Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

9 December 2014*

(Competition — Agreements, decisions and concerted practices — Market for concrete reinforcing bars in bars or coils — Decision finding an infringement of Article 65 CS after the expiry of the ECSC Treaty on the basis of Regulation (EC) No 1/2003 — Fixing of prices and payment terms — Limiting or controlling output or sales — Infringement of essential procedural requirements — Legal basis — Rights of the defence — Fines — Gravity and duration of the infringement — Mitigating circumstances — Taking account of an annulment judgment in a related case)

In Case T-91/10,

Lucchini SpA, established in Milan (Italy), represented initially by M. Delfino, J.-P. Gunther, E. Bigi, C. Breuvart and L. De Sanctis, and subsequently by J.-P. Gunther, E. Bigi, C. Breuvart and D. Galli, lawyers,

applicant,

v

European Commission, represented initially by R. Sauer and B. Gencarelli, acting as Agents, assisted by M. Moretto, lawyer, and subsequently by M. Sauer and R. Striani, acting as Agent, assisted by M. Moretto,

defendant,

APPLICATION for a declaration of the non-existence of, or for the annulment of Commission Decision C(2009) 7492 final of 30 September 2009 (Case COMP/37.956 — Reinforcing bars, re-adoption), as amended by Commission Decision C(2009) 9912 final of 8 December 2009 and, in the alternative, for the annulment of Article 2 of that decision and, in the further alternative, for a reduction in the amount of the fine imposed on the applicant,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro (Rapporteur), acting as President, A. Popescu and G. Berardis, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

gives the following

* Language of the case: Italian.

Judgment

Legal framework

1. *ECSC Treaty provisions*

1 Article 36 CS provided:

‘Before imposing a pecuniary sanction or ordering a periodic penalty payment as provided for in this Treaty, the Commission must give the party concerned the opportunity to submit its comments.

The Court shall have unlimited jurisdiction in appeals against pecuniary sanctions and periodic penalty payments imposed under this Treaty.

In support of its appeal, a party may, under the same conditions as in the first paragraph of Article 33 of this Treaty, contest the legality of the decision or recommendation which that party is alleged not to have observed.’

2 Article 47 CS read as follows:

‘The Commission may obtain the information it requires to carry out its tasks. It may have any necessary checks made.

The Commission must not disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. Subject to this reservation, it shall publish such data as could be useful to Governments or to any other parties concerned.

The Commission may impose fines or periodic penalty payments on undertakings which evade their obligations under decisions taken in pursuance of this Article or which knowingly furnish false information. The maximum amount of such fines shall be 1% of the annual turnover, and the maximum amount of such penalty payments shall be 5% of the average daily turnover for each day’s delay.

Any breach of professional secrecy by the Commission which has caused damage to an undertaking may be the subject of an action for compensation before the Court, as provided in Article 40.’

3 Article 65 CS provided:

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

(a) to fix or determine prices;

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

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

…

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

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

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

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

2. *EC Treaty provisions*

5 Article 305(1) EC provided:

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

3. *Regulation (EC) No 1/2003*

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

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

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

...'

8 Article 23(2) of Regulation No 1/2003 provides:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 [EC] or Article 82 [EC]'.

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

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

10 Paragraph 2 of the Communication of 18 June 2002 states that its purposes are:

'…

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

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

11 Paragraph 31 of the Communication of 18 June 2002, which appears in the section addressing specific issues raised by the transition from the ECSC regime to the EC regime, 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.'

Subject-matter of the dispute

12 The present case concerns an application for a declaration of the non-existence of, or for the annulment of Commission Decision C(2009) 7492 final of 30 September 2009 relating to a proceeding under Article 65 CS (Case COMP/37.956 — Reinforcing bars, re-adoption) ('the first decision'), as amended by Commission Decision C(2009) 9912 final of 8 December 2009 ('the amending decision') (the first decision as amended by the amending decision being referred to hereinafter as 'the contested decision') and, in the alternative, for the annulment of Article 2 of the contested decision and, in the further alternative, for a reduction in the amount of the fine imposed on the applicant Lucchini SpA.

13 In the contested decision, the Commission found that the following companies had infringed Article 65 CS:

— Alfa Acciai SpA ('Alfa');

— Feralpi Holding SpA ('Feralpi');

— Ferriere Nord SpA;

— IRO Industrie Riunite Odolesi SpA ('IRO');

— Leali SpA and Acciaierie e Ferriere Leali Luigi SpA in liquidation ('AFLL') (together referred to as 'Leali-AFLL');

— The applicant and SP SpA, in liquidation (together referred to as 'Lucchini-SP');

— Riva Fire SpA ('Riva');

— Valsabbia Investimenti SpA and Ferriera Valsabbia SpA (together referred to as 'Valsabbia').

The applicant

14 The applicant is a public limited company whose registered office is in Milan (Italy). Until 20 April 2005, the majority of its share capital was held by natural and legal persons connected, respectively, with the Lucchini family and the Lucchini group, with the remaining shares being held by insurance companies and financial bodies. Since that date, the applicant has been controlled by the Severstal group.

15 Siderpotenza SpA ('the first Siderpotenza') was, between 1989 and 1991, an undertaking jointly controlled by Lucchini Siderurgica SpA and the former Acciaierie e Ferriere Leali Luigi. On 5 March 1991, the first Siderpotenza was taken over Lucchini Siderurgica. Lucchini Siderurgica was taken over by Lucchini on 10 October 1998, with effect from 1 December 1998.

16 On 31 October 1997, Lucchini Siderurgica's reinforcing bar business was transferred to Siderpotenza, a company established in July 1997 ('the new Siderpotenza'). On 30 May 2002, the new Siderpotenza transferred all its reinforcing bar plant to Ferriere Nord.

Background to the dispute

17 From October to December 2000, the Commission carried out a number of checks pursuant to Article 47 CS at the premises of certain Italian undertakings engaged in the manufacture of reinforcing bars and at the premises of an association of certain Italian steel undertakings. It also requested them to supply information pursuant to Article 47 CS.

18 On 26 March 2002, the Commission opened the administrative procedure and formulated objections under Article 36 CS ('the statement of objections'). The applicant submitted written observations on the statement of objections. It did not request an oral hearing.

19 On 12 August 2002, the Commission formulated additional objections ('the supplementary statement of objections') addressed to the same addressees as the statement of objections. In the supplementary statement of objections, based on Article 19(1) of Council Regulation No 17 [of 6 February 1962]: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), the Commission explained its position concerning the continuation of the proceedings following the expiry of the ECSC Treaty. The undertakings concerned were allowed a period of time in which to submit their observations and a second hearing, in the presence of representatives of the Member States, took place on 30 September 2002.

20 At the end of the procedure, the Commission adopted Decision C(2002) 5087 final of 17 December 2002 relating to a proceeding under Article 65 CS (Case COMP/37.956 — Reinforcing bars) ('the 2002 decision'), in which it found that, contrary to Article 65(1) CS, the addressees thereof had implemented a single, complex and continuous restrictive practice on the Italian market for concrete reinforcing bars in bars and coils having as its object or effect the fixing of prices, with a view to which the restriction or control of production and/or sales was also concerted. In that decision, the Commission imposed a fine of EUR 16.14 million jointly and severally on SP and the applicant.

21 On 5 March 2003, the applicant brought an action before the General Court challenging the 2002 decision. By judgment of 25 October 2007 in Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP and Others* v *Commission* (ECR II-4331), the General Court

annulled the 2002 decision. The Court held that, having regard, in particular, to the fact that the 2002 decision contained no reference to Article 3 or Article 15(2) of Regulation No 17, the decision was based on Article 65(4) and (5) CS alone (*SP and Others* v *Commission*, cited above, paragraph 101). Since those provisions had expired on 23 July 2002, the Commission could no longer derive competence from those provisions, which were no longer in force when it adopted the 2002 decision, in order to establish an infringement of Article 65(1) CS and to impose fines on the undertakings which had allegedly participated in the infringement (*SP and Others* v *Commission*, cited above, paragraph 120).

22 By letter of 30 June 2008, the Commission informed the applicant and the other undertakings concerned of its intention to re-adopt the decision, changing the legal basis from that which it had chosen for the 2002 decision. It also stated that, having regard to the limited scope of the judgment in *SP and Others* v *Commission*, cited in paragraph 21 above, the re-adopted decision would be based on the evidence presented in the statement of objections and the supplementary statement of objections. The undertakings concerned were allowed a period of time in which to submit their observations.

The first decision

23 On 30 September 2009, the Commission adopted the first decision, which was notified to the applicant by letter of 1 October 2009.

24 In the first decision, the Commission stated that the restrictions on competition referred to in the decision arose out of an agreement between Italian producers of reinforcing bars and between those producers and their association, which had taken place between 1989 and 2000 and had had the object or effect of fixing or determining prices and restricting or controlling production or sales by means of the exchange of a large volume of information relating to the market for reinforcing bars in Italy.

25 In so far as concerns, first of all, the legal assessment of the conduct in question in this case, the Commission emphasised, in recitals 353 to 369 of the first decision, that Regulation No 1/2003 was to be interpreted as empowering it to establish and sanction, after 23 July 2002, agreements in the sectors which fell within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*. In recital 370 of the first decision, it stated that the decision had been adopted in accordance with the procedural rules of the EC Treaty and Regulation No 1/2003. In recitals 371 to 376 of the first decision, the Commission also pointed out that the principles governing the temporal succession of rules could lead to the application of substantive provisions which were no longer in force at the time when an EU institution adopted a measure, subject to application of the principle of *lex mitior*, in accordance with which a person may not be punished for an act which does not constitute an offence under the law which came into force subsequently. It concluded that, in this case, the EC Treaty was not in fact more favourable than the ECSC Treaty and that, consequently, the principle of *lex mitior* could not be relied on in order to contest the application of the ECSC Treaty to the conduct in question in this case.

26 Next, as regards the application of Article 65(1) CS, the Commission began by pointing out that the purpose of the cartel had been to fix prices on the basis of which the restriction or control of production or sales had also been agreed. According to the Commission, in so far as concerned price fixing, the cartel had essentially involved agreements or concerted practices relating to the base price from 15 April 1992 to 4 July 2000 (and, until 1995, payment terms) and agreements or concerted practices relating to ‘extras’ from 6 December 1989 to 1 June 2000.

27 Secondly, in so far as concerns the effect of the restrictive practices in question on the market, the Commission stated that, since this was an agreement whose purpose was to prevent, limit or alter the normal play of competition, it was not necessary to establish that there had been any effects on the

market. It nevertheless submitted that the cartel had had specific effects on the market. In particular, the Commission concluded that the cartel had influenced the sale price charged by reinforcing bar manufacturers in Italy, even if the measures taken within the cartel had not always immediately produced the effects hoped for by the participating undertakings. Moreover, according to the Commission, some aspects could have had delayed effects. Furthermore, the undertakings concerned represented approximately 29% of the Italian market for reinforcing bars in 1989, 60% in 1995 and approximately 83% in 2000, which suggested that the concerted price increases were having a growing effect on the market. Lastly, the Commission emphasised that the fact that the initiatives taken in the matter were, from 1989 onwards, communicated to all manufacturers of reinforcing bars increased the significance of those effects even in the initial years of the cartel.

28 Thirdly, the Commission identified the addressees of the first decision. In so far as the applicant is concerned, the Commission stated, in recitals 538 to 544 of the first decision, that it had decided to impute liability for the infringement to SP and the applicant, since they formed an undertaking to which not only their own actions could be imputed but also those of Lucchini Siderurgica and the first Siderpotenza.

29 As regards its position that SP and the applicant formed a single economic unit, the Commission relied on the fact that, throughout the period of the infringement, both SP and the applicant were directly or indirectly controlled by the Lucchini family. Moreover, control over SP had been exercised, in the actual management of its manufacturing and commercial policy in the reinforcing bar business, by the applicant, as was shown, according to the Commission, by specific and circumstantiated documentary evidence as well as by corroborating elements relating to the organisational structure of SP and the applicant, in particular, the fact that certain persons had occupied positions in commercial management within those companies sometimes simultaneously.

30 As regards the imputation to SP and the applicant of any anti-competitive conduct on the part of the first Siderpotenza and Lucchini Siderurgica (which no longer have any legal existence), first, the Commission pointed out that Lucchini Siderurgica had legally succeeded the first Siderpotenza following the merger by incorporation of 5 March 1991 and that, similarly, the applicant had succeeded Lucchini Siderurgica following the merger by incorporation of 1 December 1998. Secondly, all the physical and human elements of the first Siderpotenza had subsequently been managed by Lucchini Siderurgica from the time of the incorporation of the first Siderpotenza into Lucchini Siderurgica, on 5 March 1991. Thirdly, the physical and human elements connected with the plant at Potenza (Italy) and organised by Lucchini Siderurgica had been transferred, within the group, to the new Siderpotenza. Fourthly, Lucchini Siderurgica, and then the applicant had exercised decisive influence over the activities of the new Siderpotenza until 1 June 2002, on which date the branch of the company manufacturing reinforcing bars had been transferred to Ferriere Nord.

31 The Commission therefore concluded that (a) there was legal continuity between the first Siderpotenza and Lucchini Siderurgica, (b) there was economic continuity between those two companies and the new Siderpotenza (now SP) with regard to the plant at Potenza, (c) Lucchini Siderurgica and the applicant were responsible for the activities of the new Siderpotenza as a result of the decisive influence which they had exercised, and (d) there was legal continuity between Lucchini Siderurgica and the applicant. The Commission concluded from the foregoing that all those entities constituted a single undertaking which could be identified as the undertaking formed by SP and the applicant.

32 Fourthly, the Commission stated that Article 65(2) CS and Article 81(3) EC were not applicable to the case. It also emphasised that the rules on prescription laid down in Article 25(1) of Regulation No 1/2003 did not preclude it from adopting the first decision

33 Fifthly, in so far as concerns the calculation of the fines imposed in this case, the Commission stated that, under Article 23(2) of Regulation No 1/2003, it could impose fines on undertakings which had infringed the competition rules. Since the upper limit on fines laid down in Article 23(2) of Regulation

No 1/2003 differed from that in Article 65(5) CS, the Commission stated that it would apply the lower limit, in accordance with the *lex mitior* principle. It also stated that, as it had informed the undertakings concerned in its letter of 30 June 2008, it had decided to apply in this case the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3) ('the 1998 Guidelines'). It added that it would, however, take account of the fact that, when it adopted the 2002 decision, it had already decided on the amount of the fines which it meant to impose on the undertakings concerned.

34 First, the Commission stated that an agreement aimed at price fixing, implemented in various ways including the restriction or control of production or sales, constituted a very serious infringement of EU competition law. It rejected the arguments put forward by the undertakings involved to the effect that the gravity of the infringement was attenuated by the fact that its actual effect on the market had been limited and by the economic context in which they had found themselves. According to the Commission, without prejudice to the very serious nature of the infringement, it had, in determining the basic amount of the fine, taken account of the specific characteristics of the case, which concerned a national market that, at the relevant time, was subject to the particular rules of the ECSC Treaty and of which the firms to which the first decision was addressed accounted for a limited share during the initial period of the infringement.

35 Second, the Commission considered the specific weight of each undertaking and classified them according to their relative importance on the relevant market. Because the relative market shares of the addressees of the first decision in the last full year of the infringement (1999) were not, in the Commission's view, representative of their effective presence on the relevant market during the period in question, the Commission identified three different groups of undertakings on the basis of their average market shares for the period 1990 to 1999, first Feralpi and Valsabbia, for which it set a starting amount of EUR 5 million, second, Lucchini-SP, Alfa, Riva and Leali-AFLL, for which it set a starting amount of EUR 3.5 million, and third IRO and Ferriere Nord, for which it set a starting amount of EUR 1.75 million.

36 In order to give the fine a sufficient deterrent effect, the Commission increased the starting amount of Lucchini-SP's fine by 200% and that of Riva by 375%.

37 Third, the Commission concluded that the cartel had lasted from 6 December 1989 to 4 July 2000. In so far as concerned the applicant's involvement in the infringement, the Commission stated that it had been a party to the agreement from 6 December 1989 to 27 June 2000. It nevertheless pointed out that, from 9 June 1998 to 30 November 1998, Lucchini-SP had not participated in the part of the agreement relating to the restriction or control of production or sales.

38 The infringement having lasted for more than ten years and six months in the case of all the undertakings except Ferriere Nord, the starting amounts of the fines were increased by 105% for all the undertakings except Ferriere Nord, for which the starting amount of the fine was increased by 70%. The basic amounts of the fines were accordingly set as follows:

— Feralpi: EUR 10.25 million;

— Valsabbia: EUR 10.25 million;

— Lucchini-SP: EUR 14.35 million;

— Alfa: EUR 7.175 million;

— Riva: EUR 26.9 million;

— Leali-AFLL: EUR 7.175 million;

— IRO: EUR 3.58 million;

— Ferriere Nord: EUR 2.97 million.

