JUDGMENT OF THE COURT (First Chamber)

14 July 2005 *

In Joined Cases C-65/02 P and C-73/02 P,

APPEALS under Article 49 of the ECSC Statute of the Court of Justice, brought on 28 February 2002,

ThyssenKrupp Stainless GmbH, formerly Krupp Thyssen Stainless GmbH, represented by M. Klusmann, Rechtsanwalt,

appellant in Case C-65/02 P,

ThyssenKrupp Acciai speciali Terni SpA, formerly Acciai speciali Terni SpA, represented by A. Giardina and G. Di Tommaso, avvocati, with an address for service in Luxembourg,

appellant in Case C-73/02 P,

* Languages of the case: German and Italian.

the other party to the proceedings being:

Commission of the European Communities, represented by A. Whelan, acting as Agent, assisted by H.-J. Freund, Rechtsanwalt (C-65/02 P), and A Whelan and V. Superti, acting as Agents, assisted by A. Dal Ferro, avvocato (C-73/02 P), with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas, R. Silva de Lapuerta, K. Lenaerts and S. von Bahr (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 By their appeals, ThyssenKrupp Stainless GmbH (hereinafter 'TKS') and ThyssenKrupp Acciai speciali Terni SpA (hereinafter 'AST') seek annulment of the judgment of the Court of First Instance of the European Communities of 13 December 2001 in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757 ('the contested judgment'), which only partially upheld their applications for the annulment of Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy Surcharge) (OJ 1998 L 100, p. 55, hereinafter 'the contested decision').

Facts

2 The facts giving rise to the proceedings before the Court of First Instance, as described by the latter Court, may be summarised as follows for the purposes of this judgment.

3 TKS, a company incorporated under German law, came into being on 1 January 1995 as a result of a merger of the businesses in the sector of stainless steel flat products resistant to acids and high temperatures of Fried Krupp AG Hoesch-Krupp ('Krupp') and Thyssen Stahl AG ('Thyssen'). TKS was initially called KruppThyssen Nirosta GmbH and then, from September 1997, it became Krupp Thyssen Stainless GmbH.

4 AST, formerly Acciai speciali Terni SpA, a company incorporated under Italian law whose principal activities include the production of stainless steel flat products, was set up on 1 January 1994. On 21 December 1994 the Commission of the European Communities authorised the joint acquisition of AST by a number of companies, including Krupp and Thyssen. In December 1995 Krupp increased its share in AST from 50 to 75% and then to 100% on 10 May 1996. Krupp then transferred all its shares in AST to TKS.

5 On 16 March 1995, following reports in the specialised press and complaints from several consumers, the Commission, under Article 47 of the ECSC Treaty, asked a number of stainless steel producers for information concerning the application by those producers of a general price increase known as the 'alloy surcharge.'

6 The alloy surcharge is a price supplement which is calculated on the basis of the prices of the alloying materials and is added to the basic price for stainless steel. The cost of the alloying materials used by stainless steel producers (nickel, chromium and molybdenum) forms a very large proportion of the total production costs. The prices of those materials are extremely volatile.

7 On the basis of the information obtained, on 19 December 1995 the Commission served a statement of objections on 19 undertakings (hereinafter 'the first statement of objections').

8 In December 1996 and January 1997, after the Commission had carried out a number of on-site inspections, lawyers or representatives of a number of undertakings informed the Commission of their wish to cooperate. On 17 December 1996 and 10 January 1997, TKS and AST each sent a statement to the Commission to that effect.

9 On 24 April 1997, the Commission sent to those undertakings, and to Thyssen, a new statement of objections superseding that of 19 December 1995 (hereinafter 'the second statement of objections').

10 In a statement dated 23 July 1997, TKS agreed to accept responsibility for the acts imputed to Thyssen as from 1993, even though the latter's stainless steel flat products business had not been transferred to it until 1 January 1995.

11 On 21 January 1998, the Commission adopted the contested decision.

12 According to that decision, the prices of alloying materials for stainless steel fell sharply in 1993. When nickel prices started to rise in September 1993, producers' profits were considerably reduced. To remedy this, most of the producers of stainless steel flat products agreed, at a meeting held in Madrid on 16 December 1993 (hereinafter 'the Madrid meeting'), to increase their prices on a concerted basis by changing the parameters for calculating the alloy surcharge. To that end they decided to apply, as from 1 February 1994, an alloy surcharge based on the method last used in 1991, taking as reference values for all producers the prices prevailing in September 1993, when the price of nickel had reached its historical low.

13 The contested decision states that the alloy surcharge calculated on the basis of the newly determined reference values was applied by all producers to their sales in Europe as from 1 February 1994, except in Spain and Portugal.

