Joined Cases T-259/02 to T-264/02 and T-271/02

Raiffeisen Zentralbank Österreich AG and Others

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices — Austrian banking market — 'Lombard Club' — Effect on trade between Member States — Calculation of fines)

Judgment of the Court of First Instance (Second Chamber), 14 December 2006 II - 5200

Summary of the Judgment

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    (Art. 81 EC)

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(Council Regulation No 17, Art. 15; Commission Notice 98/C 9/03, point 3, second indent)

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1. The Community judicature may take note of a change of name of a party to proceedings and an action for annulment brought by the addressee of a measure may be continued by the universal successor in title of that addressee, in particular in the case of the death of a natural person or where a legal person ceases to exist and all its rights and obligations are transferred to another person. In such circumstances, the universal successor in title is necessarily substituted automatically for its predecessor as addressee of the contested measure.

Conversely, the Community judicature has no power, either in the context of an

action for annulment under Article 230 EC or even in the exercise of its unlimited jurisdiction under Article 229 EC, with regard to penalties, to amend the decision of a Community institution by replacing the addressee thereof by another natural or legal person when that addressee still exists. That power belongs only to the institution that adopted the measure concerned. Thus, once the competent institution has adopted a decision and, therefore, established the identity of the person to whom the decision is to be addressed, it is not for the Court to substitute another person for the latter.

(see paras 71, 72)

2. An application brought by a person in his capacity of addressee of a measure in order to give effect to his rights in the context of an action for annulment under Article 230 EC and/or of an application for amendment under Article 229 EC cannot be transferred to a third person who is not the addressee thereof. If such a transfer were to be allowed, there would be a discrepancy between the status by virtue of which the action was brought and the status by virtue of which it was purportedly pursued. Moreover, such a transfer would give rise to a discrepancy between the identity of the addressee of the measure and that of the person litigating as addressee.

(see para. 73)

3. If, under Article 3(1) of Regulation No 17, the Commission finds, 'upon application or upon its own initiative', that there is infringement of Article 81 EC or of Article 82 EC, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end. Under Article 3 (2) of Regulation No 17, such an application may be made by a natural or legal person who claims a legitimate interest in that regard. It is apparent from Articles 6 to 8 of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 EC and 82 EC that persons who have made such an application enjoy certain procedural rights, including in particular the right to receive a copy of the non-confidential version of the statement of objections.

Such an application may be validly submitted once an infringement procedure has been commenced on the Commission's own initiative. Regulations No

17 and No 2842/98 do not, for the purpose of recognising the standing of a person as an applicant, require that the application derives from the Commission's opening of the infringement proceedings and that the investigation into the infringement complained of has not yet started. If the position were otherwise, persons with a legitimate interest in obtaining a finding of infringement of the competition rules would be prevented from exercising, in the course of the procedure, the procedural rights associated with that status under Articles 6 to 8 of Regulation No 2842/98.

In that regard, a political party may validly invoke its status as a recipient of banking services and the fact of suffering economic damage as a result of anti-competitive practices in order to justify a legitimate interest in submitting an application for a finding by the Commission that those practices constituted an infringement of Articles 81 EC and 82 EC.

There is nothing to prevent an end-purchaser of goods or services from satisfying the requirements for having a legitimate interest within the meaning of Article 3 of Regulation No 17. An end-user who proves that his interests have been, or are liable to be, adversely affected as a result of the restriction of competition in question has a legitimate interest within the meaning of that provision in lodging an application or a complaint with a view to obtaining a finding by the Commission of an infringement of Articles 81 EC and 82 EC.

It is irrelevant that, initially, the end-purchaser claimed a general interest which it sought to defend as an opposition political party and that it only later contended that, as an end-user of the services in question, it had been economically damaged by the cartel complained of. That first stance could not deprive it of the opportunity to rely subsequently, in order to justify a legitimate interest within the meaning of Regulation No 17, on its status as a customer of the banks against which the procedure had been initiated, and on the economic loss which it allegedly suffered as a result of the agreements in question.

The admission of an interested party as a complainant, together with the transmission to that party of the statement of objections, cannot moreover be made subject to the condition that it must occur prior to any oral hearing before the Commission. Regulations No 17 and No 2842/98 do not lay down any specific time-limit within which a third party applicant or complainant showing a legitimate interest must exercise his right to receive the statement of objections and be heard in the context of an

infringement procedure. Thus, Articles 7 and 8 of Regulation No 2842/98 merely provide that the Commission is to provide the applicant or complainant with a copy of the objections and set a date by which the applicant or complainant may make known his views in writing, any such person being entitled to express his views orally if he so requests. It follows that the right of an applicant or complainant to receive the statement of objections and to be heard in an administrative procedure for the establishment of an infringement of Articles 81 EC and 82 EC may be exercised at any time during the course of the procedure.

