JUDGMENT OF THE COURT (Grand Chamber)

29 March 2011 *

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* Language of the case: German.

In Case C-352/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 2 September 2009,

ThyssenKrupp Nirosta GmbH, formerly ThyssenKrupp Stainless AG, established in Duisburg (Germany), represented by M. Klusmann, Rechtsanwalt, and S. Thomas, Universitätsprofessor,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castillo de la Torre and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann, A. Arabadjiev (Rapporteur) and J.-J. Kasel, Presidents of Chambers, E. Juhász, G. Arestis, A. Borg Barthet, T. von Danwitz and C. Toader, Judges,

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2010,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2010,

gives the following

Judgment

1 By its appeal ThyssenKrupp Nirosta GmbH, formerly ThyssenKrupp Stainless AG, asks the Court to set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') in Case T-24/07 *ThyssenKrupp Stainless* v *Commission* [2009] ECR II-2309 ('the judgment under appeal') dismissing its application for annulment of the Commission's decision of 20 December 2006 relating to a

proceeding under Article 65 of the ECSC Treaty (Case No COMP/F/39.234 – Alloy surcharge – readoption) ('the contested decision') and its application, in the alternative, for reduction of the fine imposed on it by that decision.

2 By that decision, the European Commission found that Thyssen Stahl AG ('Thyssen Stahl') had from 16 December 1993 to 31 December 1994 infringed Article 65(1) CS by modifying and applying, as a concerted practice, the reference values used to calculate an alloy surcharge, and on that basis imposed a fine of EUR 3 168 000 on ThyssenKrupp Stainless AG.

I — Legal context

A — *Provisions of the ECSC Treaty*

3 Article 65 CS provided:

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

(a) to fix or determine prices;

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

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

…

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

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

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

4 In accordance with Article 97 CS, the ECSC Treaty expired on 23 July 2002.

B — *Provisions of the EC Treaty*

5 Article 305(1) EC provided:

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

C — *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 and 82 of the [EC] Treaty (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, headed 'Finding and termination of infringement', provides:

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

…’

8 Under Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC or Article 82 EC.

D — *Provisions relating to the calculation of the fine*

9 Section D of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; ‘the cooperation notice’) states:

‘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.'

II — Background to the dispute

10 The facts of the dispute, as set out in paragraphs 10 to 32 of the judgment under appeal, may be summarised as follows.

11 On 1 January 1995 Krupp Thyssen Nirosta GmbH, a company incorporated under German law, was created following the concentration of the stainless steel flat products activities of Thyssen Stahl and Fried. Krupp AG Hoesch-Krupp. Thyssen Stahl continued to operate independently in other sectors. As a result of a number of changes of company name, Krupp Thyssen Nirosta GmbH became ThyssenKrupp Stainless AG and finally ThyssenKrupp Nirosta GmbH.

12 Stainless steel is a type of special steel which is resistant to corrosion because of the use of various alloying materials (chrome, nickel, molybdenum). It 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 which were covered by the ECSC Treaty.

13 On 16 March 1995 the Commission asked a number of stainless steel producers to provide it with information on a price supplement known as the 'alloy surcharge', calculated on the basis of the prices of the alloying materials, which was added to the basic price for stainless steel. The cost of the alloying materials forms a large and very variable proportion of total production costs. On the basis of the information obtained, the Commission sent a statement of objections to 19 undertakings on 19 December 1995.

14 In December 1996 and January 1997, a number of undertakings including the appellant and Thyssen Stahl informed the Commission of their wish to cooperate. On 24 April 1997 the Commission sent each of the undertakings concerned, including the appellant and Thyssen Stahl, a new statement of objections, to which those two undertakings replied individually.

15 By letter of 23 July 1997 addressed to the Commission ('the statement of 23 July 1997'), the appellant stated as follows:

'With regard to the abovementioned proceeding [Case IV/35.814 – ThyssenKrupp Stainless], you made a request to the legal representative of [Thyssen Stahl] that [the appellant] should expressly confirm that it assumed responsibility for any acts done by [Thyssen Stahl] following the transfer of [Thyssen Stahl'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.'

16 By Decision 98/247/ECSC relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/35.814 – Alloy surcharge) (OJ 1998 L 100, p. 55; 'the initial

decision'), the Commission found that most of the producers of stainless steel flat products, including the appellant and Thyssen Stahl, had agreed, at a meeting held in Madrid (Spain) on 16 December 1993, to increase their prices on a concerted basis by changing the parameters for calculating the alloy surcharge from 1 February 1994. It concluded that the undertakings concerned had infringed Article 65(1) CS.

17 The initial decision was served on the appellant but not on Thyssen Stahl, as the Commission considered, on the basis of the statement of 23 July 1997, that the appellant was liable for the acts of Thyssen Stahl. It therefore imposed on it a fine relating also to the acts of which Thyssen Stahl had been accused and referring to the period from December 1993 to 1 January 1995.

18 On 11 March 1998 the appellant brought an action inter alia for the annulment of the initial decision.

19 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 General Court annulled the initial decision in so far as it attributed liability to the appellant for the infringement of Article 65(1) CS committed by Thyssen Stahl, and consequently reduced the fine. The General Court considered that the Commission had not given the appellant an opportunity to submit comments on the acts of which Thyssen Stahl was accused, and had thereby infringed its rights of defence.

20 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 dismissed the appeals brought by the appellant and the Commission against that judgment.

21 Following an exchange of correspondence with the appellant and Thyssen Stahl, the Commission sent the appellant a statement of objections on 5 April 2006. The appellant replied to the statement of objections by letter of 17 May 2006, and a public hearing took place on 15 September 2006.

22 On 20 December 2006 the Commission adopted the contested decision. According to the preamble to the decision, it was based inter alia on the ECSC Treaty, in particular Article 65, on the EC Treaty and on Regulation No 1/2003. The operative part of the decision provided inter alia:

'*Article 1*

[Thyssen Stahl] 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

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

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

III — Procedure before the General Court and the judgment under appeal

23 By application lodged at the Registry of the General Court on 6 February 2007, the appellant brought an action for the annulment of the contested decision, pursuant to Articles 225 EC and 230 EC.

