

OPINION OF ADVOCATE GENERAL

BOT

delivered on 26 October 2010¹

1. The subject matter of this case is the appeal brought by ThyssenKrupp Nirosta GmbH² against the judgment of the General Court of the European Communities (now ‘the General Court’) of 1 July 2009 in *ThyssenKrupp Stainless v Commission*.³

2. The basis of this case is Commission Decision 2007/486/EC of 20 December 2006 relating to a proceeding under Article 65 of the ECSC Treaty (Case No COMP/F/39.234 – Alloy surcharge – readoption).⁴ By that decision, the Commission of the European Communities found that, from 16 December 1993 to 31 December 1994, Thyssen Stahl AG⁵ had infringed Article 65 CS by amending and applying the reference values in the formula for calculating an alloy surcharge. On that basis, the Commission ordered TKS to pay a fine of EUR 3 168 000.

3. In the judgment under appeal, the General Court dismissed TKS’s applications for annulment of the contested decision and reduction of the fine.

4. Essentially, this appeal raises several questions concerning the application of basic principles of the law on proceedings under competition law. Some of those questions are the same as, or indeed closely related to, those raised in the context of the appeals brought against the judgment of the General Court in *ArcelorMittal Luxembourg and Others v Commission*⁶ in Joined Cases C-201/09 P and C-216/09 P currently pending before the Court of Justice, in which I am also delivering an Opinion.

5. The first question concerns the validity of the legal basis of the contested decision. Having regard to the fact that the ECSC Treaty has expired and to the lack of transitional provisions, the Commission used the provisions

1 — Original language: French.

2 — Formerly ThyssenKrupp Nirosta AG, formerly Thyssen-Krupp Stainless AG, ‘TKS’.

3 — T-24/07 [2010] ECR I-2309, ‘the judgment under appeal’.

4 — OJ 2007 L 182, p. 31, ‘the contested decision’.

5 — ‘Thyssen’.

6 — T-405/06 [2009] ECR II-771.

of Regulation (EC) No 1/2003⁷ as the basis for finding and punishing the infringement of Article 65(1) CS. On this point, I shall advance the view that the General Court was entitled to find that legal basis valid.

6. The second question concerns the scope of *res judicata*. Can the substance be regarded as having been examined, without an *inter partes* hearing? Clearly not. And it is by extending the principle of *res judicata* to a point of law in the judgment which was not the subject of any challenge or debate before it, that the General Court to my mind erred in law. It is intolerable in any legal system for observance of the fundamental requirements for a fair hearing, which include the adversarial principle, to give way to an overextension of the principle of *res judicata*. For these reasons, I shall be proposing that the Court set aside the judgment under appeal.

7. The third question concerns the attributability of the concerted practices. Essentially, the question is whether the Commission was entitled to attribute liability for the infringement committed by another undertaking to

TKS on the basis of a unilateral statement made by TKS. In my view, it is unlawful to attribute liability in this way because to do so disregards the principle of personal liability and leaves out of account the factor which, according to the settled case-law of the Court of Justice, is decisive, namely lack of economic continuity between the two undertakings. I shall also make clear that a public authority such as the Commission, which has responsibility for ensuring application of the principles set out in Article 81 EC, cannot derogate from the rules and principles governing attributability in relation to concerted practices on the basis of private agreements concluded by undertakings.

8. Finally, the fourth question concerns the interpretation of the rules on limitation of actions. The question is whether the Commission can still order Thyssen to pay a fine for the anticompetitive conduct engaged in from 16 December 1993 to 31 December 1994. First, it will be necessary to consider whether, where an action is brought before the Union judicature, suspension of the limitation period has relative effect, that is to say that it applies only to the applicant company, or takes effect *erga omnes*, in which case the suspension of the limitation period during the judicial proceedings applies to all the undertakings which participated in the infringement, whether or not they have brought proceedings. Secondly, it will be necessary to consider the effects of a judgment ordering annulment of a Commission decision on calculation of the limitation period. Following a review of the nature and scope of the suspension of the limitation period, I shall argue that the limitation period in respect of such proceedings ended on 24 April 2002.

⁷ — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1 p. 1).

I — Legal context

automatically void and may not be relied upon before any court or General Court in the Member States.

A — Provisions of the ECSC Treaty

9. Article 65 ECSC provides:

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.

‘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.

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

...

4. Any agreement or decision prohibited by paragraph 1 of this Article shall be

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

B — *Provisions of the EC Treaty*

11. Article 305(1) EC, which was repealed following the entry into force of the Lisbon Treaty, stated:

‘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.’

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.’

14. Article 23(2)(a) of the regulation provides that 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.

15. Article 25 of Regulation No 1/2003 lays down the provisions on limitation periods for proceedings.

C — *Regulation No 1/2003*

12. Regulation No 1/2003, it will be recalled, relates to the implementation of the rules on competition laid down in Articles 81 EC and 82 EC.

13. Article 7(1) of that regulation reads as follows:

‘Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 [EC] or of Article 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such

16. Those rules are substantially identical to those laid down in 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.⁸

17. Pursuant to Article 1(1) and (2) of Decision No 715/78 and Article 25(1) and (2) of Regulation No 1/2003, the limitation period in proceedings expires if the Commission has

8 — OJ 1978 L 94, p. 22. Those rules originated in Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), which does not apply in this case.

not imposed a fine or a penalty within five years from the day on which the infringement ceased.

decision of the Commission is the subject of proceedings before the Court.

18. None the less, under Article 2(1) and (2) of Decision No 715/78 and Article 25(3) and (4) of Regulation No 1/2003, that limitation period may be interrupted by any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement. Such actions include requests for information, authorisations to conduct inspections, the initiation of proceedings and notification of the statement of objections. The interruption applies for all the undertakings which have participated in the infringement.

19. Article 2(3) of Decision No 715/78 and Article 25(5) of Regulation No 1/2003 lay down a final date. They provide that 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 has been suspended.

20. Finally, Article 3 of Decision No 715/78 and Article 25(6) of Regulation No 1/2003 provide that the limitation period in proceedings is to be suspended for as long as the

II — Factual background

21. The facts as they appear in the judgment under appeal may be summarised as follows.

22. On 1 January 1995, Krupp Thyssen Nirosta GmbH, a company incorporated under German law, came into being as a result of a concentration of the stainless steel flat products businesses of Thyssen and Fried Krupp AG Hoesch-Krupp. Thyssen has continued its activities independently in other sectors.⁹

23. On the basis of information requested on 16 March 1995 from several stainless steel producers, the Commission, on 19 December 1995, sent statements of objections to 19 undertakings. After certain undertakings, including TKS and Thyssen, made known their wish to cooperate, the Commission, on 24 April 1997, sent them a fresh statement of objections, to which TKS and Thyssen replied individually.

⁹ — Following a series of changes to the company name, Krupp Thyssen Nirosta GmbH became ThyssenKrupp Stainless AG and then finally ThyssenKrupp Nirosta GmbH.

24. By a letter dated 23 July 1997 addressed to the Commission ('the statement of 23 July 1997'), TKS declared as follows:

'With regard to the abovementioned proceeding [Case IV/35.814 – ThyssenKrupp Stainless], you made a request to the legal representative of [Thyssen] that [TKS] should expressly confirm that it assumed liability for any acts done by [Thyssen] following the transfer of [Thyssen's] stainless steel flat products business, in so far as the stainless steel flat products at issue in these proceedings are concerned, and this also applies to the period dating back to 1993. We hereby expressly give you that confirmation.'

25. By Decision 98/247/ECSC,¹⁰ the Commission found that most producers of stainless steel flat products, including TKS and Thyssen, had infringed Article 65(1) CS by agreeing, in the course of a meeting held in Madrid on 16 December 1993, to increase their prices from 1 February 1994 on a concerted basis.

26. On the basis of the statement of 23 July 1997, the Commission notified the decision to TKS alone. It consequently imposed a

fine in regard not only to TKS's own actions, but also in regard to the facts alleged against Thyssen, for the period from December 1993 to 1 January 1995.

27. On 11 March 1998, TKS brought an action for, inter alia, annulment of the initial decision.

28. By judgment of 13 December 2001 in *Krupp Thyssen Stainless and Acciai speciali Terni v Commission*,¹¹ the General Court annulled the initial decision in so far as it attributed liability to TKS for Thyssen's infringement of Article 65(1) CS, and reduced the fine accordingly. It held that the Commission had not enabled TKS to submit its observations on the facts alleged against Thyssen, and had therefore infringed the rights of the defence of TKS.

29. By judgment of 14 July 2005 in *ThyssenKrupp v Commission*,¹² the Court of Justice dismissed the appeals brought by TKS and the Commission against that judgment.

30. Following exchanges of correspondence with TKS and Thyssen, on 5 April 2006 the Commission sent TKS a new statement of objections. TKS replied on 17 May 2006 and a public hearing took place on 15 September 2006.

10 — Decision of 21 January 1998 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/35.814 – Alloy surcharge) (OJ 1998 L 100, p. 55, 'the initial decision').

11 — Joined Cases T-45/98 and T-47/98 [2001] ECR II-3757.

12 — Joined Cases C-65/02 P and C-73/02 P [2005] ECR I-6773.

31. On 20 December 2006, the Commission adopted the contested decision. TKS is the sole addressee of the decision. According to its preamble, the decision was based, *inter alia*, on the ECSC Treaty and Article 65 CS, as well as on the EC Treaty and Regulation No 1/2003. The operative part of the contested decision provides as follows:

‘Article 1

[Thyssen] has infringed Article 65(1) CS from 16 December 1993 to 31 December 1994 by modifying and applying the reference values used to calculate the alloy surcharge. This has had both the object and the effect of restricting and distorting normal competition within the common market.

Article 2

A fine of EUR 3 168 000 is hereby imposed in respect of the infringement referred to in Article 1.

Since [TKS] has, by the statement of 23 July 1997, assumed liability for the conduct of [Thyssen], the fine is imposed on [TKS].

...’

III — The action before the General Court and the judgment under appeal

32. By application lodged at the Registry of the General Court on 6 February 2007, TKS brought an action for annulment of the contested decision based on Article 230 EC.

33. The action was based on 10 pleas.

34. The first two pleas concerned the legal basis of the contested decision and related to infringement of the principle of *nulla poena sine lege* as a result of the application of Article 65(1) CS after 23 July 2002 and the unlawful nature of the combined application of Regulation No 1/2003 and Article 65 CS respectively.

