JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

26 April 2007 *

In Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02,

Bolloré SA, established in Puteaux (France), represented by R. Saint-Esteben and H. Calvet, lawyers,

applicant in Case T-109/02,

Arjo Wiggins Appleton Ltd, established in Basingstoke (United Kingdom), represented by F. Brunet, lawyer, J. Temple Lang, Solicitor, and J. Grierson, Barrister,

applicant in Case T-118/02,

supported by

Kingdom of Belgium, represented by A. Snoecx and M. Wimmer, acting as Agents,

intervener in Case T-118/02,

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

Mitsubishi HiTec Paper Bielefeld GmbH, formerly Stora Carbonless Paper GmbH, established in Bielefeld (Germany), represented by I. van Bael, lawyer, and A. Kmiecik, Solicitor,

applicant in Case T-122/02,

Papierfabrik August Koehler AG, established in Oberkirch (Germany), represented by I. Brinker and S. Hirsbrunner, lawyers,

applicant in Case T-125/02,

M-real Zanders GmbH, formerly Zanders Feinpapiere AG, established in Bergisch Gladbach (Germany), represented by J. Burrichter and M. Wirtz, lawyers,

applicant in Case T-126/02,

Papeteries Mougeot SA, established in Laval-sur-Vologne (France), represented initially by G. Barsi, J. Baumgartner and J.-P. Hordies, and subsequently by Messrs Barsi and Baumgartner, lawyers,

applicant in Case T-128/02,

Torraspapel, SA, established in Barcelona (Spain), represented by O. Brouwer, F. Cantos and C. Schillemans, lawyers,

applicant in Case T-129/02,

Distribuidora Vizcaína de Papeles, SL, established in Derio (Spain), represented by E. Pérez Medrano and I. Delgado González, lawyers,

applicant in Case T-132/02,

Papelera Guipuzcoana de Zicuñaga, SA, established in Hernani (Spain), represented by I. Quintana Aguirre, lawyer,

applicant in Case T-136/02,

v

Commission of the European Communities, represented, in Cases T-109/02 and T-128/02, by W. Mölls and F. Castillo de la Torre, acting as Agents, assisted by N. Coutrelis, lawyer, in Cases T-118/02 and T-129/02, by W. Mölls and A. Whelan, acting as Agents, assisted by M. van der Woude, lawyer, in Case T-122/02, initially by R. Wainwright and W. Mölls, and subsequently by R. Wainwright and A. Whelan, acting as Agents, in Cases T-125/02 and T-126/02, by W. Mölls and F. Castillo de la

Torre, assisted by H.-J. Freund, lawyer, in Joined Cases T-132/02 and T-136/02, by W. Mölls and F. Castillo de la Torre, assisted by J. Rivas Andrés and J. Gutiérrez Gisbert, lawyers,

defendant,

APPLICATION for annulment of Commission Decision 2004/337/EC of 20 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/E-1/36.212 — Carbonless paper) (OJ 2004 L 115, p. 1) or, in the alternative, reduction in the fine imposed on the applicants by that decision

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

composed of M. Vilaras, President, F. Dehousse and D. Sváby, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearings on 2 (T-132/02 and T-136/02), 7 (T-109/02 and T-128/02), 14 (T-122/02), 16 (T-118/02 and T-129/02) and 21 June 2005 (T-125/02 and T-126/02),

gives the following

Judgment

Background

1 In autumn 1996, the Sappi paper group, owned by Sappi Ltd, provided the Commission with information and documents which gave the Commission grounds for suspecting that a secret cartel existed or had existed for fixing prices in the carbonless paper sector, in which Sappi operated as a producer.

2 In light of the information provided by Sappi, the Commission carried out investigations at the premises of a number of carbonless paper producers pursuant to Article 14(2) and (3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ English Special Edition 1959-62, p. 87). Accordingly, inspections provided for under Article 14(3) of Regulation No 17 were carried out on 18 and 19 February 1997 at the premises of Arjo Wiggins Belgium SA, Papeteries Mougeot SA ('Mougeot'), Torraspapel, SA, Sarriopapel y Celulosa, SA ('Sarrió') and Grupo Torras, SA. In addition, inspections were carried out under Article 14(2) of Regulation No 17 between July and December 1997 at the premises of Sappi, Arjo Wiggins Appleton plc ('AWA'), Arjo Wiggins Europe Holdings Ltd, Arjo Wiggins SA and its subsidiary Guérimand SA, Mougeot, Torraspapel, Sarrió, Unipapel, Sociedade Comercial de Celulose e Papel L^{da}, Stora Carbonless Paper GmbH ('Stora'; formerly Stora-Feldmühle AG) and Papierfabrik August Koehler AG ('Koehler').

3 In 1999 the Commission also sent requests for information pursuant to Article 11 of Regulation No 17 to AWA, Mougeot, Torraspapel, Cartiere Sottrici Binda SpA ('Binda'), Carrs Paper Ltd ('Carrs'), Distribuidora Vizcaína de Papeles, SL ('Divipa'), Ekman Iberica, SA ('Ekman'), Papelera Guipuzcoana de Zicuñaga, SA ('Zicuñaga'), Koehler, Stora, Zanders Feinpapier AG ('Zanders') and Copigraph SA. In those requests, the undertakings concerned were asked to give particulars of their announcements of price rises, their sales volumes, customers, turnover and meetings with competitors.

4 In reply to the request for information, AWA, Stora and Copigraph admitted their participation in multilateral cartel meetings held between carbonless paper producers. They provided the Commission with various documents and information.

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

6 On 26 July 2000 the Commission initiated the procedure and adopted a statetement of objections ('SO'), which it addressed to 17 undertakings, that is, AWA, Bolloré SA, and its subsidiary Copigraph, Carrs, Zicuñaga, Divipa, Mitsubishi HiTech Paper Bielefeld GmbH ('MHTP'), formerly Stora, Mougeot, Koehler, Sappi, Torraspapel and Zanders. They were given access to the Commission's investigation file in the form of a copy on CD-ROM, which was sent to them on 1 August 2000.

7 All the undertakings to which the SO was addressed, save Binda, International Paper and Mitsubishi Paper Mills Ltd, submitted written observations in response to the objections raised by the Commission.

8 A hearing took place on 8 and 9 March 2001.

9 After obtaining the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, and in light of the final report of the hearing officer, the Commission adopted, on 20 December 2001, Decision 2004/337/EC relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) (OJ 2004 L 115, p. 1; 'the decision').

10 In the first paragraph of Article 1 of the decision, the Commission finds that 11 undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating in a complex of agreements and concerted practices in the sector of carbonless paper.

11 In the second paragraph of Article 1 of the decision, the Commission finds that AWA, Bolloré, MHTP, Koehler, Sappi, Torraspapel and Zanders participated in the infringement from January 1992 to September 1995, Carrs from January 1993 to September 1995, Divipa from March 1992 to January 1995, Zicuñaga from October 1993 to January 1995 and Mougeot from May 1992 to September 1995.

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

13 According to the first paragraph of Article 3 of the decision, the following fines were imposed on the undertakings concerned:

— AWA: EUR 184.27 million;

— Bolloré: EUR 22.68 million;

— Carrs: EUR 1.57 million;

— Divipa: EUR 1.75 million;

— MHTP: EUR 21.24 million;

— Zicuñaga: EUR 1.54 million;

— Mougeot: EUR 3.64 million;

— Koehler: EUR 33.07 million;

— Sappi Ltd: EUR 0;

— Torraspapel: EUR 14.17 million;

— Zanders: EUR 29.76 million.

14 According to the second paragraph of Article 3 of the decision, the fines are payable within three months of the date of notification of the decision. The third paragraph of Article 3 provides that, after expiry of that period, interest will automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on 1 December 2001, plus 3.5 percentage points, namely 6.77 per cent.

15 The decision is addressed to the 11 undertakings referred to in Articles 1 and 2 of the decision.

16 According to the decision (recital 77) the parties to the cartel agreed on an overall anti-competitive plan aiming essentially at improving the profitability of the participants by collectively increasing prices. According to the decision, the principal objective of the cartel through that plan was to agree price increases and also the timing of those increases.

17 To that end various meetings were organised at different levels — general, national and regional. According to recital 89 of the decision, the general cartel meetings were followed by a series of national or regional meetings, the purpose of which was to ensure market-by-market implementation of the price increases agreed at the general cartel meetings. During these meetings the participants exchanged detailed and individual information on their prices and sales volumes (recital 97). In order to ensure implementation of the agreed price increases, in some national cartel meetings sales quotas were allocated and market shares were fixed for each participant (recital 81).

18 The Commission took the view that the cartel arrangements involved all major operators in the EEA and were conceived, directed and encouraged at high levels in each participating company. By its very nature, the implementation of that type of

cartel leads automatically to an important distortion of competition (recital 377). Taking into account the nature of the behaviour under scrutiny, its actual impact on the carbonless paper market and the fact that it covered the whole of the common market and, following its creation, the whole EEA, the Commission considered that the undertakings concerned by the decision had committed a very serious infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement (recital 404).

19 In order to establish the starting amount of the fine according to the gravity of the infringement, the Commission put the undertakings concerned into five categories according to their relative importance in the market concerned (recitals 406 to 409). In order to ensure that the fine had a sufficient deterrent effect, it then increased the starting amount of the fine thus determined by 100% for AWA, Bolloré and Sappi (recitals 410 to 412). The Commission then took into account the duration of the infringement committed by each undertaking in order to fix the basic amount of the fines imposed (recitals 413 to 417).

20 As regards aggravating circumstances, the Commission increased the basic amount of the fine imposed on AWA by 50% on account of its position as cartel leader (recitals 418 to 424). The Commission did not establish any extenuating circumstances in the present case.

21 The Commission adopted the final amounts to take into account the provisions of Article 15(2) of Regulation No 17 (recital 434), then applied the Leniency Notice which justified a reduction in the amount of the fines by 50% for Mougeot, 35% for AWA, 20% for 'Bolloré (Copigraph)' and by 10% for Carrs, MHTP and Zanders (recitals 435 to 458).

Procedure and forms of order sought

22 By separate applications lodged at the Registry of the Court of First Instance between 11 and 18 April 2002, Bolloré (T-109/02), AWA (T-118/02), MHTP (T-122/02), Koehler (T-125/02), Zanders (T-126/02), Mougeot (T-128/02), Torraspapel (T-129/02), Divipa (T-132/02) and Zicuñaga (T-136/02) brought the present actions.

23 Bolloré claims that the Court should:

— annul Articles 1, 2 and 3 of the decision, in so far as those articles relate to it;

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

— order the Commission to pay the costs.

24 AWA claims that the Court should:

— annul or substantially reduce the fine imposed on it by the decision;

— order the Commission to pay the costs;

— take all other measures which the Court may deem appropriate.

25 The Kingdom of Belgium, which intervened in support of AWA's application, claims that the Court should substantially reduce the fine imposed on AWA.

26 MHTP claims that the Court should:

— annul Article 1 of the decision in so far as it is apparent that it participated in an infringement before 1 January 1993;

— reduce the level of the fine imposed on it;

— order the Commission to pay the costs.

27 Koehler claims that the Court should:

— annul the decision;

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

— order the Commission to pay the costs.

28 Zanders claims that Court should:

— annul Article 3 of the decision, in so far as it imposes on it a fine of EUR 29.76 million;

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

— order the Commission to pay the costs.

29 Mougeot claims that the Court should:

— annul the decision;

— in the alternative, substantially reduce the amount of the fine imposed by the Commission;

— order the Commission to pay the costs.

30 Torraspapel claims that the Court should:

— annul Article 1 of the decision in that it finds that the applicant infringed Article 81(1) EC between 1 January 1992 and September 1993, and reduce the fine accordingly;

— substantially reduce the fine imposed on the applicant under Article 3 of the decision;

— order the Commission to pay the costs, including the expenses and interest arising from the provision of a bank guarantee or from the payment of the whole or part of the fine.

31 Divipa claims that the Court should:

— annul the decision to the extent that it establishes, in addition to its participation in a cartel relating to the Spanish market, its participation in a cartel covering the entire EEA market and, in the alternative, reduce the fine imposed on it by that decision;

— order the Commission to pay the costs.

32 Zicuñaga claims that the Court should:

— annul Articles 1, 3 and 4 of the decision, in so far as those articles relate to it;

— in the alternative, reduce the amount of the fine imposed by the Commission as follows:

— annul the increase of the 10%, on the ground that its participation in the infringement does not exceed one year;

— reduce substantially, at the very mimimum by 60%, the basic amount of the fine, due to the existence of mitigating circumstances;

— order the Commission to pay the costs.

33 For each of those cases, the Commission contends that the Court should dismiss the application and order the applicant to pay the costs.

34 In Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-128/02, T-132/02 and T-136/02, the Court asked questions in writing to which the parties replied within the prescribed period.

35 By letter of 14 June 2005, which included observations on the report for the hearing, the applicant in Case T-126/02 informed the Court of the change in its company name and status, from Zanders Feinpapiere AG to M-real Zanders GmbH (also 'Zanders').

36 The parties presented oral argument separately and answered the Court's questions at the hearings on 2, 7, 14, 16 and 21 June 2005.

37 Since the parties were requested by the Court, at the hearing in each case, to present their observations on a possible joinder of all the cases for the purposes of the judgment and they did not raise any objections, the Court considers that the present cases should be joined pursuant to Article 50 of the Rules of Procedure.

Law

38 The parties seek annulment of the decision and/or cancellation or reduction of the fine.

I — *The pleas for annulment of the decision*

39 The applicants seek, as the case may be, annulment of the decision in full or certain of its provisions which concern them. Those claims for annulment rely on procedural pleas relating to the administrative procedure and substantive pleas concerning the Commission's findings as to the participation of certain undertakings in the infringement.

A — *The pleas relating to the administrative procedure*

1. The first plea, alleging infringement of the right to be heard resulting from the failure to disclose documents classed as confidential by the Commission during the administrative procedure

(a) Arguments of the parties

40 Zicuñaga maintains that it is clear both from legal literature and from Article 19 of Regulation No 17 that full access to the investigation file is a procedural guarantee intended to ensure effective exercise of the rights of the defence, in particular the

right to be heard. It points out that that guarantee is intended to enable the party concerned not only to dispute the inculpatory documents relied on by the Commission, but also to gain access to exculpatory documents which may be useful for its defence.

41 In the relation to the confidential documents, it is for the Commission to reconcile the legitimate interests of the undertaking concerned in respecting confidentiality, on the one hand, with the rights of the defence on the other. However, the Commission cannot base its final decision on documents on which the party accused of the infringement did not have an opportunity to comment. The Commission's refusal to disclose a given document during the administrative procedure constitutes, moreover, a breach of the rights of the defence where it is conceivable that the administrative procedure might have had a different outcome had the document in question been disclosed to the interested party. According to Zicuñaga, it follows that the failure to disclose documents classified as confidential by the Commission infringed the applicant's rights of defence.

42 The Commission submits that its investigation of the case complies with all the necessary safeguards and does not infringe any principle of law. It considers, in addition, that since Zicuñaga does not specify which inculpatory documents the Commission used, its argument is inadmissible.

(b) Findings of the Court

43 At the outset, it is necessary to point out the ambiguity of Zicuñaga's argument. The title of the plea in question ('Infringement of the right to be heard. Failure to produce inculpatory documents') gives the impression that the applicant only disputes the Commission's failure, in the course of the administrative procedure, to disclose documents used against it in the decision. Other passages in its application

suggest that it also criticises the Commission's failure to disclose, during the procedure, documents which allegedly might have contained exculpatory evidence.

44 In so far as Zicuñaga seeks to criticise the fact that the Commission did not produce, during the administrative procedure, documents allegedly used against it in the decision, it should be pointed out, as the Commission also does in its written pleadings, that Zicuñaga does not identify any document of that nature. Since it is not in any way substantiated, Zicuñaga's contention must, to that extent, be dismissed.

45 In so far as Zicuñaga criticises the fact that the Commission refused it access, during the administrative procedure, to documents allegedly useful for its defence, in that they might contain exculpatory evidence, it should be recalled that, according to case-law, in order to allow the undertakings in question to defend themselves effectively against the objections raised against them in the SO, the Commission has an obligation to make available to them the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 170 and the case-law cited).

46 In addition, the right of undertakings and associations of undertakings to the protection of their business secrets must be weighed against the safeguarding of the right of access to the entire investigation file. Therefore, if the Commission takes the view that certain documents in its investigation file contain business secrets or other confidential information, it should prepare non-confidential versions of those documents or have them prepared by the undertakings or associations of undertakings providing the documents in question. If the preparation of non-confidential versions of all the documents proves difficult, it should send the parties concerned a sufficiently precise list of the documents posing problems so as to

enable them to ascertain whether it is appropriate to seek access to specific documents (see, to that effect, Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraphs 88 to 94).

47 In the present case, it is clear from Zicuñaga's written pleadings that it criticises in particular the fact that the Commission refused it access to detailed information, referred to in recital 288 of the decision, relating to country-by-country sales in the EEA territory during the reference period of the cartel by several undertakings accused of the infringement, including Zicuñaga. According to Zicuñaga, that information probably contained evidence which would have enabled it to show that it did not apply a policy of concerted pricing together with the European carbonless paper producers.

48 In that regard, the list of documents comprising the file in Case T-136/02, produced by the Commission in reply to a question from the Court, shows that the Commission made available to the parties, during the administrative procedure, a non-confidential version of the documents corresponding to the information referred to in recital 288 where those documents were classified as non-accessible. Zicuñaga was therefore in a position to ascertain whether it was appropriate to seek access to specific documents.

49 It should be recalled, in this regard, that in a proceeding finding an infringement of Article 81 EC, the Commission is not required to make available, of its own initiative, documents which are not in its investigation file and which it does not intend to use against the parties concerned in the final decision. An applicant who learns during the administrative procedure that the Commission has documents which might be useful for its defence must make an express request to the Commission for access to those documents. If the applicant does not do so during the administrative procedure, his right to do so is barred in any action for annulment brought against the final decision (Joined Cases T-25/95, T-26/95, T-30/95 to

T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, *'Cement'*, paragraph 383).

50 However, Zicuñaga did not, during the administrative procedure, make a formal request for access to the confidential version of the information referred to above. Although it refers, in its reply to a question from the Court, to a written request for access to that information and produces the Commission's letter rejecting that request, it must be pointed out that that request is dated 3 April 2002 and therefore after the date on which the administrative procedure was closed and the decision adopted. Since Zicuñaga failed to make such a request during the administrative procedure, its right to do so is barred in the action for annulment.

51 It is therefore appropriate to reject this plea in law put forward by Zicuñaga.

2. The second plea, alleging infringement of the right of access to the file on account of the failure to produce documents not included in the investigation file communicated via CD-ROM

(a) Arguments of the parties

52 Koehler accuses the Commission of failing to grant it access to certain documents which were not part of the investigation file communicated via CD-ROM to the addressees of the SO on 1 August 2000. It refers, in particular, to the replies to the SO from other addressees of that document, and to the annexes to those replies, in particular the expert's report, mentioned in the footnote on page 365 of the decision, sent by AWA to the Commission. It maintains that a number of references to the replies to the SO contained in the decision show that the Commission based its

factual analysis and its calculation of the fines on those replies. Koehler adds that Mougeot's reply to the SO shows that the file also clearly contained information which would have been useful for its defence.

53 The Commission replies that, while it is true that it can only base its findings on facts on which the undertakings concerned had the opportunity to submit comments, the replies to the SO do not form part of the investigation file to which access has to be granted. The administrative procedure must be deemed to be closed as soon as those replies are received and cannot be pursued ad infinitum, with each undertaking wishing to make comments on the observations of the others. Koehler has not pointed to any inculpatory evidence on which the Commission based its objections against it and on which it was unable to comment.

(b) Findings of the Court

54 The arguments of Koehler may be said to comprise two aspects. First, certain documents not contained in the investigation file to which it had access were used by the Commission as inculpatory evidence in the decision, without Koehler having had access to that evidence during the administrative procedure and without being able to comment on it. Secondly, the Commission failed to disclose to Koehler documents not contained in the investigation file to which it had access and which might have contained exculpatory evidence. These two points should be the subject of separate analysis.

55 As regards, first of all, the failure to disclose supposed inculpatory evidence not contained in the investigation file to which Koehler had access, it should be recalled, as a preliminary point, that a document can be regarded as a document that

incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated (*Cement*, paragraph 284).

56 Since documents that have not been communicated to the parties concerned during the administrative procedure are not admissible evidence (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 21; Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraphs 55 and 56; and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraphs 34 and 35), it will be necessary, if it should prove that the Commission relied in the contested decision on documents that were not in the investigation file and were not communicated to the applicants, to exclude those documents as evidence (*Cement*, paragraph 382; see also, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30; *Solvay* v *Commission*, cited in paragraph 46 above, paragraph 57; and *ICI* v *Commission*, paragraph 36).

57 It follows that, if the Commission intends to rely on a passage in a reply to a SO or on a document annexed to such a reply in order to establish the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be able to comment on such evidence (see, that effect, *AKZO* v *Commission*, cited in paragraph 56 above, paragraph 21; *Shell* v *Commission*, cited in paragraph 56 above, paragraph 55; and *ICI* v *Commission*, cited in paragraph 56 above, paragraph 34).

58 In the present case, the applicant submits, generally, in its request that, '[o]wing to a number of references in the footnotes, there can be no doubt that the Commission used the observations of the other parties to the proceeding in order to substantiate both its account of the facts and the calculation of the amount of the fine'. Such a general assertion does not, however, allow the Court to ascertain which particular documents were supposedly used as evidence against Koehler in the decision. At the hearing, moreover, Koehler admitted that there was no inculpatory document to which it did not have access.

59 As regards, secondly, the failure to disclose supposedly exculpatory evidence not contained in the investigation file to which it had access, Koehler refers to the replies of other addressees of the SO and the annexes to those replies. However, it fails to prove that it expressly requested the Commission to disclose that evidence; it even admitted at the hearing that it did not file a request for access to those documents. Koehler is therefore barred from disputing before the Court the fact that it did not have access to that evidence (see, to that effect, *Cement*, paragraph 283; see also paragraph 49 above).

60 For the sake of completeness the Court notes that Koehler has not shown that, if it had had access to the replies of other addressees of the SO and to the annexes to those replies, it would have been able to invoke arguments such as to affect the outcome of the decision (see, to that effect, Case 30/78 *Distillers* v *Commission* [1980] ECR 2229, paragraph 26, and Case T-7/90 *Kobor* v *Commission* [1990] ECR II-721, paragraph 30).

61 In fact, in relation, first of all, to the expert's report annexed by AWA to its response to the SO, in so far as the reference made by Koehler to that report seeks to identify a document not contained in the investigation file to which it had access and which might have been useful for its defence, it is clear from the decision (recitals 390, 392 and 396) that the Commission explicitly rejected the arguments made by AWA during the administrative procedure, on the basis of that report, alleging that the infringement did not have any concrete impact on the market. Koehler's contention that the fact of not having access to that report during the administrative procedure damaged its defence cannot therefore succeed.

62 In relation, next, to Mougeot's reply to the SO, Koehler submits in its reply that Mougeot's reply shows that the file clearly contained information useful for its defence. It refers in that regard to the passage in that reply cited in recital 293 of the decision in which Mougeot, retracting a statement made earlier to the Commission, claims that 'the [SO] does not prove that the AEMCP [Association of European

Manufacturers of Carbonless Paper] meetings would have served as a framework for collusive mechanisms before restructuring of the association in September 1993'. However, in recital 295 of the decision, the Commission explicitly rejects that argument, claiming that the statements of Sappi, Mougeot and AWA, read together, prove that general cartel meetings were held from at least 1992 onwards. Referring to recitals 112 and 113 of the decision, it adds that the evidence provided by Sappi confirms that collusion took place at the meetings of the AEMCP or that meetings were held on the occasion of these meetings before September 1993. The passage in Mougeot's reply to the SO cited by Koehler does not show, contrary to what Koehler maintains, that the replies to the SO and the documents annexed to those replies would have enabled that undertaking to make arguments capable of altering the outcome of the administrative procedure.

63 In the light of all the preceding considerations, the Court must reject this plea.

3. The third plea, alleging infringement of the rights of the defence and of the adversarial principle resulting from a lack of consistency between the SO and the decision

(a) Arguments of the parties

64 Bolloré maintains that, at the stage of the SO, the Commission established its participation in the infringement merely on the basis of its liability as a parent company for the personal conduct of its subsidiary Copigraph. Conversely, the decision contains a new objection against Bolloré, alleging its personal and independent involvement in the cartel. Bolloré submits that, by not offering it the opportunity to comment on that objection at the time of the administrative procedure, the Commission infringed its rights of defence.

65 The Commission disputes that, in the decision, Bolloré is considered to be personally involved in the infringement. The conduct of its subsidiary was attributed to the applicant on the ground that, together, they formed one and the same undertaking. This plea can only therefore be upheld if it is proved that the attribution of the infringement to the applicant on this ground was not apparent in the SO or if it were established that the Commission, in its decision, had based its assessment on facts on which Bolloré could not have commented during the pre-litigation procedure. However, this is not the case here.

(b) Findings of the Court

66 On this point, it must be borne in mind that in order to respect the rights of the defence, which constitutes a fundamental principle of Community law and must be observed in all circumstances, in particular in all proceedings liable to give rise to penalties, including administrative procedures, the undertaking concerned must be in a position to make known its views on the truth and relevance of the facts, complaints and circumstances relied on by the Commission (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 32 and the case-law cited).

67 According to the case-law, the SO must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the SO can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (Joined Cases C-89/85,

C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63).

68 In addition, an infringement of the rights of the defence must be examined in the light of the objections established by the Commission in the SO and in the decision (Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 70, and *Solvay* v *Commission*, cited in paragraph 46 above, paragraph 60). In those circumstances, the finding of an infringement of the rights of the defence presupposes that an objection — which the undertaking maintains it was not accused of in the SO — is established by the Commission in the contested decision.

69 In the light of the case-law set out in the previous three paragraphs, it is appropriate, in the present case, to ascertain first of all the basis on which the Commission, in its decision, established Bolloré's liability for the infringement. The relevant information is to be found in recitals 353 to 356 of the decision (part II (Legal assessment), section 2.3 (Liability for the infringement) 2 (Copigraph and Bolloré)).

70 Those recitals read as follows:

'(353) Copigraph SA was a wholly owned subsidiary of [Bolloré] (formerly known as Bolloré Technologies SA) during the time of the infringement and was acquired by AWA in November 1998. Copigraph ceased activity on 2 February 2000 with effect from 30 December 2000. Bolloré claims that it cannot be held responsible for Copigraph's behaviour, because Copigraph had complete economic autonomy. According to Bolloré this autonomy stems from the following: the management structures of Copigraph and Bolloré were strictly separate; Copigraph had its own

infrastructure and Copigraph's commercial policy was independent because it acquired almost 35% of its raw-material requirement from outside the Bolloré group, one of the sources being a competitor.

(354) Copigraph belonged to Bolloré's special papers division and the then head of division, [Mr V.], was simultaneously the Managing Director of Copigraph. In addition, the then Commercial Director of Copigraph, [Mr J.B.], had also held a sales position at the Thonon mill since 1994. [Bolloré] was necessarily informed of its subsidiary's participation in the cartel.

(355) There is also evidence implicating the parent company, [Bolloré] directly in the cartel activities. Bolloré was a member of the AEMCP, whose official meetings also served as cartel meetings from January 1992 until September 1993. Bolloré's representative, the head of its special papers division [Mr V.], attended these cartel meetings together with the Commercial Director of Copigraph. The head of Bolloré's special papers division also participated in the French market cartel meeting of 1 October 1993. In all subsequent cartel meetings where individual representatives of Copigraph are identified the meeting was attended by the Commercial Director of Copigraph. All these meetings took place in 1994 and, as mentioned, the Commercial Director of Copigraph also held simultaneously a sales position in Bolloré.

(356) On that basis, the Commission concludes that Bolloré should be held responsible not only for its own conduct but also for the conduct of Copigraph in relation to the cartel, for the whole of the specified period.'

71 It is clear from the extract of the decision reproduced above that liability for the infringement was attributed to Bolloré on the ground that, first, it should be deemed liable for the participation of its subsidiary Copigraph in the cartel, and, secondly, there was evidence of its direct involvement in the cartel activities.

72 Bolloré does not dispute the fact that the SO enabled it to understand, and comment on, the fact that, in the SO, the Commission held it liable for the infringement on account of its responsibility as the 100% parent company of Copigraph at the time of the infringement, for Copigraph's participation in the cartel. Its objection relates to the absence of information in the SO as to the Commission's intention to hold it liable for the infringement on the basis of its direct involvement in the cartel activities as well.

73 The relevant passages of the SO are contained in paragraphs 240 to 245 and 248 (part II (Legal assessment), part B (Application of the competition rules) 8 (Liability for the infringement)).

74 It must be borne in mind, first of all, that in those paragraphs of the SO the Commission in no way mentions that Bolloré is directly involved in the cartel, unlike the information relating to other parent companies referred to in the SO, such as AWA and Torraspapel, in respect of which the Commission states, as regards AWA, that '[it] participated directly and autonomously in the cartel through its division Arjo Wiggins Carbonless Paper Operation' and, in relation to Torraspapel, that '[t]here is also evidence implicating the parent company directly in the collusive activities'.

75 Next, as Bolloré correctly points out, it is clear from paragraph 243 of the SO that the Commission distinguished between two types of situation:

'In relation to the relationships between parent companies and their subsidiaries, the Commission addresses this SO to the parent company where

— two or more subsidiaries participated in the infringement,

— the parent company was involved in the infringement.

For other cases where a subsidiary has participated, the statement is addressed to that subsidiary and its parent company.'

76 As regards the Bolloré and Copigraph group, the SO was addressed not only to Bolloré, but also to Copigraph, which, in the light of the criteria set out in paragraph 243 of the SO, was such as to reassure Bolloré that the Commission did not take the view, at the stage of the SO, that Bolloré, the parent of the group, was directly involved in the infringement.

77 It should therefore be noted that, as set out in the SO, the Commission intended to hold Bolloré liable for the infringement solely on the ground that, as the parent company of the group comprising Bolloré and Copigraph at the time of the infringement, it had to be held liable for the unlawful conduct of Copigraph, its wholly-owned subsidiary. By reading the SO, Bolloré could not foresee that, in order to hold it liable for the infringement, the Commission also intended to rely on its own direct involvement in the cartel activities, as it does in its decision.

78 It should be added that the facts referred to by the Commission in recital 355 of the decision, in support of its argument relating to Bolloré's direct involvement in the infringement, namely that Bolloré was a member of AEMCP and represented by Messrs V. and J.B. at several cartel meetings, was not mentioned in the SO. In fact, even if it were accepted that, following the Commission's line of argument, Bolloré's membership of AEMCP was apparent from documents attached to the SO, clearly the Commission only referred to Copigraph as being a member of AEMCP, and never to Bolloré. As regards Messrs V. and J.B., they were consistently referred to in

the SO as the representatives of Copigraph, and not of Bolloré, at the cartel meetings. In addition, at no point in the SO did the Commission mention Bolloré as being one of the undertakings represented at such meetings.

79 Accordingly, the SO did not enable Bolloré to acquaint itself with the objection based on its direct involvement in the infringement, or even with the facts established by the Commission in the decision in support of that objection, so that Bolloré was unable, as is clear from reading its reply to the SO, properly to defend itself during the administrative procedure vis-à-vis the objection and the facts in question.

80 However, even if the decision contains new allegations of fact or law on which the undertakings concerned have not been given the opportunity to comment, the defect will only entail the annulment of the decision in that respect if the allegations concerned cannot be substantiated to the requisite legal standard on the basis of other evidence in the decision on which the undertakings concerned were given the opportunity to comment (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 196; see also, to that effect, Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 447). Moreover, infringement of Bolloré's rights of defence is only capable of affecting the validity of the decision relating to Bolloré if the decision is based purely on the fact of Bolloré's direct involvement in the infringement (see, to that effect, *Mo och Domsjö* v *Commission*, cited in paragraph 67 above, paragraph 74). In that case, since the new objection in the decision relating to Bolloré's direct involvement in the cartel activities could not be upheld, Bolloré could not be held liable for the infringement.

81 Conversely, if it transpires, when examining the substance (see paragraphs 123 to 150 below), that the Commission was correct to hold Bolloré liable for the participation of its subsidiary Copigraph in the cartel, the fact that the Commission erred in law cannot be sufficient to justify annulment of the decision because it

could not have had a decisive effect on the operative part adopted by the Commission (see, to that effect, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 49, and Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraph 49). According to settled case-law, in so far as certain grounds of a decision in themselves provide a sufficient legal basis for that decision, any errors in other grounds of the decision have no effect in any event on its operative part (Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 144; see also, to that effect, Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29).

4. The fourth plea, alleging infringement of the rights of the defence, of the right to a fair hearing and of the principle of the presumption of innocence

(a) Arguments of the parties

82 Zicuñaga maintains, first of all, that the Commission infringed the principle of the presumption of innocence by establishing its participation in the cartel on the basis of mere assumptions and indirect statements. It maintains that the absence of a sufficiently clear penalty for submission of inaccurate or incomplete information may encourage undertakings to provide the Commission with information that has been reconstructed or distorted in order to emphasise their cooperation. Zicuñaga goes on to state that, while at the outset an undertaking only expected to benefit from leniency on the part of the Commission where it provided decisive evidence, the Commission then softened its approach. It claims that, in those circumstances, the statements of Sappi should be considered with caution and can only be deemed reliable to the extent they are corroborated by other evidence.

83 Secondly, Zicuñaga asserts that the Commission cannot base its findings on the testimonies of a person whose identity is not known, lest it should prejudice the rights of the defence by not allowing the defendant to refute the claims made by that witness in the course of the hearing. Referring to the case-law of the European Court of Human Rights, it maintains that it is essential to be able to put to a witness his own statements so as to measure the level of credibility of the testimony and of the person concerned, and to permit the defendant to dispute evidence against him and to question the author of that evidence about it either at the time of submitting the evidence or afterwards.

84 The Commission disputes the characterisation as mere assumptions or indirect statements of the evidence on which it relies to establish Zicuñaga's participation in the infringement. It points out the Community judicature has never called into question the lawfulness of the Leniency Notice nor the probative value of statements made by undertakings on that basis. Moreover, Regulation No 17 does not provide for the possibility of questioning witnesses in the course of the administrative procedure and the applicant did not make any request to this effect before the Court.

(b) Findings of the Court

85 In so far as Zicuñaga's argument seeks to deny the probative value of the statements of non-identified persons relied on by the Commission in support of the objections made against Zicuñaga in the decision, that argument falls within the examination of the substance and will be dealt with later, when ascertaining whether those objections have been sufficiently established.

86 In so far as this line of argument also alleges infringement of the rights of the defence and of the right to a fair hearing in that the failure to mention in the SO the identity of the author or authors of the statements in support of the Commission's

findings in relation to Zicuñaga prevented Zicuñaga from disputing those findings by requesting that the author or authors be heard in the course of the administrative procedure, it should be recalled that, whereas Article 6(3)(d) of the European Convention on Human Rights ('the ECHR') states that '[e]veryone charged with a criminal offence has the following minimum rights: ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him', it is clear from settled case-law that the Commission cannot be described as a 'tribunal' within the meaning of Article 6 of the ECHR (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 81, and Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 7). Moreover, Article 15(4) of Regulation No 17 specifically provides that Commission decisions imposing fines for breach of competition law are not to be of a criminal law nature (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235).

87 Nevertheless, the Commission is bound to observe the general principles of Community law in the course of the administrative procedure (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 8). However, it must be pointed out, first, that although the Commission may hear natural or legal persons where it deems it necessary to do so, it is not entitled to call witnesses to testify against the undertaking concerned without their agreement, and, secondly, the fact that the provisions of Community competition law do not place the Commission under an obligation to call witnesses whom the undertaking concerned wishes to give evidence on its behalf is not contrary to those principles (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 392).

88 In the present case, it is apparent moreover that Zicuñaga does not provide any information showing that, during the administrative procedure, it asked the Commission for details as to the identity of the persons who made the statements relied on by the Commission in support of the objections made against it in the SO in order for those persons to be heard in its presence. It also fails to establish that it requested the Commission to call witnesses to give evidence on its behalf during the administrative procedure.