(see paras 95-98, 100, 101)

4. An infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.

A system of committees established by banks in order to coordinate their conduct regularly with respect to the essential factors of competition in the market in banking products and services in a Member State may thus be classified as a single overall cartel where one of them, as the top-level body at the head of all the other committees, has dealt with questions falling within the scope of numerous specific committees, and which takes fundamental decisions, performs a role of arbitrator between the various groups in cases of disciplinary problems regarding compliance with the agreements and where there is close interlocking of the committees and their decision-making process, because the committees sometimes hold joint meetings, the terms of reference of the groups overlap and the committees keep each other informed of their activities.

(see paras 111, 114, 117-120, 126)

5. In the context of procedures for applying the competition rules, the fact that a trader who was in a position similar to that of the penalised operator was not found by the Commission to have committed any infringement cannot in

any event constitute a ground for setting aside the finding of an infringement by the penalised operator, provided that it was properly established.

several factors which, taken separately, are not necessarily decisive.

(see para. 138)

6. Faced with a network of very complex agreements, the Commission enjoys a discretion in determining which of the various concerted practices it considers as particularly significant, and that choice can only be subject to limited review by the Court.

It is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable. A restriction of competition is liable to affect trade between Member States when it is likely to divert trade patterns from the course which they would otherwise have followed. Therefore, the effects of partitioning of the markets are not alone to be taken into consideration in concluding that a cartel is capable of affecting trade between Member States.

(see para. 144)

7. In order for an agreement between undertakings to be able to affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, in a manner which might harm the attainment of the objectives of a single market between States. The effect on intra-Community trade is therefore normally the result of a combination of

Only the capability of a cartel to affect trade between Member States, that is to say its potential effect, is sufficient for it to fall within the scope of Article 81 EC and it is not necessary to demonstrate an actual effect on trade. The fact that a past infringement is examined after the event is not such as to change that criterion, a potential effect on trade also being sufficient in such a case.

It is nevertheless necessary for the potential effect of the cartel on inter-

State trade to be appreciable, or, in other words, that it be not insignificant.

(see paras 163, 164, 166, 167)

8. The definition of the relevant market differs according to whether Article 81 EC or Article 82 EC is to be applied. In the context of the application of Article 81 EC, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. That is why, for the purposes of Article 81(1) EC, the objections to the definition of the market adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition. Thus, the objection to the definition of the relevant market is of no consequence provided that the Commission has rightly concluded that the agreement in question distorted competition and was liable to have an appreciable effect on trade between Member States.

(see para. 172)

9. In competition law, the relevant market comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.

Since the various banking services covered by agreements between banks cannot be substituted for each other, however, most customers of universal banks call for a set of banking services, such as deposits, loans and payment operations, and competition between those banks is liable to relate to all those services, a narrow definition of the relevant market would therefore be artificial in that business sector. Moreover, a separate examination would not make it possible fully to appreciate the effects of agreements which, although relating to products or services and customers (retail or corporate) that are different, nevertheless fall within the same business sector. The effect on trade between Member States may be indirect, and the market on which it is

liable to arise is not necessarily the same as the market for the products or services of which the prices are fixed by the cartel. The fixing of prices for a wide range of retail and corporate banking services is liable, as a whole, to have repercussions on other markets.

Consequently, the Commission is not required, in such a case, to examine separately the markets for the various banking products covered by such agreements in assessing the effects on trade between Member States in this case.

(see paras 173-175)

10. The fact that certain clauses of an agreement do not have the object or effect of restricting competition does not preclude an overall examination of the agreement. With greater reason, that applies where certain agreements within a single cartel might qualify for an exemption.

It follows that when examining a system of committees established by banks in order to coordinate their conduct with respect to the essential factors of competition in the market in banking products and services in a Member State, the Commission may take account of the potential cumulative effect of all the committees in order to determine whether the cartel as a whole is capable of affecting trade between Member States. On the other hand, the question whether each of the committees in isolation is capable of affecting trade between Member States is not relevant. It also follows that it is unnecessary to establish that any one or other of the various committees, in isolation, is liable to affect trade between Member States for it to be found that the cartel as a whole is capable of so doing. Therefore, the capability of the committees to affect inter-State trade does not presuppose that any particular concerted practice involved services of a cross-border nature.

