

JUDGMENT OF THE COURT (Grand Chamber)

29 March 2011 *

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* Language of the case: French.

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In Joined Cases C-201/09 P and C-216/09 P,

APPEALS under Article 56 of the Statute of the Court of Justice, brought on 5 and 10 June 2009 respectively,

ArcelorMittal Luxembourg SA, formerly Arcelor Luxembourg SA, established in Luxembourg (Luxembourg), represented by A. Vandecasteele and C. Falmagne, avocats (C-201/09 P),

appellant,

the other parties to the proceedings being:

European Commission, represented by F. Castillo de la Torre and E. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

ArcelorMittal Belval & Differdange SA, formerly Arcelor Profil Luxembourg SA,
established in Esch-sur-Alzette (Luxembourg),

ArcelorMittal International SA, formerly Arcelor International SA, established in
Luxembourg (Luxembourg),

applicants at first instance,

and

European Commission, represented by F. Castillo de la Torre, X. Lewis and E. Gippini
Fournier, acting as Agents, with an address for service in Luxembourg (C-216/09 P),

appellant,

the other parties to the proceedings being:

ArcelorMittal Luxembourg SA, formerly Arcelor Luxembourg SA, established in
Luxembourg,

ArcelorMittal Belval & Differdange SA, formerly Arcelor Profil Luxembourg SA, established in Esch-sur-Alzette, represented by A. Vandencastele, avocat,

ArcelorMittal International SA, formerly Arcelor International SA, established in Luxembourg, represented by A. Vandencastele, avocat,

applicants at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann, A. Arabadjiev (Rapporteur) and J.-J. Kasel, Presidents of Chambers, E. Juhász, G. Arestis, A. Borg Barthet, T. von Danwitz and C. Toader, Judges,

Advocate General: Y. Bot,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2010,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2010,

gives the following

Judgment

- 1 By their appeals, ArcelorMittal Luxembourg SA, formerly Arcelor Luxembourg SA (C-201/09 P), the European Commission (C-216/09 P) and, by way of cross-appeal, ArcelorMittal Belval & Differdange SA, formerly Arcelor Profil Luxembourg SA, and ArcelorMittal International SA, formerly Arcelor International SA, (C-216/09 P) ask the Court to set aside in part the judgment of the Court of First Instance of the European Communities (now 'the General Court') in Case T-405/06 *ArcelorMittal Luxembourg and Others v Commission* [2009] ECR II-771 ('the judgment under appeal') annulling in part Commission Decision C(2006) 5342 final of 8 November 2006 relating to a proceeding under Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (Case COMP/E/38.907 – Steel beams), a summary of which was published in the *Official Journal of the European Union* of 13 September 2008 (OJ 2008 C 235, p. 4; 'the contested decision').

- 2 By the contested decision, the Commission found that the undertaking made up of ArcelorMittal Luxembourg SA, ArcelorMittal Belval & Differdange SA and ArcelorMittal International SA had from 1 July 1988 to 16 January 1991 participated in a series of agreements and concerted practices whose purpose or effect was to fix prices, allocate quotas, and exchange information on a large scale in the Community steel beams market, contrary to Article 65(1) CS, and imposed on those companies jointly and severally a fine of EUR 10 million for those infringements.

I — Legal context

A — Provisions of the ECSC Treaty

3 Article 65 CS provided:

‘1. All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply.

...

4. Any agreement or decision prohibited by paragraph 1 of this Article shall be automatically void and may not be relied upon before any court or tribunal in the Member States.

The Commission shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this Article.

5. On any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce, by arbitration, penalty, boycott or by any other means, an agreement or decision which is automatically void or an agreement for which authorisation has been refused or revoked, or has obtained an authorisation by means of information which it knew to be false or misleading, or has engaged in practices prohibited by paragraph 1 of this Article, the Commission may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the agreement, decision or practice prohibited by this Article; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10% of the annual turnover of the undertakings in question in the case of fines, and 20% of the daily turnover in the case of periodic penalty payments.'

⁴ In accordance with Article 97 CS, the ECSC Treaty expired on 23 July 2002.

B — *Provisions of the EC Treaty*

5 Article 305(1) EC provided:

‘The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.’

C — *Regulation (EC) No 1/2003*

6 Under Article 4 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the [EC] Treaty (OJ 2003 L 1, p. 1), ‘[f]or the purpose of applying Articles 81 [EC] and 82 [EC], the Commission shall have the powers provided for by this Regulation.’

7 Article 7 of Regulation No 1/2003, headed ‘Finding and termination of infringement’, provides:

‘1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 [EC] or of Article 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. ... If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

...’

- 8 Under Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC or 82 EC.

D — *Provisions on limitation periods in proceedings*

- 9 Article 1(1) of Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ 1978 L 94, p. 22) and Article 25(1) of Regulation No 1/2003 subject the Commission's power to impose fines for infringements of the provisions of competition law, in principle, to a limitation period of five years.
- 10 Article 1(2) of Decision No 715/78 and Article 25(2) of Regulation No 1/2003 provide that time is to begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time is to begin to run on the day on which the infringement ceases.
- 11 Article 2(1) of Decision No 715/78 and Article 25(3) of Regulation No 1/2003 state that any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement is to interrupt the limitation period. The limitation period is to be interrupted with effect from the date on which the action is notified to at least one undertaking which has participated in the infringement.

Actions which interrupt the running of the period are to include in particular the following:

- written requests for information by the Commission or Commission decisions requiring the requested information;

 - written authorisations to carry out investigations issued to its officials by the Commission or a Commission decision ordering an investigation;

 - the initiation of proceedings by the Commission;

 - notification of the statement of objections of the Commission.
- ¹² Article 2(2) of Decision No 715/78 and Article 25(4) of Regulation No 1/2003 provide that the interruption of the limitation period is to apply for all undertakings which have participated in the infringement.
- ¹³ In accordance with Article 2(3) of Decision No 715/78 and Article 25(5) of Regulation No 1/2003, each interruption is to start time running afresh. However, the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period is to be extended by the time during which limitation is suspended.

- 14 Under Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003, the limitation period in proceedings is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court.
- 15 It follows from Article 4 of Decision No 715/78 and Article 26(1) and (2) of Regulation No 1/2003 that the Commission's power to enforce decisions imposing fines under the provisions of the ECSC Treaty or Article 23 of Regulation No 1/2003 is subject to a limitation period of five years, with time running from the day on which the decision becomes final.

