JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

1 July 2009 *

In Case T-24/07,

ThyssenKrupp Stainless AG, established in Duisburg (Germany), represented by M. Klusmann and S. Thomas, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre, R. Sauer and O. Weber, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION for annulment, in whole or in part, of the Commission's decision of 20 December 2006 relating to a proceeding under Article 65 [CS] (Case No COMP/F/39.234 - Alloy surcharge — readoption) and, in the alternative, an application for reduction of the fine imposed on ThyssenKrupp Stainless by that decision,

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

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2008,

gives the following

Judgment

Legal context

1. *ECSC Treaty provisions*

1 Article 65 CS provides:

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

(a) to fix or determine prices;

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

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

2. However, the Commission shall authorise specialisation agreements or joint buying or joint selling agreements in respect of particular products, if [certain requirements are met …]

3. The Commission may, as provided in Article 47, obtain any information needed for the application of this Article, either by making a special request to the parties concerned or by means of regulations stating the kinds of agreement, decision or practice which must be communicated to it.

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

2 The ECSC Treaty expired on 23 July 2002, in accordance with Article 97 CS.

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

3 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; 'Communication of 18 June 2002').

4 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.'

5 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 …'

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

6 Under Article 4 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [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(1) of Regulation No 1/2003 states:

'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. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. 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]; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.’

9 Article 27 of Regulation No 1/2003 states:

‘1. 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.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission’s file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

…’

Facts

10 Krupp Thyssen Nirosta GmbH, a company incorporated under German law, was created on 1 January 1995 following the merger of the stainless steel divisions of

Thyssen Stahl AG ('Thyssen') and Fried. Krupp AG Hoesch-Krupp which make flat products resistant to acids and high temperatures. Following a number of changes of name, Krupp Thyssen Nirosta became ThyssenKrupp Stainless AG ('the applicant' or 'TKS').

11 Stainless steel is a type of special steel whose main property is resistance to corrosion. This resistance is achieved by the use of different alloying materials (chrome, nickel, molybdenum) in the production process. Stainless steel is used in the form of flat products (plates or coils; hot or cold rolled) or long products (bars, wire rod, sections; hot rolled or finished). Most of those products were covered by the ECSC Treaty in accordance with Article 81 CS.

12 On 16 March 1995, following reports in the specialised press and complaints from several consumers, the Commission, under Article 47 CS, asked a number of stainless steel producers for information concerning the application by those producers of a general price increase known as the 'alloy surcharge'.

13 The alloy surcharge is a price supplement which is calculated on the basis of the prices of the alloying materials and is added to the basic price for stainless steel. The cost of the alloying materials used by stainless steel producers (nickel, chromium and molybdenum) forms a very large proportion of the total production costs. The prices of those materials are extremely volatile.

14 On 19 December 1995, on the basis of the information obtained, the Commission served a statement of objections on 19 undertakings.

15 In December 1996 and January 1997, after the Commission had carried out a number of onsite inspections, lawyers or representatives of a number of undertakings informed

the Commission of their wish to cooperate. On 17 December 1996, TKS sent a statement to the Commission to that effect.

16 On 24 April 1997, the Commission sent to the undertakings concerned a new statement of objections superseding that of 19 December 1995. TKS and Thyssen were each addressees of the statement of objections and each of those undertakings replied to it separately by letters from their respective representatives on 30 June 1997.

17 By a letter dated 23 July 1997 addressed to the Commission ('the statement of 23 July 1997'), TKS stated:

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

18 On 21 January 1998, the Commission adopted Decision 98/247/ECSC relating to a proceeding pursuant to Article 65 [CS] (Case IV/35.814 — Alloy surcharge) (OJ 1998 L 100, p. 55).

19 According to that decision, most of the producers of stainless steel flat products agreed, at a meeting held in Madrid on 16 December 1993, to increase their prices on a concerted basis by changing the parameters for calculating the alloy surcharge. To that end, they decided to apply, as from 1 February 1994, an alloy surcharge based on the

method last used in 1991, taking as reference values for all producers the prices prevailing in September 1993, when the price of nickel had reached its historical low.

20 The Commission found that the undertakings concerned had, as a result, infringed Article 65(1) CS by modifying and by applying in a concerted fashion the reference values used to calculate the alloy surcharge, and that this had both the object and the effect of restricting and distorting normal competition within the common market.

21 Decision 98/247 was notified to TKS but not to Thyssen.

22 It is apparent from recital 102 to Decision 98/247 and Articles 1 and 2 thereof that the Commission took the view, on the basis of the statement of 23 July 1997, that TKS was liable for the acts of Thyssen and therefore imposed on it a fine relating also to the acts imputed to Thyssen. In that connection, the Commission expressed the view, in recital 78 to Decision 98/247, that the duration of the infringement imputed to Thyssen extended from December 1993, the date of the Madrid meeting at which the collusive conduct between the producers of stainless steel flat products commenced, to 1 January 1995, the date on which Thyssen ceased business in that sector.

23 On 11 March 1998, TKS brought an action for, inter alia, annulment of Decision 98/247.

24 By judgment of 13 December 2001 in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, the Court of First Instance annulled Article 1 of Decision 98/247 in so far as it attributed to TKS liability for the infringement of Article 65 CS committed by Thyssen.

25 The Court of First Instance considered that the Commission had not given TKS an opportunity during the administrative procedure to submit its comments on the truth and relevance of the acts imputed to Thyssen, and that, consequently, TKS had been unable to exercise its rights of defence in that respect. The Commission was not, therefore, entitled to attribute liability for the acts of Thyssen to TKS or, consequently, to impose a fine on TKS in respect of the acts attributed to Thyssen when, on that point, the statement of objections was addressed only to the latter (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, paragraphs 66 and 67).

26 Accordingly, the Court of First Instance reduced TKS's fine by the amount which had been imposed on it in respect of the infringement committed by Thyssen, and set the amount of the fine ultimately imposed on TKS at EUR 4 032 000.

27 By judgment of 14 July 2005 in Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, the Court of Justice dismissed the appeals brought by TKS and the Commission against the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above.

28 Having, by letter of 29 November 2005, requested a variety of information from the management of the Thyssen Krupp AG group and, by letter of 6 March 2006, sent a request for information to Thyssen for details of its turnover, the Commission served a statement of objections on TKS on 5 April 2006.

29 By letter of 17 May 2006, the applicant replied to the statement of objections and a public hearing was held on 15 September 2006.

30 On 20 December 2006, the Commission adopted the decision relating to a proceeding under Article 65 [CS] (Case No COMP/F/39.234 — Alloy surcharge — readoption) ('the Decision').

31 The preamble to the Decision reads as follows:

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

Having regard to the Treaty establishing the European Community,

Having regard to Regulation … No 1/2003 …,

Having regard to the Commission’s decision of 5 April 2006 in part to re-examine the present case,

Having regard to the information available to the Commission and the checks made under Article 47 [CS],

Having regard to the written comments submitted pursuant to Article 36 [CS],

Having regard to the requests for information provided for in Article 18 of Regulation No 1/2003,

Having given the undertaking concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 27(1) of Regulation No 1/2003 and Commission Regulation (EC) No 773/2004 of 7 April 2004

relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

…'

32 The operative part of the Decision contains the following provisions:

'*Article 1*

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

Article 2

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

Since [TKS] (a legal person) has, by the statement of 23 July 1997, assumed liability for the conduct of Thyssen … (a legal person), the fine is imposed on [TKS].

…'

Procedure and forms of order sought by the parties

33 By application lodged at the Registry of the Court of First Instance on 6 February 2007, the applicant brought the present action.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, requested the Commission to answer a question in writing on the content of the file relating to the administrative procedure which culminated in the adoption of the Decision. The Commission complied with that request on 3 December 2008.

35 By letter of 3 December 2008, the Commission lodged comments on the Report for the Hearing, which were notified to the applicant. By letter of 8 December 2008, the applicant requested the Court of First Instance not to place those comments in the file on the ground that they would have the effect of altering the presentation of the Commission's arguments and that they amounted to supplementary and belated comments on the substance.

36 The Court of First Instance rejected the applicant's request as being devoid of purpose since the Commission's letter of 3 December 2008 was already in the file and, moreover, stated that the possible existence of new arguments of the Commission and their admissibility would be assessed in the judgment.

37 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 11 December 2008.

38 At the hearing, the applicant indicated that the statement of 23 July 1997 had been revoked. In response to a question from the President, the applicant confirmed that it had made no such revocation during the administrative procedure and that the sole purpose of the revocation was to illustrate the position defended by the applicant in its written submissions, namely that the statement of 23 July 1997 was merely a revocable private statement, and that liability for Thyssen's conduct could not be imputed to the applicant on the basis of that statement. Formal notice of the revocation and of the applicant's abovementioned statements was taken in the minutes of the hearing.

39 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, annul Article 2 of the Decision;

— in the further alternative, reduce appropriately the amount of the fine;

— order the Commission to pay the costs.

40 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

1. *The existence of allegedly new and belated arguments of the Commission*

41 After the Commission lodged comments on the Report for the Hearing, the applicant submitted that those comments altered the presentation of the Commission's arguments and amounted to supplementary and belated comments on the substance.

42 It must be held that the applicant's assertion is not substantiated by any specific illustration relating to particular paragraphs of the comments in question. On the contrary, it must be held that those comments merely comprise details of the scope of

some of the Commission's arguments which were expounded in its written submissions or a reminder of aspects of the reasoning not included in the Report for the Hearing which is necessarily a summary.

43 Therefore, it appears that the applicant has not produced evidence to show the existence of new arguments of the Commission within the scope of Article 48(2) of the Rules of Procedure.

2. *The Commission's powers*

44 The first two pleas in support of annulment should be examined together; they relate, respectively, to breach of the principle *nulla poena sine lege* and to the unlawful nature of the application of Regulation No 1/2003 in conjunction with Article 65 CS, and clearly raise the issue of the Commission's power to adopt the Decision, which entails determining whether that decision has a sound legal basis.

Arguments of the parties

45 The applicant asserts, in the first place, that the Decision is unlawful because, in that decision, the Commission imposed a fine on the applicant that was 'not based on a valid conferment of authority', which is contrary to the principle *nulla poena sine lege*.

46 The applicant points out that the ECSC Treaty expired on 23 July 2002 and that, as a result, the Commission lost its power to impose penalties for infringements of Article 65 CS. It follows from Article 70 of the Vienna Convention on the Law of Treaties of 23 May 1969, which lays down a general rule of customary international law

applying to the ECSC Treaty, that, once a treaty has expired, it can no longer serve as the basis for any obligation or power.

47 According to the applicant, Article 65 CS could not be applied retroactively unless there was a transitional provision in respect of the competition rules laid down by the ECSC Treaty, which is not the case, whereas the Member States or the Council did adopt transitional provisions — in the form of protocols, decisions or regulations — to govern the consequences of the expiry of the ECSC Treaty in other areas.

48 The applicant states that if the Commission wanted to apply Article 65 CS it would have to have been empowered to do so. However, neither the ECSC and EC Treaties nor secondary legislation, in particular Regulation No 1/2003, included any provision allowing such retroactive application.

49 Nor can the Commission claim to be empowered to apply Article 65 CS by referring to an allegedly uniform system of prohibition resulting from a uniform European legal order. The ECSC and EC Treaties have certainly been linked, at the institutional level, since the Merger Treaty. However, they constitute two separate legal orders with competences and powers that are regulated differently.

50 The applicant submits that the Commission does not have a general absolute power and that, according to the principle that the Community can only act within the powers conferred on it that is enshrined in Article 5 EC, the Community institutions cannot unilaterally confer powers on themselves. The Commission is empowered to implement the Treaties in the Community legal order only in so far as that power has been specifically conferred upon it by the various Treaties. According to the applicant, if the period of the validity of a treaty comes to an end, as it did in the case of the ECSC Treaty on 23 July 2002, the powers of the bodies previously authorised to implement the treaty in question are also terminated.

51 As regards the Commission's opposing arguments — namely that Article 81 EC is 'a subsidiary "catch-all" provision' in respect of Article 65 CS and that the latter may still be applied in view of the general legal principle of the hierarchy of norms, from the *lex generalis* to the *lex specialis* — these are, the applicant submits, irrelevant.

52 Article 65 CS is not a *lex specialis* in relation to Article 81 EC in the sense understood by the Commission. According to the applicant, a *lex specialis* is a norm which satisfies all the criteria of a *lex generalis*, together with at least one additional criterion. That is not the case as far as the relationship between Article 65 CS and Article 81 EC is concerned, since Article 65 CS does not include all the criteria of Article 81 EC and, in particular, the genuine requirement that trade between Member States must be affected. Nothing can be inferred from the principle of speciality as regards the applicability of a law that is no longer in force.