35. By its third plea, TKS contended that the Court, in the judgment of 14 July 2005 in *ThyssenKrupp v Commission*, made a finding which was *res judicata* that TKS was not responsible for Thyssen’s actions. It then pleaded the unlawfulness of the statement of 23 July 1997 as its fourth plea.

36. By its fifth and sixth pleas, TKS claimed infringement of the principles of legal certainty and *non bis in idem*. By its seventh plea, it alleged infringement of the limitation period rules, claiming that the infringement committed by Thyssen was time-barred. The eighth and ninth pleas were based on infringement of the rights of the defence on

the ground, first, that there was an infringement of the right of access to the file and, secondly, that the statement of objections was unlawful.

37. In the alternative, TKS claimed in its tenth plea that the amount of the fine was calculated incorrectly because the Commission failed to take account of the fact that TKS did not dispute the existence of the infringement as a whole.

38. Paragraphs 37 and 38 of the judgment under appeal state that the parties made submissions at the hearing on 11 December 2008 and that, at the hearing, TKS indicated that the statement of 23 July 1997 had been revoked, of which formal notice was taken in the minutes of the hearing.

39. By the judgment under appeal, the General Court dismissed the application and ordered TKS to pay the costs.

40. Essentially the General Court found that the application of Article 65(1) CS after 23 July 2002 to facts predating that time does not infringe the principle of *nulla poena sine lege* and that, for the purposes of this application, the Commission was entitled to take the view that it had jurisdiction on the basis of Regulation No 1/2003. The General Court found that the Court of Justice, in its judgment of 14 July 2005 in *ThyssenKrupp v Commission*, had held that, by virtue of the statement of 23 July 1997, TKS was liable for the actions of Thyssen and that this was *res judicata*.

41. The General Court found that the legal bases for the penalty and the transfer of liability were determined with sufficient clarity, first, by Articles 7(1) and 23(2) of Regulation No 1/2003 and, secondly, by the statement of 23 July 1997. It dismissed the alleged infringement of the principle of *non bis in idem* because, under the statement, Thyssen's infringement was attributable to TKS. The General Court found that the infringement was not time-barred because the limitation period had to be assessed as regards TKS and it had been suspended during the judicial proceedings relating to the initial decision.

42. Finally, the General Court ruled that the statement of objections was lawful and that the Commission had not infringed TKS's right of access to the file, nor had it erred in failing to take account of the alleged fact that the existence of the infringement was not disputed.

IV — Procedure before the Court of Justice and forms of order sought

43. In support of its appeal, TKS requests that the Court set aside the judgment under appeal, and in the alternative, refer the case back to the General Court, and in the further alternative, that it reduce the amount of the fine imposed on it under Article 2 of the contested decision. It further requests that the Commission be ordered to pay the costs.

44. The Commission contends that the appeal ought to be dismissed and TKS ordered to pay the costs.

47. The third ground is based on a lack of precision both as regards the legal basis of the contested decision and as regards the transfer of liability, which the General Court wrongly found to be precise. By the fourth ground, TKS accuses the General Court of having infringed the provisions governing limitation. The fifth ground concerns infringement of the principles governing the calculation of the amount of the fine.

V — Appeal

45. TKS advances five grounds of appeal, the first being infringement of the principle of *nulla poena sine lege* owing to the application of Article 65(1) CS after 23 July 2002; erroneous application of Article 23 of Regulation No 1/2003 to Article 65(1) CS; infringement of the sovereignty of the States signatory to the ECSC Treaty; and inapplicability to the facts of the present case of the judgment of the General Court in *González y Díez v Commission*.¹³

A — Preliminary observations

48. In order to examine those grounds of appeal it is necessary first of all to recall the nature of the procedure for implementing the competition rules.

46. By its second ground of appeal, TKS argues that the judgment of the Court of 14 July 2005 in *ThyssenKrupp v Commission* did not hold, as *res judicata*, that it was liable for the actions of Thyssen; that the General Court disregarded the scope of the principle of *res judicata*; that it infringed TKS's rights of defence; and that it wrongly found that the statement of 23 July 1997 caused liability to be transferred from Thyssen to it.

49. While this procedure is not *stricto sensu* a criminal matter, it is none the less quasi-criminal in nature. The fines referred to in Article 23 of Regulation No 1/2003 are comparable in nature and size to criminal penalties and the Commission's role, given its investigatory, examination and decision-making functions, is primarily one typical of criminal proceedings against undertakings. In my view, the procedure is therefore covered by 'criminal' within the meaning of Article 6(1) of the European Convention for the protection of human rights and

¹³ — Case T-25/04 [2007] ECR II-3121.

fundamental freedoms¹⁴ and must therefore be subject to the guarantees provided for by the criminal justice component of that provision.¹⁵

by national competition authorities.¹⁹ Indeed, given the aim of competition law (namely to protect economic public policy), the nature of the fines (both preventive and punitive in effect, with no element of compensation for damage) and their size (financial penalty of a high amount), such proceedings must, according to the European Court of Human Rights, be subject to the guarantees provided for in Article 6 ECHR.

50. That view is entirely in line with the case-law of the European Court of Human Rights. That court identifies three criteria when determining whether a charge is criminal in nature, namely the legal classification of the offence in domestic law, the extent to which the penalty is repressive in nature and has a deterrent effect, and the severity of the penalty to which the defendant may be sentenced.¹⁶ The first criterion is of formal and relative value only and the other two are alternatives.¹⁷ The European Court of Human Rights has adopted this reasoning for many administrative penalties,¹⁸ including those imposed

51. That is the course followed by the case-law of this Court. Noting the special nature of litigation in competition cases, the Court applies elementary principles of criminal law and the fundamental principles enshrined in Article 6 ECHR. Thus, in *Commission v Anic Participazioni*,²⁰ the Court recognised the applicability of the principle of personal liability to the competition rules.²¹ Then in *Hüls v Commission*²² the Court referred to the principle of the presumption of innocence enshrined in Article 6(2) ECHR. In that case, the Court held that, given the nature of the infringements in question and the nature and severity of the ensuing penalties, the

14 — Convention signed in Rome on 4 November 1950 ('the ECHR').

15 — On this question see cases currently pending before the Court of Justice *KME Germany and Others v Commission* (C-272/09 P) and *Internationale Fruchthandels-Gesellschaft Weichert v Commission* (C-73/10 P).

16 — See Eur. Court HR, judgment in *Engel and Others v. the Netherlands*, 8 June 1976, §82, series A no 22. For an exposition of the case-law of the European Court of Human Rights in relation to the application of those criteria, see Eur. Court HR, *Jussila v. Finland* [GC], no. 73053/01, §§ 29 to 39, ECHR 2006-XIV.

17 — See Eur. Court HR, *Ezeh and Connors v. the United Kingdom* [GC], 9 October 2003, nos. 39665/98 and 40086/98, §86, ECHR 2003-X.

18 — For example, concerning an administrative penalty imposed following a road traffic accident, see Eur. Court HR, *Öztürk v. Germany*, 21 February 1984, series A no 73; concerning a penalty imposed for a customs offence, see Eur. Court HR, *Salabiaku v. France*, 7 October 1988, series A no 141-A; concerning a penalty imposed by the French Financial Markets Board, see Eur. Court HR, *Didier v. France* (dec.) no. 58188/00, ECHR 2002-VII; concerning a tax surcharge imposed in the context of a reassessment by the authorities, see Eur. Court HR, *Jussila v. Finland*; and in relation to a reprimand given by the French Banking Commission, see Eur. Court HR, *Dubus S.A. v. France*, no. 5242/04, 11 June 2009.

19 — In this connection, see Eur. Commission HR, *Melchers and Co. v. Germany*, 9 February 1990, and *Société Stenuit v. France*, 30 May 1991; Eur. Court HR, *Lilly v. France* (dec.), 3 December 2002. See also Eur. Court HR, *Jussila v. Finland*, § 43, and *Dubus S.A. v. France*, § 35, and, for an isolated interpretation, Eur. Court HR, *OOO NESTE and Others v. Russia*, 3 June 2004.

20 — Case C-49/92 P [1999] ECR I-4125.

21 — Paragraph 78. That case-law has been confirmed (see Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 77).

22 — Case C-199/92 P [1999] ECR I-4287.

principle of the presumption of innocence applies to procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.²³

1. Arguments of the parties

52. Those facts demonstrate to the requisite legal standard that, in considering this appeal, particular attention should be paid to observance of the fundamental safeguards in Articles 47 to 49 of the Charter of Fundamental Rights of the European Union²⁴ and to Article 6 ECHR.

54. The first ground of appeal is divided into four parts: first, infringement of the principle of *nulla poena sine lege* owing to Article 65(1) CS having been applied after 23 July 2002; secondly, the unlawful character of the combined application of Article 23 of Regulation No 1/2003 and Article 65(1) CS; thirdly, infringement of the sovereignty of the States signatory to the ECSC Treaty; and, fourthly, the inapplicability of the judgment in *González y Díez v Commission*, cited above, to which the General Court refers in the judgment under appeal.

B — *First plea in law: no legal basis for the contested decision*

(a) First part: infringement of the principle of *nulla poena sine lege* owing to Article 65(1) CS having been applied after 23 July 2002

53. TKS essentially maintains that, owing to the expiry of the ECSC Treaty on 23 July 2002, the Commission lost its jurisdiction to penalise an infringement of Article 65 CS, and that there is no legal provision empowering the Commission to apply that article.

55. TKS argues that to base a decision on Article 65 CS after 23 July 2002 in order to punish infringements which ceased before the expiry of the ECSC Treaty infringes the principle of legality of criminal offences and penalties. To accept that certain practices which came under the ECSC Treaty now come under the EC Treaty because of the continuity of the law of the Union would run counter to the principles of the Vienna

²³ — Paragraph 150.

²⁴ — OJ 2010 C 83, p. 389, 'the Charter'.

Convention on the Law of Treaties²⁵ and be tantamount to accepting an interpretation by analogy of the provisions of criminal law.

56. Because the ECSC Treaty has expired and there are no transitional provisions for Article 65 CS, the Commission, as from 23 July 2002, no longer enjoys any jurisdiction under that article. The question of the correspondence between Articles 65 CS and 81 EC and the application of the *lex specialis* are therefore no longer relevant in the present case.