39 Fourth, as regards aggravating circumstances, the Commission pointed out that Ferriere Nord had already been the addressee of a Commission decision, adopted on 2 August 1989, concerning its participation in a price-fixing and sales-restricting agreement in the welded steel mesh industry, and increased the basic amount of its fine by 50%. The Commission found there to be no mitigating circumstances.

40 Fifth, as regards application of the Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the 1996 Leniency Notice'), the Commission stated that Ferriere Nord had provided it with useful information which had allowed it to gain a better understanding of the functioning of the cartel before the statement of objections was sent, and accordingly granted it a reduction of 20% of the amount of its fine. The Commission considered that the other undertakings concerned had not satisfied the criteria laid down in the notice.

41 The operative part of the first decision reads as follows:

'Article 1

The following undertakings have infringed Article 65(1) [CS] by taking part, in the periods in question, in a continuing agreement and/or concerted practices in respect of concrete reinforcing bar in bars and coils having as its object and/or effect the fixing of prices and the restriction and/or control of production and sales in the common market:

— [Leali-AFLL] from 6 December 1989 to 27 June 2000;

— [Alfa] from 6 December 1989 to 4 July 2000;

— [Ferriera Valsabbia and Valsabbia Investimenti] from 6 December 1989 to 27 June 2000;

— [Feralpi] from 6 December 1989 to 27 June 2000;

— [IRO] from 6 December 1989 to 27 June 2000;

— [Lucchini-SP] from 6 December 1989 to 27 June 2000;

— [Riva] from 6 December 1989 to 27 June 2000;

— [Ferriere Nord] from 1 April 1993 to 4 July 2000;

Article 2

The following fines are imposed in respect of the infringements referred to in Article 1:

— [Alfa]: EUR 7.175 million;

— [Feralpi]: EUR 10.25 million;

— [Ferriere Nord]: EUR 3.57 million;

— [IRO]: EUR 3.58 million;

— [Leali and AFLL], jointly and severally: EUR 6.093 million;

— [Leali]: EUR 1.082 million;

— [Lucchini and SP], jointly and severally: EUR 14.35 million;

— [Riva]: EUR 26.9 million;

— [Valsabbia Investimenti and Ferriera Valsabbia], jointly and severally: EUR 10.25 million.

…'

Developments after the notification of the first decision

42 By letters sent between 20 and 23 November 2009, eight of the eleven companies to which the first decision was addressed, namely the applicant, Riva, Feralpi, Ferriere Nord, Alfa, Ferriera Valsabbia, Valsabbia Investimenti and IRO, informed the Commission that the annex to the first decision, as notified to its addressees, did not contain the tables illustrating the price variations.

43 On 24 November 2009, the Commission informed all the addressees of the first decision that it would make sure that a decision containing the said tables was notified to them. It also stated that the period of time allowed for paying the fine and possibly instituting legal proceedings would begin to run from the date of notification of the 'full decision'.

The amending decision

44 On 8 December 2009, the Commission adopted the amending decision, which included in its annex the missing tables and corrected the numbered references to those tables in eight footnotes. The amending decision was notified to the applicant on 9 December 2009.

45 The operative part of the amending decision contained amendments to footnotes 102, 127, 198, 264, 312, 362, 405 and 448 to the first decision. The tables set out in the annex to the amending decision were added as annexes to the first decision

Procedure and forms of order sought by the parties

46 By application lodged at the Registry of the General Court on 19 February 2010, the applicant brought the present action.

47 The applicant claims that the Court should:

— as a preliminary and main point, declare the decision non-existent or null and void or, in any event, annul the decision by which the Commission imposed on it, jointly and severally with the company SP SpA, a fine of EUR 14.35 million, on the grounds of the incomplete nature of the decision and breach of essential procedural requirements, lack of competence and an error of law concerning the legal basis, and infringement of the rights of the defence and an error of law;

— in the alternative, in any event, annul Article 2 of the decision of 30 September 2009 by which the Commission imposed on it a fine of EUR 14.35 million on the grounds of lack of evidence, in breach of Article 2 of Regulation No 1/2003 and Article 65 of the ECSC Treaty;

— in the further alternative, fix its fine at the symbolic sum of EUR 1 000 or, in any event, reduce, by reference to its turnover, the fine imposed by the Commission, on the grounds of the incorrect application of Article 23 of Regulation No 1/2003 and the 1998 Guidelines, having regard to the gravity and duration of the infringement;

— in any case, order the Commission to pay the costs.

48 The Commission contends that the Court should:

— dismiss the action in its entirety;

— order the applicant to pay the costs.

49 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure in the case.

50 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 7 February 2013.

51 At the hearing, the applicant requested, pursuant to Article 48(2) of the Rules of Procedure of the General Court, permission to place on the case-file a document dated 21 December 2012 which showed that it had entered into extraordinary administration. The Commission made no objection to that request and it was granted accordingly. The Commission made observations on the document at the hearing.

Law

52 As a preliminary point, it should be observed that the action comprises three heads of claim, that is to say, an application for a declaration that the contested decision is non-existent or for the annulment of the contested decision, in the alternative, an application for the annulment of Article 2 of the contested decision and, in the further alternative, an application for a reduction in the amount of the fine imposed on the applicant.

53 In support of its action, the applicant puts forward five pleas in law. The first four pleas are put forward in support of its application for a declaration that the contested decision is non-existent or for the annulment of the contested decision and the fifth is put forward in support of its applications for the annulment of Article 2 or for a reduction in the amount of the fine imposed on it.

54 The first plea in law alleges infringement of essential procedural requirements. The second plea alleges a lack of competence on the Commission's part and an error of law in its choice of legal basis for the contested decision. The third plea alleges infringement of the applicant's rights of defence and an error of law. The fourth plea alleges a lack of evidence and incorrect application of the substantive law. Lastly, the fifth plea alleges that the amount of the fine is excessive, a lack of evidence and an inadequate statement of reasons, incorrect application of Article 23(2) of Regulation No 1/2003 and of the 1998 Guidelines and breach of the principle of proportionality.

1. *Admissibility of the annexes to the reply*

55 As a preliminary point, the Commission disputes the admissibility of the documents which the applicant produced as annexes to its reply.

56 It must be observed that the applicant in fact appended 186 annexes to its reply. It argued in this connection, in an accompanying letter which it lodged with its reply, that the production of two annexes, C.8 and C.13, had proved necessary in order for it to respond to the arguments put forward in the defence, 'in which the Commission [had] asserted that the fact that the first Siderpotenza was controlled by the Leali group did not exclude the applicant's joint and several liability ... and [had] reconfirmed that Lucchini was liable for the conduct of the companies which, over the years, had managed the branch of the business relating to reinforcing bars, as successor to Lucchini Siderurgica SpA ...' It also stated that the other annexes, C.7, C.9 to C.12 and C.14 to C.186, were documents that had been sent to it on a CD-ROM, as annexures to the statement of objections, which had been mislaid and of which it had asked the Commission for copies once it had realised that it needed to see them in order to answer the arguments set out in the defence.

57 It must be recalled that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, an application must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if necessary without other supporting information (Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 166).

58 According to consistent case-law it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. While the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17; orders in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21, and Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49). The annexes may be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by applicants in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments (see, to that effect, Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 99).

59 Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34, and Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 154).

60 That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court also applies to the reply (*Microsoft* v *Commission*, cited in paragraph 58 above, paragraph 95) and to pleas in law and complaints referred to in the pleadings (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and *France Télécom* v *Commission*, cited in paragraph 57 above, paragraph 166).

61 Moreover, Article 44(1) of the Rules of Procedure, relating to the particulars which an application submitted to the Court must contain, provides that an application must state 'where appropriate, the nature of any evidence offered in support'. Similarly, according to Article 46(1) of the Rules of Procedure, the defence must state the nature of any evidence offered by the defendant.

62 Those provisions, which determine the stage of the proceedings at which the evidence offered must be produced, take into account the adversarial principle, the principle of equality of arms and the right to a fair hearing, in the interests of the sound administration of justice. In that they require the parties to make known the evidence which they offer as soon as they lodge an application or a defence, their purpose is to ensure that the parties are informed of the evidence lodged in support of the arguments

put forward and to enable them to prepare an effective defence or reply, in accordance with the abovementioned principles and the right to a fair hearing. Moreover, the lodging of evidence in the initial stage of the proceedings is justified by the need to ensure the sound administration of justice, inasmuch as it enables the case-file to be prepared swiftly and the case to be dealt with expeditiously (Case C-243/04 P *Gaki-Kakouri* v *Court of Justice* [2005], not published in the ECR, paragraph 30, and Joined Cases T-40/07 P and T-62/07 P *de Brito Sequeira Carvalho* v *Commission* [2009] ECR Staff Cases I-B-1-89 and II-B-1-551, paragraph 113).

63 Those two provisions are supplemented by Article 48(1) of the Rules of Procedure, which reads as follows:

'In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.'

64 That provision is also an expression of the requirement for a fair hearing and, more specifically, the requirement that the rights of the defence are protected, inasmuch as it authorises the submission of offers of evidence in situations other than those contemplated by Articles 44(1) and 46(1) of the Rules of Procedure (*Gaki-Kakouri* v *Court of Justice*, cited in paragraph 62 above, paragraph 32).

65 Since it is an exception to the rules governing the lodging of evidence offered, Article 48(1) of the Rules of Procedure requires parties to give reasons for the delay in offering their evidence. That obligation implies that the court has the power to check the merits of the reasons given for the delay in lodging the evidence offered and, depending on the case, the substance of that evidence, as well as the power to disregard the evidence if the application is not sufficiently well founded (*Gaki-Kakouri* v *Court of Justice*, cited in paragraph 62 above, paragraph 33).

66 First of all, it must be observed that the applicant has not given reasons for the delay in presenting Annexes C.1 to C.6. Moreover, those annexes contain tables drawn up by the applicant and observations which the applicant makes on other documents to which it makes only a cursory reference in its reply. Having regard to the case-law mentioned in paragraphs 57 to 60 above, to describe as an annex what are just supplementary written observations of the applicant, amounting merely to an extension of the pleadings, is incompatible with the quality that defines an annex, that is to say, its purely evidential and instrumental function. Annexes C.1 to C.6 must therefore be declared inadmissible.

67 Secondly Annexes C.8 and C.13 cannot be regarded as offers of evidence in rebuttal, since the assertions made by the Commission in paragraphs 81 and 90 of its defence, which those annexes are intended to rebut, are the same as those which it had already made in recital 541 of, and footnote 593 to the contested decision. Recital 541 and footnote 593 summarise the Commission's central finding regarding the existence of an economic unit comprising the applicant and SP and the legal and economic continuity between Lucchini Siderurgica and the first Siderpotenza and between Lucchini and SP. It follows that Annexes C.8 and C.13 are inadmissible.

68 Thirdly, as the applicant itself has pointed out, Annexes C.7, C.9 to C.12 and C.14 to C.186 were taken from two CD-ROMs containing the documents annexed to the statement of objections which were sent to it along with the statement of objections. Those documents were also mentioned in the contested decision. The reason given by the applicant, namely that it had mislaid the CD-ROMs as a result of the time that had elapsed since it had received them and the restructuring that had taken place within the undertaking cannot, however, justify its delay in offering this evidence, since the applicant could have obtained a copy of the CD-ROMs in good time before lodging its application in this case. It must be emphasised in this connection that the applicant only asked the Commission for copies of the CD-ROMs after it received the defence. It follows that Annexes C.7, C.9 to C.12 and C.14 to C.186 are also inadmissible.

69 In any event, it must be observed that the pleadings make general reference to (a) Annexes C.7, C.10 and C.14, whose content is 'described in greater detail' in table 1 in Annex C.1, (b) Annexes C.7, C.5 to C.34, whose content is 'described in greater detail' in table 3 in Annex C.3, (c) Annexes C.10, C.14 and C.34 to C.39, whose content is 'described in greater detail' in table 5 in Annex C.5 and (d) Annexes C.40 to C.186, whose content is 'summarised' in table 6 in Annexe C.6. Consequently, these annexes are also inadmissible in accordance with the case-law mentioned in paragraphs 57 to 60 above.

2. *The claim for a declaration that the first decision is non-existent or for the annulment of the first decision*

70 In so far as concerns the applicant's claim that the Court should declare the contested decision non-existent, it must be recalled that, according to the case-law of the Court of Justice, acts of the institutions of the European Union are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48, Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraph 69, and Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraph 18).

71 However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the European Union must be treated as having no legal effect, even provisional, that is to say, they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting requirements with which a legal order must comply, namely, stability of legal relations and respect for legality (*Commission* v *BASF and Others*, cited in paragraph 70 above, paragraph 49, and *Hoechst* v *Commission*, cited in paragraph 70 above, paragraph 70).

72 The gravity of the consequences attaching to a finding that an act of an EU institution is non-existent means that, for reasons of legal certainty, such a finding is to be reserved for quite extreme situations (*Commission* v *BASF and Others*, cited in paragraph 70 above, paragraph 50, and *Hoechst* v *Commission*, cited in paragraph 70 above, paragraph 76).

73 It must immediately be observed in this case that the irregularities to which the applicant refers do not appear to be of such obvious gravity that the contested decision must be regarded as legally non-existent. The reasons are as follows.

The first plea in law, alleging infringement of essential procedural requirements

74 The applicant maintains that the contested decision must be held to be non-existent or must be annulled, since the conformed copy of the first decision that was notified to it was missing its annexes, which suggests that the College of Commissioners had not approved the full act, which would constitute an infringement of the Rules of Procedure of the Commission. The applicant also submits that the amending decision does no more than notify the annexes that were missing from the first decision and that it contains three new articles the numbering of which overlaps with that of the first decision. That creates confusion as to the content of the contested decision and is contrary to the principles of legal certainty and respect for the rights of the defence.

75 More specifically, the applicant asserts, first of all, that the tables that were not appended to the first decision were an essential element of the statement of reasons on which that decision was based. The fact that they were omitted from the first decision should, therefore, lead the Court to hold the contested decision to be non-existent or, at very least, to annul it. According to the applicant, a flaw in the first decision of such gravity could not be remedied by the adoption of the amending decision.

76 It must be recalled that, according to settled case-law, the statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent European Union Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 15 CS must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (see, to that effect, Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraph 298, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 129; see also, by analogy, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1996] ECR I-1719, paragraph 63, and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 131 and the case-law cited).

77 Moreover, in the context of individual decisions, it is settled case-law that the purpose of the obligation to state reasons for an individual decision is both to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision may be vitiated by a defect which may permit its legality to be contested (see Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 148 and the case-law cited).

78 The statement of reasons must, therefore, in principle be notified to the person concerned at the same time as the decision adversely affecting him (*Elf Aquitaine* v *Commission*, cited in paragraph 77 above, paragraph 149).

79 It must be acknowledged that the first decision did not include its annexes, which contained various tables to which reference was made in recitals 451 (table 13), 513 (tables 1 and 3), 515 (tables 1 to 3), 516 (tables 9, 11 to 14 and 16) and 518 (tables 11, 12 and 14) of the first decision as well as in footnotes 102 (tables 15 to 17), 127 (tables 18 to 21), 198 (tables 22 and 23), 264 (tables 24 and 25), 312 (table 26), 362 (table 27), 405 (table 28), 448 (tables 29 and 30) and 563 (all the tables annexed to the decision) to the first decision. The Commission states in this connection that the tables had been created in order to provide a fast, easy reference to the price variations mentioned in the first decision and that they merely reproduced in schematic form the information and data presented in the case file.

80 It is therefore necessary to verify whether, irrespective of the fact that the tables mentioned in paragraph 79 above were not annexed to the first decision, the relevant recitals of the first decision, in which the tables were referred to as support, disclosed in a clear and unequivocal fashion the reasoning followed by the Commission and enabled the applicant to ascertain the reasons for the measure.

81 It must be observed at the outset that, as the Commission points out, all of the tables missing from the first decision had been annexed to the statement of objections.

82 It must also be emphasised that, in the amending decision, the Commission did not change all the references to the missing tables given in the first decision, only the references given in footnotes 102, 127, 198, 264, 312, 362, 405 and 448 to the first decision.