89 In the light of the foregoing, the present plea, in so far as it is based on an infringement of the rights of the defence and of the right to a fair hearing, must be rejected. In so far as it is aimed at disputing the probative value of the evidence relied on by the Commission in support of the objections made against Zicuñaga in the decision, that aspect will be considered in the examination of the substance.

5. The fifth plea, alleging breach of the principle of sound administration when investigating the case and a failure to state the grounds in the decision

(a) Arguments of the parties

90 Zanders accuses the Commission of having investigated the case in a manner purely adverse to it. It maintains that the Commission should have taken into account the information which Zanders provided to it, in December 2000 and March 2001, as to its decisive role in ending the cartel or that it should have investigated this information further if it had any doubts as to its value. It also criticises the fact that the Commission did not take into account an expert report which it submitted in March 2001 in order to show that the impact of the attempts to form cartels on prices was minimal or non-existent. In addition, the decision does not contain any reasoning as to the failure to take those two factors into account or any examination of Zanders' individual role.

91 The Commission contends that Zanders does not substantiate its claim that it played a special role in ending the infringement. As to the impact of the price agreements on the market, the Commission devoted a whole section to this in the decision (recitals 382 to 402) in the course of its assessment of the concrete effects of the infringement. The decision fully respects the obligation to state reasons by

examining the applicant's conduct in conjunction with that of five other undertakings in recitals 263 to 271. Moreover, in its reply to the SO, Zanders did not argue that its role was purely a passive one.

(b) Findings of the Court

92 It should be recalled that, in cases such as this one, where the Community institutions have a power of appraisal in order to be able to fulfil their tasks, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance; those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision and Others* v *Commission* [1996] ECR II-649, paragraph 93).

93 Moreover, it is settled case-law that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 368).

94 In this respect, it must be held that the decision discloses in a clear and unequivocal fashion the reasoning followed by the Commission and enables Zanders to ascertain the reasons for the adopted measure and the Court to exercise its power of review. In fact, in recitals 263 to 271 of the decision, the Commission examines Zanders' participation in the cartel, together with that of AWA, Koehler, Sappi, Stora and Torraspapel.

95 Zanders asserts, more specifically, that its role in ending the infringement and the expert's report which it provided were not taken into account.

96 As regards Zanders' role in ending the infringement, it must be pointed out that, in its reply of 12 December 2000 to the SO, Zanders referred to the letter of 1 April 1996 from the CEO of International Paper addressed to all employees in the group, drawing their attention to the fact that the group attached the highest importance to observing laws and ethics in relation to contacts with customers, commercial partnerships, administrations and other bodies. It also referred to the meeting held at its premises with the aim of impressing upon its managerial staff the need to observe competition law and drawing up a compliance programme. It further referred to the fact that the president of its division, who became the president of the AEMCP on 1 January 1996, had made an unequivocal declaration in public, after his accession to the presidency of the association, that the undertaking had ceased any collusive activities.

97 Clearly, the evidence referred to in the previous paragraph was submitted by Zanders in its response to the SO in support of its observations for the purposes of refuting the Commission's objection in the SO that collusive contacts continued after autumn 1995. More precisely, the presentation of such evidence formed part of Zanders' argument seeking to establish that, as from autumn 1995, it no longer participated in secret cartel meetings or concerted practices on pricing with its competitors, its pricing policy was set independently, and, in particular, the price increase which it applied in September 1996 was not the product of a collusive meeting.

98 There can be absolutely no doubt, however, that Zanders argument set out in the previous paragraph was taken into account by the Commission in the course of the administrative procedure. In the decision, the end of the infringement established in relation to Zanders is in fact September 1995, and not, as stated in the SO, March 1997.

99 However, neither Zanders' reply of 12 December 2000 to the SO, nor the supplementary observations sent by Zanders to the Commission on 2 March 2001 show that the evidence referred to in paragraph 96 above, or any other evidence, was presented by Zanders in the course of the administrative procedure with a view to proving, as Zanders is now seeking to do, that it played a decisive role in ending the unlawful cartel, such that this warranted recognition as a mitigating circumstance when setting the fine. In those circumstances, Zanders cannot accuse the Commission of infringing the principle of sound administration by failing to take into account both the evidence mentioned above and evidence allegedly intended to establish that it contributed decisively to ending the collusion before the Commission began its initial investigations.

100 Similarly, it must be pointed out that, in its reply to the SO Zanders did not contend that it had played an exclusively passive role in the cartel. It therefore cannot rely on a failure to state reasons in the decision in this respect. In addition, in relation to the period from 1992 until autumn 1995, in its reply to the SO Zanders denied having played the key or leading role that was attributed to it in paragraphs 187 and 199 of the SO. Zanders was thus arguing that there were no aggravating circumstances. However, the Commission did not establish any such circumstances in relation to Zanders.

101 The expert's report commissioned by Koehler, MHTP and Zanders from PricewaterhouseCoopers, dated 2 March 2001, is entitled 'The competitive situation

on the European carbonless paper market from summer or autumn 1995 to February or March 1997' ('the PricewaterhouseCoopers report').

102 It is apparent from the letter accompanying the PricewaterhouseCoopers report sent to the Commission that the main aim of this report was to refute the allegations made by the Commission in the SO in relation to the operation of the cartel on the carbonless paper market during the period from summer or autumn 1995 to February or March 1997 inclusive. Moreover, the conclusion of that report expressly mentions the fact that the economic analysis shows that the conduct of the three producers in question between summer or autumn 1995 and February or March 1997 was not concerted.

103 It must be stated that the PricewaterhouseCoopers report relates to a period which falls outside the infringement period established in the decision. To that extent, the report is not relevant.

104 However, on reading the application it becomes apparent that Zanders' criticism concerns the Commission's failure to take into account the information, also contained in the PricewaterhouseCoopers report, which seeks to show that the impact of the attempts at forming a cartel on prices during the period from January 1992 to autumn 1995 inclusive was minimal or non-existent.

105 In that respect, even if it were considered appropriate to take into account supplementary information provided in support of an entirely irrelevant factor, the Commission cannot be accused of failing to take into account Zanders' arguments as to the allegedly limited impact of the cartel.

106 In fact, recital 388 of the decision states as follows:

'AWA, Carrs, MHTP (Stora), Koehler, Sappi and Zanders claim that the actual impact of the cartel on the carbonless paper market in the EEA was very limited or that the cartel had no negative impact at all. In this respect, they concentrate on arguing that there was limited or no impact on prices, because the prices actually realised on the market were lower than the agreed or announced increases. According to these cartel participants, this shows that the agreed price increases were not implemented in practice. They have put forward many arguments to support this assertion, which include in particular the following claims: prices and producers' margins have fallen substantially; carbonless paper prices essentially reflect changes in pulp costs and demand, and during the later phases of the cartel the capacity constraints; competition between the producers continued; and producers had to negotiate price increases with customers on individual basis.'

107 While it makes no explicit reference to the PricewaterhouseCoopers report sent by Zanders to the Commission in the course of the administrative procedure, that extract from the decision proves without a doubt that the Commission took into account during the procedure the information provided, in particular by Zanders, with a view to proving that the impact of the attempts to form a cartel on prices during the infringement period was negligible or non-existent. The Commission's rejection of the undertakings' arguments supported by that information indicates that the Commission considered that those arguments were not such as to alter its point of view, set out in recitals 382 to 387 of the decision, as to the actual impact of the infringement on the market. On the other hand, that extract cannot be interpreted as establishing that the Commission failed, when assessing the case, to afford proper consideration to the arguments which Zanders set out in its defence (see, to that effect, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 118).

108 Following that analysis, the fifth plea in law must be rejected.

6. The sixth plea, alleging infringement of the principle of sound administration, of the right of access to the file and of the rights of the defence, resulting from the fact that certain documents in the investigation file were difficult to find and the list of documents comprising that file was unusable

(a) Arguments of the parties

109 AWA maintains that the list of documents put onto the CD-ROM by the Commission which was given to it in the course of the administrative procedure was unusable. It submits, in fact, that the list did not contain either an index or a description of the documents concerned, but merely indicated why some of those documents were allegedly confidential and the place of any corresponding non-confidential version.

110 Koehler maintains that, before sending the CD-ROM to the addressees of the SO, the Commission removed certain confidential documents from the file and replaced them with non-confidential versions which were inserted elsewhere on the file. However, neither in the SO nor in the decision did the Commission take the trouble to make the consequential amendments to the references to the documents it had moved. In addition, it failed to mention that those non-confidential versions existed or where to find them in the file. The list of documents put together by the Commission only enabled the relevant documents to be identified very approximately. Occasionally, it was even impossible to find the document in question.

111 The Commission considers that it cannot be accused of any infringement of the rights of the defence. First, a list of the various documents on the file was made available to the undertakings, at the same time as the CD-ROM, using the normal classification of accessibility of the documents. Secondly, the documents referred to

in the SO were already attached to that document, with a list indicating the connection between the confidential and non-confidential versions.

(b) Findings of the Court

112 It is clear from the information provided by the Commission in the two cases at issue (T-118/02 and T-125/02) that, on 26 July 2000, it sent the addressees of the SO, at the same time as sending that SO and the documents referred to therein, a list of documents annexed to the SO. That list was produced by the Commission as an annex to its defence in Case T-125/02. On the Court's request, the Commission also produced that list in Case T-118/02.

113 The list in question includes for each document referred to in the SO, according to the order of reference in the SO, a brief description of the document, the identity of the undertaking at whose premises the document was found or who sent it, the number of the document, and, where appropriate, the number of the non-confidential version.

114 On 1 August 2000, the addressees of the SO also received from the Commission, at the same time as the CD-ROM containing the Commission's investigation file in its entirety, a list entitled 'List of documents', setting out in respect of each document, according to the numbering order of the file, the document's accessibility code (A for accessible; PA for partially accessible; NA for not accessible). In relation to the documents classed as non-accessible and the non-accessible parts of the documents classed as partially accessible, the list indicated where in the file the non-confidential version of the document or of the part of the document concerned and/or a

summary of the content of the document or part of the document concerned could be found. In so doing, the Commission fully respected the provisions under section II A 1.4 of its notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3).

115 Having both the list of documents attached to the SO and the 'List of documents' referred to in the previous paragraph, AWA and Koehler were perfectly able, as were the other addressees of the SO, to locate the documents they sought in the investigation file, whether in the original version or in the non-confidential version according to the accessibility code indicated on those lists.

116 Admittedly, as the Commission itself states in its written pleadings relating to Case T-125/02, as regards the documents — inter alia those, specifically referred to by Koehler, cited in the SO — which were classed as non-accessible or partially accessible, the addressees of the SO did not find straightaway the non-confidential version or the summary of the content of those documents in the place corresponding to their number in the file, and they had to refer to a list in order to locate that non-confidential version or summary in the file. However, the limited degree of inconvenience and the slight loss of time which such a situation might have caused the addressees of the SO clearly cannot be regarded as affecting the lawfulness of the decision.

117 It follows that the sixth plea must be rejected.

7. The seventh plea, alleging breach of the principle of sound administration and of the rights of the defence on account of the late notification of the decision

(a) Arguments of the parties

118 AWA submits that, while the decision was apparently adopted on 20 December 2001, it was only notified to it on 8 February 2002. It goes on to state that, whatever the reasons for such late notification, for a month and a half following the adoption of the decision it was unable to explain, particularly to its customers, why it had received the highest individual fine ever imposed.

119 The Commission replies that on 5 February 2002 it adopted a short corrigendum to its decision of 20 December 2001 because of the change in the applicant's company name. The notification of the decision on 8 February 2002 coupled with a corrigendum explaining the changes made cannot therefore be deemed to be late.

(b) Findings of the Court

120 It is apparent from the letter of 7 February 2002, by which the member of the Commission in charge of competition matters notified the decision to its addressees, including AWA, that the decision was adopted on 20 December 2001 and a corrigendum was made on 5 February 2002 by written procedure E/177/2002. The existence of that corrigendum explains why the decision was notified to its addressees a month and a half after its adoption. The period between adoption of the decision and the corrigendum cannot be considered to be excessive.

121 In so far as AWA's argument is to be understood as a criticism of the fact that the Commission made the decision public before notifying it to its addressees and thus prevented AWA from providing an explanation as to the reasons for that decision to third parties, it should be pointed out that AWA does not provide any evidence to the effect that the Commission revealed the content of the decision before notifying it to its addressees. In any event, even if that were the case, it must be stated that, however regrettable such conduct might be, the decision had already been adopted and its validity cannot be affected by acts subsequent to its adoption (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 16).

B — *The pleas alleging breach of Article 81 EC and Article 53 of the EEA Agreement and errors of assessment by the Commission in relation to the participation of certain undertakings in the infringement*

122 Three undertakings, namely Bolloré, Divipa and Zicuñaga, dispute the substance of the Commission's findings relating to their participation in the infringement.

1. Bolloré's situation

123 As a preliminary point, it should be recalled that in the decision (recitals 353 to 356), the Commission holds Bolloré liable for the infringement, first, on the basis of its direct, personal involvement in the cartel activities, and, secondly, because of its liability for the participation of its subsidiary, Copigraph, in the cartel. It has been held, however (see paragraphs 66 to 81 above), that the SO did not enable Bolloré to acquaint itself with the objection alleging its personal involvement in the cartel, nor with the facts alleged by the Commission in the decision in support of that

objection. That finding means that there is no purpose in appraising Bolloré's substantive argument contesting the validity of its personal, direct involvement in the cartel.

124 It is therefore appropriate to examine Bolloré's argument that the Commission was wrong to hold it liable for the offending conduct of its subsidiary Copigraph in the cartel.

(a) Arguments of the parties

125 Bolloré points out that, in the decision, in order to hold it liable for the conduct of Copigraph the Commission relies on two factors, namely, first, that Copigraph was its wholly owned subsidiary at the time of the infringement, and, secondly, that it was bound to be informed of Copigraph's participation in the cartel.

126 It maintains that the first factor is not sufficient to hold it liable for Copigraph's infringement. Further evidence is required to enable the Commission to assume that the parent company exercised decisive influence over the actions of its subsidiary. However, in the present case, such further evidence is missing. Bolloré in fact explained in its reply to the SO that Copigraph enjoyed great autonomy in the conduct of its commercial policy, which the Commission does not dispute. Furthermore, Copigraph accounted for only one third of the turnover of the Bolloré de Thonon-les-Bains papermill and the business relations between Bolloré and Copigraph at that mill did not entail any limitation to Copigraph's commercial autonomy.

127 Bolloré observes out that the Commission deduces the second element from three facts, that is, the fact that Copigraph was part of its special papers division, the fact that Mr V., director of that division, was also the managing director of Copigraph and the managing director of the Bolloré papermill at Thonon-les-Bains, and the fact that Mr J.B., commercial director at Copigraph at that time, also held a sales position at the Thonon-les-Bains papermill since 1994. However, those three facts do not warrant the conclusion that Bolloré was necessarily informed of Copigraph's participation in the cartel.

128 According to the Commission, it is not disputed that Copigraph was Bolloré's wholly-owned subsidiary from 1990 to 1998. On the basis of case-law, that is sufficient to warrant the assumption that Bolloré exercised a controlling influence over the conduct of its subsidiary. That assumption is also corroborated by the evidence set out in recitals 353 to 355 of the decision.

(b) Findings of the Court

129 As a preliminary point it must be observed that, while disputing the duration of the infringement, Bolloré does not deny the fact of Copigraph's involvement in the cartel activities.

130 Its argument consists essentially of suggesting that the evidence relied on by the Commission in its decision does not enable it to hold Bolloré liable for the participation of its subsidiary, Copigraph, in the cartel.

131 According to settled case-law the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent

company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; and Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 26).

132 In that regard, although the evidence relating to the 100% shareholding in its subsidiary provides a strong indication that the parent is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary (see, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 131 above, paragraphs 27 to 29, and the Opinion of Advocate General Mischo in that case, ECR I-9928, points 17 to 62). Something more than the extent of the shareholding must be shown, but this may be in the form of indicia. It need not necessarily take the form of evidence of instructions given by the parent company to its subsidiary to participate in the cartel (see, to that effect, the Opinion cited above, points 40, 48 and 51).

133 In the present case, it is clear from recitals 353 and 354 of the decision that, in holding Bolloré liable for Copigraph's participation in the cartel, the Commission did not rely exclusively on Bolloré's undisputed 100% shareholding in Copigraph at the time of the infringement, but also on other factual matters, referred to in paragraph 127 above, for the purposes of establishing that Copigraph carried out, in all material respects, the instructions given to it by Bolloré.

134 Referring to the arguments set out in its reply of 28 November 2000 to the SO (recital 353 of the decision), Bolloré advances various arguments to show that Copigraph enjoyed complete commercial autonomy at the time of the infringement. In those circumstances, it must be examined whether those contentions are well founded or whether there are instead indications that Bolloré exercised decisive influence over its subsidiary.

135 In the first place, Bolloré submitted during the administrative procedure that its management body and that of Copigraph were completely separate.

136 However, the footnote on page 1 of Bolloré's reply to the SO states the following:

'Until 1993, Bolloré and Copigraph shared a common director, Ms [G.], who represented Bolloré Participation on the board of Bolloré Technologie, and was Copigraph Holding's permanent representative within Copigraph. She resigned these posts on 25 October 1993.'

137 Thus, without prejudice to the further examination as to whether Bolloré's argument disputing Copigraph's participation before September or October 1993 is well founded, Copigraph's management body included, for a part of the infringement period established by the Commission, one member of Bolloré's board of directors.

138 In addition, it is clear from the information provided by Bolloré in its reply to the SO that, while not sitting on Bolloré's board of directors, the four persons comprising Copigraph's board from September 1993 to March 1997 all had, for the most part, management-level positions (financial, accounting or management) within Bolloré. In addition, as the Commission correctly points out in recital 354 of the decision, Mr V., Copigraph's CEO during the infringement period was, according to Bolloré's reply to the SO, employed by Bolloré and managed its mill at Thonon-les-Bains.

According to the information set out in that recital — information which Bolloré confirms in its written pleadings — Mr V. was also the director of Bolloré's special papers division. This very significant presence of members of Bolloré's management at the helm of Copigraph shows the extent of Bolloré's involvement in the management of its subsidiary. This necessarily put Bolloré in a position to exercise decisive influence over Copigraph's commercial policy on the market.

139 This analysis is further strengthened, in relation to the infringement period from February to September 1995 inclusive, by the information contained in the statement made on 2 April 2002 by Mr J.B., annexed to the application, that he, Copigraph's commercial director from the end of September 1992 to March 1997, also held a commercial position within Bolloré from February 1995.

140 It should be added, in that respect, that the fact that the Court held in Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraphs 47 and 48, that the participation of a member of the parent's management board in the collusive meetings amounted to evidence that the parent company necessarily knew and approved of its subsidiary's participation in infringement cannot be interpreted as meaning that the member or members of the parent company holding management positions within the subsidiary must necessarily have authority as agents of the parent company for it to be concluded that the subsidiary is not commercially independent from the parent company (see, to that effect, the Opinion of Advocate General Mischo in *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 132 above, point 58). The fact that a person who is a member of the parent company does not have authority as its agent does not prevent him from ensuring, when exercising his management functions within the subsidiary, that the subsidiary's course of action on the market is consistent with the line laid down at management level by the parent company.

141 Secondly, Bolloré pointed out during the administrative procedure that Copigraph had its own infrastructure.

142 It is true that, as Bolloré submitted in its response to the SO, the fact that a subsidiary is neither the owner of the production installations nor the employer of its staff and that its turnover is entered into the parent company's annual accounts may help to show that the subsidiary was not independent of its parent (see, to that effect, *Mo och Domsjö* v *Commission*, cited in paragraph 67 above, paragraphs 89 to 94). However, the fact that in the present case Copigraph had, as Bolloré stated in its reply to the SO without challenge by the Commission, its own production installations and its own staff and that it entered its turnover into its own annual accounts does not in itself prove that Copigraph defined its conduct on the market entirely independently from its parent, Bolloré.

143 Finally, during the administrative procedure, Bolloré relied on a series of factors which, it submitted, showed that Copigraph defined its commercial policy independently. First, the paper-related activities were minor and Copigraph's turnover as a proportion of the group's turnover was negligible. Secondly, even after being taken over by Bolloré, Copigraph continued to acquire almost 35% of its raw material requirement from outside the Bolloré group, including from a direct competitor of Bolloré.

144 Nevertheless, even if it were true, Bolloré's contention that its activities in the paper sector and Copigraph's turnover as a proportion of the group turnover are both insignificant does not in any way prove that Bolloré allowed Copigraph complete autonomy in defining its conduct on the market. No conclusion to this effect can be drawn from the fact that Copigraph's supplies of raw materials were provided, during the infringement period, in part by suppliers outside the Bolloré group. That finding does not rule out that, by participating in the cartel, Copigraph carried out, in all material respects, the instructions given by its parent.

145 In that regard, it should be pointed out that, as stated in recital 354 and not contested by Bolloré, Copigraph was part of Bolloré's special papers division.

146 In addition, Bolloré's response to the SO includes the following information concerning the circumstances of Bolloré's acquisition of Copigraph:

'In 1990, the Bolloré paper factory at Thonon-les-Bains (Haute-Savoie) was up against very stiff competition on a paper market marked by four consecutive years of increases in the price of wood pulp.

[Copigraph] undertook conversion and distribution of carbonless paper, and as such was one of the Thonon factory's principal customers. Copigraph accounted for more than [a third] of the factory's turnover and more than half of its volumes.

The main reason for Bolloré's acquisition of all the shares in [Copigraph] was to ensure that the Thonon factory had markets for its products and that this industrial establishment (with 340 persons in its employ at the time) remained open.

This vertical integration seemed all the more judicious at the time given that the Thonon factory had to cope with a very sensitive situation given the overcapacity affecting the market.'

147 As the Commission correctly points out in its written pleadings, it is apparent from the extract set out above that Copigraph's incorporation in the special papers division was part of a vertical integration scheme in which the Bolloré factory at Thonon-les-Bains was responsible for carbonless paper production and Copigraph for conversion and distribution of the product. The same extract also shows that Bolloré's acquisition of Copigraph was aimed essentially at ensuring that the Bolloré factory at Thonon-les-Bains had markets to sell to and remained open in a time of economic difficulties arising from the stiff competition on the market. The Commission was justified in seeing in those circumstances evidence which contributed to proving that Copigraph's participation in the price cartel had originated from the application of a general policy defined by Bolloré for the purposes, inter alia, of seeking to maintain the position of its factory at Thonon-les-Bains on the market.

148 It follows from the foregoing that the evidence advanced by Bolloré does not support its contentions as to Copigraph's independence. On the contrary, the evidence set out in paragraphs 136 to 140 and 145 to 147 above, together with that relating to Bolloré's ownership of the entire share capital in Copigraph during the infringement period, lead to the conclusion that Copigraph's participation in the price-fixing cartel was the result of Bolloré's exercise of decisive influence over its subsidiary. The Commission was therefore correct in holding Bolloré liable for Copigraph's participation in the agreement.

149 In addition, the fact that Copigraph was taken over by AWA in November 1998 is not such as to relieve Bolloré, which still exists, of liability for Copigraph's offending conduct prior to the acquisition (see, to that effect, C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145, and Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 25).

150 In the light of the foregoing, the Court must dismiss Bolloré's plea alleging breach of Article 81 EC and Article 53 of the EEA Agreement in so far as the Commission holds it liable for the infringement of its subsidiary Copigraph. Irrespective of any direct involvement in the infringement, which the Court has ruled out (see paragraphs 66 to 81 above), Bolloré's liability for the infringement is therefore established.

2. Situation of Divipa and Zicuñaga

(a) Arguments of the parties

151 Divipa and Zicuñaga submit that the Commission was wrong to find that they participated in cartel meetings on the Spanish market. They dispute the probative value of several documents relied on by the Commission. They also argue that it was inappropriate to consider that they knew or should have known that the cartel was Europe-wide.

152 Both applicants submit that the Commission failed to take their particular characteristics into account. They both point out that they are not members of the AEMCP. Divipa goes on to state that it is a small-scale family business operating exclusively on the Spanish market which does not produce, but only converts and distributes carbonless paper. Its prices depend on those of its principal supplier, Koehler, and those of its competitors. Zicuñaga emphasises that it has never sold carbonless paper.

153 Zicuñaga submits further that the Commission was wrong to find that it participated in a worldwide plan which included concerted practices to increase prices and agreements fixing sales quotas and market shares.

154 The Commission contests the applicants' criticisms as to the probative value of the evidence on which it relies in support of its arguments. It states that the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact. This evidence shows that Divipa and Zicuñaga participated in the cartel on the Spanish market. In order to be able to hold them liable for participation in the European cartel, the Commission need not demonstrate knowledge of every single detail of the cartel, but merely the existence of a series of objective circumstances warranting the finding that they knew or could reasonably have foreseen that the cartel had a European dimension. The Commission adds that, in the decision, the status of membership of the AEMCP as such was not considered to be proof of the infringement. Moreover, the size or status as wholesaler, distributor or converter cannot relieve the undertaking concerned of liability where it has infringed the competition rules. The fact that the cartel was not always successful or that the undertaking in question did not observe the terms of the agreement at all times does not preclude the Commission from making a finding of participation in the cartel. It is not necessary to show that the undertaking concerned participated in every aspect of the cartel.

(b) Findings of the Court

155 It should be observed first of all that the evidence of participation in a cartel must be assessed in its entirety, taking into account all relevant circumstances of fact (see, to that effect, the Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, at II-869 — joint Opinion in the *Polypropylene* judgments). The Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place. However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraphs 179 and 180, and the case-law cited).

156 In the first paragraph of Article 1 of the decision, the Commission accuses Divipa and Zicuñaga of having participated, in breach of Article 81(1) EC and Article 53(1) of the EEA Agreement, in 'a complex of agreements and concerted practices in the sector of carbonless paper'. The infringement started in respect of Divipa in March 1992 and in respect of Zicuñaga in October 1993 and ended for both parties in January 1995.

157 By reading together recitals 77 to 81, 252, 253, 327, 328, 333 and 334 of the decision, it is apparent that the Commission found that the complex of agreements and concerted practices amounted to an anti-competitive global plan which extended essentially to price increases and the timing of their implementation, and, on occasion, fixing common sales quotas and market shares and exchanging information in order to facilitate the conclusion of agreements for increasing prices or to guarantee the implementation of the price increases agreed.

158 In recitals 153 to 176 of the decision, the Commission presents a number of items of evidence showing, in its view, that collusive meetings on the Spanish market were held between February 1992 and October 1994 and that Divipa and Zicuñaga participated in a number of those meetings.

159 Next, the Commission asserts, in recital 286 of the decision, that, although Divipa and Zicuñaga were found to have participated only in cartel meetings concerning the Spanish market, they must have understood that the cartel covered the whole territory that became the EEA in 1994. In support of that assertion, it relies on recital 287, by referring to recitals 89 to 94 and recitals 197, 211, 277 and 280 of the decision, in particular the fact that the two levels of meetings were closely intertwined and that no participants to the national meetings could ignore the fact that the purpose of these meetings was complementary to the general cartel meetings.

160 It is therefore appropriate, first of all, to ascertain the validity of the Commission's allegations as to the existence of a cartel on the Spanish market and the participation of Divipa and Zicuñaga in that cartel. If those allegations prove to be well founded, it will then be necessary to examine whether proof of such participation, combined with the evidence set out in recitals 286 to 289 of the decision, shows that Divipa and Zicuñaga also participated in the general cartel established in the first paragraph of Article 1 of the decision.

The existence of collusive meetings on the Spanish market

161 Clearly, a number of factors combine to show that there was a cartel on the Spanish market for carbonless paper from February1992 to 1995.

162 In the first place, Sappi admitted having participated in the cartel meetings concerning the Spanish market from February 1992 and supplied various pieces of information in that regard. In its reply of 18 May 1999 to the Commission (Documents Nos 15193 to 15206), Sappi refers to various collusive meetings concerning the Spanish market held on 17 and 27 February 1992, 30 September and 19 October 1993, and 3 May and 29 June 1994. In relation to the period from 1993 to 1995, an employee of Sappi stated (Documents Nos 15179 and 15180) that it had attended six or seven meetings in Barcelona with other suppliers. Those meetings took place around four or five times per year. He thought he first attended on 19 October 1993 and for the last time in 1995. According to him, the aim of those meetings was to fix prices for the Spanish market. The meetings lasted around two hours and generally ended in a decision to raise prices by a given percentage. The participants were Copigraph, Arjo Wiggins, Torraspapel, Zicuñaga, Koehler, Stora-Feldmühle (now MHTP), Zanders and Divipa. The extracts of Sappi's statements contained in the various documents are part of the documents attached to the SO, so that all the applicants had access to them. The Commission also produced them before the Court.

163 Secondly, AWA admitted participating in multilateral cartel meetings between the carbonless paper producers and gave the Commission a list of meetings between competitors held between 1992 and 1998. Document No 7828, which is an extract of the reply of 30 April 1999 sent by AWA to the Commission, includes a general statement by AWA as to the organisation of several meetings, inter alia, in Lisbon and Barcelona between 1992 and 1994, which it thinks were attended by representatives of Sarrió, Binda, Stora-Feldmühle (now MHTP) and Divipa or by some of those undertakings and, probably for one meeting only, by Zicuñaga. The collusive nature of some of those meetings is clear from AWA's statement, reproduced in Document No 7829, that some of those meetings were 'improper', in that they functioned as discussions on the prices of carbonless paper, including exchanges of intentions regarding announcements of price increases. AWA's statements contained in those two documents (Nos 7828 and 7829), produced before the Court, also formed part of the documents attached to the SO to which Divipa and Zicuñaga had access.

164 AWA then supplied, in its reply to the SO, a list of 'improper' meetings between competitors the existence of which AWA claims it helped to prove. That list includes, for the Spanish market alone, the meetings of 17 February and 5 March 1992, 30 September 1993, 3 May, 29 June and 19 October 1994. That list, referred to in recital 170 of the decision and which the Court asked to be produced in Case T-132/02, does not show which undertakings attended those meetings. Neither Divipa nor Zicuñaga nor any other applicant identified that list as being an inculpatory document to which they did not have access or for which they did not make a request for access.

165 Thirdly, in its statements of 14 April 1999 (Documents Nos 7647 to 7655), Mougeot, which also admitted its participation in multilateral cartel meetings between carbonless paper producers, lists a number of meetings, indicating for each one, its object, content and the persons who were present. Those meetings include, in respect of the Spanish market, the one of 19 October 1994, to which Copigraph, Stora, Torraspapel, Divipa, Ekman, Zicuñaga, Koehler, AWA and Mougeot, according to the latter, sent a representative. According to those documents, the object of that meeting was the organisation of the Spanish market and under the heading 'Content of the meeting', it was stated 'Price-fixing on the Spanish market

depending on the size of the customers ...'. Mougeot's statements also formed part of the documents attached to the SO and were produced before the Court.

166 Admittedly, Mougeot gave its statements after the material events and for the purpose of application of the Leniency Notice. They cannot however be regarded as devoid of probative value. Statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (*JFE Engineering* v *Commission*, cited in paragraph 155 above, paragraph 211).

167 However, according to the case-law of the Court of First Instance, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (*JFE Engineering* v *Commission*, cited in paragraph 155 above, paragraph 219; see also, to that effect, Case T-337/94 *Enso-Gutzeit* v *Commission* [1998] ECR II-1571, paragraph 91).

168 In that respect, it should be noted that, first, the statements of Sappi, AWA and Mougeot support each other on a number of points, such that they substantiate each other. Secondly, it is apparent in the present case that their statements are corroborated by other evidence contemporaneous with the facts at issue. Thus, the existence of each of the collusive meetings referred to by AWA is confirmed by another item of evidence dating from the time of the infringement and from another undertaking present at the particular meeting.

169 First, in relation to the meeting of 17 February 1992, in a fax (Document No 4588, cited in recital 157 of the decision and in paragraph 61 of the SO) dated 17 February 1992, Mr W. (Sappi) informs his line manager, Mr J., that the situation is uncertain,

at the very least, because of Koehler's and Sarrió's conduct and that a meeting of the interested parties concerned took place that day.

170 Secondly, as regards the meeting of 5 March 1992, in a note of 27 February 1992 (Document No 4589, referred to in recital 158 of the decision and paragraph 60 of the SO), Mr W. (Sappi) informs the same person again that he made arrangements to attend a meeting the following week in Barcelona with other interested parties to discuss recent developments on the Spanish market. He goes on to say that the meeting is to be held on 5 March 1992. Both these documents were annexed to the SO.

171 The note of 9 March 1992 (Documents Nos 4703 and 4704, referred to in recital 156 of the decision and paragraph 60 of the SO) from Sappi's Spanish agent to Sappi Europe, while not being a complete account of the meeting, is very precise as to the conduct of the undertakings referred to, including Divipa. The parties discussed the matter of a price increase of 10 Spanish pesetas (ESP), being the objective set by the distributors but which was not fully achieved. The author of that note states that Divipa did not raise its prices at all. According to him, it is obvious that Sappi Europe cannot increase its prices if the other suppliers do not follow suit. He refers further to the fact that Zicuñaga announced the launch of a project to produce carbonless paper on the French side of the Spanish border, a move which should strengthen competition.

172 Thirdly, in relation to the meeting of 30 September 1993 in Barcelona, a note (Documents Nos 5 and 9972, cited in recital 163 of the decision) drawn up on that date by the representative of Sappi sets out the sales announced for 1992 and 1993 by AWA, Binda, Copigraph, Sappi, Divipa, Stora-Feldmühle, Koehler, Sarrió and Zanders together with a quota for the fourth quarter of 1993. The participants agreed to announce a price increase of 10% for reels and sheets of paper. They also agreed to meet again to confirm compliance with the quotas. That note was referred to in full in paragraph 80 of the SO.

173 Fourthly, in relation to the meeting of 19 October 1993, according to a note (Document No 4474, referred to in recitals 165 and 192 of the decision) drawn up in Spanish by an employee of Sappi and headed 'Report of the visit' (informe vista), a meeting was held on 19 October 1993 attended by all the distributors except Copigraph. At that meeting the participants agreed that the reels price increase for end-users should be 8%. They also agreed to notify the manufacturer that they would accept only a 7.5% increase in the manufacturer's prices, which would lead to a 0.5% increase in the distributor's margin. Even if that note is undated, it should be borne in mind that the reference to 'today's' prices proves that the note is contemporaneous with the recorded facts. The fact that the note is unsigned and undated is quite normal since it is a note relating to a meeting the anti-competitive object of which was a reason for its author to leave the least trace possible (see, to that effect, *Shell* v *Commission*, paragraph 56 above, paragraph 86). Secondly, given the language in which that note was drawn up and the other information supplied by Sappi there can be no doubt that the note concerned the Spanish market. Apart from the last sentence, that note was reproduced in paragraph 84 of the SO.

174 Fifthly, with regard to the meeting of 3 May 1994, the file includes a note (Document No 14535) of the same date, also drawn up by an employee of Sappi and headed 'Report of the visit'. That note has as its subtitle 'Meeting of manufacturers to analyse price situation'. It states, in respect of each participating undertaking, namely, Copigraph, AWA, Torraspapel, Zicuñaga, Koehler, Stora, Zanders, Sappi and Divipa, the name of the person representing it. The note also contains a table setting out the current prices and those — increased — prices envisaged for 16 May, stating that those prices were the result of agreements between the distributors. That note was attached to the SO and its contents detailed in paragraphs 110 to 112 thereof.

175 Sixthly, as regards the meeting of 29 June 1994, a note (Document No 4476, referred to in recitals 164 and 166 of the decision) dated that day is headed 'Meeting of carbonless paper manufacturers'. It also states the name of the person representing each participating undertaking, namely Torraspapel, Reacto, Divipa, Stora, AWA, Sappi and Zicuñaga. The note begins with the term '[r]eels', followed by the wording '[a]ll provided with full order books and quotas'. It refers, in respect of the reels, to a price increase of 10% to be applied from 1 September. Various indicative prices are

mentioned for direct sales to printers, distinguishing between three categories of customers and according to the type of products. The note indicates that since the price agreed for sheets was not complied with, it returned to its former level. It was decided to increase that price in two stages, on 1 July and 1 September 1994, by 5% each time. The note ends with the wording 'Next meeting: 23 September at 12.30'. The document was attached to the SO and its content set out in paragraphs 121 to 123 thereof.