14 In Article 1 of the contested decision, the Commission found that Compañía española para la fabricación de aceros inoxidables SA (Acerinox) (hereinafter 'Acerinox), ALZ NV, AST, Avesta Sheffield AB ('Avesta'), Krupp and Thyssen, which had become TKS as from 1 January 1995, and Ugine SA, then known as Usinor SA ('Usinor'), had infringed Article 65(1) of the ECSC Treaty from December 1993 to November 1996 in the case of Avesta and in the case of all the other undertakings up to the date of the decision, by modifying and by applying in a concerted fashion the reference values used to calculate the alloy surcharge. It considered that that practice had both the object and the effect of restricting and distorting competition within the common market.

15 Under Article 2 of the contested decision, the following fines were imposed:

— Acerinox: ECU 3 530 000,

— ALZ NV: ECU 4 540 000,

— AST: ECU 4 540 000,

— Avesta: ECU 2 810 000,

— TKS: ECU 8 100 000, and

— Usinor: ECU 3 860 000.

The actions before the Court of First Instance and the contested judgment

16 By applications lodged at the Registry of the Court of First Instance on 11 and 13 March 1998 respectively, TKS and AST brought actions for the annulment of the contested decision in so far as it concerned them and, in the alternative, for substantial reduction of the fines imposed on them by that decision.

17 By the contested judgment, the Court of First Instance:

— joined Cases T-45/98 and T-47/98 for the purposes of the judgment;

— annulled Article 1 of the contested decision to the extent to which it attributed to TKS responsibility for the infringement committed by Thyssen;

— set the amount of the fines imposed on TKS and AST by Article 2 of the contested decision at EUR 4 032 000;

— dismissed both actions in all other respects;

— in Case T-45/98, ordered TKS and the Commission each to bear their own costs, and

— in Case T-47/98, ordered AST to bear its own costs and to pay two thirds of the Commission's costs, and ordered the Commission to bear one third of its own costs.

The forms of order sought and the pleas in law on which the appeals are based

18 In Case C-65/02 P, TKS claims that the Court of Justice should:

— annul the contested judgment to the extent to which it dismissed its application;

— amend Article 1 of the contested decision and change the period of the infringement as far as it is concerned;

— reduce in the same proportion the amount of the fine imposed on it under Article 2 of the contested decision;

— in the alternative, with regard to the immediately preceding two heads of claim, refer the case back to the Court of First Instance;

— dismiss the Commission's cross-appeal, and

— order the Commission to pay the costs of the appeal and of the cross-appeal.

19 In the same case, the Commission contends that the Court of Justice should:

— dismiss the appeal;

— in the alternative, if the contested judgment is annulled, reject the claim for reduction of the fine;

— annul the contested judgment to the extent to which the Court of First Instance:

(i) annulled Article 1 of the contested decision by which responsibility for the infringement committed by Thyssen was attributed to TKS;

(ii) set at an amount less than EUR 7 596 000 the fine imposed on TKS in Article 2 of the contested decision;

(iii) ordered the Commission to bear its own costs;

— order TKS to pay the costs of the proceedings before the Court of Justice.

20 In Case C-73/02 P, AST claims that the Court of Justice should:

— annul the contested judgment to the extent to which it confirmed the contested decision imposing a flat-rate fine even though it formed part of the TKS group on which a flat-rate fine was also imposed;

— in the alternative, annul the contested judgment to the extent to which it confirms Article 1 of the contested decision according to which the infringement of the competition rules attributed to it lasted until the date of adoption of that decision;

— annul the contested judgment to the extent to which it did not uphold its claim for an additional reduction of 40% of the fine by virtue of its cooperation during the administrative procedure, and

— order the Commission to pay the costs.

21 In the same case, the Commission contends that the Court of Justice should:

— dismiss the appeal;

— in the alternative, reject the claim for annulment of the contested decision if any part of the contested judgment is annulled, and

— order AST to pay the costs.

22 TKS puts forward three pleas in law in support of its appeal:

— error of law in the assessment of the duration of the infringement;

— miscalculation of the amount of the flat-rate fine, and

— error of law as to the consequences of TKS's cooperation in the inquiry procedure concerning reduction of the fine.

23 AST also puts forward three pleas in law in support of its appeal:

— error of law consisting in the imposition of a fine on it even though it formed part of the TKS group;

— error of law in the assessment of the duration of the infringement, and

— breach of the principle of equal treatment and non-discrimination regarding reduction of the fine.

24 The Commission puts forward three pleas in law in support of its cross-appeal:

— distortion of certain documentary evidence and error of law in the appraisal concerning the transfer responsibility from Thyssen to TKS;

— incorrect assessment of the prescribed conditions regarding respect for the rights of the defence, and

— incorrect assessment as to whether there was any encroachment upon the exercise of the rights of the defence.