83 First, as regards tables 15 to 17 (mentioned in footnote 102 to the first decision), it must be observed that, according to that footnote, these contain 'data on the changes in the size extras occurring in the reinforcing bar industry in Italy from December 1989 to June 2000'. The Commission mentioned these tables in support of the first sentence of recital 126 of the first decision, which reads as follows:

'During the first meeting of which the Commission is aware (that of 6 December 1989 at [Associazione Industriale Bresciana]), those taking part unanimously decided to increase the size extras for reinforcing bar for both bars and coils intended for the Italian market (+ ITL 10/kg for extras from 14 to 30 mm, + ITL 15/kg for those from 8 to 12 mm, + ITL 20/kg for those from 6 mm; all increased by ITL 5/kg for material in coils) with effect from 11 December 1989.'

84 It must be observed that the Commission expressly stated in that recital the increases in the size extras for reinforcing bar that had been decided on by those attending the meeting of 6 December 1989, along with the date on which those increases were to take effect. Moreover, in so far as concerns subsequent increases, which, according to footnote 102 to the first decision, are also set out in these tables (inasmuch as the tables cover the period 1989 to 2000), it should be pointed out they are not dealt with in section 4.1 of the first decision (in which recital 126 falls), which addresses the conduct of the firms between 1989 and 1992. In any event, these increases are also mentioned in recitals 126 to 128 and 133 (for the years 1989-1992), 93 and 94 (for the years 1993-1994), 149 to 151, 162 and 163 (for 1995), 184 and 185 (for 1996), 199, 200 and 213 (for 1997), 269 (for 1999) and 296 to 304 (for 2000) as well as in recitals 439 and 515 of the first decision.

85 Second, in so far as concerns tables 18 to 21, mentioned in footnote 127 to the first decision, it must be observed that, according to that footnote, these contain 'data relating to the basic list prices or prices communicated to agents relating to the period end 1989/end 1992 ... in the Commission's possession'. The Commission mentioned these tables in support of recital 131 of the first decision, which reads as follows:

'As far as the base prices for reinforcing bar during the period of the aforesaid agreement are concerned, IRO and (the former) Ferriera Valsabbia applied a price of ITL 210/kg with effect from 16 April 1992 and a price of ITL 225/kg from 1/6 May 1992. IRO, (the former) Ferriera Valsabbia, Acciaieria di Darfo and Acciaierie e Ferriere Leali Luigi applied the price of ITL 235/kg from 1/8 June 1992.'

86 It must, therefore, be observed that, referring also to the five pages in the administrative file which it mentions in footnote 126 to the first decision, the Commission expressly stated in recital 131 the base prices which had been set by the undertakings mentioned therein, along with the dates on which those prices took effect. It should also be pointed out that, in recital 419 of the first decision, the Commission stated that the first activity relating to the fixing of the base price had taken place by 16 April 1992 at the latest. Any data set out in tables 18 to 21 of the first decision, relating, according to footnote 127 to the decision, to the base price for the period 'end 1989' to 16 April 1992 is therefore irrelevant to the proper understanding of the points made by the Commission in recital 131 of the first decision.

87 Third, as regards tables 22 and 23, referred to in footnote 198 to the first decision, it must be observed that, according to that footnote, these contain 'data relating to the base prices in the price list or communicated to agents relating to 1993 and 1994 ... in the Commission's possession'. The Commission mentioned these tables in support of recital 145 of the first decision, which reads as follows:

'As specified in the fax from Federacciai on 25 November 1994, a further meeting was held in Brescia on 1 December 1994 where the decisions specified in another fax from Federacciai were taken, received by the companies on 5 December 1994. These decisions related to:

— the prices for reinforcing bar (320 Lire/kg base ex Brescia, with immediate effect);

— payments (from 1 January 1995 the maximum period would be 60/90 days from the end of the month, from 1 March 1995 the period would be reduced to 60 days) and discounts;

— output (with an obligation for each company to notify Federacciai of the tonnes of reinforcing bar produced in September, October and November 1994 and by 7 December 1994).

Alfa Acciai S.R.L. adopted the new base price on 7 December 1994. On 21 December 1994 it was also adopted by Acciaieria di Darfo S.p.A., and Alfa Acciai S.R.L. confirmed the same price. The base price from [Lucchini-SP] for January 1995 was also 320 Lire/kg.'

88 It must be emphasised in this connection that the Commission mentioned the tables referred to in footnote 198 to the first decision in support of its assertion that 'Alfa Acciai S.R.L. [had] adopted the new base price on 7 December 1994', [o]n 21 December 1994 it [had] also [been] adopted by Acciaieria di Darfo S.p.A., and Alfa Acciai S.R.L. [had] confirmed the same price'. That 'new base price' and that 'same price' were the price of LIT 320/kg mentioned in the first indent of recital 145. Any data set out in tables 22 and 23 of the first decision, relating to the base price for the period 1993 to 7 December 1994 is therefore irrelevant to the proper understanding of the points made by the Commission in recital 145 of the first decision.

89 Fourthly, in so far as concerns tables 24 and 25, mentioned in footnote 264 to the first decision, it must be observed that, according to that footnote, these contain 'data relating to the list base prices or prices communicated to agents (and, in the case of Lucchini Siderurgica S.p.A., those relating to the monthly situation) for 1995 in the possession of the Commission'. The Commission mentioned these tables in support of recital 174 of the first decision, which reads as follows:

'Subsequently, in a document from early October 1995, in the possession of Federacciai (handwritten by the secretary of the acting Director General) it is stated that:

— customers were arguing over payments (hence the need for a communication confirming firmness over payments),

— since the previous week the price of reinforcing bar had come down by a further 5/10 Lire/kg, lying between 260/270 Lire/kg in the Brescia area with quotations below 250 Lire/kg outside that area,

— the rather confused market situation made it difficult to give an accurate indication of price, and

— companies would have to be asked for data for orders in week 39 (from 25 to 29 September 1995) and week 40 (from 2 to 6 October 1995).'

90 It must, therefore, be observed that, in recital 174 of the first decision, the Commission merely gave an account of the content of a document handwritten by the secretary of the acting Director General in October 1995. In that context, the Commission merely referred to tables 24 and 25 in support of the

statement made in the handwritten document that 'the rather confused market situation made it difficult to give an accurate indication of price'. Tables 24 and 25 therefore appear to be irrelevant to the proper understanding of the points made by the Commission in recital 174 of the first decision.

91 Fifthly, in so far as concerns table 26, mentioned in footnote 312 to the first decision, it must be observed that, according to that footnote, it contains 'data relating to the list base prices or those communicated to agents (and in the case of Lucchini Siderurgica S.p.A., also those relating to its monthly statement) for 1996 ... in the Commission's possession'. The Commission mentioned this table in support of its assertion in recital 200 of the first decision that '[d]uring the period from 22 October 1996 to 17 July 1997 there [had been] at least twelve meetings of the companies' commercial managers ... held [inter alia] on ... Tuesday 22 October 1996 at which the price of 230 Lire/kg ex Brescia [had been] reconfirmed for the month of November 1996 and the quotation of 210 Lire/kg [had been] maintained solely for deliveries in October'.

92 It must, therefore, be held that, notwithstanding the absence of table 26 from the first decision, the Commission expressly mentioned, in recital 200 of the decision, the base prices for the period in question and the date on which they took effect.

93 Sixth, in so far as concerns table 27, mentioned in footnote 362 to the first decision, according to that footnote, it contains 'data relating to the list base prices or prices communicated to agents (and, in the case of Lucchini Siderurgica S.p.A., those relating to the monthly situation too) for 1997 ... in the Commission's possession'. The Commission mentioned this table in support of recital 216 of the first decision, which reads as follows:

'However, [Lucchini-SP ...], Acciaieria di Darfo S.p.A., Alfa Acciai S.R.L., Feralpi Siderurgica S.R.L., IRO, Riva Prodotti Siderurgici S.p.A. and (the former) Ferriera Valsabbia S.p.A. are the seven companies which received a communication (dated 24 November 1997) from Pierluigi Leali relating to the "PRICE/DELIVERY AGREEMENT" ... "The price of 270 Lire/kg was only requested, without any result" — the communication continued — "by a couple of manufacturers while in reality, as stated several times in the course of that meeting of commercial managers, the quotation had settled to 260 Lire/kg and occasionally less. We find with some satisfaction, however, that the fall has stopped as a result of the quota allocation of deliveries which all are respecting and which, as agreed, will be checked by external inspectors appointed for that purpose". "At the end of this month" — the communication continued — "which is dragging on through inertia, it will be essential to act immediately to buttress the minimum quotation of 260 Lire/kg (which would certainly not have affected the few purchases during the period). With the planning of deliveries in December agreed (- 20% over the quota for November) we are certainly in a position to maintain the price level agreed; it is however essential" — Pierluigi Leali concluded — "that no one accepts any exceptions to the minimum price decided (260 Lire/kg)."'

94 It is therefore clear from the wording of that recital that the Commission was merely setting out the wording of the communication of 24 November 1997 mentioned in the recital. Table 27 therefore appears to be irrelevant to the proper understanding of the points made by the Commission in recital 216 of the first decision.

95 Seventh, as regards table 28, mentioned in footnote 405 to the first decision, it must be observed that, according to that footnote, it contains 'data relating to the list base prices or prices communicated to agents (and for Lucchini/Siderpotenza also those relating to the monthly situation) for 1998 ... in the Commission's possession'. The Commission mentioned this table in support of recital 241 of the first decision, which reads as follows:

'On 11 September 1998 Pierluigi Leali sent a communication ... in which, referring to the express intent to maintain the minimum quotation at "170 Lire ex base" (at a meeting held on 9 September 1998), there had been "anomalous activities, i.e. quotations on average 5 Lire/kg less than the level

established which had become even greater in some areas of the south". "For our part" — Pierluigi Leali wrote — "the minimum agreed level will be maintained with a consequent reduction in the flow of orders". "We hope" — the communication ended — "that at the meeting between commercial managers on Tuesday 15th of this month we will achieve a substantial holding of prices, which will have an effect on a possible recovery of the quotation."'

96 It is therefore clear from the wording of that recital that the Commission was merely setting out the content of the communication of 11 September 1998 mentioned in the recital. Table 28 therefore appears to be irrelevant to the proper understanding of the points made by the Commission in recital 241 of the first decision.

97 Eighth, as regards tables 29 and 30, mentioned in footnote 448 to the first decision, it must be observed that, according to that footnote, they contain 'data relating to list base prices or prices communicated to agents (and in the case of Lucchini/Siderpotenza those relating to the monthly situation too) for 1999 and 2000 in the possession of the Commission'. The Commission mentioned those tables in support of recital 276 of the first decision, which reads as follows

'Further information on the market situation for reinforcing bar in Italy during this period is included in a document drawn up by Leali on 10 November 1999 and in particular in the section entitled "BENEFITS AND LIMITATIONS OF THE COMMERCIAL AGREEMENT IN 1999" which states "The basic agreement reached between national manufacturers has made it possible to reverse the situation of price weakness which was a feature of the two previous years 1997 and 1998 and to recover a gross margin of over 50 Lire/kg in the course of 1999. During 1998 the average gross margin (selling price — cost of raw materials) was 70 Lire/kg, and for a good five months it fell below that threshold." "The agreement reached has made it possible to stabilise selling prices in the course of the year, and manufacturers have been able to benefit from the situation as regards the costs of raw material, increasing gross margin by a further 50 Lire per kg, raising it to a net 122 Lire/kg."'

98 It is therefore clear from the wording of recital 276 of the first decision that the Commission was merely setting out the content of the communication of 10 November 1999 mentioned in the recital. The absence of tables 29 and 30 is therefore irrelevant to the proper understanding of the points made by the Commission in recital 276 of the first decision.

99 Ninth, table 13, mentioned in recital 451 of the first decision, is referred to in support of the assertions that, '[a]s far as 1997 is concerned, it [was to] be noted that the first half of this year [had been] marked by a constant increase in the base price fixed through the anti-competitive agreement: 190 Lire/kg fixed at the meeting on 30 January, 210 Lire/kg fixed at the meeting on 14 February, 250 Lire/kg fixed at the meeting on 10 July (paragraph (200))' and that, '[d]uring the same period, the average market base price [had] also increased constantly from 170 Lire/kg in January to 240 Lire/kg in July (Table 13 of the annexes); in September of that year the average market base price increased again, reaching 290 Lire/kg (Table 13 of the annexes)'. It must therefore be observed that the Commission expressly set out, in that recital, the increased in the base prices for the year 1997 and that the table is not therefore indispensable to a proper understanding of the Commission's reasoning.

100 Tenth, it must be pointed out that, in recital 496 of the first decision (footnote 563 [see footnote 564] to the first decision), the Commission referred generally to 'the tables annexed to this decision' in support of its assertion that '[t]he information in [its] possession ... [showed] that all the companies involved in this proceeding [had] published price lists during the period in question'. Nevertheless, it must be emphasised that recital 496 of the first decision also refers to recitals 419 to 433 thereof, which 'list all the occasions where there is evidence that the base price was discussed by the companies (and the trade association)'. The Commission stated, in this connection, that '[s]ome of these occasions [had] been mentioned in connection with the question of common intent (see paragraphs (473)-(475))', that '[o]n the other occasions between 1993 and 2000, what took place [had] to be described as consultation' and that '[t]he aim of this consultation was to influence the behaviour of the

manufacturers on the market and make manifest the behaviour each of them proposed adopting on the market, basically in connection with fixing the base price'. It is therefore apparent that the series of tables annexed to the first decision was therefore not indispensable to the proper understanding of the objections put forward by the Commission.

101 Eleventh, in so far as concerns the references to tables 1 to 3, 9, 11 to 14 and 16 made in recitals 513, 515, 516 and 518 of the first decision, it must be emphasised that those recitals appear within the section of the first decision concerned with the effects on the market of the restrictive practices, and that it is clear from the content of those recitals that the tables to which they refer either restate the figures mentioned in the recitals or are not indispensable to a proper understanding of the Commission's reasoning with regard to the effects of the cartel.

102 Having regard to the foregoing considerations, it cannot be held that the failure to annex the tables referred to in paragraph 79 above to the first decision prevented the applicant from understanding the objections set out in the first decision.

103 Secondly, the applicant refers to the case-law of the EU courts according to which the operative part and reasoning of the decision notified must correspond to those of the decision adopted by the College of Commissioners, exception being made for any corrections to spelling or grammar which may still be made to an act after its formal adoption by the College of Commissioners. In the present case, the first decision as notified to the applicant was incomplete in that its annexes were missing. It may therefore be supposed that the College of Commissioners did not approve the full act, which constitutes an infringement of the Rules of Procedure of the Commission, in particular a breach of the authentication procedure and of the principle of collegiality.

104 When questioned on this point at the hearing, the applicant stated that it withdrew its plea alleging breach of the authentication procedure for the first decision. As regards the alleged breach of the principle of collegiality, the applicant stated, in substance, that its plea arose from the fact that the College of Commissioners could not have been in a position to adopt a decision in full awareness of the facts.

105 In this connection, it must be held that the failure to annex the tables mentioned in paragraph 79 above to the first decision may entail the unlawfulness of the contested decision only if their absence made it impossible for the College of Commissioners to sanction the conduct referred to in Article 1 of the contested decision in full knowledge of the facts, that is to say, without being misled in a material respect by inaccuracies or omissions (see, to that effect and by analogy, Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraphs 23 to 25, Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 88, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 742, and the judgment of 17 February 2011 in Case T-122/09 *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods* v *Council*, not published in the ECR, paragraphs 104 and 105).

106 Irrespective of the absence of the aforementioned tables, the facts on which the contested decision was based are set out to the requisite legal standard in the text of the decision itself (see paragraphs 81 to 102 above). Consequently, it cannot be claimed that, when it adopted the first decision, the College of Commissioners did not have full knowledge of the facts on which the measure was based. The omission was, therefore, incapable of vitiating the procedure by which the contested decision was adopted and thus calling into question the decision's legality.

107 Thirdly, the applicant argues that the amending decision does no more than notify the annexes that were missing from the first decision and that it contains three articles the numbering of which 'overlaps' with that of the first decision. According to the applicant, the Commission should not have adopted a decision based on a 'supplemental, incomplete text' and should have adopted a decision on

the basis of the text of the contested decision in its entirety. Moreover, Article 2 of the amending decision, which sets out the addressees of the decision, sits ill with Article 2 of the first decision, which set out the amounts of the fines. That confusion is unacceptable from the point of view of legal certainty and respect for the rights of the defence.

108 First of all, it must be held that the Commission's power to adopt a particular act necessarily also includes the power to amend that act, on condition that the provisions on the relevant power and the formal requirements and the procedures laid down in that regard in the Treaty are complied with (see, to that effect, the Opinion of Advocate General Tizzano in Case C-27/04 *Commission* v *Council* [2004] ECR I-6649, points 134 and 143). It follows that the Commission was entitled to adopt the amending decision in order to append the missing tables as annexes to the contested decision. It must also be emphasised in this connection that, in the introduction to the amending decision, the Commission expressly referred to the first decision, the annexes to which had been omitted when the decision was adopted.