II — Background to the dispute

- 16 The facts of the dispute, as set out in paragraphs 16 to 37 of the judgment under appeal, may be summarised as follows.
- 17 ARBED SA, which has changed its company name to become Arcelor Luxembourg SA and then ArcelorMittal Luxembourg SA ('ARBED'), manufactured steel products.
- 18 TradeARBED SA, which has changed its company name to become Arcelor International SA and then ArcelorMittal International SA ('TradeARBED'), was set up as a wholly-owned subsidiary of ARBED and distributed the steel products manufactured by ARBED.

- 19 ProfilARBED SA, which has changed its company name to become Arcelor Profil Luxembourg SA and then ArcelorMittal Belval & Differdange SA ('ProfilARBED'), was formed on 27 November 1992 as a wholly-owned subsidiary of ARBED in order to carry out from that date ARBED's economic and industrial activities in the beams sector.
- 20 In 1991 the Commission, on the basis of decisions adopted pursuant to Article 47 CS, carried out inspections at the offices of various undertakings, including TradeARBED. On 6 May 1992 it sent a statement of objections to the undertakings concerned, which did not include ARBED or ProfilARBED but did include TradeARBED. TradeARBED attended a hearing which was held from 11 to 14 January 1993.
- 21 By Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1; 'the initial decision'), the Commission found that 17 European steel undertakings, including TradeARBED, had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) CS, and it imposed fines on 14 undertakings operating in that sector, including ARBED (ECU 11 200 000), for infringements committed between 1 July 1988 and 31 December 1990.
- 22 By judgment of 11 March 1999 in Case T-137/94 *ARBED v Commission* [1999] ECR II-303, the General Court dismissed the action brought by ARBED for annulment of the initial decision but reduced the fine imposed on ARBED to EUR 10 000 000.

- 23 By judgment of 2 October 2003 in Case C-176/99 P *ARBED v Commission* [2003] ECR I-10687, the Court of Justice set aside the judgment of the General Court and annulled the initial decision in so far as it concerned ARBED, on the ground of infringement of the rights of the defence.
- 24 Following that judgment, the Commission decided to initiate a new proceeding in respect of the anti-competitive conduct which had formed the subject-matter of the initial decision. On 8 March 2006, it sent ARBED, TradeARBED and ProfilARBED a statement of objections informing them of its intention to adopt a decision finding them jointly and severally liable for the infringements in question. Those companies replied to the statement of objections on 20 April 2006.
- 25 On 8 November 2006 the Commission adopted the contested decision, Articles 1 and 2 of which provide:

‘Article 1

The undertaking composed of [ARBED, TradeARBED and ProfilARBED] participated, in breach of Article 65(1) [CS], in a series of agreements and concerted practices having the object or effect of fixing prices, allocating quotas and exchanging, on a large scale, information on the Community market for beams. The participation of the undertaking thus composed in those infringements is established between 1 July 1988 and 16 January 1991.

Article 2

A fine of EUR 10million is hereby imposed on [ARBED, TradeARBED and ProfilARBED] jointly and severally for the infringements referred to in Article 1.’

III — Procedure before the General Court and the judgment under appeal

- ²⁶ By application lodged at the Registry of the General Court on 27 December 2006, ARBED, TradeARBED and ProfilARBED brought an action against the contested decision on the basis of Articles 33 CS and 36 CS and Articles 229 EC and 230 EC.
- ²⁷ ARBED, TradeARBED and ProfilARBED submitted, by their first plea in law, that the contested decision lacked a legal basis and that the Commission had misused its powers. The second plea alleged breach of the rules on the attribution of infringements, the third plea breach of the rules on the limitation period for proceedings, and the fourth plea infringement of the rights of the defence.
- ²⁸ Since it considered in particular that the Community Treaties established a single legal order, that the EC and ECSC Treaties pursued a common objective of the maintenance of a system of free competition, and that a principle common to the legal systems of the Member States aims, when legislation is amended, unless the legislature expresses a contrary intention, to ensure continuity of the legal system, the

General Court rejected the first plea, holding that Articles 7(1) and 23(2) of Regulation No 1/2003 were to be interpreted as enabling the Commission to find and penalise, after 23 July 2002, agreements between undertakings arrived at in the sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.

- 29 The General Court also rejected the second plea, finding, first, that that plea was not relied on by TradeARBED and, secondly, that the Commission had not erred in law by attributing the infringement committed by TradeARBED to ARBED and, as ARBED's 'economic successor', ProfilARBED, on the basis that ARBED held 100% of the capital of TradeARBED and the evidence confirmed that it exercised decisive influence over the conduct of TradeARBED and did in fact make use of that power.
- 30 In connection with the third plea, the General Court rejected the allegation of breach of the rules concerning the limitation period for proceedings with respect to ARBED, finding that, because of the suspension of the limitation periods during the first proceedings before the General Court and the Court of Justice, the contested decision had been taken within both the 5-year and the 10-year limitation periods. On the other hand, finding that the suspension took effect *inter partes* and not *erga omnes*, the General Court held that, as regards ProfilARBED and TradeARBED, the 10-year limitation period had been exceeded, and consequently annulled the contested decision in so far as it concerned them.
- 31 The General Court rejected the fourth plea in so far as it was put forward by ARBED, finding that, since it had merely alleged that the evidence that might have been available to it in 1990 had disappeared as a result of the lapse of time, ARBED had not established in what way the duration of the administrative procedure could have impeded the exercise of its rights of defence.

³² By the judgment under appeal, the General Court therefore annulled the contested decision in so far as it concerned ProfilARBED and TradeARBED and dismissed the remainder of the action as unfounded.

IV — Procedure before the Court

³³ By order of 10 September 2009, the President of the Court joined Cases C-201/09 P and C-216/09 P for the purposes of the oral procedure and the judgment.

V — Forms of order sought by the parties

³⁴ By its appeal (C-201/09 P) ARBED claims that the Court should:

— set aside the judgment under appeal in so far as it upholds the contested decision with respect to ARBED; and

— order the Commission to pay the costs of the present proceedings and of those before the General Court.

