JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

31 March 2009 *

In Case T-405/06,

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

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,

represented by A. Vandencasteele, lawyer,

applicants,

* Language of the case: French.

Commission of the European Communities, represented by X. Lewis and F. Arbault, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2006) 5342 final of 8 November 2006 relating to a proceeding under Article 65 [CS] concerning agreements and concerted practices engaged in by European producers of beams (Case COMP/F/38.907 — Steel beams),

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

composed of N.J. Forwood (Rapporteur), President, D. Šváby and L. Truchot, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 5 November 2008,

gives the following

Judgment

Legal context

Provisions of the ECSC Treaty

1 According to Article 65 CS:

‘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.'

2 Pursuant to Article 97 CS, the ECSC Treaty expired on 23 July 2002.

Provisions of the EC Treaty

3 According to Article 305(1) EC:

'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.'

Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty

4 On 18 June 2002, the Commission adopted a communication concerning aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ 2002 C 152, p. 5; 'the communication of 18 June 2002').

5 At point 2 of the communication of 18 June 2002, the purposes of that communication are stated to be:

'— in its section 2, to summarise for economic operators and Member States, in so far as they are concerned by the ECSC Treaty and its related secondary legislation, the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime,

— in its section 3, to explain how the Commission intends to deal with specific issues raised by the transition from the ECSC regime to the EC regime in the areas of antitrust …, merger control … and State aid control'.

6 Point 31 of the communication of 18 June 2002, in the section on specific issues raised by the transition from the ECSC regime to the EC regime, is worded as follows:

'If the Commission, when applying the Community competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law …'

Regulation (EC) No 1/2003

7 According to 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 [EC] and 82 [EC] (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'.

8 According to Article 7(1) of Regulation No 1/2003:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 [EC] or 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.'

9 According to 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 Article 82 EC.

Provisions concerning limitation periods in proceedings

10 According to 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, the power of the Commission to impose fines for infringements of the provisions of competition law are to be subject, in principle, to a limitation period of five years.

11 According to Article 1(2) of Decision No 715/78 and Article 25(2) of Regulation No 1/2003, 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.

12 According to Article 2(1) of Decision No 715/78 and Article 25(3) of Regulation No 1/2003, 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 in proceedings. 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.

13 According to Article 2(2) of Decision No 715/78 and Article 25(4) of Regulation No 1/2003, the interruption of the limitation period is to apply for all undertakings which have participated in the infringement.

14 According to 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.

15 According to 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 Community judicature.

Background to the dispute

16 At the time when the facts of the present case took place, ARBED SA was active in the manufacture of steel products. Since then ARBED SA has changed its business name and has become in turn Arcelor Luxembourg SA and then ArcelorMittal Luxembourg SA ('ARBED').

17 At the same time, TradeARBED SA, formed as a wholly-owned subsidiary of ARBED, was involved in the distribution of steel products manufactured by ARBED. Since then, TradeARBED SA has changed its name and has become in turn Arcelor International SA and then ArcelorMittal International SA ('TradeARBED').

18 ProfilARBED SA 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. Since then, ProfilARBED SA has changed its name and has become in turn Arcelor Profil Luxembourg SA and then ArcelorMittal Belval & Differdange SA ('ProfilARBED').

19 In 1991, the Commission, on the basis of a number of decisions adopted pursuant to Article 47 CS, carried out inspections at the offices of various undertakings, including TradeARBED. On 6 May 1992, the Commission sent a statement of objections to the undertakings concerned, including TradeARBED, but not to ARBED. TradeARBED also took part in a hearing, which was held from 11 to 14 January 1993.

20 By Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 [CS] 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 imposed fines on 14 undertakings operating within that sector, including ARBED (ECU 11 200 000), for infringements committed between 1 July 1988 and 31 December 1990.

21 According to recital 322 to the initial decision:

'Only TradeARBED took part in the various arrangements and agreements. However, TradeARBED is a sales company that sells, inter alia, beams on a commission basis for its parent company ARBED. TradeARBED receives a small percentage of the sales price for its services. To ensure equality of treatment, this Decision is addressed to ARBED, the beams-producing company in the ARBED group, and the turnover in the relevant products is the turnover of ARBED and not of TradeARBED.'

22 By judgment of 11 March 1999 in Case T-137/94 *ARBED* v *Commission* [1999] ECR II-303, the Court of First Instance dismissed the major part of the action brought by ARBED for annulment of the initial decision and reduced the amount of the fine imposed on ARBED by Article 4 of that decision 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 Court of First Instance and annulled the initial decision in so far as it concerned ARBED. At paragraphs 21 to 24 of that judgment, the Court of Justice held:

'21 Given its importance, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person (see Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 143 and 146).

22 It is common ground that, in the present case, the statement of objections did not state that fines might be imposed on [ARBED]. Moreover, as the Court of First Instance observed in paragraph 101 of the judgment under appeal, [ARBED] was not the addressee of the statement of objections and was denied a right of access to the file for that reason.

23 While it is undisputed that [ARBED] was aware of the statement of objections addressed to its subsidiary TradeARBED and of the procedure which had been initiated against that subsidiary, it cannot be concluded from that fact that [ARBED's] rights of defence were not infringed. Ambiguity as to the legal person on whom the fines would be imposed, which could have been dispelled only by properly addressing a fresh statement of objections to [ARBED], persisted up to the end of the administrative procedure.

24 It follows that the Court of First Instance was wrong to conclude from the facts of the present case, in paragraph 102 of the judgment under appeal, that the failure to address a statement of objections to [ARBED] was not such as to entail annulment of the contested decision, in so far as it concerned [ARBED], on the ground of infringement of the rights of the defence.'

24 Following the setting-aside of the judgment of the Court of First Instance and the annulment of the initial decision, 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, the Commission addressed a statement of objections to ARBED, TradeARBED and ProfilARBED (together 'the applicants') informing them of its intention to adopt a decision finding them jointly and severally liable for the infringements in question. The applicants responded to that statement of objections on 20 April 2006.

The contested decision

25 On 8 November 2006, the Commission adopted Decision C(2006) 5342 final relating to a proceeding under Article 65 [CS] concerning agreements and concerted practices engaged in by European producers of beams (Case COMP/F/38.907 — Steel beams ('the contested decision'), a summary of which was published in the Official Journal of 13 September 2008 (OJ 2008 C 235, p. 4).

26 The preamble to the contested decision reads as follows:

'having regard to the Treaty establishing the European Coal and Steel Community, and in particular to Article 65 thereof,

having regard to the Treaty establishing the European Community,

having regard to Regulation [No 1/2003], and in particular to Article 7(1) and Article 23(2) thereof,

…'

27 As regards the legal consequences of the expiry of the ECSC Treaty on 23 July 2002, the Commission stated at recital 292 to the contested decision that that did not entail the extinction of its powers to impose sanctions in respect of infringements of the competition rules in the sectors concerned by that Treaty. At recitals 293 to 295 to the contested decision, the Commission explained that that was so because the ECSC Treaty and the EC Treaty belonged to a single legal order, based on the Treaties establishing the European Union and the different Communities. The Commission referred, in particular, to Opinion 1/91 of the Court of 14 December 1991 [1991] ECR I-6079, paragraph 21, and also to Article 305(1) EC, which establishes a 'relationship of *lex generalis*/*lex specialis*' between the EC Treaty and the ECSC Treaty. It also observed that since the expiry of the ECSC Treaty the sectors covered by that Treaty had been subject to the rules of the EC Treaty.

28 As regards its powers to apply the competition rules of the ECSC Treaty after the expiry of that Treaty to infringements committed before that date, and in particular in the circumstances of the present case, the Commission referred, at recitals 297 and 298 to the contested decision, to point 31 of the communication of 18 June 2002 and emphasised that a distinction must be drawn, in that regard, between procedural rules and substantive rules. It went on to state, at recitals 299 to 301 to the contested decision:

'299. First of all, as regards procedural questions, it follows from a general principle of Community law, as set out in the [c]ommunication [of 18 June 2002] and recognised by the Court of Justice in [Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9, and Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22], that the applicable procedural rules are those in force at the time when the measure in question is adopted. Also, that principle requires that the procedural rules of the EC Treaty currently in force have been applicable since the expiry of the ECSC Treaty. The [contested decision] has therefore been adopted in accordance with the procedural rules of the EC Treaty, in particular Regulation [No 1/2003]. Article 7(1) of that regulation provides … that the Commission has the power to find infringements of the competition rules by

undertakings. Article 23(2) of that regulation permits the Commission to impose sanctions where such infringements have been committed.

300. As regards the Commission's power to adopt the present decision, such power flows from the succession, within the single legal order, of Article 81 EC, as a *lex generalis*, to Article 65 [CS], as a *lex specialis*, on the expiry of the latter Treaty. In view of the substantial equivalence of those material rules within the jurisdictional limit established by the criterion of an effect on trade between Member States laid down in Article 81 EC and of the identity of the organ, namely the Commission, empowered to apply those two rules under the two respective Treaties …, the succession of norms means that the Commission also has the power, under Article 7(1) and Article 23(2) of Regulation [No 1/2003], to initiate a proceeding pursuant to Article 65 [CS], to find an infringement of that article, to put an end to the infringement thus found and to impose a fine in order to penalise that infringement.

