of appeal under review must be rejected in its entirety.

(b) The second part: error of law concerning the public authorities' participation in the banking committee meetings

(i) Arguments of the parties

224 BA-CA maintains that the Court of First Instance erred in law by omitting, in paragraph 505 of the judgment under appeal, to take account of the public authorities' participation in committee meetings as an attenuating circumstance.

225 It is clear from the Commission's decision-making practice and from the case-law of the Court of Justice that tolerance of conduct by a national legislature or by the authorities constitutes an attenuating circumstance, thereby justifying a reduction of the fine, that being the case regardless of the size of the undertakings concerned.

226 In particular, BA-CA criticises the Court of First Instance for having held, in paragraph 505 of the judgment under appeal, that tolerance of the infringement by the public authorities cannot be taken into consideration 'having regard in particular to the resources available to the banks to obtain precise and accurate legal information'. First, that condition is not in conformity with the case-law of the Court of Justice, notably Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 57. Second, such a condition would give rise to discrimination against certain undertakings by reason of their objects.

227 The Commission considers, principally, those statements to be inadmissible on the ground that they are a repetition of facts set out before the Court of First Instance. In the alternative, those statements are unfounded.

(ii) Findings of the Court

228 In paragraph 505 of the judgment under appeal, the Court of First Instance observed:

'As regards the participation of certain public authorities ([Austrian National Bank], the Ministry of Finance and the Wirtschaftskammer) in the meetings, the information produced by the applicants is not sufficient to show reasonable doubt as to the illegality of the committees under Community competition law. Whilst it is not excluded that, in certain circumstances, a national legal framework or conduct on the part of national authorities may constitute mitigating circumstances (see, by analogy, *CIF*, … paragraph 57), the approval or tolerance of the infringement by the Austrian authorities cannot be taken into account under that heading in this case, having regard in particular to the resources available to the banks to obtain precise and accurate legal information.'

229 The first sentence of that paragraph is an assessment of fact by the Court of First Instance which cannot be called in question in an appeal.

230 As regards the second sentence of that paragraph, it must be stated immediately that the Court of First Instance did not commit any error of law.

231 First, contrary to BA-CA's contention, in the *CIF* judgment, the question on which a ruling was sought concerned, in the context of Article 81 EC, the role of the national competition authority where a cartel is imposed or encouraged by a national legislative provision that legitimises or strengthens its effects. The Court held in paragraph 57 of that judgment that 'when the level of the penalty is set the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a

mitigating factor'. It follows that the *CIF* judgment was in no way concerned with the participation of the public authorities in a cartel.

232 Moreover, as the Advocate General emphasised in point 404 of his Opinion, the Austrian law allowing banking establishments to collude with each other was repealed by 1 January 1994 at the latest, that is to say, one year before the infringement period covered by the contested decision.

233 Also, BA-CA cannot invoke any breach of the principle of equal treatment. The Court of Justice has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (see Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 205).

234 It follows that BA-CA's complaints must be rejected, as must, therefore, the second part of this ground of appeal.

(c) The third part: the Court of First Instance erred in law regarding the public nature of the meetings

(i) Arguments of the parties

235 BA-CA maintains that, in paragraph 506 of the judgment under appeal, the Court of First Instance erred in law in that it did not accept that the committee meetings were a matter of public knowledge and therefore did not reduce its fine.

236 First, the Court of First Instance, it is submitted, breached the rules of evidence by not examining the merits of the documents produced by BA-CA proving that the aim and subject-matter of the committee meetings were a matter of public knowledge.

237 Second, the Court of First Instance misrepresented the content of the exposition of the facts given by BA-CA in so far as the latter had not specifically maintained that the public knowledge of the committee meetings proved their legality.

238 Third, the Court of First Instance exceeded the bounds of what may be required by taking the view that the public must be fully apprised of the discussions within the committee meetings for it to be possible to grant a reduction of the fine.

239 The Commission considers that those allegations are inadmissible or, in the alternative, unfounded. It submits that there is no case-law to the effect that cartel members may consider that their practices are lawful by reason of the fact that certain conduct is well known. If that were the case, it would be sufficient to make certain practices public in order to avoid pecuniary penalties. In that regard, the Court of First Instance made it quite clear that public knowledge is not decisive.

(ii) Findings of the Court

240 As regards the first two allegations, they must be rejected since BA-CA has not produced the information needed for it to be able to examine whether the evidence relied on by the Court of First Instance for the findings made in paragraph 506 of the judgment under appeal was distorted.