176 In addition, an internal fax (Document No 4565, cited in recital 166 of the decision) of Sappi, dated 4 November 1994, refers to the fact that the leader on the Spanish market, Torraspapel, announced a price reduction of ESP 10, and that everything suggests that the November increases will have no effect, since so far no distributor has announced them. That fax was referred to in paragraph 130 of the SO and attached thereto.

177 Seventhly, and finally, regarding the meeting of 19 October 1994, it is clear from the manuscript note (Document No 1839, referred to in recitals 167, 222 and 223 of the decision) of 21 October 1994, drawn up by Mougeot and relating to the Spanish market, that the participants agreed on the prices to be applied on 3 January 1995. Zicuñaga and Mougeot were 'authorised to sell [below] [ESP] 5/kg'. The author of the note states that it 'seems Utopian to ask Zicuñaga to sell at 2% below the prices of the large producers without consideration of volumes'. The next meeting was set for 24 November 1994 at the same time in the same place. That manuscript note was attached to the SO.

178 It is therefore apparent that, of the meetings referred to by Sappi — and not mentioned by AWA — namely, those of 27 February 1992 and 19 October 1993, only the first of these is not supported by other evidence. However, there is no need to verify the Commission's findings on the holding of the meeting of 27 February 1992, which in any event falls outside the infringement period of which Divipa and Zicuñaga are accused.

179 Finally, in addition to the meetings of 17 February and 5 March 1992, 30 September and 19 October 1993 and 3 May, 29 June and 19 October 1994, the Commission also refers, in Table 3 contained in recital 129 of the decision and in Annex II thereto, to a meeting held in Barcelona on 16 July 1992 concerning the Spanish and Portuguese markets and a meeting held on 23 September 1994 relating to the Spanish market alone.

180 As regards the meeting of 16 July 1992, it is clear from recital 159 of the decision that the Commission's findings relating to the holding and anti-competitive object of that meeting are based on the information contained in Documents Nos 4484, 4501 to 4503 and 4520, cited in footnotes Nos 167 and 168 of the decision and attached to the SO.

181 In its oral statement (Document No 4484), Mr B.G. of Unipapel, Sappi's agent in Portugal, stated that on 16 July 1992 he went to Barcelona for a meeting, the object of which was to 'discuss the situation of the carbonless paper market in Portugal and Spain'.

182 That statement is supported by copies of notes of travel expenses (Documents Nos 4501 to 4503) which prove that Mr B.G. made a return trip from Lisbon to Barcelona on 16 July 1992.

183 In another oral statement (Document No 4520), Mr B.G. stated that the purpose of the 16 July 1992 meeting was to discuss price increases and market shares. He added that the agreements had in the main related to reels. He also admitted, without being able to corroborate it, that there were similar agreements for sheets. He stated further that during that meeting information was exchanged as to the quantities sold and the prices applied by each undertaking.

184 In the light of the information set out in the previous three paragraphs, the Commission was justified in finding that a meeting was held on 16 July 1992 during which agreements were concluded for price increases and allocation of market shares relating to Spain and Portugal, at the very least in relation to reels. It should be pointed out, however, that the Commission does not contend that Divipa attended that meeting, as Mr B.G. was not mentioned as one of the participants.

185 In relation to the meeting of 23 September 1994, the note (Document No 4476) referred to in paragraph 175 above admittedly corroborates the fact that that meeting had been arranged. However, no document or statement confirms that the meeting was in fact held on that date. It must therefore be held that the Commission has not established that a meeting relating to the Spanish market was held on 23 September 1994.

186 The fact remains that, on the basis of precise and coherent evidence, the Commission established to the requisite legal standard the existence of an agreement on the Spanish market, at least from March 1992 until January 1995. In fact, the agreement had continued to produce its effects after the collusive meetings had formally ceased in October 1994, since the price increases planned during the meeting of 19 October 1994 (see paragraph 177 above) were to be applied on 3 January 1995 (see, to that effect, Case 243/83 *Binon* [1985] ECR 2015, paragraph 17, and Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 231).

187 That agreement took the form of repeated meetings between competing undertakings during which they agreed in essence on price increases and the timing of those increases. On one occasion, that is, the meeting of 30 September (see paragraph 172 above), quotas were fixed.

Participation of Divipa and Zicuñaga in the cartel on the Spanish market

188 According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155; *Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraph 96; 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 81).

189 Having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it (*Aalborg Portland and Others* v *Commission*, cited in paragraph 188 above, paragraph 82).

190 In the present case, it is apparent that, first of all, the table (Document No 15199) setting out the various meetings, and the date, object and participants of those meetings as contained in Sappi's reply of 18 May 1999, referred to in paragraph 162 above, mentions Divipa and Zicuñaga as having participated in the collusive meeting of 19 October 1993. That assertion is supported by the reference, in the note referred to in paragraph 173 above, to the fact that all the distributors apart from Copigraph participated in that meeting.

191 Secondly, it is apparent from the statements of Sappi's employee, referred to in paragraph 162 above, that Divipa and Zicuñaga were present at the meetings which he attended between October 1993 and 1995. In relation to the meetings of 3 May

and 29 June 1994, that employee even says that Divipa was represented by Mr A. and Mr C. and Zicuñaga by Mr E. Those statements are supported, in respect of each of those meetings, by notes of the Sappi employee, referred to in paragraphs 174 and 175 above, which were contemporaneous with the facts at issue.

192 Thirdly, according to AWA's statements referred to in paragraph 163 above, Divipa participated in the meetings on the Spanish market which were held between 1992 and 1994, or, at the very least, at some of those meetings. Zicuñaga, on the other hand, probably only attended one of those meetings. In that respect, it should be pointed out that the rather cautious nature of that statement made several years after the facts at issue cannot cast doubt on the probative value of the precise information contained in the documentary evidence drawn up by Sappi at the time of the infringement, which refers expressly to Zicuñaga's presence at the meetings of 19 October 1993, 3 May and 29 June 1994.

193 Fourthly, it is apparent from Mougeot's statements, referred to in paragraph 165 above, that Divipa and Zicuñaga were present at the meeting of 19 October 1994. Zicuñaga's participation in that meeting is also supported by Mougeot's handwritten note of 21 October 1994, referred to in paragraph 177 above, containing the wording 'Zicuñaga and Mougeot authorised to sell [below] [ESP] 5/kg'. Combined with AWA's statements referred to in the previous paragraph, Mougeot's precise statements as to the presence of Mr A. (Divipa) at that meeting allowed the Commission to conclude that Zicuñaga had attended the meeting of 19 October 1994.

194 The fact, argued by Divipa in its reply of 18 May 1999, that Sappi does not mention that a meeting concerning the Spanish market was held on 19 October 1994 is explained by the fact that Sappi did not attend that meeting, as is proved by the list of participants at the meeting drawn up by Mougeot. In any event, that fact cannot invalidate the bundle of consistent evidence proving that that meeting was held and attended by Divipa.

195 It follows from all of the above evidence that the Commission has established to the requisite legal standard that Divipa and Zicuñaga participated in collusive meetings held on a continuous basis between 19 October 1993 and 19 October 1994.

196 Even though those undertakings did not participate in all the meetings forming part of a scheme of periodic meetings as alleged by the Commission, neither Divipa nor Zicuñaga referred to evidence showing that they distanced themselves publicly from what was discussed at the meetings which they attended. They are therefore still liable for the infringement. Since it has been established that the applicants took part in those meetings and that their object was inter alia to fix prices, the applicants at least gave their competitors the impression that they were participating in them in the same spirit as the others (see, to that effect, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232, and Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98). It must be borne in mind that that scheme of meetings was part of a series of efforts made by the undertakings in question, in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in carbonless paper. It would therefore be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements (*Rhône-Poulenc* v *Commission*, cited in paragraph 155 above, paragraph 126).

197 Divipa's participation in the cartel from March 1992 onwards is clear, first of all, from AWA's statements referred to in paragraphs 163 and 192 above. Those statements are further supported by Divipa's words in the note of 9 March 1992 referred to in paragraph 171 above. In that note, Sappi's Spanish agent clearly examines the application by various undertakings of the price increase of ESP 10, the objective previously set by the distributors. The agent expressly mentions the fact that Divipa did not increase its prices. However, the monitoring of Divipa's pricing policy, next to that of Sarrió and AWA which had their own trading company on the Spanish market, constitutes a strong indication of its participation in the cartel at that time.

198 Those findings as to Divipa's and Zicuñaga's participation in the cartel on the Spanish market from March 1992 and from October 1993 respectively, until January 1995 in the case of both undertakings, cannot be called into question by considerations relating to the individual characteristics of those undertakings.

199 It is clear from recitals 17 and 330 of the decision that the Commission duly took into account the fact that neither Divipa nor Zicuñaga were members of the AEMCP. Moreover the Commission did not consider the status of member of the AEMCP as a constituent element of the infringement.

200 As regards the differences highlighted by Divipa and Zicuñaga between the price increases decided during the meetings which they attended and the evolution of prices during the period in which those decisions were meant to have been applied, even if the accuracy of the figures produced by those undertakings in order to illustrate their pricing policy during that period is accepted, those differences are capable of showing at most that the undertakings concerned did not comply with the decisions on price increases made during the meetings in question. Under the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the Guidelines'), non-implementation in practice of the agreements may constitute an attenuating circumstance; it will therefore be appropriate to appraise the arguments of the parties in this regard in the context of the pleas for annulment or reduction of the fine (see paragraphs 594 to 635 below). On the other hand, it must be stated that non-observance of the agreed prices does not change the fact that the object of those meetings was anti-competitive and that, therefore, the applicants participated in the agreements (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 79). Those differences, even if they are proved, are not grounds for discounting the evidence of Divipa and Zicuñaga's participation in those collusive meetings.

201 The fact alleged by Zicuñaga that production and distribution of carbonless paper were carried out, within its group, by the Papeteries de l'Atlantique SA is not such as to call into question the participation of Zicuñaga, the only undertaking referred to

in the statements of the other members of the cartel, in the infringement. It should be pointed out that, although Zicuñaga only held 50% of the capital in Papeteries de l'Atlantique at the material time, the Commission holds Zicuñaga responsible for the infringement in respect of its own conduct and not as the parent of Atlantique. First, the documentary evidence relating to the meetings of 3 May and 29 June 1994 (see paragraphs 174 and 175 above) expressly refer to the presence of a representative from Zicuñaga at those two collusive meetings concerning the Spanish market. Secondly, the handwritten note of 21 October 1994 drawn up by Mougeot (see paragraph 177 above) expressly refers to Zicuñaga. At no point does it mention the Papeteries de l'Atlantique. In addition, even if the decision does not correctly reflect the exact nature of Zicuñaga's activities within the group, Zicuñaga did not dispute the assertion contained in recital 365 of the decision that it was responsible for setting price policies for all paper products of the group.

202 Divipa also argues that there are differences between the data on its declared sales contained in Sappi's notes and the data attached to its application. Those differences allegedly show that Divipa did not supply the data contained in Sappi's notes. In that regard, it should be pointed out that the data attached by Divipa to its application is not substantiated by any document capable of establishing that it reflects reality. In any event, even if it is accurate, the difference that is apparent between that data and that contained in Sappi's notes only proves that the latter data did not reflect reality. It does not, however, permit the inference that the sales averages referred to in Sappi's notes were not announced by Divipa at the meeting of 30 September 1993.

203 Divipa also argues that for a small distributor such as itself to have attended meetings of producers defies all logic. It should be pointed out that its capacity as a distributor is not such as to cast doubt on the series of indicia proving Divipa's participation in the cartel on the Spanish market. Its capacity as such does not mean, moreover, that it had no interest in participating in the cartel, which, according to the Commission's analysis set out in recitals 153 and 165 of the decision and not contested by Divipa, necessarily had to include the distributors in order to operate

properly on the Spanish market, which was characterised by extensive, integrated networks of production and distribution, such that a number of producers were also distributors. In addition, according to the note dated 29 June 1994 (Document No 4476, referred to in paragraph 175 above), the agreement reached at that meeting related to prices applicable to consumers, which, in the light of Divipa's status as distributor, suffices to explain that undertaking's presence at the meeting.

204 Finally, the fact that Divipa purchases between 60 and 70% of its carbonless paper requirement from Koehler and the remainder from other manufacturers implies a certain dependence vis-à-vis its suppliers in relation to the purchase price. However, first, that dependence cannot be regarded as complete. The table provided by Divipa as an annex to its application shows that in 1993 Divipa did not always pass on certain reductions in its purchase price straightaway, so that its margin thus remained significant. Secondly, and in any event, that fact also does not mean that it had no interest in participating in the cartel, since every price increase decided in that context and applied to the customer could result in an increase in its profit margin. It is also clear from the table that between January and December 1994 Koehler's purchase prices went from 159.25 to 195.70 and Divipa's margin from 20.38 to 43.81. Finally, it is clear from the note relating to the meeting of 19 October 1993, referred to in paragraph 173 above, that the negotiations related, first, to prices that the distributor had to pay the manufacturer, and, secondly, to the increase applied by the distributors to their clients, this incorporating an increase in the distributor's margin.

Divipa's and Zicuñaga's participation in the cartel on the European market

205 It is clear from recital 286 of the decision that the Commission only found Divipa and Zicuñaga to have participated in collusive meetings concerning the Spanish market. It asserts, however, that 'they must have understood that the cartel covered the whole territory that became the EEA in 1994'.

206 The Commission relies, in this regard, on the fact that the general European cartel meetings and the national collusive meetings, in particular the Spanish ones, were inextricably linked, the fact that the large European carbonless paper producers took part in collusive activities on the Spanish market, and the fact of significant intra-Community trade flows in the carbonless paper sector during the reference period.

207 According to the case-law, an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (*LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 158 and the case-law cited).

208 In the present case, it is clear inter alia from paragraph 187 above that the object of the agreements relating to the Spanish market in which Divipa and Zicuñaga participated was to fix common price increases. In addition, on one occasion, namely the meeting of 30 September 1993 — which Zicuñaga, not yet participating in the cartel, did not attend — sales quotas on that market were allocated on the basis of an exchange of information on the sales made. Those agreements were therefore in line with the general European cartel, the object of which was mainly to increase the prices of carbonless paper, and, in some cases, to fix common sales quotas or market shares and to exchange confidential information in order to facilitate the conclusion or application of price-fixing agreements.

209 However, according to the case-law, the mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does

not suffice to render that undertaking responsible for the global cartel. It is only if the undertaking knew or should have known when it participated in the agreement that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel (Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 45).

210 The Commission asserts, in its decision, that this was the case with Divipa and Zicuñaga, which these undertakings dispute.

211 Admittedly, it is common ground that Divipa and Zicuñaga were not members of the AEMCP and that they never took part in the official meetings of that association — which, according to the Commission functioned as the framework for the European cartel until September 1993 — or in the general cartel meetings which were held at the margins of the official AEMCP meetings from September 1993. Moreover, none of the evidence relating to the participation of Divipa and Zicuñaga in collusive meetings on the Spanish market shows that a price-fixing cartel operating at European level was discussed at either of those meetings.

212 However, neither Divipa nor Zicuñaga provide evidence capable of rebutting the Commission's findings in recitals 89 to 94 and 211 of the decision and Mougeot's statements set out in recital 90. According to those statements, 'AWA felt that unless the managers responsible for local markets were involved there was little chance of achieving the results hoped for, which explained the holding of meetings market by market' and 'the local managers were told by their superiors that they wanted a price rise, and had to decide between themselves how the rise should be secured in practice'. Those statements clearly show that, in order to ensure the success of the decisions to raise prices made at the general cartel meetings, the participants in those meetings sought to ensure that those decisions were applied generally over the various regional and national markets. In the light of the significant volume of trade flows between Member States in relation to the product concerned, it was not particularly effective to take measures restricting competition only at the level of a single Member State.

213 The Commission thus produced two tables (Tables 5 and 6, contained in recitals 207 and 217 of the decision and in paragraph 117 and 127 of the SO) found at Sappi's premises showing the price increases agreed for various countries at the two general meetings of 21 June and 22 September 1994. In relation to Spain, those tables do not contain any figures, only the wording 'to be specified'. However, the minutes of the meeting of 29 June 1994 (Document No 4476, referred to in paragraph 175 above) concerning the Spanish market and Mougeot's handwritten note of 21 October 1994 (Document No 1839, referred to in paragraph 177 above; see also paragraph 235 below) following the meeting of 19 October 1994 also relating to the Spanish market, show that each of those general meetings was followed by a national meeting during which price increases for the Spanish market were in fact specified. In addition, as the Commission points out in its written pleadings, the fact that Mougeot's handwritten note mentions the words 'in light of the AEMCP volumes announced in respect of Spain' and describes a discussion revolving around those figures lends credence to the argument that Divipa and Zicuñaga were necessarily aware of the wider framework, at European level, of which the meetings relating to the Spanish market formed part and in which they participated.

214 In addition, the various documents relied on by the Commission in relation to the Spanish meetings (in recitals 154 to 171 of the decision, Annex II to the decision and the corresponding footnotes) show unequivocally that a certain number of representatives of European carbonless paper producers were present at those meetings and whose participation in the general cartel meetings, in the light of the evidence cited by the Commission in recitals 263 to 276 of the decision, cannot be disputed, nor, in the majority of cases, was it disputed.

215 It seems scarcely conceivable that, while, as the Commission points out in recital 176 of the decision, it is clear from the indicia provided by a representative of Unipapel during the investigations (Document No 4525, the relevant extract of which is set out in paragraph 74 of the SO) that the Portuguese customers suspected that a European-wide cartel underpinned the conduct of Portuguese operators in relation to price increases, Divipa and Zicuñaga, which, at the meetings on the Spanish markets, rubbed shoulders with representatives of major European

carbonless paper producers involved in the general cartel meetings, were unaware that, by participating in collusive agreements on that market, they were part of a European-wide cartel.

216 In those circumstances, it must be held that Divipa and Zicuñaga must have been informed of the existence and content of the European cartel (see, to that effect, *Cement*, paragraph 4097) and that, by participating in agreements on the Spanish market having the same object as the European cartel they were necessarily aware that in doing so they were taking part in that cartel (see, to that effect, *Cement*, paragraph 4099).

217 The fact, as claimed by Zicuñaga, that the file does not contain any evidence showing that the prices relating to markets other than the Spanish market were discussed at the Spanish meetings or were brought to its knowledge by other undertakings is fully in line with the cartel's general system of organisation, namely that the discussions held, particularly in the context of meetings at national or regional level, were intended to establish the practical arrangements for applying the price increases decided on at European level to the prices charged on the local market concerned. This is not capable of undermining the analysis set out above.

218 Zicuñaga bases another argument on its lack of participation in the meetings and allegedly collusive activities taking place on the French and Italian markets, despite its commercial interests in the latter. It is appropriate to recall in this respect Zicuñaga's statement at the hearing that 'it was responsible for setting price policies for all paper products of the group and ... consequently, took all price decisions also concerning Papeteries de l'Atlantique products' (recital 365 of the decision). Therefore, the assertion that Zicuñaga had commercial interests not only in Spain but also in France and Italy through the activities of its subsidiary, Papeteries de l'Atlantique, could be understood as meaning that Zicuñaga, which could not have

been unaware that certain undertakings represented in the Spanish meetings were active on the French and Italian markets, when defining the pricing policy of its group must have enquired whether the agreements in which it participated were part of a European cartel, and thus must necessarily have been informed of the existence of such a cartel.

219 In any case, the circumstance referred to in the previous paragraph is not capable of casting doubt on the analysis set out in paragraphs 205 to 217 above. Furthermore it might also be understood as proof that Zicuñaga was aware that the agreements in which it participated on the Spanish market were part of a European cartel and therefore thought it unnecessary to take part in meetings and collusive activities anywhere other than in Spain.

220 Furthermore, it should be pointed out that Zicuñaga's situation is different in several respects from that of the undertaking Sigma Tecnologie di rivestimento in *Sigma Tecnologie* v *Commission*, cited in paragraph 209 above, to which Zicuñaga refers in its written pleadings. Indeed, unlike the applicant in that case, in the sector in question Zicuñaga operated on several national markets. Furthermore, even accepting Zicuñaga's argument that it was perceived by its Spanish competitors as applying an aggressive pricing policy, Zicuñaga did not provide any evidence capable of proving that, like Sigma Tecnologie di rivestimento, it was excluded from certain meetings or collusive activities because it was a 'troublemaker' (*Sigma Tecnologie* v *Commission*, cited in paragraph 209 above, paragraph 42 and 46). On the contrary, Mougeot's note relating to the meeting of 19 October 1994, referred to in paragraph 177 above, shows that Zicuñaga was considered to be a full member of the Spanish cartel, in which it was allowed to sell at prices slightly lower than those which had to be applied by the other members of the cartel.

221 In the context of its argument seeking to prove that it did not implement the price-fixing agreements at issue, Zicuñaga complains that the Commission, during the administrative procedure, refused it access to the detailed information referred to in recital 288 of the decision. In that respect, it is appropriate to refer back to the arguments set out in paragraphs 45 to 51 above.

Zicuñaga's participation in agreements fixing sales quotas and market shares

222 Finally, as set out in paragraph 153 above, Zicuñaga denies its participation in agreements fixing sales quotas and market shares.

223 In that respect, it is clear from reading together recitals 77, 81, 252, 253, 326 to 331, 376, 382 and 383 of the decision that the Commission found there to be agreements fixing sales quotas and market shares not as separate infringements, but as constituent elements of a single infringement, referred to in Article 1 of the decision and imputed to Zicuñaga, whose general purpose was to increase carbonless paper prices in the whole territory that became the EEA in 1994 (recital 327 of the decision), the central plank of which was the conclusion of agreements to increase prices (recital 383 of the decision).

224 It is appropriate, first, to ascertain whether the Commission correctly established the existence of agreements fixing sales quotas and market shares and whether it was justified in forming the view that those agreements formed part of the overall anti-competitive plan constituting the infringement established in the first paragraph of Article 1 of the decision. In that respect, the Commission distinguishes in recitals 241 to 251 of the decision between the evidence which, in its view, proves the existence of agreements allocating sales quotas and those which, according to the Commission, prove the existence of market-sharing agreements.

225 As regards, first of all, the Commission's contentions as to the allocation of sales quotas, it should be pointed out, first, that the document drawn up by Sappi concerning the meeting held on 30 September 1993 in Barcelona (Document No 5 referred to in paragraph 172 above) shows that the participants in that meeting declared at the outset their monthly sales averages in 1992 and 1993 and proceeded to allocate sales quotas for the fourth quarter of 1993 before agreeing to announce a 10% increase in the price of reels and sheets on 1 January 1994, and, finally, decided to convene again on a date to be fixed at a later stage for the purposes of checking compliance with the quotas.

226 Secondly, it should be noted that Zicuñaga does not call into question the Commission's findings in recitals 138, 242 and 243 of the decision that a 'meeting note' (Document No 6, set out in paragraph 87 of the SO) drawn up by Sappi at a meeting held on 1 October 1993 concerning the French market indicates that the participants at that meeting agreed to both a price increase and an allocation of quotas for the fourth quarter of 1993 'to allow price increases'.

227 In relation, next, to the Commission's contentions as to the market-sharing agreements, Zicuñaga does not put forward any evidence casting doubt on the Commission's findings in recitals 141 and 246 of the decision that the meeting which was held in spring 1994 at Nogent-sur-Marne concerning the French market functioned both as an agreement to increase prices and as a market-sharing agreement (Document No 7651, referred to in paragraphs 113 to 115 of the SO and attached thereto).

228 The facts set out above permit the finding that the Commission was correct to state in recital 241 of the decision that 'to support the implementation of the agreed price increases, in some national cartel meetings sales quotas were allocated and market shares were fixed for each participant'. The Commission was therefore able to take the view that the agreements to increase prices and fix common sales quotas and

markets shares were inextricably linked aspects of the same overall anti-competitive plan constituting the infringement found in the first paragraph of Article 1 of the decision.

229 Secondly, it should be examined whether the Commission was right to accuse Zicuñaga of the aspects of the single infringement relating to the agreements on sales quotas and market shares.

230 The term '[r]eels', followed by the wording '[a]ll provided with full order books' contained in Sappi's note of 29 June 1994, referred to in paragraph 175 above, does not necessarily prove that an agreement on sales quotas was concluded during the meeting of 29 June 1994. It does show, however, that at the time of holding that meeting, all those attending, including Zicuñaga, were party to an agreement allocating sales quotas in relation to the reels market.

231 It should be pointed out that the evidence, referred to in the previous paragraph, relating to the meeting of 29 June 1994 constitutes the only evidence capable of being used against Zicuñaga as evidence of its direct participation in an agreement allocating sales quotas. The Commission did not find that Zicuñaga had participated in the meeting of 30 September 1993 in Barcelona in which an agreement on sales quotas for the fourth quarter of 1993 was entered into. With regard to the other meetings, Zicuñaga's attendance at which was correctly established by the Commission, the Commission does not claim in its decision that those meetings served as a framework for sales quotas agreements.

232 In its defence, the Commission argues, however, that sales quotas were also discussed at the meeting of 19 October 1994.

233 In that respect, Mougeot's handwritten note of 21 October 1994 relating to a meeting held on 19 October 1994 concerning the Spanish market (see paragraph 177 above) contains the following information:

'I asked in light of the AEMCP volumes announced for Spain (except for Zicuñaga) at the end of August 94, [up by] 4 300 [tonnes], where our 93 volumes had got to ([down by] 50%)?

— Sarrió's reply: volumes go up and down!

— Koehler's reply: the AEMCP figures are incorrect!'

234 This could mean, as the Commission submits in its defence, that at the meeting of 19 October 1994 discussions took place concerning sales quotas or volumes. It is apparent, however, that the Commission does not refer, either in the part of the decision concerning the meetings on the Spanish market or in that concerning sales quotas and market shares, to those assertions in support of its allegations concerning the conclusion of agreements on sales quotas or market shares during the reference period. In those circumstances, those assertions cannot be taken into consideration for the purposes of establishing Zicuñaga's participation in sales quotas agreements.

235 This being so, the fact remains that the indication set out in paragraph 230 above establishes that Zicuñaga was informed of the existence of an agreeement on sales quotas during the meeting of 29 June 1994.

236 In those circumstances, and since it has been established that Zicuñaga participated in agreements to raise prices on the Spanish market when it knew, or must have known, that in so doing it was part of a European cartel, the Commission was also able to hold it liable for sales quotas agreements entered into during the period of its participation in the agreements to increase prices. It should be borne in mind that, according to settled case-law, an undertaking that has participated in a multiple infringement of the competition rules by virtue of its own conduct, which falls within the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and is intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question is aware of the unlawful conduct of the other participants, or can reasonably foresee such conduct, and is prepared to accept the risk (*Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraph 203).

237 Accordingly, Zicuñaga must be held liable for the agreement to allocate sales quotas referred to in the meeting of 29 June 1994.

238 As regards the market-sharing agreements, it is clear from recitals 246 to 251 of the decision that the Commission bases its findings as to the existence of such agreements, first of all, on assertions relating to two meetings on the French market organised in spring 1994 and 6 December 1994. However, the decision does not contain any evidence from which it may be inferred that Zicuñaga was aware of the fact, or could reasonably foresee, that meetings on the French market functioned as market-sharing agreements. In that respect, contrary to its findings concerning agreements to increase prices, the Commission did not find in the decision that the market-sharing agreements observed on the French market were in the nature of the decentralised application of an alleged European agreement on market-sharing whose members informed the local managers of the various markets concerned. In those circumstances, it cannot be held that Zicuñaga, which, it is common ground,

did not take part in collusive meetings on markets other than the Spanish market, knew of or could reasonably foresee, the existence of the market-sharing agreements referred to above.

239 According to the Commission, it is then apparent that the market shares appeared on the agenda of the general cartel meetings (recital 250 of the decision). It should be recalled, however, that it is common ground that Zicuñaga never attended general cartel meetings. In addition, the evidence advanced by the Commission in recitals 250 and 251 of the decision in support of its contention related to the general cartel meeting of 2 February 1995, that is, a meeting taking place after the end of the infringement period upheld against Zicuñaga in the second paragraph of Article 1 of the decision.

240 It follows that Zicuñaga's participation in market-sharing practices has not been established.

241 In the light of the foregoing, it must be held that the Commission was justified in holding Zicuñaga liable for practices allocating sales quotas during the period of its participation in the infringement. On the other hand, it must be held that the Commission was wrong to accuse Zicuñaga of the aspect of the single infringement relating to market-sharing agreements.

242 However, that error of assessment is not such as to undermine the findings that Zicuñaga, in the course of meetings concerning the Spanish market, participated in agreements to raise prices, or the analysis that, through those agreements, Zicuñaga took part in the European cartel fixing prices for carbonless paper which constituted the main aspect of the infringement established in the first paragraph of Article 1 of the decision. The considerations set out above relating to market-sharing are not such as to call into question Zicuñaga's participation in that infringement. It must be held that Zicuñaga, having participated for over a year in those price initiatives,

could reasonably foresee that the participating undertakings were seeking to ensure the success of those initiatives by various mechanisms and Zicuñaga was prepared to accept that possibility. For the purposes of examining the alternative claims made by Zicuñaga with a view to securing a reduction in the fine imposed on it under Article 3 of the decision, it must be established, however, whether, and, as appropriate, to what extent Zicuñaga's lack of responsibility for the market-sharing practices justifies a reduction in the fine imposed on it.

243 On the basis of all those considerations, it is appropriate to dismiss Divipa's plea alleging breach of Articles 81 EC and 53 of the EEA Agreement, and Zicuñaga's plea, alleging errors of assessment.

C — *The pleas relating to the duration of the infringement*

244 A number of applicants, namely Bolloré, MHTP, Koehler, Mougeot, Torraspapel, Divipa and Zicuñaga, dispute the Commission's findings as to the duration of their participation in the infringement. Some of those applicants (MHTP, Koehler, Mougeot and Torraspapel) make their arguments in the context of claims for partial annulment of Article 1 of the decision and reduction in the fine imposed on them under Article 3 of the decision, while others (Bolloré, Divipa and Zicuñaga) do so in the context of their alternative claims for a reduction of the fine. As regards the latter undertakings, it is clear from their written pleadings that they essentially dispute the lawfulness of the contested decision in that, in the second paragraph of Article 1, it establishes the duration of the infringement of which each of them is accused. It is therefore appropriate to re-classify their claim as also seeking annulment in part of the second paragraph of Article 1 of the decision relating to the duration of the infringement.

245 Bolloré, MHTP, Koehler, Mougeot and Torraspapel make largely the same argument, namely that the Commission has not proven their participation in the cartel during the period before September or October 1993 or during the period before January 1993 in the case of MHTP. Save for certain specificities linked to their respective situations, the essence of their arguments is that, first, contrary to the Commission's contentions, it is not proved that the meetings held at European level within the AEMCP before September or October 1993 functioned as collusive pricing agreements, and, secondly, it is not proved that they participated in collusive meetings at national or regional level before that period. It is appropriate, first of all, to examine together the respective arguments of the various undertakings referred to above, and Mougeot's additional argument that the Commission has not proved its participation in the agreement after July 1995. It will then be appropriate to examine the pleas advanced by Divipa and Zicuñaga respectively.

1. The pleas advanced by Bolloré, MHTP, Koehler, Mougeot and Torraspapel

(a) Participation of the applicants in the infringement before September or October 1993

Arguments of the parties

246 In the context of a plea alleging breach of Article 15(2) of Regulation No 17, Bolloré submits that the Commission failed to prove its liability in respect of the cartel between January 1992 and September or October 1993. In support of its claim, it submits, first, that Copigraph denied participating in any cartel before September 1993. Secondly, it denies that AWA's statements of 5 May 1999, those of Mougeot of 14 April 1999 and those of Sappi of 6 January 1998 — on which the Commission relies to prove that Copigraph participated in the cartel before September 1993 — had any probative value. It also points to the contradictory nature of the various

statements, submitting that those of Mougeot relate to alleged general cartel meetings while those of AWA concern an alleged cartel relating to the French market. It also asserts that the first price increase applied by Copigraph dates from December 1993, which rules out the possibility of its involvement in a cartel before September or October 1993.

247 In the context of a plea alleging lack of evidence, MHTP submits that the Commission did not prove its participation in an infringement before January 1993. In support of that claim, it submits, first of all, that the statements of AWA, Sappi and Mougeot cited in recitals 107 and 108 of the decision fail to prove that the AEMCP meetings organised in 1992 functioned as a cartel. Secondly, it contends that, contrary to the Commission's findings, its participation in the meeting of 5 March 1992 relating to the Spanish market, the meeting in spring 1992 relating to the French market and that of 16 July 1992 relating to the Spanish and Portuguese markets has not been proven.

248 In the context of a plea alleging lack of evidence, Koehler submits that the Commission has not proved its participation in an anti-competitive agreement prior to October 1993. In support of that claim, it submits, first of all, that the statements of Mougeot and Sappi relied on by the Commission do not prove that collusive agreements were entered into within the framework of the AEMCP before October 1993. It goes on to state that the fact that collusive meetings took place concerning a number of national or regional markets before October 1993 does not show that there was Europe-wide coordination at that time. Secondly, Koehler asserts that, contrary to the Commission's findings, its participation in the meetings of 17 February and 5 March 1992 relating to the Spanish market, the meeting in spring 1992 relating to the French market and that of 16 July 1992 relating to the Spanish and Portuguese markets, the meeting of 14 January 1993 concerning the United Kingdom and Irish markets, the meeting in spring 1993 concerning the French market and the meeting of 30 September 1993 concerning the Spanish market, has not been proven.

249 In the context of a plea alleging manifest error of assessment, Mougeot submits that the Commission has not established its participation in a cartel before October 1993. It points out that Sappi's statements relied on by the Commission do not refer to it as one of the participants in the collusive meetings organised in 1992 and 1993. It adds that, since it was not a member of the AEMCP in 1992, it attended the meetings held by that association on 26 May and 10 September 1992 merely as an observer member and that it should be borne in mind that the participants in the AEMCP meeting of 9 February 1993 — which is the first meeting of that association in which it participated as a member — did not discuss the existence or the desirability of a cartel in its presence.

250 Mougeot further maintains that, in recital 111 of the decision, the Commission distorts the content of its statements of 14 April 1999. It also denies that Sappi's statement — cited by the Commission in recital 112 of the decision in support of its argument that the official AEMCP functioned as collusive meetings on prices before the association was restructured in September 1993 — has any probative value.

251 In the context of a plea alleging erroneous application of Article 81(1) EC and infringements of the principle of presumption of innocence and of an essential procedural requirement, Torraspapel submits that there is no evidence of its alleged participation in an infringement before the period between January 1992 and September 1993 inclusive. Torraspapel makes several preliminary comments as to the risks of strategic denunciation linked to the Commission's new leniency policy and the lack of probative value of the statements of AWA, Sappi and Mougeot relied on by the Commission in support of its argument. It then denies, first, that the official AEMCP meetings functioned as cartel meetings until September 1993. Secondly, it asserts that, contrary to the Commission's findings, it did not participate in the meetings of 17 February and 5 March 1992 relating to the Spanish market, the meetings in spring 1992 and spring 1993 concerning the French market and the meeting of 16 July 1992 concerning the Spanish and Portuguese markets.

252 The Commission disputes the criticisms concerning the probative value of the statements of AWA, Sappi and Mougeot. Those statements explain the cartel's organisation, including in 1992. The Commission also answers point by point the applicants' arguments relating to their lack of participation in the various national or regional meetings at issue.

Decision

253 According to the second paragraph of Article 1 of the decision, Bolloré, MHTP, Koehler and Torraspapel participated in the infringement from January 1992 to September 1995, whereas, according to that same provision, Mougeot participated in the infringement from May 1992 to September 1995.

254 The relevant passages of the decision in respect of the participation of the five applicants involved in the infringement during the period between January or May 1992, as appropriate, and September or October 1993 inclusive, are the following:

'(83) The EEA-wide planning and coordination of the cartel took place at the general cartel meetings convened under the cover of the official meetings of the trade association, the AEMCP.

(84) At the general cartel meetings the participants decided in principle on timing and the amount (in percentage form) of the price increases for each EEA country. They agreed on several consecutive price increases and for some months ahead.

(85) The AEMCP meetings functioned as cartel meetings at least from January 1992 until September 1993 ...

(87) The AEMCP meetings were normally well attended, and at the time of the infringement all the then AEMCP members participated in those meetings: AWA, Binda, Copigraph, Koehler, Mougeot, Sappi, Stora, Torraspapel/Sarrió and Zanders.'