(see paras 176-178, 195, 196, 208)

11. An agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.

It follows that there is, at least, a strong presumption that a practice restrictive of competition applied throughout the territory of a Member State is liable to contribute to compartmentalisation of the markets and to affect intra-Community trade. That presumption can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

In that connection, with regard to the banking sector, there may be agreements covering the entire territory of a Member State which do not have an appreciable effect on trade between Member States.

This is not the case, however, with a complex infringement consisting of concerted practices within a committee involving not only almost all the credit establishments in the Member State in question but also a wide range of banking products and services, in particular deposits and loans and, therefore, capable of changing the conditions of competition throughout that Member State.

In such a case, the fact that the members of the cartel did not take measures to exclude foreign competitors from the market provides no basis for concluding that there was no cross-border effect.

Such an infringement may have contributed to maintenance of the barriers to access to the market, in that it facilitated retention of structures in the Member State in question, the inefficiency of which, moreover, was admitted by one of the participants itself, and of the corresponding habits on the part of customers.

(see paras 180-185)

12. In order to establish the participation of an undertaking in a single agreement, the Commission must prove that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.

Such is the case where, in the context of a system of committees established by

banks in order to coordinate their conduct regularly with respect to the essential factors of competition in the market in banking products and services in a Member State, one of them participated in the most important committees dealing with lending and deposit conditions and where those committees maintained particularly close relations with the top-level body, that bank could not therefore have been unaware that the committees in which it participated formed part of a wider set of agreements and that its participation in the concerted practices on deposit and lending conditions contributed to the pursuit of the cartel's objectives as a whole.

It is irrelevant, in that connection, that the bank at issue was absent from certain committees. The fact that an undertaking has not taken part in all aspects of a cartel or that it has played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine.

Neither is it relevant that the bank in question was not familiar with the detail of the concerted practices taking place within numerous committees in which it did not participate nor the fact that it was unaware of the existence of certain committees.

(see paras 189-193)

13. It is not necessary for an undertaking to have been aware that it was infringing the competition rules for an infringement to be regarded as having been committed intentionally. It is sufficient that it could not have been unaware that its conduct had as its object the restriction of competition in the common market.

In that regard, whether or not the undertaking in question was aware of the interpretation of the cross-border criterion adopted by the Commission or the case-law is not decisive; what is important is whether it knew of the circumstances specifically giving rise to the capability of the cartel to affect trade between Member States or, at least, whether it could not have been unaware of them.

Such is the case where, in the context of a system of committees established by

banks in order to coordinate their conduct regularly with respect to the essential factors of competition in the market in banking products and services in a Member State, the banks knew, through their participation in the main committees, that the network covered the whole territory of the Member State and a very wide range of important banking services, in particular loans and deposits, and where they were therefore aware of the essential facts giving rise to an effect on trade between Member States.

It is not appropriate in this regard to ascertain to what extent the banks were aware of the incompatibility of their conduct with Article 81 EC. Similarly, the fact that under national law certain cartels were not automatically prohibited but could be prohibited, in response to an application, by a court of competent jurisdiction has no impact on the intentional nature of the infringement of Article 81 EC. Finally, the public nature of the meetings and the participation therein of the national authorities does not affect either the intention to restrict competition or the knowledge of the circumstances giving rise to the capability of the agreement to affect trade between Member States.

(see paras 205-207, 209)

14. Notification is not a mere formality imposed on undertakings but an indispensable condition for obtaining certain benefits. Under the terms of Article 15(5)(a) of Regulation No 17, no fine may be imposed in respect of acts taking place after notification, provided they fall within the limits of the activity described in the notification. That advantage enjoyed by an undertaking which notifies an agreement or a concerted practice is the counterpart of the risk incurred by the undertaking in itself reporting the agreement or concerted practice. That undertaking in fact takes the risk not only of having the agreement or practice found to be in breach of Article 81(1) EC and of having the application of paragraph 3 refused but also of being punished by a fine for acts prior to notification. A fortiori, an undertaking which did not wish to run that risk cannot claim, on being fined for an infringement in respect of an agreement which was not notified, that there was a hypothetical possibility that notification might have led to an exemption.