57. In the first place, the Commission considers that the ECSC and EC Treaties come within a single legal order, in the context of which the ECSC Treaty constituted a *lex specialis* in relation to the EC Treaty. Thus, the principle of *nulla poena sine lege* has been observed since, after the expiry of the ECSC Treaty, the same concerted practices are still prohibited by a rule identical in substance to Article 65 CS, namely Article 81 EC. Accordingly, pursuant to the general principles of the law governing temporal application of the law, and subject to the principle of *lex mitior*, it is the law in force at the time of the facts which must be applied.

58. Secondly, the Commission considers it still has jurisdiction to apply Article 65(1) CS. The EC and ECSC Treaties constitute a single legal order, having regard to the single

prohibition system for infringements of the competition rules, to the fact that the Commission has sole jurisdiction in this field, and to the relationship of *lex specialis* and *lex generalis* of the two treaties, characterised, in particular, by the general nature of the prohibition on agreements, decisions and concerted practices laid down in Article 81 EC. The general principles of law apply to this legal order, in particular those governing the temporal application of the law, which justifies the maintenance of the Commission's jurisdiction notwithstanding the expiry of the ECSC Treaty.

(b) Second part: unlawfulness of the combined application of Article 23 of Regulation No 1/2003 and Article 65(1) CS

59. First of all, TKS infers from the expiry of the ECSC Treaty that there is no legal basis for penalising an infringement of Article 65(1) CS. It notes the prohibition on interpretation by analogy in the law on criminal penalties and argues that the General Court made such an interpretation in recognising that the Commission may rely on Article 23 of Regulation No 1/2003 to punish infringements of the ECSC Treaty.

25 — *United Nations Treaty Collection*, vol. 1155, p. 331.

60. Secondly, TKS points out that it is not for the European Union judiciary to fill a legal vacuum resulting from the absence of any transitional provision covering Article 65 CS.

interpretation of criminal provisions in its case-law.²⁶

(c) Third part: infringement of the sovereignty of the States signatory to the ECSC Treaty

61. Thirdly, it considers that, having regard to the principle of the allocation of powers, the Commission's powers defined in the EC Treaty are strictly limited to that Treaty. By holding that Article 23(2) of Regulation No 1/2003, as a procedural rule, is applicable in the present case, the General Court erred in law. Further, the principles of the temporal application of the law no longer apply given that the Commission has lost all jurisdiction to penalise infringements of Article 65 CS.

63. TKS considers that the judgment under appeal infringes the sovereignty of the States signatory to the ECSC Treaty in so far as, when the Treaty expired, jurisdiction to impose penalties in the field it covers reverted to the Member States, since the States signatory conferred the power to impose penalties on the Commission only up to that date.

62. The Commission considers that the General Court correctly applied the principles of the temporal application of the law. The *lex generalis* status of Article 81 EC means that Article 23 of Regulation No 1/2003 is of general application, rendering superfluous any transitional provision relating to Article 65 CS. In addition, by relying on that provision for its jurisdiction the Commission did not infringe any general principles of interpretation, given that the question of correct jurisdiction is one that has no bearing on the principle of the legality of penalties and given that the Court has already upheld a teleological

64. The Commission doubts whether as a legal person under private law TKS is entitled to invoke such a violation. Because of continuity within a single legal order, the Member States, which unanimously confirmed the contested decision within the consultative committee, never possessed or recovered jurisdiction to punish agreements in the sector in question. TKS is therefore seeking to obtain impunity in old cases, which is incompatible with the importance of the prohibition on concerted practices.

²⁶ — Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405.

(d) Fourth part: inapplicability of the judgment in *González y Díez v Commission*

infringement of Article 65(1) CS by relying as the basis for its jurisdiction on the provisions of Regulation No 1/2003 which, I would recall, is the regulation implementing Article 81 EC.

65. TKS takes the view that the reference by the General Court to *González y Díez v Commission* is irrelevant because the subject matter of the case (State aid) and the effects of distortion of competition are not comparable with the present case. In addition, the infringement in question does not produce effects for the future.

68. Indeed, in the present case, the Commission relied on Article 7(1) of Regulation No 1/2003 in finding an infringement. In addition, the Commission based itself on Article 23(2) of that regulation in order to impose a fine on TKS. None the less, the Commission calculated the amount of the fine by reference not to the method of calculation used in the latter provision, but to the method laid down in Article 65(5) CS, in accordance with the principle of *lex mitior*.

66. The Commission considers that certain aspects of the present case and *González y Díez v Commission* are comparable to the extent that, in both cases, all the facts occurred before expiry of the ECSC Treaty, but the procedure for the recovery of the aid or the penalty took place after 23 July 2002. In addition, in both cases, the distortions of competition could have adverse effects for the future.

69. This is not the first time that the Commission has relied on a combination of substantive law and procedural law derived from the EC and ECSC Treaties. It has done so in two other cases.²⁷

2. My assessment

67. I shall examine the four parts of the first ground of appeal together. TKS is essentially asking the Court to decide whether, after the expiry of the ECSC Treaty, the Commission was entitled to find and penalise an

70. It did so where there was no transitional provision enabling it to establish and penalise an infringement of Article 65(1) CS after the expiry of the ECSC Treaty. Therefore, if it fails to adopt a decision before the expiry of the Treaty, owing to late discovery of

²⁷ — *González y Díez v Commission*, which has not been appealed, and Case T-405/06 *ArcelorMittal Luxembourg and Others v Commission* [2009] ECR II-771, which is the subject of appeals currently pending before the Court of Justice (Joined Cases C-201/09 P and C-216/09 P).

anticompetitive practices or, as is the situation in the present case, where the initial decision is set aside, there is no provision enabling it to ensure observance of the rights and obligations flowing from that provision.

71. Next, neither of the two regulations implementing the Community competition rules refers to situations which occurred under the aegis of the ECSC Treaty, whether Regulation No 17 of the Council of 6 February 1962,²⁸ or Regulation No 1/2003. Only the Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty²⁹ refers to such a situation. Paragraph 31 of that communication provides 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 ...’

72. Because of that lacuna, the Commission adopted an initial solution which the General Court rejected in *SP v Commission*,³⁰ *Riva Acciaio v Commission* (T-45/03), *Feralpi Siderurgica v Commission* (T-77/03) and *Ferriere Nord v Commission* (T-94/03). In each of these cases, the Commission based its jurisdiction exclusively on the provisions of the ECSC Treaty, despite the expiry of the latter. Thus, in the decision adopted on 17 December 2002 in regard to Ferriere Nord SpA, the Commission relied on Article 65(4) CS in order to establish an infringement of Article 65(1) CS and on Article 65(5) CS to impose a fine on the undertaking.

73. The General Court annulled all those decisions for lack of jurisdiction. In particular, it recalled that under the case-law of the Court of Justice,³¹ the provision constituting the legal basis of a measure and empowering the Community institution to adopt the measure in question must be in force at the time of its adoption.

74. The Commission did not appeal in any of those cases.

28 — Regulation No 17 of the Council, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

29 — OJ 2002 C 152, p. 5.

30 — Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 [2007] ECR II-4331.

31 — See Case C-269/97 *Commission v Council* [2000] ECR I-2257, in which the Court held that ‘Community measures must be adopted in accordance with the Treaty rules in force at the time of their adoption’ (paragraph 45).

75. In this case, the Commission is therefore presenting a new solution, by relying as the basis for its decision on a combination of substantive law derived from the ECSC Treaty and procedural law derived from the EC Treaty, in force at the time of the adoption of the contested decision.

76. In the judgment under appeal, the General Court confirmed the lawfulness of that combination by applying a teleological interpretation of the rules established by the Union legislature. In recognising that the Commission had the power to adopt such a decision, the General Court set out its reasoning in three stages. First of all, in paragraphs 75 to 79 of the judgment under appeal, it set out the nature and scope of the ECSC Treaty within the legal order of the European Union. Then, in paragraphs 80 to 84 of the judgment, it referred to the coherence and identity of the objectives pursued by the two Treaties, applying the rules of interpretation laid down by the Court of Justice. Finally, at paragraphs 85 to 89 of the judgment, the General Court verified that the Commission had acted in observance of the principle of lawfulness and, in particular, the principles governing the temporal application of the law.

77. In this Opinion I shall, like the General Court, argue that that legal basis is valid and I shall follow the same lines of reasoning as that Court.

78. Within the legal order of the European Union, the ECSC Treaty constitutes a regime specific to the steel and coal sectors which derogates from the general-purpose rules

established in the context of the EC Treaty. The relationship between the two treaties was settled in Article 305 EC. The effect of that provision was to exclude application of the EC Treaty and secondary legislation enacted on the basis thereof to goods falling within the steel and coal sectors where the issues raised were the subject of specific rules established in the context of the ECSC Treaty.³²

79. None the less, in the absence of specific provisions, the EC Treaty and the rules for its application applied to products falling within that sectoral community³³ and, following its disappearance on 23 July 2002, the general scope of the EC Treaty was extended to sectors initially governed by the ECSC Treaty.

80. The succession of the legal order established by the EC Treaty to that of the ECSC Treaty occurred in the context of a 'functional' unity between the two communities.³⁴ Very early on, the Court of Justice recognised the existence of a single legal order.³⁵ It has also recognised the continuity of the legal system and stated that, unless the Union legislature indicates otherwise, the continuity of the

32 — See Case C-408/04 P *Commission v Salzgitter* [2008] ECR I-2767, paragraph 88 and the case-law cited.

33 — See Case C-18/94 *Hopkins and Others* [1996] ECR I-2281, paragraph 14 and the case-law cited.

34 — Joined Cases 27/59 and 39/59 *Campolongo v High Authority* [1960] ECR 391, at 405.

35 — See Opinion 1/91 [1991] ECR I-6079, paragraph 21.

legal system must be maintained in the event of a change of legislation.³⁶

various national courts, whose interpretations might differ, and the Court ... were to have no power to ensure that such rules were given a uniform interpretation [³⁹].⁴⁰

81. The judgments in *Busseni*³⁷ and *Lucchini*³⁸ on which the General Court bases its reasoning illustrate how the Court of Justice views that functional unity between the two treaties. Those two cases concerned the jurisdiction of the Court of Justice to give a preliminary ruling on the interpretation of the rules of the ECSC Treaty.