The joinder of the cases

25 The views of the parties and of the Advocate General having been heard, it is appropriate, because the subject-matter of the present cases is connected, to join them for the purposes of the judgment in accordance with Article 43 of the Rules of Procedure of the Court of Justice.

The appeals brought by TKS and AST

26 Since the three pleas on which TKS and AST base their appeals are essentially the same, it is appropriate to consider them together and to consider, for each plea, any slight differences raised by either of the appellants.

The plea alleging an error of law in the assessment of the duration of the infringement

Arguments of the parties

27 TKS, in its first plea, and AST, in its second, maintain that the infringement did not last four years, namely from the date of the Madrid meeting until that of the adoption of the contested decision, but that it was sporadic, contrary to the finding made by the Court of First Instance in paragraph 182 of the contested judgment. The infringement did not start until that meeting and lasted for only a few weeks.

28 TKS and AST state that each undertaking determined its prices autonomously, as is evidenced by the fluctuations of their prices. They acted independently, without concertation, in deciding not to change the reference value for the alloy surcharge. They consider that the Court of First Instance gave an incorrect statement of reasons, in particular in paragraph 178 of the contested judgment, for its conclusion regarding the duration of the infringement.

29 In addition, TKS and AST criticise the Court of First Instance for failing to take account of the error which the Commission committed by not informing them clearly in the course of the administrative procedure that it considered that the cartel was continuing to operate. That omission on the part of the Commission thwarted the legitimate expectations of the two undertakings.

Findings of the Court

30 The plea put forward by TKS and AST comprises two parts. The first concerns the assessment of information available for determination of the duration of the agreement and the second concerns alleged frustration of the legitimate expectations of those undertakings.

31 As regards the first part of the plea, the Court of First Instance correctly held, in paragraph 174 of the contested judgment, that it is incumbent on the Commission to prove not only the existence of the agreement but also its duration.

32 The Court of First Instance first noted, in paragraph 176 of the contested judgment, that the purpose of the agreement was to ensure that, in the method for calculating the alloy surcharge, the producers of stainless steel flat products used the same reference values with a view to raising the final price. The Court of First Instance then found, in paragraph 177 of the same judgment, that it was clear from the contested decision that the agreement commenced at the Madrid meeting and that, in Europe, with the exception of Spain and Portugal, TKS and AST and other undertakings participating in the agreement in fact applied to their sales as from 1 February 1994 an alloy surcharge calculated in accordance with the method based on the reference values agreed at that meeting.

33 The Court of First Instance found, finally, in paragraph 178 of the contested judgment, that TKS and AST did not deny that the reference values which they agreed at that meeting were not changed before the adoption of the contested decision. The Court of First Instance inferred from this, also in paragraph 178, that since the undertakings in question continued to apply those reference values, the fact that no express decision was then taken regarding the period for which the agreement would be applied cannot prove that the agreement was sporadic rather than continuous.

34 It must be observed that the conclusion reached by the Court of First Instance in paragraph 178 of the contested judgment constitutes an assessment of facts which it is inappropriate to call in question, in an appeal, in the absence of anything to show that evidence was distorted or that an error was made in the legal analysis of the facts.

35 In that connection, TKS and AST maintain that the Court of First Instance failed to take account of other information showing the lack of an agreement in the years 1994 to 1998, namely the different prices adopted by them and the existence of parallel conduct.

36 However, it must be considered that those factors are either irrelevant or provide no basis whatsoever for querying the Court of First Instance's assessment.

37 As regards, first, the differences in the prices applied by TKS and AST to their respective customers, and the fluctuations of those prices, which, it is maintained, reflected their autonomous conduct in the market and the absence of any concertation, it must be held, as the Court of First Instance correctly held in paragraph 179 of the contested judgment, that that argument is irrelevant. The prices concerned in fact represent the final price of stainless steel flat products applied by those undertakings. However, the fact that those prices were different and that those two undertakings applied them at various times during the period under consideration provides no basis whatsoever for rejecting the conclusion reached by the Commission and the Court of First Instance, namely that those prices were, to a considerable extent, the result of an agreement relating to a decisive price component, in this case the alloy surcharge.

38 Secondly, the argument regarding alleged parallel conduct likewise provides no basis for calling in question the finding concerning the continuing application of the agreement, since another explanation is appropriate. In that connection, the Court of First Instance correctly found, in paragraph 180 of the contested judgment, that maintenance by those undertakings of the same reference values in the calculation formula for the alloy surcharge was accounted for by the application of reference values determined jointly in discussions between producers in December 1993.