(see para. 213)

15. Since 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 and, in particular, the new method of calculating fines which they incorporate, were reasonably foreseeable by it, prior to their adoption, at the time of committing an infringement, an undertaking cannot take exception to the method followed in calculating the fines on the ground that the Commission, by applying the guidelines and by having again made its practice more stringent at a later stage, infringed the principle of non-retroactivity upheld by Article 7 of the European Convention for the Protection of Human Rights and Article 49 of the Charter of Fundamental Rights of the European Union.

(see paras 217, 218)

16. 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 are an instrument designed to clarify, in compliance with superior rules of law, the criteria that the Commission intends applying when exercising the discretion conferred on it by Article 15(2) of Regulation No 17 for the purpose of setting fines.

In setting out in the Guidelines the method which it proposed to apply when calculating fines imposed under Article 15(2) of Regulation No 17, the Commission remained within the legal framework laid down by that provision and did not exceed the discretion conferred on it by the legislature.

Although rules of that kind designed to produce external effects cannot be classified as rules of law by which the administration is bound in all cases, they nevertheless set out rules of conduct that indicate the practice to be followed and from which the administration cannot depart, in a particular case, without giving reasons that are compatible with the principle of equal treatment.

By adopting such rules of conduct and announcing, by publishing them, that it will henceforth apply them to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules if it wishes to avoid a finding, if it be the case, that it is in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations.

Even though the Guidelines do not therefore constitute the legal basis of

the decision imposing a penalty on an undertaking for breach of the Community competition rules — which is based on Articles 3 and 15(2) of Regulation No 17 — they none the less determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings.

It therefore falls to the Court of First Instance, in reviewing the legality of the contested decision, to verify whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and the Leniency Notice and, to the extent to which it establishes any departure therefrom, to verify whether that departure is legally justified and supported by a statement of reasons to the requisite legal standard.

The limitation which the Commission has imposed on its discretion by adopting the Guidelines is not, however, incompatible with the retention of a considerable degree of discretion. The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15 of Regulation No 17, as interpreted by the Court of Justice.

However, the Commission's discretion and the self-imposed limits on it do not prejudge the exercise, by the Community judicature, of its unlimited jurisdiction.

(see paras 219-227)

Like the Guidelines, the notice on the non-imposition or reduction of fines in cartel cases has created legitimate expectations on which undertakings rely, so that the Commission is obliged to comply with it when assessing the latter's cooperation for the purpose of setting the fine.

17. The fact that, in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, the Commission set out its approach to assessment of the gravity of an infringement does not prevent it from assessing

infringements as a whole by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines.

In fixing the amount of fines regard must be had to the duration of the infringement and to all the factors capable of affecting the assessment of the gravity of the infringement. The gravity of infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up.

In that connection, it is in particular the assessment of the nature of the infringement which enables account to be taken of various relevant factors, which the Guidelines could not list exhaustively and which include the potential impact (as opposed to the actual and measurable impact) of the infringement on the market.

(see paras 237-239)

18. The three aspects to be taken into account in the assessment of the gravity of the infringement with regard to 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, namely, its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market, do not carry the same weight in the context of an overall examination. The nature of the infringement plays a major role, in particular, in characterising 'very serious' infringements. In that regard, it is clear from the description of very serious infringements given in the Guidelines that agreements or concerted practices designed in particular to set prices may, on the basis of their nature alone, be classified as 'very serious', without there being any need to characterise such conduct by reference to a particular impact or geographic area. That conclusion is corroborated by the fact that, whilst the description of serious infringements expressly mentions their impact on the market and their effects on extensive areas of the common market, that of very serious infringements, on the other hand, does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area.

While there is an interdependence between the three criteria in that a high degree of seriousness in the light of one or other of the criteria may offset the lesser gravity of the infringement in other respects, the extent of the geographic market is only one of the three

criteria which are relevant to overall assessment of the gravity of the infringement, and, among those interdependent criteria, is not an autonomous criterion in the sense that only infringements affecting most of the Member States would be classifiable as 'very serious'. Neither the Treaty, nor Regulation No 17, nor the Guidelines, nor the case-law support the conclusion that only geographically very extensive restrictions may be considered as such. Therefore, not only infringements involving the participation of almost all undertakings in the European market can be classified as very serious within the meaning of the Guidelines.

(see paras 240, 241, 311, 313, 381)

19. Horizontal price agreements constitute very serious infringements, within the meaning of 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, even in the absence of other restrictions on competition such as partitioning of the market.