24 By its first plea in law, the appellant alleged a breach of the principle *nulla poena sine lege* by reason of the application of Article 65(1) CS after the expiry of the ECSC Treaty. Its second plea in law claimed that the application of Regulation No 1/2003 in conjunction with Article 65 CS was unlawful. Its third plea in law alleged a breach of the principle of *res judicata*, in that the Court of Justice had found, in paragraph 88 of *ThyssenKrupp* v *Commission*, that the appellant was not liable for the conduct of Thyssen Stahl.

25 By its fourth plea in law, the appellant argued that the statement of 23 July 1997 could not give rise to liability on its part or transfer the burden of paying the fine. By its fifth plea in law, it argued that the contested decision infringed the 'principle of precision', since neither the legal basis for the imposition of the penalty nor the concept of 'assumption of liability by way of a private declaration' had been determined with sufficient clarity.

26 The sixth plea in law alleged a breach of the principle *non bis in idem* by reason of the transfer of liability by way of a private statement. By its seventh plea in law, the appellant claimed that the infringement committed by Thyssen Stahl was statute-barred. The eighth and ninth pleas in law alleged infringements of the rights of the defence, by reason of, first, an infringement of the right of access to the file and, second, the unlawfulness of the statement of objections.

27 The appellant submitted in the alternative, by a tenth plea in law, that the amount of the fine had been calculated incorrectly, as the Commission had failed to take account of the fact that the appellant did not dispute the existence of the infringement as a whole.

28 In paragraphs 37 and 38 of the judgment under appeal, it was stated that the parties presented oral argument at the hearing on 11 December 2008 and that, at that hearing, the appellant stated that it revoked the statement of 23 July 1997, formal notice of the revocation being taken in the minutes of the hearing.

29 By the judgment under appeal the General Court dismissed the action and ordered the appellant to pay the costs.

30 The General Court essentially found, first, that the application of Article 65(1) CS after 23 July 2002 to facts before that date did not infringe the principle *nulla poena sine lege* and that, for that application, the Commission could base its powers on Regulation No 1/2003. It considered that the Court of Justice had held in *ThyssenKrupp* v *Commission*, which had the force of *res judicata*, that the appellant was liable for the actions of Thyssen Stahl by virtue of the statement of 23 July 1997.

31 Next, according to the General Court, the legal bases for the penalty and the transfer of liability had been determined with sufficient clarity in Articles 7(1) and 23(2) of Regulation No 1/2003 and by the statement of 23 July 1997. The allegation of breach of the principle *non bis in idem* was rejected, since the infringement committed by Thyssen Stahl was attributable to the appellant by reason of that statement. The infringement was not statute-barred, since the limitation period had to be assessed with reference to the appellant and had been suspended during the judicial proceedings contesting the initial decision.

32 Finally, the General Court held that the statement of objections was lawful and that the Commission had not infringed the appellant's right of access to the file or erred by not taking into account the alleged fact that the appellant had not disputed the existence of the infringement as a whole

IV — Forms of order sought by the parties

33 The appellant claims that the Court should:

— set aside the judgment under appeal;

— in the alternative, refer the case back to the General Court;

— in the further alternative, reduce the fine imposed on it by Article 2 of the contested decision; and

— order the Commission to pay the costs.

34 The Commission contends that the Court should:

— dismiss the appeal and uphold the judgment under appeal; and

— order the appellant to pay the costs.

V — The application for the oral procedure to be reopened

35 By document received at the Court Registry on 28 October 2010, the Commission requested the Court to order the oral procedure to be reopened pursuant to Article 61 of the Court's Rules of Procedure, if the Court were to address questions of 'restriction of the *res judicata* principle by the principle *audi alteram partem*', the Commission's ability to impose a fine on Thyssen Stahl in an administrative phase after the delivery of the present judgment and for the conduct at issue, or the consequences of the annulment of the initial decision for the suspension of the limitation period. According to the Commission, these points were considered by the Advocate General in points 155, 174 to 176, and 198 to 212 of his Opinion but are not the subject-matter of the dispute and were not argued by the parties.

36 Pursuant to the above provision, the Advocate General was heard on the application.

37 Under Article 61 of the Rules of Procedure, the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of a point which has not been argued by the parties (see Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31 and the case-law cited).

38 The Court considers that it has all the material necessary to give judgment in the present case and that the case does not have to be examined in the light of a point that has not been argued before it.

39 There is therefore no need to order the oral procedure to be reopened.

VI — The appeal

40 The appellant puts forward five grounds of appeal. The first ground of appeal alleges breach of the principle *nulla poena sine lege* as a result of the application of Article 65(1) CS after 23 July 2002, incorrect application of Article 23 of Regulation No 1/2003 to an infringement of Article 65(1) CS, infringement of the sovereignty of the signatory States to the ECSC Treaty, and the inapplicability to the facts of the present case of the judgment in Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121.

41 By its second ground of appeal, the appellant submits that the attribution to it of liability for the conduct of Thyssen Stahl was not the subject of a finding with the force of *res judicata* in *ThyssenKrupp* v *Commission*, that the General Court misinterpreted the scope of the *res judicata* principle, that it infringed the rights of the defence, and that it wrongly held that the statement of 23 July 1997 had transferred liability from Thyssen Stahl to the appellant.

42 The third ground of appeal alleges lack of precision, both of the legal basis of the contested decision and of the transfer of liability, which the General Court wrongly failed to find. By its fourth ground of appeal, the appellant claims that the General Court infringed the rules on limitation periods. The fifth ground of appeal alleges breach of the principles relating to the calculation of the fine.

A — *First ground of appeal and first part of the third ground of appeal: breach of the principle nulla poena sine lege and the principle 'of precision', and lack of power of the Commission*

1. Arguments of the parties

43 By its first ground of appeal, the appellant submits, first, that the application of Article 65(1) CS after 23 July 2002 infringes the principle *nulla poena sine lege*, since the ECSC Treaty and the powers it conferred on the Commission expired on that date in accordance with Article 97 CS. It argues that the prohibition by Community and international law of interpreting provisions of criminal law and provisions on fines by analogy requires that the legal basis of a penalty should follow clearly and unequivocally from written law.