82. The first case covered the situation in which, unlike Article 234 EC, such jurisdiction was not expressly provided for in Article 41 CS. In order to fill that lacuna, the Court went beyond the textual differences between the two provisions and based its reasoning on the common objectives pursued by them and on the objectives and coherence of the treaties. It thus stated as follows: '[i]t would ... be contrary to [those] objectives and [that] coherence ... if the determination of the meaning and scope of rules deriving from the [EC] and EAEC Treaties were ultimately a matter for the Court of Justice ..., but such jurisdiction in respect of rules deriving from the ECSC Treaty *were to be retained exclusively by the*

83. The Court then applied that reasoning in the *Lucchini* case. That case concerned the situation in which, as a result of the expiry of the ECSC Treaty, the Court lost its jurisdiction to determine questions referred for a preliminary ruling on the interpretation and application of that treaty. The Court, acknowledging that Article 41 CS no longer in fact applied, held that it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the Community legal order if the Court did not have jurisdiction to ensure uniform interpretation of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that treaty.⁴¹

84. It is on the basis of that case-law that the General Court recognised the Commission's jurisdiction to bring proceedings. Beyond the differences in the wording of Articles 65(1) CS and 81 EC, the General Court has stated that those two provisions are interpreted in the same way by the Union judicature and pursue the same objectives.

36 — Case 23/68 *Klomp* [1969] ECR 43, paragraph 13.

37 — Case C-221/88 [1990] ECR I-495, paragraphs 8 to 16.

38 — Case C-119/05 [2007] ECR I-6199.

39 — My italics.

40 — *Busseni*, paragraph 16.

41 — *Lucchini*, paragraph 41.

85. The wording of Articles 65(1) CS and 81(1) EC is indeed sufficient to establish that the Member States intended to retain the same rules and field of intervention for the Communities. Although they may differ in wording, those provisions both express the same requirements, namely of establishing a common market where there is healthy and effective competition, and, to that end, prohibiting agreements whose purpose or effect is to distort normal competition. As the General Court pointed out, the continuity of undistorted competition in the steel and coal sectors has therefore not been interrupted as a result of the expiry of the ECSC Treaty, it has merely continued in the context of the EC Treaty. In addition, Articles 65(1) CS and 81(1) EC protect the same legal interests. With regard to procedures, the two provisions are based on similar premises⁴² and their implementation falls under the aegis of the same authority, namely the Commission.

86. In those circumstances, and subject to the principles governing the temporal application of the law, it seems to me that the General Court was entitled to conclude that the continuity of the Community legal order and the objectives which govern its functioning require that, in so far as it succeeded the

European Coal and Steel Community, the European Community ensures, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied to both Member States and individuals under the ECSC Treaty.⁴³ To hold that the Community lacked that capacity following the expiry of the ECSC Treaty therefore seems to me contrary to the purpose and coherence of the treaties as intended by the Union legislature, and irreconcilable with the continuity of the Community legal order recognised by the Court.

87. That interpretation cannot of course stand unless the Community, here represented by the Commission, acts in observance of the general principles governing the temporal application of the law.⁴⁴ Those principles, as set out by the General Court at paragraph 85 of the judgment under appeal, are as follows.

88. Procedural rules are generally held to apply to all disputes pending at the time when they enter into force. In other words, the Commission must act against the infringement

42 — In this connection, it is interesting to note that in accordance with the Guidelines laid down in 1998 by the Union legislature, calculation of the fine imposed on an undertaking which has infringed Article 65(1) CS or Article 81(1) EC is based on the criteria set out in the context of the EC Treaty, namely the gravity and duration of the infringement (see Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty) (OJ 1998 C 9, p. 3).

43 — Paragraph 83 of the judgment under appeal.

44 — See Case C-450/06 *Varec* [2008] ECR I-581, in which the Court stated that procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (paragraph 27).

committed under the ECSC Treaty in the form and according to the procedure prescribed by the provisions in force at the date of its decision, that is, those provided for in the context of Regulation No 1/2003.

under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

89. The same is not true, on the other hand, of substantive rules. These are not retroactive unless the Union legislature provides to the contrary.⁴⁵ The applicable substantive law therefore remains that in force at the time when the infringement was committed. That rule safeguards legal certainty for individuals, for whom it is quite simply essential that they be in a position to determine where the limits of their individual freedom lie without being subsequently taken by surprise in their conclusions by a retroactive law.

90. That rule is derived from the principle, enshrined in Article 49(1) of the Charter and in Article 7(1) ECHR, of the legality of criminal offences and penalties.

91. Article 49(1) of the Charter provides as follows:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence

92. The analysis carried out by the General Court at paragraph 89 of the judgment under appeal seems to me fully consistent with that principle. Article 65(1) CS, which defines the infringement, was the substantive rule which applied and was in fact applied by the Commission. The contested decision related to a legal situation which had definitively been perfected before the expiry of the ECSC Treaty, having subsisted from 16 December 1993 to 31 December 1994. In addition, having regard to the fact that is a *lex specialis*, the ECSC Treaty and the rules adopted for its implementation were indeed the only rules applicable to situations of that kind which arose before its expiry. Finally, as the General Court indicated, in no sense did the Union legislature provide for retroactive application of Article 81 EC after the expiry of the ECSC Treaty.

93. In adopting the contested decision, the Commission therefore punished an act which constituted an infringement at the time when it was committed. When the infringement was committed between 16 December 1993 and 31 December 1994, it was clearly and precisely defined in Article 65(1) CS. In addition, the infringement was punishable by a penalty clearly set out in Article 65(5) CS.

⁴⁵ — By way of exception to this rule, the Court considers that substantive rules may cover situations which arose prior to their entry into force where examination of their wording, purpose or scheme enables such effect to be attributed to them (*Varec*).

The undertakings were therefore fully cognisant of the consequences of their acts, both in the context of the first procedure that led to the adoption of the initial decision and in the context of the present procedure. Finally, let us not forget that in the very particular context of readoption of a decision, TKS could not legitimately rely on the expiry of the ECSC Treaty to escape punishment by the Commission (in so far as the infringement committed by Thyssen is attributable to it).

seems to me that that provision constitutes a substantive rule.

96. None the less, I understand that, in the particular context of the present case, the Commission was relying on the provision for the power to punish TKS. As regards the amount of the fine, the Commission, under the principle of *lex mitior* set out in Article 49(1) of the Charter, calculated the amount in accordance with Article 65(5) CS in order that TKS might benefit from the lighter penalty.

94. So, with regard to the rules of procedure, we know that, in the context of the implementation of Article 81 EC, the provisions empowering the Commission to adopt a decision finding an infringement and to punish infringing undertakings in Article 81 EC are, since the entry into force on 1 May 2004 of Regulation No 1/2003, Articles 7(1) and 23(2) of that Regulation respectively. Taking the view that those provisions constitute procedural rules, the General Court therefore endorsed their immediate application.

97. In the light of the foregoing, it seems to me that the General Court did not therefore err in law in holding that the Commission could, in a situation such as that in question, rely on Articles 7(1) and 23(2) of Regulation No 1/2003 to find and penalise concerted practices in the sector covered by the scope of the ECSC Treaty.

95. It is on this last point that I depart from the analysis of the General Court. Article 23(2) of Regulation No 1/2003 not only empowers the Commission to impose a fine, it also sets the amount of the fine. It therefore

98. I must, however, point out that, contrary to the statement of the General Court at paragraph 84 of the judgment under appeal, the Commission was entitled to act in this way not after 23 July 2002, the date on which the ECSC Treaty expired, but from 1 May 2004, the date on which Regulation No 1/2003 entered into force.

99. That error does not, however, have any consequence on the outcome of the dispute.

100. In the light of the all those considerations, I propose that the Court dismiss the first ground of appeal as unfounded.

misinterpreted paragraph 88 of the Court's judgment in *ThyssenKrupp v Commission*. In TKS's view, in that paragraph the Court found that TKS was not substantively liable for the actions of Thyssen, and that matter is now *res judicata*. Consequently, the Commission could not validly impose a fine for Thyssen's unlawful conduct.

C — *Second ground of appeal: infringement of the principle of res judicata with regard to the attributability to TKS of liability for the actions of Thyssen*

1. Arguments of the parties

101. In the second ground of appeal, TKS maintains that the General Court erred in law in holding that the question of the attribution of liability to it for the acts committed by Thyssen was *res judicata*.

102. This ground of appeal is divided into three parts.

103. In the context of the first part, TKS is essentially arguing that the General Court

104. The Commission considers that TKS is distorting the judgment under appeal. In fact, as the General Court held, the Court of Justice recognised that in view of the statement of 23 July 1997 the Commission was entitled to attribute liability for Thyssen's actions to TKS. In addition, TKS's interpretation runs counter to the purpose of the cross-appeal brought before the Court of Justice. That appeal was limited to the matter of the waiver of the right to be heard. Thus, the Court was not bound to consider the substance of the statement of assumption of liability.

105. In the second part, TKS claims that the General Court infringed the principle of *res judicata* in extending the scope of *res judicata* beyond the subject of the case in the previous procedure. The subject of that procedure was limited to infringement of TKS's rights of defence in connection with the adoption of the initial decision. TKS maintains that *res judicata* could not therefore be a bar to any appeal against a fresh decision, in which it could argue that the statement of 23 July 1997 was unlawful. In this respect, TKS notes that

the facts relating to the alleged transfer to it of liability for Thyssen's acts have changed in the light of the revocation of that statement between the initial decision and the contested decision.

106. TKS also argues that, in so doing, the General Court infringed TKS's rights of defence by depriving it of the possibility of advancing pleas not hitherto advanced.

107. The Commission is of opinion that TKS's arguments contradict those presented at first instance, when it argued that the European Union judicature had already definitively settled the question of transfer of liability. This ground of appeal is therefore novel and thus inadmissible at the stage of appeal.

108. In addition, according to settled case-law, *res judicata* attaches to points of fact and law which have actually or necessarily been settled by the judgment in question. The Commission points out that in both the proceedings brought against the initial decision and those which gave rise to the judgment under appeal it was necessary to consider whether it could, on the basis of the statement of 23 July 1997, attribute liability to TKS for the infringement committed by Thyssen.

109. The statement of 23 July 1997 was therefore the subject of the dispute in these proceedings and, at paragraphs 59 and 62 of the judgment in *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission*, the General Court made a finding that liability could be attributed, which was not challenged on appeal and was moreover upheld on the substance by the Court of Justice. Since it is bound by Article 233 EC to take the necessary measures to comply with the judgment of the Court of Justice, the Commission was required to take those findings into consideration. In addition, since the contested decision was adopted in the same administrative proceedings as the initial decision, TKS cannot submit different statements on the same facts.