241 As regards the third allegation, it must be pointed out that the Court of First Instance did not state that the public must be fully acquainted with cartels but only that the full extent of the cartel must be known to the public. That allegation must therefore be rejected as unfounded.

242 It follows that the third part of this ground of appeal must be rejected, as must, therefore, the entire ground of appeal alleging errors of law, failure to state reasons and distortion of evidence in relation to the existence of attenuating circumstances.

3. The ground of appeal alleging breach of the Leniency Notice

243 This ground of appeal comprises essentially two parts.

(a) The first part: the Court of First Instance did not correctly assess the discretion available to the Commission

(i) Arguments of the parties

244 BA-CA claims that the Court of First Instance did not correctly assess the discretion available to the Commission for implementation of the Leniency Notice or the limits of its judicial review.

245 Section D of the Leniency Notice does not in fact give the Commission any discretion, first, as to whether the information provided by the undertaking facilitated the Commission's task or, second, as to whether an undertaking that has cooperated must have its fine reduced. The reference to *Dansk Rørindustri and Others* v *Commission* is likewise no basis for unlimited discretion on the part of the Commission. Moreover, contrary to what the Court of First Instance held in paragraph 532 of the judgment under appeal, appraisal of an undertaking's cooperation falls within the Court of First Instance's unlimited jurisdiction.

246 The Commission considers that BA-CA's assertions are incorrect.

(ii) Findings of the Court

247 The first part of the present ground of appeal must be rejected outright.

248 In paragraph 394 of *Dansk Rørindustri and Others* v *Commission*, the Court of Justice held that the Commission enjoys a wide discretion in deciding whether the information or documents voluntarily provided by undertakings have facilitated its task and whether the undertakings should be granted a reduction under Section D.2 of the Leniency Notice.

249 Therefore, the Court of First Instance did not err in law in holding in paragraph 532 of the judgment under appeal that such an appraisal by the Commission was subject only to limited review.

250 It follows that the first part of the ground of appeal under review must be rejected as unfounded.

(b) The second part: error of law in the application of the Leniency Notice

(i) The first complaint: error of law concerning the requirement of 'added value' resulting from the cooperation given and breach of the principle of equal treatment

— Arguments of the parties

251 RZB and BA-CA claim, in essence, that the Court of First Instance erred in law by holding, in paragraph 553 of the judgment under appeal, that the Commission was entitled to require that the cooperation gave rise to 'added value' to enable the fine to be reduced.

252 BA-CA also claims that the Court of First Instance breached the principle of equal treatment by applying that criterion. Observance of that principle would necessarily have resulted in a larger reduction of the fine since its cooperation was greater and qualitatively superior to that of the other banks.

— Findings of the Court

253 The first argument merely repeats the one put forward before the Court of First Instance and is thus inadmissible in an appeal.

254 As regards the second argument, it must be borne in mind that, in 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 needed 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 (*Dansk Rørindustri and Others* v *Commission*, paragraph 244 and the case-law there cited).

255 However, as far as the extent of the reduction of the fine is concerned, it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 245).

256 In that regard, it must be borne in mind that, in paragraphs 553 to 557 of the judgment under appeal, the Court of First Instance examined the added value of the documents produced by the applicants and went on to find that it did not justify a greater reduction of their fines. Such an assessment of the facts is a matter solely for the Court of First Instance and, according to case-law already referred to in the present judgment, the Court of Justice cannot substitute its own findings in an appeal.

257 It follows that the present ground of appeal must be declared inadmissible in so far as it seeks re-examination of the reduction of the fine.

(ii) The second complaint: errors of law in the examination of the extent of the undertakings' cooperation, breach of the principles of equal treatment, the protection of legitimate expectations and observance of the rights of the defence, and inadequate statement of reasons

258 The second complaint comprises essentially six parts.

— The first part of the second complaint

Arguments of the parties

259 By a first argument, alleging contradictory reasoning, RZB maintains that the Court of First Instance failed to draw the appropriate inferences from the fact that certain answers given to the Commission were not only voluntary (paragraph 542 of the judgment under appeal) but went beyond the information requested by the Commission (paragraph 552 of the judgment under appeal).

260 By a second argument, RZB asserts that the position set out in paragraph 541 of the judgment under appeal ultimately allows the Commission to address to undertakings which it considers to belong to a cartel requests for information that are framed in very vague terms and give rise to consequences for those undertakings that do not reply. The Commission therefore exerts an irresistible constraint on those undertakings by sending them simple standard questions which induce them to incriminate themselves. The reasoning followed infringes the rights of the defence as set out in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 32.