53 Article 65 CS can no longer be applied on the basis of the Communication of 18 June 2002 either. That communication did not have binding effect and the Commission did not, in any event, have the power to adopt rules creating legal rights for the purposes of handling old cases, even to ensure a 'harmonious transition' between the provisions of the ECSC Treaty and those of the EC Treaty, according to the wording of the Decision.

54 Nor can Article 65 CS be applied in the present case under the *lex mitior* principle. The *lex mitior* principle does not serve as justification for the retroactive application of a 'criminal law'; on the contrary, it presupposes such retroactivity.

55 In the second place, the applicant maintains that the Decision is unlawful because it applies Regulation No 1/2003, in particular Article 23 thereof, in conjunction with Article 65 CS. That 'conjunction of norms' cannot constitute a valid legal basis for the imposition of penalties and, moreover, leads to serious procedural errors which justify the Decision being deemed to be 'non-existent' within the meaning of the case-law of the Court of Justice in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005.

56 First, the applicant submits that it follows from the recitals in the preamble to Regulation No 1/2003, which entered into force after the expiry of the ECSC Treaty, and from the wording of Article 23 of that regulation, that the regulation allows the Commission to impose fines for infringements of Articles 81 EC and 82 EC, but not for infringements of Article 65 CS, to which no reference is made in Article 23 of Regulation No 1/2003. By basing its fine for an infringement of Article 65 CS on Article 23 of Regulation No 1/2003, the Commission committed a clear breach of the principle *nulla poena sine lege*.

57 The Commission cannot reasonably proceed on the basis of the case-law cited in recital 70 to the Decision, according to which substantive rules are not retroactive. Article 23 of Regulation No 1/2003, which contains the true legal basis of the penalty, that is to say, which gives the Commission power to impose a fine, is a 'substantive penal provision' and is equivalent to Article 65(5) CS.

58 Even on the assumption that Article 23 of Regulation No 1/2003 can be regarded as a procedural rule, its application remains unlawful since the application of Regulation No 1/2003 to the penalty for infringements of Article 65 CS must be automatically ruled out, *ratione materiae*.

59 Second, the applicant claims that the application of Regulation No 1/2003 in conjunction with Article 65 CS vitiated the entire procedure and observes that, if, when Article 65 CS was in force, the Commission had based a fine on the provisions of that article in conjunction with those 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), its decision would also have been manifestly invalid and would have had to be annulled. The same applies now that Article 65 CS is no longer applicable and the applicability of Regulation No 1/2003 to infringements of Article 65 CS must be ruled out both *ratione materiae* and *ratione temporis*.

60 Contrary to the Commission's assertions, it is not correct that the reference which Article 23 of Regulation No 1/2003 makes to Article 81 EC also entails another 'virtually invisible' reference to Article 65 CS. The applicant submits that, since it is prohibited

under the law applicable in the matter of infringements to apply penalties by analogy, the application of Article 23 of Regulation No 1/2003 to a rule which is not mentioned in that article constitutes an 'unacceptable analogy'.

61 The applicant states that the legal basis of Regulation No 1/2003 is provided by Article 83 EC, which empowers the Council and the Commission to adopt the appropriate regulations to give effect to the 'principles set out in Articles 81 [EC] and 82 [EC]', without any mention of Article 65 CS. The absence of any reference to the latter provision cannot in any event be regarded as an error by the Community legislature, which is what would be required in order for a provision to be applied by analogy so as to overcome a legal void. The applicant submits that, in accordance with the principle laid down in the first paragraph of Article 5 EC that the Community can only act within the powers conferred on it, no power to implement Article 65 CS could be conferred upon the Commission on the basis of the EC Treaty, even in the alternative or impliedly, and that Regulation No 1/2003 can, as regards powers, only refer back to Article 81 EC.

62 The Commission contends that the first two pleas in support of annulment advanced by the applicant should be dismissed as unfounded.

Findings of the Court

The legal basis of the Decision

63 It should first of all 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 (Opinion 1/91 [1991] ECR I-6079, paragraph 21).

64 Within that Community legal order, the institutions have conferred powers only (Opinion 2/00 [2001] ECR I-9713, paragraph 5, and Case C-93/00 *Parliament* v *Council* [2001] ECR I-10119, paragraph 39). 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 (Opinion 2/00, paragraph 5).

65 In the present case, first, it must be noted that the preamble to the Decision contains references to provisions of the ECSC Treaty, that is to Articles 36 CS, 47 CS and 65 CS, but also to the EC Treaty, to Regulation No 1/2003, specifically to Article 18 and Article 27(1) thereof, and to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18).

66 Second, it should be noted that, in the grounds of the Decision, the Commission states the following in recital 70:

'This decision has … been adopted in accordance with the procedural rules of the EC Treaty and, in particular, with Regulation No 1/2003. Article 7(1) of that regulation confers on the Commission, pursuant to Article 85 EC, the power to find that undertakings have committed infringements of competition law. Article 23(2) of Regulation No 1/2003 authorises the Commission to impose penalties for infringements.'

67 In recital 73 to the Decision, the Commission explains that the fact that Article 81 EC, as *lex generalis*, succeeded Article 65 CS, as *lex specialis*, when the ECSC Treaty expired means that, 'under Article 7(1) and Article 23(2) of Regulation No 1/2003, the Commission is also competent to initiate a proceeding under Article 65 CS in order to identify an infringement of that article, to put an end to the infringement thus identified and to impose a fine as a penalty for that infringement'.

68 Reference is made in recital 163 to the Decision to the fact that, under Article 65(5) CS, the Commission 'was able' to impose fines on undertakings which engaged in certain anti-competitive conduct and that 'an equivalent right was conferred on the Commission by Article 23 of Regulation … No 1/2003 which the Commission applied in this case'.

69 It is also apparent from the grounds of the Decision that the reference in the preamble to Article 65 CS concerns paragraph 1, that is, the substantive provision addressed to undertakings and associations of undertakings prohibiting certain anti-competitive conduct, and paragraph 5, inasmuch as it provides for the possibility of the imposition of fines not exceeding twice the turnover on the products which were the subject of the collusive agreement. The reference to the applicability of Article 65(5) CS concerns the discussion of the principle of *lex mitior* so as to justify the application in the present case of that provision instead of Article 23(2) of Regulation No 1/2003 for the calculation of the amount of the fine (see recitals 162 to 168 and 178 to the Decision).

70 In those circumstances, it must be held that the legal basis of the Decision by which the Commission finds that there has been an infringement of Article 65(1) CS and imposes 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.

71 It must therefore be held, at this stage, that the applicant's arguments to the effect that the principle of *lex mitior* and the Communication of 18 June 2002 were not capable of constituting a valid legal basis for the Decision are of no relevance, since the Commission's power is based, in the present case, on neither one nor the other, but on the articles of Regulation No 1/2003 referred to above.

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

72 In its first two pleas in support of annulment, the applicant submits, in essence, that, by the very fact that the ECSC Treaty expired on 23 July 2002, the Commission lost its power to impose penalties for infringements of Article 65 CS and that there is no provision — transitional or permanent — under primary law or secondary legislation empowering the Commission to apply that article. The application in the Decision of Article 65 CS in conjunction with Regulation No 1/2003 does not, in any event, constitute a valid legal basis for it, since that regulation confers powers on the Commission only in relation to the implementation of Articles 81 EC and 82 EC.

73 That argument cannot be accepted.

74 In the first place, it must be recalled that the provision constituting the legal basis of a measure and empowering the Community institution to adopt the measure in question must be in force at the moment of its adoption (Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 45); this is indisputably the case in respect of Article 7(1) and Article 23(2) of Regulation No 1/2003, which constitute the legal basis of the Decision.

75 In the second place, it should be noted that the Community Treaties put in place a unique legal order (see, to that effect, Opinion 1/91, cited in paragraph 63 above, paragraph 21, and Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 78), in the context of which, as is reflected in Article 305(1) EC, the ECSC Treaty constituted a specific regime derogating from the general rules established by the EC Treaty.

76 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; and Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 102).

77 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 76 above, paragraph 9, and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 100).

78 However, in so far as matters were not the subject of provisions in the ECSC Treaty or 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, and *Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 77 above, paragraph 100; see also, to that effect, Opinion 1/94, cited in paragraph 76 above, paragraph 27).

79 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.

80 Although the succession of the legal framework of the EC Treaty to that of the ECSC Treaty has led, since 24 July 2002, to a change of legal bases, procedures and applicable substantive rules, that succession is part of the unity and continuity of the Community legal order and its objectives (Case T-25/04 *González y Díez* v *Commission* [2007] ECR I-3121, paragraph 55; see also, to that effect, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 41), as the Commission correctly observes in recitals 65 to 67 to the Decision.

81 It should be pointed out, in that regard, that the putting in place and maintaining of a system of free competition, within which the normal competitive conditions are ensured and on which, in particular, the rules in the field of State aid and of cartels between undertakings are based, constitute one of the essential objectives of both the EC Treaty (see, to that effect, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 31) and the ECSC Treaty (see, to that effect, Opinion 1/61 [1961] ECR 243, 262; Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 33; and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraphs 265 and 299 to 304).

82 In that context, although the rules of the ECSC and EC Treaties governing the field of cartels differ to a certain extent, it must be pointed out that the meaning of agreement and concerted practices under Article 65(1) CS corresponds to that of agreement and concerted practices for the purposes of Article 81 EC, and that those two provisions are interpreted in the same way by the Community judicature (see, to that effect, *Thyssen Stahl* v *Commission*, cited in paragraph 81 above, paragraphs 262 to 272 and 277). 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 and by the same institution, the Commission, the administrative body responsible for the implementation and development of competition policy in the general interest of the Community (see, by analogy, *González y Díez* v *Commission*, cited in paragraph 80 above, paragraph 55).

83 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 the non-compliance with the rules in the field of cartels is liable, under the EC Treaty, to expand its effects over time after the expiry of the ECSC Treaty (see, by analogy, *González y Díez* v *Commission*, cited in paragraph 80 above, paragraph 56).

84 It follows from the above that, contrary to the applicant's contention, Regulation No 1/2003 and, specifically, Article 7(1) and Article 23(2) thereof, must be interpreted as enabling the Commission, after 23 July 2002, to identify, and to impose penalties in respect of, cartels in the fields falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis* (see, by analogy, *González y Díez* v *Commission*, cited in paragraph 80 above, paragraph 57), notwithstanding the fact that the provisions of that regulation referred to above do not expressly mention Article 65 CS.

85 In addition, the application, within the Community 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 that regard, it follows from settled case-law that, although procedural rules are generally held to apply to all disputes pending at the time when they enter into force, this is not the case with substantive rules. The latter must be interpreted, in order to ensure respect for the principles of legal certainty and the protection of legitimate expectations, as applying to situations existing before their entry into force only in so far as it clearly follows 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; and Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 55).

86 From that point of view, as regards the question of the substantive provisions applicable to a legal situation which was definitively established before the expiry of the ECSC Treaty, the continuity of the Community legal order and the requirements relating to

the principles of legal certainty and the protection of legitimate expectations require the application of substantive provisions drawn from the ECSC Treaty to the facts which fall within their scope of application *ratione materiae* and *ratione temporis*. Just because, by reason of the expiry of the ECSC Treaty, the regulatory framework in question is no longer in force at the time when the assessment of the factual situation is carried out does not alter that situation since that assessment concerns a legal situation which was definitively established at a time when substantive provisions adopted under the ECSC Treaty were applicable (*González y Díez* v *Commission*, cited in paragraph 80 above, paragraph 59).

87 In the present case, the Decision was adopted on the basis of Article 7(1) and Article 23(2) of Regulation No 1/2003, following a procedure carried out in accordance with that regulation. The provisions concerning the legal basis and the procedure followed until the adoption of the Decision fall within the scope of procedural rules for the purposes of the case-law referred to in paragraph 85 above. Since the Decision was adopted after the expiry of the ECSC Treaty, the Commission rightly applied the rules contained in Regulation No 1/2003 (see, by analogy, *González y Díez* v *Commission* cited in paragraph 80 above, paragraph 60, and, by contrast, Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP and Others* v *Commission* [2007] ECR II-4331).

88 It must be noted in that regard that, contrary to the applicant's assertions, Article 23 of Regulation No 1/2003 does not lay down a substantive rule; such a rule, by definition, is not intended to provide a legal basis for the Commission's action, unlike precisely the aforementioned Article 23, which empowers the Commission to fine undertakings and associations of undertakings which have contravened Articles 81 EC and 82 EC.