35 In its response to that appeal, the Commission contends that the Court should:

- dismiss the appeal; and

- order ARBED to pay the costs.

36 By its appeal (Case C-216/09 P), the Commission claims that the Court should:

- set aside the judgment under appeal in so far as it annuls the fines imposed on ProfilARBED and TradeARBED by the contested decision;

- dismiss the appeal of ProfilARBED and TradeARBED; and

- order ProfilARBED and TradeARBED to pay the costs.

37 In their response to that appeal, ProfilARBED and TradeARBED brought a cross-appeal and contend that the Court should:

- uphold the judgment under appeal in so far as it annuls the fines imposed on them by the contested decision by application of the relative effect of the suspension of the limitation period;

- in the alternative and by way of cross-appeal, set aside the judgment under appeal in so far as it
 - applies the ECSC Treaty and Regulation No 1/2003 against them;
 - attributes the conduct of TradeARBED to ProfilARBED;
 - fails to acknowledge that the proceedings are statute-barred as regards ProfilARBED by application of the rules on the interruption of the limitation period;
 - fails to acknowledge the infringement of the rights of the defence which ProfilARBED can rely on in view of the particularly long duration of the proceedings;
- order the Commission to pay the costs at first instance and on appeal.

³⁸ In its response to that cross-appeal, the Commission contends that the Court should:

- dismiss the cross-appeal; and
- order ProfilARBED and TradeARBED to pay the costs.

VI — The application for the oral procedure to be reopened

39 By document received at the Court Registry on 27 October 2010, the Commission requested the Court to order the oral procedure to be reopened pursuant to Article 61 of the Court's Rules of Procedure, if the Court were to address the question of the liability of ProfilARBED as a result of the carrying on of ARBED's economic activities by ProfilARBED. According to the Commission, this point was considered by the Advocate General in points 224 to 235 of his Opinion but is not the subject-matter of the dispute and was not argued by the parties.

40 Pursuant to the above provision, the Advocate General was heard on the application.

41 Under Article 61 of the Rules of Procedure, the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of a point which has not been argued by the parties (see Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31 and the case-law cited).

42 The Court considers that it has all the material necessary to give judgment in the present case and that the case does not have to be examined in the light of a point that has not been argued before it.

43 There is therefore no need to order the oral procedure to be reopened.

VII — The appeals

- 44 In its appeal (C-201/09 P) ARBED puts forward four grounds of appeal. By the first ground of appeal, ARBED alleges breaches of Article 97 CS and Regulation No 1/2003, misuse of powers, errors of law and failure to state reasons.
- 45 The second ground of appeal alleges breach of the principle of the legal personality of companies and the principle that penalties must fit the offence, failure to state reasons, incorrect interpretation and application of the Court's case-law on the attributability of the conduct of a wholly-owned subsidiary to the parent company, and breach of the principle of *res judicata* and the hierarchy of norms.
- 46 The third ground of appeal alleges breaches of the rules on limitation periods and the principle of *res judicata* with respect to the initial decision, and failure to state reasons. By the fourth ground of appeal, ARBED complains that the General Court failed to state reasons and breached the rights of the defence and the principle of *res judicata* with respect to the *ARBED v Commission* judgment of 2 October 2003.
- 47 In its appeal (C-216/09 P) the Commission puts forward a single ground of appeal, alleging errors of law in the interpretation of Decision No 715/78.

A — *The appeal by ARBED (C-201/09 P)*

1. First ground of appeal: breaches of Article 97 CS and Regulation No 1/2003, misuse of powers, error of law and failure to state reasons

(a) Arguments of the parties

⁴⁸ ARBED notes, first, that Article 97 CS provided that the ECSC Treaty would expire on 23 July 2002 and the contested decision, which was based on Article 65 CS, was taken on 8 November 2006. By holding that it was lawful for the practices at issue to be proceeded against on the basis of Article 65 CS, the General Court infringed Article 97 CS and failed to address its submissions on the lack of a legal basis for that decision.

⁴⁹ According to ARBED, the General Court erred in law in finding that the Community treaties established a single legal order. Under Article 305(1) EC, the ECSC Treaty constitutes a specific system of rules derogating from the general rules laid down by the EC Treaty, and the succession of the legal framework of the EC Treaty to that of the ECSC Treaty brought with it, from 24 July 2002, a change in the legal bases, procedures and substantive rules applicable. The institutions' obligation to interpret the various treaties consistently can be performed only by observing the limits which the treaties themselves set, and cannot therefore induce the institutions to maintain in force a provision of a treaty which was to expire on 23 July 2002 beyond that date.

- 50 The judgments in Case 23/68 *Klomp* [1969] ECR 43 and Case C-119/05 *Lucchini* [2007] ECR I-6199 cited by the General Court in support of its position cannot be used to reach any other conclusion. The former judgment related to an amendment to primary Community law as a result of the Merger Treaty, not to the expiry of a treaty, while the latter concerned a decision taken under the ECSC Treaty before, not after, its expiry.
- 51 Secondly, ARBED takes the view that, by basing the Commission's powers on Regulation No 1/2003, the General Court misused its powers and failed to address ARBED's arguments. ARBED observes that Regulation No 1/2003 was adopted after the expiry of the ECSC Treaty and submits that, having regard to Article 4 of that regulation and in the absence of any mention of the ECSC Treaty, the regulation gives the Commission power only to proceed against infringements of Articles 81 EC and 82 EC.
- 52 Even if Regulation No 1/2003 did give the Commission power to penalise breaches of Article 65 CS, it infringed the ECSC Treaty since, although adopted by virtue of the EC Treaty alone, it purported to amend the ECSC Treaty. It follows from the case-law that the consistent interpretation of the substantive provisions of the various treaties has no effect on the powers allocated to the various institutions by those treaties, since the institutions are empowered under each treaty to exercise only the powers conferred on them by that treaty.
- 53 ARBED submits that the General Court's approach amounts to conferring power on the Council of the European Union to decide who are the competent authorities to implement Article 65(1) CS, although the authors of the ECSC Treaty exercised that power, and to changing the nature of the power allocated to the Commission by the ECSC Treaty, which is exclusive under Article 65 CS but competes with the powers of

the competent national competition authorities and the national courts under Regulation No 1/2003.