39 Consequently, it must be concluded that the Court of First Instance did not err in law by finding, in paragraphs 174 to 184 of the contested judgment, that the Commission was entitled to consider that the infringement lasted for four years, namely from the time of the Madrid meeting until the date of adoption of the contested decision, and that the contested judgment contains an adequate statement of reasons on that point.

40 As regards the second part of the plea, concerning alleged infringement of the legitimate expectations of TKS and AST, it must be observed that, contrary to their assertions, the Court of First Instance held, in paragraph 215 of the contested judgment, that the Commission could not be criticised for taking the view that the infringement was continuous without informing them of that fact during the administrative procedure. The Court of First Instance confirmed its assessment, in particular by indicating that, in paragraph 50 of the second statement of objections, the Commission emphasised that 'the concertation began at the Madrid meeting and has been pursued'.

41 Moreover, it must be borne in mind that, according to settled case-law, the principle of the protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force (Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 30). Accordingly, as the Advocate General correctly observed in point 112 of his Opinion, an undertaking which deliberately engages in anti-competitive conduct therefore has no right to allege a breach of that principle on the pretext that the Commission did not clearly inform it that its conduct constituted an infringement.

42 It follows that the plea in law put forward by TKS and AST concerning the duration of the infringement attributed to them must be rejected as unfounded.

The plea alleging an error of law through failure to grant an additional reduction of the fine

Arguments of the parties

43 By their third plea TKS and AST claim that, since they substantially admitted the facts on which the contested decision is based, as the Court of First Instance found in paragraphs 262 and 268 of the contested judgment, they should be granted the same reduction of the fine as the undertakings which also expressly admitted the existence of the infringement. No distinction can in their view be drawn between those undertakings as regards the degree of their cooperation with the Commission and their conduct cannot give rise to different reductions of the fines imposed.

44 According to TKS and AST, it is clear from the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), and from the earlier version of that notice (OJ 1996 C 207, p. 4, hereinafter 'the Leniency Notice'), that, in order to be granted a reduction of a fine, it is sufficient for the undertakings concerned to provide evidence and, consequently, substantially admit the facts. It is not necessary for undertakings to classify those facts from the legal point of view and thereby admit their participation in an infringement. The legal classification of the facts and the finding of an infringement resulting therefrom are tasks for which the Commission alone is responsible.

45 Thus, the Commission could not grant an additional reduction of a fine to an undertaking which accepted the legal classification of the facts or expressly admitted its participation in an infringement. To reduce a fine in such circumstances would undermine the rights of the defence, since it would be tantamount to penalising an undertaking which had decided to defend itself by contesting the existence of an infringement.

46 TKS also maintains that it was not because it contended that its decisions were adopted autonomously that it denied having participated in an infringement, in this case a concerted practice. As for AST, it merely contested the classification as an 'agreement' and not the fact that what was agreed was contrary to the competition rules.

47 Consequently, TKS and AST consider that the Court of First Instance erred in law by refusing, in paragraphs 260 to 281 of the contested judgment, to grant them an additional reduction of the fine like that granted to Usinor and Avesta.

Findings of the Court

48 In order to determine whether the Court of First Instance erred in law by applying to the fine imposed on TKS and AST a lesser reduction than that granted to Usinor and Avesta, it is necessary to refer to the case-law of the Court of Justice concerning the extent of the Commission's powers in preliminary investigation procedures and administrative procedures, having regard to the need to respect the rights of the defence.

49 According to the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 34 and 35, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

50 However, while the Commission may not compel an undertaking to admit its participation in an infringement, it is not thereby prevented from taking account, when fixing the amount of the fine, of the assistance given by that undertaking, of its own volition, in order to establish the existence of the infringement.

51 In that connection, it is clear from the judgment in Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, and in particular from paragraphs 56, 59 and 60 thereof, that the Commission may, for the purpose of fixing the amount of a fine, take account of the assistance given to it by the undertaking concerned to establish the existence of the infringement with less difficulty and, in particular, of the fact that an undertaking admitted its participation in the infringement. It may grant an undertaking which has assisted it in that way a significant reduction of the amount of its fine and grant a substantially lesser reduction to another undertaking which did no more than fail to deny the main factual allegations on which the Commission based its objections.

52 As the Advocate General observed in point 140 of his Opinion, it must be emphasised that admission of an alleged infringement is a matter entirely within the will of the undertaking concerned. The latter is not in any way coerced to admit the existence of the agreement.

53 It must therefore be considered that the fact that the Commission took account of the degree of cooperation with it shown by the undertaking concerned, including admission of the infringement, for the purpose of imposing a lower fine does not constitute any breach of its rights of defence.