110. The Commission maintains that it was no longer lawfully possible to withdraw the statement of 23 July 1997 because the contested decision had been adopted in the meantime.

111. In the context of the third part, TKS argues that it was unlawful for the Commission to transfer liability based on the statement of 23 July 1997. First, that statement was intended to apply to civil liability actions brought against Thyssen only. Secondly, as regards application of the competition rules, TKS is not Thyssen's successor in law, which, in accordance with the case-law, does not allow a transfer of liability. Thirdly, such a transfer infringes the principle of *jus publicum privatorum pactis mutari non potest*, under which

a private agreement cannot alter legal consequences arising under public law.

could be sabotaged, for example, because of a lower turnover or financial distress on the part of the undertaking assuming liability.

112. The Commission disagrees with those arguments. First of all, it points out that TKS only revoked the statement of 23 July 1997 before the General Court, during the proceedings against the contested decision. The revocation was effected in such a way that the time-limit had expired in respect of acts committed by Thyssen.

2. My assessment

115. Before beginning an analysis of the second ground of appeal, it is necessary to recall the reasoning adopted by the General Court in the judgment under appeal, and the stages of the procedure.

113. Secondly, all parties were aware that this was not an assignment of a civil debt but an assumption of liability for the infringement in light of the fine. That is clear from the wording used by TKS and the findings of fact made by the Union judicature in the proceedings brought against the initial decision.

(a) The judgment under appeal

114. Thirdly, Article 23(2) of Regulation No 1/2003 is no bar to an undertaking which has acquired a business in circumstances such as those at issue being fined if it has clearly stated to the Commission that it wishes to assume liability for the concerted practice. That situation is not, in the Commission's view, comparable to a statement addressed to it and informing it that it is assuming liability in a manner agreed bilaterally between two undertakings. By such a transfer of liability, the Commission's enforcement jurisdiction

116. In the judgment under appeal, the General Court found that the issues relating to the validity of the statement of 23 July 1997 and the lawfulness of attributing liability for Thyssen's acts to TKS had been definitively resolved by the Union judicature and that they were therefore now *res judicata*.

117. To this end, the General Court considered the scope of the judgments delivered in the proceedings against the initial decision.

118. First of all, at paragraph 114 of the judgment under appeal, the General Court examined the scope of its judgment of 13 December 2001 in *Krupp Thyssen Stainless and Acciai speciali Terni v Commission*. It thus started from the premiss that ‘the *finding as to the validity of the statement of 23 July 1997* by which TKS had confirmed that it assumed liability for Thyssen’s conduct *was a necessary precursor* to the discussion and subsequent conclusion by the General Court of an infringement of TKS’s rights of defence.’⁴⁶

119. That ‘finding’ appears at paragraph 62 of the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni v Commission*. It is worded as follows:

‘... it is undisputed that, in view of the statement [of] 23 July 1997, the Commission was, by way of exception, entitled to impute to [TKS] liability for the unlawful conduct of which [Thyssen] was accused ... [⁴⁷]. It must be concluded that such a statement, which in particular takes account of economic considerations specific to concentrations of undertakings, implies that the legal person within whose sphere of liability the business of another legal person was brought after the date of the infringement deriving from that business should be required to be answerable for it, even though, in principle, it is incumbent

upon the natural or legal person running the undertaking concerned at the time of the infringement to answer for it.’

120. Next, the General Court, at paragraphs 116 to 138 of the judgment under appeal, examined the scope of the judgment of the Court of Justice of 14 July 2005 in *ThyssenKrupp v Commission*.

121. In this connection, it focussed on paragraph 88 of that judgment. That paragraph addresses the plea raised by the Commission in its cross-appeal. The cross-appeal challenged the General Court’s conclusion that the Commission had failed to observe TKS’s rights of defence. In particular, it criticised it for not having taken account of the exceptional circumstances enabling it to attribute liability for Thyssen’s acts directly to TKS.

122. Paragraph 88 of the judgment in *ThyssenKrupp v Commission* is worded as follows:

‘As regards the alleged exceptional circumstances relied on by the Commission [to enable it to impute liability for Thyssen’s acts to TKS], it need merely be pointed out in the first place that TKS is not the economic successor of Thyssen, the latter having continued to exist as a separate legal person until

46 — My italics.

47 — My italics

the date of adoption of the [initial] decision. Secondly, such unity of action as may have characterised the conduct of Thyssen and of TKS after 1 January 1995 does not suffice to justify imputing to TKS conduct engaged in by Thyssen before that date, by reason of the principle ... according to which a legal person may be penalised only for acts imputed to it individually. As regards, finally, the statements allegedly made by TKS concerning Thyssen's activities during the administrative procedure, it has already been stated ... that they do not enable liability for Thyssen's conduct prior to that date to be attributed to TKS.

of 23 July 1997 as a legal basis for imputing Thyssen's conduct to [TKS] and for the subsequent penalty imposed on the latter, *has already been considered and definitively settled by the Community judicature and is therefore res judicata*.⁴⁸ At paragraph 145 of that judgment the General Court therefore held that '[t]hat principle of *res judicata* precludes that point of law from being resubmitted to the [General Court] for consideration' and accordingly rejected the plea that the transfer of liability was unlawful as inadmissible.

123. The Court therefore dismissed the plea raised by the Commission in support of its cross-appeal.

(b) My assessment

124. In the judgment under appeal, the General Court noted that the sole purpose of that paragraph was to respond to the Commission's argument as to the existence of exceptional circumstances and it did not admit of the conclusion that TKS could not, in the view of the Court of Justice, be held liable for the actions of Thyssen.

126. Like TKS, I take the view that the General Court's analysis on this issue is vitiated by several errors of law.

127. First, I consider that the General Court misinterpreted paragraph 88 of the judgment of the Court of Justice in *ThyssenKrupp v Commission*.

125. Accordingly, at paragraph 139 of the judgment under appeal, the General Court held that 'the Community judicature took the view that the Commission was – exceptionally – entitled, in view of the statement of 23 July 1997, to attribute to TKS liability for the conduct imputed to Thyssen' and, at paragraph 144 of the judgment, that 'the point of law ... regarding the validity of the statement

128. In that paragraph the Court of Justice to my mind very clearly rejected the finding of the General Court at paragraph 62 of *Krupp*

⁴⁸ — My italics.

Thyssen Stainless and Acciai Speciali Terni v Commission as to the alleged existence of exceptional circumstances. A mere reading of paragraph 88 of the judgment in *Thyssen-Krupp v Commission* is sufficiently persuasive. Accordingly, the General Court was not entitled to take the view, at paragraph 139 of the judgment under appeal, that 'the Community judicature' was endorsing the attribution of liability. That in my view constitutes a first error of law.

129. Secondly, I consider that the General Court did not correctly apply the principle of *res judicata* inasmuch as the questions as to the validity of the statement of 23 July 1997 and the lawfulness of the transfer of liability were not the subject of adversarial argument between the parties in the earlier proceedings.

130. The Court of Justice has recognised the fundamental importance, both in the legal order of the Union and in the national legal orders, of the principle of observance of *res judicata*.⁴⁹ This principle is an expression of the principle of legal certainty.⁵⁰ It guarantees

the stability of the law and of legal relations as well as the proper administration of justice. Judicial decisions which are no longer subject to appeal become irrefutable in social relations and become legal facts. Those facts must be respected.

131. It is generally accepted that *res judicata* only applies in regard to those matters which were the subject of the decision. The thing claimed must be the same, the proceedings must be based on the same cause of action and be between the same parties. The principle of *res judicata* is thus a bar to the parties bringing a claim before the courts which is identical to one whose merits or otherwise have already been determined, and therefore prevents endless challenges to situations which have already been settled.

132. The Court of Justice has recognised that *res judicata* attaches not only to the operative part of a judicial decision, but also to the *ratio decidendi* which is inseparable from it. Thus, it states under settled case-law that '*res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question'.⁵¹ Contrarily, unless I am mistaken, the Court has not ruled on the limits of the scope of *res judicata* where

49 — See Case C-526/08 *Commission v Luxembourg* [2010] ECR I-6151, paragraph 26 and the case-law cited.

50 — Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 46. See also Eur. Court HR, *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII, in which the court plainly stated that legal certainty requires that 'where the courts have finally determined an issue, their ruling should not be called into question' (§ 61).

51 — See *Commission v Luxembourg*, paragraph 27 and the case-law cited.

the procedural guarantees for a fair hearing have not been observed.

133. That, however, is the subject-matter of the present case. In the judgment under appeal, the General Court extended the application of *res judicata* to a *ratio* which was not the subject of challenge before it and which, furthermore, was not the subject of adversarial argument between the parties. In my view such an interpretation of the principle of *res judicata* constitutes an error of law, inasmuch as it violates the procedural guarantees essential to the conduct of a fair hearing and, in particular, the adversarial principle.

134. Indeed, can one reasonably accept that *res judicata* extends to a *ratio decidendi* touching on the substance of procedural rights even where the parties have not effectively engaged in argument?

135. The right to a fair hearing is a fundamental principle of European Union law⁵² which is related to observance of rights of the defence and the right to a fair hearing which is enshrined both in Article 47 of the Charter and in Article 6 ECHR.

136. The Court reaffirmed the importance and limits of that principle in *Commission v Ireland and Others*.⁵³ The adversarial principle applies to all proceedings that may lead to a decision of a Community institution which has an appreciable effect on the interests of a person. Therefore, it applies before the European Union judicature. In addition, it is intended to benefit all the parties to a dispute, both individuals and the Member States or institutions.

137. According to the Court of Justice, the adversarial principle confers on each party to an action the right to take cognisance of the points on which the court is to base its decision and to be able to discuss them. This enables the court to be better informed. Submitting all the points likely to affect the outcome of the case to *inter partes* argument thus enables the court to rule entirely impartially and in full knowledge of all matters of fact and law. It also constitutes the basis for the confidence that individuals must have in the legal system. That confidence presupposes that the parties must be confident that they have been able to make submissions on all the points on which the court has based its decision.

⁵² — Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paragraph 61.

⁵³ — C-89/08 P [2009] ECR I-11245, paragraphs 50 to 59. For a summary of the content of that principle, see points 87 to 107 of my Opinion in that case.

138. That case-law is consistent with the interpretation by the European Court of Human Rights of the right to an *inter partes* hearing. That right is part of the right to a fair hearing provided for by Article 6 ECHR and, to the extent that the ECHR seeks to safeguard specific and effective rights, it imposes an obligation on all courts, *inter alia*, to engage in a proper examination of the submissions, arguments and evidence provided by the parties.