89 As regards substantive rules, the Decision relates to a legal situation which was definitively established before the expiry of the ECSC Treaty on 23 July 2002, the period of the infringement having extended from 16 December 1993 to 31 December 1994. 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 Decision, bearing in mind that it follows precisely from the *lex generalis* nature of the EC Treaty in relation to the ECSC Treaty, enshrined in Article 305 EC, that the specific regime resulting from the ECSC Treaty

and the rules enacted for its implementation is, in accordance with the principle *lex specialis derogat legi generali*, applicable only to situations existing prior to 24 July 2002.

90 It follows from all the foregoing considerations that the first two pleas in law in support of annulment advanced by the applicant, relating, respectively, to breach of the principle *nulla poena sine lege* and to the unlawful nature of the application of Regulation No 1/2003 in conjunction with Article 65 CS, must be rejected.

3. *The force of* res judicata *and the validity of the statement of 23 July 1997*

91 It should be noted that, in respect of the third plea in law in support of annulment, relating to the failure to comply with the principle of *res judicata*, both parties invoke the concept of the principle of *res judicata* in support of their case, drawing diametrically opposed conclusions.

92 The applicant submits that, in paragraph 88 of its judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice held that the applicant was not substantively liable for Thyssen's conduct and that that point is now *res judicata*. Conversely, the Commission claims that, in the Decision, it relies on the acknowledgement in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above and confirmed by the Court of Justice, of the validity of the statement of 23 July 1997 by which the applicant confirmed that it assumed liability for Thyssen's conduct, and that this is no longer open to challenge because that point of law has been settled by the Community judicature and is *res judicata*.

93 However, by its fourth plea in law, relating to the unlawfulness of the imposition of a fine on the basis of the statement of 23 July 1997, the applicant seeks specifically to challenge the point of law referred to above, alleging that the statement cannot support the imputation of liability for Thyssen's conduct or the subsequent penalty, in view of its actual effect and its incompatibility with Community legislation on cartels.

94 Accordingly, the third and fourth pleas in law in support of annulment should be considered together, since the response to be given to one will determine the admissibility of the other. In that regard, even though no plea of inadmissibility relating to the principle of *res judicata* is expressly advanced by the Commission in the discussion of the fourth plea in support of annulment, it is touched upon in the Commission's written submissions on the third plea, which is inextricably linked to the fourth plea in support of annulment. In any event, the question of the force of *res judicata* is a matter of public policy and must, consequently, be raised by the Court of its own motion (see, to that effect, Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 45).

Arguments of the parties

95 The applicant submits in relation to the third plea in support of annulment that, in paragraph 88 of its judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice held that the applicant was not substantively liable for Thyssen's conduct and that that point is now *res judicata*, which amounts to a plea of inadmissibility so far as the Commission's argument is concerned.

96 The Court of Justice based that conclusion on (i) the finding of a lack of economic succession in the present case and of unity of action, and (ii) the fact that the statement of 23 July 1997 and the other statements made during the administrative procedure do not enable liability for Thyssen's unlawful conduct to be imputed to TKS.

97 The applicant does not accept the Commission's argument that, in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court was unable to rule out substantive liability on the part of TKS, since it was referring in that paragraph to the Commission's cross-appeal which did not relate to the transfer of liability to TKS.

98 The applicant submits that, even on the assumption that a finding in regard to the issue of the transfer of liability was not necessary in the context of consideration of the cross-appeal, it does not follow from this that paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, is irrelevant. The Court was free to find in the grounds of its judgment that there was no transfer of liability, even though the Commission had not expressly touched on that point in its appeal, and that finding should be respected by the parties.

99 In *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice, first of all, confirmed in paragraphs 82 to 87 the decision of the Court of First Instance to annul the Commission's decision on the grounds of a procedural defect, and went on, in paragraph 88, to develop an additional argument to show that the Commission's decision was invalid, stating that, irrespective of the procedural defect referred to, TKS could not be substantively liable for Thyssen's conduct.

100 The applicant explains that, in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court indicated that the statements made by TKS during the administrative procedure, mentioned in paragraphs 85 and 86 of the judgment, do not enable liability for Thyssen's conduct to be attributed to TKS, and that paragraph 85 of that judgment expressly related, moreover, to the statement of 23 July 1997. The terminology chosen by the Court is perfectly explicit. If the Court had intended in paragraph 88 of the abovementioned judgment to refer only to a procedural error, as the Commission assumes, it would not have held that the Commission was precluded from '[attributing] liability … to [the applicant]', in the words of the Court.

101 Moreover, the contentions in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, make no sense if they refer only to procedural errors, since that issue has already been dealt with exhaustively in paragraphs 85 to 87 of that judgment. If the Court had wished not to adjudicate on the transfer of liability in paragraph 88 of the abovementioned judgment, it would not have found, in the first two sentences, that Thyssen had continued to exist and that liability could not, therefore, be imputed to TKS in accordance with the case-law arising from Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125. According to the applicant, since there was already a procedural error, as a result of which the Commission's decision was void, the fact that the Court commented in the first two sentences of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, on the issue of the transfer of liability can only mean that it intended thereby to supplement its reasoning for the dismissal of the cross-appeal brought by the Commission. The Court's additional reasoning in those first two sentences would be incomplete if the third sentence did not also refer to the question of the substantive transfer of liability, since, otherwise, that question would remain unanswered with regard to the statement of 23 July 1997.

102 The applicant further submits that the Italian version of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, upon which the Commission relies in support of its interpretation of paragraph 88 of the judgment, is irrelevant since the language of the case is German, and that that interpretation is, in any event, linguistically incorrect.

103 The applicant also states that, irrespective of the interpretation of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the fact that there was no transfer of liability is also correct from the point of view of substantive law. It is apparent from the case-law that a legal successor cannot be held liable for infringements of competition rules committed by its predecessor, so long as the latter still exists, as in the case of Thyssen. In its written submissions, the Commission now accepts that conclusion.

104 Finally, the applicant submits that, contrary to the Commission's assertions, the third plea in law is not inadmissible since it cannot be opposed on the basis of the 'legal force'

of the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above; that judgment referred exclusively to Decision 98/247 which is not covered by the present action. Since no court has yet ruled in general terms on the lawfulness of the Decision, it is not final and enforceable, with the result that the third plea in law cannot be inadmissible by reason of the principle of *res judicata*.

105 In connection with its fourth plea in support of annulment, the applicant submits that, by the statement of 23 July 1997, it wanted to express its agreement 'with the Commission's pursuit of the proceeding in relation to the entire infringement against [the applicant] alone and not, in parallel thereto, also against Thyssen'. That statement cannot be taken as a basis for TKS's liability or for the transfer of liability for payment of the fine.

106 It maintains that, during the previous procedure and in the procedure which led to the adoption of the Decision, it established very clearly that the statement of 23 July 1997 could not be regarded as an assumption of liability for the payment of fines. Upholding the Commission's contrary claim would effectively ascribe a diametrically opposed meaning to the parties' true intention, which was quite apparent at the date of adoption of the Decision.

107 Even on the assumption that the statement of 23 July 1997 can be interpreted as containing an 'assumption of liability', that would not mean that TKS could be ordered to pay the fine owed by Thyssen, since that private statement can only have declaratory effect and cannot create rights. Such a statement cannot alter the position of the addressee, which flows directly from primary law and which does not have effects in relation to either substantive or procedural law, because it is incompatible with the rules relating to fines in cartel cases. Those rules fall indisputably within public law, 'in particular penal law and the law of sanctions'. Independent private statements made by private-law individuals cannot alter the legal consequences arising under public law, 'particularly penal law and the law of sanctions'. That principle dates from Roman law

(*jus publicum privatorum pactis mutari non potest*) and is applied in the legal systems of the Member States, thus constituting a legal tradition common to the Member States which must be respected by the Commission.

108 That conclusion is equally valid where a declaration of assumption of liability is approved by the Commission, since the latter does not have the power to depart from the rules governing fines handed down in relation to cartels. The applicant states that, in its decision of 19 January 2005 (Case No C.37.773 — MCAA), the Commission itself took the view that a private declaration of assumption of liability could not lead to a transfer of liability for the payment of fines imposed under the law concerning cartels. According to the applicant, 'liability for the payment of fines rests with the addressee, even if the Commission wishes to impose the fine on an addressee other than the one who is liable under primary or secondary Community legislation'. That remains the case even where undertakings share the Commission's desire to place the burden of liability for the fine on an addressee other than the one who is actually liable. In any event, the possibility of such a margin of discretion on the part of the Commission must be ruled out, as it verges on arbitrariness.

109 The Commission contends that the third plea in law is rendered inadmissible by the fact that the finding of the Court of First Instance in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, that a penalty is possible on the basis of the statement of 23 July 1997 has already acquired the force of *res judicata*. In any event, the applicant has no legal interest in bringing proceedings to challenge, at this stage, that possibility of a penalty, which has not been disputed until now. That lack of any legal interest also constitutes grounds for the inadmissibility of the fourth plea in support of annulment, alleging the unlawfulness of the imposition of a fine on the basis of the statement of 23 July 1997, a plea which, in any event, is unfounded.

Findings of the Court

110 It should be held at the outset that there is no doubt that the applicant has a legal interest in bringing proceedings against the Decision which imposes a fine of EUR 3 168 000 on it, and that the third plea in support of annulment, concerning a failure to comply with the principle of *res judicata*, cannot be declared inadmissible merely on the ground that, in the procedure which culminated in the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, the applicant only challenged the possibility that the statement of 23 July 1997 could be interpreted as containing a waiver of its right to a fair hearing.

111 Consequently, it is necessary to consider the substance of the applicant's arguments.

112 It is important to note in that respect that the Court of Justice has recognised the fundamental importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38, and Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20).

113 It is settled case-law that the principle of *res judicata* extends only to matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14; order in Case C-277/95 P *Lenz* v *Commission* [1996] ECR I-6109, paragraph 50; and 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 44).

The implications of the judgment of the Court of First Instance in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*

114 It is apparent from paragraphs 51, 52 and 55 to 68 of the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, that:

— the applicant itself described as an undisputed fact its acceptance of liability for the infringement committed by Thyssen, without expressing any restriction or reservation as to the value of the statement of 23 July 1997;

— the Court of First Instance expressly noted the fact that TKS was not challenging the possibility of liability for Thyssen's alleged infringement being imputed to it by the Commission;

— the Court of First Instance clearly accepted that the Commission was entitled to impute to TKS, on the basis of the statement of 23 July 1997, liability for Thyssen's alleged infringement between December 1993 and 1 January 1995;

— Article 1 of Decision 98/247 was annulled in so far as it imputed Thyssen's alleged infringement to TKS only because the statement of 23 July 1997 could not be interpreted as implying 'in addition' a waiver by TKS of its right to be heard regarding the acts imputed to Thyssen; that misconception by the Commission of the effect of that statement resulted in an infringement of TKS's rights of defence;

— the finding as to the validity of the statement of 23 July 1997 by which TKS had confirmed that it assumed liability for Thyssen's conduct was a necessary precursor to the discussion and subsequent conclusion by the Court of First Instance of an infringement of TKS's rights of defence.

115 In the operative part of the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, the Court of First Instance annulled Article 1 of Decision 98/247 in so far as it attributed to TKS liability for the infringement of Article 65 CS committed by Thyssen, reduced TKS's fine by the amount which had been imposed on it in respect of the infringement committed by Thyssen, setting the amount of the fine ultimately imposed on TKS at EUR 4 032 000, and dismissed the application in all other respects.

The implications of the judgment of the Court of Justice in *ThyssenKrupp* v *Commission*

116 The applicant lodged an appeal against the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, claiming, in essence, that the Court of Justice should:

— set aside the judgment under appeal in so far as the Court of First Instance dismissed its application;

— amend Article 1 of Decision 98/247 and change the period of the infringement as far as the applicant is concerned;

— reduce in the same proportion the amount of the fine imposed on the applicant under Article 2 of Decision 98/247;

— in the alternative, with regard to the immediately preceding two heads of claim, refer the case back to the Court of First Instance.

117 TKS put forward three pleas in law in support of its appeal:

— error of law in the assessment of the duration of the infringement;

— miscalculation of the amount of the flat-rate fine;

— error of law as to the consequences of TKS's cooperation in the inquiry procedure concerning reduction of the fine.

118 It follows from the foregoing that the applicant's appeal did not relate to the assessment by the Court of First Instance of the transfer of liability from Thyssen to TKS.