301. Next, as regards the substantive rules, it is a general principle of law, as set out in the [c]ommunication [of 18 June 2002] and recognised by the Court in [*Salumi and Others*, paragraph 9, and *CT Control (Rotterdam) and JCT Benelux* v *Commission*, paragraph 22], that the actual law applicable continues to be the law in force at the time when the infringement was committed, whatever the date of application, within the limit of the *lex mitior* principle recognised by the Court in [Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 69], where it is applicable to proceedings involving the imposition of administrative fines for infringements of the competition rules …'

29 At recitals 302 to 304 to the contested decision, the Commission set out its reasons for concluding in the present case that the application of Article 65 CS was consistent with the *lex mitior* principle.

30 Last, at recitals 305 and 306 to the contested decision, the Commission rejected the arguments put forward by the applicants in their response to the statement of objections in order to challenge its power to adopt that decision.

31 As regards the determination of the three legal persons to which the contested decision was addressed, as identified at recitals 1 and 455, the Commission stated, at recital 2:

'Among the companies mentioned at recital 1, [TradeARBED] participated, in breach of Article 65(1) [CS], in a series of agreements and concerted practices … [ARBED] and [ProfilARBED] are held jointly and severally liable with [TradeARBED] for those infringements, in so far as those companies all belong to the undertaking headed initially by [ARBED] and then by Arcelor SA.'

32 The Commission further observed, at recital 453 to the contested decision, that it had sent a statement of objections 'not only to the legal entity which had directly participated in the infringement, namely [TradeARBED], but also to two other legal entities which were members of the same economic unit, namely [ARBED] and [ProfilARBED], to which [TradeARBED]'s conduct [could] be imputed'.

33 As regards, more particularly, ARBED, the Commission stated the following grounds for imputing the infringement, at recitals 458 and 460 to 468 to the contested decision:

'458. It should be noted, as a preliminary point, that since the concentration of [ARBED], Usinor and Aceralia within the Arcelor group in 2001 …, the group headed by [ARBED] no longer exists today in the form in which it existed at the time of the impugned facts.

…

460. According to the consistent case-law of the Court of Justice (Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29), where a parent company holds all the share capital of its subsidiary, the Commission is entitled to consider that the parent company actually exercised decisive influence on the conduct of its subsidiary.

461. As regards the substantive conditions that justify such imputation of liability, it should be observed first of all that, like the prohibition in Article 81(1) [EC], the prohibition in Article 65(1) [CS] is addressed, in particular, to "undertakings". It follows from the case-law of the Court of First Instance (see Case T-11/89 *Shell* v *Commission* [1992] ECR II-757) that the concept of an undertaking within the meaning of Article 81 [EC] must be understood as designating an economic unit consisting of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see also Cases 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50, upheld by the Court of Justice in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 15 to 18).

462. In the present case, [TradeARBED] is a wholly-owned subsidiary of [ARBED]. At the hearing before the Court of First Instance in Case T-137/94, counsel for the applicant stated that [TradeARBED] is a sales company which distributes the steel products, and notably the beams, produced by [ARBED] … Furthermore, [ARBED]'s registered office was at the same address as [TradeARBED]'s, and both companies had the same telephone switchboard and the same telex number. Counsel for [TradeARBED] presented himself equally as counsel for [ARBED] and counsel for [TradeARBED]. Two representatives of [ARBED] assisted [TradeARBED] at the administrative hearing which took place between 11 and 14 January 1993 (judgment of 11 March 1999 in *ARBED* v *Commission*, paragraphs 96 and 97). [TradeARBED]'s conduct on the market for beams therefore depended on its parent company, [ARBED]. At the time when the infringements were committed, the production facilities for steel beams, which

are the relevant product in the present case, belonged to [ARBED]. There is therefore no doubt that [ARBED] exercised decisive influence over [TradeARBED].

463. In their respective responses to the statement of objections of 8 March 2006, the legal persons to which the present decision is addressed maintain that the Commission has not adduced evidence of [ARBED]'s participation that would justify the imposition of a penalty on that undertaking. Furthermore, they consider that to impose penalties on [TradeARBED] and [ARBED] in the present decision would entail the formulation of conclusions "wholly opposed to and irreconcilable with" those drawn by the Commission in the [initial decision].

464. In that regard, it is sufficient to recall that the mere fact that [TradeARBED] participated directly and specifically in the infringement does not preclude the liability of its parent company which exercised decisive influence over that subsidiary. Next, it should be emphasised that the Commission finds in the present decision that although only [TradeARBED] directly participated in those infringements, the fact remains that, as already found in the [initial decision], [TradeARBED]'s conduct may be imputed to [ARBED] on account of the decisive influence which [ARBED] exercised over it. Thus the Commission's findings in the present decision are in no way opposed to or irreconcilable with those of the [initial decision].

465. The legal persons to which the present decision is addressed further consider that the Commission would infringe the principle of equal treatment if, in order to determine the imputability of the infringement in the present decision, it substituted for the criterion of participation in the infringement which it used as against the undertakings which were members of the cartel on which sanctions were imposed in the [initial decision] the criterion of the exercise of decisive influence by the parent company.

466. On that point, it must be borne in mind that the Commission stated, at recital 322 to its [initial decision], that: "Only TradeARBED took part in the various arrangements and agreements. However TradeARBED is a sales company that sells, inter alia, beams on a commission basis for its parent [ARBED]. TradeARBED receives a small percentage of the sales price for its services. To ensure equality of treatment, this Decision is addressed to [ARBED], the beam-producing company in the ARBED group, and the turnover in the relevant products is the turnover of ARBED and not of TradeARBED". As for the other undertakings on which sanctions were imposed in the [initial decision], the Commission imputed liability according to the following criterion: "Where more than one company in a group has been involved in the infringements outlined above, this Decision is addressed to the production company as it is the production companies that have most to gain from advance knowledge of prices and volumes" [initial decision, recital 319].

467. According to well-established case-law [Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 272; and Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047], "[t]he principle of equal treatment prohibits like cases from being treated differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being objectively justified".

468. In the present case, there is no doubt that the Commission conformed to the principle of equal treatment when it applied an objective criterion, namely the criterion of production of steel beams by the companies, for the purpose of determining the undertakings to which the infringements are imputable. It could thus be emphasised *a contrario* that, if the Commission intended to apply the fine on the sole basis of direct participation and therefore to calculate the fine by reference to the turnover achieved by [TradeARBED], which receives only a small percentage of the selling price for its services, unlike the other undertakings on which sanctions were imposed in its [initial decision], it would then establish discrimination as against those other undertakings. The undertakings to which the present decision is addressed cannot therefore properly rely on a breach of the equal treatment of the undertakings on which sanctions are imposed.'

34 As regards, more particularly, ProfilARBED, the Commission stated the following reasons for imputing the infringement, at recitals 470 to 472 to the contested decision:

'470. [ProfilARBED] was formed in November 1992, as a wholly-owned subsidiary of [ARBED], and the production facilities of long carbon steel products, including beams …, were transferred from [ARBED] to [ProfilARBED]. Consequently, [ProfilARBED] pursued the industrial and economic activities of [ARBED], which ceased production of carbon steel following that transfer …

471. In so far as [ProfilARBED] is the economic successor of [ARBED] as regards its industrial and economic activities in the beams sector, within the group headed by [ARBED] (which subsequently became the Arcelor group), the Commission is entitled to initiate a proceeding against [ProfilARBED] on the basis of its liability for the infringements at issue in the present decision.

472. In effect, in the "*Cement*" case [Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 354 to 361)], the Court of Justice held that the Commission had correctly held a company liable for the unlawful activities of another company, which belonged to the same group and whose economic activities in the cement sector had been transferred to the first company. In the Court's view, the fact that the second company continued to exist as a legal person after the transfer did not render that conclusion invalid. In accordance with the judgment in "*Cement*", as [ProfilARBED] succeeded [ARBED] with respect to the latter's industrial and economic activities in the beam-production sector, liability for the infringements at issue in the present case may be attributed to it. The fact that [ARBED] still exists as a legal person does not render that conclusion invalid. Furthermore, any other conclusion would enable the rules of Community competition law to be circumvented, since undertakings would thus be able to avoid assuming liability for

infringements which they had committed by transferring the activities at issue to another company in the same group. It is for that reason that the present decision is also addressed to [ProfilARBED].'