139. The adversarial principle not only confers on all parties the right to take cognisance of the evidence and submissions presented to the court and to discuss them, but also, as the Court expressly held in *Commission v Ireland and Others*, the 'right for the parties to be apprised of pleas in law raised by those Courts of their own motion, on which they intend basing their decisions, and to discuss them'. According to the Court, in order to meet the requirements relating to the right to a fair hearing, the parties must be apprised of, and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings. Accordingly, except in particular cases such as, *inter alia*, those provided for by the rules of procedure of the Union judicature, those courts cannot base their decisions on a plea raised of their own motion, even one involving a matter of public policy, without first having invited the parties to submit their observations on that plea.

140. The Court infers that obligation from the case-law of the European Court of Human Rights under which a court must itself observe the rule that the parties should be heard, in particular, when it decides a dispute on a ground it has identified of its own motion.⁵⁴

141. In this case it is clear from the wording of paragraph 62 of the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* that the General Court raised of its own motion the lawfulness of the transfer of liability by the Commission.⁵⁵ Indeed, as the General Court points out at paragraph 114, last indent, of the judgment under appeal, the finding as to the validity of the statement of 23 July 1997 was a necessary precursor to the subsequent finding of an infringement of the rights of the defence.

142. None the less, this point of law did not form the subject-matter of any actual discussion between the parties. First of all, it was not a matter of contention on which the parties took issue before the court. The parties did not therefore argue it. Secondly, the General Court did not invite the parties to submit

⁵⁴ — *Commission v Ireland and Others*, paragraph 54.

⁵⁵ — In that paragraph the General Court stated that 'it is undisputed that, in view of the statement [of] 23 July 1997, the Commission was, by way of exception, entitled to impute to [TKS] liability for the unlawful conduct of which [Thyssen] was accused [and it] must be concluded that such a statement, which in particular takes account of economic considerations specific to concentrations of undertakings, implies [such a transfer]'.

observations when it raised that point of law of its own motion.

immediately and with certainty, what is *res judicata*, in so far as it constitutes a fundamental principle of law, and a source of certainty and stability? In reality, the Court of Justice was never asked to rule on the lawfulness of such a statement.

143. Yet the lawfulness of the transfer of liability was a decisive issue as regards the outcome of the proceedings. Nor was it obvious how to resolve it. The terms employed by the General Court in *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission* and the views adopted by the Court of Justice in the context of the appeal show that the lawfulness of the transfer of liability was, and still is, open to serious debate.

146. Therefore, in the absence of adversarial argument and of persuasive explanations on the part of the General Court, and taking account also of the Court's rebuttal, I believe that the General Court was not entitled to hold that the European Union judicature had ruled definitively on the issues relating to the lawfulness of the statement of 23 July 1997 and the related transfer of liability.

144. First of all, at paragraph 62 of the judgment, the General Court does not provide persuasive explanations of the reasons for which it was necessary, in the present case, to make an exception to the fundamental principle of the personal nature of penalties. Although it refers to the existence of alleged 'economic considerations specific to concentrations of undertakings' to justify, exceptionally, such a transfer of liability, this justification seems to me far too vague to warrant a departure from the settled case-law of the Court of Justice on the attributability of conduct.

147. Thirdly, I am of the view that, by rejecting TKS's argument as inadmissible, the General Court disturbed the balance between the parties, placing the applicant at a clear disadvantage compared to the Commission.

145. Next, the Court of Justice very clearly rejected the finding of the General Court in that paragraph 62 on the alleged existence of exceptional circumstances. However, is it not necessary that it be possible to identify,

148. Pursuant to the case law of the European Court of Human Rights all parties have a right to argue their position in a balanced manner without the proceedings allowing either of them a particular advantage.⁵⁶ That is part of the right to a fair hearing.

⁵⁶ — See Eur. Court HR, *Ernst and Others v. Belgium*, no. 33400/96, §60, 15 July 2003.

149. However, the solution chosen by the General Court in the judgment under appeal means that TKS cannot challenge further the lawfulness of the statement of 23 July 1997 or the transfer of liability effected thereby, even though it was never heard on this point. In the proceedings against the initial decision, TKS was deprived of the possibility of making its submissions; now, its submissions are rejected as inadmissible on the ground of *res judicata*. In contrast, as regards the Commission, the General Court accepted without any *inter partes* argument that it was exceptionally entitled to rely on that statement, and then applied the principle of *res judicata* to reject the challenge by TKS. To my mind, that evaluation may give the impression of an imbalance in the Commission's favour.

150. In the light of all these considerations, I am of the view that the General Court, in finding that the Union judiciary had definitively ruled on the lawfulness of the transfer of liability, misinterpreted the judgment of the Court in *ThyssenKrupp v Commission* and, in addition, infringed the principle of *res judicata*. In so doing, the General Court also deprived TKS of the right to a fair hearing.

151. Accordingly I propose that the Court should declare that the second ground of appeal relied on by TKS is well founded and annul the judgment under appeal.

D — *Consequences of annulling the judgment under appeal*

152. Where a judgment is set aside on appeal, Article 61 of the Statute of the Court of Justice provides that the Court may either refer the case back to the General Court or itself give final judgment in the matter, where the state of the proceedings so permits.

153. The dispute in the present case concerns the proceedings brought by the Commission for the infringement committed by Thyssen between 16 December 1993 and 31 December 1994. The sole purpose of the contested decision is to attribute to TKS, on the basis of the statement of 23 July 1997, liability for the anti-competitive conduct of Thyssen and to impose a fine accordingly.

154. First of all, it must be determined whether the Commission was entitled to attribute to TKS liability for the infringement committed by Thyssen on the basis of the statement of 23 July 1997.

155. If, as I believe, the Commission was not entitled to do so, the question is whether it can legitimately proceed against Thyssen for its acts committed between 16 December 1993 and 31 December 1994 in the light of the rules on limitation periods.

156. These two issues were the subject of *inter partes* discussion before the Court. Therefore, in my view, judgment may be given on those two points.

157. I therefore propose that the Court examine the fourth and seventh pleas in law claiming annulment raised by TKS before the General Court.

1. The attributability to TKS of liability for the infringement committed by Thyssen

(a) Arguments of the parties⁵⁷

158. In its fourth plea of annulment, TKS challenges the lawfulness of attributing liability for the infringement committed by Thyssen. It argues that the statement of 23 July 1997 did not allow the Commission to attribute liability. TKS relies, first, on the case-law of the Court, according to which, in the event of legal succession, a successor may not be held liable for acts committed by its predecessor when the latter still exists. Secondly, TKS points to the considerations set out by

the Court at paragraph 88 of the judgment in *ThyssenKrupp v Commission*, to the effect that there was no economic succession between the two undertakings and neither the unity of action between the two undertakings nor the statements made by TKS during the administrative procedure could justify liability being so attributed. Finally, TKS relies on the principle *jus publicum privatorum pactis mutari non potest* to argue that a private agreement such as the statement of 23 July 1997 cannot alter the legal consequences attaching to the application of rules of public law or, *a fortiori*, of criminal law.

159. The Commission disputes that reasoning. In line with the submissions lodged in the course of the proceedings brought against the initial decision, the Commission again indicated at the hearing that the situation in question was a case of economic succession. In addition, it considered that there was no legal bar to its taking account of such a statement, which was freely and consciously made by TKS, in order to attribute liability for Thyssen's anticompetitive activities to it.

(b) My assessment

160. I cannot share the Commission's view.

⁵⁷ — For a more exhaustive summary of the arguments of the parties, see paragraphs 105 to 109 of the judgment under appeal.

161. By making TKS liable for the infringement committed by Thyssen, the Commission infringed the principle of personal liability and its corollary the principle of the personal nature of penalties, on which the concept of the attributability of liability for illicit agreements is founded.⁵⁸

162. Those principles constitute fundamental guarantees deriving from criminal law. Pursuant to the principle of personal liability, no person can be liable other than for his own acts. Under the principle of the personal nature of penalties, no punishment may be imposed other than on the guilty party. Those principles therefore preclude a legal or natural person who is neither the author of nor the accomplice to an offence from being held responsible for it, and therefore constitute limits to the exercise by public authorities of the *jus puniendi*. They also constitute limits for private persons, who cannot falsely plead guilty to offences which they have not committed.

163. As I have stated, the Court accepted the applicability of the principle of personal liability to competition law in *Commission v Anic Partecipazioni*. In that case the Court held that, given the nature of the infringements

in question and the nature and degree of severity of the ensuing penalties, liability for an infringement of competition rules is personal in nature.⁵⁹ Previously, in *Hüls v Commission*, the Court had applied the principle of the presumption of innocence.⁶⁰ I do not see how observance of that principle can be reconciled with a finding of guilt against a person who falsely pleads guilty.

164. Therefore, where an economic entity infringes the competition rules, it is the legal or natural person responsible for the operation of that undertaking that must answer for the consequences of his own acts, even if at the time when the decision finding the infringement is adopted, the operation of the undertaking has been placed under the responsibility of another person.⁶¹ As long as the legal person responsible for the operation of that undertaking at the time of the infringement exists, liability for the undertaking's unlawful conduct must attach to that legal person even if the assets and personnel which contributed to the commission of the infringement have been transferred to a third party after the period of the infringement.⁶²

59 — Paragraph 78.

60 — Paragraph 150.

61 — See Cases C-248/98 P *KNP BT v Commission* [2000] ECR I-9641, paragraph 71; C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 78; C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 37; C-297/98 P *SCA Holding v Commission* [2000] ECR I-10101, paragraph 25; and C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39 and the case-law cited.

62 — See inter alia *SCA Holding v Commission*, paragraph 25.

58 — *Akzo Nobel and Others v Commission*, paragraph 56 and the case-law cited.

165. None the less, in a field such as competition the authorities are dealing with intricate conduct manifesting itself in insidious behaviour capable of masking or altering the identity of the perpetrator (following for example sales, mergers or other legal or organisational changes).⁶³ In order to prevent undertakings from escaping the penalties imposed by the Commission and in order to ensure effective implementation of the competition rules, the Court, restrictively, allows anticompetitive conduct of one company to be attributed to another company in two types of situation, namely, first, where the undertakings in question belong to a group of companies (which is not the case here) and, secondly, where the new company carries on the business of the perpetrator in such a way that there is 'economic continuity' between the former and latter.⁶⁴

166. However the criterion of 'economic continuity' can only apply where the legal person responsible for operating the undertaking has

ceased to exist legally or economically following commission of the offence.⁶⁵ That is the difficulty.