54 That is the construction to be placed on the Leniency Notice and, in particular part D thereof, according to which the Commission may grant an undertaking a reduction of 10 to 50% of the amount of the fine that it would have imposed in the absence of cooperation, in particular where that undertaking informs the

Commission that it does not substantially contest the facts on which the Commission has based its allegations. Thus, the type of cooperation, capable of giving rise to a reduction of the fine, which the undertaking concerned may provide is not limited to admitting the nature of the facts but also involves admitting participation in the infringement.

55 In this case, the Court of First Instance found, in paragraph 261 of the contested judgment, that, according to the contested decision, only Usinor and Avesta had admitted the existence of the infringement, whereas TKS and AST had disputed the existence of the concertation and, consequently, had not admitted the infringement. The Court of First Instance observed that the Commission inferred from this that the cooperation shown by TKS and AST was more limited than that shown by Usinor and by Avesta and did not justify as large a reduction of the fine as that granted to the latter.

56 As regards TKS, the Court of First Instance stated in paragraph 263 of the contested judgment that it claimed to have taken its decisions concerning the alloy surcharged independently. In paragraph 264 of that judgment, it inferred from this, without committing any error of law, that TKS had thus, by implication but undeniably, given the impression that the criteria of coordination and cooperation specific to a concerted practice were absent. In paragraph 266 of that judgment, the Court of First Instance concluded that that undertaking could not be regarded as having explicitly admitted its participation in the infringement.

57 As regards AST, the Court of First Instance observed, in paragraph 268 of the contested judgment, that although it did not substantially contest the facts on which the Commission relied, it did not admit the existence of concertation.

58 In that connection, it must be considered that the Court of First Instance was right, in paragraph 269 of the contested judgment, to reject AST's argument that such an admission stemmed from the fact that it did not deny that its conduct might be

described as a concerted practice. It was entirely proper that, in paragraph 270 of the contested judgment, the Court of First Instance drew a distinction between express admission of an infringement and a mere failure to deny it, which does not contribute to facilitating the Commission's task of finding and bringing to an end infringements of the Community competition rules.

59 It must also be observed that the Court of First Instance was right to refer to the Leniency Notice, the 2002 version of that notice not having yet been adopted on the date on which the contested judgment was delivered. In that connection, the Court of First Instance was also right to hold, in paragraph 275 of that judgment, that the fact that the notice expressly envisages the possibility of admitting the infringement at a relatively early stage of the procedure does not rule out such an admission at a later stage, before or after notification of the statement of objections to the undertaking concerned, or the taking account by the Commission of that admission in order to reduce the amount of a fine.

60 In those circumstances, it must be considered that the Court of First Instance was right to hold that an express admission of the infringement may give rise to an additional reduction of the fine and to conclude that, in the absence of such an admission by TKS and AST, the degree of cooperation shown by those two undertakings to the Commission did not justify their being granted a reduction of the fine as large as that granted to Usinor and Avesta.

61 It follows that the plea concerning the lack of an additional reduction of the fine imposed on TKS and AST must be rejected as unfounded.

The plea alleging an error of law regarding application of the flat-rate fine

Arguments of the parties

62 TKS, by its second plea, and AST, by its first plea, maintain that the Court of First Instance erred in law, in paragraphs 189 to 192 of the contested judgment, by failing to take account of the fact that, on the date on which the fine was imposed, namely 21 January 1998, the three following entities, namely TKS, the stainless steel flat products business previously owned by Thyssen, and AST, belonged to the same group of undertakings and therefore formed a single economic entity, under the direction of TKS.

63 TKS and AST maintain that, where the amount of a fine is calculated on a flat-rate uniform basis, the Commission is required to apply that amount to the economic entity. Because a fine was imposed on each of the three entities in the TKS group, in reality the latter's fine was three times as high as that imposed on the other undertakings concerned, namely Acerinox, ALZ NV, Avesta and Usinor.

64 AST adds that the imposition of two separate fines, one on TKS and one on itself, was not justified in the light of the judgment of the Court of First Instance in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, in so far as, first, TKS knew, when it acquired the totality of the shares in AST, that the latter had participated in the agreement, since TKS itself had been a party to it, and, second, the duration of AST's independence, when the agreement started to operate, was negligible.

65 TKS maintains that, by examining only the relationship of TKS with AST and by failing to respond to its plea concerning the group which it formed with the stainless steel flat products business previously owned by Thyssen, and by imposing separate fines on Thyssen and on it, the Court of First Instance failed to do justice and did not include in the contested judgment an adequate statement of reasons on that point.

Findings of the Court

66 In that connection, it must be observed that the Court of First Instance was right to hold, in paragraphs 189 and 191 of the contested judgment, that determination of an undertaking's responsibility for an infringement of the competition rules depends on whether that undertaking acted autonomously or whether it merely followed instructions from its parent company. In the latter case, the Court of First Instance correctly pointed out, in paragraph 189, that an undertaking's anti-competitive conduct may be attributed to its parent company.