255 In addition, it is clear from recitals 107 to 113 that Sappi admitted that competing manufacturers colluded during the regular meetings which took place at least from the beginning of 1992 onwards. A Sappi employee stated that those meetings were held 'Community-wide' from 1991. AWA also admitted that such meetings were held from the beginning of 1992. Mougeot, which joined the AEMCP at the end of 1992, gave a statement (Document No 7647, referred to in paragraph 165 above) concerning the content of an official AEMCP meeting held in 1993, on the basis of which the Commission inferred that the reconstitution of the association also involved a restructuring of the cartel. Mougeot stated:

'Probably on the occasion of the official AEMCP meeting in Frankfurt on 14 September 1993, or at the meeting before that, but certainly when [Mr B.] became head of AWA's self-copying division [Mr B.] clearly decided to invite the main self-copying manufacturers on each market to these unofficial meetings, and to change the organisation of the official AEMCP meetings. [Mr B.] decided that from now on there would be a lawyer present at all AEMCP meetings in order to give them an official character and ensure that the proceedings were not open to criticism. However, anything to do with prices would no longer be discussed at those meetings but only at "unofficial" meetings.'

Findings of the Court

256 First of all, it should be pointed out that, in relation to adducing evidence of an infringement of Article 81(1) EC, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and *Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraph 86).

257 Therefore, the Commission has to provide sufficiently precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place (see Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited).

258 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 513 to 520). Moreover, as the Court has already stated in paragraphs 155 and 166 above, the evidence must be assessed as a whole and statements made for the purposes of the Leniency Notice cannot for that reason alone be considered to be devoid of probative value.

259 It is clear from the decision that the Commission bases the liability of the five applicants concerned during the period between January 1992, or May 1992 in the

case of Mougeot, and September or October 1993, on their participation in collusive contacts and a system of collusive meetings interlinking, on the one hand, official AEMCP meetings, which, it maintains, functioned as pricing collusion meetings and, on the other, national or regional cartel meetings.

260 It is appropriate to analyse, first of all, the alleged system of collusive meetings, consisting of official AEMCP meetings and national or regional cartel meetings and, secondly, the participation of the undertakings concerned in those meetings before September or October 1993.

— The alleged system of collusive meetings

Official AEMCP meetings before September or October 1993

261 Recitals 107 to 113, 254 to 256 and 295 of the decision show that, to support its contention concerning the holding, before September or October 1993, of general (European) cartel meetings in the framework of official AEMCP meetings, the Commission relies, first of all, on Mougeot's declarations contained in Document No 7647 (see paragraph 255 above), secondly, the testimony of a Sappi employee and the admissions of Sappi and AWA, and, thirdly, the existence of numerous pieces of evidence showing that national or regional cartel meetings were organised from January 1992, as discussed in paragraph 281 et seq. below.

262 First of all, on reading recitals 113 and 254 of the decision, it is apparent that Mougeot's statements (Document No 7647) set out in recital 108 of the decision and referred to in paragraph 255 above, constitute the key aspect of the Commission's case on this point.

263 In this regard, it is appropriate, first of all, to dismiss Mougeot's contention that the Commission distorted the content of its statements. A comparison of recital 108 of the decision with Document No 7647, which contains the statements in question, shows that the Commission, in its decision, literally and faithfully reproduced Mougeot's statements contained in the document mentioned above.

264 In addition, in reply to an argument raised by Koehler, the particularly clear terms of Mougeot's statements explains why, as is apparent from recital 295 of the decision, the Commission did not set any store by Mougeot's later denial contained in its response to the SO.

265 It is also appropriate to dismiss Torraspapel's argument that footnote 97 of the decision shows that the Commission itself has doubts as to the probative value of Mougeot's statements. The fact that, in that footnote, the Commission, in the light of the content of the documentary evidence contained in the file, dismissed Mougeot's assertion that it attended an AEMCP meeting for the first time on 9 February 1993, cannot be interpreted as an expression of general doubt on the part of the Commission as to the probative value of Mougeot's assertions. In addition, unlike Mougeot's assertion referred to in footnote 97 of the decision, the statements set out in recital 108 of the decision are not contradicted by any evidence capable of casting doubt on the probative value of those statements.

266 It is clear from Mougeot's statements that, at an official AEMCP meeting it was decided by Mr B., when he became managing director of AWA self-copying division, to reorganise the activities of the AEMCP by holding, from that point onwards, official meetings of the association with a lawyer present in order to ensure that they were 'not open to criticism', by no longer discussing 'any pricing issues' at those meetings and from then on by calling 'unofficial' meetings to deal with those aspects. Mougeot's statements indicate clearly that, before the reorganisation of the activities of the AEMCP decided on by Mr B. (AWA), the official AEMCP meetings functioned as pricing discussions. Those discussions were precisely the aspect of those meetings open to criticism.

267 None of the applicants concerned disputes the assertion, contained in recital 110 of the decision, that the first official AEMCP meeting held with a lawyer present took place on 18 November 1993. In those circumstances, the Commission was justified in concluding that Mr B.'s decision to restructure the activities and meetings of the AEMCP was taken at the official meeting of that association which immediately preceded the meeting of 18 November 1993, that is, the meeting of 14 September 1993. The Commission was therefore correct in taking the view that pricing discussions took place in the context of the official AEMCP meetings up until the meeting of 14 September 1993.

268 That view is reinforced by recitals 115 to 121 of the decision, from which it is apparent that, after that decision to restructure, unofficial meetings — whose object was to agree price increases in the EEA — were held at the margins of official AEMCP meetings.

269 Secondly, the Commission relies on the extract, set out in recital 112 of the decision, of the testimony (Document No 5407, annexed to the SO) of a person employed by Sappi in February 1993 recalling that his colleagues 'would come back from meetings, including AEMCP meetings, with a very definite view on the price increases that were to be implemented and that they were relatively unconcerned by competitor reactions'.

270 Contrary to the assertions of some of the applicants, the recollections of the Sappi employee were not expressed with any hint of doubt or caution. In the absence of any assertions to the contrary, those statements should be understood as referring equally to the period before as to the period after September 1993. They confirm the fact that, in respect of the period between February and September 1993 inclusive, collusive meetings relating to European-wide price increases took place in the context of official AEMCP meetings which, moreover, was not disputed by the undertakings which admitted their participation in the cartel from 1992 onwards.

271 It is therefore apparent at this stage of the analysis that the Commission was correct in taking the view that, before September 1993, price agreements were agreed in the context of official AEMCP meetings. It must now be ascertained whether the Commission was justified in finding that the official AEMCP meetings were used as a framework for such agreements as from January 1992 at the latest and were continuously used as such until September 1993.

272 In that regard, it is clear from recitals 86 and 113 of the decision that, in support of its findings, the Commission contends that the first official AEMCP meeting of which it has written evidence is that of 23 January 1992. By comparing that assertion, on the one hand, with the consistent statements of AWA and Sappi, referred to in recital 107 of the decision, which demonstrate that collusive meetings were held at a European level from the beginning of 1992, and, on the other, evidence that the organisation of regular meetings and contacts at national or regional level began in January 1992 (the same recital), the Commission takes the view that the European cartel on pricing began in January 1992 at the latest. The Commission goes on to state, in recital 113 of the decision, that the documents in its possession show that eight AEMCP meetings were held between January 1992 and the meeting of 14 September 1993, all in Zurich.

273 It should be pointed out, first of all, that none of the applicants casts doubt on the accuracy of the assertions in the decision concerning the holding of an official AEMCP meeting on 23 January 1992.

274 Next, it should be borne in mind, first, that in its statement (Documents Nos 7828 and 7829, see paragraph 163 above) referred to by the Commission in recital 107 of the decision, AWA admitted to having participated, from the beginning of 1992, in certain 'improper' meetings with competitors which functioned as exchanges of intentions regarding announcements of price increases. AWA's statement, according to its reply to the Commission's request for information (Document No 7829), relates to meetings in which Sarrió, Mougeot, Stora-Feldmühle, Copigraph, Koehler and Zanders participated, and which took place between 1992 and 1995 in Paris, Zurich and Geneva. However, Zurich is the city which, as is apparent from Table A of Annex I to the decision, was host to all the official AEMCP meetings organised between January 1992 and September 1993.

275 However, according to AWA's reply (Document No 7827), the extract referred to in recitals 61 and 107 of the decision relates to the particular circumstances of the meetings which took place from 1 January 1992 until the date on which that reply was made, but not the official AEMCP meetings, so that it can be inferred that the reply excluded all the AEMCP meetings, as not being collusive. Since, according to the principle of the benefit of doubt, the existence of reasonable doubt should benefit the applicants, it must be held that AWA's statements in themselves do not permit the inference that the official AEMCP meeting of 23 January 1992 functioned as a framework for collusion on prices. Nevertheless, those statements, are a substantial indication of the existence of a cartel at European level from the beginning of 1992.

276 Secondly, in relation to Sappi's declarations referred to in recital 107 of the decision, it is clear from recital 73 of the decision that the Commission refers to 'statements made by Sappi [suggesting] that there were contacts of a collusive nature between the European carbonless producers as long ago as the founding of their trade association, the AEMCP, in 1981, and in particular from the mid-1980s onward'.

277 In footnote 64 of the decision (Document No 4656), the Commission states:

'Sappi has provided to the Commission a statement made by one of its employees who has been in sales of carbonless paper since the 1970s, saying that "[h]e had first suspected that there was collusion in carbonless paper in about the mid 1980[s] because of comments made by senior management ... [h]e would have believed that the collusion involved Arjo Wiggins, Köhler and Stora Feldmühle, among others [and he] had been aware of bilateral exchanges of information from about the mid/late 1980s".'

278 A statement of another Sappi employee shows that there were Community-wide contacts and collusive meetings between competitors from 1991 to 1993. That employee of Sappi states that he believed that those contacts led to collusion and that the suppliers discussed Community-wide pricing between themselves.

279 The statements of the Sappi employees referred to in the previous paragraphs are such as to establish the existence of a Europe-wide cartel on pricing involving several producers from the end of the 1980s or the beginning of the 1990s. Moreover, those statements support those of AWA as to the existence of a cartel at European level from the beginning of 1992. However, they do not permit the inference that the official AEMCP meeting of 23 January 1992 functioned as a framework for collusive contacts. No more than AWA's statements do they therefore in themselves permit the inference that the Commission was correct in establishing that collusive agreements on prices were entered into from January 1992 in the framework of the official AEMCP meetings.

280 It is therefore appropriate to examine the third factor advanced by the Commission, that is, the organisation of meetings and collusive contacts at national or regional level at the margins of the official AEMCP meetings from the beginning of 1992.

Meetings at national or regional level before September or October 1993

281 It is clear from Table 3, headed 'National and regional cartel meetings from February 1992 until spring 1995' and set out in recital 129 of the decision, that the Commission found that seven national or regional meetings were held between February 1992 and 30 September 1993. According to the details of those meetings provided in Annex II to the decision:

— on 17 February 1992 a meeting concerning the Spanish market was held, attended among others by Koehler and Torraspapel;

— on 5 March 1992 a meeting on the Spanish market was held, attended among others by Stora (MHTP), Koehler and Torraspapel;

— in spring 1992, probably in April, a meeting was held on the French market attended among others by Copigraph (subsidiary of Bolloré), Stora (MHTP), Koehler, Mougeot and Torraspapel;

— on 16 July 1992 a meeting was held concerning the Spanish market, attended among others by Stora (MHTP), Koehler and Torraspapel;

— on 14 January 1993 a meeting was held on the United Kingdom and Irish markets, attended among others by Stora (MHTP) and Koehler;

— in spring 1993, probably in April, a meeting was held on the French market attended among others by Copigraph (subsidiary of Bolloré), Stora (MHTP), Koehler, Mougeot and Torraspapel;

— on 30 September 1993, a meeting was held on the Spanish market, attended among others by Copigraph (subsidiary of Bolloré), Stora (MHTP), Koehler, Mougeot and Torraspapel.

282 It is appropriate to assess the validity of the Commission's findings relating to the holding of those meetings and their anti-competitive object.

283 As regards, first, the meeting of 17 February 1992 relating to the Spanish market, the Court has already held in paragraphs 161 to 169 above that the purpose of that meeting, to ensure that an agreement on a price increase on the Spanish market was observed, was collusive and consistent with the general object of the infringement.

284 Secondly, in relation to the meeting of 5 March 1992, it is also clear from the Court's findings in paragraphs 161 to 170 above that both the holding and the collusive object of that meeting have been established.

285 Thirdly, the holding and the anti-competitive object of the meetings in spring 1992 and spring 1993 concerning the French market are apparent from the statements of Sappi employees contained in Documents Nos 15026, 15027 and 15272, referred to in recital 137 of the decision and attached to the SO.

286 The extract of Sappi's statement contained in Document No 15272 is worded as follows:

'The director (at the time) of sales of Sappi (UK) Ltd in France stated that he attended two meetings with competitors in France with his boss, Mr W. The first took place in spring 1992 and the second a year after. One was held in a hotel in Charles-de-Gaulle airport and the other in the centre of Paris. Those are the only meetings of this kind in which he participated and he does not know whether there were others in France.

During those meetings, the discussion mainly concerned sheets, which Sappi did not sell in France at the time. The meetings did not lead to a consensus or any agreement on sheets. In relation to reels, the discussion concerned past and present pricing levels and not future pricing levels.'

287 In addition, in the table (Document No 15200, attached to the SO) contained in its reply of 18 May 1999 to an information request from the Commission, Sappi states that meetings were held at various dates in spring 1992 and spring 1993, probably April, in Paris, at Charles-de-Gaulle airport and in a hotel close to place de l'Étoile. According to that table, the purpose of those meetings was to exchange information and discuss customers and the prices they were charged. Sappi states that representatives of Sappi, AWA, Sarrió, Zanders, and Zanders' agent in France, Europapier and Feldmühle participated in those meetings. It claims that it cannot recall whether a representative of Koehler was also present.

288 The information set out in the previous paragraphs shows that the Sappi employee who provided that information and who personally attended those events recalls precisely that two meetings between competitors were held in spring 1992 and

spring 1993 in Paris, the object of which was, inter alia, to discuss customers and the prices they were charged. The absence of precise information as to exactly when those meetings were held can probably be explained by the significant lapse in time between the events at issue and the time when that employee was asked about them and this is not such as to detract from the precision of his testimony as regards the period in which the meetings concerned were held, their location and their object. Therefore, those various aspects of the Sappi employee's statements cannot be considered to be devoid of probative value.

289 As regards the meeting of spring 1993, it should be added that Documents Nos 4798, 4799 and 5034, cited by the Commission in footnote 135 of the decision, correspond to notes of travel expenses and show that Mr F. (Koehler) and Mr W. (Stora-Feldmühle) both went to Paris on 14 April 1993. Such evidence supports the Commission's argument that the meeting of spring 1993 took place in April.

290 It is clear from the Sappi employee's statements, referred to in paragraph 286 above, that according to his recollection no agreement on prices was entered into at the meetings of spring 1992 and spring 1993. However, the assertion that the participants in those meetings did not arrive at a consensus or an agreement of any nature in respect of sheets must be interpreted as meaning that attempts were made to that effect at those meetings as regards sheets, thereby rendering those meetings unlawful.

291 In fact, in the course of those attempts the participants were moved to exchange individual information on their prices and/or sales volumes in respect of sheets. According to the case-law (*Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraphs 117 and 121), the requirement that every economic operator determine its own policy, which is inherent in the Treaty provisions on competition, strictly precludes any direct or indirect contact between such operators, whose object or effect is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct

which one has decided to adopt or contemplates adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question. In that regard, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in collusion and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. In the light of that case-law, it must be accepted that the meetings of spring 1992 and spring 1993, in relation to the market for sheets, functioned as a framework for concerted action contrary to Article 81(1) EC.

292 Furthermore, the statements of the Sappi employee referred to in paragraph 286 above describe, in relation to reels, information exchanges and discussions during the meetings on customers and the prices they were charged, which, in the light of the case-law referred to in the preceding paragraph, shows the existence of concerted action prohibited under Article 81(1) EC.

293 The holding of meetings between competitors in spring 1992 and spring 1993 in Paris and the anti-competitive object of those two meetings are therefore established.

294 For the sake of completeness, even if it were to be held that those meetings merely gave rise to information exchanges which only breach the competition rules in so far as they are aimed at facilitating the conclusion of agreements on price increases and sales quotas and monitoring adherence to the agreements (recital 97 of the decision), the outcome would be unchanged.

295 Having regard, first of all, to the extract of Sappi's statement showing that at the meetings in question attempts were made to reach an agreement on the market for

sheets, secondly, to the evidence to the effect that since at least January 1992, price increases were agreed at European level in the context of the official AEMCP meetings, and, thirdly, to the presence both at the meeting of spring 1992 and that of spring 1993 of a number of undertakings which were represented at those official meetings (among others, Sappi, AWA and Zanders), the Commission is justified in taking the view that the object of exchanging commercial information at the meetings in France was necessarily linked to an agreement to increase prices of carbonless paper.

296 In relation, fourthly, to the meeting of 16 July 1992, it is clear from the Court's findings in paragraphs 180 to 184 above that the holding and collusive object of that meeting are established.

297 Fifthly, in order to establish the holding and anti-competitive object of the meeting of 14 January 1993, the Commission relies on the non-confidential Documents Nos 15026, 15175 and 15176, 15271 and 15272 and 4752 attached to the SO.

298 Document No 15026 includes the following information:

'The first employee told us that ... he thought that two meetings had taken place at the Heathrow Business Centre and one at the Intercontinental in London, but he could not recall which ... The second employee told us that ... an entry in his diary, dated 14 January 1993, referred to a meeting at the Heathrow Business Centre in terminal 2 at 10 o'clock. He could see no other reason for being there than to take part in a meeting with competitors ...'

299 Documents Nos 15175 and 15176 contain the following information:

'The items of evidence which ... was able to provide are the following ... As set out in the statements of 11 November and 20 December 1996, he attended a meeting with competitors in the United Kingdom, probably on Thursday 14 January 1993 at the Heathrow Business Centre in terminal 2 at 10 o'clock. A copy of the relevant page of his diary is attached at annex 5. [Mr I.], the sales and marketing director of Sappi (UK) Ltd, asked him to take part. The meeting concerned in the main the exchange of information as to which supplier supplied which customers, the trends and expectations of the markets. No agreement was reached ... Arjo Wiggins directed the meeting. It was rather a case of exchanging information than concluding agreements as to the future conduct to be adhered to.'

300 Documents Nos 15271 and 15272 include the following statements:

'The first employee said that ... On occasion, however, informal ad hoc meetings had taken place in the United Kingdom between competitors, the purpose of which was to ascertain the market, in particular concerning past activities, and to obtain the views of competitors rather than to achieve a consensus or engage in a concerted practice aimed at agreeing an increase in prices. Sappi's purpose in participating in those meetings was to obtain information, even if others may have used those meetings to communicate data or seek to distort the market; the discussions at those meetings were not aimed at sharing the market or allocating customers; ... he confirmed that he took part in such meetings, one a year in 1992, 1993 and 1994. He may also have attended one or two other meetings (but no more). He did not attend any meeting in 1995 or 1996. The industry had already begun the practice of organising such meetings when it started to be concerned with carbonless paper sales ... The meetings generally took place at Heathrow airport or in a London hotel ...'

301 Document No 4752 corresponds to the extract of the diary of a Sappi employee and contains the following entry for 14 January 1993: 'T2 Heathrow 10 o'clock Bus. Centre'.

302 In the light of the various matters referred to in paragraphs 298 to 301 above, the Commission was justified in finding that the meeting between competitors took place at Heathrow airport on 14 January 1993 at 10 o'clock in the morning. Admittedly, the extract set out in paragraph 299 above shows that the participants at that meeting did not come to an agreement. However, besides the fact that that extract may be interpreted as showing that an attempt was made to reach an agreement contrary to Article 81(1) EC, which, for the reasons set out in paragraph 291 above, is such as to render the meeting in question unlawful, the extract from Sappi's statement set out in paragraph 299 above shows that the meeting functioned as an exchange of information on the respective customers of the various participants in that meeting.

303 It should be recalled that the Commission considered the information exchanges to be such as to breach the competition rules on the ground that they contributed to the conclusion of, or compliance with, an agreement to increase prices.

304 A number of indicia support the argument that the object of exchanging information at the UK meeting was linked to an agreement to increase prices. First, the extract of Sappi's statement shows that an attempt to reach an agreement was made at the meeting concerned. Secondly, there is evidence to show that agreements to increase prices were concluded at European level in the context of the official AEMCP meetings from at least January 1992. Thirdly, the meeting of 14 January 1993 brought together a number of undertakings which were represented at the official AEMCP meetings in the context of which general cartel meetings concerning agreements to increase prices took place.

305 It should also be pointed out that, according to recital 183 of the decision, AWA confirmed in its reply to the SO that that meeting of 14 January 1993 was part of the 'improper' meetings between competitors (see, also, paragraph 164 above).

306 As regards, sixthly, the meeting of 30 September 1993 in Barcelona, referred to in recital 163 of the decision, the Court has already held in paragraph 172 above that the Commission was correct in finding that that meeting was held and that it functioned as a framework for exchanges of commercial information on individual sales in 1992 and 1993 and for agreements on the allocation of sales quotas for the fourth quarter of 1993 and a price increase to be implemented on 1 January 1994. In addition, the fact that, at that meeting of 30 September 1993 the participants first exchanged commercial information concerning their respective average sales before agreeing on the distribution of sales quotas, deciding on a collective price increase and then agreeing to convene again to ascertain compliance with those sales quotas, supports the Commission's argument that information on sales was exchanged and sales quotas agreed on certain occasions in order to facilitate the conclusion of agreements to increase prices and to ensure that those agreements were implemented.

307 Accordingly, the Commission has established to the requisite legal standard the holding of collusive meetings on the Spanish market on 17 February, 5 March and 16 July 1992 and 30 September 1993, on the French market in spring 1992 and spring 1993, and on the United Kingdom and Irish markets on 14 January 1993. The holding of those collusive meetings at national or regional level, in the light of Mougeot's statement, contained in recital 90 of the decision, that the reason for those meetings was to ensure that the price increases decided at European level were generally applied, reinforces the Commission's description of the infringement in recital 77 of the decision, in particular the fact that the means of achieving the objective of the cartel was to hold meetings at various levels (general, national or regional).

308 In respect of the start of the infringement, the Commission was therefore justified in finding that collusive contacts were made in Spain, contemporaneously with the official AEMCP meeting of 23 January 1992, which had the same object as those of the general cartel meetings which were organised in the context of the official AEMCP meetings until September 1993. That finding, together with the statements of several undertakings concerning their participation in a European cartel from January 1992 and AWA's assertion as to its participation in 'improper' meetings, from January 1992 onwards, on various national or regional markets relating to exchanges of intentions as to announcements of price increases (Document No 7828), leads the Court to conclude that the Commission was right in considering that the official AEMCP meeting of 23 January 1992 functioned as a general cartel meeting and served to fix, in respect of the participating undertakings, the starting point of the infringement as January 1992.

309 As was pointed out in paragraph 272 above, according to recital 113 of the decision, the documents in the Commission's possession show that between January 1992 and the meeting of 14 September 1993 eight AEMCP meetings took place, the exact dates of which are referred to in Table A of Annex I to the decision, all in Zurich. Having regard to that information, which the applicants have not challenged, and in the light of the admissions of Sappi, AWA, and that of Mougeot contained in recital 108 of the decision — from which it is clear that until September 1993 the general cartel meetings were held in the context of the official AEMCP meetings, that statement being supported, in relation to the period from February to September 1993 inclusive, by those of a Sappi employee (see paragraph 269 above) — the Commission was justified in finding that the European cartel on prices continued between January 1992 and September 1993, even if it were accepted that only some of the eight official meetings referred to above functioned as collusive agreements on prices at European level.

310 The Court therefore holds to be sufficiently established the Commission's findings that, from January 1992 until September 1993, collusive agreements to increase prices Europe-wide were entered into in the context of official AEMCP meetings, these being followed by a series of regional or national meetings whose object was to ensure implementation of those agreements on a market-by-market basis.

311 It must still be ascertained whether the Commission correctly established, for the period before September or October 1993, the participation of the five applicants in the global anti-competitive plan whose main objective was to reach agreement on price increases and the timing of their implementation through the holding of meetings at various levels.

— Participation of the applicants in meetings before September or October 1993

312 It should be recalled at the outset that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where that scheme of meetings was part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in question, it would be artificial to split up such conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements (see the case-law referred to in paragraphs 188 and 196 above).

313 The Court notes that neither Koehler nor Torraspapel disputes the statement, in Table B of Annex I to the decision, that they both attended all the official AEMCP meetings which were held over the period between January 1992 and September 1993. Even if it were accepted that only some of the meetings referred to above functioned as collusive agreements on prices, that suffices for a finding that the Commission rightly established their continued participation in collusive agreements on prices, and, therefore, in the infringement found in the first paragraph of Article 1 of the decision from January 1992 to September 1993 inclusive.

314 MHTP, in turn, does not dispute the statements, in the table referred to in the preceding paragraph, that undertakings in the Stora group took part in various official AEMCP meetings which were held during the period between January 1992 and September 1993. Since MHTP does not, moreover, dispute the Commission's findings in recitals 360 to 362 of the decision that it must be held liable for the unlawful behaviour of the undertakings in the Stora group, the Commission correctly established MHTP's participation in collusive agreements on prices and, therefore, in the infringement found in the first paragraph of Article 1 of the decision during the period between January 1992 and September 1993.

315 In addition, MHTP does not dispute its liability for the infringement from January 1993. By not contesting the facts which underlie the finding of the infringement for the period between January 1993 and the middle of 1995 — which permitted it to secure a 10% reduction in the fine imposed on it — (recitals 456 and 458 of the decision) — MHTP admits that collusive meetings were held at European level between January 1993 and September or October 1993. At the hearing, it also said that the existence of those European cartel meetings at that time was entirely plausible. It also accepted at the hearing that it was entirely credible, taking Mougeot's statement literally, that the AEMCP meeting constituted the forum for the cartel at that time. However, neither MHTP nor the other undertakings disputing the collusive nature of the AEMCP meetings before its restructuring in September or October 1993 furnished evidence capable of proving any change in the organisation or structure of the AEMCP in January 1993. Furthermore, MHTP did not provide any alternative explanation to that given by the Commission as to the location and holding of the collusive meetings of the European cartel before the restructuring of the AEMCP in September/October 1993.

316 Bolloré does not dispute the statements, in Table B of Annex I to the decision, that Copigraph attended the official AEMCP meeting of 23 January 1992, then four of the seven subsequent meetings which took place before the 14 September 1993 meeting. The indication of Copigraph's presence at the official AEMCP meeting of 23 January 1992 gives grounds for considering that on that date Copigraph participated in a collusive agreement on prices at European level.

317 Even if it is not certain that all the official AEMCP meetings which were held between January 1992 and September 1993 functioned as a framework for the conclusion of a collusive agreement on prices, the finding that Copigraph participated in five of the eight official meetings warrants the conclusion that that undertaking participated continuously in collusive Europe-wide pricing agreements between January 1992 and September 1993. Copigraph did not in fact distance itself overtly from the meetings which it attended (see the case-law referred to in paragraphs 188 and 196 above).

318 Finally, as regards Mougeot, it is common ground that it did not attend the meeting of 23 January 1992 and that the first AEMCP meeting in which it participated was that of 26 May 1992. Mougeot then took part in all the AEMCP meetings until September 1993, that is, six of the eight meetings which preceded the 14 September 1993 meeting. Mougeot did not, any more than Copigraph, distance itself publicly from the meetings which it attended (see the case-law referred to in paragraphs 188 and 196 above). Even when it took part in those meetings as an observer, Mougeot failed to demonstrate that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 188 above, paragraph 81). It is not clear from any evidence adduced that Mougeot was accepted in the AEMCP with difficulty or that it was marginalised. On the contrary, according to the minutes of the AEMCP meeting of 26 May 1992, it had been decided at the previous meeting to invite Mougeot to join the AEMCP. Furthermore, at that meeting, the president of the AEMCP asked the Mougeot representative to introduce its company as a new member and not as a mere guest. The minutes of the AEMCP meetings of 10 September and 25 November 1992 show that the Mougeot representative was present as one of the participants without distinguishing that undertaking from the others. The minutes of the meeting of 25 November 1992 state that the Mougeot representative informed the participants that the company should be able to add its figures to those of the association in December, figures which would cover the second semester of 1992. Even if Mougeot did not acquire the status of member of the AEMCP until 1993, its presence at the collusive AEMCP meetings in the same capacity as the other members from May 1992 onwards together with the supply of information covering the second semester of 1992 show, in the absence of evidence to the contrary, that Mougeot participated in the cartel from 26 May 1992.

319 Those findings as to the participation of the applicants concerned in the Europe-wide cartel before September or October 1993 are sufficient to hold them liable for the infringement for that period.

320 For the sake of completeness, the Court finds that evidence as to the participation of a number of those undertakings at meetings at national or regional level serves to underline the continuous nature of their participation in the infringement.

321 Accordingly, the Commission found that Koehler and Torraspapel had participated in the meeting of 17 February 1992. To that end, it relies on Sappi's internal note of the same date (Document No 4588), describing a meeting of the 'interested parties'. That reference — read in conjunction with those contained in the note relating to the uncertainties caused by the conduct of Koehler and Sarrió on the Spanish market — enabled the Commission to find that Koehler and Sarrió were among the 'interested parties' attending that meeting, the purpose of which was to examine the problems connected with the failure of those two undertakings to comply with the agreement referred to above. As is clear from the note of 9 March 1992 (Documents Nos 4703 and 4704, referred to in paragraph 171 above), they were party to that agreement in their capacity as carbonless paper distributor or supplier on the Spanish market.

322 Since Torraspapel did not deny either the Commission's assertion, in recital 363 of the decision, that Sarrió was and still is its wholly-owned subsidiary, or the Commission's claim, in the same recital, that its liability for Sarrió's conduct had not been disputed during the administrative procedure, the Commission was justified in holding it liable for Sarrió's participation in the collusive meeting of 17 February 1992.

323 As regards the meeting of 5 March 1992, it is clear from footnotes 7 and 10 in Annex II to the decision that, for the purposes of establishing the participation of Koehler and Torraspapel in that meeting, the Commission relies on the internal Sappi note

of 9 March 1992, referred to in recital 156 of the decision (Documents No 4703 and 4704, referred to in paragraph 171 above). However, while it may be inferred from that note that the two undertakings in question were party to an agreement to increase prices by ESP 10 per kilo at the beginning of February 1992 on the Spanish market, it does not contain any information to show that they took part in a collusive meeting on 5 March 1992.

324 However, it is clear from AWA's reply of 30 April 1999 to a Commission request for information (Document No 7828, referred to in paragraph 163 above) that representatives of Sarrió (Torraspapel), Koehler and Stora (MHTP) were present at the 'improper' meetings, of which the meeting of 5 March 1992 was part, as AWA confirmed in its reply to the SO (recital 170 of the decision).

325 Furthermore, the Commission finds that the five applicants concerned attended the two meetings relating to the French market.

326 Sappi's statements referred to in paragraphs 276 to 279 and 285 to 293 above, combined with AWA's assertion, in Document No 7828, that representatives of that undertaking participated in 'improper meetings' between 1992 and 1995, in particular in Paris, involving representatives of Sarrió, give grounds for concluding that the Commission correctly established Sarrió's (Torraspapel's) participation in the two meetings concerned. The doubts expressed by the Sappi employee (Document No 15027, annexed to the SO) as to whether or not the Sarrió representative who attended that meeting was the sales manager of that undertaking in France cannot obscure the fact that, contrary to the cautious tone it adopted with regard to the presence of a Koehler representative at those meetings, it expresses no reservations as to Sarrió's representation at them.

327 As regards Stora (MHTP), the assertion, contained in the statement referred to in paragraph 287 above, that Feldmühle was represented at the meeting of spring 1992, combined with AWA's assertion, contained in Document No 7828, concerning the participation of representatives of that undertaking in 'improper meetings' between 1992 and 1995, in particular in Paris, alongside representatives of Stora-Feldmühle, supports the Commission's argument that Stora-Feldmühle attended the meeting of spring 1992 and, thus, the attribution to MHTP of liability for that participation.

328 In its written pleadings, MHTP points out that the Sappi employee, who is the source of the information referred to in the previous paragraph, also states that Stora-Feldmühle did not attend the meeting of spring 1993 in Paris, while the Commission claims that it has evidence of that undertaking's participation in the meeting. It maintains that in those circumstances it cannot be ruled out that the Sappi employee erred in its identification of the French meeting which Stora-Feldmühle attended. However, the firm nature of the Sappi employee's assertion as to Stora-Feldmühle's presence at the first of the two French meetings described in his testimony renders MHTP's contention wholly improbable.

329 In relation to the meeting of spring 1993, MHTP does not dispute its participation in the infringement from January 1993 and does not criticise the Commission's findings as to the meeting of spring 1993 in Paris and its participation in that meeting. There is no reason, in those circumstances, to investigate the validity of the Commission's finding as to Stora-Feldmühle's participation in the meeting of spring 1993 in Paris.

330 The Sappi employee does not refer to the presence of Mougeot and Copigraph (Bolloré's subsidiary) at those two meetings. However, the general assertion in AWA's statement, in Document No 7828, as to the organisation between 1992 and 1995 of 'improper' meetings in Paris, Zurich and Geneva between representatives of

AWA, Sarrió, Mougeot, Stora-Feldmühle, Copigraph, Koehler and Zanders, constitutes an indicium of Mougeot's and Copigraph's participation in the meetings of spring 1992 and spring 1993 in France.

331 That indicium cannot by itself prove their participation in those two meetings. However, since Mougeot and Copigraph were two of the major players on the French market for carbonless paper, the reference to those two undertakings in AWA's general assertion as to the holding of meetings between competitiors between 1992 and 1995, particularly in Paris, necessarily implies that they were perceived — at least by the European market leader — as being party to unlawful conduct on the French market over the entire period, irrespective of their presence at or absence from the two meetings mentioned above. That indicium of participation in the cartel on the French market at that time is reinforced by Mougeot's statements that it 'received phone calls from one company or another, most often from AWA, announcing the details of price increases by market' essentially 'until mid-1995' (Document No 11598, recital 95 of the decision and paragraph 41 of the SO).

332 As regards the meeting of 16 July 1992, Mr B.G. submitted (see Document No 4484, referred to in paragraph 180 above) that Sarrió (Torraspapel), AWA (Messrs F. and B.) and Koehler (Mr F.) were present at that meeting. That statement, which supports AWA's general assertion, contained in Document No 7828, as to its participation between 1992 and 1994 in 'improper' meetings in Barcelona alongside representatives, among others, of Sarrió (Torraspapel) and Koehler, establishes those two undertakings' participation in the collusive meeting of 16 July 1992 concerning the Spanish and Portuguese markets.

333 In relation to Stora (MHTP), in establishing that undertaking's participation in the meeting of 16 July 1992, the Commission relies on AWA's statements (Document No 7828) that the latter participated between 1992 and 1994 in a number of meetings in Lisbon and Barcelona alongside representatives of Sarrió, Unipapel, Koehler, Ekman and Stora-Feldmühle or some of those undertakings.

334 It should be pointed out that Mr B.G., in his detailed statements regarding the meeting of 16 July 1992, does not mention Stora as being one of the participants in that meeting. In that context, AWA's general assertion might seem insufficient for the purposes of establishing Stora's (MHTP's) participation in the meeting of 16 July 1992.

335 It should be recalled, however, as the Commission points out in its written pleadings in Case T-122/02, that it is clear from Mr B. G.'s statements that the holding of the meeting of 16 July 1992 was manifestly explained by the fact that Sarrió and Stora-Feldmühle were charging very low prices — below the cost of the paper — in Portugal. As the Commission rightly points out, that reference to the policy of charging very low prices, particularly by Stora-Feldmühle, may be understood as meaning that that undertaking was not adhering to the pricing discipline required of it under an agreement on the market. In other words, such an assertion, combined with AWA's statement contained in Document No 7828, may be regarded as proving that, despite not attending the meeting on 16 July 1992, Stora-Feldmühle was at that time party to a pricing agreement on the Iberian markets.

336 The Commission finds that Stora (MHTP) and Koehler participated in the meeting of 14 January 1993. MHTP does not dispute its participation in the infringement from the beginning of January 1993. In those circumstances, there is no need for the Court to examine the validity of the Commission's finding as to the participation of that undertaking in the meeting of 14 January 1993.