The 'very serious' nature of such infringements is exacerbated in particular where they are committed in a sector, such as the banking sector, which is important to the economy as a whole and where the agreements at issue are extensive covering a wide range of important products and involving the vast majority of the economic operators in the relevant market, including the largest undertakings. The gravity of an infringement by reason of its nature depends above all on the danger that it represents to undistorted competition. In that regard, the breadth of a price agreement, as regards both the products concerned and the undertakings involved, plays a decisive role and an extensive horizontal price cartel relating to such an important economic sector cannot normally escape the classification of very serious infringement, whatever its context.

The lack of any secrecy surrounding the cartel, the fact that the cartel has been created and maintained with the support of the Member State concerned, the taking into account of considerations relating to the deterrent nature of fines, the fact that the infringement involves a concerted practice, the approval or tolerance of unlawful conduct by the public authorities, the fact that other subjects have also been dealt with, that are neutral from the standpoint of competition law, or that the Member State concerned had recently acceded to the European Union at the material

time, cannot affect the assessment of the intrinsic gravity of the infringement.

(see paras 249, 250, 252, 254-257, 260, 262, 263)

20. In assessing the actual impact of an infringement on the market, it is incumbent on the Commission to take as a reference the competition which would normally have prevailed if there had been no infringement.

In the case of a price cartel, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices, for example by announcing them to customers, instructing their employees to use them as a basis for negotiation and monitoring their application by their competitors and their own sales departments. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers' room for negotiation.

On the other hand, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel.

In order to assess the gravity of the infringement, it is decisive to ascertain that the cartel members did all they could to give concrete effect to their intentions. What then happened at the level of the market prices actually obtained is liable to have been influenced by other factors outside the control of the members of the cartel. The members of the cartel cannot therefore benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine.

(see paras 284-287)

21. It falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking. While the legal person managing the undertaking at the time of the infringe-

ment exists, responsibility for the undertaking's infringement follows that legal person, even though the assets and personnel which contributed to the commission of the infringement have been transferred to third persons after the period of the infringement.

Such liability of a purchaser exists even in a case where the liability for an infringement committed by an undertaking before it was taken over may be imputed to an earlier parent company.

On the other hand, where, between the infringement and the time when the undertaking in question must answer for it, the person responsible for the operation of that undertaking has ceased in law to exist, it is necessary, first, to establish the combination of physical and human elements which contributed to the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that, because of the disappearance of the person responsible for its operation when the infringement was committed, the undertaking may evade liability for it.

That possibility does not in itself mean that the subsidiary itself will be penalised. An undertaking — that is to say an economic unit comprising personal, tangible and intangible elements — is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management as provided for in the undertaking's articles of association even though the financial consequences of the fine are ultimately borne by its owners. That rule would not be observed if the Commission, faced with unlawful conduct on the part of an undertaking, were always required to ascertain who is the owner exercising a decisive influence on the undertaking and were allowed to impose a sanction only on that owner. Since the power to penalise the parent company for the conduct of a subsidiary thus has no bearing on the legality of a decision addressed only to the subsidiary that participated in the infringement, the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period.

When the undertaking in question ceases to exist, upon being merged with a purchaser, the latter takes on its assets and liabilities for infringements of Community law. In such cases, the liability for the infringement committed by the undertaking taken over may be attributed to the purchaser.

That choice is also available to the Commission where there are successive

changes in the economic control of the subsidiary. Although, in such a case, the Commission may impute the conduct of a subsidiary to the former parent company for the period prior to the transfer and thereafter to the new parent company, it is not required to do so and may choose to penalise only the subsidiary for its own conduct.

(see paras 324-326, 329, 331, 332, 372)

22. Account must be taken, for the purpose of classifying undertakings into categories in accordance with the sixth paragraph of Section 1A of 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, of the objective or structural characteristics of the undertakings and the situation in the relevant market.

Those objective factors include not only the size and power of an undertaking in the market, as reflected by the undertaking's market share or turnover, but also its links with other undertakings where such links are capable of influencing the structure of the market. The effective capacity of an undertaking to cause significant damage and the real impact of the infringement committed by it must be assessed against the background of the economic reality. It is therefore legitimate for the Commission, under the Guidelines, to take account of such relationships in order to determine the effective economic capacity of the members of a cartel to cause damage and the specific weight of their infringement.

In that connection, the structure of the market can be influenced not only where links between undertakings confer on one of them a power of management or complete control of the competitive conduct of other operators, as in the case of economic units. An undertaking's power in the market may also increase, beyond its own market share, where it maintains stable relationships with other undertakings in which it is capable of informally exercising de facto influence on their conduct. The same applies where the links between undertakings have the effect of reducing or eliminating competition between them. The fact that such links are not of such a nature as to justify the finding that the undertakings concerned form part of a single economic entity does not mean that the Commission must disregard them and assess the market situation as if those links did not exist.