35 As regards the possibility that its power to impose fines might be time-barred, the Commission stated as follows, at recitals 446 to 452 to the contested decision:

'446. For the purpose of determining the rules on limitation applicable to the present case as regards the imposition of fines, there is no need to establish whether the limitation rules are procedural, with the consequence that the relevant provisions of Regulation [No 1/2003] would be applicable, or whether the limitation rules are substantive, with the consequence that the provisions of [Decision No 715/78] would be applicable, since they are substantially identical …

447. … [T]he Commission carried out inspections in the steel beams sector on 16, 17 and 18 January 1991, which is the date on which it considers that the infringement ceased. On 6 February 1992, the Commission sent [TradeARBED] a statement of objections. Letters containing requests for information were sent to [TradeARBED] and to [ARBED]'s legal department, notably on 26 November 1993, requesting [ARBED] to communicate the turnover achieved by [ARBED] in the ECSC between January and September 1993. On 16 February 1994, the Commission adopted the [initial decision] imposing a fine on [ARBED] for [TradeARBED]'s participation in the infringements of Article 65 of the ECSC Treaty. On 8 April 1994, [ARBED] brought an action against that decision before the Court of First Instance. On 11 March 1999, the Court of First Instance delivered its judgment in Case T-137/94 *ARBED* v *Commission*. On 11 May 1999, [ARBED] lodged an appeal against that judgment with the Court of Justice. On 2 October 2003, the Court of Justice set aside the judgment in Case T-137/94. On 8 March 2006, the Commission decided to open a new proceeding in respect of the anti-competitive conduct which had formed the subject-matter of the [initial decision] and sent a new statement of objections to [ARBED, TradeARBED and ProfilARBED], which led to the adoption of the present decision.

448. In light of the foregoing, the Commission finds that [ARBED] cannot rely on limitation in so far as the present decision was not adopted outside the period in which the Commission may impose a fine in accordance with the provision referred to at recital 446. In effect, without mentioning the actions taken for the purposes of the preliminary investigation and the proceedings addressed to other undertakings, the letters containing requests for information sent to [ARBED] on 26 November 1993 and the [initial decision] each constitute actions interrupting time and cause the limitation period to begin to run anew as regards all the companies making up the economic unit headed by [ARBED]. Next, the limitation period was suspended, in accordance with Article 3 of Decision [No 715/78], first by the introduction, on 11 May 1994, of an action by [ARBED] against the [initial decision] before the Court of First Instance, which delivered its judgment on 11 March 1999, then, second, by the introduction, on 11 May 1999, of an appeal before the Court of Justice, which delivered its judgment on 2 October 2003. After thus being suspended, the five-year limitation period was again interrupted when the Commission adopted the statement of objections on 8 March 2006. Next, it must be noted that the present decision is adopted within the limitation period of 10 years which runs from the end of the infringement in 1990, which was suspended during the 10 years taken by the proceedings which [ARBED] initiated before the Court of First Instance and then before the Court of Justice. Consequently, and contrary to the parties' contention in their respective responses to the statement of objections of 8 March 2006, there is no doubt that [ARBED] cannot rely on the limitation period for the imposition of fines.

449. Nor, moreover, do the rules on limitation constitute an obstacle to the imposition of a fine on [TradeARBED] in so far as the actions brought by [ARBED] before the Court of First Instance and the Court of Justice against the [initial decision] also suspended the limitation period with respect to [TradeARBED]. In the present case, the final action interrupting the limitation period with respect to [TradeARBED] is the statement of objections issued on 8 March 2006, after the limitation period had been suspended throughout the duration of the proceedings initiated by [ARBED] before the Court of First Instance and the Court of Justice.

450. In effect, as provided for in Article 3 of Decision [No 715/78] and Article 25 of Regulation [No 1/2003], the limitation period in proceedings is to be suspended for so long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

451. The Commission therefore considers that the suspension of the limitation period resulting from the initiation by an undertaking of proceedings before the Court of First Instance and the Court of Justice applies both to the legal entity which is party to the proceedings and to all the other legal entities forming part of the same economic unit, irrespective of the legal entity which initiated those proceedings. In that regard, it should be noted first of all that Article 3 of Decision [No 715/78] does not preclude such an interpretation. Next, it should be emphasised that, were it otherwise, the Commission would be unable to correct any procedural errors which it might make in spite of the right to adopt a new decision which the Court of Justice expressly recognised in *PVC II*. In fact, when the [initial decision] was the subject of an action before the Court of First Instance, and then before the Court of Justice, it would have been improper, in light of the principle of good administration, for the Commission to adopt a new decision in order to impose a sanction on [TradeARBED] when the proceedings initiated by [ARBED] were pending. That is all the more flagrant when during the proceedings [ARBED] did not merely raise only procedural claims but also raised substantive claims as regards [TradeARBED]'s participation in the infringements. There is no doubt, therefore, that, for the same reason, [TradeARBED] cannot benefit from the rules on limitation with respect to the imposition of fines.

452. Last, it should be noted that the arguments set out at recital 449 et seq. concerning [ARBED] necessarily apply to [ProfilARBED], which is the economic successor of [ARBED].'

36 In the words of Article 1 of the contested decision:

'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.'

37 In the words of Article 2 of the contested decision, '[a] fine of EUR 10 million is hereby imposed on [ARBED, TradeARBED and ProfilARBED] jointly and severally for the infringements referred to in Article 1'.

Procedure and forms of order sought by the parties

38 By application lodged at the Registry of the Court of First Instance on 27 December 2006, the applicants brought the present action on the basis of Articles 33 CS and 36 CS and also of Articles 229 EC and 230 EC.

39 As the composition of the Chambers of the Court was altered, the Judge-Rapporteur was assigned to the Seventh Chamber, to which the present case was therefore assigned.

40 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

41 The parties presented oral argument and their answers to the questions put by the Court at the hearing held on 5 November 2008.

42 The applicants claim that the Court should:

— annul the contested decision;

— at least, annul Article 2 of that decision, in that it imposes a pecuniary sanction on them, or drastically reduce that sanction;

— order the Commission to pay the costs.

43 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

44 In support of their claims, the applicants rely, in substance, on four pleas. The first plea alleges lack of legal basis for the contested decision and misuse of powers. The second plea alleges breach of the rules on the imputation of infringements, in that the contested

decision imputes to three affiliated companies liability for the conduct of one of them, although the other two did not participate in that conduct. The third plea alleges breach of the rules on the limitation period for proceedings. The fourth plea, which is raised in the alternative, alleges breach of the rights of the defence, in that the period after which the contested decision was adopted was excessive.

First plea: lack of legal basis for the contested decision and misuse of powers

Arguments of the parties

45 The applicants further divide their plea into two parts.

46 In the first part of the plea, they maintain that the Commission infringed Article 97 CS and misused its powers by applying Article 65 CS after the date of expiry of the ECSC Treaty. They submit that the expiry of that Treaty, on 23 July 2002, necessarily entailed the extinction of the Commission's power to apply that provision, contrary to the assertion made at recital 292 to the contested decision.

47 The fact, relied on at recital 293 to the contested decision, that the EC and ECSC Treaties belong to a single legal order, based on the Treaties establishing the European Union and the different Communities, is irrelevant. The institutions are indeed under an obligation to develop a coherent interpretation of the different Treaties. However, that cannot in any case constitute a valid ground on which the Commission could ensure the 'survival' of the ECSC Treaty beyond its term, since the provisions of that

Treaty do not so provide. The applicants rely, in particular, in that regard on Opinion 1/91 of the Court, paragraph 29.

48 In the second part of the plea, the applicants maintain that the Commission infringed Regulation No 1/2003 and misused its powers by basing its power to adopt a decision pursuant to Article 65 CS on a regulation which confers powers on it solely for the purpose of implementing Articles 81 EC and 82 EC.

49 As regards the procedural rules applicable in this case, the applicants take issue, in particular, with the assertion at recital 299 to the contested decision that Article 7(1) and Article 23(2) of Regulation No 1/2003 confer powers on the Commission to establish and penalise 'infringements of the competition rules'. It follows from Article 4 of that regulation, on the contrary, that the powers which it confers on the Commission are granted solely in order to allow the Commission to pursue infringements of Articles 81 EC and 82 EC.

50 The applicants also observe that Regulation No 1/2003 was adopted after the expiry of the ECSC Treaty. By failing to extend, in that regulation, the Commission's powers to implement Article 65 CS, the Council in all likelihood concluded, rightly in the applicants' view, that it was not competent to extend the duration of that Treaty, since the power to do so belonged exclusively to the authors of that Treaty and not to the institutions created by it.

51 As regards the argument which the Commission bases on the communication of 18 June 2002, the applicants emphasise that the mere repetition of a fundamental position does not suffice to justify it.

52 In their reply, the applicants further submit that, even on the assumption that Regulation No 1/2003 might be interpreted as referring also to proceedings under Article 65 CS, that could not entail a variation of the scope of the ECSC Treaty and, more particularly, of Article 97 thereof. It follows from the hierarchy of norms that a Council regulation cannot amend a treaty. That applies a fortiori because Article 95 CS established a specific procedure to be followed where an amendment of the ECSC Treaty was deemed necessary in order to cover cases not provided for by that Treaty.

53 As regards the substantive rules, the applicants contend that the general principle of law invoked at recital 301 to the contested decision, that the actual law applicable continues to be the law in force at the time when the infringement was committed, whatever the date of its application, is not applicable in the present case. What is involved here is not an amendment of a legislative text by its author, but an initiative taken by the institution responsible for implementing the legal rule with the intention of extending the existence of that rule beyond the date of expiry expressly determined by its author. In the present case, the ECSC Treaty expired on 23 July 2002, in accordance with Article 97 thereof, and the authors took no step whatsoever with the intention of maintaining certain of its provisions in force. No matter how regrettable the Commission may find that situation, it has no authority to substitute itself for those authors by maintaining Article 65 CS in force.