337 As regards Koehler's participation in that meeting, it is clear from the extract from Sappi's statement in Document No 15026 that, according to the first employee whose testimony was the subject of that statement, '[Mr D.] (Koehler)' was present for the entirety or part of the meetings held in the United Kingdon at Heathrow airport or in a London hotel. The second employee, whose testimony was also the subject of the statement mentioned above, stated in turn that he thought that '[Mr D.] (Koehler)' had attended the meeting of 14 January 1993. The statement

referred to above, and the one that 'as well as the names of competitors provided to the Commission in December 1996, [the employee concerned] was able to identify ... [Mr K.] of Koehler as one of the participants' are also contained in Documents Nos 15176 and 15178, which correspond to another statement of Sappi. Finally, AWA stated (Document No 7828) that between 1992 and 1994, its representatives in the United Kingdom participated in 'improper' meetings involving, in particular, representatives of Koehler.

338 In the light of that body of indicia, the Commisison was correct in finding that Koehler was represented at the meeting of 14 January 1993.

339 As regards the participation of Copigraph, Koehler, Stora-Feldmühle and Torraspapel in the meeting of 30 September 1993, it is clear from footnotes 40, 42, 44 and 45 of Annex II to the decision that the Commission bases it findings on Documents Nos 5 and 7828. The mention, contained in Sappi's 'notes for file' on that meeting, of 'declared' sales, and the information, based on those notes, relating to the allocation of precise sales quotas for the fourth quarter of 1993 (see paragraph 172 above), are strong evidence of the presence of the various undertakings referred to in paragraph 1 of those notes, namely Copigraph, Stora-Feldmühle, Koehler and Sarrió.

340 In addition, in relation to Sarrió, Koehler and Stora-Feldmühle, that strong evidence is corroborated by the general assertion, contained in AWA's statement in Document No 7828, that managers of AWA in Spain attended several 'improper' meetings between 1992 and 1994, particularly in Barcelona, at which AWA believes that representatives of Sarrió, of Koehler and its agent, Ekman, and of Stora-Feldmühle were also present.

341 As regards Koehler, it must again be pointed out that, as set out in footnote 186 of the decision, the Commission has an expenses note, an airplane ticket and a hotel bill belonging to Mr F. (Koehler), which prove that he was in Barcelona on 30 September 1993. At the Court's request, the Commission produced those documents in Case T-125/02.

342 Furthermore, even assuming that some of the applicants concerned did not in fact attend the meeting of 30 September 1993, the evidence that they were allocated sales quotas for the last quarter of 1993, in the light of their declared sales for 1992 and 1993, proves that on that date they were part of the cartel on the Spanish market involving the anti-competitive conduct shown by Sappi's 'notes for file'.

343 Finally, as Koehler correctly points out in its written pleadings, it is clear from Annex II to the decision that, in order to establish that undertaking's participation in the meeting referred to above, the Commission relies on the finding that Ekman was present at that meeting. The Commission finding in question appears to be based on the extract from AWA's statement contained in Document No 7828 that 'Ekman (Koehler's agent)' was one of the participants at the Spanish meetings which AWA attended between 1992 and 1993.

344 In its written pleadings, Koehler maintains that Ekman was an independent distributor, so that Ekman and Koehler cannot be considered to form one and the same economic entity, and therefore that Koehler cannot be held liable for Ekman's conduct. However, it is clear from AWA's statement referred to in the previous paragraph that Ekman was perceived by the other participants as attending the meeting as Koehler's agent, and not as an independent distributor. Next, Sappi's 'notes for file' on the meeting of 30 September 1993 (Document No 5, referred to in paragraph 172 above) refer to 'Koehler's declared sales'. This shows that Ekman was accompanied at that meeting by an employee of Koehler — as AWA's statement referred to above seems to indicate, together with the documentary evidence

attesting to Mr F.'s (Koehler) presence in Barcelona on 30 September 1993 — or that Ekman attended the meeting as Koehler's representative acting according to Koehler's instructions, as is shown by AWA's perception of the capacity in which Ekman took part in that meeting. In any event, the Commission was justified in establishing Koehler's participation in the meeting of 30 September 1993.

345 In conclusion, the Commission has proved to the requisite legal standard that Bolloré (through the intermediary of Copigraph), Koehler, Mougeot and Torraspapel participated in the infringement before September or October 1993 and that MHTP did so before January 1993.

(b) Mougeot's participation in the infringement after 1 July 1995

346 In the context of a plea alleging manifest error of assessment, Mougeot maintains that it has not been established that it participated in the infringement after 1 July 1995. It denies that it participated in the unofficial AEMCP meeting of 2 February 1995, referred to in recital 273 of the decision. It further submits that the evidence relied on by the Commission does not prove that it adhered to the agreement to raise prices allegedly entered into at that meeting. It adds that the Commission's contention, set out in recital 273 of the decision, concerning its adherence to price increases on the Italian market in September 1995 is not supported by any evidence referred to in the decision.

347 The Commission finds that Mougeot participated in the infringement until September 1995. It is clear from recitals 126, 237, 250, 251 and 273 of the decision that that finding relies, first, on the consideration, at the general cartel meeting of 2 February 1995, of Mougeot's volume requirements, and, secondly, on its adherence to the agreements concluded at that meeting.

348 It must be borne in mind, first, as regards the holding and collusive object of that meeting, that the Commission produced the minutes of that meeting (Document No 7, attached to the SO and paragraphs 144 to 146 thereof). According to those minutes, on 2 February 1995 a general cartel meeting was held in Frankfurt at which a series of price increases was agreed for different EEA markets (France, Germany, Austria, Spain, Portugal, the United Kingdom, Italy, Finland, Denmark, Norway, Sweden, Greece, Belgium, the Netherlands and Iceland) in relation to reels and sheets and the date of implementation of the various price increases. Those dates were between 1 February 1995 (10% increases in the price of reels and 5% in the price of sheets on the Spanish market) and 1 September 1995 inclusive (8% increases in the price of reels and 5% in the price of sheets on the United Kingdom market; 10% increase in the prices of reels and sheets on the Italian market).

349 It is apparent, secondly, as regards Mougeot's participation in that meeting, that the list of participants at that meeting, as contained in the minutes and partially set out in recital 124 of the decision, included Mr P.B. (Mougeot). He is also referred to as a participant in that meeting by Sappi in its statements of 18 May 1999 (Document No 15200 in the non-confidential version, referred to in paragraph 162 above).

350 However, Mougeot produced Mr P.B.'s boarding card for 15.30 proving that, in its view, its representative left Frankfurt immediately after the official AEMCP meeting held that day.

351 It should be pointed out, in that regard, that it follows from recital 123 of the decision that, as the Commission notes, this does not rule out the possibility that Mougeot's representative participated in the beginning of the meeting held at 14.00 at the airport.

352 However, even though Mougeot was not present at that general cartel meeting of 2 February 1995, a number of pieces of evidence, taken as a whole, prove that Mougeot was associated with the decisions adopted and adhered to them.

353 First of all, even if the reference to the Mougeot representative on the list of participants at that meeting should be regarded as erroneous, it nevertheless shows that Mougeot was perceived as having participated in the meeting or as being part of the limited group of participants in the cartel.

354 Secondly, it is apparent that Mougeot's volume requirements were discussed at that meeting, as establised by the minutes of the meeting. According to those minutes 'Mougeot needs a market share' and AWA 'will propose to allocate it a certain tonnage'. The consideration, in the general meeting, of Mougeot's needs and the proposed solution lends credence to Mougeot's continued participation in the cartel. They do not support the contention that there was merely a bilateral discussion between Mougeot and AWA.

355 Thirdly, as the Court has already held in paragraph 331 above, Mougeot itself stated (Document No 11598) that it 'received phone calls from one company or another, most often from AWA, announcing the details of price increases by market ... until mid-1995'. This was therefore the case in February1995.

356 Fourthly, in a fax dated 2 February 1995 (Document No 1378, recital 237 of the decision) and sent the following day to a British distributor, J & H Paper, Mougeot states that '[t]he U.K. market will increase by 8% the 6th of March so we propose you our best offer'. That statement, read in conjunction with that contained in the minutes of the meeting of 2 February 1995 relating to an increase of 8% in the price of reels on the UK market from 1 March 1995 leads to the conclusion that that undertaking must have been informed on the day of the meeting of the adoption, during that meeting, of a 8% increase in the price of reels on the UK market from the beginning of March 1995, and immediately passed that increase in the proposed prices to the distributor to which the above mentioned fax was addressed.

357 As the Commission correctly contends in its written pleadings, it is appropriate to dismiss Mougeot's argument that that fax does not reflect the application of an agreement to increase prices, but a unilateral decision adopted by Mougeot prior to the meeting of 2 February 1995.

358 Admittedly, the fax in question begins with the words '[a]s I told you last week, we have to increase our prices because of an increase [in the price] of the pulp in January'. However, as the Commission correctly points out, it is clear from that extract of the fax that Mougeot's annoucement to J & H Paper during the week which preceded the despatch of that fax dealt only with the need for a price increase. The fact that Mougeot communicated the exact amount of that increase (8%) only on 3 February 1995 leads to the conclusion that Mougeot, first of all, intended to warn J & H Paper of an imminent increase in the price of paper, and, secondly, told it of the amount of that increase on the basis of information received regarding the price increase agreed at the general cartel meeting of 2 February 1995 for the UK market from 1 March 1995. In addition, the fax at issue refers to an 8% increase in the prices implemented as from 6 March 1995 on the 'British market', and not only by Mougeot, therefore confirming the collusive origin of that decision to raise prices.

359 Finally, clearly Mougeot did not distance itself from the cartel and thus the decisions taken during that general cartel meeting of 2 February 1995. On the contrary, Mougeot does not deny having participated in the cartel up to July 1995. It admits its presence at a meeting of spring 1995, the object of which was to fix the prices for July.

360 It is clear from all those matters that the Commission was justified in taking the view that Mougeot had adhered to the agreements concluded at the general meeting of 2 February 1995, including the decision to increase prices in the United Kingdom and Italy. It should be added that the question whether Mougeot implemented those price increases cannot affect its liability for the infringement. Nor is the fact that an

undertaking does not act on the outcome of a meeting having an anti-competitive object such as to relieve it of responsibility for its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 50, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 188 above, paragraph 85).

361 Accordingly, pursuant to the settled case-law, referred to in paragraph 186 above, that Article 81 EC also applies to agreements which continue to produce effects after they have formally ceased, the Commission correctly found that Mougeot participated in the cartel until September 1995, the date of the last price increase planned at the meeting of 2 February 1995.

362 The Court must therefore reject Mougeot's plea alleging that it did not participate in the cartel after 1 July 1995.

2. The plea raised by Divipa

363 In the context of pleas alleging erroneous application of Article 81 EC and Article 53 of the EEA Agreement and error of assessment, Divipa maintains that the Commission was wrong to impose a fine on it for the period between March 1992 and January 1995. It submits that it did not take part in any of the meetings in which the Commission accuses it of having partipated between March 1992 and October 1994. It adds that the prices which it applied in January 1995 are not the same as those which were agreeed at the meeting of 19 October 1994. It cannot therefore be found to have adhered to the cartel any time after that meeting.

364 In that respect, it follows from paragraph 185 above that the Commission's findings that there was a collusive meeting of 23 September 1994 on the Spanish market and that Divipa participated in that meeting are therefore not established. On the other hand, following the assessment in paragraphs 170 to 195 above, it must be held that the Commission's findings as to Divipa's participation in the collusive meetings on the Spanish market held on 30 September and 19 October 1993, and on 3 May, 29 June and 19 October 1994 are established.

365 Even though Divipa's participation in the collusive meeting of 5 March 1992 has not been proved directly, it follows from a body of consistent indicia (see, in particular, paragraphs 170 to 195 and 205 to 215 above) that Divipa was a member of the cartel from March 1992. The Commission was therefore justified in finding Divipa's participation in the infringement from that date.

366 As regards the end of the period of Divipa's participation in the infringement, it is clear from paragraphs 162 and 177 above that the Commission correctly established Divipa's participation in a meeting on the Spanish market on 19 October 1994 at which prices were fixed for implementation on 3 January 1995. In those circumstances, even if Divipa's contention — that the prices which it applied in January 1995 were not the same as those which were agreed at the meeting referred to above — were to be believed, that contention is at most such as to demonstrate that in January 1995 Divipa did not comply with the agreement concluded on 19 October 1994, which, together with the absence of evidence concerning Divipa's participation in a collusive agreement after January 1995, leads to the conclusion that Divipa's participation in the infringement, as the Commission finds in its decision, ceased in January 1995. On the other hand, that contention does not undermine the finding that Divipa, at the meeting of 19 October 1994, participated in a price-fixing agreement and agreed with the other participants to implement that agreement on 3 January 1995, which reflects its adherence to the agreement until that date. The Commission was therefore right in finding that Divipa participated in the infringement until January 1995.

367 It must be held that Divipa's participation in collusive meetings concerning the Spanish market reflects its adherence to the general European cartel (see paragraphs 205 to 215 above), and, therefore, its participation in the infringement found in the first paragraph of Article 1 of the decision.

3. The plea raised by Zicuñaga

368 In the context of a plea alleging errors of assessment, Zicuñaga maintains that the Commission's claims concern only its alleged participation in meetings organised between October 1993 and October 1994. It goes on to state that no evidence establishes its participation in the meeting of October 1993 and its participation therefore lasted five months at most.

369 In that respect, it is clear from the Court's findings in paragraphs 161 to 201 above that the Commission was justified in finding that Zicuñaga participated in the collusive meetings relating to the Spanish market held on 19 October 1993, 3 May, 29 June and 19 October 1994. It must be held that Zicuñaga's participation in the various meetings shows its participation in the infringement found in the first paragraph of Article 1 of the decision.

370 In relation to the meeting of 19 October 1994, it has been pointed out in paragraph 193 above that at that meeting Zicuñaga participated in an agreement to fix prices and agreed with the other participants to implement that agreement on 3 January 1995, which, according to the case-law cited in paragraph 188 above, shows its adherence to the cartel until that date.

371 In the light of the foregoing, the Court must hold that the Commission was justified in finding in the second paragraph of Article 1 of the decision that Zicuñaga participated in the infringement during the period from October 1993 until January 1995. The plea examined must therefore be dismissed.

II — *The pleas for cancellation or reduction of the fines set in the first paragraph of Article 3 of the decision*

372 All the applicants submit heads of claim seeking a reduction of the fine imposed. For its part AWA contends, principally, that the fine which it was ordered to pay should be annulled. The applicants' arguments can essentially be broken down into eight pleas or series of pleas.

A — *The plea alleging infringement of the rights of the defence and of the principle of the protection of legitimate expectations on account of the incomplete and imprecise nature of the SO in relation to the fines*

1. Arguments of the parties

373 This plea can be subdivided into three parts. First, AWA submits that the Commission set its fine on the basis of a series of factors which were not announced in the SO and on which it did not therefore have the opportunity to comment during the administrative procedure. Second, it complains that the Commission imposed on it a fine higher than those imposed in previous decisions. Third, AWA claims that the Commission set the fine in disregard of the Guidelines and did not announce its intention in the SO that it would be departing from them.

374 The Commission submits that the SO enabled AWA to know the factors considered relevant for the purpose of determining its fine. The Commission maintains, moreover, that it complied fully with the Guidelines. Lastly, the fact that the Commission in the past imposed fines of a certain level for particular types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17.

2. Findings of the Court

375 This plea will be addressed by examining, initially, the second and third parts, in which AWA claims that the Commission, by departing from its earlier practice and the Guidelines, infringed AWA's right to be heard and its legitimate expectations.

(a) Infringement of the right to be heard and failure to observe the principle of the protection of legitimate expectations in so far as the Commission departed from its previous practice

376 As regards previous decisions it should be recalled that, according to settled case-law, the fact that the Commission in the past imposed fines of a certain level for particular types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17, if that is necessary to ensure the implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 109; Case T-7/89 *Solvay* v *Commission*, cited in paragraph 196 above, paragraph 309; and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). The proper application of the Community competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that

policy (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 109, and *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 237).

377 Moreover, according to settled case-law, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained (Case 245/81 *Edeka* [1982] ECR 2745, paragraph 27, and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33). Consequently, undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 146, and *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 243).

378 Consequently, AWA cannot base an argument on the fact that the Commission exceeded the level of fine applied in its previous practice. Indeed, AWA appears to admit, in its reply, that the Commission's previous practice could not give rise to legitimate expectations on its part.

(b) Infringement of the right to be heard and of the principle of the protection of legitimate expectations in so far as the Commission departed from the Guidelines

379 AWA submits that the Commission departed from the Guidelines without announcing its intention to do so, thus prejudicing the legitimate expectations which AWA had placed in those provisions. The Commission departed from the Guidelines, first of all, by ignoring the fact that the infringement in question had no effect or, at the most, had a limited effect. Next, its assessment of the gravity of the infringement led it to set the starting amount of the fine at EUR 70 million, that is to

say an amount 3.5 times higher than the starting point referred to in the Guidelines for 'very serious infringements', namely EUR 20 million. Lastly, AWA asserts that the Commission should have announced its intention to impose a fine the amount of which, before the reduction applied under the Leniency Notice, was 2.5 times higher than the maximum amount ever imposed by the Commission on one single undertaking.

380 It should be recalled that the Guidelines were published in January 1998, that is to say after the infringement but before the SO was sent on 26 July 2000.

381 According to AWA, the Commission would have been free to depart from the Guidelines and impose higher fines if it had amended the Guidelines or, at the very least, if it had announced such an intention in the SO, which it did not do.

382 However, it must be stated that AWA has failed to demonstrate how the Commission departed from the Guidelines when setting the fine. By putting forward its plea, AWA errs in its reading of both the Guidelines and the decision.

383 First, as regards the impact of the infringement, the Commission explained, at recitals 382 to 409 of the decision, the manner in which it took into account, in the assessment of the gravity of the infringement, the actual impact of the infringement on the market and the real effect of the unlawful conduct of each participant on competition. The Commission considered the argument, put forward by some of the undertakings, including AWA, during the administrative procedure, that the actual impact of the infringement on the market was very limited. The Commission then explained why it was necessary to reject such an argument. The Commission thus found in its decision that the infringement had indeed had an impact and set the fine accordingly. AWA cannot therefore claim that the Commission did not take account

of the impact of the infringement. The fact that that impact was taken into account also means that it cannot be complained that the Commission failed to announce its intention not to take into consideration the non-existent or limited impact of the infringement.

384 Assuming that AWA in actual fact disputes the Commission's assessment of the impact of the infringement on the market, its criticism merges in that respect with that underlying its plea concerning the gravity of the infringement and will be examined in that context.

385 Moreover, the Commission had announced its intention to take account of the impact of the infringement. It had stated in the SO that it would take into consideration, in its assessment of the gravity of the infringement, its 'actual impact on the market' (paragraph 262).

386 Secondly, in so far as AWA asserts that the Commission exceeded the starting amount referred to in the Guidelines, it should be recalled that they provide, in respect of 'very serious infringements', like 'horizontal restrictions such as price cartels and market-sharing quotas', for '[l]ikely fines' which can go 'above ECU 20 million'. In view of the fact that the Commission left open the possibility of opting for a starting amount in excess of EUR 20 million, it cannot be claimed that the Commission departed from the Guidelines on that point.

387 It must be added that the Commission took as a basis, when setting the starting amount of EUR 70 million determined for AWA, the specific weight of the undertaking and the real impact of its unlawful conduct on competition, as reflected in the applicant's turnover for the relevant product in the EEA. It should be recalled

in this respect that the Commission announced, in paragraph 266 of the SO, that it was going to take account of the importance of each participating undertaking on the market concerned and the impact of its offending conduct on competition.

388 Thirdly, so far as concerns the level of the fine determined before the reduction applied under the Leniency Notice, AWA fails to demonstrate how the Guidelines preclude the imposition of a fine of such a level. Furthermore, it is necessary to recall the case-law referred to in paragraph 377 above, according to which AWA was not entitled to entertain any legitimate expectation that the Commission would not exceed the level of fines previously imposed.

389 AWA also raises a more general argument, according to which the Commission should have announced its intention to apply its 'new fining policy'.

390 It is difficult to discern how the calculation method used in the decision would be new in relation to previous practice, if not through the application of the Guidelines which themselves reflect a calculation method which differs from the previous practice in calculating the amount of fines. Unlike the applicants in the 'Pre-insulated Pipes' judgments (in particular *Sigma Tecnologie* v *Commission*, cited in paragraph 209 above), AWA does not call in question the changes brought about by the Guidelines in relation to previous practice. It appears to object only to the application, in its case, of a method for calculating fines which contradicts, in its opinion, both the administrative practice and the Guidelines of the Commission.

391 According to the case-law, where it had indicated the elements of fact and of law on which it would base its calculation of the fines, the Commission was under no

obligation to explain the way in which it would use each of those elements in determining the level of the fine (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 21, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 19).

392 Even if the method followed by the Commission in this case were to be regarded as innovative in relation to existing administrative practice, the Commission was not therefore bound to inform the undertakings concerned, during the administrative procedure, that it intended to use a new method to calculate the amount of the fines (*LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 207).

393 Moreover, it should be recalled that, in view of the Commission's margin of assessment when imposing fines, the applicant could not acquire a legitimate expectation that the Commission would not exceed the level of fines previously imposed (*LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 243).

394 Lastly, it must also be observed that the reference that AWA makes in this context to Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, relying on the fact there was no announcement in the SO that there would be a radically new and more severe policy for setting fines, is irrelevant, given that that judgment does not deal with the content of a statement of objections, but the statement of reasons for the decision.

395 Consequently, it cannot be found that there was an infringement of the right to be heard or of the principle of the protection of legitimate expectations so far as concerns the manner in which the Commission applied the Guidelines.

(c) Infringement of the right to be heard in so far as the Commission set the fine on the basis of factors which were not announced in the SO

396 The argument that the Commission set AWA's fine on the basis of a series of factors which were not announced in the SO and on which AWA did not therefore have the opportunity to comment during the administrative procedure still remains to be considered. AWA complains that the Commission did not announce its intention to increase the starting amount of the fine for deterrence and that it did not explain how it would take deterrence into consideration, in particular on the basis of AWA's size. Nor did the Commission announce how it would take account of the leadership of the undertakings involved.

397 In this regard, it should be recalled that, according to settled case-law, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been 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 elements to defend themselves not only against a finding of infringement but also against the fact of being fined (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 21, and *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 199).

398 It follows that, so far as concerns the determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make their submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. Moreover, the undertakings have an additional guarantee, as regards the setting of that amount, in that the Court of First Instance

has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (*Tetra Pak* v *Commission*, cited in paragraph 86 above, paragraph 235, and *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 200).

399 In the present case, it is necessary to examine the two points on which the Commission, in AWA's view, infringed its right to be heard.

400 As regards AWA's principal role in the cartel, it must be pointed out that the SO did in fact announce that such a factor was going to be taken into account. The Commission gave details, at paragraph 198 of the SO, of 'AWA's role as the cartel leader' whilst it stated, in the part of the SO dealing with the fine, that the individual fine to be imposed on each of the participating undertakings would reflect inter alia the role played by each of them in the collusive arrangements 'as described above'. Moreover, it is apparent from the decision that, during the administrative procedure, AWA disputed having played a principal role in the cartel, which demonstrates that it correctly understood the charge made against it in this regard in the SO, and that it expressed a view on that point.

401 As regards deterrence, the Commission expressly announced, at paragraph 264 of the SO, its intention 'to set any fines at a level sufficient to ensure deterrence'. Moreover, in accordance with the case-law, the Commission stated, at paragraphs 262 to 266 of the SO, the principal elements of fact and law on which it was going to base the calculation of the amount of the fine to be imposed on the applicant, so that, in this respect, the applicant's right to be heard was duly observed.

402 In such a context, AWA cannot reasonably submit that the Commission should have announced in a more detailed manner the factors which it was going to take into account in order to ensure that the fine had a sufficiently deterrent effect. As the Commission could set the amount of the fine only after hearing the undertakings

and finalising the administrative procedure, it was unable during the administrative procedure to predict the amounts of the fines to be imposed on the undertakings concerned or evaluate the deterrent effect of those amounts and comment on the possible need for adjustments in order to ensure that the fines had such an effect.

403 In that regard, it is settled case-law that, where it has indicated the elements of fact and of law on which it will base its calculation of the fines, the Commission is under no obligation to explain the way in which it would use each of those elements in determining the level of the fine. 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 in effect inappropriately anticipate the Commission's decision (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 21, and *Michelin* v *Commission*, cited in paragraph 391 above, paragraph 19).

404 For all those reasons, AWA's plea alleging infringement of the rights of the defence and of the principle of the protection of legitimate expectations must be rejected in its entirety.

B — *The plea alleging breach of the principle of non-retroactivity*

1. Arguments of the parties

405 The claim that the Commission applied, in this case, a new fining policy also constitutes the basis of AWA's plea alleging a breach of the principle of non-retroactivity. AWA submits that the breach of the principle of non-retroactivity

stems from the fact that the fine imposed on it was much higher than the fines imposed at the time of the infringement. According to AWA, the Commission was not entitled to apply a new fining policy without first warning undertakings of such a change in its policy.

406 The Commission maintains that it complied fully with the Guidelines, so that in the present case it cannot be charged with applying retroactively a new fining policy.

2. Findings of the Court

407 It should be recalled that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or will apply a particular method of calculating the fines. Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines above that applied in the past. That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines.

408 It must be concluded that the Guidelines and, in particular, the new method of calculating fines contained therein — on the assumption that this new method had the effect of increasing the level of the fines imposed — were reasonably foreseeable for undertakings such as the applicants at the time when the infringements concerned were committed.

409 Accordingly, in applying the Guidelines in the contested decision to infringements committed before they were adopted, the Commission did not infringe the principle of non-retroactivity (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 228 to 232).

410 In so far as AWA submits, in reality, that the Commission infringed the principle of non-retroactivity, not by applying the Guidelines, but by departing from them when imposing the fine on the applicant, reference should be made to paragraphs 379 to 395, from which it follows that this plea must be rejected.

411 Lastly, in so far as the plea alleging breach of the principle of non-retroactivity must be construed as also criticising the fact that the Commission departed from its previous decisions, reference should be made to paragraphs 376 to 378 above in which the Court held that that plea must be rejected.

412 For all those reasons, the plea alleging breach of the principle of non-retroactivity must be rejected.

C — The pleas alleging insufficient evidence, breach of the principles of the presumption of innocence, of proportionality and of equal treatment, and errors of assessment as regards the Commission's findings in relation to the participation of certain undertakings in the European cartel

413 Divipa and Zicuñaga claim that the amounts of their fines should be reduced, and submit that the Commission assumed that they participated in a European cartel

whereas in actual fact they participated only in a cartel at national level. They repeat, in this respect, the argument they that they also put forward as a substantive plea in connection with their claim that the decision should be annulled. By the same plea, Divipa also complains that when setting its fine the Commission did not find that it had not participated in an unlawful cartel and had not participated directly in pricing decisions.

414 As regards participation in the European cartel, reference should be made to paragraphs 205 to 215 above from which it follows that neither Divipa nor Zicuñaga could have been unaware that their participation in the cartel at national level was part of a wider European cartel. They cannot therefore claim that their fines should be reduced on that basis.

415 As regards Divipa's participation in the cartel, it is apparent from paragraphs 155 to 204 above that the Commission provided sufficient proof, as regards the Spanish market, that Divipa participated in the cartel for the period from March 1992 to January 1995, which is clear in particular from its participation in a series of meetings during which the undertakings active on the Spanish market agreed on price rises and, at the meeting of 30 September 1993, on an allocation of sales quotas. Divipa cannot therefore claim that its fine should be reduced on the ground that it did not participate in an unlawful cartel.

416 Concerning Divipa's argument that it did not participate directly in pricing decisions, it must be stated that Divipa fails to demonstrate that it publicly distanced itself from what was discussed at the meetings which it attended. It therefore gave the other participants to believe that it subscribed to what was decided there and would comply with it (*Aalborg Portland and Others* v *Commission*, cited in paragraph 188 above, paragraph 82). In so far as that argument amounts to claiming a passive role, it will be examined in the assessment of the attenuating circumstances (see paragraphs 596 to 635 below).

417 As regards Zicuñaga, it remains to be determined whether and, if so, to what extent its unproven participation in market-sharing practices (see paragraphs 238 to 240 above) justifies a reduction of its fine.

418 In this respect, it should be pointed out that the summary of the infringement in the introductory part of the decision refers to '[an] agreement and/or concerted practice ... by which [the producers and distributors concerned] fixed price increases, allocated sales quotas and fixed market shares and set up machinery to monitor the implementation of the restrictive agreements' (recital 2 of the decision). In the description of the nature of the infringement, the Commission refers, at recital 376 of the decision, to an infringement which 'consisted of price fixing market sharing practices, which are by their very nature the worst kind of violations of Article 81(1) [EC] and Article 53(1) of the EEA Agreement'.

419 However, the operative part of the decision describes the infringement that the applicant was alleged to have committed only in general terms, as a 'complex of agreements and concerted practices in the sector of carbonless paper' (first paragraph of Article 1 of the Decision).

420 Moreover, it is apparent from the decision that the agreement on price increases is the 'principal objective' (recital 77) and the 'corner stone' (recital 383) of the cartel. In the description of the objectives of the cartel, at recitals 77 to 81 of the decision, the Commission refers to 'an overall anti-competitive plan aiming essentially at improving the profitability of the participants by collectively increasing prices' and states that '[i]n the framework of this global plan, the principal objective of the cartel was to agree price increases and also the schedule for the increases'. According to recital 81 of the decision, the allocation of sales quotas and market shares in some national cartel meetings aimed to 'ensure the implementation of the agreed price increases', to 'avoid departures from the common scheme' and to 'refrain from competition on other commercial aspects'.

421 It should be observed in this regard that the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings. They are all co-perpetrators of the infringement but their participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.

422 However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including a course of action implemented in practical terms by other participating undertakings but sharing the same anti-competitive object or effect.

423 It must moreover be remembered that Article 81 EC prohibits agreements between undertakings and decisions by associations of undertakings, including conduct which constitutes the implementation of those agreements or decisions and concerted practices, when they may affect intra-Community trade and have an anti-competitive object or effect. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 EC (*Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraphs 79 to 81).

424 In this instance, the Court finds that, in the circumstances of the case, because of their identical object and their close synergies, the agreements and concerted practices found to exist formed part of an overall plan which was in turn part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices. As the Commission correctly states at recital 253 of the decision, it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as

consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices. The infringement constitutes a single infringement by virtue of the identical nature of the objective pursued by each participant in the agreement, not by virtue of the methods of implementing that agreement (*Cement*, paragraph 4127).

425 In such circumstances, an undertaking which has participated in such an infringement by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to contribute towards the implementation of the infringement as a whole, was also responsible, throughout the period of its participation in that infringement, for the conduct of other undertakings in the context of the same infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct and was prepared to accept the risk.

426 It must be held that the Commission established to the requisite legal standard Zicuñaga's participation in the system of cartel meetings, the price increases and certain measures designed to facilitate the implementation of the price increases for the entire duration of its participation in the infringement (see paragraphs 155 to 243 above).

427 The fact that Zicuñaga thus intended to contribute towards the implementation of the infringement as a whole is such as to give rise to its responsibility for the conduct planned or followed by the other undertakings and within the scope of the various elements of the infringement. It was aware of all those elements or could reasonably foresee them by virtue of its participation in the regular meetings of carbonless paper producers and distributors for more than one year.

428 With regard to the measures designed to facilitate the implementation of the price increases, it need merely be stated that the various forms of conduct referred to at recital 2 of the decision were all secondary to the price increases, in that they sought to create conditions favourable to the achievement of the price objectives fixed by the carbonless paper producers and distributors. It must be held that Zicuñaga, having participated for over a year in those price initiatives, could reasonably foresee that the participating undertakings were seeking to ensure the success of those initiatives by various mechanisms and Zicuñaga was prepared to accept that possibility. Therefore, even if it has not been proved that Zicuñaga actually participated in the adoption or implementation of all those measures, it is nevertheless responsible for the actual course of action followed in that context by the other undertakings as part of a single infringement in which it participated and to which it contributed (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraphs 205 to 207).

429 However, it should be recalled that the Commission has not established Zicuñaga's participation in market-sharing practices (see above, paragraphs 238 to 240). Whilst the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme is not material to the establishment of the existence of the infringement, such a factor must be taken into consideration when the gravity of the infringement is assessed and if and when the fine is determined (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 188 above, paragraph 292). Since the Commission has failed to demonstrate that Zicuñaga's non-participatation in the market-sharing practices was not taken into account in respect of all the parameters which led to the determination of the final amount of the fine imposed on Zicuñaga, the Court thus holds, in the exercise of its unlimited jurisdiction, that Zicuñaga's final fine must be reduced by 15%.

D — *The pleas alleging insufficient evidence, infringement of Article 253 EC, of Article 15(2) of Regulation No 17 and of the principles of proportionality and equal treatment, lack of individual determination of the fines, erroneous factual findings, errors of assessment and errors of law in the assessment of the gravity of the infringement*

430 Several undertakings dispute the assessment of the gravity of the infringement that the Commission carried out on the basis of the factors relied on its decision, namely the nature of the infringement and its actual impact, and the classification of the participants in the cartel according to the gravity of the infringement and the increase in the fine for deterrence.

1. Nature of the infringement

431 The Commission took the view that the infringement consisted of price-fixing and market-sharing practices, which are by their very nature the worst kind of violations of Article 81(1) EC and Article 53(1) of the EEA Agreement.

432 AWA disputes the gravity of the agreements in question, asserting that they were essentially limited to discussions concerning the timing and amount of announcements of price increases and did not relate to market sharing or sales quota allocations, or did so only insignificantly and largely ineffectively. In its submission, certain statements by Sappi confirm that the meetings did not serve as a framework for market-sharing arrangements. AWA adds that the cartel in the paper market was not fully institutionalised and did not have an effective system for enforcing the agreements. All those factors make the infringement less serious than those found in other cases.

433 Torraspapel claims that the Commission was wrong to find that the cartel related to price-fixing and market-sharing practices and that, consequently, it wrongfully categorised that cartel as very serious.

434 It must be borne in mind, first, that, according to settled case-law, the gravity of an infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (see Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 246, and the case-law cited).

435 Furthermore, 'infringements involving price-fixing and market-sharing ... must be treated as particularly serious since they involve direct interference with the essential parameters of competition on the market in question' (*Thyssen Stahl* v *Commission*, cited in paragraph 107 above, paragraph 675).

436 The Court clarified the concept of a very serious infringement in particular in Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 ('*ADM* v *Commission*'), paragraphs 117 to 131. It is apparent from that judgment that the classification of an infringement as very serious is not conditional on a partitioning of the markets. On the contrary, horizontal agreements relating to price cartels or market-sharing quotas are presumed to jeopardise the proper functioning of the internal market, and other practices likely to have the same effect may also be classified as very serious infringements.

437 It does not follow from that case-law or from the Guidelines that the classification of an infringement as very serious presupposes that several of those practices must be present. A horizontal pricing agreement may in itself constitute such an infringement if it undermines the proper functioning of the market. It is established that in the present case the undertakings concerned agreed on prices and its effect

was to undermine the proper functioning of the market. That is sufficient to justify the classification of the infringement as very serious in the present case, even if the agreements in question related only to price-fixing practices.

438 For the sake of completeness, it must be observed that AWA does not really dispute the existence of agreements on market sharing or on allocations of sales quotas, but submits rather that those activities were relatively insignificant and largely ineffective.

439 Lastly, as regards the alleged non-institutionalised nature of the cartel and the absence of any monitoring system, it must be stated that the structure put in place proved to be sufficient for the cartel to function for several years. It is apparent from several passages in the decision that the participants in the cartel meetings exchanged detailed, individual information on their prices and sales volumes and that the implementation of the agreements was monitored, in particular by AWA. Thus, the account of the meeting of 1 October 1993 drawn up by Mougeot (document No 7648, cited at recital 104 of the decision and attached to the SO) indicates that there were sanctions for failure to comply with the agreements: ('[Mr B.] said quite expressly that he would not tolerate any failure to follow this price increase and that he would "personally look after" anyone who did not "play the game"'). When asked to describe the monitoring system and the reasons for the authority of Mr B. and AWA, Mougeot replied (document No 11494, cited at recital 104 of the decision and attached to the SO):

'As far as we know there were no contracts, documents or legal circumstances which gave AWA any sort of authority. But they had a position of moral and economic leadership on the market ... AWA's financial and industrial weight enabled [M.B.] to say that if any of these increases were not passed on AWA would make it its business to push the market right down by applying a price policy that would leave most people high and dry. He showed quite clearly what he was capable of by crushing Binda in Italy.'