On the other hand, the specific conduct of the various members of a cartel or the degree of their individual culpability is not decisive, as such, for the purpose of division into categories. The conduct of an undertaking may, it is true, give some indication of the nature of its relations with other undertakings. The existence of specific types of conduct, such as the organisation of exchanges of information with the latter or the explicit adoption of positions at cartel meetings designed to defend their interests or require them to observe anti-competitive agreements, is not, however, either necessary or in itself sufficient to justify taking into consideration the market share of the latter undertakings when the power in the market of the first undertaking is assessed. In the absence of stable relationships with the undertakings with which information is exchanged or whose interests are represented, such conduct is not decisive for the purpose of classifying undertakings into categories, whereas, if appropriate, account may be taken of it when aggravating and mitigating circumstances are appraised, under Sections 2 and 3 of the Guidelines.

It follows that, in the context of a system of committees established by banks in order to coordinate their conduct regularly with respect to the essential factors of competition in the market in banking products and services in a Member State, since the links between the lead institutions and the decentralised banks of their groupings endowed the lead institutions with far greater economic power than that which derived from their market shares as commercial banks and reflected the market share of their respective groupings in their entirety, a correct assessment of the effective capacity of the lead institutions to cause significant damage and of the specific weight of their unlawful conduct necessitates an examination not only of their own market shares as commercial banks but also of the market shares of the decentralised banks and therefore justifies the allocation of the market shares of the decentralised sectors to the central establishments.

(see paras 359-362, 377, 404, 407, 409)

23. In so far as the Commission indicates expressly, in its statement of objections, that it is going to consider whether it is appropriate to impose fines on the undertakings concerned and has indicated the main factual and legal criteria capable of attracting a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed 'intentionally or negligently', it fulfils its duty to respect those undertakings' rights of defence. On the other hand, the Commission is not obliged, when indicating the elem-

ents of fact and of law on which it is to base its calculation of the fines, to explain the way in which it would use each of those elements in determining the level of the fine and this, especially since the undertakings have an additional guarantee, as regards the setting of the amount of the fine, 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.

(see para. 369)

24. The Commission's approach, in setting the amount of the fines, of dividing the members of a cartel into several categories, making the basic amounts for all undertakings in the same group the same, cannot in principle be criticised, although it ultimately ignores differences of size of undertakings in the same category. The Commission is not required to ensure, when fines are imposed on several undertakings involved in the same infringement, that the final amounts of the fines reflect every distinction between the undertakings concerned with regard to their size.

The fact remains, however, that any such division into categories must be in conformity with the principle of equal treatment and the determination of thresholds for each of the categories identified must be coherent and objectively justified.

(see paras 422, 423)

25. Under the last subparagraph of Article 15(2) of Regulation No 17, regard must be had, in addition to the gravity of the infringement, to the duration of the infringement in fixing the amount of the fine. It follows that the impact of the duration of the infringement on the starting amount of the fine must, as a general rule, be significant. Except in special circumstances, that militates against a purely symbolic increase of the starting amount on account of the duration of the infringement. Thus, where an agreement with an anti-competitive objective is not implemented, it is nevertheless necessary to take account of the period during which the agreement existed, that is, the time between the date on which it was entered into and the date on which it was terminated.

Accordingly, an increase corresponding to 10% a year of the starting amount cannot be reserved for special cases. 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 lay down that limit only for infringements of long duration, whilst for those of medium duration (in general one to five years) the sole upper limit was set at 50% of the starting amount, which does not rule out exceeding a rate of increase of 10% a year.

Furthermore, an increase in the fine by reference to the duration of the infringement is not limited to a situation in which there is a direct relation between the duration and serious harm caused to the Community objectives referred to in the competition rules.

(see paras 465-467)

grant an additional reduction on such grounds automatically; the appropriateness of any reduction of the fine in respect of mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances.

The adoption of the Guidelines has not rendered irrelevant the case-law under which the Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines it intends imposing, by reference in particular to the circumstances of the case. Thus, in the absence of any binding indication in the Guidelines regarding the mitigating circumstances that may be taken into account, the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of mitigating circumstances.