44 In the appellant's view, the fact that after 23 July 2002 certain practices which previously came under the ECSC Treaty may come under the EC Treaty does not permit any deduction to be made as regards the possibility of penalising after that date, on the basis of Article 65(1) CS, infringements which ceased before that date.

45 The General Court confused the concepts of the singleness and the continuity of the Community legal order when it deduced from those concepts that the ECSC Treaty could apply under the EC Treaty. As the ECSC and EC Treaties are treaties of public international law, they are covered by the principles set out in Article 70 of the Vienna Convention on the Law of Treaties of 23 May 1969, under which no contractual obligation or power can derive from a treaty of international law that has expired.

46 Even if the Community treaties are to be interpreted in accordance with uniform principles, that does not mean that the Commission has a general power to enforce them, regardless of the existence of the different legal orders deriving from the various treaties. It follows from several legal acts of Community law that the institutions only have specific powers of attribution deriving from legally autonomous treaties.

47 Consequently, since the Commission no longer has power on the basis of the ECSC Treaty, the question whether the constituent elements of the infringements defined in Article 65 CS and Article 81 EC correspond and are interpreted in the same way is in the appellant's view irrelevant. The fact that, in some national laws, constituent elements of agreements are interpreted in the same way as those laid down in Articles 81 and 82 EC does not mean that the Commission has power to apply the national provisions concerned.

48 The appellant observes that, according to the case-law of the General Court, the nature of the ECSC Treaty as a *lex specialis* in relation to the EC Treaty cannot give the Commission power under Article 65(5) CS after the expiry of the ECSC Treaty. It submits that that observation must be extended to Article 65(1) CS, as that provision forms part of the legal basis of the penalty. The principle *lex specialis derogat legi generali* cannot therefore justify the application of Article 65(1) CS, which is no longer in force, since that principle governs solely the relationship between two rules of law that are in force.

49 In the absence of transitional provisions with the status of a rule of law – which is not the case with the Commission's Communication concerning aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, adopted on 18 June 2002 (OJ 2002 C 152, p. 5) – enabling the Commission to penalise infringements of Article 65(1) CS after 23 July 2002, no provision of the treaties or of secondary law makes provision for the Commission to be able, after 23 July 2002, to adopt a decision such as the contested decision.

50 The appellant submits, secondly, that since the expiry of the ECSC Treaty there is no longer any rule of law laying down penalties for breach of Article 65(1) CS, since Article 65(5) CS expired with the ECSC Treaty, a fact that the General Court has previously acknowledged in its case-law.

51 By finding that Article 23 of Regulation No 1/2003 was to be interpreted as allowing the Commission to penalise infringements of the ECSC Treaty even though that provision makes no reference to Article 65 CS, the General Court, in the appellant's view, breached the principle *nulla poena sine lege*, which states that provisions of criminal law may not be interpreted beyond their literal meaning. They cannot be the subject of an extensive historical, systematic or teleological interpretation, as that would amount to application by analogy, which is prohibited where the law on penalties is concerned.

52 The appellant submits that it follows from the case-law that a penalty may not be imposed unless it rests on a clear and unambiguous legal basis which expressly provides for the imposition of a penalty for the acts in question. It concludes that the Court of Justice has, in the field of the law concerning penalties, rejected any extensive systematic or teleological interpretation going beyond the literal meaning of the provisions in question. The General Court adopted a prohibited interpretation by analogy.

53 Thirdly, the appellant submits that the conditions for the application by analogy of Article 23 of Regulation No 1/2003 to an infringement of Article 65(1) CS are not satisfied. The facts must be analogous to those falling under Article 23 and there must be a legal vacuum contrary to the objective pursued by the legislature.

54 According to the appellant, even on the assumption that Article 65(1) CS is identical to Article 81 EC in all relevant aspects, which is not the case, since the factual elements are different in several respects, there is no legal vacuum contrary to the objective pursued by the legislature. In accordance with the democratic principle and the principle of separation of powers, a court can only fill a legal vacuum that has escaped the notice of the legislature, contrary to the objective pursued. A court has no jurisdiction to correct the acts of the legislature by applying provisions which appear to it to be more appropriate than those in force.

55 The appellant submits that, in the present case, circumstances that argue against the existence of such a legal vacuum are that the legislature did not lay down any transitional provisions, although in several other fields of the ECSC Treaty provisions for temporal extension or transitional provisions were adopted, and that, by the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 20 July 1998 concerning the expiry of the Treaty establishing the European Coal and Steel Community (OJ 1998 C 247, p. 5), the Council of the European Union and those representatives, stating that they were ready to adopt all necessary measures to deal with the consequences of the expiry of that treaty, invited the Commission to submit proposals in other areas affected by the expiry, but the Commission did not respond to that invitation as regards the law on cartels.

56 Fourthly, the appellant submits that the application of Article 23 of Regulation No 1/2003 to an infringement of Article 65(1) CS breaches Articles 5 EC, 7(1) EC and 83 EC, since the application of Article 23 cannot go beyond what is permitted by the conferment of authority in that regulation. Even if the Council had wished to formulate Article 23 in such a way as to allow the imposition of penalties for infringements of Article 65(1) CS, that would not have been possible, as the EC Treaty confers powers only for the application of its own provisions.

57 The appellant submits that it follows from Article 5 EC, the second sentence of Article 7(1) EC, and Article 211 EC that, in carrying out the tasks entrusted to the Community institutions under the EC Treaty, the powers of the Commission are strictly limited to the EC Treaty, by that treaty. As the constituent elements of the infringement and its legal consequences together form the legal basis of the penalty, this reasoning applies both to the direct legal consequences of an infringement and to its constituent elements.

58 The appellant submits that Article 83 EC only empowers the Council to adopt a regulation for the application of Articles 81 EC and 82 EC. Consequently, the limitation of the scope of Article 23 of Regulation No 1/2003 to infringements of the EC Treaty is not a drafting error which can be corrected by the application by analogy of Article 23 to infringements of Article 65(1) CS.

59 By finding that Article 23(2) of Regulation No 1/2003 lays down a procedural rule, the General Court erred in law. According to the appellant, Article 23 is a substantive provision which confers a power to impose penalties by authorising the Commission to impose fines which are not directly provided for in the EC Treaty for infringements of Articles 81 EC and 82 EC.