67 On the other hand, where undertakings in a group participating in a cartel have acted autonomously, the Commission may impose a fine on each of them, using a flat-rate amount as a starting point.

68 In this case, the Court of First Instance found, in paragraph 191 of the contested judgment, that TKS and AST did not deny having acted autonomously throughout the duration of the agreement and that finding is not in any way called in question in the appeals. It follows that the Commission was entitled to apply to each of those undertakings the flat-rate basic fine, together with an amount reflecting the duration of the infringement, and to require payment of the amount of the fine thus calculated from each of those undertakings because they had continued to be two

distinct legal persons since the commencement of the cartel. In those circumstances, the Court of First Instance did not err in law by holding, in paragraph 192 of the contested judgment, that there was no reason to uphold the plea put forward by TKS and AST to the effect that a single flat-rate fine should have been imposed on the group as a whole.

69 As regards AST's argument based on the judgment in *Stora Kopparbergs Bergslags* v *Commission*, it need merely be pointed out that that judgment was annulled by the Court of Justice on the point relied on by AST. The Court of Justice held that the fact that a parent company could not have been unaware that the subsidiaries acquired by it had participated in a cartel does not suffice to impute to it responsibility for infringements committed by those companies before they were acquired (see Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 39).

70 As regards TKS's complaint that the Court of First Instance failed to respond to its argument concerning the group relationship involving TKS and the stainless steel flat products business previously owned by Thyssen, it must be pointed out, as the Advocate General observed in points 91 and 93 of his Opinion, that the Court of First Instance was entitled, for reasons of economy of procedure, to decide not to respond to it specifically. Since the Court of First Instance had already annulled Article 1 of the contested decision to the extent to which it attributed to TKS responsibility for the infringements committed by Thyssen and accordingly amended the amount of the fine imposed on TKS under Article 2 of that decision, thus upholding the latter's plea in law alleging infringement of its right to be heard concerning the conduct of Thyssen, it was not required to examine another plea directed towards attaining the same result.

71 The plea alleging an error in the application of the flat-rate fine must therefore be rejected as unfounded.

72 Since none of the pleas put forward by TKS and AST in support of their appeals is well founded, their appeals must be dismissed.

The cross-appeal

The first plea in the cross-appeal, alleging distortion of evidence and an error of law in the assessment of the transfer of responsibility from Thyssen to TKS

Arguments of the parties

73 The Commission contends that the Court of First Instance adopted an overly restrictive interpretation of the statement made on 23 July 1997 in which TKS agreed to be held responsible for the conduct attributed to Thyssen as from 1993, even though the latter's business in the stainless steel flat products sector had not been transferred to it until 1 January 1995.

74 According to the Commission, the Court of First Instance distorted that statement by wrongly considering, in paragraph 64 of the contested judgment, that it could not be interpreted as implying, in addition to that acceptance of responsibility, a waiver by TKS of its right to be heard concerning Thyssen's conduct.

75 The Commission considers that the Court of First Instance did not fully examine the documents which led to the statement of 23 July 1997 and that it distorted them.

76 It thus claims that, both in its response to the first statement of objections and in its letter of 17 December 1996, TKS submitted observations both in its own name and in that of Thyssen regarding the latter's activities prior to 1 January 1995. Moreover, in its response to the second statement of objections, TKS refers to the letter of 17 December 1996 concerning those activities. Furthermore, Thyssen itself, in responding to both statements of objections, confined itself to referring to TKS's observations and replied only as a matter of 'utmost precaution'. Thyssen also maintained that the Commission was not entitled to pursue in parallel the procedure commenced against TKS and the procedure concerning it.

77 The Commission adds that the second statement of objections makes it clear that TKS was assuming responsibility for Thyssen's conduct before the latter's activities were transferred on 1 January 1995, in the same way as it had accepted responsibility for action taken by Krupp.

78 According to the Commission, the fact that the second statement of objections was sent to TKS and Thyssen separately and that those two undertakings responded separately is of no importance. Those undertakings replied only in a purely formal manner. Although doubts might nevertheless still have existed, they were dispelled by the fact that, after receiving the replies to that statement of objections from those undertakings, the Commission again asked TKS to confirm its acceptance of responsibility for Thyssen's conduct since 1993.

79 The Commission also maintains that the Court of First Instance failed to take account of the exceptional circumstances allowing it to attribute responsibility for an infringement to a legal person other than the one that committed it. In the first place, TKS is the beneficiary and economic successor of Thyssen. Next, the conduct of those two undertakings was characterised by clear unity of action in relation to

the part of Thyssen's business that was taken over by TKS. Finally, the latter made statements on behalf of Thyssen during the administrative procedure. The Commission adds that the case-law supports its view that it was entitled to impose a fine on TKS in respect of Thyssen's conduct.