(see paras 472, 473)

26. The Commission must comply with the terms of its own Guidelines when determining the amount of fines. However, 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 do not state that the Commission must always take account separately of each of the mitigating circumstances listed in Section 3 of the Guidelines and it is not obliged to

27. According to the first indent of Section 3 of 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, 'an exclusively passive or "follow-my-leader" role' of an undertaking in the commission of the infringement may, if established, constitute a mitigating circumstance.

In that connection, one circumstance that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the 'ordinary' members of the cartel.

However, provided that an undertaking has participated, even without playing an active role, in one or more meetings with an anti-competitive purpose, it must be regarded as having participated in the cartel unless it proves that it publicly distanced itself from the unlawful concertation. By its presence at the meetings, the undertaking adheres or at least gives the other participants to believe that it adheres in principle to the terms of the anti-competitive agreements concluded at the meetings.

In that connection, in assessing its passive or follow-my-leader role, it is not relevant whether or not the undertaking benefited from the agreements. First, a follower may also benefit from the effects of a cartel. Second, the fact of not benefiting from an infringement cannot constitute a mitigating circumstance, since otherwise the fine would cease to have any deterrent effect.

(see paras 481, 482, 486, 489)

28. According to the second indent of Section 3 of 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, 'non-implementation in practice of the offending agreements or practices' may amount to a mitigating circumstance. However, the fact that an undertaking whose participation in a concerted practice with its competitors is established did not conduct itself in the market in the manner agreed with its competitors does not necessarily have to be taken into account, as a mitigating circumstance, when the amount of the fine to be imposed is determined.

An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit and an undertaking which does not distance itself from the

results of a meeting in which it was present in principle retains full responsibility for the fact of its participation in the cartel. Therefore, the Commission is not required to recognise the existence of a mitigating circumstance consisting of non-implementation of a cartel unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question. It would be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful cartel and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition.

(see paras 490, 491)

29. Under the third indent of Section 3 of 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, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is a mitigating circumstance. However, a reduction of the fine by reason of the termination of an infringement as soon as the Commission intervenes cannot be automatic but depends on an appraisal of the circumstances of the case by the Commission, in the context of its discretion. In that regard, the application of that provision of the Guidelines in favour of an undertaking will be particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive, on the assumption that it is proven.

Even if, in the past, the Commission has regarded voluntary termination of an infringement as a mitigating circumstance, it is entitled, when applying its Guidelines, to take account of the fact that, even though their illegality was established at the inception of Community competition policy, very serious manifest infringements are relatively frequent and, therefore, to take the view that it is appropriate to abandon that generous practice and no longer reward the termination of such an infringement by a reduction of the fine.

In those circumstances, the appropriateness of a reduction of a fine by reason of

termination of the infringement may depend on whether the undertakings in question could reasonably doubt the illegality of their conduct and reference to the manifest nature of the infringement could constitute a sufficient indication of the reasons for the Commission's choice not to apply a reduction of the fine for such a reason.

(see paras 497-499)

Whilst it is not excluded that, in certain circumstances, a national legal framework or conduct on the part of national authorities may constitute mitigating circumstances, the approval or tolerance of the infringement by the national authorities cannot be taken into account under that heading where the undertakings in question have the necessary resources available to them to obtain precise and accurate legal information.

(see paras 504, 505)

30. In the context of enlargement of the European Union, the possible legality of anti-competitive agreements under national law is not in itself sufficient to leave room for reasonable doubt as to the illegal nature of the conduct of the participating undertakings under Community law. This is particularly the case where the undertakings in question have considerable resources available to them. It is the responsibility of such undertakings to prepare for the legal consequences of the accession to the European Union of the Member State in which they are established, and, in particular, to apprise themselves in due time of the terms of the Community competition rules (and indeed the law of the European Economic Area) which will be applicable to them and the new features thereof compared with national law.

31. When it imposes a penalty for breach of the competition rules, the Commission is not required to treat the poor financial health of the sector in question as a mitigating circumstance; the fact that in previous cases the Commission took account of the economic situation in the sector as a mitigating circumstance does not mean that it must necessarily continue to follow that practice. As a general rule, cartels come into being when a sector is experiencing difficulties.

(see para. 510)

32. In competition law, cooperation in an investigation that does not go further than what is required of undertakings under Article 11(4) and (5) of Regulation No 17 does not justify reduction of the fine. On the other hand, such a reduction is justified where an undertaking has provided information well in excess of that which the Commission may require under Article 11 of Regulation No 17.

In order to justify reduction of a fine for cooperation, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of Community competition rules and reveal a true spirit of cooperation.