54 The applicants further submit, in their reply, that if conduct engaged in before 23 July 2002 continues to be governed by the ECSC Treaty, then it is governed by all the provisions of that Treaty, including Article 97, which precludes any application of the Treaty after that date.

55 The Commission disputes the applicants' arguments, relying on a line of argument comparable to that set out in the contested decision.

Findings of the Court

56 The Court will examine both parts of the plea together.

57 The Court points out that the Community Treaties established a single legal order (see, to that effect, Opinion 1/91 of the Court, paragraph 21, and Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 78), in which, as reflected in Article 305(1) EC, the ECSC Treaty constituted a specific regime derogating from the rules of general application established by the EC Treaty.

58 Pursuant to Article 97, the ECSC Treaty expired on 23 July 2002. Consequently, on 24 July 2002 the scope of the general regime resulting from the EC Treaty extended to the sectors which were initially governed by the ECSC Treaty.

59 Although the succession of the legal framework of the EC Treaty to that of the ECSC Treaty has led, since 24 July 2002, to a change of legal bases, procedures and applicable substantive rules, that succession is part of the unity and continuity of the Community legal order and its objectives (Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 55).

60 In that regard, it must be observed that the introduction and maintenance of a system of free competition, within which the normal conditions of competition are safeguarded and which is at the origin of the rules on collusive conduct between undertakings, is one of the essential objectives of both the EC Treaty (see, to that effect, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 31) and the ECSC Treaty (see, to that effect, Opinion 1/61 of the Court of 13 December 1961 [1961] ECR 243, 262, and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraphs 265 and 299 to 304).

61 In that context, although the rules of the ECSC and the EC Treaties governing the sphere of collusive conduct between undertakings diverge to a certain extent, it must be emphasised that the concepts of agreements and concerted practices within the meaning of Article 65(1) CS correspond with those on collusive conduct and concerted practices within the meaning of Article 81 EC and that both provisions have been interpreted in the same way by the Community judicature (see, to that effect, *Thyssen Stahl* v *Commission*, paragraphs 262 to 272 and 277). Thus, the pursuit of the aim of undistorted competition in the sectors which initially fell within the common market in coal and steel is not suspended by the fact that the ECSC Treaty has expired, since that objective is also pursued in the context of the EC Treaty, by the same institution, namely the Commission, the administrative authority responsible for implementing and developing competition policy in the general interest of the Community (see, to that effect and by analogy, *González y Díez* v *Commission*, paragraph 55).

62 Furthermore, 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 (Case 23/68 *Klomp* [1969] ECR 43, paragraph 13). The Court observes that, in that judgment, the Court of Justice applied that principle in the context of an amendment of primary Community law, by the effect of the Merger Treaty.

63 The continuity of the Community legal order and of the objectives which govern its function thus requires that, in so far as it succeeds the European Coal and Steel Community and in its own procedural framework, the European Community ensures, 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 under the ECSC Treaty and the rules adopted for its application. That requirement applies all the more in so far as the distortion of competition resulting from non-compliance with the rules on agreements and collusive conduct between undertakings is liable to extend its effects to a time after the expiry of the ECSC Treaty when the EC Treaty applies (see, by analogy, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 41 and the case-law cited, and *González y Díez* v *Commission*, paragraph 56).

64 It follows from the foregoing that, contrary to the applicants' contention, Regulation No 1/2003 and, more particularly, Article 7(1) and Article 23(2) thereof, must 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* (see, by analogy, *González y Díez* v *Commission*, paragraph 57), even though those provisions of Regulation No 1/2003 do not expressly refer to Article 65 CS.

65 It should be further pointed out that the application of the rules of the EC Treaty to a field initially governed by the ECSC Treaty must comply with the principles governing the temporal application of the law. In that regard, it follows from settled case-law that although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, that is not the case with substantive rules. The latter must, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them (*Salumi and Others*, paragraph 9; Case 21/81 *Bout* [1982] ECR 381, paragraph 13; and Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 55).

66 From that point of view, as regards the question of the substantive provisions applicable to a legal situation which was definitively established before the expiry of the ECSC Treaty, the continuity of the Community legal order and the requirements relating to the principles of legal certainty and the protection of legitimate expectations require the application of substantive provisions drawn from the ECSC Treaty to the facts which fall within their scope of application *ratione materiae* and *ratione temporis*. Just because, by reason of the expiry of the ECSC Treaty, the regulatory framework in question is no longer in force at the time when the assessment of the factual situation is carried out does not alter that situation since that assessment concerns a legal situation which was definitively established at a time when substantive provisions adopted under the ECSC Treaty were applicable (*González y Díez* v *Commission*, paragraph 59).

67 In the present case, the contested decision was adopted on the basis of Article 7(1) and Article 23(2) of Regulation No 1/2003, following a procedure carried out in accordance with that regulation. The provisions concerning the legal basis and the procedure followed until the adoption of the contested decision fall within the scope of procedural rules for the purposes of the case-law referred to at paragraph 65 above. Since the contested decision was adopted after the expiry of the ECSC Treaty, the Commission rightly applied the rules contained in Regulation No 1/2003 (see, to that effect and by analogy, *González y Díez* v *Commission*, paragraph 60, and, *a contrario*, Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP and Others* v *Commission* [2007] ECR II-4331).

68 As regards the substantive rules, it must be observed that the contested decision relates to a legal situation which had definitively come into being before the expiry of the ECSC Treaty, as the infringement period was from 1 July 1988 to 16 January 1991 (see paragraph 140 below). In the absence of any retroactive effect of material competition law applicable since 24 July 2002, it must be held that Article 65(1) CS is the substantive rule applicable and actually applied by the Commission in the contested decision, since it follows precisely from the nature of *lex generalis* of the EC Treaty by comparison with the ECSC Treaty, laid down in Article 305 EC, that the specific regime of the ECSC Treaty and of the rules adopted for its application is alone, under the principle *lex specialis derogat legi generali*, applicable to situations which came into being before 24 July 2002.

69 It follows from all of the foregoing considerations that both parts of the first plea must be rejected.

Second plea: breach of the rules on the imputation of infringements

Arguments of the parties

70 The applicants deny that liability for the infringements found in the contested decision can be imputed to ARBED and to ProfilARBED.

71 As regards ARBED, and in response to recital 460 to the contested decision, the applicants contend, with reference to paragraph 28 of *Stora Kopparbergs Bergslags* v *Commission*, that the Court of Justice never confirmed that 100% control was sufficient for a parent company to be considered liable for the conduct of its subsidiary. The Court of Justice held that, in a situation in which the parent company had agreed to assume liability for the conduct of its subsidiary during the administrative procedure, the Commission was entitled to presume that it was indeed liable for that conduct. That is not the position in the present case, and, moreover, the Commission never notified ARBED, during the first administrative procedure, of its intention to impute to it liability for the conduct of TradeARBED.

72 The applicants further submit that in *Stora Kopparbergs Bergslags* v *Commission* the Commission had taken the approach of addressing the decision at issue to the parent company where there was express evidence implicating the parent company in the participation of its subsidiary in the cartel (see recital 143 to Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1)). That is not the situation in the present case.

73 Since the particular conditions identified by the Court of Justice in *Stora Kopparbergs Bergslags* v *Commission* are not satisfied in this case, the applicants claim that the general principle that penalties must fit the offence and the general principle of the burden of proof require that the Commission must demonstrate that specific charges

may be addressed to each of the addressees of the statement of objections. The applicants rely, in that regard, on Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 118 and the case-law cited.

74 In the present case, however, the Commission found, both in the contested decision (recitals 444 and 464) and in the initial decision (recital 322), that only TradeARBED had taken part in the various agreements and practices at issue.

75 Last, the applicants claim that the imputation of the infringement committed by TradeARBED to ARBED, on the sole ground that ARBED holds 100% of the capital of its subsidiary, leads in the present case to discrimination by comparison with the other undertakings concerned. Contrary to the Commission's assertion at recital 468 to the contested decision, the initial decision used, with respect to those undertakings, an imputability test based not on the production of beams but on actual participation in the infringements at issue. Only where two companies in the same group participated in the cartel did the Commission adopt a decision solely against the production company (see recitals 320 and 321 to the initial decision). In the applicants' submission, the Commission cannot depart from that imputability test in the present case without being guilty of discrimination, contrary to the principle of equal treatment.

76 In their reply, the applicants further maintain that in the present case the Commission chose not to rely on the rebuttable presumption that parent companies participate in the activities of their wholly-owned subsidiaries but, rather, to examine, on the basis of the facts and information which it had collected, whether those companies had actually participated in the infringement. In the present case, the Commission concluded from its examination of the facts in the initial decision that, so far as the ARBED group was concerned, only TradeARBED had participated in the infringement. That had two consequences.

77 First, since the Commission had decided, in the context of the procedure culminating in the adoption of the initial decision, not to rely on the rebuttable presumption in question, the applicants contend that it cannot take a different approach in the context

of the procedure culminating in the adoption of the contested decision without committing a breach of the principle of equal treatment.

78 Second, recourse to that presumption is made impossible in the present case by the binding nature which, in the applicants' submission, attaches to the initial decision, in which the Commission concluded that only TradeARBED had participated in the infringement. That aspect of the initial decision was never disputed or, a fortiori, annulled by a judicial decision.