440 Mougeot was also reproached by AWA for failing to comply with its instructions (recital 143 of the decision). Moreover, the fact that Sappi also monitored quite attentively the price movements and quotas of the cartel members in relation to the targets set is apparent from the note of 9 March 1992 and the note concerning the meeting of 30 September 1992, referred to in paragraphs 171 and 172 above respectively.

441 In any event, it does not follow either from the Guidelines or from the case-law that, in order to be classified as a very serious infringement, the cartel must include particular institutional structures.

442 In the light of the foregoing, the Commission was right to classify the cartel in question as an infringement of a very serious nature.

2. Actual impact of the infringement

443 Several applicants (AWA, MHTP, Zanders and Torraspapel) claim that the actual impact of the cartel on the carbonless paper market was very limited. The Commission did not examine correctly the price movements in relation to that product and took account only of increases and not of decreases. According to the applicants, the prices actually obtained on the market were lower than the agreed or announced increases. This shows that those increases were not implemented in practice. Furthermore, certain applicants refer to the unfavourable development of the carbonless paper prices and to their decreasing margins or derisory profits. Carbonless paper prices essentially reflect changes in pulp costs and demand.

444 AWA submitted two reports by National Economic Research Associates ('the Nera reports'). The first, dated December 2000, was submitted in the context of the administrative procedure. The second, dated April 2002, was compiled for the purposes of the judicial proceedings. They both seek to demonstrate that the prices resulting from the offending agreements could not have exceeded those which would have been observed under normal conditions of competition. Koehler and Zanders submitted during the administrative procedure and produced before the Court the PricewaterhouseCoopers report, which describes the situation of the European carbonless paper market from summer or autumn 1995 to February or March 1997 (see paragraphs 101 to 103 above).

445 In the decision, at recitals 382 to 402, the Commission rejects the arguments of the undertakings concerned, contending in essence that the very fact that price increases and their timing were announced following concertation suffices to show an impact on the market. Whilst recognising that the carbonless paper market was in decline, the Commission considers that this does not exclude the fact that the cartel managed to control or limit the price decrease. According to the Commission, the examples of differences of opinion do not show a complete failure to implement the agreements. Certain agreed increases were postponed and sometimes increases smaller than foreseen were applied.

446 It must first be recalled that, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 612, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 38). According to the case-law, in order to assess the actual effect of an infringement on the market the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraphs 619 and 620; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 235; and *Thyssen Stahl* v *Commission*, cited in paragraph 107 above, paragraph 645).

447 The Guidelines state in this respect that, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Under the heading of 'very serious infringements', the Guidelines give examples of types of infringements and their object, without mentioning their actual impact other than by very general reference to jeopardising the proper functioning of the internal market. They do not directly link the gravity of the infringement to its impact. Actual impact is one factor among others and should not even be taken into account where it cannot be measured.

448 In assessing the gravity of the infringement, the Commission none the less relied on the fact that the infringement had, in its view, had an actual impact on the EEA carbonless paper market (recitals 382 to 402 of the decision), as it must now do in accordance with the first paragraph of Section 1A of the Guidelines where it is apparent that that impact can be measured.

449 It must be stated that the specific evidence put forward by the Commission indicates with reasonable probability that the cartel had an appreciable impact on the market in question.

450 First, it is apparent in particular from recitals 203, 204, 213, 214, 215, 225, 227, 235, 236, 237 of, and Annex V to, the decision that the price agreements were often implemented by announcing to clients the price increases agreed at the meetings. According to Mougeot's statements of 14 April 1999 (document No 7649, attached to the SO), Mr B. stated, during the meeting of 1 October 1993, that the 'price increases were to be notified by circular letters sent to clients in order to render those increases effective'. As recital 384 of the decision indicates, the agreed increases thus necessarily served as a basis for fixing individual transaction prices.

451 The fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 194). The Commission was not therefore required to examine the details of the parties' arguments seeking to establish that the agreements in question did not have the effect of increasing prices beyond those which would have been observed under normal conditions of competition and to respond point by point to those arguments. In particular, it was not obliged to refute the analysis in support of this in the first Nera report submitted by AWA, as the Commission explains at recitals 390 to 401 of the decision. Contrary to what AWA appears to claim, the Commission cannot be criticised in this respect for not stating reasons.

452 Furthermore, the fact that certain applicants' price instructions did not always strictly correspond to the target prices set at the meetings is not such as to undermine the finding that there was an impact on the market through the taking into account of the agreed price announcements when individual prices were set. The effects taken into account by the Commission when setting the general level of fines are not those resulting from the actual conduct which a particular undertaking claims to have adopted but those resulting from the whole of the infringement in which the undertaking participated with others (see, to that effect, *Hercules Chemicals* v *Commission*, cited in paragraph 196 above, paragraph 342).

453 That finding of an impact on the market through the announcement of agreed prices and the fact that those prices impacted on clients cannot be called in question by the fact that the relevant documentary evidence gathered by the Commission does not cover the entire period referred to. First, it is clear from recitals 383 and 384 of the decision that the Commission expressly took into consideration that factor when measuring the impact on the market. Second, it took account of other factors in its analysis of the impact on the market and, beyond that, of the gravity of the infringement.

454 Second, the Commission relies on occasional quota and market-sharing agreements which were respected at least to a certain extent.

455 It is apparent from the file that the sales quotas were allocated at the meeting of 30 September 1993 in Barcelona (document No 5 referred to in paragraph 172 above) and at the meeting of 1 October 1993 in Paris (document No 6). The information provided by certain undertakings on their real sales figures for 1992 and 1993 shows a close correlation between the quotas agreed and the sales volume information exchanged at those meetings (see Annex III to the decision). The report of the meeting of 29 June 1994 (see paragraph 175 above) also refers to quotas. Furthermore, it follows from Mougeot's statements of 14 April 1999 (documents Nos 7651 to 7653, referred to in paragraph 165 above) and the annexes thereto (documents Nos 7657 and 7658, attached to the SO) that agreements on market shares were concluded at the meeting of 31 May 1994 in Nogent-sur-Marne and at the meeting of 6 December 1994 in Geneva. The Commission is therefore correct to submit that those sales quota allocations and that market sharing constitute additional evidence of the impact of the infringement on the market.

456 Third, the Commission submits that the finding relating to the actual impact of the cartel is reinforced by the fact that the implementation of the price increases was monitored and controlled.

457 It must be stated that the points put forward by the Commission at recitals 97 to 106 do indeed demonstrate the existence of such control, exercised in particular by AWA. That is apparent in particular from Mougeot's statements of 14 April 1999, set out at recital 104 of the decision and already referred to in paragraph 439 above, according to which '[Mr B.] said quite expressly that he would not tolerate any failure to follow this price increase and that he would "personally look after" anyone who did not "play the game"'. Several notes by Sappi (see paragraphs 169, 171, 175 and 176 above) also demonstrate that the conduct of the cartel members was monitored, in particular as regards the implementation of the agreed price increases.

458 It must be stated that, for the purposes of the assessment of the gravity of the infringement, only the question whether the agreements were controlled or monitored is relevant, and it is immaterial that any specific undertaking played a predominant role in that control or monitoring. The control of the implementation of the agreed prices was part of the plan to which the cartel members subscribed. Torraspapel cannot therefore criticise the Commission for taking account of those monitoring systems at the stage when it assessed the nature of the infringement, given that the individual responsibility of each participant is then examined at a later stage.

459 As regards the last indicium of the impact of the cartel put forward by the Commission, namely the long duration of the infringement notwithstanding the risks involved, it must be pointed out that, since the practices in question lasted three years in most cases, it was hardly likely that, at that time, the producers considered them wholly ineffective (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 748).

460 All those factors lead the Court to the conclusion that the Commission was right to find that the infringement in question had an actual impact on the market.

461 It should be added that the Commission cannot be criticised for not taking into account at that stage the fact that the carbonless paper market was in decline. The Commission refers to that fact at recital 392 of the decision, specifically in the examination of the actual impact of the infringement, and explains clearly the reasons why that decline does not exclude the cartel's impact on the market. Whilst accepting that in such a situation the prices could be expected to decrease, the Commission considers that that 'this does not exclude that the cartel managed to control or limit the price decrease'. Consequently, in its view, 'the cartel may have impeded the production capacity to adjust naturally to the demand by maintaining inefficient competitors in the market longer than they would have stayed under normal conditions of competition'.

462 In this respect, it should be stated that the mere fact that the market in question was in decline and that certain undertakings were suffering losses cannot preclude the setting up of a cartel or the application of Article 81 EC. On the contrary, by their own admission, certain undertakings asserted that that state of affairs encouraged them to join the cartel. It should be added that, even assuming that they are proven, the poor market conditions do not mean that the cartel had no impact. As the Commission states, the agreed price increases made it possible to control or limit the decrease in prices, thereby distorting competition. The fact that the market conditions may have led to price decreases in no way detracts from the complaint alleging concerted price increases. The fact that the increase of the price of pulp may have encouraged the undertakings to raise the price of carbonless paper has no bearing on the complaint that they did not do so independently, but by colluding with each other and entering into agreements. Moreover, the fact that, in a market in decline characterised by significant structural overcapacity where one would expect to see prices decrease, the price of carbonless paper was able to follow the increases in the price of pulp could precisely be regarded as evidence of a cartel.

463 By way of conclusion regarding the gravity of the infringement, the Court considers that the Commission was right to classify the agreements in question as a very serious infringement. The infringement is by its nature very serious, had an impact on the market and covered the whole of the common market and, following the creation of the EEA, the whole of that area.

3. Classification of the participants in the cartel for the purposes of setting the amounts of the fines

464 According to the Guidelines, within each of the categories of infringement provided for, and in particular as far as serious and very serious infringements are concerned, 'the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed'.

465 Taking as a basis the EEA-wide product turnover in 1995, the Commission put the undertakings concerned into five categories according to their relative importance in the market concerned in the EEA. AWA, which is the largest carbonless paper producer, alone makes up the first category. The second category includes MHTP, Zanders and Koehler, the third, Torraspapel and Bolloré, the fourth, Sappi and Mougeot, and the fifth, Divipa, Zicuñaga and Carrs.

466 The arguments put forward by the applicants in this connection relate to several points, namely the choice of the reference year, the taking into account of incorrect turnover figures and the disproportionate result to which the Commission's method leads.

467 Before analysing those points, it is necessary to recall the case-law cited in paragraph 376 above from which it is apparent that, in the context of Regulation No 17, the Commission has a margin of discretion when fixing fines, in order that it may channel the conduct of undertakings towards compliance with the competition rules. The proper application of those rules requires that the Commission be able at any time to adjust the level of fines to the needs of Community competition policy, if necessary by raising that level.

468 It is in addition settled case-law that the criteria for assessing the gravity of an infringement may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or other of those figures an

importance which is disproportionate in relation to other factors and that the fixing of an appropriate fine cannot be the result of a simple calculation based on overall turnover (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraphs 120 and 121; Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176; and *ADM* v *Commission*, cited in paragraph 436 above, paragraph 188).

(a) Choice of the reference year

469 The choice of the reference year is criticised by Torraspapel and Divipa. The latter submits that the Commission should have taken as a basis the turnover for 1994. Several undertakings, including Divipa, were not involved in the cartel in 1995. For its part, Torraspapel claims that its turnover for 1995 was exceptionally high in relation to that of previous years and did not therefore accurately reflect its real importance on the market during the infringement period.

470 It should be recalled that, as Divipa itself accepts, according to the settled case-law of the Court, the Commission is not required to calculate the amount of fines according to the gravity on the basis of amounts founded on the turnover of the undertakings involved, since the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; *Ferriere Nord* v *Commission*, cited in paragraph 446 above, paragraph 33; and Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 163).

471 According to recital 407 of the decision, the Commission used the EEA-wide product turnover in 1995 — the last year of the period of the infringement found — as the basis for comparing the relative importance of the undertakings in the market concerned and for classifying them in different categories in relation to the capacity of each of them to distort competition.

472 It must be stated in this respect that, whatever the merits of their claims, the result would not have been different for Torraspapel and Divipa if the Commission had taken their turnover for 1994 as a basis. It follows from table 1(b) set out at recital 18 of the decision that, with turnover and market share comparable to those of Bolloré (Copigraph), Torraspapel would remain in the third category and Divipa would still be in the last category. The decision cannot therefore be called into question on that point. The Court therefore finds that that complaint is irrelevant.

(b) Taking into account of an incorrect overall turnover figure

473 AWA and Koehler submit that the Commission took into account the turnover of each of their respective groups, while for MHTP and Zanders it took account only of the turnover specific to the undertaking concerned.

474 AWA asserts that if the Commission had taken into account only the turnover specific to AWA, it would not have concluded that there was a very substantial difference in size between it and the other undertakings involved, the starting amount of the fine would therefore have been lower and the final fine would have been EUR 141.75 million less. Koehler claims that, by not taking into account the differences in economic weight between the groups to which MHTP, Zanders and it belong, the Commission wrongly placed it in the same category as those two undertakings.

475 In so far as AWA and Koehler criticise the classification of the participants in the cartel on the basis of an incorrect overall turnover figure, their plea cannot succeed.

476 It is clear from recitals 406 to 409 of the decision that the Commission separated the undertakings in question 'according to their relative importance in the market concerned' taking as the basis the 'EEA-wide product turnover'. The total turnover of the companies or groups of companies was not therefore a factor at that stage.

477 For the sake of completeness, it must be observed that the complaint of AWA and Koehler relates less to their own turnover than to the fact that the turnover of the groups to which MHTP and Zanders belong was not taken into account. However, even if the Commission made a mistake in the case of MHTP and Zanders, a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (Case C-297/98 P *SCA Holding* v *Commission*, cited in paragraph 468 above, paragraph 160). The argument that the fine imposed on MHTP and Zanders was too low cannot lead to a reduction of AWA's or Koehler's fine. To that extent, their plea must be rejected.

478 Furthermore, in the absence of evidence that the groups to which Zanders and MHTP belong were involved in the infringement, the Commission was justified in not using the total turnover of those groups. Since the Commission did not find sufficient evidence to attribute the infringement to those groups, it was for the applicants, in so far as they considered that the involvement of those groups was evident from the file, to adduce evidence (see, to that effect, Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881 ('*ABB* v *Commission*'), paragraph 181). In the present case, neither AWA nor Koehler adduces that evidence. Their plea must therefore be rejected.

(c) Disproportionate result of the application of the Commission's method

479 Several undertakings submit that the amount of the fine set by the Commission according to the gravity of the infringement is disproportionate in relation to their own turnover, to the other participants in the cartel or in relation to the amounts imposed in other decisions, or to several of those factors combined, as the case may be. The method of calculating the basic amount of the fine thus infringes the principle of proportionality and the principle of equal treatment.

Breach of the principle of proportionality

480 MHTP asserts that it is not apparent that the Commission took account of its turnover on the relevant market. The Commission put the undertakings concerned into different categories according to their shares of the relevant market. However, recourse to market shares to distinguish between the undertakings involved in an infringement does not automatically comply with the principle of proportionality. By relying exclusively on market shares, the Commission takes account only of the relative differences between turnover and not of the absolute level of turnover on the relevant product market.

481 It should first be recalled that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (see *HFB and Others* v *Commission*, cited in paragraph 87 above, paragraph 443, and the case-law cited).

482 Furthermore, the mere fact that, in that context, the Commission did not rely exclusively on each undertaking's turnover on the relevant market but took into consideration other factors relating to the significance of the undertakings on that market cannot lead to the conclusion that the Commission imposed a disproportionate fine. It follows from the case-law that it is important not to confer on an undertaking's total turnover or on its turnover accounted for by the goods in respect of which the infringement was committed an importance which is disproportionate in relation to the other factors (*LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 303).

483 The factors taken into account by the Commission in the present case are clearly set out in the decision at recitals 372 to 408. They include turnover on the relevant market. In addition, the fact that the starting amounts set by the Commission are not based on a given percentage of turnover, as in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, cannot in itself render them disproportionate.

484 Lastly, the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market (*LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 278).

485 MHTP's complaint must therefore be rejected.

486 Koehler submits that the Commission infringed the principle of proportionality by imposing on it a fine which was totally disproportionate in the light of its economic power and the profit deriving from the cartel. It submits that the Court of Justice and the Court of First Instance have confirmed on numerous occasions the essential role played by the criterion of the economic power of the undertaking concerned for the purpose of assessing the gravity of the infringement. The Guidelines also attach great importance to the size of the undertaking concerned.

487 It should be recalled in this respect that, in order to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition, the Commission put the undertakings concerned into five categories according to their relative importance in the market concerned (recital 406 of the decision). The Commission therefore differentiated according to the size of the undertakings.

488 Koehler moreover recognises this, while maintaining that the Commission correctly states that a differentiated calculation of the fine is required but does not manage to apply convincingly to the specific case the Guidelines which it has imposed on itself. It adds in its reply that the Commission did not make the necessary differentiations required by virtue of its own method for setting the fine.

489 Koehler's principal argument seems to consist in the fact that it is a family business which does not have access to the capital market and which, both from the point of view of its size and of its resources, is a small undertaking in comparison with the other participants which were penalised.

490 In order to establish breach of the principle of proportionality, Koehler compares its fine with those imposed on MHTP, Zanders and AWA.

491 However, it must be stated that, in making its point, Koehler includes in the overall turnover of MHTP and Zanders that of the groups of which, in its opinion, those undertakings form part. The Court has held in paragraph 478 above that the Commission was right not to take account of the total turnover of the groups to which those two undertakings belong.

492 As regards the comparison of Koehler's fine with that of AWA, it should be recalled that the starting amount set at recital 409 of the decision expressly takes into account the relative importance of the undertakings in the market concerned, taking as the basis the EEA-wide product turnover. Thus, at that stage, the starting amount of the fine of each of those two undertakings reflects overall the differences in their turnover on the carbonless paper market.

493 The Commission then doubles the starting amount of AWA, Sappi and Bolloré for deterrence in order to take account of their size and overall resources. By doubling AWA's fine on that basis but not that of Koehler, the Commission thus takes into consideration the difference in size and overall resources which separate those two undertakings.

494 It should be added that a mere comparison of the percentage that the fines represent in relation to the overall turnover of the undertakings concerned is not sufficient to establish the disproportionate nature of Koehler's fine. The fixing of an appropriate fine cannot be the result of a simple calculation based on overall turnover (see the case-law cited in paragraph 468 above).

495 Furthermore, those comparisons do not establish that the basic amount of Koehler's fine is disproportionate, given the size of the undertaking and its overall resources.

The applicant does not adduce any evidence capable of proving that the basic amount of the fine is excessive in relation to its specific weight. Although it is true that Koehler is a family business, its turnover relating to carbonless paper, in particular, is such that it cannot be classified as one of the small undertakings of the sector.

496 Lastly, the Commission is not required, when determining the amount of fines, to ensure, where fines are imposed on various undertakings involved in the same infringement, that the final amounts of the fines reflect all differentiation between the undertakings concerned as regards their total turnover (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 217).

497 Koehler's complaint alleging breach of the principle of proportionality must therefore be rejected.

Breach of the principle of equal treatment

498 AWA claims that the amount of the fine set in its case according to the gravity of the infringement is excessive in relation to that set for the other participants in the cartel. The Commission complied with the Guidelines as regards MHTP, Zanders and Koehler but it applied the former system to AWA, which was based on the respective importance of the undertakings concerned on the market.

499 Zanders claims that the Commission's classification discriminated against it in relation to its competitors who were considerably more active in the cartel, such as Koehler, MHTP and Torraspapel.

500 Koehler submits that the general principle of equal treatment is infringed where, in view of the economic power of the undertaking in question, a fine affects that undertaking to a much greater extent than the other undertakings concerned. As a family business, it disputes its classification in the same category as MHTP and Zanders. Its arguments reflect substantially those already examined in connection with breach of the principle of proportionality. To that extent, reference should be made to paragraphs 486 to 497 above.

501 As has been consistently held, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (see Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309, and the case-law cited).

502 The Guidelines provide that, where an infringement involves several undertakings (cartels), it may be necessary in some cases to apply weightings to the amounts determined within the category selected in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

503 In that case, the Guidelines add that 'the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetical calculation'.

504 According to the case-law, where the Commission divides the undertakings concerned into categories for the purpose of setting the amount of the fines, the

thresholds for each of the categories thus identified must be coherent and objectively justified (*Tokai Carbon and Others* v *Commission*, cited in paragraph 496 above, paragraph 220).

505 On that basis, it is necessary to ascertain whether the Commission's classification observes the principle of equal treatment.

506 It should be recalled that, 'in order to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition' the Commission put, in the decision (recitals 406 and 407), the undertakings concerned into categories 'according to their relative importance in the market concerned'. To that end, it took 'as the basis for the comparison of the relative importance of an undertaking in the market concerned ... the EEA-wide product turnover'. Recital 408 also refers to their market shares. The reasoning for the classification is therefore clear.

507 Since they are such as to indicate the importance of the undertaking, those factors, namely its EEA-wide product turnover and its market shares, can be taken into account by the Commission in that connection, in accordance with the case-law cited in paragraph 468 above.

508 As recital 407 of the decision indicates, the Commission used, in order to establish the different categories, the figures in table 1(b) in recital 18 of the decision.

509 In this respect, it must be stated that the turnover indicated in that table is based on information provided by the undertakings in their answers to the requests for information. AWA cannot therefore argue, in these proceedings, that it provided inaccurate information. In any event, it is apparent that the new figures put forward in its application remain in the same order of magnitude and would not therefore have led to a different result.

510 Furthermore, contrary to what AWA asserts, it is not apparent from the comparison of the figures in the table in question and the categories established by the Commission that the latter applied to AWA a system different from that applied to the other undertakings.

511 It is true that recourse to market shares among other factors in order to differentiate between the undertakings would be contrary to the principle of equal treatment if it did not apply to all the undertakings concerned. However, AWA itself provides a table in its application from which it is apparent, on its own assertions, that 'the amounts determined for gravity are, broadly speaking, correlated with the participants' shares of the affected market'. Contrary to what AWA claims, the principle of equal treatment has therefore been observed.

512 Zanders submits, for its part, that it was the subject of discrimination in being classed in the same category as MHTP and Koehler, even though their involvement in the cartel was considerably more active than its own, or in not being classed in the same category as Torraspapel, even though there was no objective reason to treat it differently.

513 It should be stated that, according to the figures taken into account by the Commission, Zanders' market share was approximately 12% in 1994 and 1995,

MHTP's approximately 14% and Koehler's approximately 10%, whilst Torraspapel's amounted to 5.4% in 1994 and 6.9% in 1995. In relation to that criterion, the categories established by the Commission do not therefore discriminate against Zanders, nor do they discriminate against Koehler, despite its claim to be a family business (see also paragraph 487 et seq. above).

514 Zanders is however seeking to establish that its market share was less important than Torraspapel's on certain markets, in particular in France, Spain and the United Kingdom.

515 It must be stated in this regard that the Commission relied, in respect of all the participants in the cartel, on their EEA-wide product turnover and market shares. It found that the cartel covered the whole of the common market and, following its creation, the whole of the EEA (recital 403 of the decision). The evidence adduced by Zanders is therefore irrelevant as it applies only to certain markets.

516 Zanders' alleged lesser involvement in the cartel — disputed by the Commission — could possibly be taken into account as an attenuating circumstance under the Guidelines. It does not however fall to be considered when setting the starting amount of the fine by reference to the gravity of the infringement where the weighting is determined on the basis of objective elements designed to 'take account of the specific weight ... of each undertaking on competition'.

517 Lastly, it is necessary to examine AWA's argument that the general level of the fines set according to gravity for this cartel is too high by comparison with those set in other recent cases.

518 AWA asserts that, with the very notable exception of the amount set in its case, the starting amounts in the present case and those set for each infringement in other cases involving very serious infringements are broadly similar. According to AWA, they should have been considerably lower because the agreements did not have the effect of increasing prices in relation to normal conditions of competition, did not prevent the participants from making minimal profits, were limited to discussions on prices and did not include any monitoring system.

519 It must be stated that AWA's argument amounts to disputing the classification of the infringement as very serious in the present case and not the amounts set by reference to the classification of the infringement as very serious, amounts which AWA describes as broadly similar to those set in other cases for the same type of infringement.

520 Since the Commission was right to classify the infringement as very serious (see paragraphs 431 to 442 above), the complaint of unequal treatment in relation to other recent cases cannot succeed, since AWA accepts that the amount is that applied in other cases for that type of infringement.

521 As regards, moreover, the amount set in the case of AWA, it should be recalled that, according to settled case-law, the fact that the Commission in the past imposed fines of a certain level for particular types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17, if that is necessary to ensure the implementation of Community competition policy.

522 The pleas disputing the classification of the participants in the cartel and the starting amounts set on that basis must therefore be rejected.

4. Increase in the fine for deterrence

523 AWA and Bolloré contest the doubling of the starting amount of the fines for deterrence. That increase leads to a fine which is highly disproportionate to the volume of sales concerned by the cartel and does not take account of the gravity of the infringement imputable to the various undertakings and their specific roles. AWA also claims that there is no statement of reasons for that increase for deterrence either in the SO or in the decision and that it is incompatible with the application of the Leniency Notice.

524 The Commission stated, at recitals 410 to 412 of the decision, that, in order to ensure that the fine had a sufficient deterrent effect, it considered, in the case of AWA, Sappi and Bolloré, 'that the appropriate starting amount for a fine resulting from the criterion of the relative importance in the market concerned require[d] further upward adjustment to take account of their size and their overall resources'. The Commission had already announced in the SO its intention to set any fines at a level sufficient to ensure deterrence.

525 The Guidelines provide that it is necessary 'to set the fine at a level which ensures that it has a sufficiently deterrent effect'. In addition, account may be taken of the fact that 'large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law'.

526 It should be recalled that the Commission may raise the level of fines in order to strengthen their deterrent effect (*Solvay* v *Commission*, cited in paragraph 196 above, paragraph 309). Furthermore, the Commission may impose a heavier fine on an undertaking which occupies a decisive position within the market and where the impact of its actions on the market is more significant than that of the actions of

other undertakings committing the same infringement, without violating the principle of equal treatment by so doing. Calculating the amount of the fine in such a way also satisfies the requirement that it be sufficiently dissuasive (Case T-66/99 *Minoan Lines* v *Commission* [2003] ECR II-5515, paragraph 284; see also, to that effect, Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 235).

527 As is apparent from *Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 106, deterrence must be both specific and general. Whilst punishing an individual infringement, the fine also forms part of a general policy to ensure that undertakings comply with the competition rules. Even in relation to the undertaking concerned, deterrence cannot be limited only to the market concerned but must apply to all its activities. Bolloré cannot therefore claim a reduction of its fine on account of the sale of its 'carbonless paper' division and the fact that it cannot re-offend in that sector.

528 In response to AWA's objection to the deterrent effect *erga omnes* of the fine, it must be stated that, whilst it is true that the fine is intended to have a deterrent effect both in relation to the undertaking fined and other undertakings which might be tempted to infringe the competition rules, the fine was calculated in the present case by taking into account the specific situation of the undertaking concerned and all the circumstances of the case. To that extent, if it is not disproportionate in relation to the undertaking concerned, it cannot become disproportionate merely because it has at the same time a deterrent effect *erga omnes*.

529 However, in this instance, the applicants dispute above all the size of the increase for deterrence in their case, which they consider to be disproportionate and unexplained.

530 As regards the allegedly disproportionate nature of the multiplier applied in the present case for deterrence, the Court approved, in *ABB* v *Commission*, cited in paragraph 478 above, paragraph 162, the Commission's doubling of the fine for deterrence in order to reflect the applicant's importance in the pre-insulated pipe sector so as to take account of its position as one of the principal European groups.

531 If reference is made to table 1(b) in recital 18 of the decision, AWA, Bolloré and Sappi are the principal European groups. Their total turnover, which is in the same range, quite clearly exceeds that of the other undertakings concerned. It follows from this that the doubling of AWA's and Bolloré's fines cannot be regarded as disproportionate in relation to the position of their groups.

532 It should be stated in this respect that, contrary to the apparent premiss of AWA and Bolloré, according to which the Commission relied, for that increase for deterrence, on the worldwide turnover of their groups, the multiplier was not calculated according to a mathematical formula and has no proportional link with the applicant's overall turnover (see, to that effect, *ABB* v *Commission*, cited in paragraph 478 above, paragraph 180). If the overall turnover of AWA, Sappi, Bolloré and Torraspapel are compared by order of importance, in table 1(b), it is apparent that Bolloré's and AWA's turnover is between five and seven times higher than Torraspapel's, although the Commission applied only a multiplier of 2, without distinguishing between AWA and Bolloré.

533 As regards the argument that that increase is highly disproportionate to the turnover concerned by the infringement, it must be observed that the starting amount of the fine according to the gravity of the infringement was calculated on the basis of the turnover from sales of the product on the market concerned. That factor was therefore taken into consideration by the Commission at the start. The increase for

deterrence is intended to take account at a later stage of the size and overall resources of the undertaking.

534 It should be recalled in this respect that the Commission may have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed (*Musique diffusion française and Others* v *Commission*, cited in paragraph 86 above, paragraph 121).

535 AWA complains however that the Commission already applied a multiplier of 3.5 when setting the starting amount on account of the applicant's importance on the carbonless paper market, and then went on to apply a deterrent multiplier of 2.

536 As stated above, the two increases do not take account of the same factors. The first relates to the importance of the undertaking on the relevant product market and the second relates to all the activities of the undertaking or of the group to which it belongs, in order to take account of its overall resources.

537 As regards the unexplained nature of the increase for deterrence, it must be pointed out that, in the decision, the Commission states that, in the case of AWA, Sappi and Bolloré, 'the appropriate starting amount for a fine resulting from the criterion of the relative importance in the market concerned requires further upward adjustment to take account of their size and their overall resources'. Contrary to what AWA maintains, the increase in question is therefore properly reasoned.

538 However, AWA disputes that the size and overall resources of the undertaking should be taken into account for deterrent purposes. It maintains that, according to a rational economic theory of deterrence, fines should be set in relation to the expected profits from the infringement on the relevant product market and to the probability of detection. In its view, the issue of deterrence has no rational link to the group's turnover at the worldwide level.

539 As regards the taking into account of the size and overall resources of the undertakings concerned, the Court considers that the Commission did not commit an error of assessment in taking the view that large undertakings generally have resources which make them better able than smaller undertakings to be aware of the requirements and the consequences of competition law (*ABB* v *Commission*, cited in paragraph 478 above, paragraph 169).

540 Moreover, since the deterrent effect of a fine is one of the factors which, according to the case-law, must be taken into account in determining the gravity of the infringement, AWA cannot criticise the Commission for having taken the deterrent effect of the fines into account when setting the starting amount corresponding to the gravity of its infringement. The taking into account of the deterrent effect of the fines forms an integral part of weighting the fines to reflect the gravity of the infringement (*ABB* v *Commission*, paragraph 167). AWA is not therefore justified in claiming that the Commission was required to apply an increase for deterrence only at the last stage of the calculation of the fine.

541 As regards the alleged incompatibility of the increase for deterrence with the application of the Leniency Notice, it should be stated that those two steps are manifestly different and the simultaneous application of those two elements cannot be held to be contradictory. The increase of the fine for deterrence is part of the phase in which the fine sanctioning the infringement is calculated. Once that amount has been determined, the application of the Leniency Notice is then

intended to reward undertakings which have decided to cooperate with the Commission. Contrary to what AWA maintains, the fact that an undertaking decides to cooperate with an investigation in order to obtain a reduction of its fine in this context in no way guarantees that it will refrain from committing a similar infringement in the future.

542 As regards the factors which could lead to a reduction in the fine of an undertaking on the basis of the attenuating circumstances specific to it, they must, if there are any, be taken into account in the examination of the attenuating circumstances and do not have to be considered at the stage of the increase for deterrence. That is the case, for example, in respect of the role of follower allegedly played by Copigraph (Bolloré) and of its termination of the infringement before the start of the investigation.

543 Lastly, before completing this examination of the applicants' arguments on the increase of the fine for deterrence, it is necessary to consider once again in this respect the unequal treatment which results, according to certain undertakings, from the fact that in their cases the turnover of the groups to which they belong was taken into consideration, whereas for other participants in the cartel the Commission did not take such turnover into account. Since the Commission states that it wishes to take account of the size and overall resources of the undertakings concerned (recital 411 of the decision) in connection with the increase of the fines for deterrence, the issue of whether or not an undertaking belongs to a group can be decisive.

544 In the case of AWA, it should be recalled that since the parent company of the group participated directly and autonomously in the cartel and moreover does not challenge this, the turnover of the group was rightly taken into account.

545 As regards Bolloré, the Court held, at paragraphs 66 to 81 above, that it was necessary to reject the objection based on its direct involvement since the SO had

not enabled Bolloré to acquaint itself with that objection and to properly defend itself on that point. However, at the end of the examination of Bolloré's position (see paragraphs 129 to 150 above), the Court held that the Commission was correct to find that that undertaking was liable for the participation of its subsidiary Copigraph in the agreement.

546 It follows that the two companies could be regarded as jointly and severally liable for the conduct alleged against them, the acts of one being imputable to the other (see, to that effect, *HFB and Others* v *Commission*, cited in paragraph 87 above, paragraphs 54, 524 and 525). It is apparent from table 1(b) in recital 18 of the decision that the turnover relating to carbonless paper taken into account in Bolloré's case is that of Copigraph, since only that company had such a turnover. The Commission therefore correctly set the starting amount of Bolloré's fine by taking into account Copigraph's turnover. Since Copigraph and Bolloré form one and the same undertaking for the purposes of Article 81 EC, the Commission was therefore justified in taking into consideration the overall resources of the group in order to ensure that the fine had a sufficiently deterrent effect.

547 At the end of this analysis, it must be concluded that the Commission was justified in increasing the starting amount of the fine in the case of AWA and Bolloré in order to ensure that it had a sufficiently deterrent effect.

548 In addition, the Commission was right to apply to Bolloré's worldwide turnover the maximum amount of 10% of turnover laid down by Article 15(2) of Regulation No 17. That maximum amount must be calculated on the basis of the total turnover of all the companies constituting the economic entity acting as an undertaking for the purposes of Article 81 EC (see, to that effect, *HFB and Others* v *Commission*, cited in paragraph 87 above, paragraph 528).

549 It is therefore necessary to reject all the pleas alleging insufficient evidence, infringement of Article 253 EC, of Article 15(2) of Regulation No 17 and of the principles of proportionality and equal treatment, failure to determine the fines individually, erroneous findings of fact, errors of assessment and errors of law in the assessment of the gravity of the infringement

E — *The pleas relating to the duration of the infringement*

550 It should be recalled that Article 15(2) of Regulation No 17 provides that the duration of the infringement is one of the factors that must be taken into account in determining the amount of the fine to be imposed on undertakings which infringe the competition rules.

551 In relation to the duration of the infringement, the Guidelines distinguish between infringements of short duration (in general, less than one year), where no increase should be made to the starting amount determined for gravity, infringements of medium duration (in general, one to five years), where that amount may be increased by up to 50%, and infringements of long duration (in general, more than five years), where that amount may be increased by up to 10% per year (first to third indents of the first paragraph of Section 1.B).

552 At recitals 414 to 416 of the decision, the Commission states that:

'(414) ... the infringement was of medium duration (one to five years) for every undertaking involved.

(415) AWA, Copigraph (Bolloré), Koehler, Sappi, MHTP (Stora), Torraspapel and Zanders committed an infringement of three years and nine months. The starting amounts of the fines determined for gravity ... are therefore increased for each of them by 35% in total.

(416) In the case of Mougeot, Carrs, Divipa and Zicuñaga, the duration of the infringement varied between one year and four months and three years and five months. The starting amounts of the fines determined for gravity are therefore increased by 30% for Mougeot, by 25% for Carrs, by 25% for Divipa and by 10% for Zicuñaga.'

