

Case C-352/09 P

**ThyssenKrupp Nirosta GmbH,
formerly ThyssenKrupp Stainless AG**

v

European Commission

(Appeal — Competition — Agreements, decisions and concerted practices — Community market in stainless steel flat products — Decision finding an infringement of Article 65 CS after the expiry of the ECSC Treaty on the basis of Regulation (EC) No 1/2003 — Powers of the Commission — Principles of *nulla poena sine lege* and *res judicata* — Rights of the defence — Attributability of the unlawful conduct — Transfer of liability by means of a statement — Limitation period — Cooperation during the administrative procedure)

Opinion of Advocate General Bot delivered on 26 October 2010 I - 2366

Judgment of the Court (Grand Chamber), 29 March 2011 I - 2410

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Agreements subject ratione materiae and ratione temporis to the legal system of the ECSC Treaty — Expiry of the ECSC Treaty — Continuation of supervisory action by the Commission within the legal framework of Regulation No 1/2003*
(Art. 65(1) CS; Council Regulation No 1/2003)

2. *Acts of the institutions — Temporal application — Expiry of the ECSC Treaty — Commission decision adopted against an undertaking after the expiry of the ECSC Treaty and relating to acts prior to the expiry of that treaty — Principle of the legality of criminal offences and penalties — Principle of the protection of legitimate expectations — Scope — Liability of undertakings for their conduct in breach of the rules on competition in the context of the succession of the legal framework of the EC Treaty to that of the ECSC Treaty — Substantive rules — Procedural rules*
(Art. 65(1) and (5) CS; Charter of Fundamental Rights of the European Union, Art. 49(1); Council Regulation No 1/2003, Arts 7(1) and 23(2))
3. *Actions for annulment — Judgment annulling a measure — Scope — Res judicata — Scope*
4. *Appeals — Grounds of appeal — Grounds of judgment disclosing an infringement of European Union law — Operative part well founded for other legal reasons — Dismissal of appeal*
5. *Competition — European Union rules — Infringements — Attribution — Infringement committed by an entity which has not ceased to exist and continued by another entity succeeding to the first one in the economic activity in the market in question — Attribution of the entire infringement to that other entity*
(Arts 81(1) and 230(4) EC)
6. *Competition — Administrative procedure — Limitation period with regard to proceedings — Attribution of the infringement to a legal person other than the person responsible for operation of the undertaking at the time of the infringement*
(Council Regulation No 1/2003, Art. 25(1) to (6); Decision No 715/98, Art. 1(1) to (3))
7. *Competition — Fines — Amount — Determination — Criteria — Reduction of the fine in return for cooperation by the undertaking accused of the infringement — Conditions*
(Commission Notice 96/C 207/04)
8. *Appeals — Grounds — Mistaken assessment of the facts — Inadmissibility — Review by the Court of Justice of the assessment of the facts put before the General Court — Possible only where the clear sense of the evidence has been distorted*
(Arts 225(1) and 229 EC; Statute of the Court of Justice, Art. 58(1), Council Regulation No 1/2003, Art. 31)

1. In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, continuity of the legal system must be ensured. That principle applies to amendments to the primary law of the European Union.

uniform application of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that treaty. The General Court does not therefore err in law by interpreting Regulation No 1/2003 as enabling the Commission to find and penalise, after the expiry of the ECSC Treaty, agreements between undertakings arrived at in the sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.

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. 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 the expiry of the ECSC Treaty on 23 July 2002, could be and still can be penalised by the Commission.

(see paras 72-74, 77-78)

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

2. The principle of the legality of criminal offences and penalties, as enshrined in particular in Article 49(1) of the Charter of Fundamental Rights of the European Union, requires that European Union rules define offences and penalties clearly. The principle of legal certainty requires that such 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. In this respect, in so far as the Treaties define clearly the infringements and the nature and extent of the penalties which can be imposed on undertakings for infringements of the rules on competition,

the principle of the legality of criminal offences and penalties and the principle of legal certainty 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.

As regards, secondly, the procedural rules applicable, the General Court was right to hold that the Commission has power to conduct the procedure pursuant to Articles 7(1) and 23(2) of Regulation No 1/2003. 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, and procedural rules are generally held to apply from the time of their entry into force.