119 The Commission lodged a cross-appeal against the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, contending, in essence, that the Court of Justice should:

— dismiss the applicant's appeal;

— in the alternative, if the judgment under appeal were to be set aside, reject the claim for reduction of the fine;

— set aside the judgment under appeal to the extent to which the Court of First Instance:

(i) annulled Article 1 of Decision 98/247 by which liability for the infringement committed by Thyssen was attributed to TKS;

(ii) set at an amount less than EUR 7 596 000 the fine imposed on TKS in Article 2 of Decision 98/247;

(iii) ordered the Commission to bear its own costs.

120 The Commission put forward three pleas in law in support of its cross-appeal:

— distortion of certain documentary evidence and error of law in the appraisal concerning the transfer of liability from Thyssen to TKS;

— incorrect assessment of the prescribed conditions regarding respect for the rights of the defence;

— incorrect assessment as to whether there was any encroachment upon the exercise of the rights of the defence.

121 It is the interpretation of the wording of the Court's response to the first plea in the cross-appeal, and specifically paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, that is the subject of debate between the parties, that interpretation being necessarily connected to the scope of that plea and to the precise terms of the argument expounded by the Commission in support of it.

122 In that regard, it is apparent from paragraphs 73 to 79 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, that, by the first plea in support of its cross-appeal, the Commission did not intend, on the face of it, to challenge the Court of First Instance's recognition of the fact that the Commission was entitled to attribute to TKS liability for Thyssen's allegedly unlawful conduct on the basis of the statement of 23 July 1997, but merely that Court's subsequent conclusion that the statement could not be interpreted as, in addition, implying a waiver by TKS of its right to be heard regarding the acts imputed to Thyssen.

123 As regards the wording of the Court of Justice's response to the first plea of the Commission's cross-appeal, the applicant asserts that the Court, first of all, confirmed in paragraphs 82 to 87 of its judgment the decision of the Court of First Instance to annul the Commission's decision on the grounds of a procedural defect, and went on, in paragraph 88, to develop an additional argument to show that the Commission's decision was invalid, stating that, irrespective of the procedural defect referred to, TKS could not be substantively liable for Thyssen's conduct.

124 The applicant contends, first of all, that, if the Court had wished not to adjudicate on the transfer of liability in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, it would not have found, in the first two sentences, that Thyssen had continued to exist and that liability for its conduct could not, therefore, be imputed to TKS in accordance with the case-law arising from *Commission* v *Anic Partecipazioni*, cited in paragraph 101 above. The Court's additional reasoning in those

first two sentences of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, would be incomplete if the third sentence did not also refer to the question of the substantive transfer of liability, since, otherwise, that question would remain unanswered with regard to the statement of 23 July 1997.

125 The Court of First Instance finds that the first argument clearly disregards the structure of the Court of Justice's assessment of the first plea in support of the cross-appeal, in which there is a strict correlation between the Court's response and the arguments advanced by the Commission.

126 In its judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above (paragraphs 80 to 87), the Court of Justice initially determines whether the conclusion of the Court of First Instance — that the statement of 23 July 1997 does not imply a waiver by TKS of its right to be heard — is vitiated by an error of law on account of a distortion, first, of the statement of 23 July 1997 itself and, second, of other documents mentioned in paragraphs 76 and 77 of the judgment of the Court of Justice, namely TKS's replies to the two statements of objections and its letter of 17 December 1996.

127 In its judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above (paragraphs 81 and 82), the Court recalls and confirms the validity of the aforementioned conclusion of the Court of First Instance with regard to the wording of the statement of 23 July 1997, then goes on to consider and reject (paragraphs 83 to 86) the Commission's argument as to the failure by the Court of First Instance to take account of other evidence relating to that statement and to the subsequent distortion of that evidence.

128 The conclusion that there was no distortion by the Court of First Instance either of the statement of 23 July 1997 or of that other evidence (*ThyssenKrupp* v *Commission*, cited in paragraph 27 above, paragraph 87) does not, however, mark the end of the Court's assessment of the first plea put forward by the Commission in its cross-appeal.

129 The Court goes on to examine and also reject another argument of the Commission relating to the existence of exceptional circumstances, based on the alleged economic succession of Thyssen by TKS, on the manifest unity of action between those two operators and on statements made by TKS on behalf of Thyssen during the administrative procedure. That is the sole object of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, which is immediately followed by the conclusion that the first plea in the cross-appeal must be rejected.

130 The applicant submits, second, that, in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice states, unequivocally, that the 'statements' made by TKS during the administrative procedure, referred to in paragraphs 85 and 86 of that judgment, do not enable 'liability for Thyssen's conduct … to be attributed to TKS', and that, moreover, paragraph 85 of the judgment refers expressly to the statement of 23 July 1997.

131 It is apparent, however, from a literal reading of the third sentence of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, that it merely refers back to the conclusion of the analysis carried out in paragraphs 85 and 86 of that judgment and that the statements referred to in those paragraphs are those which had already been assessed by the Court, namely TKS's responses to the two statements of objections and its letter of 17 December 1996.

132 While it is true that the statement of 23 July 1997 is mentioned in paragraph 85 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the wording of the last sentence of that paragraph shows that the Court is making a distinction, for the purposes of its reasoning, precisely between TKS's statements on certain activities of Thyssen before the acquisition thereof in 1995 and the statement of 23 July 1997. The Court takes the view, therefore, that, even though in its response to the first statement of objections and in its letter of 17 December 1996, the applicant had also submitted observations on certain activities of Thyssen before the acquisition thereof in 1995, the statement of 23 July 1997 did not imply that TKS considered itself fully and sufficiently defended with regard to the issue of the imputability of Thyssen's conduct and therefore that the Commission was entitled to impose on it a fine in respect of that conduct without again hearing its views.

133 In addition, in the third sentence of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court mentions the statements which were allegedly made by TKS 'concerning Thyssen's activities' during the administrative procedure, a form of words which enables those statements to be distinguished from the statement of 23 July 1997 by which TKS confirmed that it assumed liability for Thyssen's acts, and which refers back to the form of words used in paragraph 85 of the judgment regarding the 'observations [submitted by TKS] on certain activities of Thyssen before the acquisition thereof in 1995'.

134 As regards the form of words used in the third sentence referred to above, according to which the statements made during the administrative procedure by TKS concerning Thyssen's activities do not enable 'liability for Thyssen's conduct prior to [1995] to be attributed to TKS', this must be read in the light of the very specific object of the first plea of the cross-appeal and the fact that the passage in question merely refers back to the conclusion of the Court's analysis in paragraphs 85 and 86 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, owing to a partial overlap in the arguments advanced by the Commission in support of the first plea of the cross-appeal.

135 The third sentence of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, must therefore be interpreted as the Court's reminder that the statements made during the administrative procedure by TKS concerning Thyssen's activities, namely TKS's responses to the two statements of objections and its letter of 17 December 1996, do not support the conclusion that the statement of 23 July 1997 also implied a waiver of its right to a fair hearing or the subsequent attribution to TKS, because of a procedural defect connected with an infringement of its rights of defence, of liability for Thyssen's conduct before 1995.

136 The applicant's contrary interpretation of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, is tantamount to admitting that, without any reasons and by dint of reference alone, the Court transformed a finding concerning the infringement of the right to a fair hearing into a finding on the transfer of liability; that cannot be accepted.

137 It must also be observed that, if paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, were to be interpreted as suggested by the applicant, namely that the Court stated that, irrespective of the procedural defect, TKS could not be held liable for Thyssen's conduct, the Court would have had no reason to go on to adjudicate on the second and third pleas of the cross-appeal disputing the existence of an infringement of the rights of the defence, which it nevertheless did in paragraphs 90 to 97 of the judgment in question, concluding that those pleas should be rejected.

138 It follows from this that the applicant's third plea, according to which, by imposing on the applicant a fine for Thyssen's unlawful conduct, the Commission failed to observe the principle of *res judicata* in respect of the Court's finding in the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, that TKS could not be held liable for Thyssen's conduct, must be rejected as being based on a misinterpretation of paragraph 88 of the aforementioned judgment.

The implications of the principle of *res judicata*

139 It follows from the foregoing considerations that the Community judicature took the view that the Commission was — exceptionally — entitled, in view of the statement of 23 July 1997, to attribute to TKS liability for the conduct imputed to Thyssen from December 1993 until the transfer of Thyssen's business to TKS on 1 January 1995, but that it had not given TKS an opportunity to comment on that conduct and that, therefore, TKS had not been able to exercise its rights of defence in that regard, a conclusion which justified the annulment in part of Decision 98/247.

140 It must be held that that point of law has actually been settled by the Community judicature in accordance with the case-law mentioned in paragraph 113 above, and that it is, therefore, *res judicata*, bearing in mind that that principle is not attached only to

the operative part of an annulment judgment. It is also attached to the *ratio decidendi* which is inseparable from it (see, to that effect, *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, cited in paragraph 94 above, paragraph 44, and the case-law cited).

141 The judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, confirmed by the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, imposed on the Commission only the obligation — pursuant to Article 233 EC, which requires an institution whose act has been declared void to take the necessary measures to comply with the judgment in question — to eliminate illegality in the measure intended to replace the annulled measure (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 48).

142 That is precisely what the Commission did in the Decision, the adoption of which was preceded by the dispatch on 5 April 2006 of a statement of objections to TKS, which responded to it on 17 May 2006. The applicant was thus given an opportunity to comment on the truth and relevance of the acts imputed to Thyssen.

143 In the present action, the Court of First Instance is requested to rule on the lawfulness of the measure replacing Decision 98/247 by which, in reliance on the remarks concerning the statement of 23 July 1997 in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, confirmed by *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Commission imposed on the applicant a fine of EUR 3 168 000 in respect of Thyssen's conduct.

144 Notwithstanding the fact that the present action relates to a measure which is technically different from Decision 98/247, it must be held that the point of law debated in this action, regarding the validity of the statement of 23 July 1997 as a legal basis for imputing Thyssen's conduct to the applicant and for the subsequent penalty imposed on the latter, has already been considered and definitively settled by the Community judicature and is therefore *res judicata*.

145 That principle of *res judicata* precludes that point of law from being resubmitted to the Court of First Instance for consideration.

146 In those circumstances, the applicant's argument that the principle of *res judicata* cannot be set up against it in the present case, since the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, was exclusively concerned with Decision 98/247 which is not at issue in the present action, is irrelevant and must be rejected.

147 It follows from all the foregoing considerations that the fourth plea in law in support of annulment, relating to the unlawfulness of the imposition of a fine on the basis of the statement of 23 July 1997, must be dismissed as inadmissible. As a result, the applicant's revocation of that statement at the hearing, intended solely to illustrate its arguments regarding the scope of that statement, is rendered irrelevant.

4. *Infringement of the 'principle of precision'*

Arguments of the parties

148 In regard to the fifth plea, the applicant submits that the Decision infringes the 'principle of precision', since the Commission did not determine with sufficient clarity either the legal basis for the imposition of the penalty or the concept of 'assumption of liability by way of a private declaration'.

149 First, it states that the Commission claims to have based the fine imposed on TKS on a 'conjunction of norms', combining at the very least Article 65 CS and Article 23 of

Regulation No 1/2003, which lacks precision, since a fine imposed on that basis is not 'foreseeable for all interested parties', contrary to what the case-law requires. The contradictory explanations offered by the Commission in its defence show that the Commission does not even know what that conjunction 'should resemble'.

150 The lack of precision in the conjunction of legal bases is borne out by the fact that it is not possible to determine, inter alia, whether the relevant time-limit for bringing an action was one month, as provided by the ECSC Treaty, or two months, as provided by the EC Treaty. The procedural uncertainties caused by the Commission constitute an infringement of TKS's rights of defence.

151 Second, the applicant states that, by virtue of the concept of 'assumption of liability by way of a private declaration' (recitals 125 and 127 to the Decision), the Commission constructed a case of legal succession *sui generis* which is applied for the first time in the present case and which is imprecise, undefined and therefore manifestly unlawful both in terms of its scope and in terms of its conditions of application.

152 This new concept is derived neither from primary or secondary Community law nor from the case-law, which provides for the contrary solution defined in *Commission* v *Anic Partecipazioni*, cited in paragraph 101 above. The infringement of the 'principle of precision' also arises from the fact that, in its decision of 19 January 2005 (MCAA), the Commission went so far as expressly to adopt the opposite point of view, namely that a private independent declaration does not in fact lead to a transfer of liability. In addition, the new concept henceforth to be applied by the Commission when imposing penalties for infringements of cartel law was not even mentioned in its statement of objections.

153 The applicant submits, lastly, that, since the Commission did not state clearly and definitively on which legal basis it was acting in imposing a penalty, it can only make

assumptions about that legal basis. That finding cannot have the effect of rendering the present plea inadmissible, as maintained by the Commission, but only of rendering the Decision void.