54 The General Court's interpretation of the rules on the temporal application of the law thus interferes with the legal identity of each treaty and with the rules on the hierarchy of norms. Moreover, the General Court confused procedural rules, substantive rules and the allocation of powers. It follows from the case-law that the question of the powers of an institution is preliminary to the question of which substantive and procedural rules apply, and that the legal basis authorising the Union institution to adopt an act must be in force at the time of its adoption.

(b) Findings of the Court

55 As a preliminary point, it must be stated, first, that any agreement corresponding to the factual elements set out in Article 65(1) CS concluded or performed before the expiry of the ECSC Treaty on 23 July 2002 could, up to and including that date, give rise to a Commission decision imposing fines on the undertakings taking part in the agreement or its performance, on the basis of Article 65(5) CS.

56 Next, it is clear that any agreement corresponding to the factual elements set out in Article 65(1) CS concluded or performed between 24 July 2002 and 30 November 2009 could give rise to such a decision of the Commission on the basis of Article 81 EC and Article 15(2)(a) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the [EC] Treaty (OJ, English Special Edition 1959-1962, p. 87) or Article 23(2)(a) of Regulation No 1/2003.

- 57 Finally, it is also common ground that any agreement corresponding to the factual elements set out in Article 65(1) CS concluded or performed from 1 December 2009 can give rise to such a decision of the Commission on the basis of Article 101 TFEU and Article 23(2)(a) of Regulation No 1/2003.
- 58 In the present case ARBED contests essentially the General Court's finding that the Commission could, by the contested decision adopted after 23 July 2002, impose a fine on it, on the basis of Article 65(1) and (5) CS in conjunction with Articles 7(1) and 23(2)(a) of Regulation No 1/2003, for taking part before 23 July 2002 in the conclusion and performance of an agreement corresponding to the factual elements set out in Article 65(1) CS.
- 59 In the first place, as regards the Commission's powers, the General Court found, in paragraphs 57 and 58 of the judgment under appeal, that by virtue of Article 305(1) EC the ECSC Treaty constituted a *lex specialis* derogating from the *lex generalis* of the EC Treaty, and that as a result of the expiry of the ECSC Treaty on 23 July 2002 the scope of the general system established by the EC Treaty was extended on 24 July 2002 to cover the sectors which were originally governed by the ECSC Treaty.
- 60 In paragraphs 59 to 61 of the judgment under appeal, the General Court stated that the succession of the legal framework of the EC Treaty to that of the ECSC Treaty was part of the continuity of the European Union legal order and its objectives, since the introduction and maintenance of a system of free competition was one of the essential objectives of both the EC Treaty and the ECSC Treaty. It emphasised that the concepts of agreements and concerted practices under Article 65(1) CS corresponded to those of agreements and concerted practices within the meaning of Article 81 EC and that those two provisions had both been interpreted in the same way by the European Union judicature.

- 61 In paragraph 62 of the judgment under appeal, the General Court observed that, in accordance with a principle common to the legal systems of the Member States, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system must be ensured, and considered that that principle applied to amendments to the primary law of the European Union.
- 62 In paragraphs 63 and 64 of the judgment under appeal, the General Court thus concluded that the continuity of the European Union legal order required the Commission to ensure, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied *eo tempore* to both Member States and individuals by virtue of the ECSC Treaty, and that Article 23(2) of Regulation No 1/2003 had therefore to be interpreted as enabling the Commission to penalise after 23 July 2002 agreements between undertakings arrived at in the sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.
- 63 Those findings are not vitiated by any error of law. It follows from the case-law that, in accordance with a principle common to the legal systems of the Member States whose origins may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system must be ensured, and that that principle applies to amendments to the primary law of the European Union (see, to that effect, *Klomp*, paragraph 13).
- 64 As the Commission rightly observes, there is no indication that the European Union legislature wished it to be possible for concerted practices prohibited under the ECSC Treaty to escape the application of all penalties after that treaty expired.

- 65 Furthermore, it follows from the observations in paragraphs 55 to 57 above that the succession of the ECSC, EC and FEU Treaties ensures, in order to guarantee free competition, that any conduct corresponding to the factual elements set out in Article 65(1) CS, whether taking place before or after 23 July 2002, could be and still can be penalised by the Commission.
- 66 In those circumstances, it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the legal order of the European Union if the Commission did not have jurisdiction to ensure the uniform application of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that treaty (see, to that effect, *Lucchini*, paragraph 41).
- 67 In the second place, the General Court was right to hold in that respect, in paragraphs 65, 66 and 68 of the judgment under appeal, that compliance with the principles governing the temporal application of the law and the requirements relating to the principles of legal certainty and the protection of legitimate expectations required the application of the substantive provisions of Article 65(1) and (5) CS to the facts of the present case, which fell within their scope *ratione materiae* and *ratione temporis*.
- 68 In particular, the principle of legal certainty requires that European Union rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44 and the case-law cited).
- 69 It must be emphasised that, at the material time, Article 65(1) and (5) CS provided a clear legal basis for the penalty imposed in this case, so that TradeARBED could not

be unaware of the consequences of its conduct. Moreover, it follows from the observations in paragraphs 55 to 57 above that the same conduct could also have been penalised subsequently, at any time, by such a penalty imposed by the Commission.

- 70 In so far as the Treaties defined clearly, before the material time, the infringements and the nature and extent of the penalties which could be imposed in respect of them, the above principles do not aim to guarantee to undertakings that subsequent amendments to the legal bases and procedural rules will enable them to escape all penalties relating to their past infringements.
- 71 It should be added that the Commission, before the expiry of the ECSC Treaty, stated that there would be no possibility of escaping such a penalty, by pointing out, in point 31 of its Communication concerning aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, adopted on 18 June 2002 (OJ 2002 C 152, p. 5), that if it identified an infringement in a field covered by the ECSC Treaty the substantive law applicable, irrespective of the date of that application, would be the law in force at the time when the facts constituting the infringement occurred, and the procedural law applicable after the expiry of the ECSC Treaty would be that of the EC Treaty.
- 72 Moreover, the *lex mitior* principle does not preclude the application in the present case of Article 65(5) CS, since the fine imposed by the contested decision is in any event below the ceiling laid down by Article 23(2) of Regulation No 1/2003 for the imposition of a fine following an infringement of the European Union rules on competition.