167. While the activities through which Thyssen was able to be party to the offence were transferred to TKS from 1 January 1995, Thyssen did not lose its legal existence and continued to carry on economic activities in other sectors, outside any structural link with TKS. As the Commission pointed out in recital 10 of the contested decision, Thyssen still existed on the day of the adoption of that decision, 20 December 2006. As the Court observed at paragraph 88 of the judgment in *ThyssenKrupp v Commission*, this is not a case of economic succession between the two companies. Therefore, Thyssen had to be considered liable for all acts in which it participated before the transfer of its business to TKS on 1 January 1995. That was the Commission's first intention, since on 24 April 1997 it sent separate statements of objections to TKS and Thyssen. Moreover, each company replied separately.

63 — In such a situation the Court considers that the purpose of punishing conduct which is contrary to the competition rules and preventing its reoccurrence by means of deterrent penalties would be compromised (see *ETI and Others*, paragraph 41 and the case-law cited).

64 — See Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 84; Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink v Commission* [1984] ECR 1679, paragraph 9, and *Commission v Anic Participazioni*, paragraph 145.

65 — See *ETI and Others*, paragraph 40. See also *Commission v Anic Participazioni*, where the Court rejected the argument which a company accused of unlawful conduct had put forward in an attempt to escape all liability, namely that it had transferred to another company the business in the course of which it had committed the infringement it was accused of (paragraph 145). In that case there were two existing and operating undertakings, one of which had merely transferred part of its business to the other, and there was no structural link between them.

168. In those circumstances, the Commission, in Article 2(2) of the contested decision, was not entitled to derogate from the principle of personal liability by making TKS liable for Thyssen's unlawful conduct from 16 December 1993 to 31 December 1994.

169. The contested decision thus disregards the principle of personal liability and takes no account of the decisive fact, under the Court's settled case-law, of the lack of economic continuity between TKS and Thyssen.

170. In addition, the Commission was not entitled to rely on the statement of 23 July 1997 in order to derogate from the application of the rules of competition law.

171. In so acting, the Commission disregarded the nature of those rules and departed from its role thereunder. The rules are a matter of public policy. On the one hand, they ensure healthy and effective competition in the common market by prohibiting anti-competitive agreements, and therefore contribute to the accomplishment of the tasks entrusted to the European Union. On the other hand, they safeguard the consumer's interests by protecting him from certain practices of undertakings. They are mandatory rules of

law which are binding on everybody, and the parties cannot therefore circumvent them by means of private agreements.

172. However, let us remember in this connection that it is primarily for the Commission to ensure that the principles laid down in Article 81 EC are applied.⁶⁶ It cannot therefore accept a unilateral statement such as the statement of 23 July 1997 which gives rise to a derogation from the rules and principles relating to the attributability of anti-competitive practices. Nor similarly can it accept a statement by which an undertaking falsely declares itself guilty of an offence it did not commit.

173. Therefore, in the light of these considerations, I believe that the contested decision infringes the principle of personal liability as regards the attribution of liability for the infringement committed by Thyssen between 16 December 1993 and 31 December 1994.

174. Thus, I consider that Article 2(2) of the contested decision must be annulled in so far as it attributes liability to TKS for that infringement.

175. The infringement of which Thyssen is accused was established and Thyssen was

⁶⁶ — See Article 105(1) TFEU.

given a hearing since the Commission sent a separate statement of objections to Thyssen on 24 April 1997, to which Thyssen replied separately. As is apparent from recital 13 of the contested decision, Thyssen responded to the statement of objections in its own name.

Thyssen, the penalty imposed on it can be imposed on it only if it could be imposed on its predecessor in law, Thyssen.

178. The Commission contends that this plea should be dismissed.⁶⁷

176. The question now is whether the Commission is still able to order Thyssen to pay a fine in respect of the anti-competitive activities it engaged in between 16 December 1993 and 31 December 1994, as set out in Article 1 of the contested decision.

179. In view of the facts of the case, consideration of this submission depends on the interpretation of the limitation rules and, in particular, those concerning suspension of the limitation period referred to in Articles 2 and 3 of Decision No 715/78 and Article 25 of Regulation No 1/2003. For reasons of clarity, and taking into account the fact that the wording of those provisions is substantially the same, I shall focus only on the provisions of Regulation No 1/2003.

2. Limitation period in regard to the Commission's power to penalise the infringement committed by Thyssen

180. Two questions arise.

177. In its seventh plea of annulment, TKS claims that the infringement committed by Thyssen was time barred from 1999 or, at the latest, 2003. It argues, in particular, that the limitation period was not interrupted or suspended since Thyssen was not a party to the proceedings brought against the original decision. In addition, it argues that, since the infringement which it is alleged to have committed is an infringement committed by

181. The first concerns the scope of the suspension. The question is whether, when an action is brought before the Union judicature, suspension of the limitation period has a relative effect, that is to say it only applies to the company bringing the action, or *erga omnes* effect, in which case the suspension of the limitation period during the proceedings is valid in respect of all undertakings which participated in the infringement, whether or

⁶⁷ — For a more exhaustive summary of the arguments of the parties, see paragraphs 193 to 198 of the judgment under appeal.

not they have brought an action. Contrary to what is expressly provided for in relation to interruption of the limitation period, Article 25(6) of Regulation No 1/2003 is silent on this point.

period, like the decision itself, retroactively non-existent. The Court answered in the negative in *Limburgse Vinyl Maatschappij and Others v Commission*.⁶⁹

182. This question is the same as that which arises in the context of the appeal brought against the judgment of the General Court in *ArcelorMittal Luxembourg and Others v Commission*. In that judgment, the General Court considered that the suspension of the limitation period laid down in Article 25(6) of Regulation No 1/2003 applies only to the undertaking bringing the action.⁶⁸ The Court of Justice is called upon to determine this point for the first time.

184. For reasons which I shall explain, I do not share either the view adopted by the General Court in *ArcelorMittal Luxembourg and Others v Commission* or that adopted by the Court of Justice in *Limburgse Vinyl Maatschappij and Others v Commission*. That interpretation of the limitation period rules, combined with the effect of the various acts which can interrupt a limitation period and the length of proceedings, render the principle of limitation meaningless.

183. The second question concerns the effects of a judgment ordering annulment. The question is whether the annulment of a decision of the Commission in judicial proceedings renders the suspension of the limitation

185. This case is a perfect illustration of this since, 15 years after the infringement ended, Thyssen still does not know the outcome. That is a result of a multiplicity of acts interrupting the limitation period (six in all), annulment of the initial decision as regards TKS and suspension of the limitation period for

68 — Paragraphs 151 to 158. The General Court advances the following grounds as the basis for its reasoning. Since suspension of the limitation period is an exception to the principle of a five-year limitation period, that concept must be interpreted strictly. Since suspension by definition constitutes a situation in which the Commission has already adopted a decision, it is no longer necessary to attach effect *erga omnes* thereto. Finally, in accordance with the judgment of the Court in Case C-310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, the relative effect of judicial proceedings and the consequences attached to that effect by the Court in principle preclude an application brought by an undertaking which is an addressee of the decision in question from affecting the situation of the other addressees of the decision.

69 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P [2002] ECR I-8375, paragraphs 142 to 157. With regard to the General Court, see in particular Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR II-4065, paragraphs 80 to 102, and *ArcelorMittal Luxembourg and Others v Commission*, paragraphs 151 to 158, which, let us remember, is currently under appeal.

11 years.⁷⁰ As surprising as it may seem, the 10-year limitation period laid down in Article 25(5) of Regulation No 1/2003 has still not ended. It will do so in April 2016, which is 21 years after the infringement ceased.

(a) Preliminary considerations

186. Before beginning consideration of these issues, it is necessary to recall the nature and scope of the limitation rules in the context of competition litigation.

187. The limitation period in respect of criminal proceedings is a universal and fundamental principle of our law. It may be defined

as a ground on which a prosecution lapses because a certain period of time has elapsed since the date on which the offence was committed. It applies in principle to all offences, even the most serious, with the sole exception of crimes against humanity, which have been declared not to be subject to limitation, in accordance with international requirements. Upon expiry of the limitation period, the prosecution lapses and no further prosecution is possible against those who participated in the offence.

188. Limitation tends to establish social peace and responds to a common concern for legal certainty. In *Falck and Acciaierie di Bolzano v Commission*,⁷¹ the Court thus asserted, with respect to limitation, that ‘the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power’ and that, in order to fulfil their function, limitation periods must be fixed in advance.⁷² Classically, a number of reasons are given to support limitation. First, with the passage of time punishment loses its *raison d’être* owing to the gradual disappearance of the disruption of public order caused by the offence. Next, in a spirit that is more protective of the interests of the persons and undertakings in question, evidence of the offence is more difficult to preserve or to establish after a certain period. Last and above all,

70 — Thyssen brought the infringement to an end on 1 January 1995. The limitation period was interrupted with regard to Thyssen, and with regard to all the undertakings party to the cartel, on 24 April 1997 following the sending of the statement of objections and then on 21 January 1998, the date on which the initial decision was delivered. The limitation period ran until 11 March 1998, that is to say for approximately one and a half months, when TKS brought an action for annulment before the General Court. The limitation period was suspended until 13 December 2001, the date on which the General Court gave judgment in *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission*, that is to say for seven years and two months. The limitation period was again interrupted on 5 April 2006 by the sending of the new statement of objections and then on 20 December 2006 by the notification of the contested decision. That limitation period therefore ran from 20 December 2006 to 6 February 2007, the date on which TKS brought the action for annulment against the contested decision, that is to say for approximately one and an half months. The period was again suspended from the bringing of that action until 1 July 2009, the date on which the General Court delivered the judgment under appeal, that is to say for two years and five months. The limitation period began to run again from that date until the bringing of this appeal on 2 September 2009, that is to say for two months. From that date until now the limitation period has been suspended for approximately one year.

71 — Joined Cases C-74/00 P and C-75/00 P [2002] ECR I-7869.

72 — Paragraphs 139 and 140. See also Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others v NALOO* [2003] ECR I-11421, paragraphs 106 and 107.

limitation makes it possible to penalise the inertia, inactivity or even negligence of the prosecuting authorities and favours infringers being tried within a reasonable time.