553 Several applicants disputed the Commission's findings in relation to the duration of the infringements committed by them. Reference should be made in this respect to paragraphs 256 to 371 above from which it is apparent that the increases made by the Commission on account of the duration of the infringement are well founded.

554 In addition, still concerning the increase connected with the duration of the infringement, AWA claims that the Commission applied the increase of the fine in respect of the duration of the infringement, not, as was indicated at recital 415 of the decision, to the starting amount, but to a sum equivalent to double that amount.

555 It is true that recital 415 of the decision refers to the 'starting amounts of the fines determined for gravity' and adds between brackets a reference to recital 409, which contains the starting amounts of the fines established according to the gravity of the infringement before the increase for deterrence.

556 The Commission admits that it is a typing error and that it should have referred to recital 412, which refers to the amount including the increase for deterrence.

557 In any event, the final result is the same. It is true that, in order to be consistent with the rest of the decision, it would have been preferable to refer to the starting amount already increased for deterrence. However, the result would not have been different if the calculation had been made the other way round, that is to say by increasing by 35%, on account of the duration of the infringement, the starting amount of EUR 70 million, then doubling that amount for deterrence. The basic amount of AWA's fine would still be that set out at recital 417.

558 The pleas relating to the duration of the infringement must therefore be rejected.

F — *The plea alleging breach of the principles of proportionality and of equal treatment and a factual error of assessment*

559 The Commission increased the basic amount of AWA's fine by 50% because of the aggravating factor constituted by the role of ringleader in the infringement (recital 424 of the decision).

560 It should be pointed out first of all that the taking into consideration of the role of ringleader is consistent with the case-law and the Guidelines.

561 As is apparent from the case-law, where an infringement has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them (*Suiker Unie and Others* v *Commission*, cited in paragraph 446 above, paragraph 623), which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established (see *Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraph 150, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 264). It follows, in

particular, that the role of 'ringleader' played by one or more undertakings in a cartel must be taken into account in setting the fine, in so far as undertakings which have played such a role must for that reason bear a special responsibility by comparison with other undertakings (*IAZ and Others* v *Commission*, cited in paragraph 121 above, paragraphs 57 and 58; Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 45; and *Mayr-Melnhof* v *Commission*, cited in paragraph 446 above, paragraph 291). In accordance with those principles, Section 2 of the Guidelines sets out, under the heading of 'aggravating circumstances', a non-exhaustive list of circumstances which can give rise to an increase in the basic amount of the fine and includes in particular the 'role of leader in or instigator of the infringement' (*ADM* v *Commission*, cited in paragraph 436 above, paragraphs 238 to 240).

562 However, AWA claims that there is little or no evidence of its leadership in the infringement and that, in any event, an increase of 50% is disproportionate and contrary to the principle of equal treatment in relation to other undertakings which took on the role of leader in the infringement.

1. Factual error of assessment

563 According to recitals 418 and 419 of the decision, a body of evidence shows that AWA took on the role of leader in the infringement, including in particular the convening and conducting of certain meetings, its role of instigator of the restructuring of the cartel, the launching of price increases and the monitoring of the implementation of the cartel.

564 AWA responds point by point to each of those allegations: The fact that it took charge of the physical organisation of some meetings does not make it the leader of the cartel, especially since other undertakings booked rooms for general or local meetings of the cartel. Assuming, in the absence of more precise evidence, that its

alleged role of instigator should be placed in the context of the position in the AEMCP held by Mr B. at the time, AWA asserts that that position cannot be evidence of leadership of any kind by it. The price increases which it allegedly initiated are uncorroborated by any evidence and are based on statements by Mougeot which are unreliable. AWA was not the only one to announce price increases and the fact that it was the first is explained by its position as market leader, a position which cannot be criticised and does not make it the leader in the infringement. AWA denies exerting pressure on any producer and asserts that there is no proof that it actually used its position as leader on the market, or at least that it threatened to do so, in order to secure compliance with the agreements. Even if Mougeot's statements are accepted as true, they prove at the most that AWA sometimes used firm language towards other producers.

565 It must be stated that certain evidence is not in itself disputed by AWA but rather the Commission's interpretation of that evidence. Thus, AWA does not dispute that it took charge of the physical organisation of some meetings, nor that Mr B. directed AEMCP at the time of its restructuring, nor even that it announced price increases and that it was the first to do so, nor finally that it asked for and was given authorisation to verify information concerning Sarrió's sales volumes on the latter's premises.

566 It is clear from recital 423 that it is that evidence as a whole which led the Commission to find that AWA played the role of ringleader:

'A coherent set of evidence shows that AWA, which had an economic leadership in the carbonless paper market and was in a position to exercise pressure on its competitors due to the fact that it acquired or distributed large proportions of some small producers['] output, had also a key role in monitoring and ensuring the compliance with the agreements.'

567 In the SO, the Commission stated:

'There is no doubt that AWA, which is the leading producer of carbonless paper in Europe, was the principal leader of the cartel throughout the EEA, except in Spain. The factual evidence on meetings ... shows that numerous cartel meetings were convened and conducted by representatives of AWA. ... There are also indications that the price increases agreed by at least two general cartel meetings and several national meetings originated from AWA, and that AWA demanded that the other participants make the same increases. AWA's position as the cartel leader is further corroborated by documents which show that AWA was the first to announce the price increases to the market, and that other competitors followed those announcements. In the minutes of the general cartel meeting of 2 February 1995 it is explicitly stated that AWA will lead the announcements of the price increases agreed at the meeting.'

568 It must be stated, first, that even if, as AWA maintains, other undertakings were able to book rooms on specific occasions, convene certain meetings or announce price increases, there is no other undertaking in respect of which there is so much evidence pointing to a leadership role. In this respect, for example, whilst it is true that Koehler also presided over the AEMCP from January 1995, the role of M. F. (Koehler) cannot be compared to that of Mr B. (AWA) who changed the manner in which the cartel functioned.

569 It is apparent, second, that the cartel members did not put forward any evidence casting doubt on AWA's leadership role. On the contrary, Mougeot's statements referred to at recitals 95, 97, 104, 108, 120, 141, 143, 193, 194, 210, 234 and 246 of the decision, and in particular those referred to in paragraph 439 above, tend to corroborate AWA's leadership role.

570 AWA disputes, however, the evidential value of Mougeot's statements, which it claims were motivated by Mougeot's interest in appearing as the victim of pressure from AWA and in being treated leniently by the Commission in exchange for such information.

571 In this respect, it must be stated that, even if there are certain differences between Mougeot's and AWA's accounts, Mougeot's statements broadly coincide on numerous points, in particular on the structure and the history of the cartel, with those of AWA, which were also made with a view to benefiting from the provisions of the Leniency Notice (see, in particular, paragraphs 163 to 168 and 261 above). The credibility of Mougeot's statements cannot therefore be called into question solely with regard to the leadership role played by AWA, especially since that ringleader role is corroborated by a body of consistent and convergent evidence.

572 Moreover, it must be stated that, in addition to Mougeot's statements, that body of evidence includes documents found by the Commission at Sappi's premises (recital 103 of the decision) and statements and communications by Sappi (see recital 181 and the reference, at recitals 228 and 233, to page 7 of the Commission's file containing statements by Sappi). It cannot therefore be claimed that the Commission's proposition is substantiated only by Mougeot's statements.

573 Lastly, as regards the pressure put on other undertakings by AWA, the Commission states, in its defence, that it did not accuse AWA of having pushed other undertakings to participate in the cartel, even though some of them, such as Carrs and Torraspapel, claimed in their responses to the SO that they had acted under pressure from AWA.

574 It is true that at recital 425 of the decision, in the examination of the attenuating circumstances of an exclusively passive role, the Commission refers to the fact that 'Carrs, Copigraph and Torraspapel claim that they played an exclusively passive role in the infringement and that they were forced to participate in the cartel due to the pressure exercised on them by the cartel leader AWA' and that 'Koehler also submits that threats by AWA were a factor pushing it to take part in the collusion'. However, they are arguments put forward by the parties in response to the SO in order to claim attenuating circumstances, arguments which the Commission then rejects at recitals 426 and 427 of the decision.

575 It must also be stated that the evidence put forward by the Commission at recitals 418 to 423 of the decision in order to establish AWA's ringleader role makes no reference to such inducements or threats by it aimed at making the undertakings participate in the cartel. AWA cannot therefore claim that it was wrongly accused of such threats or that it did not have access to the statements of the undertakings referring to those threats. It follows from recitals 420 to 422 of the decision and from AWA's pleadings that AWA addressed the complaint that it was the leader in every respect and exercised its rights of defence by disputing it. It cannot plead infringement of its rights of defence in this respect.

576 All the foregoing leads the Court to find that the Commission did not commit a manifest error of assessment in finding, on the basis of a set of consistent and convergent evidence, that AWA took on the role of ringleader in the infringement.

577 It must now be determined whether that role justified an increase of 50% in AWA's fine.

2. Breach of the principle of proportionality

578 AWA argues that even if it was the leader in the infringement, this did not justify a 50% increase in the fine. In order to establish the disproportionate nature of that increase, it relies on the Commission's previous decisions and compares its position with that of the other undertakings whose fines were increased in the same way.

579 However, the argument that an increase of 50% is higher than that generally applied in other Commission decisions is not capable of proving an infringement of the principle of proportionality (see, to that effect, *ADM* v *Commission*, cited in paragraph 436 above, paragraph 248).

580 In this respect, it is sufficient to recall that, according to settled case-law, when determining the amount of each fine, the Commission has a discretion and is not required to apply any particular arithmetical formula (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, and *Mo och Domsjö* v *Commission*, cited in paragraph 67 above, paragraph 268, upheld, on appeal, in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47).

581 For the sake of completeness, and in response to the argument that the rate of 50% represents, in percentage terms, the highest increase ever imposed on account of a ringleader role and, in absolute terms, the second highest increase based on such a reason, it must be observed that that rate cannot be regarded as exceptional.

582 In its Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-

1/36.490 — Graphite electrodes) (OJ 2002 L 100, p. 1), the Commission imposed on SGL Carbon AG an increase of 85% on account of aggravating circumstances. It is however true that the role of ringleader was not the only aggravating circumstance, since SGL Carbon was also accused of obstructing the Commission's investigation and refusing to terminate the infringements. In the case of UCAR International Inc., the increase was 60% for its role as ringleader and instigator and for continuing the infringement after the investigations. In Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd (OJ 1999 L 76, p. 1) the increase was 75%. British Sugar plc was penalised for its role as instigator and for being the 'driving force behind the infringement', but also because it had infringed its Community competition law compliance commitments and had committed two infringements of the competition rules on the same market.

583 Furthermore, a rate of increase of 50% has been applied to other undertakings for their role as ringleader, for example to F. Hoffman-La Roche AG by Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1) and to Archer Daniels Midland and Ajinomoto by Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24).

584 However, AWA submits that, according to the Commission's previous decisions, the application of that rate of 50% requires an element of instigation or coercion.

585 As regards the element of instigation, it must be observed that, in Decision 2001/418, an increase of 50% was imposed on ADM whereas the instigator role was

clearly attributed to Ajinomoto. That example therefore militates against AWA's contention that an element of instigation is needed for a rate of 50% to be applied.

586 However, even accepting AWA's contention that the application of a rate of increase of 50% requires an element of instigation, that element is present in this instance. AWA convened and conducted several cartel meetings, was the 'instigator of the restructuring of the cartel' (recital 418 of the decision), initiated several price increases and was often the first to announce the price increases on the market. The increase of 50% cannot therefore be considered to be disproportionate (see paragraphs 568 to 576 above).

587 For the sake of completeness, as regards the element of coercion, it must be observed that the Guidelines also refer, amongst the aggravating circumstances, to retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement. Those measures are therefore in themselves an aggravating circumstance different from that of the role of leader in or instigator of the infringement.

588 Furthermore, in this instance, according to recital 104 of the decision, Mougeot's statements refer to threats, since '[Mr B.] said quite expressly that he would not tolerate any failure to follow this price increase and that he would "personally look after" anyone who did not "play the game"'.

589 Moreover, it cannot be excluded that AWA's indisputable economic leadership on the carbonless paper market provided it with a certain coercive power. Mougeot's statements referred to in paragraph 439 above support that view.

590 Accordingly, the increase of 50% in AWA's fine on account of its ringleader role does not infringe the principle of proportionality.

3. Breach of the principle of equal treatment

591 In AWA's submission, the increase of 50% in the fine on account of its ringleader role also infringes the principle of equal treatment in so far as several undertakings played an identical part in the cartel. Koehler organised several meetings. Torraspapel, Mougeot and MHTP played a leading part in the national agreements by taking responsibility for the practical organisation of meetings. The decision describes Torraspapel as the cartel leader in the Spanish market. The fact that those undertakings' fines were not also increased therefore constitutes unjustified discrimination.

592 It must be observed that there is no set of consistent and convergent evidence in respect of those undertakings of the same nature and importance as that which points to AWA's being the ringleader of the infringement concerned. The fact that one or other of those undertakings may have had a specific function in the cartel does not make it a ringleader. It is the combination of a number of factors, corroborated by the statements of several undertakings, which confers that quality on AWA (see paragraphs 568 to 576 above).

593 The Commission was therefore correct to increase AWA's fine by 50% on account of aggravating circumstances.

G — *The pleas alleging infringement of Article 253 EC, of Article 15(2) of Regulation No 17 and of the principles of proportionality and equal treatment, failure to determine the fines individually, excessively restrictive interpretation of the Guidelines on fines, and manifest errors of assessment, resulting from failure to take account of certain aggravating circumstances*

1. Exclusively passive or 'follow-my-leader role' in the cartel

594 Several applicants (Bolloré, Zanders, Mougeot, Divipa and Zicuñaga) assert that they played only a passive, 'follow-my-leader' or marginal role in the cartel. The Commission should therefore have reduced their fines on account of attenuating circumstances.

595 The Commission rejects their arguments on the ground that all the participants in the cartel were active members of it.

596 It must be recalled that where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (*Suiker Unie and Others* v *Commission*, cited in paragraph 446 above, paragraph 623, and *Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraph 150) in order to determine whether there are any aggravating or attenuating circumstances relating to them.

597 Sections 2 and 3 of the Guidelines provide for adjustment of the basic amount of the fine by reference to certain aggravating and attenuating circumstances. In particular, in accordance with the first indent of Section 3 of the Guidelines, 'an exclusively passive or follow-my-leader' role in the infringement will, where it is established,

constitute an attenuating circumstance. A passive role implies that the undertaking adopts a 'low profile', that is to say does not actively participate in the creation of any anti-competitive agreements (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraphs 165 to 167).

598 Furthermore, the applicants cannot submit that the fact they were not one of the cartel ringleaders should have led to a reduction in the amount of their fines. By claiming that they did not play an active role, they are asserting only that there are no aggravating circumstances (see, to that effect, *Lögstör Rör* v *Commission*, cited in paragraph 93 above, paragraph 322, and Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 230).

599 According to Bolloré, the Commission inferred from Copigraph's regular participation in the cartel meetings and the price increase initiatives that it had not played an exclusively passive role. However, in Bolloré's opinion, regular participation in the meetings and the price increase measures does not preclude the undertaking concerned from playing only a follow-my-leader role in the cartel. The Commission is required to verify in concrete terms the degree of participation by the undertaking concerned in the cartel, from a quantitative and qualitative point of view. Bolloré was the least assiduous member of AEMCP at the meetings.

600 It must be stated in this regard that Copigraph's attendance rate, as Bolloré recognised in its application, namely 15 out of 21 AEMCP meetings, 8 out of 11 of the meetings held between 14 September 1993 and September 1995 and 3 out of 4 of the general meetings, not to mention its attendance at the national meetings on the French market and at 4 of the 6 meetings relating to the Spanish market, is not negligeable. It does not in any case establish that its participation in cartel meetings is significantly more sporadic than that of the ordinary members of the cartel for the purposes of *BPB de Eendracht* v *Commission*, paragraph 501 above, paragraph 343. Its participation in those meetings and in those price increase initiatives, together with the admission of its participation in the cartel, do not therefore show an exclusively passive or follow-my-leader role.

601 However, Bolloré appears to assert that where an undertaking pleads that it played a passive role, the Commission should recognise attenuating circumstances for it and reduce the amount of its fine, except where the Commission demonstrates that the undertaking actually had an active role. That argument cannot succeed.

602 The Guidelines do not state that the Commission must always take account of each of the individual attenuating circumstances set out at Section 3. Although the circumstances in the list at Section 3 of the Guidelines are certainly among those which may be taken into account by the Commission in a specific case, it is not required to grant a further reduction as a matter of course when an undertaking puts forward evidence of the existence of one of those circumstances. Whether it is appropriate to grant a reduction of the fine on grounds of attenuating circumstances must be determined on the basis of a global assessment which takes account of all the relevant circumstances. In the absence of a mandatory indication in the Guidelines of the attenuating circumstances which may be taken into account, it must be held that the Commission retained a certain discretion when making a global assessment of the size of any reduction in the fines to reflect attenuating circumstances.

603 In any event, the Guidelines cite as an example of attenuating circumstances an 'exclusively' passive or follow-my-leader role in implementing the infringement. Participation in the majority of the collusive meetings is already sufficiently active not to be classified as 'exclusively' passive or follow-my-leader.

604 Mougeot claims that its fine is disproportionate in the light of its level of responsibility in the cartel. However its arguments do not establish that it played an exclusively passive or follow-my-leader role, and it does not claim that it did so. Nor can the fact that it did not play a leadership role result in a reduction in the fine, for the reason stated at paragraph 598 above.

605 Divipa submits that the Commission did not take account of its exclusively passive and subordinate role in the cartel. It asserts that it did not participate in any meetings of, or decisions taken by, the carbonless paper producers and, as a simple distributor, maintained with those producers only relations of a purely vertical nature. However, the Court has held that it was necessary to reject Divipa's plea disputing its participation in the infringement (see paragraphs 155 to 221 above). Since its participation in collusive meetings on the Spanish market has been established, its role cannot be classified as exclusively passive. The question whether or not it participated in those meetings as a distributor cannot change that finding.

606 Zicuñaga cites its exclusively passive or follow-my-leader role in the cartel as one of the attenuating circumstances which the Commission should have taken into account when calculating its fine. In support of that claim, it relies only on Commission decisions in which the Commission treated ringleaders differently from ordinary members.

607 However, since the Commission has established Zicuñaga's participation in collusive meetings concerning the Spanish market (see paragraphs 155 to 243 above), Zicuñaga is not justified in seeking a reduction in its fine by arguing merely that it played an exclusively passive or follow-my-leader role without adducing evidence capable of proving that.

608 Zanders does not dispute that it was a member of the cartel for the period between January 1992 and September 1995, which indeed enabled it to obtain a reduction in its fine under the Leniency Notice, but denies playing the active or even key role of which the Commission accuses it. It disputes that it was present at certain meetings and adds that the direct proof available to the Commission establishes that it did not participate in important aspects of the cartel or, at least, that it participated to a lesser extent than other undertakings by confining itself to a follow-my-leader role. Zanders denies in particular that it participated in unofficial AEMCP meetings following the restructuring of that organisation in autumn 1993.

609 The fact that Zanders' participation in certain meetings cannot be established and that it was more active in the collusive agreements at the national level than at the European level does not prove that it had an exclusively passive or follow-my-leader role. Zanders itself states that it does not deny in principle that collusion took place with it after certain meetings at which it was not present. Moreover, despite its decision no longer to participate in unofficial AEMCP meetings after the restructuring of AEMCP, Zanders admitted at the hearing that it had not informed the other members that it was distancing itself from, or no longer participating in, the cartel. It therefore continued to be perceived as a fully-fledged member by the other participants and to be informed of the results of the collusive meetings. Lastly, it is apparent from Zanders' statements at the hearing that it applied the decisions taken at the meetings at which it was not represented, except in a few cases where it did not adhere to them. Those elements therefore cast doubt on the argument that Zanders adopted an exclusively passive approach.

610 Zanders seems above all to be seeking to establish that it did not play a 'key role'. However, according to the case-law cited in paragraph 598 above, by that claim, it asserts only that there are no aggravating circumstances.

611 As regards the alleged discrimination against Zanders in relation to other undertakings which in its view were considerably more active in the cartel, the assessment of an exclusively passive or follow-my-leader role in the cartel must be carried out in respect of each undertaking individually. The fact that other undertakings may have been more active does not automatically mean that Zanders had an exclusively passive or follow-my-leader role. Only total passivity on its part could be taken into account as a factor, but this has not been established.

612 In conclusion, the Commission is right to maintain that all the undertakings participating in the cartel were active members of it in so far as they participated in meetings during which they exchanged information and agreed on price increases

which were then announced to customers. Whilst it is true that they were not necessarily all as active in every aspect of the infringement and on the whole of the market, none played, strictly speaking, an exclusively passive or follow-my-leader role. The Commission therefore correctly applied the Guidelines which do not provide for gradations between the role of leader and an exclusively passive or follow-my-leader role.

2. Size and influence on the market of the offending undertaking

613 Divipa submits that it should not have been classed in the same category as Carrs and Zicuñaga because it is a small-scale family business which carries out its conversion and distribution activities only at a local level. The infringement which it was found to have committed had no restrictive effect on competition.

614 The Commission maintains that it took account of Divipa's limited influence by placing it in the fifth category. Since all the undertakings which were members of the cartel infringed the competition rules, Divipa's argument cannot lead to its being placed in a category lower than that of Carrs and Zicuñaga.

615 In this respect, it must be stated, first, that Divipa's small size was duly taken into account, since it was placed in the last category with a fine whose starting amount was set at EUR 1.4 million, whilst, for an infringement categorised as very serious, that amount could have been over EUR 20 million. Second, the Court has already held that the fact that the applicant is a medium-sized family undertaking does not constitute a mitigating circumstance (*LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 338).

616 As regards the argument that the infringement which Divipa was found to have committed had no restrictive effect on competition, the assessment of the effects of the cartel cannot be limited only to the market on which Divipa claims to operate, when the cartel covered the whole of the common market and then the EEA. Trade between Member States has therefore been affected, so that Article 81 EC is applicable. If that argument should be interpreted as claiming that the infringement it was found to have committed had no actual impact on competition, reference is made to paragraphs 445 to 459 above.

617 There was therefore no reason to grant Divipa the benefit of an attenuating circumstance on account of its size and limited influence.

3. Conduct on the market during the infringement period

618 Divipa claims that it never applied the agreements allegedly concluded at the meetings in which it did not participate. Its commercial conduct was the opposite of the content of those agreements. The impact of its conduct on the market was therefore minimal, or even non-existent.

619 Torraspapel claims that the Commission failed to take account of the fact that it did not comply with the price agreements notwithstanding the pressure brought to bear on it. The development of its pricing policy does not correspond to the alleged price agreements. Its pricing behaviour regularly hindered the anti-competitive effects of the cartel, which is sufficient for a finding by the Commission that it should have the benefit of an attenuating circumstance.

620 Zicuñaga claims that, by reason of the Guidelines and the Commission's practice, account must be taken, as an attenuating circumstance, of the fact that the prohibited agreement was not applied or was applied only in part.

621 The Commission asserts that it is not required to take non-compliance with an illicit agreement into account as an attenuating circumstance. It relies in this respect, in particular, on Case T-327/94 *SCA Holding* v *Commission*, cited in paragraph 468 above, paragraph 142.

622 As already noted, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (*Suiker Unie and Others* v *Commission*, cited in paragraph 446 above, paragraph 623, and *Commission* v *Anic Partecipazioni*, cited in paragraph 149 above, paragraph 150) in order to determine whether there are any aggravating or attenuating circumstances relating to them.

623 Section 3 of the Guidelines entitled 'Attenuating circumstances' sets out a non-exhaustive list of circumstances which may lead to a reduction in the basic amount of a fine, one of which is the non-implementation in practice of the agreements (Section 3, second indent).

624 It should be noted that the Guidelines do not list the attenuating circumstances that the Commission must take into account. Consequently, the Commission retains a certain discretion when making a global assessment of the size of any reduction in the fines to reflect attenuating circumstances.

625 It is necessary to check, in that connection, whether the circumstances relied on by the applicants are capable of showing that during the period in which they were parties to the infringing agreements they actually avoided applying them by adopting competitive conduct in the market (*ADM* v *Commission*, cited in paragraph 436 above, paragraph 268; see also, to that effect, *Cement*, cited in paragraph 49 above, paragraphs 4872 to 4874).

626 In the present case, the evidence adduced by the applicants does not demonstrate that they actually avoided applying the infringing agreements in question by adopting competitive conduct in the market.

627 As regards Torraspapel, whilst it is true that it can be inferred from recitals 157, 166 and 216 of the decision that that undertaking did not always follow the price increases agreed or followed them late, numerous other factors (see, in particular, recitals 204, 206, 215, 225 to 227, 236 to 238 of the decision) show that, to a large extent, it implemented those agreements. It is apparent, for example, from recitals 204 and 206 that AWA, Koehler, Sappi, Stora and Torraspapel announced, during the period January to May 1994, price increases identical to those agreed at the general meeting of 19 January 1994. Similarly, for September and October 1994 AWA, Sappi, Stora, Torraspapel and Zanders announced price increases identical to those agreed at the meeting of 21 June 1994 (recital 215). As regards the period from December 1994 to February 1995, the Commission states at recital 225 that it discovered that all the participants at the general cartel meeting of 22 September 1994 — AWA, Koehler, Sappi, Stora, Torraspapel and Zanders — announced price increases identical to those agreed at that meeting. Lastly, in a document dated 16 February 1995 received from Sappi and cited at recital 238, it is stated that 'the increase of 6% [reels] on 1.3.1995 is announced by the markets leaders Sarrio/Stora/AWA'. It is also apparent from the documents submitted by the Commission that Torraspapel sometimes concluded separate agreements for certain large customers by postponing the agreed price increase. In the figures which it submitted in support of its argument that the agreed price increases were not applied, the applicant compares the average monthly prices without explaining those delays or the rescheduling in implementation.

628 As for Divipa, its claim that it is a simple distributor which is not in competition with the other undertakings involved is unfounded. Even if it bought large reels from manufacturers, it itself manufactured sheets and small reels which it supplied, like the other undertakings involved, to third parties. On the Spanish and Portuguese markets, certain manufacturers distributed their products themselves and others operated through independent distributors (recital 153 of the decision). The integrated producers controlled the whole process and imposed their prices on the printers, whilst the producers which were not vertically integrated had to negotiate

sale prices with the distributors. It was necessary in that case to set two levels of price: that which the producer asked the distributor to pay and that which the distributor required third parties to pay. The note on the meeting of 19 October 1993 in Barcelona (document No 4474, referred to at recital 192 and in paragraph 172 above) shows that the cartel also covered that latter price. By participating in the cartel, Divipa was therefore able to influence its profit margin.

629 Furthermore, the Commission established that Divipa had participated in collusive meetings on the Spanish market during which price increases were agreed. Divipa claims however that it did not apply those agreements. In the present case, the evidence adduced by the applicant does not however demonstrate that it did not apply the agreements in question by adopting conduct on the market which was liable to impede the anti-competitive effects of the infringement found to have occurred. The tables provided by Divipa annexed to its application show, for example, that in 1994 its margins and sales prices increased considerably notwithstanding structural overcapacities and a market in decline. In addition, the mere fact that it may not have complied fully with the agreements entered into — if established — is not sufficient to oblige the Commission to make a finding of attenuating circumstances in its favour. The applicant could, through its more or less independent policy on the market, simply be trying to exploit the cartel for its own benefit (Case T-327/94 *SCA Holding* v *Commission*, cited in paragraph 468 above, paragraph 142, and *Cascades* v *Commission*, cited in paragraph 451 above, paragraph 230).

630 The same considerations as those set out in the preceding paragraph in the case of Divipa apply to Zicuñaga. The Commission established that Zicuñaga participated in the collusive meetings on the Spanish market during which price increases were agreed. Whilst it is true that Zicuñaga puts forward as an attenuating circumstance the fact that those agreements were not implemented, it fails to establish as much. In its argument on the attenuating circumstances, it merely refers to several Commission decisions, most of which precede the application of the Guidelines. It relies on the fact that, in those decisions, the Commission took account, when assessing the gravity of the infringement, of whether the agreements in question had

or had not been implemented. However, in order to assess any attenuating circumstances, the Commission must, in accordance with the principle that penalties and sanctions are specific to the individual undertaking, examine the relative seriousness of the undertaking's participation in the infringement (*ADM* v *Commission*, cited in paragraph 436 above, paragraph 265).

631 In any event, the information provided by Zicuñaga in other parts of its application which do not relate to the issue of attenuating circumstances confirms that Zicuñaga's and Divipa's prices moved in parallel. It is apparent, moreover, also from the application that Zicuñaga's prices rose from ESP 174.99 in November 1993 to ESP 210.99 in December 1994. The fact that the prices charged by Zicuñaga do not tally exactly with those agreed at the various collusive meetings cannot in itself prove that Zicuñaga did not implement the agreements in question.

632 In this respect, it must be pointed out that the Commission states, at recital 397 of the decision, that '[t]he evidence on the meetings and price increases ... shows that occasionally the agreed increases were postponed to later dates, somewhat smaller increases were implemented ... or further meetings were arranged to revise the agreement'. The Commission infers from this that the cartel had 'an impact on the pricing policies of the cartel members even if the implemented increases occasionally fell short of the agreed levels or they were implemented later'.

633 The Commission did not therefore contend that all the price increases agreed had been implemented according to the amount set at the meeting in question. The fact that the exact amount of the increase agreed during a specific meeting was not applied cannot prove that the cartel did not have an impact on the pricing policies of the members of the cartel of which Zicuñaga was a part. It cannot moreover be excluded that, by charging prices which did not tally with those which were supposed to flow from the implementation of the agreements whilst continuing to

participate in the collusive meetings on the Spanish market, Zicuñaga sought to obtain from the other members of the cartel permission to sell at prices lower than those referred to by the general decision (see, to that effect, *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 342, upheld, on appeal, by Joined Cases C-189/02 P, C-200/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 409 above). Mougeot's handwritten note of 21 October 1994, referred to in paragraph 177 above, attests in any case to the fact that Zicuñaga obtained that permission, which may amount to another means of exploiting the cartel.

634 In those circumstances, the Court considers itself to be sufficiently informed by the evidence adduced in the decision and the information supplied by Zicuñaga to confirm, without requesting further information from the Commission, that Zicuñaga should not benefit from an attenuating circumstance on the basis that the agreements or unlawful practices were not in fact implemented.

635 The Commission was therefore right to decide not to find attenuating circumstances in favour of the applicants on the basis that the agreements or infringing practices were not implemented in practice.

4. Existence of threats and pressure

636 Several applicants (Koehler, Bolloré for Copigraph and Torraspapel) claim that the Commission did not take account of the threats and pressure brought to bear on them, essentially by AWA.

637 Whilst it is true that, at recitals 104, 106 and 425 of the decision, the Commission refers to the threats by AWA, it states, at recital 427:

'[T]he threats (in this case from the cartel leader) cannot justify infringements of the Community and EEA competition rules. Instead of joining the cartel, the companies should have informed the competent authorities, including the Commission, of the illegal behaviour of their competitors in order to put an end to it.'

638 It must be pointed out that the existence of threats and pressure is not one of the attenuating circumstances listed, albeit non-exhaustively, in the Guidelines.

639 That pressure, whatever its extent, cannot amount to an attenuating circumstance. The existence of such pressure does nothing to alter the reality and the gravity of the infringement (Joined Cases C-189/02 P, C-200/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 409 above, paragraph 370). The applicants could have reported the pressure to the competent authorities and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participate in the cartel (see, to that effect, *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 339). That is true of all the undertakings concerned in the present case, and there is no need to distinguish between them by reference to the alleged intensity of the purported pressure.

640 The Commission was not therefore required to take the threats alleged by certain applicants into account as an attenuating circumstance.

5. Termination of the infringement

641 Bolloré, MHTP and Zanders claim that the Commission did not take account, as an attenuating circumstance in their case, of termination of the infringement as soon as the Commission intervened. For its part, Zicuñaga claims that in several earlier Commission decisions the Commission reduced the amount of the fine on the ground that the infringement had ceased before the adoption of the final decision.

642 The Commission responds to MHTP, at recital 429 of the decision, by stating that it took into account for the assessment of the infringement only the limited period of time for which it considered it had sufficient evidence. It adds that since this is an obvious infringement, the claim of MHTP to have early termination considered as an attenuating circumstance must be rejected.

643 It must be stated that termination of the infringement as soon as the Commission intervenes is one of a number of attenuating circumstances expressly set out in Section 3 of the Guidelines.

644 None the less, it must be stated that the Commission cannot be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance (*ABB* v *Commission*, cited in paragraph 478 above, paragraph 213).

645 It is apparent in the present case that the time at which the applicants concerned are alleged to have terminated the infringement, namely September 1995 at the latest, is before the first intervention or investigations by the Commission, which were in January 1997.

646 In this case, the application of a reduction would duplicate the taking into account of the duration of the infringements, which, in accordance with the Guidelines, is applied in calculating the fine. Duration is taken into account for the specific purpose of imposing a heavier penalty on undertakings which infringe the competition rules over a prolonged period than on those whose infringements are of short duration. Thus, a reduction in the amount of a fine on the ground that an undertaking terminated its unlawful conduct before the Commission first intervened would have the effect of benefiting for a second time those responsible for infringements of short duration.

647 However, it is apparent from recital 348 of the decision that the Commission was unable to establish the date on which the cartel ceased. It found that the infringement ended in September 1995 because it had a body of documentary evidence until that time. The Commission does not however exclude that the collusion continued after that time. Events after September 1995 were nevertheless not taken into account in the calculation of the amount of the fines in question, so that any request for a reduction of the fines on this ground must be rejected.

648 For the sake of completeness, if it were necessary to consider the parties' arguments seeking a reduction of the fine because the infringement finished before the Commission intervened, the outcome would be no different.

649 In order to substantiate its request for a reduction in its fine because the infringement finished before the Commission intervened, Zicuñaga merely cites Commission decisions to that effect.

650 It should be pointed out that, according to settled case-law, the Commission is not bound by its previous decisions. This is a fortiori the case here since the decisions relied on all precede the application of the Guidelines. Moreover Zicuñaga has not

put forward any evidence specific to its situation which would justify a reduction in its fine on account of the early termination of the infringement. The fact that the duration of the infringement alleged against it is shorter than that attributed to the other undertakings has already been taken into account in so far as the increase applied to it for duration is lower than that of the other undertakings.

651 Nor do Bolloré and MHTP adduce evidence such as to establish that, in relation to the termination of the infringement, they are in a particular situation which would justify a reduction of their fines.

652 Zanders, on the other hand, relies not only on the termination of the infringement but also on the active role it played in this respect. It puts forward several matters. At a meeting in autumn 1995 with the relevant executives of the undertaking its board insisted that the rules of competition law be strictly observed. That meeting marked the start of an important compliance programme as part of which the employees of the undertaking received training in competition law. In spring 1996, the chairman of the board of International Paper sent a letter (Annex 8 to the application) to all the employees of the company calling on them to abide by the competition rules, a letter to which guidelines on how to comply with European Compeition law were attached. In addition, in relation to the outside world, the chairman of the board of Zanders, who became chairman of the AEMCP on 1 January 1996, indicated to competitors in this connection, without the slightest possibility of misunderstanding, that Zanders had 'turned its back' on the cartel. The number of AEMCP meetings dropped in 1996 and Zanders was no longer represented at the secret meetings.

653 However, although it was important that the applicant took measures to prevent future infringements of Community competition law by its personnel, that fact did not alter the reality of the infringement found in the present case. That fact did not in itself mean that the Commission was obliged to reduce the applicant's fine on account of an attenuating circumstance (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, cited in paragraph 409 above, paragraph 373, upholding, on appeal, *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 345). That conclusion is all the more applicable in the present case because the Commission did not take into account, in its calculation of the fine, the period during which Zanders claims to have taken measures to terminate the infringement.

654 Moreover, again for the sake of completeness, it should be pointed out that the active role that Zanders played in the termination of the infringement, in particular in its capacity as chair of the AEMCP, seems difficult to reconcile with the exclusively passive or follow-my-leader role which it claims to have had in the infringement.

655 Lastly, and in any event, in respect of all the undertakings relying on that plea, the Commission is under no obligation, in the exercise of its discretion, to reduce a fine for the termination of a manifest infringement, whether that termination occured before or after its investigation.