73 It follows from all the above considerations that a diligent undertaking in ARBED's position could not at any time be unaware of the consequences of its conduct or count on the fact that the succession of the legal framework of the EC Treaty to that of the ECSC Treaty would have the consequence of allowing it to escape all penalties for infringements of Article 65 CS committed in the past.

74 As regards the legal basis and the procedural rules applicable, the General Court was also right to hold, in paragraphs 64 and 67 of the judgment under appeal, that the Commission's power to impose the fine in question by the contested decision derived from Article 23(2) of Regulation No 1/2003 and that the procedure had to be carried out in accordance with that regulation.

75 It follows from the case-law that the provision which forms the legal basis of an act and empowers the Union institution to adopt the act in question must be in force at the time when the act is adopted (see, to that effect, Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 45) and that procedural rules are generally held to apply from the time of their entry into force (see, to that effect, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9, and Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31).

76 It may be added that the application of Regulation No 1/2003 by the Commission did not restrict but rather tended to extend the procedural guarantees provided by the legal framework of the ECSC Treaty for undertakings which are the target of procedures, as ARBED indeed does not contest.

- 77 It follows that the General Court did not err in law in concluding, in paragraphs 67 and 68 of the judgment under appeal, first, that the Commission's power to impose the fine at issue by the contested decision derived from Article 23(2) of Regulation No 1/2003 and that the procedure had to be conducted in accordance with that regulation and, secondly, that the substantive law laying down the penalty applicable was Article 65(1) and (5) CS.
- 78 In the third place, in so far as ARBED submits that the General Court did not explicitly deal with all its arguments, it must be recalled that, according to settled case-law, the General Court's duty, under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice, to state reasons for its judgments does not require it to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the measures in question were taken and provides the Court of Justice with sufficient material for it to exercise its powers of review (Case C-431/07 P *Bouygues and Bouygues Télécom v Commission* [2009] ECR I-2665, paragraph 42, and order in Case C-150/09 P *Iride and Iride Energia v Commission*, paragraph 42).
- 79 The General Court's reasoning is clear and is such as to enable ARBED to know why the General Court rejected the plea in question and to provide the Court with sufficient material to exercise its powers of review. It follows that the judgment under appeal is not vitiated by a failure to state reasons.
- 80 Having regard to all the foregoing, the first ground of appeal must be rejected.

2. Second ground of appeal: breach of the principle of the legal personality of companies and the principle that penalties must fit the offence, failure to state reasons, incorrect interpretation and application of the case-law on the attributability of the conduct of a wholly-owned subsidiary to the parent company, and breach of the principle of *res judicata*

(a) Admissibility and effectiveness of the ground of appeal

(i) Arguments of the parties

⁸¹ In its response to the appeal in Case C-201/09 P, the Commission submits that in so far as this ground of appeal seeks to challenge the attribution, in paragraphs 106 to 119 of the judgment under appeal, of the conduct of TradeARBED to ProfilARBED, it is inadmissible, since an appeal cannot validly contain a plea that concerns another party to the proceedings.

⁸² Moreover, the Commission submits that the second ground of appeal is ineffective, since it is directed only at the application of the presumption that a company holding 100% of the capital of a subsidiary exercises effective control, and not at the General Court's finding that the Commission had demonstrated the actual exercise of decisive influence by ARBED over TradeARBED, justifying the conclusion that those companies formed a single economic entity.

(ii) Findings of the Court

⁸³ As regards the admissibility of the part of the ground of appeal relating to the attribution of the conduct of TradeARBED to ProfilARBED, it is clear that this ground

of appeal does not relate to the judgment under appeal in so far as it affects the legal position of ARBED. As the Commission rightly submits, an appellant cannot raise a ground of appeal for the benefit of another party to the proceedings. Consequently, this ground of appeal must be declared inadmissible in so far as it concerns the attribution of TradeARBED's conduct to ProfilARBED.

- ⁸⁴ As regards the effectiveness of the second ground of appeal, it is apparent from paragraph 99 of the judgment under appeal that, to reach the conclusion that ARBED and TradeARBED were an economic unit, the General Court relied on all the considerations preceding that paragraph, thus including the rebuttable presumption that a parent company controlling 100 % of a subsidiary actually exercises a decisive influence over the conduct of the subsidiary.
- ⁸⁵ In those circumstances, the substance of the second ground of appeal must be examined.

(b) Substance

(i) Arguments of the parties

- ⁸⁶ ARBED submits, first, that the General Court concluded that the conduct of TradeARBED could be attributed to ARBED on the basis of the competition law doctrine that undertakings that are legally distinct may form a single economic entity. That doctrine has hitherto been used solely to exempt undertakings from the consequences of the existence of legally distinct persons by providing that the prohibition

of agreements between undertakings in Article 81 EC does not apply to undertakings within the same group and by excluding acquisitions of undertakings within the same group from the application of the rules on concentrations.

- 87 By finding the undertakings within a group collectively liable by reason of the conduct of one of them, the General Court denied the rights of individuals to carry on their economic activities by means of distinct legal entities each endowed as a legal person with its own legal personality and having individual liability.
- 88 Moreover, the General Court's approach leads to an inconsistent result. The fact that the unlawful conduct of a company belonging to a group can be attributed both to the parent company and to a sister company combined with the fact that only the parent company is able to rebut a presumption of decisive influence amounts to imposing stricter rules on the sister company.
- 89 Consequently, according to ARBED, the judgment under appeal breaches the principle of legal personality and the principle that penalties must fit the offence, and displays an internal inconsistency in its reasoning that is equivalent to a failure to state reasons.
- 90 ARBED submits, second, that by holding that a rebuttable presumption that the parent company exercises a decisive influence on the conduct of its wholly-owned subsidiary justifies the attributability of the subsidiary's conduct to the parent company, the General Court breached general principles of law and departed from the case-law of both the Court of Justice and the General Court. That case-law requires the

Commission to show that specific complaints may be raised against each undertaking that is the subject of a decision imposing fines.