154 The Commission contends that the applicant's arguments concerning the alleged 'uncertainties caused by the Commission' are so vague that the plea must be dismissed as inadmissible for lack of precision. It contends in the alternative that the plea should be dismissed as unfounded.

Findings of the Court

Admissibility of the plea in law

155 The Commission challenges the admissibility of the fifth plea on the basis of its alleged lack of precision.

156 In that regard, it should be borne in mind that, under Article 44(1) of the Rules of Procedure, the application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, so that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333).

157 In the present case, it is apparent from the applicant's written submissions on the plea relating to the infringement of the 'principle of precision' that it is in fact referring to the principle of legal certainty which the Commission has allegedly infringed on account of the lack of precision, first, as regards the legal basis of the penalty and, second, as regards the attribution of liability.

158 It must be held that, in so doing, the applicant provided sufficiently clear and precise information, given that it did not inhibit the Commission from responding in its defence to the arguments raised and enabled the Court to exercise its power of review.

159 The plea must therefore be declared admissible and examined as to its substance.

Substance

160 According to settled case-law, to which the applicant refers in its written submissions, Community legislation must be clear and its application foreseeable for all interested parties. As a result of that requirement for legal certainty, the binding nature of any act intended to have legal effects must be derived from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis (Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 26). The Court of Justice has also stated that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11).

161 As regards, first of all, the allegation of a lack of precision with regard to the legal basis of the Decision, the applicant maintains that the Decision is based on a 'conjunction of

norms', combining at the very least Article 65 CS and Article 23 of Regulation No 1/2003, which lacks precision. Leaving aside entirely irrelevant considerations in regard to the alleged lack of precision in the defence, the applicant submits that that combination is imprecise, as the fine imposed was not 'foreseeable for all interested parties' and that the lack of precision in the 'cocktail of legal bases' is responsible for procedural uncertainties which amount to infringements of the rights of the defence.

162 The applicant's arguments in that regard are based on a false premiss and must be rejected.

163 It is quite apparent from the Decision that the legal basis for it, that is to say, the provisions which give the Commission authority to act in the sphere in question, consists solely of Article 7(1) and Article 23(2) of Regulation No 1/2003, without Article 65 CS. The reference in the Decision to Article 65 CS concerns paragraph 1, the substantive provision addressed to undertakings and associations of undertakings prohibiting anti-competitive conduct, and paragraph 5, in that it provides for the possibility of imposing fines not exceeding twice the turnover on the products which were the subject of the collusive agreement. The reference to the applicability of Article 65(5) CS concerns the discussion of the principle of *lex mitior* for the purposes of justifying the application in the present case of that provision instead of Article 23(2) of Regulation No 1/2003 in calculating the amount of the fine (see recitals 162 to 168 and 178 to the Decision).

164 The wording of the first and second pleas in support of annulment considered above shows that the applicant did not experience genuine uncertainty as regards the legal basis of the Decision.

165 Apart from the explicit reference to Article 7(1) and Article 23(2) of Regulation No 1/2003, the Commission noted, in recital 70 to the Decision, that, according to settled case-law, whereas procedural rules are generally held to apply to all disputes

pending at the time when they enter into force, substantive rules are generally interpreted as not applying to situations existing before their entry into force (*Meridionale Industria Salumi and Others*, cited in paragraph 85 above, paragraph 9). In addition, Article 4 of the Decision expressly mentions that that decision is enforceable 'pursuant to Article 256 [EC]'; the decision was notified to the applicant by means of a letter explaining that that notification was 'in accordance with Article 254 [EC]'.

166 In those circumstances, there is no doubt that the action against the Decision, which was adopted more than four years after the expiry of the ECSC Treaty, had to be brought in accordance with Article 230 EC and the Rules of Procedure, and that Article 23 of the ECSC Statute of the Court of Justice could not be applied in any event.

167 Moreover, the applicant does not give any explanation to support the specific complaint that the legal basis is imprecise owing to the fine imposed not being 'foreseeable for all interested parties', and, in any event, does not rely on the unlawfulness of Article 23 of Regulation No 1/2003 from the point of view of the principle of *nullum crimen, nulla poena sine lege*, a corollary of the principle of legal certainty, or even on inadequate reasoning in the Decision.

168 It should be noted that the Decision, by which the Commission finds there to have been an infringement of Article 65(1) CS and imposes a penalty on the applicant after the expiry of the ECSC Treaty, was adopted in conformity with the principles governing the temporal application of the law and that the Commission rightly applied Article 65 CS as a substantive rule and the rules as to competence and procedure derived from Regulation No 1/2003, including Article 23(2), which makes express provision for the possibility of a fine being imposed by the Commission on undertakings whose conduct has been anti-competitive.

169 In so far as the applicant seeks, in fact, to challenge the validity of the legal basis of the Decision by referring to 'a cocktail of legal bases not permitted either by case-law or by legal doctrine', it is sufficient to note that it has previously been held that the legal basis used conferred power on the Commission to identify and penalise an infringement of Article 65(1) CS as from the adoption of the Decision.

170 As regards, second, the allegation of a lack of precision in the present case in relation to the attribution of liability, suffice it to note that the applicant's liability for Thyssen's conduct is based expressly and solely on the statement of 23 July 1997, as is altogether apparent from recitals 112 to 117, 125, 127, 128 and 149 to the Decision. Examination of the applicant's written submissions reveals, moreover, that there is no uncertainty at all on that point.

171 It appears, in reality, that the arguments developed by the applicant in support of its fifth plea in support of annulment are designed to demonstrate afresh the unlawfulness of such a basis, an objection which is inadmissible since that point of law has already been finally settled by the Community judicature in favour of the validity of that basis, and it is, therefore, *res judicata* (see paragraphs 139 to 147 above).

172 It follows from all the foregoing considerations that the plea relating to the infringement of the 'principle of precision' must be rejected.

5. *Infringement of the principle* non bis in idem

Arguments of the parties

173 In regard to its sixth plea, the applicant asserts that the concept of 'transfer of liability by way of a private declaration' infringes the principle *non bis in idem*, which must also be adhered to in the 'repetition of a procedure concerning the imposition of a fine'.

174 The present case involves an unlawful double penalty. The infringement committed by TKS had already been subject to a final penalty and the Commission additionally attributed liability to TKS for the infringement committed by Thyssen, effectively penalising TKS twice for the same act.

175 TKS states that, in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice held that, substantively, it was not possible for liability to be transferred, and submits that it was therefore fined a second time, in spite of the fact that the matter had become *res judicata*. As a result of the Court's finding, it is irrelevant that the part of Decision 98/247 that was annulled corresponded to the part of the fine which was, in theory, imposed on the applicant in respect of the infringement attributed to Thyssen.

176 In addition, in accordance with its new concept of the 'assumption of liability by way of a private declaration', the Commission was imputing to the applicant another party's liability. The Commission itself stated that liability did not initially fall on TKS and that it was not a question of liability being imposed in the context of legal succession either. However, according to the applicant, if that is the case, the inevitable conclusion is that the Commission is imposing on it a new, second fine instead of confining itself to correcting a procedural error. The imposition of a penalty for the infringement committed by Thyssen would therefore be lawful only if TKS had not already been penalised for the infringement which it committed. However, as the penalty imposed on

TKS in 1998 is no longer open to challenge, the proceedings should henceforth be regarded as closed in respect of the whole set of facts at issue.

177 The Commission contends that this plea should be rejected.

Findings of the Court

178 It should be noted that the principle *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 59).

179 The application of the principle *non bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (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 338).

180 In the present case, the applicant claims that it was subject to an unlawful double penalty. It asserts that it had already been penalised definitively in Decision 98/247 for the infringement it committed, and that, by attributing to it in the Decision liability for the infringement committed by Thyssen, the Commission penalised it twice for 'the same act'.

181 In support of that allegation, the applicant again pleads the unlawfulness of the imputation of liability for the infringement committed by Thyssen on the basis of the statement of 23 July 1997, first, by recalling its arguments to the effect that, in paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice held that TKS was not substantively liable for Thyssen's unlawful conduct and, second, by asserting that, in the Decision, the Commission was imputing to the applicant another party's liability.

182 The applicant infers from that alleged unlawfulness that the fine imposed in the Decision can have no purpose other than to penalise for a second time the infringement committed by the applicant, which is contrary to the principle *non bis in idem*.

183 The Court considers that argument to be based on a false premiss.

184 As has already been stated, the Community judicature took the view that the Commission was — exceptionally — entitled, in view of the statement of 23 July 1997, to attribute to TKS liability for the unlawful conduct imputed to Thyssen.

185 Having noted the existence of a procedural defect based on the infringement of the applicant's rights of defence, the Court of First Instance, in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, annulled Article 1 of Decision 98/247 in so far as it attributed to TKS responsibility for the infringement of Article 65 CS committed by Thyssen, in consequence reduced TKS's fine by the amount which had been imposed on it in respect of the infringement committed by Thyssen, and set the amount of the fine ultimately imposed on TKS for its own anti-competitive conduct at EUR 4 032 000.

186 That judgment was upheld by the Court of Justice in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, and it will be recalled that the applicant's interpretation of paragraph 88 of that judgment has already been rejected.

187 According to Article 233 EC, it is for the Commission to remedy an illegality found by the Community judicature, which is what it did in the procedure culminating in the adoption of the Decision. Having corrected the procedural defect, that decision had the sole purpose of attributing to the applicant, on the basis of the statement of 23 July 1997, liability for the infringement of Article 65 CS committed by Thyssen and imposing on it, in consequence, a fine of EUR 3 168 000.

188 The Decision does not, therefore, in any way constitute a second penalty for TKS's unlawful conduct which had already been dealt with definitively by Decision 98/247. In addition, as the Commission correctly points out, the assumption of liability by the statement of 23 July 1997 does not reduce the two infringements committed by TKS and Thyssen to a single infringement.

189 Furthermore, by referring once again and exclusively to the anti-competitive conduct of Thyssen, the Decision does not infringe the principle *non bis in idem.*

190 It must be borne in mind that the principle *non bis in idem* does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an 'acquittal' within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 62).

191 That judicial solution is fully applicable in this case, since the penalty imposed on the applicant in the Decision in respect of its liability for the infringement committed by Thyssen replaces the penalty that was pronounced in Decision 98/247 in the same regard, thereby ruling out any infringement of the principle *non bis in idem*.

192 It follows from all the foregoing considerations that the plea relating to the infringement of the principle *non bis in idem* must be rejected.

6. *Limitation period*

Arguments of the parties

193 With regard to the seventh plea, the applicant claims that, in accordance with Article 1(1) of Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ 1978 L 94, p. 22), the infringement committed by Thyssen is subject to a limitation period of five years, which ended in 1999, or in 2003 at the latest, if the date on which the other cartel members ended the infringement is taken into consideration.

194 There was no interruption of the limitation period within the meaning of Article 2 of Decision No 715/78 or any suspension thereof, since Thyssen was not a party to the procedure which culminated in the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above. The result is the same if reference is made to the rules on limitation periods in Article 25 of Regulation No 1/2003 or in Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

195 Contrary to the Commission's view, the limitation period is not determined in this case by the infringement committed by TKS, bearing in mind that the fine imposed in the Decision penalises an infringement that was originally committed by Thyssen. Referring to the judgment of the Court of Justice in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, the applicant submits that, since the infringement which is imputed to it was committed by Thyssen, a penalty can be imposed on it only in so far as it could have been imposed on its predecessor in law, namely Thyssen. Since the infringement is time-barred as far as Thyssen is concerned, it is also time-barred vis-à-vis the applicant, which is supposed to have 'replaced Thyssen in the procedure liable to result in a fine'.

196 In response to the Commission's argument that there is no 'succession issue' because Thyssen still exists and because its power to proceed against the infringements arises solely and directly from the alleged declaration of assumption of liability, the applicant maintains that the concept of legal succession is not subject to the condition that the predecessor in law should no longer exist and that succession occurs where legal powers are amended, even if the predecessor in law still exists. In addition, it is irrelevant whether that transfer of liability is described as 'legal succession' or as the Commission's use of its 'penal power' on the strength of the statement of 23 July 1997, since it has always been a matter of liability for an infringement in which the applicant was not at all involved.

197 The applicant states that the Commission also objects to the limitation point on the basis of its 'legitimate interest in making a finding of infringement' by means of the Decision taken against TKS, and claims that the limitation periods do not apply to 'decisions making a finding of infringement'. That argument cannot be accepted because it is not clear how the Commission could justify such a 'legitimate interest' within the meaning of Article 7(1) of Regulation No 1/2003 and what is at issue here is not a declaratory decision but a decision imposing a fine. Even a 'legitimate interest in making a finding of infringement' could not in any way alter the fact that the infringement is time-barred. In any event, a 'decision making a finding of infringement' which is not subject to the rules on limitation periods would be in breach of TKS's rights of defence, because that legitimate interest was never mentioned in the statement of objections.