261 RZB states that that case-law is not called in question by the rule laid down by the Court of Justice in Case C-301/04 P *Commission* v *SGL Carbon* [2006] ECR I-5915, paragraph 48, since the problems raised there were more focused and more specific than in the present case.

262 According to the Commission, RZB is disregarding the fact that it cannot take account of information deriving from voluntary cooperation within the meaning of the Leniency Notice unless such information facilitates its task in finding and penalising the infringement and represents genuine cooperation. However, the information from RZB amounted only to a description of the historical context of the Lombard network and the subject-matter of the cartel meetings, which was already in the Commission's possession. The essential 'added value' was therefore lacking.

263 Moreover, the Commission emphasises that it had been informed, when it questioned the applicants, that all the banking products had been dealt with in numerous committee meetings and that the latter fell within the scope of a network, so that the context of the infringement and thus the subject-matter of the investigation were clearly identified, particularly as regards those undertakings that took part in the committee meetings, the nature of the infringement and the subject-matter of the agreements.

264 Finally, the Commission states that the questions related to all the committee meetings held regularly, so that the undertakings did not have to make a selection or assess which meetings might amount to infringements of Article 81 EC.

Findings of the Court

265 As regards the first argument, contrary to RZB's assertion, the Court of First Instance did not contradict itself when it stated in paragraph 542 of the judgment under appeal that 'it is apparent from recital 546 to the contested decision that the Commission acknowledged the voluntary nature of the replies to the questions concerning the

subject-matter of the collusive meetings' and, in paragraph 552 thereof, that' [t]he Commission acknowledged, in recital 553 to the contested decision, that the banks had provided voluntarily, in the joint exposition of the facts, information going beyond what had been asked of them'.

266 The first finding relates to the disclosure of documents in the context of the request for information sent by the Commission to the banks on 21 September 1998 as part of the procedure provided for in Article 11(2) to (4) of Regulation No 17.

267 On the other hand, the second finding relates to the content of the joint exposition of the facts produced by the banks during the preliminary procedure, but following their replies to the abovementioned request for information.

268 Furthermore, the Court of First Instance was right to hold in paragraph 545 of the judgment under appeal that, '[i]n any event, the same would apply in the case of a different assessment as to the voluntary nature of the production of such documents' since the Commission had already granted a 10% reduction in the fines.

269 It follows that the first argument in the first part of the second complaint must be rejected.

270 As regards the second argument, concerning observance of the rights of the defence, it must be pointed out 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 (see Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 94).

271 Although, in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all the necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish the existence of anti-competitive conduct by it or another undertaking, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned (*Orkem* v *Commission*, paragraph 34).

272 However, in this case, it need merely be pointed out that the Commission has never taken any 'decision' within the meaning of Article 11(2) and (5) of Regulation No 17. Consequently, the argument in paragraph 541 of the judgment under appeal, that the Court of First Instance did not comply with the rule in *Orkem* v *Commission*, must be rejected.

273 Therefore, the second argument must be rejected, as must, therefore, the first part of the second complaint in its entirety.

— The second part of the second complaint, alleging errors of law in the assessment of the joint exposition of the facts

Arguments of the parties

274 First, RZB and BA-CA maintain that the Court of First Instance erred in law in considering, in paragraph 556 of the judgment under appeal, that contextual explanations relating to practices contrary to competition law cannot be regarded as cooperation in the procedure within the meaning of the Leniency Notice on the ground that they may constitute a means of defence for the undertakings. According to BA-CA, no rule of law exists whereby a document that the parties use with a view to their

defence cannot at the same time provide the Commission with valuable and useful substantive information that contributes to the finding of an infringement.

275 Second, RZB claims that the Court of First Instance's analysis is incorrect since the Commission's reasoning is contrary to its own decision-making practice. The appellant refers, in that regard, to Section IIA(9)(a) and Section IV of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

276 Third, BA-CA maintains that the Court of First Instance was wrong to hold that the Commission was entitled to take into account, when assessing the usefulness of the banks' voluntary cooperation, the fact that they did not provide, together with the joint exposition of the facts, 'all the documents concerning the committees'.

277 In its view, no rule to that effect exists. Moreover, in view of the extent of the infringement, BA-CA was able to provide those documents only in successive stages.