- 91 The judgments in Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151 and Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925 cannot justify the position adopted by the General Court, as the former is not relevant and the latter was interpreted wrongly.
- 92 In *AEG-Telefunken v Commission* the Court had to rule, according to ARBED, not on the possibility of attributing liability to a parent company for an infringement committed by a subsidiary but on the proof that the parent company had taken part in an infringement. In addition, unlike the situation at issue in that case, the national law applicable in the present case does not provide that the governing bodies of a wholly-owned subsidiary are the same as those of the parent company.
- 93 As to *Stora Kopparbergs Bergslags v Commission*, ARBED submits that the Court never confirmed that control of 100% of a company suffices for the parent company to be regarded as liable for the conduct of the subsidiary. Unlike ARBED, the parent company in that case had, during the administrative procedure, agreed to accept liability for the conduct of its subsidiary. Moreover, in the Commission decision which was the subject-matter of that judgment, the Commission had adopted the approach of imposing the penalty on the parent company where there was express evidence that the parent company had participated in the infringement.
- 94 ARBED submits, third, that by finding that a decisive influence of ARBED on TradeARBED both existed and had been exercised, even though the contested decision and the initial decision accepted that ARBED had not participated in the infringement by exercising that influence, the General Court breached the principle of *res judicata* with respect to the initial decision, exceeded its jurisdiction by substituting

its own assessment for that of the Commission, and applied the *AEG-Telefunken* and *Stora Kopparbergs Bergslags* line of case-law incorrectly.

(ii) Findings of the Court

⁹⁵ It is settled case-law that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The Court has stated that in this context the term ‘undertaking’ must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons, and that when such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (Case C-90/09 P *General Química and Others v Commission* [2011] ECR I-1, paragraphs 34 to 36 and the case-law cited).

⁹⁶ The conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities (Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 58 and the case-law cited).

⁹⁷ In the particular case of a parent company having a 100% shareholding in a subsidiary which has infringed the Union’s rules on competition, the parent company is able to

exercise decisive influence over the conduct of its subsidiary, and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of the subsidiary (*Akzo Nobel and Others v Commission*, paragraph 60 and the case-law cited).

- ⁹⁸ In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent exercises decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (*Akzo Nobel and Others v Commission*, paragraph 61 and the case-law cited).
- ⁹⁹ While it is true that the Court referred, in paragraphs 28 and 29 of *Stora Kopparbergs Bergslags v Commission*, not only to the fact that the parent company owned 100 % of the capital of the subsidiary but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary and the fact that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the General Court had based its reasoning, and not to make the application of the presumption referred to in paragraph 97 above subject to the production of additional evidence of the actual exercise of influence by the parent company (*Akzo Nobel and Others v Commission*, paragraph 62).
- ¹⁰⁰ It follows from those considerations, first, that the General Court did not err in law in holding that where a parent company has a 100 % shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary and, second, contrary to ARBED's claims, that

neither the alleged principle of the legal personality of companies nor the principle that penalties must fit the offence precludes the Commission from imposing a fine on a parent company for an infringement committed by its wholly-owned subsidiary.

- 101 Where the parent company exercises decisive influence over the conduct of its subsidiary, especially its anti-competitive conduct, it is the undertaking consisting of the parent company and the subsidiary which is liable for the infringement of the competition rules laid down by the ECSC and EC Treaties resulting from that conduct, in accordance with the case-law referred to in paragraph 95 above.
- 102 Moreover, the General Court noted in paragraphs 94 and 96 to 98 of the judgment under appeal that the Commission had found in the contested decision that it had not been shown, or even claimed, that TradeARBED determined its commercial policy independently of ARBED, and that further evidence had confirmed that ARBED had decisive influence over the conduct of TradeARBED and had in fact made use of that power.
- 103 In those circumstances, ARBED's argument that the case-law on the attributability to the parent company of the conduct of a wholly-owned subsidiary was incorrectly applied and that the General Court substituted its own assessment for that of the Commission must be rejected.
- 104 As to ARBED's argument that the attribution of the unlawful conduct to a sister company by virtue of the concept of an economic entity is inconsistent because it leads to stricter rules on liability being imposed on that company than on the parent company, it suffices to note that in the present case the Commission attributed that conduct to the sister company because it had taken over the commercial activities of the parent

company, and that, since the liability of the sister company depended on that of the parent company, the rules on liability imposed on the sister company are consequently no stricter than those applied to the parent company.

105 As regards the submission of a breach of the principle of *res judicata*, it suffices to state that, in any event, *res judicata* cannot apply to a Commission decision, and certainly not to a decision which was annulled, such as the initial decision in so far as it concerned ARBED.

106 As to the failure to state reasons allegedly resulting from inconsistency in the General Court's reasoning, it follows from the foregoing that the alleged inconsistency derives from an incorrect reading by ARBED of the case-law relating to the attributability to the parent company of the conduct of a wholly-owned subsidiary. This argument must therefore in any event be rejected.

107 It follows that the second ground of appeal must be rejected.

3. Third ground of appeal: breach of the rules on limitation periods and the principle of *res judicata* and failure to state reasons

(a) Arguments of the parties

108 ARBED submits that, by finding that ARBED had taken part in the infringement because the infringement committed by TradeARBED could be attributed to it, the General Court, first, contradicted itself, since it distinguished in paragraph 100 of

the judgment under appeal between liability through attribution and liability through participation; secondly, failed to show that ARBED satisfied the conditions for the acts interrupting or suspending the limitation period to be relied on against it; thirdly, misapplied the rules on limitation periods; and, fourthly, breached the principle of *res judicata*.

(b) Findings of the Court

- ¹⁰⁹ As regards the argument alleging that the General Court's reasoning was contradictory, it has already been found, in paragraph 106 above, that the supposed inconsistencies proceed from an incorrect reading by ARBED of the case-law on the attributability to the parent company of the conduct of a wholly-owned subsidiary. This argument must therefore be rejected.
- ¹¹⁰ It also follows that, contrary to ARBED's submission, the acts interrupting the limitation period could, in view of that attributability and the existence of an economic unity between TradeARBED and ARBED, be relied on against ARBED
- ¹¹¹ Finally, as regards the argument of breach of the principle of *res judicata*, it has already been pointed out, in paragraph 105 above, that, in any event, *res judicata* cannot apply to a Commission decision, and certainly not to a decision which was annulled, such as the initial decision in so far as it concerned ARBED.