79 As regards ProfilARBED, the applicants claim that, even on the assumption that the Commission were able to impute to the production company of the ARBED group liability for the infringement committed by TradeARBED, it would still have to choose to take proceedings against either ARBED, as the production company active at the time of the facts at issue, or ProfilARBED, as the economic successor to ARBED in the beam-production field.

80 In the applicants' contention, the Commission cannot, without committing a breach of the principle that penalties must fit the offence, impute the same infringement both to the undertaking which participated in the infringement and to the undertaking which subsequently carried out the activity concerned by the infringement. The Commission's approach would lead to proceedings being brought and a finding of infringement made against two undertakings for the same facts.

81 In any event, in so far as ProfilARBED is held liable for the conduct of ARBED as its successor in the activity of beam production, it relies, *mutatis mutandis*, on the arguments set out at paragraphs 71 to 78 above.

82 The Commission disputes the applicants' arguments, relying on a line of argument comparable to that set out in the contested decision.

Findings of the Court

83 It is necessary to draw a distinction between the individual situations of each of the three applicants.

— TradeARBED

84 Without prejudice to their arguments developed in the context of the first and third pleas, the applicants do not dispute that the contested decision could be addressed to TradeARBED, as the company identified in the initial decision as the only company in the ARBED group to have 'participated in the various agreements and practices'.

85 It is therefore appropriate to consider that the second plea is not relied on by TradeARBED in support of its claim for annulment of the contested decision.

— ARBED

86 It cannot be established, on the basis of the arguments developed by the applicants in the context of the present plea, that the imputation to ARBED of liability for the

unlawful conduct of TradeARBED and the imposition of a fine on those two companies jointly and severally are vitiated by an error of law.

87 In that regard, it must be borne in mind, first of all, that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, currently under appeal, paragraph 57; see also Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited).

88 It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market (*Akzo Nobel and Others* v *Commission*, paragraph 58; see also Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

89 In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a rebuttable presumption that the parent company actually exercises decisive influence over the conduct of its subsidiary (*Akzo Nobel and Others* v *Commission*, paragraph 60; see also, to that effect, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* ('*PVC II*'), paragraphs 961 and 984) and therefore constitutes with the subsidiary a single undertaking within the meaning of Article 81 EC (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* (not published in the ECR), paragraph 59). It is therefore for the parent company which is challenging before the Community judicature a Commission decision imposing a fine on it for the conduct of its subsidiary to rebut that presumption

by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29).

90 In that regard, it is true that, as the applicants claim, the Court of Justice, at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, 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 or that both companies were jointly represented during the administrative procedure. However, those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of *AEG-Telefunken* v *Commission* is amended (*Akzo Nobel and Others* v *Commission*, paragraph 61).

91 In those circumstances, it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company for the presumption that the parent company exercises decisive influence over the conduct of the subsidiary on the market to be established. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on its subsidiary, even where it is found that the parent company did not participate directly in the agreements, unless the parent company proves that its subsidiary acts independently on the market (judgment of 18 December 2008 in Case T-85/06 *General Química and Others* v *Commission* (not published in the ECR), paragraph 62).

92 As to whether the Commission could lawfully impute liability to the parent company in the present case, it must be observed at the outset that, like the prohibition in Article 81(1) EC, the prohibition in Article 65(1) CS is addressed, in particular, to 'undertakings'. It has already been held, moreover, that the concept of undertaking has the same meaning in both of those provisions (Case T-145/94 *Unimétal* v *Commission* [1999] ECR II-585, paragraph 600). Consequently, the rules on the imputation of

liability for infringements of Article 81(1) EC also apply in the case of infringements of Article 65(1) CS (see, to that effect, Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 96).

93 In the present case, it is common ground that ARBED holds 100% of the capital of its subsidiary TradeARBED.

94 The Commission was therefore entitled to take the view, as it did at recital 460 to the contested decision, that ARBED had exercised decisive influence on the conduct of TradeARBED, since it had not been shown, or even claimed, that that subsidiary determined its commercial policy independently in such a way as not to constitute, together with its parent company, a single economic entity and therefore a single undertaking for the purposes of Article 65 CS.

95 The line of argument developed by the applicants in that regard in the present action, on the basis of paragraph 28 of *Stora Kopparbergs Bergslags* v *Commission*, is the consequence of a misreading of that judgment and must therefore be rejected for the reasons set out at paragraph 90 above.

96 In any event, the Commission is correct to observe that, at recital 462 to the contested decision, it provided further evidence, which, further to the presumption based on the fact that the parent company held all the capital of its subsidiary, confirmed not that ARBED did actually participate in the infringements in question, but that it was capable of exercising decisive influence over TradeARBED's conduct and did in fact make use of that power.

97 At paragraph 92 of the judgment of 11 March 1999 in Case T-137/94 *ARBED* v *Commission*, which was not challenged in the appeal before the Court of Justice, this Court held, moreover, on the basis of the submissions of counsel for ARBED at the hearing, that TradeARBED was a sales company which distributed ARBED's steel

products, in particular steel beams, by acting either as an agent, in which case the sale was invoiced directly to the customer by ARBED, or as a commission agent, in which case the sale was invoiced to the customer by TradeARBED on behalf of ARBED, TradeARBED receiving commission on the product sold. This Court also considered it established that TradeARBED did not determine its conduct on the Community market in beams independently, but in all material aspects carried out the instructions given to it by ARBED.

98 It also follows from paragraphs 96 and 97 of the judgment of 11 March 1999 in Case T-137/94 *ARBED* v *Commission*, which were not challenged on appeal, that: (a) throughout the administrative procedure culminating in the initial decision, ARBED or TradeARBED, as applicable, had responded without distinction to the requests for information which the Commission addressed to TradeARBED; (b) ARBED regarded TradeARBED as being merely its sales 'arm' or 'organisation'; and (c) ARBED had even spontaneously regarded itself as the addressee of the statement of objections formally notified to TradeARBED and had instructed a lawyer to defend its interests.

99 It follows from the foregoing that ARBED and its subsidiary TradeARBED must be regarded as constituting one and the same undertaking for the purposes of Article 65(1) CS and that the Commission was correct to impute to the former liability for the latter's conduct.

100 For the remainder, the applicants' argument is based on confusion between the direct imputation to a parent company of the infringement committed by the parent in collusion with its subsidiary, on account of its own actual participation in that infringement, and the imputation to that parent company of liability for the infringement committed solely by its subsidiary on account of the decisive influence which the parent company exercises over the conduct of its subsidiary.

101 Contrary to the applicants' contention, it is on the latter rule of imputability that the Commission relied in order to address to ARBED both the initial decision (see recital 322 thereto) and the contested decision (see, in particular, recital 462 thereto).

102 In those circumstances, the argument which the applicants base on the alleged binding effect attaching to the finding made in the initial decision that only TradeARBED had participated in the infringements at issue must be rejected as ineffective.

103 As regards the argument which the applicants claim to base on what they allege to be discrimination of which they were the victims, by comparison with the other undertakings to which the contested decision was addressed, it is wholly unfounded. As follows from recitals 466 to 468 to the contested decision (and already from recital 322 to the initial decision), it was precisely in order to take account of the individual situation of the undertaking composed of ARBED and TradeARBED, which, as a sales company distributing ARBED's beams, received only a small percentage of the sales price for its services, and in order to ensure equal treatment of all the beam-producing undertakings involved in the infringements in question, that the Commission intended to impute to ARBED liability for the infringements committed by its subsidiary TradeARBED. Far from entailing discrimination against ARBED, that imputation of liability is wholly consistent with the general principle of equal treatment, which, according to consistent case-law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56, and Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, paragraph 137 and the case-law cited).

104 Last, the Court considers that, in application of the concept of 'undertaking', ARBED and TradeARBED could be regarded as jointly and severally liable for the conduct in respect of which they were criticised, as the acts committed by one of them were imputable to the other and therefore deemed to have been committed by it (see, to that

effect, *HFB and Others* v *Commission*, paragraphs 524 and 525, *Tokai Carbon and Others* v *Commission*, paragraph 62, and *Akzo Nobel and Others* v *Commission*, paragraph 62; see also, to that effect and by analogy, Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41, and Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraphs 26 to 28).

105 It follows from the foregoing considerations that the second plea must be rejected as unfounded in so far as it is put forward by ARBED.

— ProfilARBED

106 Nor can it be established on the basis of the arguments developed in the present case by the applicants, in the context of the present plea, that the imputation of liability for the unlawful conduct of ARBED/TradeARBED to ProfilARBED and the imposition of a fine on those three companies jointly and severally are vitiated by an error of law.

107 First of all, the Court considers that the Commission was entitled to impute to ProfilARBED, as the economic successor of ARBED in the field of beam production within the ARBED group, liability for the unlawful conduct of ARBED and therefore, indirectly, liability for the unlawful conduct of TradeARBED.

108 That imputation of liability appears to be justified in light of the economic continuity test developed by the case-law, particularly in cases of restructuring or other changes within a group of undertakings (see, in that regard, Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraphs 40 to 49, and the Opinion of Advocate General Kokott in that case [2007] ECR I-10896, points 65 to 84).