60 The appellant argues that, in paragraph 85 of the judgment under appeal, the General Court erred in its reasoning by justifying the applicability of Article 65(1) CS by the rule governing the temporal application of the law, according to which the substantive rules in force at the material time must apply. The temporal application of a provision that has expired presupposes that the Commission has retained – what is not the case here – its power to apply the provisions of the legal order in question.

61 Fifthly, the appellant submits that the judgment under appeal infringes the sovereignty of the States signatory to the ECSC Treaty, since, on the expiry of that treaty, the power to impose penalties in the field in question was restored to the Member States, as the signatory States had conferred power on the Commission to impose penalties only up to the date of that expiry.

62 Sixthly, the appellant submits that the General Court was wrong to refer to paragraph 57 et seq. of its judgment in *González y Díez* v *Commission*. Even on the assumption that that judgment is well founded, it was delivered in the field of State aid. In the field of cartels, the principle *nulla poena sine lege* imposes stricter rules for the imposition of fines.

63 Also, the General Court observed that the distortion of competition resulting from non-compliance with the rules in the field of State aid could extend its effects over time beyond the expiry of the ECSC Treaty. The present case, on the other hand, in the appellant's submission, concerns a breach of Article 65 CS which ceased in January 1998 and thus no longer, on the date on which the fine was imposed – 20 December 2006 – produced any effect which only the imposition of a fine could remove.

64 By the first part of the third ground of appeal, the appellant submits that, by holding that it followed from the contested decision that the Commission intended to combine Article 23(2) of Regulation No 1/2003 with Article 65(1) CS, the General Court disregarded the 'principle of precision of the legal basis', which requires that a penalty may be imposed only if it rests on a clear and unambiguous legal basis laying down a penalty for the particular case. Article 23(2) of Regulation No 1/2003 lays down penalties not for infringements of Article 65(1) CS but solely for infringements of Articles 81 EC and 82 EC.

2. Findings of the Court

65 As a preliminary point, it must be stated, first, that any agreement corresponding to the factual elements set out in Article 65(1) CS concluded or performed before the expiry of the ECSC Treaty on 23 July 2002 could, up to and including that date, give rise to a Commission decision imposing fines on the undertakings taking part in the agreement or its performance, on the basis of Article 65(5) CS.

66 Next, it is clear that any agreement corresponding to the factual elements set out in Article 65(1) CS concluded or performed between 24 July 2002 and 30 November 2009 could give rise to such a decision of the Commission on the basis of Article 81 EC and Article 15(2)(a) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the [EC] Treaty (OJ, English Special Edition 1959-1962, p. 87) or Article 23(2)(a) of Regulation No 1/2003.

67 Finally, it is also common ground that any agreement corresponding to the factual elements set out in Article 65(1) CS concluded or performed from 1 December 2009 can give rise to such a decision of the Commission on the basis of Article 101 TFEU and Article 23(2)(a) of Regulation No 1/2003.

68 In the present case the appellant contests essentially the General Court's finding that the Commission could by the contested decision adopted after 23 July 2002 impose a fine on it, on the basis of Article 65(1) and (5) CS in conjunction with Articles 7(1) and 23(2)(a) of Regulation No 1/2003, for taking part before 23 July 2002 in the conclusion and performance of an agreement corresponding to the factual elements set out in Article 65(1) CS.

69 In the first place, as regards the Commission's powers, the General Court held, in paragraph 74 of the judgment under appeal, that the provision constituting the legal basis of an act and empowering a European Union institution to adopt the act in question must be in force at the time of adoption of the act, and this was the case with Article 23(2) of Regulation No 1/2003.

70 In paragraphs 76 to 79 of the judgment under appeal, the General Court noted that, by virtue of Article 305(1) EC, the ECSC Treaty constituted a *lex specialis* derogating from the *lex generalis* of the EC Treaty, and that as a result of the expiry of the ECSC Treaty on 23 July 2002 the scope of the general system established by the EC Treaty was extended on 24 July 2002 to cover the sectors which were originally governed by the ECSC Treaty.

71 In paragraphs 80 to 82 of the judgment under appeal, the General Court stated that the succession of the legal framework of the EC Treaty to that of the ECSC Treaty was part of the continuity of the European Union legal order and its objectives, since the introduction and maintenance of a system of free competition was one of the essential objectives of both the EC Treaty and the ECSC Treaty. It emphasised that the concepts of agreements and concerted practices under Article 65(1) CS corresponded to those of agreements and concerted practices within the meaning of Article 81 EC and that those two provisions had both been interpreted in the same way by the European Union judicature.

72 In paragraphs 83 and 84 of the judgment under appeal, the General Court thus concluded that the continuity of the European Union legal order required the Commission to ensure, 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 by virtue of the ECSC Treaty, and that Article 23(2) of Regulation No 1/2003 had therefore to be interpreted as enabling the Commission to penalise after 23 July 2002 agreements between undertakings arrived at in the sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.

73 Those findings are not vitiated by any error of law. It follows from the case-law that, in accordance with a principle common to the legal systems of the Member States whose origins may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system must be ensured, and that that principle applies to amendments to the primary law of the European Union (see, to that effect, Case 23/68 *Klomp* [1969] ECR 43, paragraph 13).

74 As the Commission rightly observes, there is no indication that the European Union legislature wished it to be possible for concerted practices prohibited under the ECSC Treaty to escape the application of all penalties after that treaty expired.

75 First, as appears from paragraph 55 above, the appellant itself pointed out that the Council and the representatives of the governments of the Member States had stated that they were ready to adopt all necessary measures to cope with the consequences of the expiry of that treaty. Second, the Commission said that it had to put forward proposals for transitional provisions only if such a step was thought to be necessary, and that, having regard to the general principles of law applicable, it considered that there was no such necessity in the field of the law on cartels.

76 It follows that the appellant cannot derive any valid argument from the lack of transitional provisions in that field.

77 Furthermore, it follows from the observations in paragraphs 65 to 67 above that the succession of the ECSC, EC and FEU Treaties ensures, in order to guarantee free competition, that any conduct corresponding to the factual elements set out in Article 65(1) EC, whether taking place before or after 23 July 2002, could be and still can be penalised by the Commission.