112 Consequently, the third ground of appeal must be rejected.

4. Fourth ground of appeal: failure to state reasons and breaches of the rights of the defence and the principle of *res judicata*

(a) Arguments of the parties

113 ARBED submits that it argued before the General Court that the evidence relevant for rebutting the presumption of the attributability of the infringement committed by TradeARBED which could have been available to ARBED in 1990 had disappeared after a lapse of time of 16 years, and it had not been possible for it to assess the relevance of potentially useful information during the procedure. ARBED's argument thus related to the impossibility of collecting the evidence needed to rebut the presumption.

114 By finding that it was for ARBED to show that the evidence relating to the real character of its relations with its subsidiary had disappeared, the General Court thus required it to prove a negative, which by definition is impossible, thereby vitiating the judgment under appeal with a failure to state reasons that constitutes a breach of the rights of the defence.

115 In so far as the General Court added, in paragraph 169 of the judgment under appeal, that the presumption of liability was already raised in the initial decision, ARBED

contends that that decision did not contain any reasoning on the attributability of one company's infringement to another company, but confined itself to stating that TradeARBED distributed beams for ARBED and that, to ensure equal treatment, the initial decision was addressed to ARBED.

- 116 As to the statement in paragraph 171 of the judgment under appeal that the presumption of liability was corroborated by the evidence in the initial decision, ARBED submits that paragraph 96 of the General Court's judgment in Case T-137/94 *ARBED v Commission* referred to the conduct of ARBED after the infringement, and that in paragraph 98 of that judgment the General Court referred to uncertainty as to the liability of ARBED and TradeARBED.
- 117 Moreover, as the initial decision was annulled by the Court of Justice in so far as it concerned ARBED, the principle of *res judicata* renders the General Court's reasoning inoperative. In ARBED's view, the General Court's reasoning disregarded the principle of *res judicata* attached to the judgment in Case C-176/99 P *ARBED v Commission*, and was based on an incorrect reading both of the initial decision and of the judgment in Case T-137/94 *ARBED v Commission*, which constitutes a failure to state reasons.

(b) Findings of the Court

- 118 As regards the argument that it was impossible to collect the evidence needed to rebut the presumption that TradeARBED's conduct could be attributed to ARBED, and that proof of a negative had been required, the case-law states that it is for an undertaking which submits that the excessive length of the administrative procedure has had an impact on the exercise of its rights of defence to demonstrate to the requisite legal

standard that, because of that excessive length, it experienced difficulties in defending itself against the Commission's allegations (see, to that effect, Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraphs 60 and 61).

- 119 The General Court found, in paragraph 168 of the judgment under appeal, that in the present case ARBED had failed to establish in what way the duration of the administrative procedure could have impeded the exercise of its rights of defence, since it had merely claimed that the evidence which might have been available to it in 1990 had disappeared after such a lapse of time.
- 120 That finding is not marred by any error of law. ARBED was the addressee of the initial decision and was a party to the earlier proceedings before the General Court and the Court of Justice. As the Commission rightly submits, such circumstances must induce any diligent company to preserve the documents necessary for its defence.
- 121 It follows that an undertaking in ARBED's position must indicate in detail, if not the specific items of evidence that have disappeared, at least the incidents, events or circumstances which prevented it, during the period in question, from complying with its obligation of diligence and brought about the alleged disappearance of the evidence alluded to.
- 122 Only by examining such specific indications can the General Court and the Court of Justice assess whether the undertaking has shown to the requisite legal standard that it experienced the alleged difficulties in defending itself against the Commission's claims as a result of the excessive length of the administrative procedure, or whether those difficulties in fact derive from a failure to comply with its obligation of diligence.

- 123 The General Court was therefore right to hold that so general an assertion as that made by ARBED could not suffice to show to the requisite legal standard that the length of the procedure had affected the exercise of its rights of defence.
- 124 In the light of that finding, the arguments put forward by ARBED against the additional considerations set out by the General Court in paragraphs 169 to 171 of the judgment under appeal are ineffective.
- 125 Consequently, the fourth ground of appeal must be rejected.
- 126 It follows from all the foregoing that the appeal by ARBED in Case C-201/09 P must be dismissed.

B — The appeal by the Commission (C-216/09 P): single ground of appeal alleging errors of law in the interpretation of Decision No 715/78

1. Arguments of the parties

- 127 The Commission submits that the General Court based its decision on an incorrect and excessively restrictive literal reading of Articles 2(3) and 3 of Decision No 715/78 when it referred, to justify a distinction between the effect of interruption of the limitation period and that of suspension of the limitation period, to the difference between

the wording of those provisions as regards effect *erga omnes*. The lack of an express mention of *erga omnes* effect in the wording of Article 3 of Decision No 715/78 does not mean that that provision does not confer such effect on suspension, as the objective common to interruption and suspension of the limitation period is that of stopping time from running for all the undertakings concerned.

- ¹²⁸ In Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 144, the Court rejected a literal, restrictive interpretation of the provisions relating to limitation periods, and took into account not only the wording but also the objective of the provision on the suspension of the limitation period, in order to approve a broad interpretation of the expression ‘decision of the Commission’ in Article 3 of Decision No 715/78.
- ¹²⁹ In that judgment the Court observed that suspension protects the Commission against the effects of limitation in situations in which it has to wait for a decision of the European Union judicature. Both interruption and suspension of the limitation period thus enable it effectively to pursue and penalise infringements of the competition rules.
- ¹³⁰ Similarly, in the Commission’s view, a restrictive interpretation of the effect of suspension of the limitation period does not follow from the case-law cited by the General Court in paragraph 154 of the judgment under appeal. In particular, in Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 40, the Court based its interpretation on the objective pursued by the rules on limitation periods.
- ¹³¹ As to the General Court’s reference to Case C-310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, the Commission submits that the

reasoning in that judgment does not apply to investigative measures such as checks and inspections, challenges to which interrupt or suspend the limitation period.