109 According to that case-law, where all or part of the economic activities are transferred from one legal entity to another, liability for the infringement committed by the initial operator, in the context of the activities in question, may be imputed to the new operator if it constitutes with the initial operator the same economic entity for the purpose of the application of the competition rules, even if the initial operator still exists as a legal entity (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraphs 354 to 359; *ETI and Others*, paragraph 48; and Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 131 to 133).

110 The Court of Justice has made clear that applying penalties in this way is permissible in particular where those entities have been subject to control by the same person and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions (*ETI and Others*, paragraph 49). That concerns quite specifically the cases of restructuring within a group of undertakings, where the initial operator does not necessarily cease to have a legal existence, but where it no longer carries out a significant economic activity on the relevant market. For the existence of a structural link between the original operator of the undertaking which participated in the cartel and the new one may allow the persons concerned to escape their liability under antitrust law — whether intentionally or unintentionally — by making use of the structural possibilities available to them. Thus, for example, the original operator could become an 'empty shell' following an internal group restructuring (*ETI and Others*, paragraph 41, and Opinion of Advocate General Kokott in that case, point 79).

111 In the present case, the formation of ProfilARBED, in 1992, as a wholly-owned subsidiary of ARBED, in order to carry out the economic and industrial activities of ARBED in the beams sector constitutes a circumstance comparable to those in *Aalborg Portland and Others* v *Commission* and *Jungbunzlauer* v *Commission*.

112 Nor do the applicants seriously dispute the possibility that liability for ARBED/TradeARBED's unlawful conduct will be imputed to ProfilARBED. What they essentially claim in their pleadings is that, even on the assumption that such imputation of liability might be possible, a point on which they do not expressly adopt a

position, the Commission would still have been required to bring proceedings either against ARBED, as the beam-producing company active at the time of the infringement, or ProfilARBED, as ARBED's economic successor in that sector.

113 That argument cannot succeed, however, in light of the fundamental concept of an economic unit which underlies all the Community case-law on the imputability of liability to the legal entities constituting the same undertaking.

114 It follows from that case-law that Community competition law refers to the activities of undertakings (see *ETI and Others*, paragraph 38 and the case-law cited). In prohibiting undertakings, in particular, from entering into agreements or participating in concerted practices that restrict competition, Article 81(1) EC and Article 65(1) CS are aimed at economic units made up of a combination of personal and physical elements which can contribute to the commission of an infringement of the kind referred to by those provisions. An undertaking within the meaning of those provisions can therefore include several subjects of the law (see *Tokai Carbon and Others* v *Commission*, paragraph 54 and the case-law cited).

115 More specifically, this Court, after pointing out that Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), does not expressly state whether an undertaking which has not been specifically and formally held liable for an infringement found by the Commission may be declared jointly and severally liable with another undertaking for payment of a fine imposed on that other undertaking, which has committed and been penalised for the infringement, has held that that provision must be interpreted as meaning that a company may be declared jointly and severally liable with another company for payment of a fine imposed on the latter company, which has committed an infringement intentionally or negligently, provided that the Commission demonstrates, in the same decision, that the infringement could also have been found to have been committed by the company held jointly and severally liable (Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, paragraphs 42 and 43).

116 The interpretation which this Court thus gave of Article 15(2) of Regulation No 17 was expressly upheld on appeal by the Court of Justice in its judgment in Case C-294/98 P *Metsä-Serla and Others* v *Commission*, paragraphs 27 and 28. The Court of Justice held, in particular, that that interpretation was not contrary to the principle of legality, because the appellants, to which the anti-competitive actions of a different legal person had been imputed, had received a fine under that article for an infringement which, as a result of that imputation of liability, they themselves were deemed to have committed.

117 Joint and several liability is thus a normal consequence of the imputation of liability for the conduct of one company to another company, in particular where the two companies constitute the same undertaking.

118 As regards the argument whereby the applicants allege breach of the principle that penalties must fit the offence, it is sufficiently answered by the circumstance, invoked by the Commission, that in the present case the three applicants, which together constitute the same undertaking for the purposes of Community competition law, received a single fine, which they are jointly and severally required to pay, and not three individual fines.

119 It follows from the foregoing considerations that the second plea must be rejected as unfounded in so far as it is put forward by ProfilARBED.

Third plea: breach of the rules on the limitation period for proceedings

Arguments of the parties

120 As regards the interruption of the limitation period, within the meaning of Article 2 of Decision No 715/78 and Article 25 of Regulation No 1/2003, the applicants claim that the only one among them capable of satisfying the definition of an undertaking which has participated in the infringement is TradeARBED. In any event, that definition cannot in their view apply to undertakings to which the Commission did not address the statement of objections.

121 In their reply, the applicants further submit that the undertakings which participated in the infringement, within the meaning of those provisions, are solely those identified as such in the procedure during which the action interrupting the limitation period was taken.

122 As regards suspension of the limitation period, within the meaning of Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003, the applicants maintain, moreover, that an action brought before the Community judicature by one of the addressees of a Commission decision has no legal effect vis-à-vis the other addressees which are not parties to the proceedings. They rely, in that regard, on the general principle that the Community judicature cannot rule *ultra petita*, on the *inter partes* effect of judicial proceedings and on the consequences for those principles resulting from Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraphs 52 and 53. A fortiori, such an action would have no effect vis-à-vis persons who, like TradeARBED and ProfilARBED in the present case, are not addressees of the decision in question and for that reason are unable to challenge it in judicial proceedings.

123 As regards a possible 'cross application' of the periods of suspension of the limitation period, as envisaged by the Commission at recital 451 to the contested decision, the applicants further submit that although, formally, decisions pursuant to Article 65 CS generally assume the form of a single document addressed to a number of undertakings, they none the less constitute, in law, a bundle of individual decisions. In that context, any action brought by one of the addressees in principle has no effect on the legal situation of the other addressees and, a fortiori, on the situation of the undertakings which are not addressees of the decision in question.

124 In that regard, the applicants further observe that, contrary to the consequences of the interruption of the limitation period expressly provided for in Article 2(2) of Decision No 715/78 and Article 25(4) of Regulation No 1/2003, Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003 do not provide that the suspension of the limitation period with respect to one undertaking is also to apply with respect to all the other undertakings which participated in the infringement. Those provisions therefore envisage suspension of the limitation period solely with respect to the parties to the proceedings.

125 In their reply, the applicants claim that that strict interpretation is supported by Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941.

126 Applying those principles to the circumstances of the present case, the applicants claim, as regards TradeARBED, that the final action interrupting the limitation period was the hearing from 11 to 14 January 1993, or the actual adoption of the initial decision on 16 February 1994, as the case may be. No action interrupting the limitation period could, by definition, be taken after the latter date and in fact no procedural document was sent to TradeARBED until the statement of objections was issued on 8 March 2006. The Commission's power to impose a fine on TradeARBED has therefore been time-barred since January 1998 or since February 1999, as the case may be. In any event, the infringement which TradeARBED is found to have committed has been time-barred since January 2001, that is to say, 10 years from the date on which the infringement ceased.

127 As regards ARBED, the applicants observe that it never received any request for information, that it was not an addressee of the statement of objections of 6 May 1992 and that, for that reason, it was refused access to the file (judgment of 2 October 2003 in Case C-176/99 P *ARBED* v *Commission*, paragraph 22). The only requests for information addressed to ARBED, in September and November 1993, were not addressed to it as an undertaking which had participated in the infringement, as is confirmed by the initial decision. The applicants infer that ARBED was not regarded by the Commission as an undertaking which had participated in the infringement, within the meaning of Article 2(1) of Decision No 715/78 and Article 25(3) of Regulation No 1/2003, in the procedure culminating in the adoption of the initial decision. They maintain, consequently, that the limitation period was never interrupted with respect to that undertaking.

128 As regards the initial decision itself, the applicants contend that it is clearly not an action taken for the purpose of the 'preliminary investigation' within the meaning of those provisions, and that it is therefore not capable of interrupting the limitation period. In any event, that decision was annulled by the Court of Justice and cannot therefore produce any effect whatsoever.

129 The action for annulment of the initial decision was initiated on 8 April 1994, that is to say, approximately three years and three months from the date on which the alleged infringement ceased. The limitation period was therefore suspended until the judgment of the Court of Justice was delivered, on 2 October 2003. From that date, the Commission had one year and a little under nine months to take an action interrupting the limitation period with respect to ARBED. In fact, the first action capable of interrupting the limitation period, namely the decision to initiate the procedure and the communication of the statement of objections, by letter of 8 March 2006, was taken two years and five months from that date.

130 The applicants agree that, from the beginning of 2004, the Commission sent various requests for information to Arcelor SA, which at the time was the leading company in the group. They observe, however, that that company was a separate legal entity from ARBED and that it was never identified as having participated in the infringements, or even as being a company to which those infringements could be imputed. In those

circumstances, the applicants submit that the requests for information in question were not capable of interrupting the limitation period with respect to any undertaking whatsoever.