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

79 In the second place, the General Court was right to hold in that respect, in paragraphs 85, 86 and 89 of the judgment under appeal, that compliance with the principles governing the temporal application of the law and the requirements relating to the principles of legal certainty and the protection of legitimate expectations required the application of the substantive provisions of Article 65(1) and (5) CS to the facts of the present case, which fell within their scope *ratione materiae* and *ratione temporis*.

80 In particular, in so far as the appellant submits that the contested decision breaches the principle *nulla poena sine lege* and a supposed 'principle of precision', in particular in that neither Regulation No 1/2003 nor Article 83 EC refers to Article 65 CS, it must be recalled that the principle of the legality of criminal offences and penalties (*nullum crimen, nullum poena sine lege*), as enshrined in particular in Article 49(1) of the Charter of Fundamental Rights of the European Union, requires that European Union rules define offences and penalties clearly (see, to that effect, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraphs 49 and 50).

81 Moreover, the principle of legal certainty requires that such rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44 and the case-law cited).

82 It must be emphasised that, at the material time, Article 65(1) and (5) CS provided a clear legal basis for the penalty imposed in this case, so that the appellant could not be unaware of the consequences of its conduct. Moreover, it follows from the observations in paragraphs 65 to 67 above that the same conduct could also have been penalised subsequently, at any time, by such a penalty imposed by the Commission.

83 In so far as the Treaties defined clearly, before the material time, the infringements and the nature and extent of the penalties which could be imposed in respect of them, the above principles do not aim to guarantee to undertakings that subsequent amendments to the legal bases and procedural rules will enable them to escape all penalties relating to their past infringements.

84 It should be added that the Commission, before the expiry of the ECSC Treaty, stated that there would be no possibility of escaping such a penalty, by pointing out, in point 31 of its Communication concerning aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, adopted on 18 June 2002, that if it identified an infringement in a field covered by the ECSC Treaty the substantive law applicable, irrespective of the date of that application, would be the law in force at the time when the facts constituting the infringement occurred, and the procedural law applicable after the expiry of the ECSC Treaty would be that of the EC Treaty.

85 Moreover, the *lex mitior* principle does not preclude the application in the present case of Article 65(5) CS, since the fine imposed by the contested decision is in any event below the ceiling laid down by Article 23(2) of Regulation No 1/2003 for the imposition of a fine following an infringement of the European Union rules on competition.

86 It follows from all the above considerations that a diligent undertaking in the appellant's position could not at any time be unaware of the consequences of its conduct or count on the fact that the succession of the legal framework of the EC Treaty to that of the ECSC Treaty would have the consequence of allowing it to escape all penalties for infringements of Article 65 CS committed in the past.

87 As regards the legal basis and the procedural rules applicable, the General Court was also right to hold, in paragraphs 84 and 87 of the judgment under appeal, that the Commission's power to impose the fine in question by the contested decision derived from Article 23(2) of Regulation No 1/2003 and that the procedure had to be carried out in accordance with that regulation.

88 It follows from the case-law that the provision which forms the legal basis of an act and empowers the Union institution to adopt the act in question must be in force at the time when the act is adopted (see, to that effect, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 45) and that procedural rules are generally held to apply from the time of their entry into force (see, to that effect, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9, and Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31).

89 It may be added that the application of Regulation No 1/2003 by the Commission did not restrict but rather tended to extend the procedural guarantees provided by the legal framework of the ECSC Treaty for undertakings which are the target of procedures, as the appellant indeed does not contest.

90 It follows that the General Court did not err in law in concluding, in paragraphs 87 and 88 of the judgment under appeal, first, that the Commission's power to impose the fine at issue by the contested decision derived from Article 23(2) of Regulation

No 1/2003 and that the procedure had to be conducted in accordance with that regulation and, secondly, that the substantive law laying down the penalty applicable was Article 65(1) and (5) CS.

91 Consequently, the first ground of appeal and the first part of the third ground of appeal must be rejected.

B – *Second ground of appeal and second part of the third ground of appeal*

1. First part of the second ground of appeal: error of law vitiating the General Court's interpretation of paragraph 88 of the judgment in *ThyssenKrupp* v *Commission*

(a) Arguments of the parties

92 According to the appellant, the General Court was wrong to hold that the Court of Justice, in paragraph 88 of *ThyssenKrupp* v *Commission*, had attributed liability to it for the infringements committed by Thyssen Stahl. On the contrary, in that judgment the Court of Justice by supplementary reasoning refused to attribute that liability to it. The procedural context to which the General Court referred in support of its interpretation does not allow any other meaning to be given to paragraph 88 of that judgment. Therefore, to adopt its interpretation, the General Court should have made an application for interpretation in accordance with Article 102 of the Rules of Procedure of the Court of Justice.

93 Moreover, since paragraph 88 of *ThyssenKrupp* v *Commission* refers to all the statements mentioned in paragraphs 85 and 86 of that judgment and forms part of the same reasoning, the appellant finds it incomprehensible that the General Court excluded the statement of 23 July 1997. Similarly, in so far as the General Court considered that that statement could not be concerned because it did not relate to the business of Thyssen Stahl, the appellant submits that that statement related precisely to Thyssen Stahl's business.

94 Finally, as regards the reasoning in the judgment under appeal to the effect that, if paragraph 88 of *ThyssenKrupp* v *Commission* were to be interpreted in the way proposed by the appellant, the Court of Justice would have had no reason to decide on the second and third grounds of the cross-appeal, the appellant submits that the European Union's courts frequently rule not only on a plea that has been successful but also on other pleas.

(b) Findings of the Court

95 The Court held in paragraph 88 of *ThyssenKrupp* v *Commission* that, as regards the alleged exceptional circumstances relied on by the Commission and mentioned in paragraph 79 of that judgment, it merely had to be pointed out that the appellant was not the economic successor of Thyssen Stahl, the latter having continued to exist as a separate legal person until the date of adoption of the contested decision, and that such unity of action as might have characterised the conduct of Thyssen Stahl and the appellant after 1 January 1995 did not suffice to justify attributing to the appellant conduct engaged in by Thyssen Stahl before that date, by reason of the principle referred to in paragraph 82 of that judgment according to which a legal person may be penalised only for acts alleged against it individually. The Court added that, as regards the statements allegedly made by the appellant during the administrative procedure concerning Thyssen Stahl's business, it had already been stated in paragraphs 85

and 86 of the judgment that they did not enable liability for Thyssen Krupp's conduct before that date to be attributed to the appellant.