109 Secondly, as regards the applicant's argument concerning the confusion allegedly created by the operative part of the amending decision, suffice it to observe that it is clear from the operative part of the amending decision that it does not 'overlap' with the operative part of the first decision. Article 1 of the amending decision, which alone amends the first decision, sets out precisely the amendments, which concern (a) the wording of the eight footnotes listed and corrected in Article 1 and (b) the addition, as annexes to the contested decision, of the tables annexed to the amending decision. Moreover, Article 2 of the amending decision does no more than list the addressees of the decision.

110 It follows that reading the first decision together with the amending decision does not lead to confusion and, consequently, no breach of the principles of legal certainty and respect for the applicant's rights of defence arising from such confusion has been established.

111 The first plea in law must therefore be rejected.

The second plea in law, alleging a lack of competence on the Commission's part and an error of law in its choice of legal basis for the contested decision

112 In the context of its second plea, the applicant submits that the contested decision is unlawful since, once the ECSC Treaty had expired, the Commission no longer had competence to adopt the contested decision on the basis of Article 65(1) CS.

113 In the first place, the expiry of the ECSC Treaty necessarily meant that the Commission no longer had competence to apply its provisions.

114 First, in accordance with Articles 54 and 70 of the Vienna Convention on the Law of Treaties of 23 May 1969, a convention between States that has expired can no longer serve as the basis for obligations or found competence, unless the contracting States express a contrary intention. Article 65(1) CS cannot, therefore, be applied retroactively, 'even as to its substantive content', unless there is a specific transitional provision, which there is not.

115 Secondly, the Commission cannot rely on the 'similarity' between Article 65 CS and Article 81 EC, which do not completely 'coincide', in order to attribute competence to itself and fine the applicant.

116 Thirdly, the combined application of Regulation No 1/2003 and Article 65 CS, when the latter provision is no longer in force, is equally incapable of providing a valid basis for the imposition of fines and infringes the principle of legal certainty as well as the principle of conferred powers and the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), since it is indisputably clear from the provisions of Regulation No 1/2003 that, under that

regulation, the Commission may only impose fines in respect of infringements of Articles 81 EC and 82 EC. By basing the contested decision on Articles 7 and 23 of Regulation No 1/2003, the Commission once again extended the temporal application of Article 65(1) CS, in clear breach of the powers of the Council, rather than complying with the judgment in *SP and Others* v *Commission*, cited in paragraph 21 above, which annulled the 2002 decision.

117 In its reply, the applicant adds that the principles governing the temporal succession of rules cannot in this case justify the application of Article 65 CS to facts arising at a time when that Treaty was in force, since provisions which are no longer in force cannot be applied where to do so would infringe the principle of conferred powers. It also asserts that the Commission was not entitled to initiate fresh proceedings under Regulation No 1/2003 because its powers to bring proceedings and to impose fines were time-barred under Article 25 of that regulation.

118 In the second place, the applicant maintains that, since the FEU Treaty was already in force when the Commission adopted the amending decision, it should have re-adopted the contested decision on the basis of this new Treaty, for reasons connected with the principle of legal certainty and with the principles governing the temporal succession of rules

119 In its rejoinder, the Commission argues, as a preliminary point, that the objection that its powers to establish and fine the infringement in question were time-barred was not put forward in the application and is inadmissible.

120 It is clear from Article 48(2) of the Rules of Procedure that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the originating application, and which is closely connected therewith, will be declared admissible (Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39, confirmed on appeal by the order in Case C-430/00 P *Dürbeck* v *Commission* [2001] ECR I-8547, paragraph 17). The same applies to a submission made in support of a plea in law (*Joynson* v *Commission*, cited in paragraph 59 above, paragraph 156).

121 On the other hand, an objection put forward in the reply that cannot be regarded as amplifying a plea because it rests on factual and legal arguments that are new, and which is based on information that was known to the applicant when it brought its action, must be declared inadmissible (Case T-474/08 *Umbach* v *Commission* [2010], not published in the ECR, paragraph 60).

122 In the present case, it must be held that the objection that the Commission's power to impose penalties is time-barred was not raised in the application and does not amplify any plea put forward in the application. It is therefore inadmissible.

123 Moreover, the Court must also reject as inadmissible, in accordance with the case-law referred to in paragraph 57 above, the objection which the applicant bases on the entry into force of the FEU Treaty before the amending decision was adopted, which is wholly unsupported.

The choice of the legal basis for the contested decision

124 It should be pointed out that the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights in ever wider fields and the subjects of which comprise not only Member States but also their nationals (see, to that effect, Case 26/62 *Van Gend & Loos* [1963] ECR 1, Case 6/64 *Costa* [1964] ECR 585, at 593, Opinion 1/91 [1991] ECR I-6079, paragraph 21, *SP and Others* v *Commission*, cited in paragraph 21 above, paragraph 70, and Case T-24/07 *ThyssenKrupp Stainless* v *Commission* [2009] ECR II-2309, paragraph 63).

125 Within that legal order, the institutions have conferred powers only. For that reason, Community measures refer in their preamble to the legal basis which enables the institution concerned to act in the field in question. The choice of the appropriate legal basis has constitutional significance (see *SP and Others* v *Commission*, cited in paragraph 21 above, paragraph 71, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 64 and the case-law cited).

126 In the present case, it must be observed that the preamble to the contested decision contains references to provisions of the ECSC Treaty, namely Articles 36 CS, 47 CS and 65 CS, but also to the EC Treaty, to Regulation No 17, in particular Article 11 thereof, to Articles 7(1), 18 and 23(2) of Regulation No 1/2003 and to Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18).

127 It is also important to point out that, in the statement of reasons for the contested decision, the Commission indicated, in recital 1, that '[t]he ... decision [established] an infringement of Article 65(1) [CS] and [was] adopted on the basis of Article 7(1) of Regulation No 1/2003'. In recital 3 of the contested decision, the Commission added that '[b]y the ... decision [it imposed] fines on the undertakings to which it [was] addressed pursuant to Article 23(2) of Regulation No 1/2003'.

128 In recital 350 of the contested decision, the Commission accordingly stated that it considered that 'Article 7(1) and 23(2) of Regulation No 1/2003 [represented] the appropriate legal bases which [empowered] it to adopt [the] decision' and that, '[o]n the basis of Article 7(1), [it had established] an infringement of Article 65(1) [CS] and [required] the addressees of the ... decision to put an end to it, and on the basis of Article 23(2) it [had imposed] fines upon them' (see also recital 361 of the contested decision).

129 That being so, it must be held that the legal basis of the contested decision, by which the Commission found that there had been an infringement of Article 65(1) CS and imposed a fine on the applicant, is to be found in Article 7(1) of Regulation No 1/2003 as regards the finding of the infringement, and in Article 23(2) of Regulation No 1/2003 as regards the imposition of the fine.

The Commission's power to find and penalise, on the basis of Regulation No 1/2003, an infringement of Article 65(1) CS after the expiry of the ECSC Treaty

130 First of all, it must be recalled that the provision which forms the legal basis of an act and empowers the Union institution to adopt the act in question must be in force at the time when the act is adopted (Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 45, Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 75, Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 88, *SP and Others* v *Commission*, cited in paragraph 21 above, paragraph 118, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 74). That is indisputably the case in so far as concerns Article 7(1) and Article 23(2) of Regulation No 1/2003, which form the legal basis of the contested decision.

131 Secondly, it is important to emphasise that the Community Treaties established a single legal order in which, as is reflected in Article 305(1) EC, the ECSC Treaty constituted a specific regime derogating from the rules of general application established by the EC Treaty (see Case T-405/06 *ArcelorMittal Luxembourg and Others* v *Commission* [2009] ECR II-789, paragraph 57, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 75 and the case-law cited).

132 By virtue of Article 305(1) EC, the ECSC Treaty thus constituted a *lex specialis* derogating from the *lex generalis* of the EC Treaty (Case 239/84 *Gerlach* [1985] ECR 3507, paragraphs 9 to 11, Opinion 1/94 [1994] ECR I-5267, paragraphs 25 to 27, *SP and Others* v *Commission*, cited in paragraph 21 above,

paragraph 111, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 76, confirmed on appeal by *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 70 and 73).

133 It follows that the rules of the ECSC Treaty and all the provisions adopted in implementation of that treaty remained in force as regards the functioning of the common market, notwithstanding the supervening EC Treaty (*Gerlach*, cited in paragraph 132 above, paragraph 9, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 100, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 77, confirmed on appeal by *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 70 and 73).

134 Nevertheless, in so far as matters were not the subject of provisions in the ECSC Treaty or of rules adopted under it, the EC Treaty and the provisions adopted for its implementation could, even before the expiry of the ECSC Treaty, apply to products covered by the ECSC Treaty (Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraph 10, *Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 133 above, paragraph 100, judgment of 25 October 2007 in Case T-94/03 *Ferriere Nord* v *Commission*, not published in the ECR, paragraph 83, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 78, confirmed on appeal by *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 70 and 73).

135 Pursuant to Article 97 thereof, the ECSC Treaty expired on 23 July 2002. Consequently, on 24 July 2002, the scope of the general scheme resulting from the EC Treaty was extended to the sectors which were initially governed by the ECSC Treaty (*ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 58, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 79, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraphs 59 and 63, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 70 and 73).

136 Although the change from the legal framework of the ECSC Treaty to that of the EC Treaty has led, since 24 July 2002, to a change of legal bases, procedures and applicable substantive rules, that change is part of the unity and continuity of the Community legal order and its objectives (Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 55, *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 59, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 80, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraphs 60 and 63, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 71 and 73).

137 In this connection, it must be observed that the introduction and maintenance of a system of free competition, within which the normal conditions of competition are safeguarded and which is at the origin of the rules on State aid and cartels between undertakings, is one of the essential objectives of both the EC Treaty and the ECSC Treaty (*ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 60, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 81 and the case-law cited, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraphs 60 and 63, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 71 and 73).

138 In that context, although the rules of the ECSC and EC Treaties governing the sphere of collusive conduct between undertakings diverge to a certain extent, it must be emphasised that the concepts of agreements and concerted practices within the meaning of Article 65(1) CS correspond to those on collusive conduct and concerted practices within the meaning of Article 81 EC and that both provisions have been interpreted in the same way by the EU judicature. Thus, the pursuit of the

objective of undistorted competition in the sectors which initially fell within the common market in coal and steel is not suspended by the fact that the ECSC Treaty has expired, since that objective is also pursued in the context of the EC Treaty, by the same institution, namely the Commission, the administrative authority responsible for implementing and developing competition policy in the general interest of the European Community (*ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 61, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 82 and the case-law cited, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraphs 60 and 63, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 71 and 73).

139 The continuity of the Community legal order and the objectives which govern its functioning thus require that, in so far as it succeeds the European Coal and Steel Community and in its own procedural framework, the European Community ensures, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied *eo tempore* to both Member States and individuals under the ECSC Treaty and the rules adopted for its application. That requirement applies all the more in so far as the distortion of competition resulting from non-compliance with the rules on agreements and collusive conduct between undertakings is liable to extend its effects to a time after the expiry of the ECSC Treaty when the EC Treaty applies (see *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 63, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 83 and the case-law cited, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraphs 62 and 63, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 72 and 73).

140 The Court of Justice has also pointed out that the succession of the ECSC, EC and FEU Treaties ensures, in order to guarantee free competition, that any conduct corresponding to the factual elements set out in Article 65(1) CS, whether taking place before or after 23 July 2002, could be and still can be penalised by the Commission (*ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 65 to 67 and 77, and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraphs 55 to 57 and 65).

141 Moreover, it follows from the case-law that, in accordance with a principle common to the legal systems of the Member States whose origins may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system must be ensured, and that that principle applies to amendments to the primary law of the European Union (Case 23/68 *Klomp* [1969] ECR 43, paragraph 13, and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 63).

142 There is no indication that the EU legislature wished it to be possible for concerted practices prohibited under the ECSC Treaty entirely to escape the application of penalties after that treaty expired (*ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 64).

143 First, the Court of Justice has pointed out that the Council and the representatives of the governments of the Member States had indicated that they were ready to adopt all necessary measures to cope with the consequences of the expiry of that treaty. Secondly, it has emphasised that the Commission had stated that it had to put forward proposals for transitional provisions only if such a step was thought to be necessary, and that, having regard to the general principles of law applicable, it had considered that there was no such necessity in the field of the law on cartels (*ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 75).

144 Consequently, the appellant cannot derive any valid argument from the lack of transitional provisions in this field (see, to that effect, *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 76).

145 That being so, it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the legal order of the European Union if the Commission were not to have jurisdiction to ensure the uniform application of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that treaty (see, to that effect, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 41).

146 It follows from the foregoing that, contrary to the applicant's contention, Regulation No 1/2003 and, more particularly, Article 7(1) and Article 23(2) thereof, must be interpreted as enabling the Commission to find and penalise, after 23 July 2002, cartels in the sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*, even though those provisions of Regulation No 1/2003 do not expressly refer to Article 65 CS (see *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 64, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 84 and the case-law cited, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 74, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraphs 72, 73 and 87). The arguments which the applicant puts forward in this connection, by which it seeks to establish that the combined application of Regulation No 1/2003 and Article 65 CS, when the latter provision is no longer in force, is incapable of providing a valid basis for the imposition of fines and infringes the principle of conferred powers, must therefore be rejected.

147 In addition, the application, within the EU legal order, of rules of the EC Treaty in a field which was originally governed by the ECSC Treaty must take effect in conformity with the principles governing the temporal application of the law. In this connection, it is settled case-law that, while procedural rules are generally held to apply to all disputes pending at the time when such rules enter into force, that is not the case with substantive rules. The latter must, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, be interpreted as applying to situations existing before their entry into force only in so far as it is clear from their wording, objectives or general scheme that such an effect must be given to them (Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9, Case 21/81 *Bout* [1982] ECR 381, paragraph 13, Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 55, *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 65, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 85, confirmed on appeal by *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 79).

148 From that point of view, as regards the question of the substantive provisions applicable to a legal situation which was definitively established before the expiry of the ECSC Treaty, the continuity of the EU legal order and the requirements relating to the principles of legal certainty and the protection of legitimate expectations require the application of substantive provisions drawn from the ECSC Treaty to the facts which fall within their scope of application *ratione materiae* and *ratione temporis*. The possibility that, by reason of the expiry of the ECSC Treaty, the regulatory framework in question is no longer in force at the time when the assessment of the factual situation is carried out does not alter that situation since the assessment concerns a legal situation which was definitively established at a time when substantive provisions adopted under the ECSC Treaty were applicable (*ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 66, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 86, confirmed on appeal by *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 79; see also, to that effect, *Ferriere Nord* v *Commission* cited in paragraph 134 above, paragraph 96).

149 In the present case, as regards the substantive rules, it must be observed that the contested decision concerns a legal situation which had definitively come into being before the ECSC Treaty expired on 23 July 2002, the infringement spanning the period from 6 December 1989 to 4 July 2000 (see paragraph 37 above). In the absence of any retroactive effect of the substantive competition law applicable since 24 July 2002, it must be held that Article 65(1) CS is the substantive rule applicable and actually applied by the Commission in the contested decision, bearing in mind that it follows precisely from the *lex generalis* nature of the EC Treaty by comparison with the ECSC Treaty, enshrined in Article 305 EC, that the specific regime resulting from the ECSC Treaty and from the rules enacted for its implementation is, in accordance with the principle *lex specialis derogat legi generali*, alone applicable to situations which came into being prior to 24 July 2002 (see, to that effect, *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 68, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 89, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 77, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 79).

150 It follows that the applicant cannot maintain that the principle that offences and punishments are to be strictly defined by law requires that the substantive rule on the basis of which a penalty is imposed must be in force not only when the unlawful act is committed but also when the decision imposing the penalty is adopted.

151 Moreover, the Court has pointed out that the principle that offences and punishments are to be strictly defined by law, as enshrined in particular in Article 49(1) of the Charter of Fundamental Rights of the European Union, requires that EU rules define offences and penalties clearly (see *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 80 and the case-law cited).

152 Furthermore, the principle of legal certainty requires that such rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 81 and the case-law cited).

153 In so far as the Treaties defined clearly, before the material time, the infringements and the nature and extent of the penalties which could be imposed in respect of them, the above principles do not aim to guarantee to undertakings that subsequent amendments to the legal bases and procedural rules will enable them to escape all penalties relating to their past infringements (*ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 70, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 83).

154 It must be observed that a diligent undertaking in the applicant's position could not at any time have been unaware of the consequences of its conduct or count on the fact that the change from the legal framework of the ECSC Treaty to that of the EC Treaty would have the consequence of allowing it to escape all penalties for infringements of Article 65 CS committed in the past (*ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 73, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 86).