131 Last, as regards ProfilARBED, the applicants claim that the first action interrupting the limitation period, namely the statement of objections of 8 March 2006, was addressed to that undertaking more than 15 years after the infringements ceased. As regards the actions interrupting the limitation period addressed to other participants in the infringements, they were all taken before the date of adoption of the initial decision, 16 February 1994, or more than 12 years before the communication of that statement of objections.

132 The Commission contends that the line of argument which the applicants develop on the basis of *Commission* v *AssiDomän Kraft Products and Others* (see paragraphs 122 to 124 above) cannot be transposed to a case involving the suspension of the limitation period. That case-law, by definition, concerns only undertakings which were already the addressees of a decision which has become definitive, and in whose case the question of suspension of the limitation period would not arise. It does not therefore establish the relative effect of the suspension of the limitation period as being applicable solely to the party to the judicial proceedings.

133 In any event, that line of argument is contradicted by the wording and the structure of the relevant provisions of Decision No 715/78 and Regulation No 1/2003. It follows from those provisions that the limitation period concerns the possibility for the Commission to conduct proceedings in respect of an infringement of competition law, and not the possibility for it to initiate an action against a specific undertaking.

134 As regards, in particular, Article 2(2) of Decision No 715/78 and Article 25(4) of Regulation No 1/2003, it follows from those provisions that the limitation period is interrupted with respect not only to the undertakings forming the subject of a procedural act, but also to those which, having participated in the infringement, are still unknown to the Commission and, accordingly, were not the subject of any measure of inquiry or are not the addressees of any procedural act. Likewise, Article 2(3) of Decision No 715/78 and Article 25(5) of Regulation No 1/2003 concern all the undertakings which have participated in the infringement.

135 Furthermore, in the Commission's contention, it is illogical and incoherent to interpret Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003 as meaning that the limitation period runs with respect to all undertakings apart from those which are parties to judicial proceedings. The Commission maintains that if the legislature had desired such a result it would have stated that the suspension of the limitation period took effect only with respect to the undertaking party to the judicial proceedings. Thus, the initiation of an action against a decision finding an infringement, by any addressee whatsoever of that decision, has the effect of suspending the limitation period with respect to all the other undertakings which have participated in the infringement, whether or not they were the addressees of an identical decision.

136 In its rejoinder, the Commission further submits that the expression 'which have participated in the infringement' implies an objective fact, namely participation in the infringement, which is quite distinct from a subjective and contingent element such as an undertaking being identified as having participated in the infringement. Thus, an undertaking may have participated in the infringement without the Commission being aware that it has done so at the time when it takes an action interrupting the limitation period.

137 The Commission contends, moreover, that *Holcim (Deutschland)* v *Commission* has no relevance in the present case, since in that judgment the Court of Justice did not rule on the question of the identity of the person or persons with respect to whom an action interrupting or suspending the limitation period may produce effects.

138 Last, the Commission observes that, at recital 451 to the contested decision, it stated that the suspension of the limitation period resulting from a company's participation in judicial proceedings necessarily applies to all the other legal entities forming part of the same economic unit, and therefore of the same 'undertaking', for the purposes of Community competition law.

Findings of the Court

139 The Court will examine, first, whether the five-year limitation period was observed, taking into account any interruption of the limitation period, and, second, whether the Commission also observed the 10-year limitation period, by reference to the individual situation of each of the three applicants.

— ARBED

140 It will be recalled that, according to Article 1 of the contested decision, the participation of the undertaking composed of ARBED, TradeARBED and ProfilARBED in the infringements at issue is established from 1 July 1988 to 16 January 1991. The applicants do not challenge that finding as to the infringement period. As the infringements in question were continuous infringements, the limitation period must be considered to have started to run on 17 January 1991 at the earliest.

141 As regards, in the first place, the five-year limitation period, it follows from the contested decision (recitals 447 and 448) that that period was interrupted, in particular, by the inspections carried out by the Commission at the premises of the undertakings concerned on 16, 17 and 18 January 1991, by the statement of objections addressed to TradeARBED on 6 February 1992, by the requests for information sent to TradeARBED and to ARBED's legal department on 26 November 1993, requesting ARBED to inform the Commission of the figures for ARBED's sales in the ECSC between January and September 1993, and by the adoption of the initial decision on 16 February 1994. Following the suspension of the limitation period throughout the proceedings pending before the Community judicature, the limitation period was again interrupted by the statement of objections addressed to ARBED on 8 March 2006.

142 ARBED does not dispute those facts, but contends that the limitation period could not be interrupted in its case since it is not an 'undertaking which has participated in the infringement' for the purposes of Article 2(1) of Decision No 715/78 and the equivalent provision in Regulation No 1/2003. First, it relies on recital 2 to the contested decision, from which it follows that only TradeARBED meets that definition. Second, that definition cannot, in ARBED's submission, apply to an undertaking to which the Commission has not addressed a statement of objections Third, that definition applies only to the undertakings which have been identified as such in the administrative procedure during which the action interrupting the limitation period was taken.

143 None of those arguments can succeed. The expression 'undertaking which has participated in the infringement' within the meaning of those provisions must be understood to mean any undertaking identified as such in a Commission decision imposing sanctions in respect of an infringement. In that regard, the fact that an undertaking was not identified as 'hav[ing] participated in the infringement' in the initial statement of objections or, more generally, in the administrative procedure during which the action interrupting the limitation period was taken is irrelevant if that undertaking is subsequently identified as having done so (see, to that effect, Case T-276/04 *Compagnie maritime belge* v *Commission* [2008] ECR I-1277, paragraph 31 and the case-law cited).

144 In fact, in accordance with Article 2(1) of Decision No 715/78 and Article 25(3) of Regulation No 1/2003, the limitation period is to be interrupted by any action taken by the Commission for the purpose of the preliminary investigation or proceedings, notified to at least one undertaking which has participated in the infringement, and, in accordance with Article 2(2) of Decision No 715/78 and Article 25(4) of Regulation No 1/2003, the interruption of the limitation period is to apply for all undertakings which have participated in the infringement in question.

145 As the Commission correctly observes, it follows from those provisions that the limitation period is interrupted not only with respect to the undertakings which were the subject of an action taken for the purpose of the preliminary investigation or proceedings, but also with respect to those which, having participated in the infringement, are still unknown to the Commission and, accordingly, have not been

the subject of any measure of investigation or are not the addressees of any procedural act. As the Commission also correctly observes, the expression 'which has participated in the infringement' implies an objective fact, namely participation in the infringement, which is distinguished from a subjective and contingent element such as the identification of such an undertaking during the administrative procedure. Thus, an undertaking could have participated in the infringement without the Commission being aware that it has done so when it takes an action interrupting the limitation period.

146 In any event, it must be held that, in the present case, ARBED did indeed 'participate in the infringement', since, in accordance with the case-law cited at paragraph 116 above, the unlawful conduct of TradeARBED may be imputed to ARBED, in such a way that it is deemed to have committed that infringement itself.

147 As for the actions interrupting the limitation period taken in the present case, it is common ground that such actions consisted in the inspections of 16, 17 and 18 January 1991, the statement of objections of 6 February 1992 and the statement of objections of 8 March 2006. The same applies to the requests for information sent to TradeARBED and to ARBED's legal department on 26 November 1993. In that regard, it has already been held that a request for information seeking turnover figures for undertakings which are the subject of a proceeding applying the Community competition rules is a necessary step in the infringement proceedings, since it enables the Commission to check that the fines it intends to impose on those undertakings do not exceed the maximum amount permitted by the regulations cited above for infringements of the Community competition rules (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 490).

148 As regards the computation of the five-year limitation period — and without needing to determine whether the initial decision may be regarded as having been interrupted with respect to ARBED, since it was annulled by the judgment of 2 October 2003 in Case C-176/99 P *ARBED* v *Commission* — the Court finds that that limitation period ran without interruption, at the most, from 26 November 1993 to 8 April 1994, or approximately four and a half months, then, after the suspension resulting from the proceedings initiated before this Court and then before the Court of Justice, from 20 October 2003 to 8 March 2006, or for approximately two years and four and a half months. It follows that the contested decision was adopted within the five-year limitation period. The same finding would have to be made if it were necessary to take account of the two-month period between the delivery of the judgment of 11 March

1999 in Case T-137/94 *ARBED* v *Commission*, and the lodging of the appeal with the Court of Justice, a point which the applicants have not raised and on which it is not necessary to adjudicate.

149 As regards, in the second place, the 10-year limitation period, it ran, at the most, from 17 January 1991 to 8 April 1994, that is to say, for approximately three years and three months, and then, after being suspended, from 20 October 2003 to 8 November 2006, that is to say, for approximately three years and one month. It follows that the contested decision was adopted within the 10-year limitation period. The same finding would have to be made if it were necessary to take into account the two-month period between delivery of the judgment of 11 March 1999 in Case T-137/94 *ARBED* v *Commission* and the lodging of the appeal with the Court of Justice, a point which the applicants have not raised and on which it is not necessary to adjudicate.

150 It follows from the foregoing considerations that the third plea must be rejected as unfounded in so far as it is put forward by ARBED.

— TradeARBED

151 As regards TradeARBED, the decisive question is whether the effect of the initiation of an action before the Community judicature relates to a specific person, in which case the suspension of the limitation period throughout the proceedings applies only with respect to the applicant undertaking, or *erga omnes*, in which case the suspension of the limitation period during the procedure applies with respect to all the undertakings which participated in the infringement, whether or not they brought an action.