Findings of the Court

80 It is necessary to consider whether, by holding that the statement of 23 July 1997 did not imply a waiver by TKS of its right to be heard, the Court of First Instance distorted that piece of evidence and also, possibly, the documents mentioned in paragraphs 76 and 77 of the present judgment and whether, therefore, it erred in law.

81 In that connection, the Court of First Instance observed in paragraph 62 of the contested judgment that it was undisputed that, having regard to the statement of 23 July 1997, the Commission was, exceptionally, entitled to impute to TKS liability for the conduct of which Thyssen was accused, from December 1993 until transfer of the latter's business to TKS on 1 January 1995.

82 However, the Court of First Instance rightly made clear, in paragraph 63 of the contested judgment, that, in so far as such a statement constitutes an exception to the principle that natural or legal persons may be penalised only for acts imputed to them individually, it must be interpreted strictly. The Court of First Instance correctly inferred therefrom that, unless he gives some indication to the contrary, the person making such a statement cannot be presumed to have waived the right to exercise his rights of defence.

83 It is nevertheless necessary to verify whether, in interpreting the statement of 23 July 1997, the Court of First Instance failed to take account of other evidence relating to that statement.

84 According to the Commission, it is clear from TKS's responses to the two statements of objections and from its letter of 17 December 1996 that TKS submitted observations in its own name on its activities and on the activities that it had taken over from Thyssen before its acquisition. A regards the latter, it had itself referred to TKS's responses. Consequently, TKS, by indicating in the statement of 23 July 1997 that it was assuming responsibility for Thyssen's conduct prior to 1 January 1995, must be regarded as having agreed to pay such fine as might be imposed on it for Thyssen's conduct on completion of the procedure initiated by the Commission. Therefore, that statement of 23 July 1997 cannot be construed as meaning that TKS had agreed to accept such responsibility only on condition that it would have its views heard again on that subject.

85 It must be pointed out that, by its letter of 17 December 1996, TKS did not expressly indicate that it was also speaking on behalf of Thyssen. Moreover, TKS's response to the first statement of objections was given in the name and on behalf of TKS. In that context, and even though TKS had also submitted in those documents observations on certain activities of Thyssen before the acquisition thereof in 1995, the statement of 23 July 1997 did not imply that TKS considered itself fully and sufficiently defended in that connection, and therefore that the Commission was entitled to impose on it a fine concerning Thyssen's conduct without again hearing its views on that point.

86 Since the Commission sent separate statements of objections to TKS and Thyssen and those undertakings replied separately concerning the acts imputed to each of them, it was incumbent on the Commission to question and hear the views of TKS concerning Thyssen's actions before deeming it to be responsible for the latter and imposing on it a fine for the infringement attributed to Thyssen.

87 Consequently, it must be held that the Court of First Instance did not in any way distort the scope either of the statement of 23 July 1997 or of the other evidence produced by TKS to the Commission. It did not err in law by considering that TKS's acceptance of responsibility for Thyssen's conduct did not imply that TKS had waived its right to be heard in that connection.

88 As regards the alleged exceptional circumstances relied on by the Commission and mentioned in paragraph 79 of this judgment, it need merely be pointed out in the first place that TKS is not the economic successor of Thyssen, the latter having continued to exist as a separate legal person until the date of adoption of the contested decision. Secondly, such unity of action as may have characterised the conduct of Thyssen and of TKS after 1 January 1995 does not suffice to justify imputing to TKS conduct engaged in by Thyssen before that date, by reason of the principle referred to in paragraph 82 of the present judgment, according to which a legal person may be penalised only for acts imputed to it individually. As regards, finally, the statements allegedly made by TKS concerning Thyssen's activities during the administrative procedure, it has already been stated in paragraphs 85 and 86 of the present judgment that they do not enable liability for Thyssen's conduct prior to that date to be attributed to TKS.

89 The first plea relied on by the Commission in support of its cross-appeal must, therefore, be rejected.

The second and third pleas in the cross-appeal, alleging that there was no breach of the principle of respect for the rights of the defence or any encroachment upon the exercise of those rights

Arguments of the parties

90 By its second plea, the Commission contends that it did not breach the principle of respect for the rights of the defence since point 11 F of the second statement of

objections stated that TKS was to be responsible for Thyssen's conduct prior to the transfer of the latter's activities on 1 January 1995 and it also asked TKS to re-confirm expressly that it was undertaking that responsibility.