155 Moreover, the contested decision was adopted on the basis of Article 7(1) and Article 23(2) of Regulation No 1/2003, following a procedure carried out in accordance with Regulation No 17 and Regulation No 1/2003. The provisions concerning the legal basis and the procedure followed up to the adoption of the contested decision fall within the scope of procedural rules for the purposes of the case-law referred to in paragraph 147 above. Since the contested decision was adopted after the expiry of the ECSC Treaty, the Commission was right to apply the rules contained in Regulation No 1/2003 (see *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 67,

and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, paragraph 87 and the case-law cited, confirmed on appeal by *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, cited in paragraph 130 above, paragraph 74, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 90; see also, to that effect, *Ferriere Nord* v *Commission* cited in paragraph 134 above, paragraph 96).

156 It follows that the second plea must be rejected.

The third plea in law, alleging infringement of the applicant's rights of defence and an error of law

157 In the context of the present plea, the applicant takes issue with the fact that the procedure was not reopened and that no new statement of objections was sent prior to the adoption of the contested decision. It also alleges that the principle of *lex mitior* was incorrectly applied in this case.

158 In its rejoinder, the Commission asserts, as a preliminary point, that the applicant put forward in its reply complaints that were not contained in its application, alleging the invalidity of the measures adopted prior to the 2002 decision, the lack of any investigation into the effects of the cartel on trade between Member States and infringement of the special rights which Regulation No 1/2003 confers on national authorities.

159 In light of the case-law referred to in paragraphs 120 and 121 above, it must be held, first of all, that the complaint alleging the invalidity of the measures adopted prior to the 2002 decision must be regarded as amplifying the plea that the Commission could not lawfully adopt the contested decision without reopening the administrative procedure and that it is, therefore, admissible.

160 Next, the complaint alleging the lack of any investigation into the effects of the cartel on trade between Member States was already formulated in the application. It is connected with the arguments made in the context of the second limb of the present plea, according to which Article 81(1) EC stipulates an additional condition, relating to an effect on trade between Member States, compared with the equivalent provision of the ECSC Treaty. It is, therefore, also valid.

161 Lastly, the complaint alleging infringement of the special rights which Regulation No 1/2003 confers on national authorities was not included in the application. Nor does it amplify any plea set out in the application. It is, therefore, inadmissible.

The first limb of the third plea, concerning the fact that the administrative procedure was not reopened and that no new statement of objections was sent

162 The applicant argues that the Commission infringed its rights of defence by failing to reopen the administrative procedure and to send it a new statement of objections before re-adopting the decision.

163 It must be recalled that Article 27(1) of Regulation No 1/2003 provides:

'Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.'

164 Moreover, it is settled case-law that, in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings. In that regard, the statement of objections constitutes the procedural safeguard applying the

fundamental principle of EU law which requires observance of the rights of the defence in all proceedings. That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see, to that effect, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraphs 34 to 36 and the case-law cited, and Case C-534/07 P *Prym and Prym Consumer* v *Commissio*n [2009] ECR I-7415, paragraphs 26 to 28).

165 Respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that the undertaking has committed an infringement (see Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 66 and the case-law cited).

166 First of all, the applicant argues that, even if an error on the Commission's part in its choice of legal basis for a decision could be regarded as a mere procedural defect, its unilateral re-examination of the rules applicable to the present case, in accordance with the principle of *lex mitior* and section 5 of the contested decision, which appears in part III thereof, entitled 'Legal assessment', is contrary to Article 27 of Regulation No 1/2003. The applicant states that it was never consulted with regard to the analysis and detailed comparison of Article 65 CS and Article 81 EC and that the Commission did not set out its reasoning in the statement of objections, only in the supplemental statement of objections, which was, at the time, still 'valid'.

167 It must be observed, as a preliminary point, that section 5 of the contested decision addresses the legal consequences of the expiry of the ECSC Treaty, in light of the judgment in *SP and Others* v *Commission*, cited in paragraph 21 above.

168 In section 5, the Commission began by referring to its Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ 2002 C 152, p. 5) and to the supplemental statement of objections, in which it had informed the undertakings concerned of its intention to follow the approach set out in the communication. It also referred to the grounds of the judgment in *SP and Others* v *Commission*, cited in paragraph 21 above, and mentioned that it had informed the undertakings concerned of its intention to re-adopt the 2002 decision following the Court's annulment of that decision, after correcting the legal basis. Next, the Commission explained the distinction between the choice of legal basis empowering it to adopt a measure, and procedural and substantive rules. As regards its choice of legal basis, it set out the reasons for which it considered that it had retained competence to take action in respect of infringements of the rules on competition in the sectors falling within the scope of the ECSC Treaty. In so far as procedure is concerned, the Commission pointed out that the relevant procedural rules were those which were applicable at the time when the decision was adopted. Lastly, as regards substantive rules, the Commission set out the principles governing the temporal succession of rules, which could lead to the application of substantive provisions no longer in force at the time when a measure is adopted, and which are limited by the principle of *lex mitior*.

169 First of all, the applicant cannot claim that it was never consulted with regard to the 'analysis and detailed comparison' of Article 65 CS and Article 81 EC. While the statement of objections, which pre-dated the expiry of the ECSC Treaty, admittedly did not address the consequences of the treaty's expiry or examine Article 65 CS and Article 81 EC from the point of view of the *lex mitior* principle, the supplemental statement of objections, which post-dated the expiry of the ECSC Treaty, specifically addressed the implications of the treaty's expiry for the present case.

170 Thus, in paragraph 11 of the supplemental statement of objections, the Commission stated that the two provisions of the ECSC Treaty that could, in the abstract, be regarded as less favourable than the equivalent provisions of the EC Treaty were Article 65(1) CS, compared with Article 81(1) EC, and Article 65(5) CS, compared with Article 15 of Regulation No 17. In paragraphs 12 to 15 of the supplemental statement of objections, the Commission examined those respective provisions in the light of the facts at issue and concluded that, in this case, the EC Treaty would not in fact be more favourable than the ECSC Treaty and that, consequently, the principle of *lex mitior* could not be relied on in order to contest the application of the ECSC Treaty to the facts at issue.

171 Admittedly, in the supplemental statement of objections the Commission did not address the question of whether Article 65(2) CS, relating to the exemption of certain agreements, might, in the abstract, be regarded as less favourable than Article 81(3) EC. However, that omission may be explained by the fact that, in paragraph 11 of the supplemental statement of objections (see paragraph 170 above), the Commission expressed the view than only paragraphs 1 and 5 of Article 65 CS could, in the abstract, be regarded as less favourable than that provision of the EC Treaty. Furthermore, in paragraph 6 of the supplemental statement of objections, the Commission stated that Article 65(2) CS was not applicable in this case, for the reasons set out in the statement of objections. The applicant cannot, therefore, maintain that, had it been given the opportunity, it could have demonstrated that certain of its pricing practices might have had positive effects for customers of SP. Indeed, it is clear from the supplemental statement of objections that the Commission considered that the sole aim of the cartel in this case was to restrict competition and that it could not benefit from any exemption.

172 In its judgment in *SP and Others* v *Commission*, cited in paragraph 21 above, the Court pointed out that the provision constituting the legal basis of a measure had to be in force at the time of the measure's adoption, and that since, in accordance with Article 97 CS, Article 65(4) and (5) CS had expired on 23 July 2002, the Commission could no longer derive competence from those expired provisions in order to establish an infringement of Article 65(1) CS and to impose fines on the undertakings which had allegedly participated in the infringement. The Court did not, therefore, address the substance of the dispute and made no ruling on the validity of the procedural measures which preceded the adoption of the contested decision.

173 Given that, according to settled case-law, the annulment of an EU measure does not necessarily affect the preparatory acts, since the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred (Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraphs 31 and 32, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 73, Case T-2/95 *Industrie des poudres sphériques* v *Council* [1998] ECR II-463, paragraph 91, and Case T-66/01 *Imperial Chemical Industries* v *Commission* [2010] ECR II-2631, paragraph 125 and the case-law cited), it must be held that the judgment in *SP and Others* v *Commission*, cited in paragraph 21 above, did not affect the lawfulness of the statement of objections or of the supplemental statement of objections and that the Commission was entitled to take up the procedure at the exact point at which the unlawfulness occurred, that is, on the adoption of the 2002 decision.

174 Secondly, it must be recalled that, on 30 June 2008, the Commission also sent the applicant and the other undertakings concerned a letter informing them of its intention to re-adopt the decision, correcting the legal basis from that which it had chosen for the 2002 decision. In that letter, which did not contain any objections against the undertakings to which it was addressed, the Commission stated its intention to re-adopt the 2002 decision following the Court's annulment of that decision in its judgment in *SP and Others* v *Commission*, cited in paragraph 21 above, and reiterated its conclusions with regard to the principle of *lex mitior*, adding that the scope of Article 65(2) CS was narrower than that of Article 81(3) EC. It stated in this connection that, as it had mentioned in

paragraph 6 of the supplemental statement of objections, neither of those provisions applied in any event. However, even in its reply to that letter, the applicant made no observations and offered no evidence to show that the conditions for exemption laid down in Article 81(3) EC were fulfilled.

175 It follows from the foregoing that the applicant cannot maintain that its right of defence were infringed as a result of its not having been consulted on the 'analysis and detailed comparison' of Article 65 CS and Article 81 EC.

176 Secondly, the applicant cannot maintain that the Commission's letter of 30 June 2008 cannot be regarded as a valid statement of objections since it did not meet the relevant requirements, being extremely succinct and allowing only one month for a reply, by contrast with the two months normally allowed for replying to a statement of objections.

177 It is important to emphasise, like the Commission and as was pointed out in paragraph 174 above, that the letter of 30 June 2008 contained no new objections and was intended to inform the undertakings concerned of the Commission's intention to re-adopt the decision after correcting its legal basis. In accordance with the case-law, where, following the annulment of a decision in a competition matter, the Commission chooses to rectify the illegality or illegalities found and to adopt a new, identical decision which is not vitiated by those illegalities, that decision relates to the same objections as those in respect of which the undertakings have already submitted observations (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 173 above, paragraph 98).

178 Given that the letter of 30 June 2008 was not a statement of objections, as is apparent, moreover, from recitals 6, 122, 123, 390 and 391 of the contested decision, the applicant's arguments that the Commission infringed its rights of defence by allowing it only one month in which to formulate observations and that the communication was too succinct are irrelevant.

179 Thirdly, the applicant maintains that its rights of defence were infringed in that the Commission did not wait for it to express its position, sending it a request for information regarding its turnover even before the period of time which it had allowed the applicant for submitting its observations had elapsed. Such a request is, generally speaking, the 'last stage' before the adoption of a decision.

180 In this connection, it must first of all be pointed out that the Commission was under no obligation to await the observations of the undertakings concerned before sending them requests for information pursuant to Article 18(2) of Regulation No 1/2003. Next, the mere fact that the Commission sent the applicant a request for information on 24 July 2008, that is, on the same day as the applicant sent its observations on the letter of 30 June 2008, does not indicate that the Commission took no account of the arguments put forward by the applicant in its observations. The applicant's argument is in any event contradicted by the fact that, in recitals 388 to 394 of the contested decision, the Commission expressly replied to the observations made by the undertakings concerned in response to the letter of 30 June 2008.

181 Having regard to all of the foregoing considerations, the applicant's argument that the reasoning of the General Court in its judgments in *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, and *ThyssenKrupp Stainless* v *Commission*, cited in paragraph 124 above, does not apply in the present case is irrelevant. First of all, it is clear from the foregoing that the applicant was not deprived of procedural safeguards in this case, next, the Commission was under no obligation to send the applicant a new statement of objections and, lastly, the applicant is mistaken to claim that it was unable to formulate observations on the analysis and detailed comparison of Article 65 CS and Article 81 EC.

182 The first limb of the third plea must therefore be rejected.

The second limb of the third plea, alleging an error of law in the application of Article 65(1) CS as being a more favourable provision than Article 81 EC

183 In the context of the second limb of the third plea, the applicant asserts that the Commission erred in law by applying Article 65(1) CS rather than Article 81(1) EC. The Commission apparently took it for granted that the *lex mitior* in this case was Article 65(1) CS, even though Article 81(1) EC stipulates an additional condition, relating to an effect on trade between Member States, compared with Article 65(1) CS.

184 The applicant takes issue with the Commission's conclusion that the infringement which it imputed to it was, in any event, capable of affecting trade between Member States. According to the applicant, the conditions laid down by the Commission in its Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] (OJ 2004 C 101, p. 81) for reaching a finding of a harmful effect on trade between Member States are not satisfied in the present case.

185 Having regard to paragraphs 169 to 175 above, the Court must reject at the outset the applicant's argument that its rights of defence were infringed in that no new procedure was initiated in order to ascertain the effects of the cartel at issue.

186 It must be recalled that the Court has held that, in order for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that influence must not be insignificant (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/05 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 36).

187 Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess whether an arrangement has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (*Erste Group Bank and Others* v *Commission*, cited in paragraph 186 above, paragraph 37, and *Asnef-Equifax and Administración del Estado*, cited in paragraph 186 above, paragraph 35 and the case-law cited).

188 Moreover, the Court has held that the fact that an arrangement relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected. An arrangement extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (see *Erste Group Bank and Others* v *Commission*, cited in paragraph 186 above, paragraph 38, and *Asnef-Equifax and Administración del Estado*, cited in paragraph 186 above, paragraph 37 and the case-law cited).

189 It must be pointed out that, in deciding which was the *lex mitior*, the Commission relied, in recitals 373 to 375 and 385 to 387 of the contested decision, on the following factors: (a) the cartel at issue related to the whole of the territory of the Italian Republic where, during the period of the cartel, between 29% and 43% of the Community's reinforcing bars had been produced, (b) the proportion of exports to total deliveries (deliveries in Italy plus exports) had always been high (between 6% and 34% during the period of the infringement), (c) the fact that, from December 1989 to July 1998, the trade association Federacciai had been involved and that the effects of the cartel had therefore extended to all Italian producers of reinforcing bars and the fact that, even when Federacciai was no longer involved, the cartel in any event involved the main Italian producers representing 80% of the market,

(d) at least two major parties to the cartel also manufactured in at least one other geographic market for reinforcing bars, (e) the cartel also provided, as a measure equivalent to a temporary, concerted reduction in production, for concerted exports from Italy and (f) the Italian share of intra-Community trade fluctuated between 32.5% in 1989 and 18.1% in 2000, with a minimum of 13.4% in 1998. Those facts are not disputed by the applicant.

190 First of all, in light of the case-law referred to in paragraph 188 above, the applicant's argument concerning the fact that the relevant geographic market in this case was limited to the Italian territory cannot be upheld.

191 Secondly, the applicant maintains that there is no evidence to show that it and the other addressees of the contested decision discussed pricing practices in other Member States or monitored the conduct of competitors abroad or exerted anti-competitive pressure on them. That argument is, however, irrelevant, since the effect on trade concept encompasses potential effects and whether or not the undertakings participating in a cartel take measures to exclude competitors from other Member States is therefore not decisive (see paragraphs 79 and 80 of the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC]).

192 Thirdly, the applicant asserts that whether there is any real or potential harm also depends on the presence of natural barriers to trade in the market. In the present case, such barriers arose from the extremely limited trade potential of reinforcing bars resulting from different standardisation rules. The decision of foreign undertakings not to establish themselves in Italy therefore resulted from the national nature of the markets, not from any anti-competitive practices. It must be held in this connection that, as the Commission concluded, the diversity of standardisation rules could not have constituted a sufficient barrier to rule out any potential harm because, despite that diversity, the level of exports from Italy and the proportion of exports to total deliveries remained high during the period under consideration.

193 Fourthly, the applicant submits that the Commission's assertion, in recital 375 et seq. of the contested decision, that there were concerted exports from Italy, must be read together with the assertion in recital 183 of the contested decision that the Member States of the European Coal and Steel Community were not included in the concerted exports. However, that point, even if it were correct, is incapable of demonstrating, that there was no harm to trade between Member States, given the factors listed in paragraph 189 above.

194 Fifthly, the applicant's observation that the FEU Treaty was already in force when the amending decision was adopted and that Article 101(1) TFEU is intended only to penalise cartels which may affect trade between Member States is irrelevant, since the wording of Article 81(1) EC is identical to that of Article 101(1) TFEU.

195 It follows from all the foregoing considerations that, in taking the view that, in this case, the application of Article 81(1) EC would not have been more favourable than the application of Article 65(1) CS, the Commission did not err in law. The second limb of the third plea must therefore be dismissed.