96 In paragraph 118 of the judgment under appeal, the General Court observed that the appellant's appeal in *ThyssenKrupp* v *Commission* had not related to the General Court's assessment of the transfer to the appellant of the liability of Thyssen Stahl. That finding made by the General Court in the judgment under appeal is not challenged in the present proceedings.

97 In paragraphs 119 to 121 of its judgment, the General Court observed that, in reply to that appeal, the Commission had brought a cross-appeal alleging inter alia distortion of certain documentary evidence and error of law in the assessment of the transfer of liability. The General Court stated that it was the interpretation of the Court of Justice's response in paragraph 88 of *ThyssenKrupp* v *Commission* to that ground of the cross-appeal which was disputed between the parties. It said that that interpretation was connected to the scope of that ground of appeal and to the precise terms of the argument expounded by the Commission in support of it.

98 In paragraph 122 of its judgment, the General Court stated that it followed from paragraphs 73 to 79 of *ThyssenKrupp* v *Commission* that, by that ground of the cross-appeal, the Commission had not intended to call into question the General Court's recognition of the transfer of liability on the basis of the statement of 23 July 1997 but only the General Court's subsequent conclusion that that statement could not be interpreted as also implying that the appellant had waived its right to be heard regarding the acts of which Thyssen Stahl was accused.

99 In paragraphs 126 to 128 of the judgment under appeal, the General Court found that, in paragraphs 81 and 82 of *ThyssenKrupp* v *Commission*, the Court of Justice had recalled and confirmed the General Court's conclusion that the statement of 23 July 1997 did not imply a waiver by the appellant of its right to be heard, and that, in paragraphs 83 to 86 of that judgment, it had considered and rejected the Commission's argument as to the General Court's failure to take account of other evidence relating to that statement and the subsequent distortion of that evidence. The General Court considered that, in paragraph 87 of that judgment, the Court of Justice had therefore concluded that there had been no distortion by the General Court either of the statement of 23 July 1997 or of that other evidence.

100 In paragraph 129 of its judgment, the General Court emphasised that the sole object of paragraph 88 of *ThyssenKrupp* v *Commission* had been the examination and rejection by the Court of Justice of 'another argument of the Commission relating to the existence of exceptional circumstances, based on the alleged economic succession of Thyssen [Stahl] by [the appellant], on the manifest unity of action between those two operators and on statements made by [the appellant] on behalf of Thyssen [Stahl] during the administrative procedure'.

101 In paragraphs 131 to 135 of the judgment under appeal, the General Court found that, in the light of the object of the first ground of the Commission's cross-appeal, it followed from a reading of the third sentence of paragraph 88 of *ThyssenKrupp* v *Commission* that that sentence merely referred to the analysis carried out in paragraphs 85 and 86 of that judgment of the statements made by the appellant during the administrative procedure on the activities of Thyssen Stahl other than the statement of 23 July 1997, namely the appellant's replies to the two statements of objections and its letter of 17 December 1996.

102 The General Court accordingly concluded, in paragraph 136 of the judgment under appeal, that the interpretation of paragraph 88 of *ThyssenKrupp* v *Commission* proposed by the appellant was 'tantamount to admitting that, without any reasons and by dint of reference alone, the Court [of Justice] transformed a finding concerning the infringement of the right to a fair hearing into a finding on the transfer of liability; that [could not] be accepted', and therefore, in paragraph 138 of its judgment, rejected

the appellant's third ground of appeal as being based on a misinterpretation of that paragraph 88.

103 Those considerations in the judgment under appeal are not vitiated by any error of law. First, contrary to the appellant's submissions, the General Court did not find in the judgment under appeal that the Court of Justice had accepted, in paragraph 88 of *ThyssenKrupp* v *Commission*, that liability for the infringements committed by Thyssen Stahl should be attributed to the appellant. On the contrary, it was stated in paragraphs 118 and 122 of the judgment under appeal that the appellant's appeal in *ThyssenKrupp* v *Commission* did not relate to the General Court's assessment of the transfer to the appellant of liability for the unlawful conduct of which Thyssen Stahl had been accused, and that paragraph 88 of *ThyssenKrupp* v *Commission* related to the cross-appeal by the Commission which also did not call into question that transfer of liability.

104 Second, as the General Court rightly observed, in paragraph 88 of *ThyssenKrupp* v *Commission* the Court replied specifically to the Commission's arguments set out in paragraph 79 of that judgment. That paragraph merely summarised the arguments in points 84 to 87 of the cross-appeal, which refer to points 60 to 64 of the cross-appeal.

105 In that respect, it is apparent from the case-file that the arguments advanced by the Commission in those points of the cross-appeal all referred exclusively to the statements made by the appellant during the administrative procedure other than the statement of 23 July 1997.

106 It follows that neither the Commission nor the appellant raised before the Court the possibility of attributing liability to the appellant, on the basis of the statement of

23 July 1997, for the conduct of Thyssen Stahl at issue. Furthermore, in paragraph 83 of the judgment, the Court found that it was necessary to verify whether there was evidence other than that statement. Consequently, the reference in the last sentence of paragraph 88 of the judgment to the statements mentioned in paragraphs 85 and 86 of the judgment referred exclusively to the appellant's statements other than the statement of 23 July 1997.

107 The first part of the second ground of appeal must therefore be rejected.

2. First argument in support of the second part of the second ground of appeal: misinterpretation by the General Court of the scope of the principle of *res judicata* and breach of the rights of the defence

(a) Admissibility of this argument

(i) Arguments of the parties

108 The Commission submits that the appellant's argument contradicts the observations it made at first instance, in which it submitted that the judicature of the European Union had already definitively decided the question of the transfer of liability. The argument is therefore novel and hence inadmissible at the appeal stage.