91 By its third plea, the Commission contends that it did not impinge upon the exercise by TKS of its rights of defence, as is clear from the latter's replies and observations submitted during the administrative procedure. In support of this plea, the Commission relies on paragraphs 142 to 146 of the judgment in Case C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365. The Commission states that in that case, in contrast to this one, the statement of objections identified as the perpetrator of the infringement only Associated Central West Africa Lines, which is a shipping conference, and not the members thereof. The Commission also refers to the judgment in Case T-137/94 *ARBED* v *Commission* [1999] ECR II-303. Like ARBED SA, to which, according to the Court of First Instance, responsibility was properly attributed for the actions of its subsidiary TradeARBED SA, on the ground, in particular, that it had responded to the statement of objections and to the request for information addressed to the latter, the Commission contends that TKS submitted observations on behalf of Thyssen, which, for its part, referred to them itself.

Findings of the Court

92 In that connection, it must be stated that the Court of First Instance was right to hold, in paragraphs 55 and 56 of the contested judgment, that respect for the rights of the defence in any proceedings liable to lead to penalties constitutes a fundamental principle upheld by the first paragraph of Article 36 of the ECSC

Treaty. It correctly pointed out that proper observance of that principle requires that the undertaking concerned should have been given an opportunity, as early as the administrative procedure, duly to put forward its views as to the reality and relevance of the alleged facts and circumstances and on the documents relied on by the Commission in support of its allegations. The Court of First Instance made it clear, in paragraph 57 of the contested judgment, that in principle it is incumbent on the natural or legal person managing the undertaking concerned when the infringement was committed to answer for it even if, on the date of the adoption of the decision finding the infringement, the running of the undertaking has become the responsibility of another person. It must be added, in the same sense, that in view of its importance, the statement objections must unequivocally identify the legal persons upon whom a fine is likely to be imposed and be addressed to the latter (see, in particular, Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, paragraph 21).

93 Since, in accordance with those principles, the Commission had sent separate statements of objections to Thyssen and TKS, a doubt might remain as to the scope of the acts imputed to TKS and as to the need for it to defend itself concerning the matters complained of in the statement of objections sent separately to Thyssen. In that connection, the reference in the second statement of objections to the fact that Thyssen's conduct prior to the creation of TKS was TKS's responsibility was not such as to dispel that doubt totally. Moreover, as is clear from paragraphs 84 to 86 of the present judgment, although the request that TKS confirm its acceptance of responsibility for Thyssen and the statement made by the latter in that connection might have clarified the question of that acceptance of responsibility, they do not thereby detract from the relevance of the question whether TKS had been given an opportunity to submit its views on the acts imputed to Thyssen for the period 1993 to 1995.

94 Since the Commission sent separate statements of objections to Thyssen and TKS, it could only fully respect the latter's rights of defence by asking it, following the

second statement objections, to indicate whether it wished to submit other observations concerning the complaints addressed specifically to Thyssen.

95 It follows that, even though TKS in fact gave its views in some considerable measure concerning Thyssen's conduct before 1 January 1995, the Commission nevertheless committed a procedural error of which TKS was entitled to avail itself. Consequently, the Court of First Instance was right to hold, in paragraph 66 of the contested judgment, that the Commission did not give TKS an opportunity to submit its observations on the reality and relevance of the acts imputed to Thyssen and that, therefore, TKS had not been able to exercise its rights of defence in that connection.

96 It must be added that the case-law to which the Commission refers, namely the judgment of the Court of First Instance in *ARBED* v *Commission* and the judgment of the Court of Justice in *Compagnie maritime belge transports and Others* v *Commission*, both cited above, provides no support for the reasoning in support of which it is invoked whatsoever. Indeed, the judgment of the Court of First Instance was set aside by the Court of Justice on appeal. The Court of Justice, referring in particular to the abovementioned judgment in *Compagnie maritime belge transports and Others* v *Commission*, thus held that the Court of First Instance had been wrong to conclude that the lack of a statement of objections addressed to ARBED SA by the Commission, even though the latter had imposed a fine on it for conduct of its subsidiary TradeARBED SA, was not such as to entail annulment of the Commission's decision for breach of the rights of the defence (see *ARBED* v *Commission*, paragraph 24).

97 It follows that the second and third pleas put forward by the Commission in support of its cross-appeal must be rejected.

98 Since none of the pleas on which the Commission bases its cross-appeal is well founded, the cross-appeal must be dismissed.

Costs

99 Under the first subparagraph of Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3), the Court may order the parties to bear their own costs where each party succeeds on some and fails on other heads of claim. Since TKS and AST have been unsuccessful in their appeals and the Commission has been unsuccessful in its cross-appeal, the parties must be ordered to bear their own costs.

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

1. **Dismisses the appeals and the cross-appeal;**

2. **Orders ThyssenKrupp Stainless GmbH, ThyssenKrupp Acciai speciali Terni SpA and the Commission of the European Communities to bear their own costs.**

[Signatures]