278 Fourth, BA-CA submits that the judgment under appeal is vitiated by a contradiction. Although the joint exposition of the facts contributed to the finding of an infringement, the Court of First Instance did not grant it a reduction of its fine.

Findings of the Court

279 Without any error of law or contradictory reasoning, the Court of First Instance was right to hold, in paragraphs 554 to 558 of the judgment under appeal, that the Commission was entitled not to regard the documents produced as annexes to the joint exposition of the facts as 'new', and to take account of the 'incompleteness of [those] annexes' and the fact that 'the banks had used [the joint exposition of the facts] to present their own view of the committees and therefore as a means of defending [themselves]'.

280 It must be borne in mind that the Commission enjoys a discretion in that regard, as is apparent from the very wording of Section D.2 of the Leniency Notice and in particular the introductory words 'Such cases may include …' (*Dansk Rørindustri and Others* v *Commission*, paragraph 394).

281 Above all, a reduction of the fine under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part (*Dansk Rørindustri and Others* v *Commission*, paragraph 395).

282 As is clear from the very concept of cooperation, as described in the text of the Leniency Notice and in particular in its introduction and Section D.1, it is only where the conduct of the undertaking concerned reveals such a spirit of cooperation that a reduction may be granted on the basis of that notice (*Dansk Rørindustri and Others* v *Commission*, paragraph 396).

283 As the Court of First Instance found, in paragraphs 554 to 557 of the judgment under appeal, RZB and BA-CA, by providing an incomplete statement of facts, which was merely confirmatory and had no 'added value', cannot claim that their conduct was of such a kind.

284 Therefore, the second part of the second complaint must be rejected.

— The third part of the second complaint, alleging an error of law regarding the assessment of RZB's admission of the anti-competitive object of the infringement and a breach of the principle of equal treatment

Arguments of the parties

285 RZB criticises the Court of First Instance for disregarding, in paragraph 559 of the judgment under appeal, the particular value of its admission, in view of the fact that the Commission expressly relied on that element to argue that it was not necessary to examine the actual impact of the committee meetings.

286 The analysis undertaken in paragraph 559 contravenes the principle of equal treatment because, despite its admissions, RZB was treated in the same way as the other banks. RZB asks the Court of Justice to rectify the Court of First Instance's error and considers that a reduction in its fine of at least 10% would be justified.

287 The Commission contends that it had already, in recital 426 to the contested decision, explained and demonstrated that the committee meetings were intended to limit competition and that the admission added nothing.

Findings of the Court

288 By taking the view, in paragraph 559 of the judgment under appeal, that '[the Commission] must, in each individual case, consider whether such an admission actually made its task easier', the Court of First Instance did not err in law.

289 As has been stated in paragraph 248 of the present judgment, the Commission enjoys a wide discretion in assessing the extent to which undertakings have cooperated in the procedure.

290 Moreover, since the admission did not facilitate the Commission's task but, as found by the Court of First Instance, merely confirmed the Commission's findings, RZB's argument that there was a breach of the principle of equal treatment cannot prosper.

291 Therefore, the third part of the second complaint must be rejected.

— The fourth part of the second complaint, alleging reversal of the burden of proof regarding the value of RZB's cooperation and breach of the principle of the protection of legitimate expectations

Arguments of the parties

292 RZB criticises the Court of First Instance for reversing the burden of proof by holding, in paragraphs 546 to 551 of the judgment under appeal, that the applicant was required

to establish, in order to obtain a reduction of more than 10% of its fine, that the Commission would not have been in a position to prove the infringement without the evidence submitted.

293 First, it claims, that analysis is contrary to the second indent of Section D.2 of the Leniency Notice and thus breaches the principle of the protection of legitimate expectations. Also, that analysis is irreconcilable with the Commission's obligation to establish, in administrative procedures, both favourable and unfavourable circumstances.

294 In the Commission's view, RZB's allegations are misconceived. It states that the first indent of Section D.2 of the Leniency Notice clearly shows that the evidence produced must contribute to confirming the existence of an infringement. Following investigations, the Commission possessed the documents needed for a finding as to the essential facts and therefore itself produced the evidence of the infringement. That evidence was not challenged by RZB.

Findings of the Court

295 In paragraph 551 of the judgment under appeal, the Court of First Instance held that 'the applicants have not established that the documents produced in response to the requests for information were necessary to enable the Commission to identify all the essential committees, or that, without them, the evidence obtained through the investigations would have been insufficient to prove the essential elements of the infringement and to enable a decision imposing fines to be adopted'.