198 The Commission contends that the seventh plea should be rejected.

Findings of the Court

199 The Court takes the view that this plea cannot be accepted because the premiss on which it is founded — that the penalty imposed on the applicant in Decision 98/247 and then in the Decision concerns 'an infringement in which the applicant was not at all involved' — is false.

200 It must be borne in mind that, by the statement of 23 July 1997 addressed to the Commission, TKS agreed to be held liable for the matters alleged against Thyssen in respect of the period starting in 1993, whereas Thyssen's business in the product sector in question had been transferred to TKS only with effect from 1 January 1995.

201 Decision 98/247 attributing to TKS liability for the anti-competitive conduct of Thyssen and imposing on it a fine in that regard is specifically and exclusively founded on the statement of 23 July 1997.

202 In *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, the Court took the view that the Commission was — exceptionally — entitled, in view of the statement of 23 July 1997, to impute to TKS liability for the conduct of which Thyssen was accused, since such a statement implies that the legal person within whose sphere of responsibility the business of another legal person was brought after the date of the infringement deriving from that business should be required to be answerable for it, even though, in principle, it is incumbent upon the natural or legal person running the undertaking concerned at the time of the infringement to answer for it (paragraph 62 of the judgment).

203 It therefore follows that TKS is legally deemed to have committed the infringement in question itself (see, by analogy, Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 28).

204 That is precisely why, in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, the Court penalised the Commission for the infringement of the applicant's rights of defence.

205 Having observed that the statement of 23 July 1997 could not be interpreted as implying, in addition, a waiver by the applicant of its right to be heard regarding the facts imputed to Thyssen, the Court held that the statement of objections notified to the applicant did not attribute liability to the applicant for the acts imputed to Thyssen, for which TKS agreed to be held responsible from then on for the purposes of the imposition of any fine, and that TKS had not been given an opportunity to submit its comments on the reality and relevance of the acts imputed to Thyssen. The Court concluded from this that the applicant had not been able to exercise its rights of defence.

206 It should be borne in mind in that regard that, on the basis of the evidence gathered following inspections and requests for information, it is for the Commission to resolve the issue of the imputability of the infringements noted, and that the essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings (Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Other*s v *Commission* [2000] ECR I-1365, paragraphs 142 and 143). In the statement of objections, the procedural document which marks the beginning of the *inter partes* administrative procedure, the Commission sets out the objections and states the facts alleged against the undertaking to which it is addressed. Given its importance, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person (Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, paragraph 21, and *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, paragraph 92).

207 The Court of First Instance therefore held that it was for TKS alone to answer for the infringement which could legally be imputed to it having regard to the statement of 23 July 1997.

208 In those circumstances, the limitation issue raised in the present case is not whether the penalty imposed on TKS in the Decision could have been imposed on its alleged 'predecessor in law', but whether the Commission was still entitled, on 20 December 2006, to impose on TKS a fine for an infringement which ceased on 1 January 1995 or 21 January 1998, depending on whether the date taken into account is that of TKS's acquisition of Thyssen's business in the stainless steel flat products sector or the date on which the continuing infringement referred to in Article 1 of Decision 98/247 ended.

209 As far as concerns the limitation rules to be taken into account, it must be noted that, since the Commission applied in the Decision the rules as to competence and procedure derived from Regulation No 1/2003, Regulation No 2988/74 cannot be applied in the present case, by reason of Article 37 of Regulation No 1/2003. Regulation No 1/2003 and Decision No 715/78 contain provisions that are substantially identical.

210 Thus, the measures referred to above provide that:

— the power of the Commission to impose fines for infringements of the rules relating to competition is to be subject, in principle, to a limitation period of five years which begins to run on the day on which the infringement is committed or on the day on which the infringement ceases in the case of continuing or repeated infringements (Article 25(1) and (2) of Regulation No 1/2003 and Article 1(1) and (2) of Decision No 715/78);

— any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period; the limitation period is to be interrupted with effect from the date on which the action is notified to at least one undertaking which has participated in the infringement and applies for all the undertakings which have participated in the infringement (Article 25(3) and (4) of Regulation No 1/2003 and Article 2(1) and (2) of Decision No 715/78);

— each interruption is to start time running afresh, but the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty, that period being extended by the time during which limitation is suspended (Article 25(5) of Regulation No 1/2003 and Article 2(3) of Decision No 715/78);

— the limitation period for proceedings is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Community judicature (Article 25(6) of Regulation No 1/2003 and Article 3 of Decision No 715/78).

211 In the present case, it should be borne in mind that, following the statement of 23 July 1997, which was made a little over two years after TKS's acquisition on 1 January 1995 of Thyssen's business in the stainless steel flat products sector, the Commission adopted Decision 98/247, penalising TKS for the first time, and doing so on 21 January 1998, within the five-year limitation period.

212 The applicant brought an action against Decision 98/247 on 11 March 1998, and the Court of First Instance delivered its judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, on 13 December 2001. That judgment was the subject of an appeal that was lodged by the applicant on 28 February 2002 and dismissed by the Court of Justice by its judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, on 14 July 2005.

213 It must be noted that, after being suspended throughout the entire period during which the proceedings against Decision 98/247 were pending, the limitation period began to run afresh from 14 July 2005 to 5 April 2006, when it was again interrupted by the statement of objections addressed to TKS in the procedure culminating in the adoption of the Decision on 20 December 2006.

214 It follows from the foregoing considerations that the Decision was adopted in conformity with the limitation rules laid down in the measures referred to in paragraph 209 above, irrespective of whether the starting-point for the limitation period is 1 January 1995 or 21 January 1998, and that the plea in support of annulment relating to the limitation period for proceedings must therefore be rejected.

7. *Infringement of the rights of the defence*

215 The applicant alleges an infringement of the rights of the defence, a complaint which is expressed in two parts alleging, first, the unlawfulness of the statement of objections (ninth plea in support of annulment) and, second, infringement of the right of access to the file (eighth plea in support of annulment).

Arguments of the parties

216 First of all, the applicant submits that the Commission states for the first time in the Decision that the transfer of liability is the product not of succession but of the statement of 23 July 1997 alone and, as regards the limitation period for that infringement, that it has a 'legitimate interest in making a finding of infringement', which was not mentioned either in the statement of objections or in the earlier procedure.

217 It also submits that, instead of a properly drawn-up statement of objections, the Commission sent it a 'patchwork' of various documents, including the 1997 statement of objections and various schedules supplemented by fragmentary legal considerations from which it was impossible to extrapolate the allegations of fact and of law which the Commission was intending to pursue and the points in respect of which the Commission had modified its assessment after the earlier decision and the 1997 statement of objections had been critically examined and, in part, annulled by the Court of Justice and the Court of First Instance.

218 According to the applicant, the reference technique used by the Commission and the particularly vague nature of the legal analysis of its main points were not sufficient, from the point of view of form, to allow a properly conducted *inter partes* procedure and could not, therefore, adequately pave the way for the adoption of the Decision.

219 Second, the applicant claims that the Commission infringed its right of access to the file by not allowing it to inspect all the documents likely to be of use in its defence during the file inspection at the Commission's offices on 24 April 2006, on the ground that certain documents contained business secrets.

220 It alleges that that refusal to provide access to the file is unjustified, if only because the documents in question were all over 10 years old and had therefore lost their allegedly confidential character, according to the terms of paragraph 23 of the Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7) ('the 2005 Notice'), and because the Commission at no time specified the nature of the business secrets that they could contain. The Commission also, more generally, failed to have regard to the fact that, in a 'readoption procedure', it naturally should have granted access to the responses to the 1997 statement of objections given by the other undertakings concerned.

221 After the period for responding to the later statement of objections expired on 17 May 2006, the Commission, by letter of 8 August 2006, gave the applicant access to some of the documents initially withheld. That measure did not, however, remedy the infringement of TKS's rights of defence, since it did not cover all the documents likely to be of use in its defence and TKS was not in a position to make use of those documents in its reply to the statement of objections; therefore, in that respect also, its rights of defence were infringed. The applicant submits that it was not possible for it to make known its views on the documents supplied on 8 August 2006, owing to the fact that, in parallel, a date had been fixed for the oral hearing.

222 Moreover, the Commission's argument that the documents which were not made available to the applicant are not relevant because the applicant did not dispute the facts is not persuasive, since an infringement of the rights of the defence may occur not only in situations where an undertaking intends to dispute the facts in order to defend itself. Such documents could reveal matters relating to mitigating circumstances which are relevant to the calculation of the fine or which concern the possibility of proceeding against an infringement from the point of view of the limitation period. In so far as the Commission contends, lastly, that the applicant should have provided further details of the documents that were not available to it, in order adequately to justify a request for access to those documents, it must be noted that that contention is contradictory, since the applicant could not have been acquainted with those documents.

223 The Commission contends that there was no infringement of the rights of the defence in this case.

Findings of the Court

224 It must be borne in mind at the outset that it is the statement of objections, on the one hand, and access to the file, on the other, that allow the undertakings under

investigation to acquaint themselves with the evidence which the Commission has at its disposal and to render the rights of the defence fully effective (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 55).

The wording of the statement of objections of 5 April 2006

225 According to the case-law, the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission (*Mo och Domsjö* v *Commission*, cited in paragraph 156 above, paragraph 63). Due observance of the rights of the defence in a proceeding in which sanctions such as those in question may be imposed requires that the undertakings and associations of undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views effectively on the truth and relevance of the facts and circumstances alleged and objections raised by the Commission (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 553). That requirement is satisfied if the decision does not allege that those concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which they have had the opportunity of making known their views (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 94). It follows that the Commission may adopt only objections on which those undertakings and associations of undertakings have had the opportunity to make known their views (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 47).

226 The applicant submits that the statement of objections of 5 April 2006 fails, on two counts, to satisfy the conditions referred to above.

227 It claims first of all that, instead of a properly drawn-up statement of objections, the Commission sent it a 'patchwork of various documents', including the 1997 statement of objections and various schedules supplemented by fragmentary legal considerations 'from which it was impossible to extrapolate the allegations of fact and of law which the Commission was intending to pursue and the points in respect of which the Commission had modified its assessment after the earlier decision and the 1997

statement of objections were critically examined and, in part, annulled by the Court of Justice and the Court of First Instance'.

228 It is common ground that, on 5 April 2006, the Commission sent the applicant a statement of objections to which the statement of objections of 23 April 1997 and its annexes were attached, together with a complete list of documents from the earlier procedure and from the 'readoption procedure', which cannot be described as a 'patchwork of various documents'.

229 Aside from the fact that the applicant does not invoke any provision of Community law that prohibits the action taken by the Commission, the Commission's action is accounted for by the particular circumstances of the case.

230 Having noted the existence of a procedural defect based on the infringement of the applicant's rights of defence, the Court of First Instance, in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, annulled Article 1 of Decision 98/247 in so far as it attributed to TKS responsibility for the infringement of Article 65 CS committed by Thyssen, in consequence reduced TKS's fine by the amount which had been imposed on it in respect of the infringement committed by Thyssen, and set the amount of the fine ultimately imposed on TKS for its own anti-competitive conduct at EUR 4 032 000.

231 The judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, confirmed by the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, imposed on the Commission only the obligation, pursuant to Article 233 EC, to eliminate illegality in the measure intended to replace the annulled measure (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 48).

232 In accordance with the case-law whereby the procedure for replacing a measure which has been annulled must, in principle, be resumed at the very point at which the illegality occurred (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 73), the Commission referred back to the date on which TKS assumed liability for Thyssen's unlawful conduct, 23 July 1997, and the procedure was resumed with effect from that date.

233 In compliance with the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, confirmed by the judgment in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Commission sent a new statement of objections to the applicant on 5 April 2006 for comments on Thyssen's anti-competitive conduct. Since the facts and legal issues pertaining to that conduct were the same as in the original procedure, the Commission was entitled to include the 'earlier objections' from 1997 as an integral part of the new statement of objections of 2006.

234 The Commission states in paragraph 16 of the 2006 statement of objections:

'The 1997 statement of objections previously sent to [Thyssen], including the annexes (I-V), is reproduced as a scanned original in Annex 1 to this statement of objections and forms an integral part hereof.'

235 It should be borne in mind that regard for the rights of the defence requires that the undertaking concerned shall have been enabled to assert effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25). Consequently, in principle only those documents which have been cited or mentioned in the statement of objections are admissible evidence as against the addressee of the statement of objections (Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 55, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 34).