- ¹³² In contrast to the bringing of proceedings against final decisions, in respect of which it cannot be ruled out that the General Court's conclusion is valid, challenges to such measures could affect the Commission's ability to pursue the case against all the undertakings involved in the infringement, even if the measures are formally addressed only to one undertaking. Consequently, the application of that judgment to suspension of the limitation period would harm the proper enforcement of competition law, whereas an interpretation allowing for effect *erga omnes* would be capable of preserving the effectiveness of that law.
- ¹³³ The Commission states that the judgment under appeal requires it, where a company contests an investigative measure addressed to it, to continue its investigation against the other undertakings and companies involved and to use, in its final decision, documents whose lawful use is uncertain, the decision otherwise being liable to be annulled. With the limitation period running as regards the other undertakings, it cannot await the outcome of the judicial proceedings relating to the investigative measure.
- ¹³⁴ Consequently, while waiting for the question of the lawfulness of the investigation to be decided by the European Union judicature, the Commission and the undertakings in question have to continue to devote resources to the investigation, and the undertakings which have not brought proceedings against the investigative measure have to bring proceedings against the final decision, pleading its unlawfulness in several actions relating to the same question. Since those undertakings are legally affected by the investigative measure, even if it is addressed to a different undertaking, they must be able to raise the alleged unlawfulness of the measure before those courts.

- 135 The Commission also submits that this situation is not comparable to that of investigative measures against which actions cannot be brought, since, first, it can remedy procedural problems in the subsequent procedure and, second, there is no action pending before the European Union judicature.
- 136 In addition, the Commission submits that the judgment under appeal facilitates evasion of payment of the fine. Since suspension affects only the company which brings the proceedings, that company could be the subject of a restructuring or a transfer of its assets, 10 years after the end of the infringement, to another company which is not affected by the suspension, thus allowing the group to avoid being fined.
- 137 Moreover, the overlapping of Articles 2 and 3 of Decision No 715/78 which results from the fact that Article 2(3) refers, as regards the restarting of the limitation period after an interruption, to Article 3 and Article 3 refers to the Commission decision mentioned in Article 2(3) militates against the distinction drawn by the General Court.
- 138 The Commission argues that the drafting history of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) confirms its interpretation of Decision No 715/78. It notes that the original proposal already provided that the interruption of the limitation period would have effect *erga omnes*, reflecting an *in rem* approach to limitation, as opposed to the *in personam* approach supported by some delegations. A compromise eventually allowed the former approach to be adopted. The provision on the suspension of the limitation period was introduced, at the suggestion of one delegation, only at the stage of the second revised proposal.

139 The Commission concludes that the Council adopted the *in rem* approach to limitation for all the provisions relating to limitation periods, including those concerning suspension. The Council said nothing further in this respect, since, the choice as to the nature of limitation periods having been made, it was not necessary to specify it also in relation to suspension.

140 In the Commission's view, as a limitation period is an exception which exists only if provision is made for it, the principle that exceptions must be interpreted strictly also supports its position. Consequently, the rules relating to limitation periods should not be given a broad interpretation favourable to undertakings. The Court's case-law has never supported a restrictive interpretation of the rules on suspension of limitation periods.

2. Findings of the Court

141 According to the case-law, it is the very fact that an action is pending before the General Court or the Court of Justice that justifies the suspension of the limitation period (*Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 153).

142 The Court has also held that, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the European Union judicature relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Union judicature (*Commission v AssiDomän Products and Others*, paragraph 53).

- 143 Moreover, in accordance with Article 4(2) of Decision No 715/78 and Article 26(2) of Regulation No 1/2003, the limitation period for enforcement runs from the date on which the decision becomes final. The Court has explained that that limitation period therefore runs from expiry of the period for bringing an action against the decision on the infringement and the fine, if no action has been brought (see, by analogy, *Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 137).
- 144 It follows, first, that, with respect to undertakings which have not brought actions against a final decision of the Commission imposing a fine on them under Article 65 CS or Article 23 of Regulation No 1/2003, that decision becomes final and, secondly, that that finality starts time running against them for the enforcement of the decision, as laid down by Article 4 of Decision No 715/78 and Article 26 of Regulation No 1/2003.
- 145 Consequently, with respect to those undertakings, an action brought by another undertaking against the same final decision cannot have any suspensive effect.
- 146 Moreover, both the wording of Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003 and the objectives pursued by those articles cover actions brought against those acts referred to in Article 2 of Decision No 715/78 and Article 25(3) of Regulation No 1/2003 against which actions lie, as well as actions brought against the Commission's final decision (see, by analogy, *Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 146).
- 147 Since Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003 do not therefore draw any distinctions as regards decisions to which suspensive effect is attached, contrary to the Commission's claims, *erga omnes* effect need not be attached

to actions brought against the acts referred to in Article 2 of Decision No 715/78 and Article 25(3) of Regulation No 1/2003 against which actions lie.

148 Having regard to the foregoing, it must be concluded that the General Court did not err in law in holding that the suspension of the limitation period which Article 3 of Decision No 715/78 and Article 25(6) of Decision No 1/2003 attach to judicial proceedings takes effect only *inter partes*.

149 In the present case, as ProfilARBED and TradeARBED rightly submit, the initial decision was directed exclusively against ARBED and the judicial proceedings which led to the annulment of that decision in so far as it concerned ARBED were contested exclusively by ARBED and the Commission. It follows that no suspensive effect can be derived from those proceedings with respect to ProfilARBED or TradeARBED.

150 In those circumstances, the Commission's appeal in Case C-216/09P must be dismissed.

151 As ProfilARBED and TradeARBED brought their cross-appeal in Case C-216/09P in the alternative, in case the Court should uphold the Commission's appeal, there is no need to examine that cross-appeal.

VIII — Costs

- ¹⁵² Under Article 69(2) of the Rules of Procedure, which, under Article 118 of those Rules, applies to appeals, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those Rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order the parties to bear their own costs.
- ¹⁵³ Since ARBED has been unsuccessful with its appeal in Case C-201/09 P, it must be ordered to pay the costs of that appeal, in accordance with the form of order sought by the Commission.
- ¹⁵⁴ As regards the appeal in Case C-216/09 P, the Court considers that, in view of the particular circumstances of the case, the Commission, TradeARBED and ProfilARBED should be ordered to bear their own costs.

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

- 1. Dismisses the appeals;**
- 2. Orders ArcelorMittal Luxembourg SA to bear its own costs and to pay those incurred by the European Commission in relation to the appeal in Case C-201/09 P;**

- 3. Orders the European Commission, ArcelorMittal Belval & Differdange SA and ArcelorMittal International SA to bear their own costs in relation to the appeal in Case C-216/09 P.**

[Signatures]