196 It follows that the third plea must be dismissed in its entirety.

The fourth plea in law, alleging a lack of evidence and incorrect application of the substantive law

197 The applicant maintains that the Commission infringed Article 65(1) CS by imputing the infringement to it, through the single undertaking Lucchini-SP, for the whole duration of the infringement, that is, from 6 December 1989 to 27 June 2000. The Commission made a manifest error of assessment by failing to distinguish, when it established the existence of a single undertaking, three periods of

infringement, that is to say, the period from 6 December 1989 to 5 March 1991, the period from 5 March 1991 to 31 October 1997, and the period from October 1997 to 27 June 2000. Moreover, the Commission failed to determine correctly the 'relationship of legal succession' between the first Siderpotenza, Lucchini Siderurgica, SP and the applicant.

198 As a preliminary point, it must be recalled that EU competition law refers to the activities of undertakings and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 38, Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraphs 54 and 55, and *Elf Aquitaine* v *Commission*, cited in paragraph 77 above, paragraph 53).

199 The Courts of the European Union have also stated that in this context the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40, and *Elf Aquitaine* v *Commission*, cited in paragraph 77 above, paragraph 53).

200 They have thus emphasised that, for the purposes of applying the competition rules, the formal separation of two companies resulting from their having distinct legal identity is not conclusive, the decisive test being whether or not there is unity in their conduct on the market. Thus, it may prove necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 140, and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

201 When such an entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (*ETI and Others*, cited in paragraph 198 above, paragraph 39, *Akzo Nobel and Others* v *Commission*, cited in paragraph 198 above, paragraph 56, and *Elf Aquitaine* v *Commission*, cited in paragraph 77 above, paragraph 53 and the case-law cited).

202 According to settled case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 37, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 143).

203 As to the circumstances in which an entity that has not committed the infringement may none the less be penalised for that infringement, the Court has stated that this situation arises if the entity that has committed the infringement has ceased to exist, either in law or economically, since a penalty imposed on an undertaking which is no longer economically active is likely to have no deterrent effect (*ETI and Others*, cited in paragraph 198 above, paragraph 40, and *ThyssenKrupp Nirosta* v *Commission*, cited in paragraph 130 above, paragraph 144).

204 Next, it must be noted that if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties (see *ETI and Others*, cited in paragraph 198 above, paragraph 41 and the case-law cited).

205 Thus, where, between the infringement and the time when the undertaking in question must answer for it, the person responsible for the operation of that undertaking has ceased in law to exist, it is necessary, first, to establish the combination of physical and human elements which contributed to the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that because of the disappearance of the person responsible for its operation when the infringement was committed the undertaking may evade liability for it (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 953; see also, to that effect, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27).

206 Furthermore, where all or part of the economic activities are transferred from one legal entity to another, liability for the infringement committed by the initial operator, in the context of the activities in question, may be imputed to the new operator if it constitutes with the initial operator the same economic entity for the purpose of the application of the competition rules, even if the initial operator still exists as a legal entity (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 165 above, paragraphs 354 to 359, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 131 to 133, and *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 109).

207 Applying penalties in this way is permissible in particular where those entities have been subject to control by the same person and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions. That concerns quite specifically the cases of restructuring within a group of undertakings, where the initial operator does not necessarily cease to have a legal existence, but where it no longer carries out a significant economic activity on the relevant market. For the existence of a structural link between the original operator of the undertaking which participated in the cartel and the new one may allow the persons concerned to escape their liability under antitrust law — whether intentionally or unintentionally — by making use of the structural possibilities available to them (see *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 131 above, paragraph 110 and the case-law cited).

208 It is in the light of those considerations that the present plea must be examined.

209 First of all, the applicant maintains that, during the period from 6 December 1989 to 5 March 1991, the first Siderpotenza was controlled by Leali. The applicant, initially a minority shareholder and then owner of 50% of the company (the remaining shares being held by Leali), was involved in neither the general management nor the commercial management of the first Siderpotenza. Both were undertaken by Leali. Unlike Leali, the applicant did not produce reinforcing bars and had no expertise or market share in that sector. Overall management, as well as management of the commercial area, was entrusted to a person connected with Leali. Lastly, the first Siderpotenza was never included in Leali's consolidated annual accounts.

210 As the Commission indicated in recital 541 of and footnote 592 [see footnote 593] to the contested decision, its imputing the actions of the first Siderpotenza to Lucchini Siderurgica and then the applicant was based on the legal succession between the first Siderpotenza and Lucchini Siderurgica, and then Lucchini. The applicant's argument therefore rests on the mistaken premiss that the Commission had concluded that it had exercised actual control over the first Siderpotenza.

211 Having regard to the case-law cited in paragraph 205 above, and given that the applicant does not dispute that all the physical and human elements of the first Siderpotenza were operated by Lucchini Siderurgica from 5 March 1991 onwards, when that company took over the first Siderpotenza, the Commission was right to conclude that Lucchini Siderurgica was the legal successor of the first Siderpotenza.

212 The argument, put forward by the applicant in its reply, that, by so doing, the Commission infringed the principle of personal responsibility cannot be upheld. Indeed, it is clear from the Commission's findings that, during the period mentioned in paragraph 209 above, the first Siderpotenza was the entity responsible for the infringement. Whilst it is true that the separate legal personality of a subsidiary does not preclude the possibility of imputing its conduct to a parent company, the Court has nevertheless held that the Commission cannot be required, as a matter of principle, first to carry out such verification before being entitled to consider taking action against the undertaking that committed the infringement, even if the latter has undergone changes regarding its status as a legal entity. The principle of personal responsibility certainly does not prevent the Commission from considering the possibility of penalising the latter undertaking before investigating whether the infringement might be possibly attributed to the parent company. If the position were otherwise, the Commission's inquiries would be made considerably more laborious by the need to verify, in each case where there were successive controllers of an undertaking, to what extent the latter's acts could be imputed to the former parent company (*Erste Group Bank and Others* v *Commission*, cited in paragraph 186 above, paragraphs 81 and 82).

213 Since the Commission could validly impose a penalty on the first Siderpotenza for the conduct at issue and impute liability to Lucchini Siderurgica as legal successor of the first Siderpotenza, the Commission was under no obligation to determine whether the conduct of the first Siderpotenza could be imputed to Leali. The applicant's argument concerning Leali's actual control of the first Siderpotenza is therefore irrelevant (see, to that effect, *Erste Group Bank and Others* v *Commission*, cited in paragraph 186 above, paragraph 85).

214 Secondly, in so far as concerns the period from 5 March 1991 (when Lucchini Siderurgica took over the first Siderpotenza) to 31 October 1997 (when Lucchini Siderurgica sold the branch of the business relating to reinforcing bars to the new Siderpotenza, the applicant acknowledged that it was then the majority shareholder in Lucchini Siderurgica. However, it disputes that that shareholding can form the basis of any presumption of liability.

215 It must be emphasised that, as is clear from recital 540 of the contested decision, in order to impute liability for the conduct of Lucchini Siderurgica to the applicant, the Commission did not rely on any presumption that the applicant had controlled Lucchini Siderurgica between 1991 and 1997. It instead relied on the principle of legal succession, as discussed in paragraph 205 above. Thus, in recital 541 of the contested decision, the Commission stated that it was obvious that Lucchini Siderurgica had legally succeeded the first Siderpotenza following the merger by incorporation of 5 March 1991 and that, similarly, the applicant had succeeded Lucchini Siderurgica following the merger by incorporation of 1 December 1998. The Commission added that the physical and human elements associated with the plant at Potenza and organised by Lucchini Siderurgica had been transferred, within the group, to the new Siderpotenza following its establishment in 1997 (see also paragraphs 28 to 31 above). Since the Commission did not rely on any presumption of liability resulting from the applicant's majority shareholding in Lucchini Siderurgica, this argument of the applicant's is equally irrelevant. The Court must draw the same conclusion with regard to the applicant's argument that the business management agreement of 2 January 1998 does not prove any structural link between it and SP in the period between 1991 and 1997.

216 Furthermore, in the context of its argument relating to the period between 5 March 1991 and 31 October 1997, the applicant has also asserted that, contrary to the Commission's assertion in recital 540 of the contested decision, it cannot be inferred from the fact that the Lucchini family held shares in both the applicant and SP that the applicant was jointly and severally liability with SP. The applicant claims that it has evidence that refutes the Commission's 'approximative' list set out in recital 538 of the contested decision. Since the information set out in recital 538 is intended to demonstrate the existence of an economic unit comprising the applicant and the new Siderpotenza, which was not established until 1997, it will be examined below.

217 Thirdly, in so far as concerns the period between October 1997 and 27 June 2000, the applicant maintains that the fact that the shares in the new Siderpotenza were held by Lucchini Siderurgica (until that company's merger with the applicant), itself and other companies belonging to the Lucchini family, and the fact that certain management costs were shared between them, are not sufficient to establish the existence of an economic unit comprising SP and itself.

218 It must be recalled in this connection that, in holding the applicant jointly and severally liable with SP during the period identified in paragraph 217 above, the Commission referred, in recital 538 of the contested decision, to the following factors in particular:

— the share capital of the applicant and that of SP were held by the Lucchini family;

— the simultaneous occupation by a number of persons of positions within the applicant and SP;

— the existence of a business management agreement under which SP undertook, inter alia, to comply, in its sales contracts with customers, with conditions relating to volumes, prices and payment terms agreed with those customers by the applicant;

— the fact that organisational changes made in the area of business relating to reinforcing bars which were decided upon in November 1999 were formalised in a communication from the applicant's commercial director to the then Vice-Chairman of the applicant (now its Chairman);

— the fact that the bill of 9 March 1999 from a restaurant where a meeting of manufacturers of reinforcing bars, attended by the applicant's commercial director, was held was made out to the applicant and was accounted for in the expenses note which that director sent to the applicant;

— the drafting, under the supervision of the applicant's commercial director, of monthly 'Area 20' reports relating to reinforcing bars;

— an internal Lucchini document of 28 February 2000 relating to 'POSSIBILITIES FOR REORGANISATION OF THE ITALIAN REINFORCING BAR MARKET', which mentions the applicant among the manufacturers of reinforcing bars;

— the fact that the applicant's commercial director was one of the addressees of various communications and one of attendees of various meetings relating to reinforcing bars during the period between November 1997 and 2000;

— the fact that the statement 'Siderpotenza, an establishment of the Lucchini Group, manufactures reinforcing bar' appeared on 9 October 2000 in the 'Reinforcing bar' section of the applicant's website.

219 First, the applicant asserts that the Lucchini family's ownership of a controlling shareholding does not constitute sufficient proof of the existence of an economic unit comprising SP and itself. It asserts that it has never been the majority shareholder in SP and that the ownership structure of the two companies was different.

220 First of all, as the Commission pointed out in recital 540 of the contested decision, 'the special feature of this case is that, throughout the period of the infringement, there was no direct shareholding control relationship between Lucchini SpA and the [new] Siderpotenza, but a common shareholding control of the two companies by the Lucchini family'.

221 It must also be observed that the applicant does not dispute that, during the period in question, control over Siderpotenza and itself was exercised, directly or indirectly, by natural and legal persons associated with the Lucchini family, but merely asserts that its ownership structure and that of

Siderpotenza were not the same. Moreover, the fact that natural and legal persons associated with the Lucchini family controlled the capital of the two companies is confirmed by a document which the applicant itself produced.

222 Secondly, the applicant maintains that the simultaneous occupation of various company positions is equally incapable of constituting such proof, since it is a traditional feature of any group of companies and is merely the natural consequence of belonging to a group of companies.

223 It is important to note that, while the Commission itself pointed out, in recital 540 of the contested decision, that the mere fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies form an economic unit, it stated that the existence of an economic unit could be proven by a set of circumstances.

224 Among those circumstances was the fact that certain persons had assumed responsibilities simultaneously within SP and Lucchini. Indeed, it is clear from the case-law that the fact of occupying key positions on the management bodies of various companies is a factor that may be taken into account in order to establish that those companies form an economic unit (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 119 and 120). In the present case, the applicant does not dispute that the same persons occupied important positions within the company and within SP and that those same persons attended meetings relating to the cartel. The fact, alleged by the applicant, that the persons in question also occupied positions in other companies within the Lucchini group and that the applicant had not appointed them directly does not alter that conclusion.

225 Thirdly, the fact that the applicant did not produce reinforcing bars is equally irrelevant. Whether or not a legal person itself produces the product to which a cartel relates does not determine whether the conduct constituting an infringement of Article 65 CS may be imputed to it. What does count is whether the legal person carries on an activity within the meaning of Article 80 CS. Even though the applicant did not directly manufacture reinforcing bars, that activity having been delegated within the group to the new Siderpotenza, it did, without question, sell reinforcing bars.

226 Fourthly, according to the applicant, it is clear from a letter which it sent to the Commission on 7 May 2002 that Lucchini did not give any instructions to SP employees regarding the activities of that company. However, that assertion is belied by the terms of the business management agreement concluded between the applicant and the new Siderpotenza, which stipulates that the latter undertakes to conform orders to the conditions established by the applicant with customers and suppliers.

227 Fifthly, the applicant asserts that the references to bills and expenses made out to it do not constitute evidence of an economic unit, since they would have been allocated at the end of the year, like all invoices, to the appropriate company within the group. That argument must also be rejected. Beside the fact that the expenses note of 31 March 1999 is obviously not an end-of-year cost allocation, that note, by which the costs of a meeting of cartel participants of 9 March 1999 was charged to the applicant, tends to show, along with the other evidence gathered by the Commission, that the applicant helped to direct the marketing policy for reinforcing bars.

228 Sixth, the applicant argues that the business management agreement of 2 January 1998, concluded for a period of one year and tacitly renewed with a parallel agreement for the provision of services for subsequent years, does not decisively establish that it constitutes a single economic entity with SP. As regards the agreement for the provision of services, the applicant points out that the Lucchini group provided, through the company Lucchini Servizi Srl, the same services to other companies connected with the group, and that there is no reason to consider that it formed a single undertaking with those companies as a result.

229 It must be observed in this connection, first of all, that the business management agreement and the agreement for the provision of services were signed on 3 November 1997 for the year 1997, and were renewed in writing on 2 January 1998 for the year 1998. It is also common ground that they were subsequently tacitly renewed.

230 Next, it is clear from the terms of those agreements that the new Siderpotenza was entrusted solely with manufacturing in the technical sense and did not determine its own conduct on the market independently. Thus, under Article 2(4) of the business management agreement, the new Siderpotenza undertook 'to conform orders to the contractual conditions established by the principle [Lucchini] with suppliers and customers (volumes, prices and payment terms)'. These agreements cannot, therefore, constitute proof of the structural independence of SP and the applicant. On the contrary, they tend to prove the economic unity of the two companies. The fact that the Lucchini group provided, through the company Lucchini Servizi, the same services to other companies associated with the group does not alter that conclusion. The applicant's arguments on this point cannot therefore be upheld.

231 In this connection, the assertions that SP was an entirely independent company from the manufacturing point of view, that it had its own organisation, that it used Lucchini Siderurgica and the applicant solely to obtain, for consideration, a series of administrative and managerial services and that it used the services of Lucchini Siderurgica to distribute its own products only during the initial phase of its activities are not credible.

232 Seventh, the applicant mentions a number of circumstances that the Commission failed to take into account in the contested decision.

233 First of all, the Lucchini group was divided into product sectors, each of which enjoyed a significant degree of autonomy. That assertion, however, does not prove that the applicant and SP did not form an economic unit, especially in view of the terms of the business management agreement concluded by the two companies. Moreover, the applicant was kept informed, by means of monthly group reports, of activity in the reinforcing bar sector.

234 Next, the fact that the trade mark for reinforcing bars was registered in the name of Siderpotenza rather than the applicant and that the identification code required under the applicable regulations referred exclusively to Siderpotenza is not such as to prove that the two companies did not form an economic unit. On the contrary it merely corroborates the position that Siderpotenza was entrusted solely with production in the technical sense.

235 Lastly, as is clear from the case-law, the fact that the applicant and SP were represented in the administrative procedure and judicial proceedings by separate legal counsel, who decided independently on their defence strategies, does not call into question the fact that the two companies formed an economic unit (see, to that effect, Joined Cases T-144/07, T-147/07 to T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others* v *Commission* [2011] ECR II-5129, paragraph 98 and the case-law cited).