236 In the 2006 statement of objections, the Commission put forward legal considerations specifically on the application of Article 65 CS, notwithstanding the expiry of the ECSC Treaty, as well as on the *lex mitior* principle, and went on to state as follows in paragraph 15:

'1. The objections are addressed exclusively to TKS in respect of the conduct of [Thyssen]. 2. Any particulars (for example, the number of Member States of the EC) must be read in their historical context. 3. Paragraph 64 concerning the applicability of Article 65(5) of the ECSC Treaty must be read in conjunction with paragraph 26 et seq. of this statement of objections. 4. The date of the statement of objections and the Member of the Commission who adopted the decision on behalf of the Commission at that time are each replaced by virtue of this statement of objections.'

237 In those circumstances, it cannot be claimed, as the applicant does without substantiating its claim, that the 2006 statement of objections did not enable it to identify the allegations of fact and of law which the Commission intended to pursue after the judgments in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, and in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above. The applicant, moreover, stated its position in its reply to the statement of objections and did not dispute the facts or the legal categorisation of the facts as set out in that statement.

238 The applicant also submitted that the 2006 statement of objections did not enable it to identify those findings of the Court of Justice which the Commission intended to accept and that, in so far as the Commission claimed not to be bound by all the Court's findings, it should, a fortiori, have adopted a statement of objections that was comprehensible and consistent. The Court of First Instance considers that, apart from the fact that that objection is, once again, imprecise, it is implicitly but necessarily based on the applicant's mistaken contention that, in *ThyssenKrupp* v *Commission*, cited in paragraph 27 above, the Court of Justice held that TKS could not be substantively liable for Thyssen's conduct. As has already been indicated, that contention arises from a misinterpretation — particularly of paragraph 88 — of that judgment.

239 The Commission has in no way claimed not to be bound by all the Court of Justice's findings and, in compliance with the decisions of the Community judicature, it sent the applicant a further statement of objections to invite the applicant's comments on Thyssen's conduct, in which it clearly stated that it took the view that, by virtue of the statement of 23 July 1997, the applicant had assumed liability for Thyssen's conduct.

240 The applicant claims, second, that the Commission introduced new legal arguments in the Decision 'by surprise'. Accordingly, the Commission claimed for the first time in the Decision that the transfer of liability was not the product of succession but solely of the statement of 23 July 1997 and, as regards the limitation period for the infringement, that it had a 'legitimate interest in making a finding of infringement', which had not been mentioned either in the 2006 statement of objections or in the earlier procedure.

241 As regards the reference to the statement of 23 July 1997 as the basis for imputing to TKS liability for Thyssen's conduct, it must be observed, first, that Decision 98/247 already referred back to that declaration of assumption of liability, which was pointed out by the Court of First Instance in paragraphs 59 to 62 of the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, and, second, that the wording of the 2006 statement of objections, in particular paragraphs 5, 7, 11 and 33, leaves no room for doubt on that point.

242 As regards the reference in the Decision to the fact that the Commission has a 'legitimate interest in making a finding of infringement', suffice it to note that this forms part of the Commission's response to the applicant's allegation in its reply to the statement of objections that the forthcoming decision is unlawful owing to an infringement of the limitation rules.

243 It should be borne in mind in that regard that, according to the case-law, the decision is not necessarily required to be an exact replica of the statement of objections (Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission*

[1980] ECR 3125, paragraph 68). The Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections. It must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains (*ACF Chemiefarma* v *Commission*, cited in paragraph 225 above, paragraph 92; see also, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 437 and 438). Thus it is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts that there will be an infringement of the rights of the defence (*ACF Chemiefarma* v *Commission*, cited in paragraph 225 above, paragraph 94; see also, to that effect, *CB and Europay* v *Commission*, cited in paragraph 225 above, paragraphs 49 to 52). That is not the case where, as in the present case, the alleged differences between the statement of objections and the final decision do not concern any conduct other than that in respect of which the undertakings concerned had already submitted observations and are therefore unrelated to any new complaint (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 103).

244 Finally, the applicant submits in paragraph 63 of the reply that '[e]ven the issue of the basis of authority to act has been left open in the statement of objections and in the Decision or has been subject to variable and non-uniform treatment'. Aside from the fact that that statement is inherently contradictory, it must be pointed out that it is also inconsistent with the wording of the 2006 statement of objections (see paragraph 19 et seq.) and with the applicant's own statements in another paragraph of the same pleading (paragraph 27), according to which the Commission 'argued in the statement of objections (SO) (paragraph 19 et seq.) that Article 65 [CS] alone, and not the EC Treaty, constitutes the substantive legal basis and that, in procedural terms, only Regulation No 1/2003 applies'.

245 Accordingly, the first part of the plea in law relating to an infringement of the rights of the defence, alleging that the statement of objections of 5 April 2006 is unlawful, must be rejected.

The right of access to the file

— Admissibility

246 Under Article 27(2) of Regulation No 1/2003, the parties concerned are 'entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets'.

247 The Community judicature has stated that the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively, on the basis of that information, on the conclusions reached by the Commission in its statement of objections. It follows that the Commission has an obligation to make available to the undertakings to which a statement of objections has been addressed all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, with the exception of confidential documents (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, paragraphs 45 and 46).

248 The right of access to the Commission's file is therefore designed to ensure effective exercise of the rights of the defence (Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 76). Those rights are not only fundamental principles of Community law but are also enshrined in Article 6 of the ECHR (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 113 above, paragraph 316).

249 A decision imposing fines on undertakings for infringements of the rules on competition cannot be annulled in whole or in part on the basis of a lack of proper access unless it is found that that lack of proper access to the investigation file has

prevented the undertakings from perusing documents which were likely to be of use in their defence and has thus infringed their rights of defence (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 179 above, paragraph 101).

250 In the present case, the applicant stated, even at the stage of the application, that its right of access to the file had been infringed by the Commission which refused the applicant access to the full set of documents likely to be of use in its defence and, in particular, refused to disclose to the applicant the responses to the 1997 statement of objections provided by the other undertakings involved in the cartel ('the earlier responses'); these documents were likely to be of use in its defence.

251 It must be held that, by so doing and contrary to what is alleged by the Commission, the applicant has satisfied the requirements of Article 44(1) of the Rules of Procedure, as interpreted by the case-law, according to which the application must specify the nature of the grounds on which it is based, so that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (*Viho* v *Commission*, cited in paragraph 156 above, paragraph 68, and *Mo och Domsjö* v *Commission*, cited in paragraph 156 above, paragraph 333).

252 The information provided in the application was sufficiently clear and precise, given that it did not inhibit the Commission from responding in its defence to the arguments raised and enabled the Court to exercise its power of review.

253 The objection must therefore be declared admissible and examined as to its substance.

— Substance

254 It is common ground that, between the applicant's inspection of the file at the Commission's offices on 24 April 2006 and the adoption of the Decision, the Commission sent the applicant a series of different documents from the undertakings involved in the cartel and penalised in Decision 98/247.

255 At the hearing, the parties were agreed that the applicant received copies of all the responses to the statement of objections of 24 April 1997 of the undertakings involved in the cartel, with the exception of the documents referred to in paragraphs 9 and 10 of the Commission's answer to the question put by the Court of First Instance, a non-confidential version of which was disclosed to the applicant (Annex S 2 contains pages 2260 to 2262, 3108 to 3318, 5824 to 5836 and 5838 to 5842 of the Commission's file relating to the first administrative procedure; 'the earlier file').

256 First of all, the Commission states that it provided access to all the documents to which the applicant's request related, provided that considerations of confidentiality, connected with the protection of the business secrets of the undertakings concerned, did not preclude this, in accordance with the 2005 Notice.

257 The 2005 Notice states that the Commission's file may contain accessible and non-accessible documents, the latter including, in particular, documents containing two categories of information, namely business secrets and other confidential information to which access may be partly or wholly restricted and which are defined in paragraphs 18 and 19 of that notice. Paragraph 18 is worded as follows:

'In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of

assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.'

258 The applicant claims that that refusal to give access to the file is unjustified, if only because the documents in question were more than 10 years old and had therefore lost their allegedly confidential nature according to paragraph 23 of the 2005 Notice, and because the Commission did not, at any time, specify the nature of the business secrets they could contain.

259 Paragraph 23 of the 2005 Notice provides as follows:

'Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential. Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties turnover, sales, market-share data and similar information which is more than five years old is no longer confidential.'

260 It must be observed, in the light of Annex S 2 to the Commission's answer to the question put by the Court of First Instance, that the information which was not made available in the non-confidential version sent to the applicant does not necessarily fall within the category defined in the last sentence of paragraph 23 of the 2005 Notice, given that the words '[a]s a general rule' and 'presumes' in that sentence preclude any automaticity in the categorisation of a document that is more than five years old.

261 As the Commission observes, without contradiction by the applicant, only certain statistical data relating to the commercial policy of Usinor-Sacilor, concerning, for example, price or cost data, profit margins, or the source of certain statistical data, were deleted from pages 3108 to 3318 of the earlier file. Moreover, it is not disputed by the applicant that the file to which it had access on 24 April 2006 at the Commission's offices already included pages 5914 to 5922, which reproduce the response of the undertaking in question to the 1997 statement of objections. Those pages were sent to the applicant again on 8 August 2006 (see Annex KB 8 to the defence which contains the Commission's letter to the applicant of 8 August 2006).

262 On pages 2260 to 2262 of the earlier file, which relate to various invoices issued by ALZ NV, the only information to be deleted was information enabling the customer to be identified. Finally, as regards pages 5824 to 5836 and 5838 to 5842 of the earlier file, it must be pointed out first of all that pages 5838 to 5842 are merely a reproduction of certain parts of pages 5824 to 5836. On pages 5824 to 5836, apart from the identity of certain customers and the date of the corresponding letter, the only information to have been deleted concerns a price-setting system still used by Avesta Sheffield (now Outokumpu) in 2006 and the existence of exemptions for certain customers (see Annex KB 8 to the defence which contains the Commission's letter to the applicant of 8 August 2006).

263 In addition, in order to enable the Commission to balance, on the one hand, the need to preserve the parties' rights of defence by granting as much access as possible to the file and, on the other, the concern to protect confidential information of other parties or third parties, those other parties or third parties must provide the Commission with all relevant details.

264 In that respect, paragraph 47 of the 2005 Notice states:

'If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the services of the Directorate-General for

Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers.'

265 It is common ground that, following the applicant's reply to the statement of objections alleging an infringement of the rights of the defence on account of a lack of full access to the earlier responses, the Commission, by letter of 20 June 2006, invited the applicant to submit, pursuant to paragraph 47 of the 2005 Notice, a reasoned request 'indicating why the non-accessible information is, in this case, required for [its] defence'.

266 In its reply of 29 June 2006, the applicant indicated via its lawyers that 'in [its] view, a new or further request to inspect the file or to state why certain documents which [had], until [then], been withheld from [it] should be made available or [could] be relevant for [its] defence is not necessary'. It recalled that that information could no longer be considered confidential, if only because of the passage of time, and stated that the relevance of that information for the purposes of its defence arises from the fact 'that the undertakings concerned in the first procedure [had] already used those submissions in their defence against the allegations now confronting [the applicant]'. The applicant essentially maintained that stance in its letters of 5 and 7 July 2006 and in a letter of 23 August 2006.

267 It must be held that that response, which is in general terms and does not go into detail in respect of each document, does not amount to a reasoned request and does not answer the Commission's query as to the apparent relevance of the information that was not accessible for the applicant's own defence in the specific context of an administrative procedure in which the applicant, the only undertaking involved in that procedure, was required to comment on the anti-competitive conduct of Thyssen.

268 When questioned by the Court of First Instance during the hearing as to the existence of a reasoned request for access after inspection of the file, the applicant mentioned its letter of 5 July 2006, already referred to above, and a letter of 26 September 2006 addressed to the Hearing Officer, which was not produced to the Court and the oral reconstruction of which did not support the conclusion that there was a genuine reasoned request within the meaning of paragraph 47 of the 2005 Notice.

269 It must also be pointed out that, in accordance with the case-law and paragraph 17 of the 2005 Notice, the applicant had access to a non-confidential version of the documents concerned. It does not claim, much less demonstrate, that that version of the documents was established in such a manner that it was unable to determine whether the information deleted was likely to be relevant for its defence, and therefore whether there were sufficient grounds to request the Commission to grant access to the information claimed to be confidential (see paragraph 38 of the 2005 Notice). Moreover, it is apparent from the Commission's letter to the applicant of 8 August 2006 — in which the Commission explains its stance regarding the confidentiality of the documents concerned in the light of the nature of the information which they contain — that the applicant received two letters that were from Arcelor, dated 30 June and 1 August 2006, stating why pages 2260 to 2262 and 3108 to 3318 of the earlier file had to remain confidential.