296 In so far as RZB's argument seeks to challenge that finding of fact by the Court of First Instance, it is inadmissible in the present appeal.

297 As regards the alleged reversal of the burden of proof, it must be pointed out that, whilst the Commission is required to state the reasons for which it considers that information provided by undertakings under the Leniency Notice constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent on undertakings wishing to contest the Commission's decision in that regard to show that, in the absence of such information provided voluntarily by the undertakings, the Commission would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines.

298 In those circumstances, the Court of First Instance was right, in paragraph 551 of the judgment under appeal, to hold implicitly that the applicants were therefore required to provide such proof.

299 Therefore, the fourth part of the second complaint must be rejected.

— The fifth part of the second complaint, alleging errors of law and contradictory reasoning in the Court of First Instance's analysis of the value of the additional documents disclosed by BA-CA

Arguments of the parties

300 BA-CA essentially contests the Court of First Instance's assessment in paragraphs 560 to 563 of the judgment under appeal of the value of the 33 binders, containing more than 10 000 pages of documents, which it sent to the Commission.

301 First, BA-CA maintains that the Court of First Instance devalued its cooperation by constantly increasing the requirements to be fulfilled to qualify for a reduction of the fine. In particular, it criticises the comparison made by the Court of First Instance of the value to be attributed to those documents and that to be given to the joint exposition of the facts.

302 Second, the appellant submits that the Court of First Instance's reasoning is contradictory, since it refused, in relation to the joint exposition of the facts, to grant a reduction of the fine in the absence of new documents, although it is established that it voluntarily disclosed new documents comprising 10 000 pages, some of which were unquestionably used for the purposes of the contested decision.

303 The Commission considers that argument to be inadmissible since it was raised before the Court of First Instance. Moreover, it emphasises that the newness of those documents, in that they had not been produced earlier, does not in itself mean that they represented useful cooperation.

Findings of the Court

304 By holding, in paragraph 560 of the judgment under appeal, that 'the production of additional documents by one of the banks can only justify a further reduction of its fine on an individual basis if that cooperation actually involved the production of new and useful information as compared with that provided jointly by all the undertakings', the Court of First Instance did not in any way err in law.

305 As has been pointed out in paragraphs 281 to 283 of the present judgment, a reduction based on the Leniency Notice can be justified only where the information provided

could be regarded as demonstrating genuine cooperation, given that the aim of reducing a fine is to reward an undertaking for making a contribution in the administrative procedure that enabled the Commission to establish an infringement with less difficulty.

306 Since it had found that the documents produced by BA-CA did not amount to new and relevant information, as compared with that contained in the joint exposition of the facts, the Court of First Instance was right to hold, in paragraph 562 of the judgment under appeal, that the Commission was not required on that ground to grant BA-CA an additional reduction of its fine.

307 It follows that the fifth part of the second complaint must be rejected.

— The sixth part of the second complaint, alleging failure to take account of BA-CA's responses to the statement of objections

Arguments of the parties

308 BA-CA contests the Court of First Instance's assessment in paragraph 564 of the judgment under appeal that the Commission was not required to take account, as constituting cooperation, of its response to the statement of objections.

309 The Commission considers that BA-CA's allegation is misconceived.

Findings of the Court

310 In that regard, it must be emphasised that the statement of objections is a procedural and preparatory document which, in order to ensure that the rights of the defence may be exercised effectively, delimits the scope of the administrative procedure initiated by the Commission, thereby preventing it from relying on other objections in its decision terminating the procedure in question (see, in particular, the order in Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1986] ECR 1899, paragraphs 13 and 14). It is therefore inherent in the nature of that statement that it is provisional and liable to be changed during the assessment subsequently undertaken by the Commission on the basis of the observations submitted to it by the parties and other findings of fact (see, to that effect, *SGL Carbon* v *Commission*, paragraph 62).

311 The Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned (see the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 13).

312 There is no rule that undertakings may not, after receiving the statement of objections and in particular in their responses thereto, provide the Commission with decisive information enabling the Commission to grant them a reduction of the fine under the Leniency Notice.

313 However, in that regard, the Court of First Instance implicitly considered, in paragraph 564 of the judgment under appeal, that BA-CA's response to the statement of objections did not do so.

314 In those circumstances, since BA-CA has not alleged that the Court of First Instance distorted the evidence in that regard, the sixth part of the second complaint must be rejected, as must, therefore, both the second complaint and the second part in their entirety.