Therefore, the Court must first consider whether the Commission disregarded the extent to which the cooperation of the undertakings in question exceeded what was required under Article 11 of Regulation No 17. In that connection, it should undertake a comprehensive review concerning, in particular, the extent to which the undertakings' rights of defence limit their obligation to reply to requests for information.

Second, the Court should verify whether the Commission correctly appraised, in the light of the notice on the non-imposition or reduction of fines in cartel cases, the extent to which the cooperation provided helped to establish the infringement. Within the limits laid down by that notice, the Commission has a discretion in assessing whether the information or documents voluntarily provided by the undertakings have facilitated its task and whether it is appropriate to grant a reduction to an undertaking under that notice. That assessment is the subject of limited review by the Court.

In the exercise of its discretion, the Commission is not, however, entitled to disregard the principle of equal treatment, which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified. That principle precludes the Commission from treating in different ways cooperation on the part of undertakings covered by the same decision.

On the other hand, the mere fact that the Commission has, in earlier decisions, granted a certain rate of reduction for particular conduct does not mean that it

is obliged to grant the same proportional reduction when appraising similar conduct in the context of a later administrative procedure.

Where a request for information is made under Article 11(1) and (2) of Regulation No 17 in order to obtain information of which the Commission may require disclosure by a decision under paragraph 5 of that article, only the promptness of the reply from the undertaking concerned can be classified as voluntary. It is for the Commission to decide whether that promptness facilitated its task in such a way as to justify a reduction of the fine and the Leniency Notice does not require it systematically to reduce fines for that reason.

Moreover, while the fact that a cartel exists is likely to facilitate the Commission's task during an inquiry more than mere acknowledgement that the facts are substantially correct and the Commission may therefore treat undertakings that have admitted the facts differently from those that have also admitted the existence of a cartel, the Commission is not, however, obliged to draw such a distinction. It must, in each individual case, consider whether such an admission actually made its task easier. This is not the case with an explicit admission of the anti-competitive object of meetings aimed at price collusion and other aspects of competition, because such object derives from their very purpose.

(see paras 529-534, 536, 559)

33. In the context of competition proceedings, the Commission may not compel an undertaking, by means of a request for information under Article 11(5) of Regulation No 17, to provide it with answers that might involve an admission on its part of an infringement which it is incumbent upon the Commission to prove. In order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17 it is nevertheless entitled to compel undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish the existence of anti-competitive conduct. The Commission may thus compel undertakings to answer purely factual questions and ask for documents already in existence to be produced.

On the other hand, requests calling on an undertaking to describe the object of

and what occurred at meetings in which it participated and also the results or conclusions of those meetings where it is suspected that the object of the meetings was to restrict competition are incompatible with the rights of the defence, given that they are liable to compel the undertaking concerned to admit its participation in an infringement of the Community competition rules.

It follows that since the Commission, following its investigations, had copious information indicative of the existence of a network of agreements organised within a large number of committees covering all banking products on a specific market, it may legitimately require the banks in question, by means of requests for information under Article 11(5) of Regulation No 17, to indicate dates of the committee meetings and details of their participants, whether it concerns the committees about which, after its investigations, the Commission had precise information, such as their names and the dates of certain meetings, or all the other committees.

(see paras 539-541, 543)

34. The sending of documents to the Commission by a company, the production of which the Commission is entitled to require under Article 11(5) of Regulation No 17, cannot be regarded as voluntary cooperation within the meaning of the notice on the non-imposition or reduction of fines in cartel cases.

(see para. 544)

35. In the context of competition proceedings, while the undertakings in question provided it voluntarily with information going beyond what had been asked of them, by means of a request for information under Article 11(5) of Regulation No 17, the Commission does not exceed the discretion available to it in assessing, in accordance with the first indent of Section D.2 of the notice on the non-implementation or reduction of fines in cartel cases, by deciding that such cooperation could only be taken into account if it gave rise to added value either by the disclosure of 'new facts' or explanations improving understanding of the case. Neither the Leniency Notice

nor the case-law on this subject requires the Commission to reduce a fine by reason of action which, in practice or logistically, supports its investigation.

(see paras 552, 553)

36. In competition law, although certain procedural irregularities during the administrative procedure may on occasion justify a reduction of the fine even if they are not such as to entail annulment of the contested decision, only procedural irregularities capable of seriously harming the interests of the party invoking them can justify such a reduction. That in particular may be the case where irregularities involve an infringement of the European Convention for the Protection of Human Rights.

(see paras 568, 569)