152 In the former case, the limitation period would have to be regarded as being exceeded by a wide margin in this case on the date of adoption of the contested decision, since it began to run on 17 January 1991. In the latter case, TradeARBED would be in the same

situation as ARBED, whose situation was examined above, and would be unable to rely on either the 10-year limitation period or the five-year limitation period.

153 Unlike the situation pertaining to the interruption of the limitation period, which is expressly provided for by Article 2(2) of Decision No 715/78 and Article 25(4) of Regulation No 1/2003 (*erga omnes* effect), that question is not resolved by that decision or that regulation in the case of the suspension of the limitation period. The applicants base their argument on that silence and claim that if the Community legislature had intended to confer *erga omnes* effect on the suspension of the limitation period it would have expressly so provided. In the Commission's contention, on the contrary, it is illogical and incoherent to interpret that silence as meaning that the limitation period runs with respect to all undertakings with the exception of those which are parties to judicial proceedings. The Commission submits that if the legislature had desired such a result it would have stated that the suspension of the limitation period has effect only with respect to the undertaking which is a party to the judicial proceedings. The Commission further maintains that it follows from the structure of the regulations in question that the limitation period concerns the possibility for the Commission to take proceedings against an infringement of competition law and not the possibility for it to initiate an action against a specific undertaking.

154 In that regard, the Court considers that, like the interruption of the limitation period (*CMA CGM and Others* v *Commission*, paragraph 484; see also Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 40, and, as regards the limitation period for an action to establish Community liability, *Holcim (Deutschland)* v *Commission*, paragraph 36), the suspension of the limitation period, which constitutes an exception to the principle of a five-year limitation period, must be interpreted restrictively.

155 That principle does not permit silence on the part of the legislature to be interpreted in the sense advocated by the Commission.

156 That applies a fortiori since, unlike the interruption of the limitation period, which is intended to enable the Commission to take proceedings and impose effective sanctions in respect of infringements of the competition rules, suspension of the limitation period

concerns, by definition, a situation in which the Commission has already adopted a decision. Normally, there is no longer any need, at that stage, to attach *erga omnes* effect to the initiation, by one of the undertakings on which sanctions have been imposed, of proceedings before the Community judicature. In that situation, on the contrary, the *inter partes* effect of the judicial proceedings and the consequences attached to that effect by the Court of Justice, notably in *Commission* v *AssiDomän Kraft Products and Others*, paragraph 49 et seq., preclude in principle an action brought by one undertaking to which the contested decision was addressed from having any effect whatsoever on the situation of the other addressees of that decision.

157 In the contested decision, the Commission none the less also developed a more specific argument, which it reiterated at the rejoinder stage. At recital 451 to that decision, it thus claims that the suspension of the limitation period resulting from the initiation by an undertaking of proceedings before the Court of First Instance and the Court of Justice applies both to the legal entity which is a party to the proceedings and to all the other legal entities forming part of the same economic unit, no matter which legal entity initiated those proceedings.

158 That argument, however, which is based on the concept of 'undertaking' understood as an economic unit, must also be rejected. While it is true that the competition rules in the Treaty are addressed to undertakings, the fact none the less remains that, for the purposes of the application and implementation of Commission decisions in such matters, it is necessary to identify, as the addressee, an entity having legal personality (see, to that effect, *PVC II*, paragraph 978). In that regard, the Court of Justice has already held, in its judgment of 2 October 2003 in Case C-176/99 P *ARBED* v *Commission*, paragraph 21, that the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person. That legal person alone is able to initiate an action against the decision adopted at the close of the administrative procedure and, accordingly, is the only person in respect of whom the limitation period may be suspended.

159 It follows from the foregoing considerations that the third plea is well founded in so far as it is raised by TradeARBED. In consequence, the contested decision must be annulled in so far as it concerns that undertaking.

— ProfilARBED

160 The considerations expressed above with respect to TradeARBED are also valid, *mutatis mutandis*, with respect to ProfilARBED.

161 The third plea is thus well founded in so far as it is raised by ProfilARBED, which cannot but entail annulment of the contested decision in so far as it concerns that undertaking.

Fourth plea: breach of the rights of the defence

Arguments of the parties

162 By way of alternative plea, the applicants maintain that the particularly long duration of the proceedings entailed a breach of their rights of defence sufficiently fundamental to entail annulment of the contested decision or, at the very least, of Article 2 of that decision, in that it imposes a financial penalty on them, or a drastic reduction in that penalty. They rely, to that effect, on Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 55.

163 In the present case, the undertakings concerned are prevented from rebutting the presumption of liability based on the existence of shareholding links between the only company to have participated in the infringement and the other two applicants, which was raised for the first time only after the proceedings had lasted for 16 years. In the applicants' submission, the evidence that might have been available to them in 1990 disappeared after such a period.

164 The Commission disputes that argument

Findings of the Court

165 This plea, which is raised in the alternative by the applicants, will be examined only in so far as it is raised by ARBED, since the third plea has already been upheld in so far as it is raised by TradeARBED and by ProfilARBED.

166 As regards the principle of respect for the rights of the defence, the Court of Justice held, at paragraph 55 of *Technische Unie* v *Commission*, on which the applicants rely, that as respect for the rights of the defence, a principle whose fundamental nature has been emphasised on many occasions in the case-law of the Court of Justice, is of crucial importance in procedures such as that followed in the present case, it is essential to prevent those rights from being irremediably compromised on account of the excessive duration of the investigation phase and to ensure that the duration of that phase does not impede the establishment of evidence designed to refute the existence of conduct susceptible of rendering the undertakings concerned liable. For that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights are fully effective, that is to say, the second phase of the administrative procedure. The assessment of the source of any undermining of the effectiveness of the rights of the defence must extend to the entire procedure and be carried out by reference to its total duration.

167 Furthermore, the burden of proving a breach of the rights of the defence by virtue of the fact that an undertaking experienced difficulties in defending itself against the Commission's allegations as a consequence of the excessive duration of the administrative procedure is borne by that undertaking (*Technische Unie* v *Commission*, paragraph 61).

168 In the present case, ARBED has failed to establish in what way the duration of the administrative procedure, which, it is true, was particularly long if account is also taken of the judicial proceedings for annulment of the initial decision, could impede the exercise of its rights of defence and, more particularly, the possibility for it to 'rebut the presumption of liability based on the existence of shareholding links between the only company to have participated in the infringement and [itself], which was raised for the first time only after the proceedings had lasted for 16 years'. In that regard, ARBED merely claimed that 'the evidence which might have been available to [it] in 1990 disappeared after such a period'.

169 It should be added that, contrary to ARBED's contention, the presumption of liability in question was not raised 'for the first time only after the proceedings had lasted for 16 years', but was raised at the stage of the initial decision, which was adopted in February 1994 (see recital 322 to that decision and paragraph 101 above).

170 Notwithstanding that, ARBED did not demonstrate, or even allege, during the first proceedings before this Court that its subsidiary TradeARBED determined its commercial policy independently in such a way as not to constitute, with ARBED, an economic entity and therefore a single undertaking for the purposes of Article 65 CS (see paragraph 94 above).

171 Last, that rebuttable presumption of liability, the principle of which was laid down as long ago as 1983 by the Court of Justice in *AEG-Telefunken* v *Commission*, was amply corroborated in the present case by the additional evidence already referred to by the Commission in the initial decision (see paragraph 96 above) and reiterated by this Court in the judgment of 11 March 1999 in Case T-137/94 *ARBED* v *Commission* (see paragraphs 97 and 98 above).

172 In those circumstances, the fourth plea must be rejected as unfounded in so far as it is put forward by ARBED.

173 It follows from all of the foregoing that the action must be dismissed as unfounded so far as ARBED is concerned, but that it must be upheld so far as TradeARBED and ProfilARBED are concerned.

Costs

174 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

175 In light of the forms of order sought by the parties, the Court therefore decides that, in so far as the present case is between TradeARBED and the Commission and between ProfilARBED and the Commission, the Commission, in addition to bearing its own costs, is to pay the costs incurred by those undertakings. Furthermore, in so far as the present case is between ARBED and the Commission, ARBED, in addition to bearing its own costs, is to pay the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

1. **Annuls Commission Decision C(2006) 5342 final of 8 November 2006 relating to a proceeding under Article 65 [CS] concerning agreements and concerted practices engaged in by European producers of beams (Case COMP/F/**

38.907 — Steel beams) in so far as it concerns ArcelorMittal Belval & Differdange SA and ArcelorMittal International SA;

2. **Dismisses the remainder of the action as unfounded;**

3. **Orders the Commission, in so far as the present case is between ArcelorMittal Belval & Differdange and the Commission and between ArcelorMittal International and the Commission, to bear its own costs and to pay the costs incurred by those undertakings;**

4. **Orders ArcelorMittal Luxembourg SA, in so far as the present case is between it and the Commission, to bear its own costs and to pay the costs incurred by the Commission.**

Forwood Šváby Truchot

Delivered in open court in Luxembourg on 31 March 2009.

[Signatures]

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