(ii) Findings of the Court

109 According to paragraphs 105 to 109 of the judgment under appeal, the appellant had argued before the General Court, by the fourth plea in law put forward in support of its claim for annulment of the contested decision, that the statement of 23 July 1997 could not bring about a transfer to it of liability in respect of the impugned conduct of Thyssen Stahl.

110 The appellant had clearly put forward that plea in law in case the General Court rejected the interpretation of paragraph 88 of *ThyssenKrupp* v *Commission* it had put forward in its third plea in law, and no force of *res judicata* was attached in that respect either to that judgment or to the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*.

111 In paragraphs 139 to 147 of the judgment under appeal, the General Court rejected that fourth plea in law, without going into its substance, on the basis of the force of *res judicata* attached to the finding it had made in paragraph 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* that, having regard to the statement of 23 July 1997, the Commission was exceptionally entitled to attribute liability to the appellant for the conduct in question.

112 The appellant therefore cannot be prevented from calling into question, by its appeal, that finding made by the General Court for the first time in the judgment under appeal, which was the basis on which its fourth plea in law put forward in support of its claim for annulment was rejected.

113 Consequently, the first argument in support of the second part of the second ground of appeal is admissible.

(b) Substance

(i) Arguments of the parties

114 The appellant submits, first, that the General Court misinterpreted the principle of *res judicata*. Since that principle states that it is not possible to bring fresh judicial proceedings relating to the same subject, its scope cannot extend beyond the subject of the dispute in the earlier proceedings. As the subject of the dispute is determined by the forms of order sought and the underlying facts, where an administrative decision is being contested the principle relates exclusively to the contested decision. In the appellant's view, it follows that the principle of *res judicata* cannot preclude the bringing of proceedings against a fresh decision, even if the two decisions in question concern the same subject.

115 In the present case, *res judicata* thus applies, in any event, only to the initial decision. The question whether Thyssen Stahl's conduct could be attributed to the appellant therefore had to be reconsidered in the contested decision. The appellant states that, in the previous judicial proceedings, it confined itself to arguing that there had been a breach of its rights of defence. The General Court's interpretation of the *res judicata* principle therefore deprived it of the opportunity of relying on pleas in law which it had not yet relied on.

116 Moreover, the appellant considers that, because it revoked the statement of 23 July 1997, the facts relating to the alleged transfer to it of liability for the conduct of Thyssen Stahl had changed, having regard to the contested decision, since the initial decision was adopted. Contrary to what the General Court held in paragraph 147 of the judgment under appeal, a subsequent change in the factual or legal circumstances cannot in any case be excluded by the principle of *res judicata*.

117 Secondly, the appellant submits that the General Court's interpretation of the principle of *res judicata* constitutes a breach of the rights of the defence. As the initial decision was annulled because the right to be heard had not been complied with as regards the attribution of liability for the conduct of Thyssen Stahl, it argues that that right had to be guaranteed by means of the new proceedings. If liability for that conduct could be attributed to it solely on the basis of *res judicata*, there would be no point in bringing fresh proceedings, and the right to be heard would thus be deprived of substance.

118 The Commission submits that, according to settled case-law, *res judicata* attaches to questions of fact and law which have been actually or necessarily settled by the judgment in question. Both the proceedings brought against the initial decision and those in which the judgment under appeal was delivered required an analysis of whether the Commission could attribute to the appellant, on the basis of the statement of 23 July 1997, liability for the infringement committed by Thyssen Stahl.

119 That statement was thus the subject of the dispute in those proceedings and, in paragraphs 59 and 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, the General Court made the finding that the liability in question could be attributed, a finding which was not challenged in the appeal against that judgment and was moreover confirmed by the Court of Justice as regards the substance. Since it was bound under Article 233 EC to take the necessary measures to comply with the Court's

decision, the Commission was obliged to take account of those findings. Moreover, since the contested decision was adopted in the same administrative proceedings as those in which the initial decision was adopted, the appellant cannot put forward different allegations on the same facts.

120 The Commission notes, moreover, that if *res judicata* could be pleaded only in the case of a fresh action for annulment of the same decision, it would apply only if the decision had been upheld in the first proceedings. However, the principle also applies in the case of annulment on the ground of procedural error, if certain preliminary questions have been decided in that connection.

121 In the Commission's view, the revocation of the statement of 23 July 1997, which did not take place until the hearing before the General Court, was no longer legally possible, since the contested decision had been adopted in the meantime. Consequently, the acceptance of liability could no longer be rejected as the basis of the contested decision. Moreover, the appellant contradicts itself in asserting at the same time that *res judicata* attaches only to the consequences of previous judgments on the initial decision and that the Court of Justice held definitively in paragraph 88 of *Thyssen-Krupp* v *Commission* that it was not liable by virtue of substantive law.

122 Finally, since the initial decision was annulled for procedural defects, a valid assumption of Thyssen Stahl's liability did not require the granting of the right to be heard, as the appellant had itself stated that it assumed that liability in the knowledge of the consequences of its statement.

(ii) Findings of the Court

123 The Court has on various occasions recalled the importance, in both the legal order of the European Union and the national legal systems, of the principle of *res judicata* (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; and Case C-526/08 *Commission* v *Luxembourg* [2010] ECR I-6151, paragraph 26) and the fact that *res judicata* attaches only to matters of fact and law actually or necessarily settled by the judicial decision in question (*Commission* v *Luxembourg*, paragraph 27 and the case-law cited).

124 In the present case, it must be recalled that the General Court held as follows in paragraph 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*:

'It must be emphasised that it is undisputed that, in view of the statement made by [the appellant] on 23 July 1997, the Commission was, by way of exception, entitled to impute to [the appellant] liability for the unlawful conduct of which Thyssen Stahl was accused between December 1993 and 1 January 1995. It must be concluded that such a statement, which in particular takes account of economic considerations specific to concentrations of undertakings, implies that the legal person within whose sphere of 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.'

125 It follows that the General Court, in paragraph 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, ruled on the lawfulness of the transfer of liability for the infringements at issue by the statement of 23 July 1997.

126 In paragraphs 139 and 140 of the judgment under appeal, the General Court held that, consequently, that point of law was *res judicata*, since it had actually been decided by the European Union judicature.