315 It follows that the ground of appeal alleging breach of the Leniency Notice is in part unfounded and in part inadmissible and must therefore be rejected in its entirety.

C — *The ground of appeal alleging breach by the Court of First Instance of the right to be heard*

(a) Arguments of the parties

316 BA-CA submits that the Court of First Instance limited its right to be heard by refusing to take witness evidence.

317 The Commission contends that the Court of First Instance is not required to take up an offer of evidence if, as in this case, it is not conducive to clarification of the facts.

(b) Findings of the Court

318 It must be observed that, in paragraph 563 of the judgment under appeal, the Court of First Instance did not accede to a request that a witness be heard, on the ground that 'that call for evidence [was] not directly relevant to assessing the usefulness of [the] documents [produced]'.

319 It must be pointed out that the Court of First Instance is the sole judge of whether the information available to it concerning the cases before it needs to be supplemented (see, in particular, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 47, and Case C-136/02 P *Mag Instrument* v *OHIM* [2004] ECR I-9165, paragraph 76).

320 Even where a request made in the application for the examination of witnesses sets out the reasons on which it is based, it falls to the Court of First Instance to assess the relevance of the request to the subject-matter of the dispute and the need to examine the witnesses named (see *Dansk Rørindustri and Others* v *Commission*, paragraph 68).

321 In this case, the appellant has not produced evidence to show that, by refusing to hear that witness, even though BA-CA was able to answer additional questions asked by the Court of First Instance, the latter undermined its right to be heard.

322 Consequently, this ground of appeal must be rejected.

D — *The ground of appeal alleging breach by the Court of First Instance of its obligation to state reasons regarding the setting of the fines and the right to be heard*

(a) Arguments of the parties

323 BA-CA alleges that, in paragraph 566 of the judgment under appeal, the Court of First Instance exercised its unlimited jurisdiction without fulfilling its obligation to state reasons and without allowing the undertakings being fined to be heard.

324 It submits that the conditions on the basis of which the Court of Justice excluded such obligations in its judgment in Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331 are not fulfilled in this case.

325 BA-CA stresses in particular that the fine imposed on the banks in 2002 was the sixth highest ever imposed by the Commission and that, when reconsidering it four years later, the Court of First Instance was wrong to take the view that it was 'relatively low'.

326 The Commission observes that the considerations set out in paragraph 566 of the judgment under appeal are merely final and additional considerations, underpinning the Court of First Instance's assessment.

(b) Findings of the Court

327 It should be recalled at the outset 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 has been emphasised on numerous occasions in the case-law of the Court (*Groupe Danone* v *Commission*, paragraph 68 and the case-law there cited).

328 In 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 Articles 81 EC and 82 EC and Article 15 of Regulation No 17 and, second, to ascertain whether the Court of First Instance responded to the requisite legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (*Groupe Danone* v *Commission*, paragraph 69 and the case-law there cited).

329 It must be pointed out that BA-CA was given an opportunity to make its views duly known and there is no need to rule as to whether the Court of First Instance, before exercising its unlimited jurisdiction, was required to invite the applicant to submit its observations on a possible amendment of the fine.

330 As the Advocate General made clear in point 519 et seq. of his Opinion, four of the six pleas put forward by BA-CA before the Court of First Instance sought a reduction of the amount of the fine imposed. Those pleas related in particular to the Commission's assessments regarding the classification of the infringement, the existence of attenuating circumstances and whether the applicant cooperated in the procedure.

331 Moreover, the Court of First Instance put numerous questions to BA-CA regarding the existence of attenuating circumstances and the applicant's cooperation in the procedure.

332 Finally, it must be observed that the Court of First Instance examined in great detail, in paragraphs 216 to 571 of the judgment under appeal, all the relevant information as to how the amount of the fine was determined.

333 This ground of appeal must therefore be rejected.

334 It follows from the foregoing considerations that the appeal must be dismissed in its entirety.

VII — Costs

335 Under Article 69(2) of the Rules of Procedure, which applies to appeals 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. Since the Commission applied for the costs to be borne by Erste, RZB, BA-CA and ÖVAG, they must be ordered to pay the costs.

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

1. **Dismisses the appeals;**

2. **Orders Erste Group Bank AG, formerly Erste Bank der österreichischen Sparkassen AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG and Österreichische Volksbanken AG to pay the costs.**

[Signatures]

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