(b) First question: relative or absolute effect of suspension of limitation period

189. As regards infringements of competition law, under Article 25(1) and (2) of Regulation No 1/2003 the limitation period is five years from the time when the infringement ended. Nevertheless, in accordance with Article 25(3) of that regulation, the limitation period may be interrupted by any action taken by the Commission for the purpose of the investigation or proceedings in respect of the infringement. That interruption retroactively cancels the period which has already run and marks the beginning of a new period. Moreover, under Article 25(6) of the regulation, the limitation period may be suspended where judicial proceedings are pending. In this case, the limitation period temporarily ceases to run.

190. Finally, the European Union legislature provided in Article 25(5) of Regulation No 1/2003 that the limitation period expires at the latest after 10 years without the Commission having imposed a fine. It adds, however, that the period is extended by the time during which limitation is suspended.

191. I consider that suspension of the limitation period during the judicial proceedings must be valid as against all companies party to the infringement, whether or not they have brought an action.

192. I do not therefore share the position adopted by the General Court in *ArcelorMittal Luxembourg and Others v Commission*, namely that the suspension applies only to the company bringing the action, for two reasons.

193. First, that view does not take account of the objective nature of the limitation period. In fact, the limitation attaches to the facts alone. It has a reality going beyond the persons concerned. Thus, where an action which the Commission may initiate lapses by the effect of the limitation period, it does so for all the facts at issue and benefits all the participants.

194. With regard to interruption of the limitation period, that is very clear from Article 25(4) of Regulation No 1/2003, which states that '[t]he interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement'. The wording of Article 25(6) of the regulation concerning

suspension of the limitation period is more general and does not make specific provision on this point. None the less, the regulation being silent, interruption and suspension of the limitation period must be identical in effect. Both constitute exceptions to the limitation period. Since the period is objective, they must therefore both apply to the facts themselves. That is all the more necessary given that this is a complex, continuous and collective infringement.

the infringement, whether or not they have brought an action.

(c) Second question: the effects of a judgment ordering annulment of a decision on calculation of the limitation period

195. Secondly, the solution adopted by the General Court produces a pernicious effect. The relative effect of suspension may actually render the Commission no longer able to bring proceedings against an undertaking which was wrongly overlooked, since those proceedings might be time-barred.

196. I therefore see no reason to introduce a distinction which seems to me to be artificial between the effects of one or the other in respect of the infringing parties.

198. As I have indicated, the Court has already been asked to rule on the question of the effects of a judgment annulling a decision on calculation of the limitation period in *Limburgse Vinyl Maatschappij and Others v Commission*, which related to an anti-competitive agreement in the field of polyvinyl chloride. The facts of that case are quite similar to the present case, since the first decision by the Commission finding an infringement was annulled by the Union judicature, and the undertakings then pleaded limitation of proceedings.

197. For the purposes of the application to the present case of Article 25(6) of Regulation No 1/2003, I therefore propose that the Court find that suspension of the limitation period during judicial proceedings must apply to all the undertakings which have participated in

199. In that judgment, the Court rejected the argument raised by the appellants, namely that the annulment of the first decision rendered the suspension of the limitation period, like the decision itself, retroactively non-existent. The Court considered that that

interpretation would deprive the suspension rule of all meaning, since, in its view, 'it is the very fact that an action is pending before the [General Court] or the Court of Justice which justifies the suspension, and not the conclusions reached by those courts in their judgment.'⁷³

existence of the judicial proceedings and not their outcome, the fact remains that the Union judicature must draw all the consequences of a judgment ordering annulment.

200. By this reasoning, my understanding is that the Court wishes to protect the Commission's right to bring proceedings against the lengthy duration of judicial proceedings. By accepting that annulment of the decision retroactively rescinds the suspension, the Union courts are exposing themselves and the Commission to the possibility that a limitation period might have expired at the end of the judicial proceedings owing to their length.

203. According to Article 264(1) TFEU '[i]f the action is well founded, the Court of Justice ... shall declare the act concerned to be void'. The effect of a judgment ordering annulment is therefore that the act in question becomes retroactively non-existent. Pursuant to the case-law, the act is therefore deemed never to have existed.⁷⁴ Its effects are in principle retrospectively rescinded unless the Court, pursuant to Article 264(2) TFEU, indicates which of those effects are to be regarded as definitive. In this connection there does not seem to be any doubt in my view that the legal effects of the act in question are those appearing in its operative part exclusively.

201. However commendable that intention may be, I do not consider that it can justify an interpretation such as that applied in that judgment.

202. First of all, whilst I agree with the conclusion that the basis for suspension is the

204. As regards the parties, the Court considers that they must be 'restored to their

73 — Paragraphs 152 and 153.

74 — See Case 22/70 *Commission v Council* [1971] ECR 263, paragraph 59; Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, paragraph 30; and C-228/92 *Roquette Frères* [1994] ECR I-1445, paragraph 17.

original position, and ... have to reconsider the disputed questions so as to resolve them in accordance with [European Union] law'.⁷⁵ In other words, the parties must be restored to the same position as that in which they found themselves before the annulled measure. Accordingly, in application of these principles, there is no possibility of procedural circumstances subsequent to the measure in question being taken into account. Just as an invalid measure of investigation cannot interrupt a limitation period, nor can an appeal against a null and void decision have suspensive effect.

206. In competition proceedings, that should therefore mean that annulment of the decision retroactively rescinds the suspension of the limitation period, so that the Commission must, within the time left before the limitation period expires, adopt a fresh decision which complies with European Union law.

207. In addition, the contrary solution encounters the hurdle of the obligation to act within a reasonable time enshrined in both Articles 41(1) and 47(2) of the Charter and Article 6(1) ECHR.⁷⁶

205. Restoring the parties to the position they were in previously means deeming them, after the judgment ordering annulment, to be in the respective legal situations they would have been in had the annulled measure never been enacted. Reconsidering the disputed questions in order to resolve them according to European Union law means determining at the time of such reconsideration the legal rules which apply, both as to form and as to substance, as though the penalty were being applied for the first time. If, for example, the legal basis on which the penalty was established no longer subsists, plainly the action cannot resume. If the time-limit for bringing proceedings has expired, there is no reason why it should become possible to bring them again.

208. The interpretation of the rules set out in Articles 25 of Regulation No 1/2003 must not on any grounds deprive the undertaking of the right to be prosecuted and have the matter determined within a reasonable time. Observance of that fundamental principle applies primarily to the Commission which is responsible for the administrative phase of

⁷⁵ — *Commission v Council*, paragraph 60.

⁷⁶ — For a summary of the content of this principle, see point 267 et seq. of my Opinion in Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland v Commission* [2009] ECR I-6155.

the procedure.⁷⁷ It also binds the European Union judicature, which is responsible for reviewing the lawfulness of the Commission's decisions.⁷⁸

and judicial, and be carried out by reference to its total duration.⁸⁰

209. The limitation period rules, like the principle that proceedings must be brought within a reasonable time, make time of the essence in the organisation of procedures. They reflect a legitimate concern within the legal order that the Commission's power to bring proceedings and the courts' exercise of the power to review lawfulness must be subject to certain time-limits. As the Court held in *Technische Unie v Commission*,⁷⁹ it is essential to prevent the rights of the defence 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, the Court considers that the assessment of the source of any undermining of the effectiveness of the rights of the defence must extend to the entire procedure, both administrative

210. However, do proceedings for an infringement of competition law, which are in principle subject to a limitation period of five years and are still ongoing 20 years after commission of the infringement, meet the reasonable time requirement?

211. The Commission, like the European Union judicature, must therefore ensure that the limitation period rules are implemented in a way that promotes the determination of actions against infringers within a reasonable time and in the context of diligently conducted proceedings. If there are matters of substance preventing the achievement of those objectives, it is for the Union, after analysis, to adopt the necessary solutions.

77 — Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraphs 55 and 56 and the case-law cited, in which it pointed out that '[i]t is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy'.

78 — The Court introduced the right to be heard within a reasonable time in competition proceedings into competition law in Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417. It went on to hold in *Der Grüne Punkt – Duales System Deutschland v Commission* that failure to observe that requirement could give rise to an application for damages under an action against the Community in the context of Article 268 TFEU and the second paragraph of Article 340 TFEU.

79 — Case C-113/04 P [2006] ECR I-8831.

212. In view of these matters, I therefore propose that the Court find that, for the purposes of the application of Article 25(6) of Regulation No 1/2003 to the present case, the annulment of the decision at the end of the judicial proceedings rendered the suspension, like the decision itself, retroactively non-existent.

80 — Paragraphs 55 and 56 and the case-law cited.

(d) Application to this case

VI — Costs

213. In the light of these elements, the infringement committed by Thyssen from 16 December 1993 to 31 December 1994 has been time-barred since 24 April 2002.

214. The annulment of the initial decision rendered the first suspension of the limitation period, like the decision, non-existent. The last act to interrupt the limitation period was therefore the notification of the statement of objections on 24 April 1997. Under Article 25(5) of Regulation No 1/2003, each interruption starts time running afresh. Consequently, the five-year limitation period applicable to the infringement committed by Thyssen ended on 24 April 2002.

215. The infringement committed by Thyssen is therefore time-barred.

216. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well-founded and the Court itself gives final judgment in the case, it is to make a decision as to costs.

217. Under the first subparagraph of Article 69(2) of the Rules of Procedure, which, pursuant to Article 118 of those rules, is applicable to the proceedings on appeal, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

218. In this case, the Commission has been unsuccessful in most of its claims. I therefore propose that the Court order the Commission to bear its own costs and to pay 50 % of the costs incurred by TKS.

219. TKS shall bear 50 % of its costs.

VII — Conclusion

220. In the light of the foregoing considerations I therefore propose that the Court:

- ‘(1) Set aside the judgment of the General Court of the European Communities in *ThyssenKrupp Stainless AG v Commission* (T-24/07);
- (2) Annul Article 2(2) of Commission Decision 2007/486/EC of 20 December 2006 relating to a proceeding under Article 65 of the ECSC Treaty (Case No COMP/F/39.234 – Alloy surcharge – readoption) in so far as it attributes liability to ThyssenKrupp Stainless AG for the infringement committed by Thyssen Stahl AG between 16 December 1993 and 31 December 1994;
- (3) Declare that the infringement committed by Thyssen Stahl AG is time-barred;
- (4) Order the European Commission to bear its own costs and to pay 50 % of those incurred by ThyssenKrupp Stainless AG;
- (5) Order ThyssenKrupp Stainless AG to bear 50 % of its own costs.’