236 Eighth, as the Commission rightly emphasises, the fact that the new Siderpotenza was not really independent from the applicant, either within the group or outside it, is equally clear from a number of other items in the case-file. For example, Lucchini was regarded as the contact point for dealings between competitors in the context of the cartel and was the recipient of invitations to anti-competitive meetings and of cartel-related correspondence (see, inter alia, recitals 217, 220 to 226, 228, 229, 232, 233, 241, 242, 258, 261, 262, 271, 277, 289, 299 and 304 of the contested decision). Also, in a list of members of Federacciai for 2000, the applicant and the new Siderpotenza have the same address, telephone number and facsimile number. In its reply, the applicant asserts, without substantiating the point further, that this conclusion is belied by 'other documents taken from the two CD-ROMs annexed to the statement of objections ... copies of which were contained in

annexes C.7 and C.15 to C.34 ... the content of which is described in further detail in table 3 of annex C.3'. However, it must be recalled that the annexes on which the applicant relies, and the observations mentioned above, have been held inadmissible (see paragraphs 66 to 68 above).

237 In light of all of the foregoing considerations, the fourth plea must be dismissed.

3. *The claim for a reduction in the amount of the fine*

Preliminary observations

238 It must be recalled that it is settled case-law that the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the 1998 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23(2) of Regulation No 1/2003 (see, to that effect, *Papierfabrik August Koehler and Others* v *Commission*, cited in paragraph 164 above, paragraph 112 and the case-law cited).

239 The gravity of infringements of EU competition law must be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 72, and *Prym and Prym Consumer* v *Commission*, cited in paragraph 164 above, paragraph 54).

240 As was stated in paragraph 33 above, in the present case, the Commission determined the amounts of the fines by applying the method laid down in the 1998 Guidelines.

241 Although the 1998 Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 224 above, paragraph 209 and the case-law cited, and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 70).

242 By adopting such rules of conduct and announcing through their publication that they will henceforth apply to the cases to which they relate, the Commission imposed a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 224 above, paragraph 211 and the case-law cited, and *Carbon-Lorraine* v *Commission*, cited in paragraph 241 above, paragraph 71).

243 Furthermore, the 1998 Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 224 above, paragraphs 211 and 213).

244 In accordance with the 1998 Guidelines, the method for determining the amount of a fine starts from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of mitigating circumstances.

245 According to Section 1 of the 1998 Guidelines, the basic amount is determined by reference to the gravity and duration of the infringement

246 As regards the assessment of the gravity of the infringement, the 1998 Guidelines state, in the first and second paragraphs of Section 1.A, that:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.'

247 According to the 1998 Guidelines, minor infringement may, for example, consist in 'restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market' (second paragraph, first indent, of Section 1.A). As regards serious infringements, the Commission states that they 'will more often than not be horizontal or vertical restrictions of the same type as [minor infringements], but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market'. It also states that 'there might also be abuse of a dominant position' (second paragraph, second indent, of Section 1.A). As regards very serious infringements, the Commission states that '[t]hese will generally be horizontal restrictions, such as "price cartels" and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly' (Section 1.A, second paragraph, third indent of the 1998 Guidelines).

248 The Commission also states that, within each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed, and that it is also necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1.A, third and fourth paragraphs, of the 1998 Guidelines).

249 According to the 1998 Guidelines, for 'very serious' infringements, the likely starting amount of the fine will be over EUR 20 million, for 'serious' infringements, the likely starting amount will be between EUR 1 million and EUR 20 million and for 'minor' infringements, the likely starting amount will be between EUR 1 000 and EUR 1 million (Section 1.A, second paragraph, first to third indents of the 1998 Guidelines).

250 In so far as concerns the duration of the infringement, according to Section 1.B of the 1998 Guidelines, a distinction should be made between the following:

— infringements of short duration (in general, less than one year), for which no increase is provided for;

— infringements of medium duration (in general, one to five years), for which increase of up to 50% of the amount determined for gravity is provided for;

— infringements of long duration (in general, more than five years), for which an increase of up to 10% per year of the amount determined for gravity is provided for.

251 As the Court pointed out in its judgments in Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125 (paragraph 129) and Case C-272/09 P *KME and Others* v *Commission* [2011] ECR I-12789 (paragraph 102), the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion — either

as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors — as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

252 It is in the light of those considerations that this plea must be examined.

The pleas of inadmissibility raised by the Commission

253 As a preliminary step, the Court must rule on the pleas of inadmissibility raised by the Commission, according to which the applicant broadened the scope of its fifth plea in law in its reply by making new claims regarding the disproportionate nature of the amount of the fine imposed by comparison with the conduct of SP and the companies which preceded it and regarding the incorrect application of the increase of 200% on account of deterrence. According to the Commission, those complaints are inadmissible under Article 48(2) of the Rules of Procedure.

254 It must be observed that, in its application, the applicant set out its fifth plea in law in four parts. These related to the failure to impose a merely symbolic fine, incorrect assessment of the gravity of the infringement, the incorrect application of an increase of 105% on account of the duration of the infringement and, lastly, the failure to take certain mitigating circumstances into account. The applicant did not, however, put forward any complaint specifically alleging breach of the principle of proportionality, that complaint being raised, incidentally, only in its reply.

255 First, the claim regarding the disproportionate nature of the amount of the fine imposed by comparison with the conduct of SP and the companies which preceded it cannot be regarded as amplifying a plea raised in the application and with which it is closely connected. Admittedly, the applicant emphasised in its application that, 'in so far as concerns Siderpotenza (now SP SpA, in liquidation), the fact that it did not apply the agreed prices or observe the shut-downs decided upon in the meetings was not properly considered by the Commission when it determined the gravity of the infringement'. However, that complaint relates solely to the classification of the infringement as 'very serious' and not to the supposedly disproportionate and unfair amount of the fine 'by comparison with the conduct' and the 'passive, marginal role' played by SP alleged in the reply. The claim is, therefore, inadmissible. In any event, the applicant's arguments concerning SP's conduct are not set out in the body of the reply itself, but appear, essentially, in a table appended to the reply and in 147 annexes, which the Court has ruled inadmissible (see paragraphs 66, 68 and 69 above).

256 Secondly, it must be observed that the supposedly incorrect application of an increase of 200% on account of deterrence was not alleged in the application and cannot be regarded as amplifying a plea raised in the application and with which it is closely connected. This claim too is therefore inadmissible.

The incorrect assessment of the gravity of the infringement, the inadequate statement of reasons and the lack of evidence

257 The applicant argues that the Commission applied the 1998 Guidelines incorrectly when assessing the gravity of the infringement. It also maintains that the contested decision is vitiated by a serious defect in the statement of reasons and a lack of evidence in that connection.

258 First of all, in so far as concerns the alleged breach of the duty to state reasons in relation to the calculation of the fines, it must be recalled that the 1998 Guidelines indicate what factors the Commission takes into consideration in measuring the gravity and duration of an infringement. That being so, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and

which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraphs 217 and 218).

259 In the present case, the unavoidable conclusion is that the Commission did satisfy that requirement. Indeed, in recitals 582 to 605 of the contested decision, it set out the factors which it took into account in classifying the infringement as 'very serious'.

260 Secondly, in so far as concerns the merits of the Commission's classification of the infringement as 'very serious', the applicant submits, first of all, that the Commission failed to take account of the actual effect of the cartel members' conduct, and in particular SP's conduct, when determining the gravity of the infringement and fixing the fine accordingly. According to the applicant, in the case of price agreements there must be a finding by the Commission that the agreement has in fact enabled the undertakings concerned to achieve a higher level of price than that which would have prevailed had there been no cartel. In the present case, the Commission was unable to prove such an effect and instead merely classified the cartel as 'very serious' on account of its aim. The applicant also argues that the cartel's impact was limited, and that that is evidenced by the actual changes in prices on the market during the reference period and is clear from a study produced by certain firms and from the statement made by the national association of iron millers, which indicates that the cartel did not have an effect.

261 First of all, the Court must reject the applicant's argument that, in determining the gravity of the infringement, the Commission ought to have taken particular account of the conduct adopted by SP, which, the applicant alleges, did not apply the prices agreed upon. It is settled case-law that the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 152, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 167, Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 133, and *KME and Others* v *Commission*, cited in paragraph 251 above, paragraph 72).

262 The Commission's consideration of the applicant's unlawful conduct shed light on the individual situation of the applicant, but could have no bearing whatsoever on the categorisation of the infringement as 'very serious' (see, to that effect, *Gütermann and Zwicky* v *Commission*, cited in paragraph 261 above, paragraph 134). Similarly, the applicant's argument that SP and the companies that preceded it could not have implemented the cartel and, in particular, could not have applied prices 'ex Brescia' because they operated almost entirely 'in the south' is irrelevant to the classification of the infringement as 'very serious'.

263 Next, it must be borne in mind that, while the impact of an infringement is a factor to be taken into account in assessing the gravity of the infringement, it is one of a number of criteria, such as the nature of the infringement and the size of the geographic market. Furthermore, it is apparent from the first paragraph of Section 1.A of the 1998 Guidelines that that impact is to be taken into account only where it can be measured (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraph 125, and *Prym and Prym Consumer* v *Commission*, cited in paragraph 164 above, paragraph 74).

264 As regards horizontal price or market sharing agreements, it is also apparent from the 1998 Guidelines that the Commission may classify these agreements as very serious infringements solely on account of their nature, without being required to demonstrate an actual impact of the infringement on the market. In such cases, the actual impact of the infringement is only one among a number of factors

which, if it can be measured, may allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million (*Prym and Prym Consumer* v *Commission*, cited in paragraph 164 above, paragraph 75).

265 In this connection, it should be noted that the system of penalties for infringement of the EU competition rules, as established by Regulation No 1/2003 and interpreted by the case-law, shows that, by reason of their very nature, cartels merit the severest fines. Their possible actual impact on the market, particularly the question of the extent to which the restriction of competition resulted in a market price higher than that which would have obtained without the cartel, is not a decisive factor for determining the level of fines. Moreover, it follows from the 1998 Guidelines that agreements or concerted practices involving in particular, as in the present case, price fixing may be classified as 'very serious' on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is supported by the fact that, whilst the description of 'serious' infringements expressly mentions market impact and effects over extensive areas of the common market, the description of 'very serious' infringements makes no mention of a requirement that there be an impact or that there be effects in a particular geographic area (See Case T-127/04 *KME Germany and Others* v *Commission* [2009] ECR II-1167, paragraphs 64 and 65 and the case-law cited).

266 In the present case, the cartel at issue had the object of fixing prices by various means, including the restriction or control of output and sales, and could therefore be classified as a very serious infringement without the Commission being required to demonstrate that it had an actual impact on the market. Moreover, in light of the case-law referred to in paragraph 265 above, the applicant cannot claim that, in this case, there had to be a finding by the Commission that the agreement had in fact enabled the undertakings concerned to achieve a higher level of price than that which would have prevailed had there been no cartel.

267 In any event, as regards the allegedly limited impact of the infringement, which the applicant says is 'manifestly clear from the actual changes in prices on the market during the reference period', which decreased during the period in question, as is shown by the tables annexed to the contested decision, it must first of all be pointed out that the applicant in no way supports its argument, for example, by reference to precise data set out in those tables. As the Commission pointed out in recitals 513 and 514 of the contested decision, beside the fact that the evolution of the real total prices could not be calculated in an unequivocal way, it found that, even taking into account the important reductions in the basic price in real terms, the prices of extras had increased by at least 40% in real terms.

268 Next, in so far as concerns the applicant's argument that the Commission had at its disposal 'abundant evidence that unequivocally demonstrated not only that the supposed cartel had had no effect on trade between Member States but also that it had had no effect on the relevant market', it must be observed that the conclusions of the study carried out by the firm Laboratorio di economia, antitrust, regolamentazione, entitled 'The reinforcing bar industry in Italy from 1989 to 2000', commissioned by Alfa, Feralpi, IRO, SP and Valsabbia ('the Lear study'), to which the applicant refers, but which it has not produced in these proceedings, were rebutted by the Commission in recitals 42, 50 to 56, 62, 513, 521 and 585 of the contested decision, the Commission finding that the data did not support the thesis of the Lear study of a reduction of the total price of 32% in real terms (see also paragraph 267 above). Moreover, in recital 490 of the contested decision, the Commission refuted the argument that the increase in the level of size extras would not have had any effect as it would have been neutralised by a reduction in the base price, observing that the total price of reinforcing bars was made up of the base price and the size extras, that the latter were seen as extraneous to competition and non-negotiable and that the increase in the level of size extras reduced the variability of the overall price and thus reduced the margin of uncertainty regarding that price. The applicant has offered no facts to call that conclusion into question.

269 Moreover, in so far as concerns the statement made by the national association of iron millers, according to which the existence of agreements restricting competition in the market was not noticed, suffice it to observe that that statement does not prove that the infringement had no impact in the market.

270 In light of the foregoing considerations, the applicant's assertion that the Commission merely asserted that the agreement had been put into effect and inferred from that that there had been an actual effect on the market is irrelevant. In any event, that assertion is groundless, since, in recitals 512 to 514 of the contested decision, the Commission concluded that the cartel had influenced the sale price of reinforcing bars, and in particular the level of size extras, in Italy during the relevant period.

271 Secondly, the applicant claims that the Commission failed to have regard to the fact that the cartel was limited to Italy and that the market shares held by the undertakings concerned were not stable and in any event, before 1996, were below 50%.

272 That argument is based on a mistaken premiss. As is clear from recital 592 of the contested decision, the Commission considered that the limitation of the effects of the cartel to the Italian market did not allow a reduction of the gravity of the infringement from 'very serious' to 'serious' because the importance of Italian production had to be taken into account. Nevertheless, in recital 599 of the contested decision, the Commission expressly took into account, when determining the starting amount of the fine, the fact that the cartel had related to a national market which, at the relevant time, was subject to the particular rules of the ECSC Treaty and of which the undertakings in question had accounted for a limited share during the initial period of the infringement.

273 In any event, it must be borne in mind in this connection that, as is clear from the case-law, the extent of the geographic market is only one of the three criteria which, according to the 1998 Guidelines, are relevant to the overall assessment of the gravity of an infringement. Among those interdependent criteria, the nature of the infringement plays a major role. The size of the geographic market, on the other hand, is not an autonomous criterion in the sense that only infringements affecting several Member States may be classified as 'very serious'. Neither the EC Treaty, nor Regulation No 17, nor Regulation No 1/2003, nor the 1998 Guidelines, nor the case-law supports the conclusion that only geographically very extensive restrictions may be considered as such (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 311 and the case-law cited). It follows that the Commission was entitled to take the view that the limitation of the effects of the cartel to the Italian market did not justify classification of the infringement at issue as 'serious'.

274 Thirdly, the applicant argues that, when determining the gravity of the infringement, the Commission appears to have disregarded the regulatory and economic context of the impugned conduct: between 1990 and 2000, the Italian market for reinforcing bars was in a grave economic crisis, which led to a contraction in demand and stability of supply, the disappearance from the market of numerous undertakings, instability in the market shares held by the undertakings involved in manufacturing and lowering prices.

275 This argument is also based on a false premiss and must be rejected.

276 First of all, the Commission stated, in recital 64 of the contested decision, that it was aware of the economic context of the steel sector in the European Union and of the reinforcing bar sector in particular. In recital 68 of the contested decision, the Commission also stated — and it has not been contradicted on this point by the applicant — that, as regards the manifest crisis in the steel sector, reinforcing bars, which had been outside the scope of the quota system since 1 January 1986, had been excluded from the 'surveillance system' on the ground that more than 80% of reinforcing bars were produced by small low-cost companies which were not, in the main, having problems.

277 Next, it must be held that the Commission was right to state, in recitals 74 and 596 of the contested decision, that, after the end of the period of manifest crisis, the operators in the steel sector could not reasonably have been unaware of the consequences of the anti-competitive practices which they were implementing and to point out that certain communications from Federacciai contained the wording 'destroy after reading', which left little doubt as to their unlawful nature.

278 Lastly, as was pointed out in paragraph 272 above, the Commission stated that, when determining the starting amount of the fine, it had taken account of the fact that the cartel had related to a national market which, at the relevant time, was subject to the particular rules of the ECSC Treaty. It must be emphasised in this connection that the Commission set the starting amount of the fine imposed on the applicant at EUR 3.5 million, that is to say, at less than a fifth of the threshold of EUR 20 million ordinarily contemplated by the 1998 Guidelines for very serious infringements (see the second paragraph, third indent, of Section 1.A of the 1998 Guidelines). The applicant cannot, therefore, assert that the Commission failed to have regard to the regulatory and economic context of the conduct complained of in this case.

279 It follows that the Commission was entitled to conclude that the alleged grave economic crisis in the Italian reinforcing bar sector did not justify classification of the infringement as 'serious'.

280 It follows from all of the foregoing considerations that the second limb of the fifth plea must be rejected.

The incorrect application of an increase of 105% on account of the duration of the infringement

281 The applicant argues that the Commission was wrong to increase the amount of its fine by 105% on account of the duration of the infringement.