(see paras 79-83, 86-88)

In the case of a Commission decision concerning a legal situation which was definitively established before the expiry of the ECSC Treaty, adopted against an undertaking after the expiry of that treaty, the General Court does not err in law by holding, first, 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 require the application of the substantive provisions of Article 65(1) and (5) CS to facts which occurred before the expiry of the ECSC Treaty and fall within the scope of that treaty *ratione materiae* and *ratione temporis*. In this respect, Article 65(1) and (5) CS provided a clear legal basis for imposing a penalty for infringement of the rules on competition, so that a diligent undertaking 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.

3. The principle of *res judicata* is of fundamental importance in both the legal order of the European Union and the national legal systems. *Res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question.

Where the European Union judicature has to confine itself to determining the content of a statement by an undertaking, in order to find that the intention of the statement is to effect a transfer of liability for the unlawful conduct from one undertaking to another, judging the lawfulness of that transfer is an *obiter*

dictum which goes beyond the bounds of the dispute before the court and does not actually or necessarily decide a point of law. It cannot therefore be *res judicata*.

undertaking which is no longer economically active is likely to have no deterrent effect.

(see paras 123, 131-132)

4. If the reasoning in a judgment of the General Court discloses an infringement of European Union law but its operative part is well founded on other legal grounds, the appeal must be dismissed.

Where an undertaking formed by the concentration of the activities of two companies expressly confirms by a statement that it wishes, as an undertaking carrying on the economic activities the subject of a cartel, to assume liability for the unlawful conduct of an entity belonging to one of those companies, with a view to the fine that the Commission can impose on it in the proceedings brought in respect of that cartel, the legal consequence of the transfer of liability which the undertaking has assumed by that statement is perfectly precise and foreseeable for it.

(see para. 136)

5. It is, in principle, for the natural or legal person who managed an undertaking when the infringement of the competition rules was committed to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the undertaking was no longer his responsibility. As to the circumstances in which an entity that has not committed the infringement may none the less be penalised for that infringement, this situation arises if the entity that has committed the infringement has ceased to exist, either in law or economically, since a penalty imposed on an

The undertaking which has assumed that liability can no longer seek the revocation of its statement at a time when the Commission, on the basis of that statement, has actually imposed a fine on it. However, the subsequent irrevocability of the statement does not prevent the undertaking from contesting, by an action before the European Union judicature, the interpretation of its content or the express or implied acknowledgment of matters of fact or law during the administrative procedure before the Commission, since that irrevocability cannot restrict the actual exercise of the right of a natural or legal person to bring

proceedings before the General Court under the fourth paragraph of Article 230 EC.

(see paras 143-144, 149-150, 153-155)

the Commission's decision imposes a fine on that undertaking alone. In particular, while certain actions of the entity transferred may indeed continue to have effects for the undertaking assuming liability, and the expiry of a limitation period in respect of that entity cannot be avoided by a transfer of liability, it does not follow that the limitation period should be assessed in relation to that entity.

6. Both Article 1(1) of Decision No 715/78 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community 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 to a limitation period of five years. That period runs, in accordance with Article 1(2) of Decision No 715/78 and Article 25(2) of Regulation No 1/2003, from the day on which the infringement was committed or ceased, and may, under Articles 2 and 3 of Decision No 715/78 and Article 25(3) to (6) of Regulation No 1/2003, be interrupted or suspended.

(see paras 166-168)

7. A reduction of the fine imposed for an infringement of the competition rules, on the basis of the Commission's notice on the non-imposition or reduction of fines in cartel cases, can be justified only if the information provided and the conduct of the undertaking concerned may be regarded as demonstrating genuine cooperation on its part.

(see para. 176)

In the case of a Commission decision imposing a fine for an infringement of the competition rules on an undertaking which, as the acquirer of an economic entity, has assumed liability for that entity's unlawful conduct, the limitation period can be assessed only in relation to the undertaking assuming liability, where

8. Where the General Court holds that the Commission was entitled to consider

that an undertaking should not enjoy an additional reduction of the fine beyond the 20% already allowed, it is making an assessment of fact in the exercise of its unlimited jurisdiction conferred, pursuant to Article 229 EC, by Article 31 of Regulation No 1/2003 which, as such, is not subject to review on appeal by the Court of Justice.

It follows from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the

substantive inaccuracy of its findings is apparent from the documents submitted to it, and, secondly, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice.

(see paras 179-180)