270 In those circumstances, the Commission's refusal, on the grounds of confidentiality, to disclose to the applicant all the documents concerned cannot be regarded as being unjustified.

271 Second, the Commission contends that it should not, in any event, be held that there was an infringement of the applicant's rights of defence, since the latter has no 'legal interest' in access to the file. The applicant admitted the facts and their legal assessment and those parts of the earlier responses to which access was not given do not contain evidence either in its favour or otherwise.

272 In response to that argument, the applicant states that 'it is not the case that an infringement of the rights of the defence can arise only where an undertaking intends to dispute the facts in order to defend itself; it may arise also where such documents may reveal mitigating circumstances which are relevant to the calculation of the fine or which concern the possibility of proceedings against an infringement from the point of view of the limitation period'.

273 It must be noted that the applicant confines itself to making a general statement on the scope of the concept of infringement of the rights of the defence, which suggests that the documents partly disclosed might be relevant for its defence on the basis that they contain exculpatory evidence. It does not complain, much less demonstrate, a failure by the Commission to communicate, during the administrative procedure, those documents, which were used against it in the Decision.

274 Where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. It is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in the decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine. In that context, the possibility that a document which was not disclosed might have influenced the course of the proceedings and the content of the Commission's decision can be established only if a provisional examination of certain evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded (*Aalborg Portland and Others* v *Commission*, cited in paragraph 179 above, paragraphs 74 to 76).

275 The fact remains that the applicant does not make any specific or precise allegation as to an infringement of its rights of defence in the present case which is connected with the documents to which it was in part refused access and the level of the fine or the issue of limitation periods.

276 Those general arguments are not of such a kind as to establish that there was, in fact, an infringement of the rights of the defence, which is a question to be assessed in the light of the circumstances of each particular case (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 69).

277 For the sake of completeness, it is apparent that the possibility that the documents which were not fully disclosed by the Commission might have influenced the course of the proceedings and the content of the Decision is purely hypothetical.

278 It should be borne in mind that, in attributing to TKS liability for the infringement committed by Thyssen and accordingly imposing on TKS a fine of EUR 3 168 000 in the Decision, the Commission acted, and could properly do so, on the basis of the statement of 23 July 1997. It has already been stated that, in so doing, the Commission did not act in breach of the limitation rules, and the non-accessible information comprising statistics and the names of undertakings is entirely irrelevant so far as a legal issue involving just the applicant's situation is concerned.

279 As regards the level of the fine and the Commission's corresponding assessment of the gravity and duration of the infringement, it must be noted that the Commission took the view that the agreements or concerted practices whose object was a uniform increase of a cost component constituted a serious infringement and that that unlawful collusion commenced with the Madrid meeting on 16 December 1993 and ended on 31 December 1994, which means that the infringement lasted for more than a year (recitals 171 and 173 to the Decision).

280 In reaching that conclusion, the Commission relied, in particular, on the statements of the undertakings involved in the cartel which were obtained during the investigation carried out during the first administrative procedure and on the statements of the applicant, which had acknowledged the truth of the facts set out in the 1997 statement of objections. Furthermore, in its response dated 17 May 2006 to the statement of objections of 5 April 2006, the applicant once again failed to challenge the facts set out therein. In those circumstances, it cannot reasonably be maintained that the

documents which were not fully disclosed might have had a significance which ought not to have been disregarded in relation to the Commission's assessment of the gravity and duration of the infringement concerned, as referred to in the case-law mentioned in paragraph 274 above.

281 In addition, it is settled case-law that, where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 199; see also, to that effect, Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

282 It follows that, so far as concerns the determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make their submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. Moreover, the undertakings have an additional guarantee, as regards the setting of that amount, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235, and *LR AF 1998* v *Commission*, cited in paragraph 281 above, paragraph 200).

283 However, there can be no dispute about the fact that the Commission set out the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement, in the 2006 statement of objections and its annexes.

284 Accordingly, the second part of the plea in law relating to an infringement of the rights of the defence, alleging an infringement of the right of access to the file, must be rejected.

285 The applicant submits, lastly, that, by letter of 8 August 2006, the Commission gave it access to some of the documents initially withheld, but that it was not in a position to make use of those documents in its reply to the statement of objections; therefore, in that respect also, its rights of defence were infringed.

286 It should be noted that, according to Article 27 of Regulation No 1/2003, the Commission must give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity of being heard on the matters to which objection has been taken '[b]efore taking decisions as provided for in Articles 7, 8, 23 and Article 24(2) [of that regulation]'.

287 In order to respect the rights of defence of undertakings, the Commission should therefore give the parties concerned the right to be heard before it takes such a decision, which, in the applicant's case, it did in the procedure leading to the adoption of the Decision.

288 It is common ground that, after the applicant was sent the statement of objections on 5 April 2006 and inspected the Commission's file at the latter's offices, the applicant was given an opportunity to put forward its point of view in its reply dated 17 May 2006 to that statement.

289 It is true that, following that reply and in response to a request by the applicant for all the replies to the 1997 statement of objections of the undertakings involved in the cartel to be communicated to it, the Commission sent documents to the applicant on a number of occasions after having assessed the confidentiality of those documents in the light of the protection of business secrets; nevertheless, it did not in any way amend the objections set out in the statement of 5 April 2006. It must be pointed out that the

applicant has not claimed, much less demonstrated, that, under the Decision, it is held liable for any infringement other than that referred to in the summary of the objections or that the Decision includes findings of fact on which the applicant has not been given an opportunity to explain itself.

290 Moreover, the applicant does not deny that, when further documents were sent to it on 8 August 2006, it was given the opportunity to comment in writing within a period of one month in order to supplement, if necessary, its reply to the statement of objections, which it failed to do.

291 The applicant replied in its letter of 23 August 2006 that it was 'no longer possible in the time available to examine the additional documents and to make appropriate observations on them', taking into account the preparation required for the hearing fixed for the rapidly approaching date of 15 September 2006.

292 That allegation is repeated in the applicant's written submissions, but does not appear to be at all justified in the circumstances of the case. It must be borne in mind that the statement of objections was made on 5 April 2006 and is based on the facts set out in the earlier statement of objections of 1997 with which the applicant was perfectly familiar. The applicant's assertion that it would have been impossible, in the last five weeks before the hearing (in other words, between 8 August and 15 September 2006), to prepare for the hearing — which, after all, the applicant had requested on 17 May 2006 — and to draft observations on the few documents sent to it is, as the Commission rightly contends, merely a pretext.

293 Furthermore, the applicant declared in its letter of 23 August 2006 that it would 'agree to the scheduled hearing going ahead on the basis of the extent of access to the file to date, in order to avoid procedural delay'. Should the procedure have to be pursued after the hearing, it had stated that it would require 'if necessary, the opportunity to submit

further defence pleas in writing'. It must be noted that the applicant did not add to its reply to the statement of objections after the hearing, even after further access to the file was given on 20 September 2006.

294 It follows from all the foregoing considerations that the plea relating to an infringement of the applicant's rights of defence must be dismissed in its entirety.

8. *The applicant's cooperation*

Arguments of the parties

295 In the alternative, the applicant claims, with regard to the 10th plea, that the amount of the fine was calculated incorrectly, since the Commission failed to take account of the fact that the applicant did not dispute the existence of the infringement as a whole. That second instance of cooperation on the part of TKS should have led to a reduction in the fine greater than the 20% reduction already granted on the basis of Section D of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), in so far as it enabled confirmation of all the facts and of their assessment as constituting an infringement of Article 65(1) CS.

296 According to the applicant, the Commission was opposed to any reduction on account of the applicant's remarks concerning the validity of the legal basis of the penalty imposed, which is entirely irrelevant given the autonomy of the issues involved. Proof of the infringement was not in any way rendered more difficult by TKS's particular remarks.

297 The Commission contends that this plea should be dismissed.

Findings of the Court

298 It should be noted that the Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. The Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (*SGL Carbon* v *Commission*, cited in paragraph 224 above, paragraphs 81 and 88).

299 In the Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fines which would otherwise have been imposed upon them (see Section A, paragraph 3, of the Leniency Notice).

300 Section D of the Leniency Notice provides:

'1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

301 In Decision 98/247, the Commission had, on the basis of Section D of the Leniency Notice, granted TKS a 10% reduction in the fine on account of its acknowledgement of the truth of the facts set out in the 1997 statement of objections. Although it had granted two other undertakings involved in the cartel a reduction of 40%, the Commission justified that rate of 10% by stating that TKS's statements and reply to the statement of objections (i) had not contributed anything new, and (ii) disputed the existence of an infringement.

302 In *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, the Court of First Instance criticised the first part of that assessment (paragraphs 232 to 248) and granted TKS, in the exercise of its unlimited jurisdiction, a reduction of 20% of the fine.

303 In this instance, the Commission recalls that the present procedure is a continuation of the original procedure from the point at which the procedural irregularity was committed and that, in that original procedure, TKS helped to clarify the facts

concerning Thyssen which, in the light of the decision of the Court of First Instance in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited in paragraph 24 above, justifies a reduction of 20% of the fine pursuant to Section D of the Leniency Notice (recitals 179 and 182 to the Decision).

304 The applicant challenges that calculation and submits that, in its reply to the 2006 statement of objections, it did not dispute the facts or, in particular, their description in legal terms as an infringement of Article 65(1) CS. It states that the factors which led to the 20% reduction have remained valid and that also to be taken into account is the fact that, in the 'readoption procedure', it did not dispute the infringement of Article 65(1) CS but, on the contrary, expressly conceded that point, which should have led the Commission to award it a reduction in the fine greater than the 20% reduction granted in the Decision.

305 In the light of an overall analysis of the reply to the 2006 statement of objections and, specifically, paragraph 75 thereof, those arguments of the applicant cannot be accepted.

306 Paragraph 75 of the reply to the 2006 statement of objections is worded as follows:

'TKS expressly declares that it does not dispute the facts alleged in the statement of objections in respect of the years 1993 to January 1998, and that the undisputed facts constituted an infringement of Article 65(1) CS.'

307 It must be held that the wording is impersonal, abstract and ambiguous; it cannot be ascertained from it against whom a finding of infringement may be made and whether that was still legally possible at the time of the reply to the 2006 statement of objections. Apart from the fact that the applicant does not refer to the period 1993/94 — the only period referred to in that statement of objections — it does not expressly and clearly confirm that the facts at issue constitute an infringement for which it is liable.

308 On the contrary, the passages contained in the reply to the 2006 statement of objections which precede paragraph 75 (see paragraph 306 above) reveal unequivocally that the applicant denies any possibility that the Commission could apply Article 65(1) CS in the present case and impute Thyssen's conduct to the applicant.

309 In order to benefit from a reduction on grounds of cooperation, the conduct of the undertaking concerned must facilitate the Commission's task of finding and bringing to an end infringements of the Community competition rules (see Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraphs 309 and 332) and the Commission must, in each individual case, consider whether that actually made its task easier (see, to that effect, Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 193, and 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 559, currently under appeal).

310 The applicant's assertion that 'the undisputed facts constituted an infringement of Article 65(1) CS' was, in the circumstances of the case as outlined in paragraph 308 above, of no assistance to the Commission.

311 Moreover, it follows from the case-law of the Court of Justice that a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate a genuine spirit of cooperation on its part (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, paragraph 395, and *SGL Carbon* v *Commission*, cited in paragraph 81 above, paragraph 68).

312 In its reply to the 2006 statement of objections, the applicant initially vigorously challenged the possibility that the Commission could apply Article 65(1) CS in the present case and impute liability for the infringement of that article to the applicant, denying — for the first time since the commencement of the initial procedure — any

validity of the statement of 23 July 1997, and then added at the end a statement which was supposed to demonstrate its cooperation but which, in reality, is intrinsically ambiguous and misleading.

313 The applicant's conduct, which reflects a strategy of seeking to reconcile contradictory aims, cannot be considered to demonstrate a genuine spirit of cooperation on its part.

314 In those circumstances, the Commission was entitled to consider that the applicant's declaration in paragraph 75 of its reply to the 2006 statement of objections did not justify more than a 20% reduction in the fine, whether on the basis of Section D of the Leniency Notice or any mitigating circumstance.

315 Accordingly the present plea in law must be rejected.

316 It follows from all the foregoing considerations that the application must be dismissed in its entirety.

Costs

317 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. Since the

applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders ThyssenKrupp Stainless AG to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 1 July 2009.

[Signatures]

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