282 First of all, the applicant claims that the Commission erred in its assertion, in recital 607 of the contested decision, that the infringement had lasted for more than ten years and six months in the case of all the undertakings except Ferriere Nord and in its consequent application of an increase of 105% to the basic amount of the fine. The Commission was mistaken to impute the infringement to the applicant with respect to the period from 6 December 1989 to 5 March 1991, since it was Leali that controlled the first Siderpotenza during that time.

283 It is, however, clear from the considerations set out in paragraphs 209 to 213 above that the Commission was entitled to impute the infringement to the applicant with respect to the period from 6 December 1989 to 5 March 1991.

284 In its reply, the applicant also asserts that the Commission failed to prove that SP or the companies that preceded it had implemented the conduct restricting competition between 1989 and 1991.

285 Even if that complaint, which was not put forward in the applicant, were admissible it would have to be held to be unfounded. Indeed, the Commission established that SP was an addressee of Federacciai's communication of 6 December 1989 concerning the level of 'size extras' and that it had altered it list prices in accordance with what was specified in that communication. Moreover, the Commission found that six undertakings, including SP, had repeatedly altered, in substantially identical fashion, the size extras, notably on 21 March and 2 April 1990, on 1 and 20 August 1990, on 17 January and 1 February 1991 and on 1 June and 28 August 1991.

286 It must be borne in mind in this connection that it is for the operators concerned to rebut the presumption that undertakings taking part in concerted action take account of the information exchanged with their competitors when determining their conduct on the market (*Commission* v *Anic Partecipazioni*, cited in paragraph 261 above, paragraph 121, and Case C-199/92 P *Hüls* v *Commission*

[1999] ECR I-4287, paragraph 162). In the absence of any evidence of that kind, the applicant's argument concerning the alleged lack of proof of its involvement in the cartel between 1989 and 1990 cannot succeed.

287 Secondly, in its reply, the applicant also asserts that the Commission failed to furnish evidence to prove SP's involvement in agreements on base prices and on the level of size extras.

288 Even if this complaint too, which again was not put forward in the applicant, were admissible the Court could not uphold it, since the applicant has put forward no evidence to call into question the facts and matters on which the Commission relied, in recitals 220, 233, 240, 241, 245 to 267 and 562 of the contested decision, in order to demonstrate SP's involvement.

289 Thirdly, the applicant points out that, in recital 606 of the contested decision, the Commission acknowledged that, from 9 June to 30 November 1998, it had suspended its participation in the part of the agreement relating to the restriction or control of output and sales. It follows that the Commission erred in accusing it of uninterrupted participation in the cartel and in applying to the starting amount of its fine a multiplier similar to that for the other companies. The fact that the Commission considered the infringement at issue to have been single and continuous does not justify the breach of the principles of equal treatment and legal certainty.

290 The Court would immediately point out that, in the contested decision, the Commission concluded that the unlawful activities identified constituted a single, complex and continuous infringement that could be regarded as a single infringement that had taken the form of continuing behaviour involving both agreements and concerted practices, all of which had pursued the same aim, namely that of increasing the price of reinforcing bars.

291 In so far as the applicant is concerned, the Commission asserted that it was certain that its participation in the cartel had extended from 6 December 1989 at the latest to 27 June 2000. It nevertheless stated that, from 9 June to 30 November 1998, Lucchini-SP had suspended its participation in the part of the agreement relating to the restriction or control of output or sales.

292 As regards the applicant's arguments concerning the duration of the infringement imputed to it, it must be observed that it does not formally dispute the characterisation of the cartel and a single and continuous infringement.

293 It must also be borne in mind that an undertaking which has participated in a single, complex infringement through conduct of its own which falls within the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 65 CS and which was intended to help bring about the infringement as a whole may also be liable for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants or could reasonably have foreseen such conduct and was prepared to accept the risk (*Commission* v *Anic Partecipazioni*, cited in paragraph 261 above, paragraph 203, Case C-441/11 P *Commission* v *Verhuizingen Coppens* [2012] ECR, paragraph 42, Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 73, and *Gütermann and Zwicky* v *Commission*, cited in paragraph 261 above, paragraph 50).

294 Accordingly, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme, or that it has played only a minor role in the aspects in which it did participate, is of no relevance to the establishment of an infringement. Where it is established that an undertaking was aware of the offending conduct of the other participants, or that it could reasonably have foreseen it and was prepared to take the risk, it is also regarded as responsible, throughout the entire period of its participation in that infringement, for the conduct put into effect by other undertakings in the

context of the same infringement (*Aalborg Portland and Others* v *Commission*, cited in paragraph 165 above, paragraph 328, and *Gütermann and Zwicky* v *Commission*, cited in paragraph 261 above, paragraph 156).

295 Consequently, the fact that, from 9 June to 30 November 1998, the applicant did not participate in the part of the agreement relating to the restriction or control of output and sales has no bearing on the duration of the infringement imputed to it. The applicant cannot, therefore, argue that the Commission has breached the principles of equal treatment and legal certainty in this regard.

296 On the other hand, as regards the assessment of the applicant's individual responsibility, it must be recalled that, although the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it has played only a minor role in the aspects in which it did participate is of no relevance for the purpose of establishing the existence of the infringement, such a factor must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 261 above, paragraph 90, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 165 above, paragraph 292).

297 In the present case, the applicant did not participate, from 9 June to 30 November 1998, in the part of the agreement relating to the restriction or control of output and sales.

298 In recital 613 of the contested decision, the Commission nevertheless explained that refraining from direct participation in one of the parts of the cartel for a short period did not justify a reduction in the fine. In particular, it stated, first of all, that the restriction or control of output or sales was entirely geared towards fixing a higher base price, as could be seen from certain internal documents of Lucchini-SP's and from statements made by Lucchini-SP. The Commission went on to state that the fact that one or other addressee of the contested decision had not taken part in one of the parts of the infringement did not make it less serious. Lastly, it pointed out that the applicant's abstention from participation related solely to one or, at most, two of the methods previously defined and proposed by the consultancy firm K in April and July 1998.

299 It must be held that that finding of the Commission's is not vitiated by any error of law.

300 Indeed, it must be observed that the applicant has put forward no evidence to call into question the reasons on which the Commission based its refusal, in recital 613 of the contested decision, to recognise as a mitigating circumstance the applicant's having briefly refrained, from 9 June to 30 November 1998, from direct participation in the part of the cartel relating to the restriction or control of output or sales.

301 It must also be emphasised that the applicant does not challenge the Commission's findings, first, that an internal document of Lucchini-SP's of April 1998 stated that '[t]he agreement between manufacturers [ought to have made] it possible to recover approximately 15-20 Lire in the price in the course of the month of May' and that '[d]emand [was] not particularly firm and the present attempt [could] be supported by a reduction in output by all manufacturers, which [could] be assessed at around 20% of their corresponding monthly outputs', secondly, that the applicant had had some faith in the fact that the situation would bring about the increases in sale price hoped for by the manufacturers in the course of the period immediately following the monitoring work by the consulting firm K and, thirdly, that, as could be verified and was documented, even the undertakings which did not participate in the system for reducing output effected through the monitoring by the consulting firm K, but operated in line with it, were aware of that system and of the fact that it was geared towards an agreed increase in the price of reinforcing bars.

302 It follows that the third limb of the fifth plea must also be rejected.

The failure to take certain mitigating circumstances into account

303 The applicant argues that its fine should be reduced on account of certain mitigating circumstances which the Commission ought to have taken into account, in accordance with Section 3 of the 1998 Guidelines.

304 First of all, the applicant alleges that it offered effective cooperation throughout the administrative procedure, which was beset by errors on the Commission's part and repeated requests for information which the applicant always answered within the period stipulated.

305 It must be observed in this connection that, although the 1998 Guidelines state that account is to be taken of effective cooperation offered by undertakings during the procedure as a mitigating circumstance, those guidelines refer to cases which fall 'outside the scope of the [1996 Leniency Notice]' (the sixth indent of Section 3 of the 1998 Guidelines). There is no dispute that the present case falls within the scope of application of the 1996 Leniency Notice, the first paragraph of Section A.1 of which refers to secret cartels aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports. It follows that the applicant cannot complain that the Commission failed to take into account its purported cooperation as a mitigating circumstance outside the legal framework of the 1996 Leniency Notice (see, to that effect, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 609 and 610, confirmed on appeal by the judgment in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 224 above, paragraphs 380 to 382).

306 Moreover, the European Union Courts have pointed out that cooperation in the investigation which does not go beyond the cooperation which undertakings are already obliged to provide under Article 11 of Regulation No 17 or Article 18 of Regulation No 1/2003 does not warrant a reduction in the fine (see, to that effect, Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 283, and Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 218).

307 Secondly, the applicant alleges that it derived no benefit or profit from the cartel.

308 Such an argument cannot succeed. Indeed, the applicant has put forward no evidence to show that it did not profit from the cartel; it merely refers to a steep decline in output, significant financial losses, appreciable financial difficulties in 2009 and the fact that SP is in liquidation.

309 In any event, even if the applicant did not profit from the practices which it was found to have committed, it is clear from the case-law that, although the amount of the fine imposed must be proportionate to the duration of the infringement and the other factors capable of affecting the assessment of the gravity of the infringement, such as the profit that the undertaking was able to derive from its practices, the fact that an undertaking has not benefited from the infringement cannot preclude the imposition of a fine, since otherwise it would cease to have a deterrent effect. It follows that the Commission is not required, when fixing the amount of fines, to take account of the fact that no benefit has been derived from the infringement in question. Furthermore, the absence of such a benefit cannot be regarded as a mitigating circumstance (see, to that effect, Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraphs 184 to 186 and the case-law cited). Equally, the Commission cannot be required, when setting the fine, to take account of the fact that operating margins in the industry in question may be narrow (Case T-11/05 *Wieland-Werke and Others* v *Commission* [2010], not published in the ECR, paragraph 227).

310 Thirdly, the applicant states that it is not active in the market for reinforcing bars.

311 That argument cannot succeed since the Court has established, in paragraphs 209 to 237 above, that the Commission was entitled to conclude that the applicant and SP formed a single economic entity to which the conduct of the first Siderpotenza and Lucchini Siderurgica (which no longer exist as legal

entities) could be imputed, along with their own actions. It is common ground that the first Siderpotenza, the new Siderpotenza and Lucchini Siderurgica all produced reinforcing bars during the period of the infringement, and so the applicant was active on that market through those companies.

312 Fourthly, the applicant asserts that whilst, according to the 1998 Guidelines, the Commission should take into account overall turnover in the business year preceding the year in which it adopted the contested decision, or turnover in the year preceding that year, in the present case, to take as a reference turnover in 2007 is contrary to the principle of legal certainty and to the spirit of competition policy inasmuch as that turnover bears no relation to the period during which the infringement allegedly occurred, that is, from 1989 to 2000, that being a consequence of the abnormal length of the administrative procedure and of the errors which the Commission made.

313 That argument is equally groundless, since, in this case, the Commission took account of the fact that, at the time of adoption of the contested decision, it had already decided on the amounts of the fines which it intended to impose on the undertakings concerned. In addition, as the Commission has correctly pointed out, its use of Lucchini-SP's most recent turnover figure had repercussions on its determination of the multiplier to be used for the purposes of deterrence, in that the Commission took the view that it was justified to increase the basic amount of the fine by 200% rather than 225%, on account of the decrease in the ratio between Lucchini-SP's turnover and that of the largest of the other undertakings from 1:3 in 2001 to 1:2 in 2008, with the result that the total amount of the fine imposed on the applicant in the contested decision was lower than the fine set in the 2002 decision.

314 In any event, it must be noted that, as a result, inter alia, of transactions bringing about transfers or concentrations, an undertaking's overall resources may vary, decreasing or increasing significantly within a relatively short space of time, in particular between the end of the infringement and the adoption of the decision imposing the fine. It follows that those resources must be valued, so as properly to achieve the objective of deterrence, in accordance with the principle of proportionality, at the time when the fine is imposed (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 285).

315 Furthermore, in so far as concerns the duration of the administrative procedure, it must be held that, two years having elapsed between the first inspections carried out by the Commission under Article 47 CS and the adoption of the 2002 decision, and another two years having elapsed between the annulment of that decision and the adoption of the contested decision (see paragraphs 17 to 23 above), the applicant cannot validly claim that the procedure lasted an abnormally long time.

316 It follows that the applicant has no valid complaint regarding the use of its turnover figure for the year preceding the adoption of the contested decision.

317 It follows from the foregoing that the fourth limb of the fifth plea must be rejected.

The failure to impose a purely symbolic fine

318 The applicant argues that, given the particular circumstances of the case, the Commission should have imposed a purely symbolic fine.

319 First of all, the applicant maintains that the infringement at issues is novel in that this is the first time a company that is not involved in the manufacture of the goods to which the infringement relates has been fined for infringement of Article 65(1) CS. It would be appropriate to apply, *mutatis mutandis*, the reasoning followed in Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides).

320 First of all, it must be borne in mind that the Court of Justice has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 205, *Erste Group Bank and Others* v *Commission*, cited in paragraph 186 above, paragraph 233, judgment of 19 April 2012 in Case C-549/10 P *Tomra Systems and Others* v *Commission*, not published in the ECR, paragraph 104).

321 Moreover, it must be observed that the applicant's argument is based on a misconception of the concept of 'undertaking' for the purposes of Article 65 CS. Indeed it follows from the reasoning set out in paragraphs 197 to 237 above that the Commission was entitled to conclude that the applicant formed a single undertaking with the new Siderpotenza (now SP), to which not only their own actions but also the actions of the first Siderpotenza and Lucchini Siderurgica could be imputed. The applicant was accordingly held individually liable for an infringement which it is deemed to have committed itself in the reinforcing bar sector on account of the legal and economic links between it and SP (see, to that effect, *Imperial Chemical Industries* v *Commission*, cited in paragraph 200 above, paragraph point 141, and Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraphs 28 and 34). It cannot, therefore, claim that the Commission should have imposed a purely symbolic fine because of the fact that it was not itself involved in the manufacture of the goods at issue.

322 Secondly, the applicant argues that the 2002 decision was the 'first decision' to be annulled on the ground of an incorrect legal basis in a matter concerning the succession of the ECSC Treaty, the EC Treaty and the TFEU Treaty.

323 That argument cannot be accepted either. Indeed, it must be recalled that the infringement occurred before the expiry of the ECSC Treaty and that a diligent undertaking in the applicant's position could not at any time have been unaware of the consequences of its conduct (see paragraphs 153 and 154 above). Furthermore, the Court has already pointed out that the reference to the entry into force of the FEU Treat is irrelevant since the wording of Article 81(1) EC is identical to that of Article 101(1) TFEU (see paragraph 194 above).

324 Thirdly, the applicant submits that the imposition of a purely symbolic fine is justified by the fact that the effect of the infringement on the relevant market was insignificant.

325 That argument, however, must be dismissed for the reasons set out in paragraphs 260 to 273 above.

326 Fourthly, the applicant argues that the duration of the administrative procedure was excessive as a result of errors made by the Commission.

327 That arguments cannot be upheld either. As was noted in paragraph 315 above, the applicant cannot validly claim that the procedures which resulted in the adoption of the 2002 decision and in the contested decision were abnormally long.

328 In any event, it must be recalled that, while compliance with the 'reasonable time' requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the courts of the European Union ensure (Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraphs 36 and 37, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 173 above, paragraphs 167 to 171, and Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 40), in order to conclude that there has been a breach of the 'reasonable time' principle, it is necessary to evaluate the impact of the duration of the procedure on the rights of defence of the undertaking concerned (see, by analogy, *Technische Unie*

v *Commission*, cited above, paragraphs 47 and 48, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraphs 73 and 74 and the case-law cited).

329 However, in this case, the applicant has not claimed that the duration of the administrative procedure affected its rights of defence. A mere reference to the duration of the procedure cannot, therefore, justify the imposition of a purely symbolic fine.

330 It follows from the foregoing that the applicant's argument that, in this case, the requirements for the imposition of a purely symbolic fine are fulfilled cannot succeed and the Court must therefore reject the present limb of the fifth plea, and thus the fifth plea in its entirety.

331 In light of the foregoing, the Court must reject the applicant's claims for annulment in their entirety. In addition, as regards the application, submitted in the alternative, for alteration of the amount of the fine imposed on the applicant, in light of the foregoing considerations in particular, there is no cause for the Court, in the exercise of its unlimited jurisdiction, to uphold that application.

Costs

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

333 Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for in the Commission's pleadings.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Lucchini SpA to pay the costs.

Martins Ribeiro Popescu Berardis

Delivered in open court in Luxembourg on 9 December 2014.

[Signatures]

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