656 In the present case, since the fixing of prices in the carbonless paper sector was unquestionably a manifest infringement, correctly described by the Commission as 'very serious' (see paragraphs 434 to 442 above), the applicants are wrong to criticise the Commission for not reducing their fines because they terminated their involvement in that infringement before the investigation began.

6. Economic situation of the carbonless paper sector

657 A number of applicants (Bolloré, Zanders, Mougeot, AWA supported by the Kingdom of Belgium, Koehler) complain that the Commission did not, in contrast to its previous established practice, take account of the crisis which the carbonless paper sector was going through at the material time.

658 At Section 5, entitled 'General comments', the Guidelines provide that, depending on the circumstances, account should be taken of 'certain objective factors such as a specific economic context'.

659 It is apparent from recitals 24, 25 and 392 of the decision that the carbonless paper market was characterised by structural over-capacity and reduced demand on account of the use of electronic media. Several undertakings claimed to have suffered significant losses during the period in question.

660 The Commission itself accepts, at recital 392 of the decision, that, during the period covered by the decision, 'the carbonless paper market was declining'. It finds, however, at recital 431, that the information received in the replies to the SO and the Mikulski Hall Associates report ('the MHA report') commissioned by the AEMCP does not support the conclusion that during the infringement period, 1992 to 1995 the carbonless paper sector was in a serious crisis comparable to the sectors concerned in the previous cartel cases mentioned by the undertakings.

661 The Commission maintains that cartels often originate at times of economic crisis, so that the possibility of taking into account the economic difficulties of the sector concerned can be envisaged only in entirely exceptional circumstances. However, the infringement period cannot be described as a particularly serious period of crisis. Notwithstanding the start of a period of decline, sales were maintained at a high level.

662 The Commission contends that the issue of the existence and of the possible extent of a crisis in the sector concerned involves the assessment by it of complex economic data. Review of that assessment by the Community judicature is limited to

verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

663 With respect to the situation of the carbonless paper sector, it is sufficient to note that in *Lögstör Rör* v *Commission*, cited in paragraph 93 above, paragraphs 319 and 320, the Court of First Instance held that the Commission was not required to regard the poor financial state of the sector in question as an attenuating circumstance. The Court of First Instance has also stated that just because in earlier cases the Commission had taken the economic sector into account as an attenuating circumstance it did not necessarily have to continue to observe that practice (Case T-13/89 *ICI* v *Commission*, cited in paragraph 56 above, paragraph 372). As the Commission properly observed, as a general rule cartels come into being when a sector encounters problems. If the applicants' reasoning were to be followed, the fine would have to be reduced as a matter of course in virtually all cases. It is therefore unnecessary to investigate further whether the facts of this case and those forming the background to other decisions in which structural crises were regarded as attenuating circumstances were in fact comparable (*Tokai Carbon and Others* v *Commission*, cited in paragraph 496 above, paragraph 345).

664 For the sake of completeness, it must be stated that the Commission took account of the situation of the carbonless paper sector and that the applicants have not showed that the analysis of the market situation carried out by the Commission was vitiated by a manifest error of assessment or a misuse of powers. In this regard, it is appropriate to recall the case-law of the Court of Justice (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62) according to which, although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of Article 81(1) EC are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 34).

665 Furthermore, again for the sake of completeness, it is apparent from the MHA report (recitals 25 to 28 of the decision) that, although the growth in demand slowed from 1990/1991, the real decrease occured during 1995, that is to say towards the end of the infringement established in the decision. The parties have adduced no evidence such as to cast doubt on that data. However, that data suggests that, whilst it is true that the market was in decline, the start of the crisis coincided with the end of the infringement.

666 The Commission was therefore right to find that the situation of the carbonless paper sector did not constitute an attenuating circumstance.

7. Absence of profit from the infringement and the offender's financial situation

667 Several applicants assert that, throughout the infringement, they made minimal profits and even suffered losses.

668 Mougeot and Bolloré refer to their losses in a plea alleging that no account was taken of the difficult economic context. Reference should therefore be made in this respect to paragraphs 657 to 666 above.

669 For Koehler, the collorary of the taking into account of the profits derived from the cartel is the taking account of the losses suffered. It follows, in its submission, that, for reasons of equity, the Commission should have reduced its fine, since it suffered considerable losses during practically the whole of the infringement and therefore derived a very limited profit, if any, from its participation in the cartel.

670 That plea cannot be upheld.

671 The Court held in the *Cement* judgment, cited in paragraph 49 above, paragraph 4881, that the fact that an undertaking has derived no profit from the infringement cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect. It follows that the Commission is not required, for the purpose of setting fines, to establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where applicable, the fact that no profit was derived from the infringement in question.

672 It should be added that, as the Commission correctly maintains, the fact that the figures advanced by the applicant indicate losses in the carbonless paper sector during the infringement period does not however exclude that its position would have been worse in the absence of the cartel and that, despite everything, it derived a certain profit from it. According to the figures provided by Koehler in its application, its losses were considerable in 1992 but decreased significantly in 1993. The applicant subsequently made a profit in 1994 then suffered losses again in 1995, but less than in 1993. It cannot therefore be ruled out that the cartel enabled Koehler to limit its losses.

673 It follows that the Commission did not err in finding that there were no attenuating circumstances in the present case.

H — *The pleas alleging breach of the principles of protection of legitimate expectations, of proportionality and of equal treatment in the application of the Leniency Notice, and misapplication of that notice*

674 Several applicants (Zicuñaga, MHTP, Mougeot, AWA and Koehler) criticise the Commission's application of the Leniency Notice, alleging breach of the principle of equal treatment.

1. Zicuñaga

675 Zicuñaga asserts that the use of that system of reducing or annulling the fine on the basis of collaboration with the Commission constitutes an infringement of the principle of equal treatment which requires equal punishment for the same conduct.

676 It should be observed, first, that although Zicuñaga seeks by that to dispute the lawfulness of the Leniency Notice, it did not plead that that notice was inapplicable on the basis of Article 241 EC.

677 It must be stated next that a reduction in the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily and, where relevant, to bring it to an end (Case C-297/98 P *SCA Holding* v *Commission*, cited in paragraph 149 above, paragraph 36). It follows that there can be no discrimination as between an undertaking which chooses freely to cooperate and one which refuses to do so, since the conduct of the first one is different from that of the second, thus justifying the different punishment.

678 It should be pointed out in this respect that the cooperation route was also open to Zicuñaga (see, to that effect, 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*, cited in paragraph 409 above, paragraph 419). However, it did not make use of it. It cannot therefore plead that it was discriminated against in this respect.

679 The plea put forward by Zicuñaga in this respect must therefore be rejected.

2. MHTP

680 MHTP claims that the Commission infringed the principles of protection of legitimate expectations and of equal treatment by reducing its fine by only 10% although it had admitted the facts and the infringement. It states that at the time when it cooperated with the Commission, decisions applying the Leniency Notice granted a reduction of the fine of at least 20%, the reduction of 10% being reserved to undertakings which did not admit the infringement. It could therefore legitimately expect to enjoy a 20% reduction, since it had waived the exercise of the rights of the defence and had admitted its participation in the infringement before the SO was sent.

681 It should be observed that MHTP's case falls within Section D of the Leniency Notice, according to which '[w]here 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'. That notice states:

'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 materially contribute to establishing the existence of 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.'

682 In the present case, the Commission granted MHTP, under the second paragraph of Section D of the Leniency Notice, a 10% reduction for not substantially contesting the facts (recital 458 of the decision). The Commission did not grant it a reduction under the second paragraph of Section D of that notice. Although the Commission accepts, at recital 446 of the decision, that MHTP sent it the information before the SO, it states at recital 450:

'MHTP (Stora)'s reply was the most obscure; it admitted discussions between competitors on prices, but claimed that no agreement on increases was reached. This vague and unsubstantiated indication cannot be qualified as information or documents that contributed to establishing the existence of the infringement and therefore does not justify any reduction on fine.'

683 It must be pointed out that MHTP has not put forward any evidence such as to establish that the information which it had provided to the Commission before the SO materially contributed to establishing the existence of the infringement.

684 As regards a comparison between the present case and the Commission's previous practice, the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure *Mayr-Melnhof* v *Commission*, cited in paragraph 446 above, paragraph 368, and *ABB* v *Commission*, cited in paragraph 478 above, paragraph 239).

685 In *ABB* v *Commission*, the Court of First Instance adopts that statement of the law in finding that there was no breach of the principle of equal treatment in relation to previous decisions of the Commission and does not examine those decisions. The

detailed examination, at paragraphs 240 to 245 of that judgment, of the observance of the principle of equal treatment, relates only to the comparison of the situation of the various participants in the cartel.

686 MHTP cites the judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 459 above (paragraph 1232), in order to argue that the Court of First Instance has already examined applications based on unequal treatment in relation to other cases. Whilst it is true that that judgment deals with that question, it does so in order to reject the argument alleging that the Commission infringed the principle of equal treatment in relation to its previous practice. According to the Court, the amount of the fines depends on a variety of criteria, which must be assessed on a case-by-case basis with reference to the circumstances of the case, and the fact that the Commission imposed fines in the past of a certain level for certain types of infringement does not mean that it is estopped from raising that level if that is necessary to ensure the implementation of competition policy. That judgment does not therefore support MHTP's claims.

687 In any event, it must be stated that the range provided for by Section D of the Leniency Notice extends from 10 to 50% and does not set particular criteria for adjusting the reduction within that range. It does not therefore give rise to any legitimate expectation of a specific percentage reduction.

688 All those considerations lead the Court to reject that plea.

3. Mougeot

689 It should be recalled at the outset that it is settled case-law that in appraising the cooperation shown by the cartel members the Commission is not entitled to

disregard the principle of equal treatment (see *Tokai Carbon and Others* v *Commission*, cited in paragraph 496 above, paragraph 394, and the case-law cited). The Commission nevertheless has a wide discretion in assessing the quality and usefulness of the cooperation provided by the various members of a cartel, and only a manifest abuse of that discretion can be censured.

690 Mougeot claims that it was discriminated against in relation to Sappi, which obtained a reduction of 100% in the fine, and that the Commission should have granted it the benefit of Section D of the Leniency Notice and thus a reduction of 75%.

691 It must be found, as is apparent from recitals 436 to 445 of the decision, that Sappi, which reported the cartel, was the only undertaking to fulfil the cumulative conditions of Section B of the Leniency Notice. Since it adduced evidence of the existence of the cartel only after the Commission undertook investigations ordered by decision, Mougeot could not rely on the provisions of Section B. In order to fall within the provisions of Section C, Mougeot had to fulfil the conditions set out in Section B(b) to (e). Mougeot itself recognises, in its application, that it was not the first undertaking to send to the Commission evidence relating to the cartel. Moreover, unlike Sappi which informed the Commission of the cartel in autumn 1996 on its own initiative, Mougeot cooperated only in response to the request for information which the Commission had sent to it in March 1999.

692 In this respect, it is clear from the express wording of Section B(b) of the Leniency Notice that the 'first' undertaking does not have to have provided all the evidence demonstrating every detail of the operation of the cartel, provided that it adduces 'some' decisive evidence. In particular, that section does not require that the evidence adduced is sufficient in itself in order to draw up the statement of objections or for the adoption of a final decision establishing the existence of an infringement. Consequently, the mere fact that Mougeot was later able to provide evidence which appeared to be decisive in enabling the Commission to prove the

infringement cannot detract from the fact that Sappi was the first undertaking to have reported the cartel and cannot result in the application to Mougeot of a provision reserved for that first undertaking, which reported the cartel prior to the Commission's investigations.

693 The Commission was therefore right to apply to Mougeot Section D of the Leniency Notice. By granting it a reduction of 50% on that basis, that is to say the maximum reduction provided for, the Commission took proper account of the significance of the evidence that Mougeot had sent and of its cooperation at the on-the-spot checks and during the investigation.

4. AWA

694 AWA submits, for its part, that it ought to have received a reduction as large as Mougeot's because it contacted the Commission before Mougeot and the evidence which it gave the Commission was more helpful than that provided by Mougeot.

695 It must therefore be ascertained, in the light of the case-law cited in paragraph 689 above, whether, by granting a reduction of 35% to AWA as opposed to 50% to Mougeot, the Commission manifestly exceeded its wide discretion in this area.

696 As regards the chronology of the provision of information to the Commission, it is true that AWA announced its intention to cooperate with the Commission before Mougeot. However, Mougeot was the first of the two actually to send the information to the Commission, on 14 April 1999. AWA's actual contribution is dated 30 April 1999.

697 In this respect, it must be stated that the Commission was not obliged to regard as decisive the fact that one of the undertakings was somewhat faster in coming forward than the other undertakings. It is clear from the Leniency Notice that being the first undertaking to adduce decisive evidence is what matters for the application of Sections B and C. In the present case, that condition was fulfilled by Sappi (see paragraphs 691 and 692 above). AWA and Mougeot therefore both fell within Section D which makes no reference to and attaches no importance to whether the cooperation of one undertaking preceded that of another.

698 Furthermore, the fact that AWA may have informed the other cartel members of its intention to cooperate before contacting the Commission has no bearing on its cooperation with the Commission.

699 On the other hand, since AWA's and Mougeot's contributions were sent to the Commission after those of Sappi and after the investigations carried out by the Commission, it is necessary to ascertain whether they are of 'similar quality'.

700 In this respect, reference should be made to recitals 447 and 448 of the decision:

'Mougeot voluntarily provided statements and documents giving detailed information on cartel meetings (mainly concerning its home market France), including information on dates of the meetings, participants, contents of the meetings and agreements reached.

AWA voluntarily submitted to the Commission information on cartel meetings detailing the periods during which in various Member States of the Community such meeting[s] were held and listing participating companies. On the contents of the meetings AWA stated that "at some of these meetings ... carbonless paper prices were discussed ... extending to an exchange of intentions regarding announcements of price increases".'

701 Furthermore, at recital 252 of the decision, the Commission lists the evidence relating to the cartel as a whole. Amongst those items of evidence are the statements of Mougeot and Sappi and the evidence provided by AWA on 'improper' meetings in its reply to the Commission request for information, and the detailed reports and statements concerning the national/regional cartel meetings obtained from Mougeot and Sappi.

702 It is apparent from a comparison of those recitals that Mougeot's information was detailed in a way that AWA's was not. Mougeot stated inter alia the dates of the meetings whilst AWA indicated only periods. However, even if AWA's original statement was not as precise as that of Mougeot, according to recital 61 of the decision, AWA, in its response to the request for information, gave the Commission 'a list of "improper" meetings or groups of meetings between competitors from 1992 to 1998'. It lists meetings held on precise dates whose existence AWA helped to establish. Moreover, the period covered by AWA's statements is longer than that

concerned by those of Mougeot. The meetings to which the latter refers in its statement of 14 April 1999 (documents Nos 7647 to 7655, referred to in paragraph 165 above) are between 1 October 1993 and summer 1995. There is therefore no clear difference between Mougeot and AWA in terms of the information obtained on the holding of the collusive meetings.

703 As regards the participants in the collusive meetings, the provision by Mougeot of the '[identity of the] participants' scarcely differs from AWA's indication of the '[names of] participating companies'. In any event, it is apparent from Annex II to the decision that AWA's statements (document No 7828) were very helpful to the Commission in establishing each undertaking's participation in the meetings. The fact that that document is by far the most cited document in the footnotes in support of the list of meetings and their participants confirms this.

704 Lastly, recitals 447 and 448 explain that Mougeot's statements are limited mainly to the 'home market France', whilst AWA's information relates to meetings in 'various Member States of the Community'. The fact that several undertakings disputed the cartel at the European level accentuates the importance of the information provided by AWA in this respect.

705 The Commission therefore committed a manifest error of assessment by granting a reduction of 50% to Mougeot and of 35% to AWA. Even if, unlike AWA, Mougeot provided documents dating back to the material time and if, on certain points, its statements are more detailed, the information given by AWA relates to a longer period and covers a wider geographical area. It must therefore be held that the cooperation of AWA and of Mougeot is of similar quality. Nor can it be maintained that their cooperation can be distinguished on the basis of its usefulness to the

Commission. It is apparent moreover from the examination carried out above by the Court concerning the Spanish market (see paragraphs 161 to 168 above) or the collusive nature of the official AEMCP meetings before September or October 1993 (see paragraphs 256 to 310 above) that the items of information provided by AWA and Mougeot support each other to a large extent and form, with those of Sappi, a body of evidence which is essential for understanding the functioning of the cartel and establishing its existence.

706 It follows that AWA's plea alleging that its reduction on account of its cooperation is insufficient and discriminatory must be upheld.

707 In the exercise of its unlimited jurisdiction, the Court holds that, since the evidence adduced by Mougeot and AWA is of similar quality, AWA must be granted the same reduction on account of its cooperation as Mougeot, namely 50%. AWA's fine must therefore be reduced as a result.

5. Koehler

708 Koehler submits that the Commission did not take account of its full cooperation both before and after the SO was sent. It is contrary to the principle of equal treatment that Carrs, MHTP and Zanders should enjoy leniency whilst it does not.

709 According to recitals 457 and 458 of the decision:

'(457) Koehler states that it does not contest some of the facts set out in the Statement of Objections. However, Koehler contests substantial parts of the factual evidence on its participation in the cartel throughout the whole period. In particular, Koehler contests the description made by the Commission of agreements on sales quotas and market shares and the existence of a monitoring system. The Commission concludes therefore that there is no effective cooperation on the part of Koehler.

(458) The Commission grants Carrs, MHTP and Zanders a 10% reduction for not substantially contesting the facts.'

710 As regards the period before the SO was sent, Koehler asserts that it cooperated fully with the Commission. It adds that 'it is thus that the investigation at Koehler's premises on 9 and 10 December 1997 was carried out without resort to force since Mr F., member of the board, had given his prior agreement'.

711 In this respect, the mere fact of agreeing to an investigation cannot be regarded as proof of full cooperation. The Leniency Notice provides for a significant reduction of the fine where, before a statement of objections is sent, an undertaking provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement. Koehler has provided no such elements and does not moreover claim to have done so. Koehler's argument cannot therefore succeed.

712 As regards the period following receipt of the SO, the Leniency Notice provides for a significant reduction of the fine where an undertaking informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations. It must be assessed whether, as it claims, Koehler did so in this case, and do this also by comparison with the other undertakings which benefited from that provision.

713 In its comments on the SO, Koehler stated that it admitted the 'facts and complaints duly investigated and proved by the Commission'. It adds in its application that '[i]n so far as [it] made that admission subject to a reservation, it did so because it deemed it unacceptable to have to declare true what was untrue for the sole purpose of obtaining a reduction of the fine'.

714 However, it must be stated that, even if Koehler attempts then to justify some of its reservations by a subsequent change in the Commission's position, it admits that it expressed reservations and 'qualified the Commission's findings in relation to the agreements on sales quotas and market shares'. In addition, when Koehler admits that information was exchanged on the quantities sold at the regional level — whilst denying any such exchange at European level — it adds that these are exceptions relating to completed periods.

715 Moreover, although Koehler claimed at the hearing that its contestation related only to the period before October 1993 and that, for the period afterwards, notwithstanding some perhaps unclear or vague wording, it had cooperated with the Commission, it is not apparent from its observations on the SO that Koehler expressly limited its contestation to the former period. On the contrary, in its introductory comments, it states that it will not dispute certain facts, namely those

that the Commission found and assessed correctly in the SO. Next, Part III, relating to the contestation of the alleged facts, contains a paragraph 3 entitled 'No agreements on sales quotas or market shares at the European level' and a paragraph 4 entitled 'No monitoring system'. Those contestations which are not limited in time cannot be considered vague or inaccurate.

716 It should be recalled that a reduction of the fine is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily and, where relevant, bring it to an end (see Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 270, and the case-law cited). The Commission has a discretion in that regard, as may be seen from the wording of Section D2 of the Leniency Notice and, in particular, from the introductory words 'Such cases may include ...'. Furthermore, and above all, a reduction 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 (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*, cited in paragraph 409 above, paragraphs 394 and 395).

717 Admissions made subject to reservations or equivocal statements do not however convey real cooperation and are not capable of facilitating the Commission's task, since they require investigation. That is all the more true where those reservations relate to aspects such as, in the present case, the duration of the infringement, sales quotas, market shares or information exchanges.

718 Since, by those reservations, Koehler disputed numerous aspects of the cartel, or at least did not assist the Commission in its task of investigating and penalising the cartel, it cannot claim a significant reduction in its fine for not substantially contesting the facts.

719 Lastly it must be ascertained whether, as Koehler claims, the refusal to grant it a reduction on that basis infringes the principle of equal treatment, as Carrs, MHTP and Zanders obtained a reduction in the fine of 10%.

720 In so far as Koehler thereby criticises the rate of reduction granted to those other undertakings for not having contested the alleged facts, even supposing that the Commission granted too high a reduction of the fine to those other undertakings, the Court points out that respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (Case T-327/94 *SCA Holding* v *Commission*, cited in paragraph 468 above, paragraph 160, *Mayr-Melnhof* v *Commission*, cited in paragraph 446 above, paragraph 334, and *LR AF 1998* v *Commission*, cited in paragraph 45 above, paragraph 367).

721 Moreover, in so far as Koehler's contestation relates to the fact that it did not obtain a reduction of the fine under the Leniency Notice, reference should be made to paragraphs 708 to 718 above, from which it is apparent that, in the circumstances of the present case, it cannot claim such a reduction.

722 For the sake of completeness, as regards substantial contestation of the facts by the other undertakings which obtained a 10% reduction of their fine, it should be pointed out that Carrs admits the existence of the cartel and its participation in it during the entire period of the infringement specified in the decision. It states however that it did not participate in the meetings relating to the United Kingdom and Ireland markets and that it was not aware of the cartel at European level. In so doing, it does not substantially contest the facts. Nor is Carrs' claim that the cartel had limited effects inconsistent with substantially admitting the facts.

723 As regards Zanders and MHTP, Koehler maintains that recitals 455 and 456, according to which they did not contest the facts, are not consistent with the finding, at recital 395, that MHTP and Zanders denied that attempted price and quota agreements were implemented.

724 It must be observed that the arguments of MHTP and Zanders set out at recital 395 seek to contest the effectiveness of the agreements in order to have them classified as less serious. They do not call in question the existence of the cartel and are not therefore inconsistent with not contesting the facts.

725 As regards the fact that MHTP admitted participating in the cartel only from the end of 1992 (recitals 270 and 271), it should be pointed out that the Commission took account of this. According to recital 456 of the decision 'MHTP states that it does not contest the facts on which the finding of an infringement from 1992 to mid-1995 is based'.

726 Furthermore, the attitude of MHTP, which disputed only the starting date of the infringement, cannot be held to be comparable to that of Koehler, whose reservations related to several aspects of the cartel.

727 In those circumstances, Koehler has not established that it was the subject of unequal treatment. It follows from those considerations that the Commission was right not to reduce its fine under the Leniency Notice.

III — *AWA's request for production of documents*

728 AWA asks the Court to request the Commission to produce internal documents relating to the calculation of its fine and all the documents referred to in the contested decision, other than those sent to the applicant on 1 August 2000.

729 It should be recalled at the outset, that, according to Article 49 of the Rules of Procedure, the Court of First Instance may, at any stage of the proceedings, prescribe any measure of organisation of procedure or any measure of enquiry referred to in Articles 64 and 65 of the Rules of Procedure. The request for production of documents is such a measure.

730 To enable the Court of First Instance to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (*Baustahlgewebe* v *Commission*, cited in paragraph 256 above, paragraph 93).

731 It must be stated that, in the terms of the application, neither the request for production of internal documents relating to the calculation of the fine nor that relating to all the documents relied on in the decision, other than those sent to AWA on 1 August 2000, identifies the documents sought with sufficient precision to enable the Court to assess their usefulness for the purpose of these proceedings.

732 Both requests must therefore be rejected.

733 For the sake of completeness, AWA has not demonstrated the usefulness of those documents for the purpose of these proceedings.

734 As regards its request for production of internal documents of the Commission relating to the calculation of its fine, the mere fact, relied on by AWA, that, in particular in several cases which gave rise to the *'Cartonboard'* judgments (in particular, *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 483 above), the Court of First Instance requested the Commission to produce such documents cannot prove their usefulness in the circumstances of this case and oblige the Court to order the same measures.

735 Furthermore, as the Commission states, the *'Cartonboard'* judgments predate the application of the Guidelines. Those guidelines seek precisely to ensure the transparency and impartiality of the Commission's decisions by setting out the framework of the new method applicable to the calculation of the amount of the fine. In the present case, the decision, which clearly applies those guidelines, explains in a detailed manner the calculation of the fine.

736 Lastly, it is settled case-law that internal documents of the Commission are not revealed to the parties unless the exceptional circumstances of the case concerned so require, on the basis of sound evidence which it is up to them to provide (order in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11; *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 716 above, paragraph 34; see also, to that effect, Case T-35/92 *Deere* v *Commission* [1994] ECR II-957, paragraph 31). AWA has not provided sound evidence to that effect.

737 As regards the request to produce all the documents relied on in the decision other than those sent to AWA on 1 August 2000, AWA states that it is intended to enable it to see and examine the evidence that the Commission relied on in the decision.

738 In this respect, even if it criticises the unusable nature of the index (see paragraphs 109 to 117 above), AWA has not disputed that it had access to the Commission's file during the administrative procedure. In so far as it does not make use of documents other than those to which the undertaking had access during the administrative procedure in order to inculpate an undertaking in the decision, the Commission cannot be required to give AWA access to all the documents cited in the decision (see, to that effect, *LR AF 1998* v *Commission*, cited in paragraph 45 above, and the case-law cited).

739 The request addressed to the Court relates to all the documents relied on in the decision other than those sent to AWA on 1 August 2000. Unlike the letter that AWA had sent to the Commission on 22 February 2002, that request does not explain that it relates in particular to the responses of the other addressees of the SO and the PricewaterhouseCoopers report.

740 However, even supposing that it were necessary to take account of that explanation also in relation to the general request addressed to the Court of First Instance, and that a request directed globally at the responses of the other addressees of the SO could be regarded as identifying with sufficient precision the documents sought, AWA has not in any event established that those documents are useful for the purpose of these proceedings.

741 The request for a measure of organisation of procedure addressed to the Court by AWA must therefore be rejected.

742 On the basis of all those considerations, the actions brought in Cases T-109/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02 and T-132/02 must be dismissed. In Case T-118/02, the fine imposed on AWA is reduced to EUR 141.75 million. In Case T-136/02, the fine imposed on Zicuñaga is reduced to EUR 1.309 million.

Costs

743 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

744 In Cases T-109/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02 and T-132/02, the applicants have been unsuccessful. Consequently they will pay the costs in full, in accordance with the form of sought by the defendant.

745 In Case T-118/02, since the action has been only partially successful, the Court will make an equitable assessment of the case in holding that the applicant is to bear two thirds of its own costs and pay two thirds of the costs incurred by the Commission and that the Commission is to bear a third of its own costs and pay a third of the costs incurred by the applicant. Since the Kingdom of Belgium intervened in support of the form of order sought by the applicant for a reduction of the fine on account of attenuating circumstances connected with the difficulties experienced by the carbonless paper sector, it must be ordered to bear its own costs and pay those of the Commission relating to its intervention, in accordance with the form of order sought by the Commission.

746 In Case T-136/02, as the action has been successful in part, the Court will make an equitable assessment of the case in holding that the applicant is to bear two thirds of its own costs and pay two thirds of the costs incurred by the Commission, and that the Commission is to bear one third of its own costs and pay one third of those incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. In Case T-109/02 Bolloré v Commission:

— dismisses the action;

— orders the applicant to pay the costs;

2. In Case T-118/02 Arjo Wiggins Appleton v Commission:

— sets the amount of the fine imposed on the applicant by Article 3 of Commission Decision 2004/337/EC of 20 December 2001 relating to a

proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) at EUR 141.75 million;

— **dismisses the remainder of the action;**

— **orders the applicant to bear two thirds of its own costs and pay two thirds of the costs incurred by the Commission and the Commission to bear one third of its own costs and pay one third of those incurred by the applicant;**

— **orders the intervener to bear its own costs and those of the Commission related to the intervention;**

3. **In Case T-122/02 Mitsubishi HiTec Paper Bielefeld v Commission:**

— **dismisses the action;**

— **orders the applicant to pay the costs;**

4. **In Case T-125/02 Papierfabrik August Koehler v Commission:**

— **dismisses the action;**

— **orders the applicant to pay the costs;**

5. **In Case T-126/02 M-real Zanders v Commission:**

— **dismisses the action;**

— **orders the applicant to pay the costs;**

6. **In Case T-128/02 Papeteries Mougeot v Commission:**

— **dismisses the action;**

— **orders the applicant to pay the costs;**

7. **In Case T-129/02 Torraspapel v Commission:**

— **dismisses the action;**

— **orders the applicant to pay the costs;**

8. In Case T-132/02 Distribuidora Vizcaína de Papeles v Commission:

— dismisses the action;

— orders the applicant to pay the costs;

9. In Case T-136/02 Papelera Guipuzcoana de Zicuñaga v Commission:

— sets the amount of the fine imposed on the applicant by Article 3 of Commission Decision 2004/337/EC of 20 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) at EUR 1.309 million;

— dismisses the remainder of the action;

— orders the applicant to bear two thirds of its own costs and pay two thirds of the costs incurred by the Commission and the Commission to bear one third of its own costs and pay one third of those incurred by the applicant.

Vilaras Dehousse Sváby

Delivered in open court in Luxembourg on 26 April 2007.

E. Coulon M. Vilaras

Registrar President

Table of contents

Background ..... II - 969

Procedure and forms of order sought ..... II - 975

Law ..... II - 980

I — The pleas for annulment of the decision ..... II - 980

A — The pleas relating to the administrative procedure ..... II - 980

1. The first plea, alleging infringement of the right to be heard resulting from the failure to disclose documents classed as confidential by the Commission during the administrative procedure ..... II - 980

(a) Arguments of the parties ..... II - 980

(b) Findings of the Court ..... II - 981

2. The second plea, alleging infringement of the right of access to the file on account of the failure to produce documents not included in the investigation file communicated via CD-ROM ..... II - 984

(a) Arguments of the parties ..... II - 984

(b) Findings of the Court ..... II - 985

3. The third plea, alleging infringement of the rights of the defence and of the adversarial principle resulting from a lack of consistency between the SO and the decision ..... II - 988

(a) Arguments of the parties ..... II - 988

(b) Findings of the Court ..... II - 989

4. The fourth plea, alleging infringement of the rights of the defence, of the right to a fair hearing and of the principle of the presumption of innocence ..... II - 995

(a) Arguments of the parties ..... II - 995

(b) Findings of the Court ..... II - 996

5. The fifth plea, alleging breach of the principle of sound administration when investigating the case and a failure to state the grounds in the decision ..... II - 998

(a) Arguments of the parties ..... II - 998

(b) Findings of the Court ..... II - 999

6. The sixth plea, alleging infringement of the principle of sound administration, of the right of access to the file and of the rights of the defence, resulting from the fact that certain documents in the investigation file were difficult to find and the list of documents comprising that file was unusable ..... II - 1004

(a) Arguments of the parties ..... II - 1004

(b) Findings of the Court ..... II - 1005

7. The seventh plea, alleging breach of the principle of sound administration and of the rights of the defence on account of the late notification of the decision ..... II - 1007

(a) Arguments of the parties ..... II - 1007

(b) Findings of the Court ..... II - 1007

B — The pleas alleging breach of Article 81 EC and Article 53 of the EEA Agreement and errors of assessment by the Commission in relation to the participation of certain undertakings in the infringement ..... II - 1008

1. Bolloré's situation ..... II - 1008

(a) Arguments of the parties ..... II - 1009

(b) Findings of the Court ..... II - 1010

2. Situation of Divipa and Zicuñaga ..... II - 1017

(a) Arguments of the parties ..... II - 1017

(b) Findings of the Court ..... II - 1018

The existence of collusive meetings on the Spanish market ... II - 1020

Participation of Divipa and Zicuñaga in the cartel on the Spanish market ..... II - 1028

Divipa's and Zicuñaga's participation in the cartel on the European market ..... II - 1033

Zicuñaga's participation in agreements fixing sales quotas and market shares ..... II - 1039

C — The pleas relating to the duration of the infringement ..... II - 1045

1. The pleas advanced by Bolloré, MHTP, Koehler, Mougeot and Torraspapel ..... II - 1046

(a) Participation of the applicants in the infringement before September or October 1993 ..... II - 1046

Arguments of the parties ..... II - 1046

Decision ..... II - 1049

Findings of the Court ..... II - 1051

— The alleged system of collusive meetings ..... II - 1052

Official AEMCP meetings before September or October 1993 II - 1052

— Participation of the applicants in meetings before September or October 1993 ..... II - 1068

(b) Mougeot's participation in the infringement after 1 July 1995. II - 1078

2. The plea raised by Divipa ..... II - 1082

3. The plea raised by Zicuñaga ..... II - 1084

II — The pleas for cancellation or reduction of the fines set in the first paragraph of Article 3 of the decision ..... II - 1085

A — The plea alleging infringement of the rights of the defence and of the principle of the protection of legitimate expectations on account of the incomplete and imprecise nature of the SO in relation to the fines ... II - 1085

1. Arguments of the parties ..... II - 1085

2. Findings of the Court ..... II - 1086

(a) Infringement of the right to be heard and failure to observe the principle of the protection of legitimate expectations in so far as the Commission departed from its previous practice ..... II - 1086

(b) Infringement of the right to be heard and of the principle of the protection of legitimate expectations in so far as the Commission departed from the Guidelines ..... II - 1087

(c) Infringement of the right to be heard in so far as the Commission set the fine on the basis of factors which were not announced in the SO ..... II - 1092

B — The plea alleging breach of the principle of non-retroactivity ..... II - 1094

1. Arguments of the parties ..... II - 1094

2. Findings of the Court ..... II - 1095

C — The pleas alleging insufficient evidence, breach of the principles of the presumption of innocence, of proportionality and of equal treatment, and errors of assessment as regards the Commission's findings in relation to the participation of certain undertakings in the European cartel ..... II - 1096

D — The pleas alleging insufficient evidence, infringement of Article 253 EC, of Article 15(2) of Regulation No 17 and of the principles of proportionality and equal treatment, lack of individual determination of the fines, erroneous factual findings, errors of assessment and errors of law in the assessment of the gravity of the infringement ..... II - 1102

1. Nature of the infringement ..... II - 1102

2. Actual impact of the infringement ..... II - 1105

3. Classification of the participants in the cartel for the purposes of setting the amounts of the fines ..... II - 1111

(a) Choice of the reference year ..... II - 1113

(b) Taking into account of an incorrect overall turnover figure ... II - 1114

(c) Disproportionate result of the application of the Commission's method ..... II - 1116

Breach of the principle of proportionality ..... II - 1116

Breach of the principle of equal treatment ..... II - 1120

4. Increase in the fine for deterrence ..... II - 1126

E — The pleas relating to the duration of the infringement ..... II - 1133

F — The plea alleging breach of the principles of proportionality and of equal treatment and a factual error of assessment ..... II - 1135

1. Factual error of assessment ..... II - 1136

2. Breach of the principle of proportionality ..... II - 1141

3. Breach of the principle of equal treatment ..... II - 1144

G — The pleas alleging infringement of Article 253 EC, of Article 15(2) of Regulation No 17 and of the principles of proportionality and equal treatment, failure to determine the fines individually, excessively restrictive interpretation of the Guidelines on fines, and manifest errors of assessment, resulting from failure to take account of certain aggravating circumstances ..... II - 1145

1. Exclusively passive or 'follow-my-leader role' in the cartel ..... II - 1145

2. Size and influence on the market of the offending undertaking ... II - 1150

3. Conduct on the market during the infringement period ..... II - 1151

4. Existence of threats and pressure ..... II - 1156

5. Termination of the infringement ..... II - 1158

6. Economic situation of the carbonless paper sector ..... II - 1161

7. Absence of profit from the infringement and the offender's financial situation ..... II - 1164

H — The pleas alleging breach of the principles of protection of legitimate expectations, of proportionality and of equal treatment in the application of the Leniency Notice, and misapplication of that notice . II - 1165

1. Zicuñaga ..... II - 1166

2. MHTP ..... II - 1167

3. Mougeot ..... II - 1169

4. AWA ..... II - 1171

5. Koehler ..... II - 1175

III — AWA's request for production of documents ..... II - 1181

Costs ..... II - 1184