127 However, as may be seen from paragraph 115 above, the appellant argues that in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* and *ThyssenKrupp* v *Commission* it confined itself to arguing that there had been a breach of its rights of defence, and that the General Court's interpretation of the *res judicata* principle in the judgment under appeal has consequently deprived it of the opportunity of relying on pleas in law which it has not yet adduced.

128 It must be recalled that the General Court had itself found, in paragraph 51 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, that the appellant had confined itself to maintaining that 'its right to be heard regarding the conduct imputed to Thyssen Stahl [had not been] observed' and that it had 'agreed, as purchaser, to accept liability for any infringements committed by [Thyssen Stahl]'. Furthermore, in paragraph 62 of that judgment, the General Court pointed out that the transfer of Thyssen Stahl's liability to the appellant by means of the statement of 23 July 1997 was not contested.

129 In those circumstances, it is clear that the lawfulness of the transfer of liability by means of the statement of 23 July 1997 was not the subject of the dispute in which the *Krupp Thyssen Stahl and Acciai speciali Terni* v *Commission* judgment was delivered.

130 Having regard to the arguments raised before the General Court in that case, its task was limited to assessing whether or not the appellant, by making the statement of 23 July 1997, had waived its right to be heard specifically on the unlawful conduct of Thyssen Stahl.

131 While the General Court, in making that assessment, had to determine the content of that statement, and was thus able to find that the intention had been to effect that transfer of liability, it was not for it to judge the lawfulness of the transfer, and if it did it would be ruling *ultra petita*.

132 It follows that, since the lawfulness of the transfer of liability by the statement of 23 July 1997 had not been raised before the General Court, the finding in paragraph 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* was an *obiter dictum* which went beyond the bounds of the dispute before the General Court and did not thus actually or necessarily decide a point of law. It cannot therefore be *res judicata*.

133 Moreover, it was noted in paragraphs 96 and 102 to 106 above that neither the appellant's appeal nor the Commission's cross-appeal in *ThyssenKrupp* v *Commission* related to the question of the lawfulness of the transfer of liability by the statement of 23 July 1997. The Court has therefore not yet decided that point of law.

134 In the light of those considerations, it must be concluded that the General Court erred in law by holding, in paragraphs 139 to 145 of the judgment under appeal, that its assessment of the lawfulness of that transfer of liability in paragraph 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* was *res judicata*.

135 It follows that, without it being necessary to examine the appellant's other arguments, the first argument in support of the second part of the second ground of appeal must be accepted.

136 It must be remembered, however, that if the reasoning in a judgment of the General Court discloses an infringement of European Union law but its operative part is well founded on other legal grounds, the appeal must be dismissed (Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58).

137 By holding that its assessment of the lawfulness of the transfer of liability in question in paragraph 62 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* was *res judicata*, the General Court rejected the fourth plea in law raised before it, which concerned the lawfulness of that transfer of liability on the basis of the statement of 23 July 1997.

138 In those circumstances, the Court must examine the second argument put forward in support of the second part of the second ground of appeal, which essentially repeats the fourth plea in law raised by the appellant before the General Court.

3. Second argument in support of the second part of the second ground of appeal, and second part of the third ground of appeal: no transfer of liability as a result of the statement of 23 July 1997, and breach of the 'principle of precision'

(a) Arguments of the parties

139 By the second argument in support of the second part of the second ground of appeal, the appellant notes that it argued before the General Court that, in accordance with the case-law, it could not be held liable as the successor to the rights and obligations

of Thyssen Stahl, since Thyssen Stahl continued to exist. In so far as the General Court attributed that liability to it on the basis of the statement of 23 July 1997, the appellant submits that it did no more than state that it assumed civil liability for Thyssen Stahl's debts and that that statement – if it still applied, which is not the case – would not enable liability arising from the law on fines to be attributed to it.

140 The appellant explains that the Commission requested it to make a statement without telling it of its intention to use the statement to support the transfer of liability for payment of the fine. That request was understood as relating solely to civil liability. In order to put an end to the incorrect interpretation of the statement by the Commission, the appellant had it placed on the record of the hearing before the General Court that it was revoking that statement.

141 In any event, such a private statement made by an undertaking is not capable, according to the appellant, of transferring liability for an infringement of the law on cartels, since the fine is a penalty imposed by the public authorities under the law, including the designation of the person on whom it is imposed. In accordance with the principle *ius publicum privatorum pactis mutari non potest*, neither the authorities nor undertakings can derogate from the legal obligation to pay the fine by means of a transfer of liability.

142 Finally, in the second part of the third ground of appeal, the appellant submits that, by holding that it follows from the contested decision that the Commission based the appellant's liability on the statement of 23 July 1997, the General Court infringed the 'principle of precision', since there is no indication in the *lex lata* that a private statement by an undertaking can lead to a transfer of liability to pay a fine, nor are the scope and limits of such a transfer defined.

(b) Findings of the Court

143 It is settled case-law that, in principle, it is for the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the undertaking was no longer his responsibility (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 37; and Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27).

144 As to the circumstances in which an entity that has not committed the infringement may none the less be penalised for that infringement, the Court has stated that this situation arises if the entity that has committed the infringement has ceased to exist, either in law or economically, since a penalty imposed on an undertaking which is no longer economically active is likely to have no deterrent effect (Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 40).

145 In the present case, it is not disputed that at the material time the entity to which the unlawful conduct at issue was attributed formed part of Thyssen Stahl and operated under Thyssen Stahl's control. It is also not disputed that at the date of adoption of the contested decision Thyssen Stahl continued both to exist in law and to carry on economic activities. It follows that, in accordance with the case-law referred to in paragraphs 143 and 144 above, the Commission was in principle required to impose the fine in question on Thyssen Stahl.

146 According to the case-file, the proceedings brought by the Commission in respect of the unlawful conduct at issue originally involved Thyssen Stahl, and even after the transfer of the entity in question to the appellant the Commission continued to act against Thyssen Stahl for that conduct.

147 The Commission explains that, after the transfer of that entity to the appellant, both the appellant and Thyssen Stahl urged that the proceedings should now be directed only against the appellant. It took the view that terminating the proceedings against Thyssen Stahl was possible only if the appellant assumed in writing liability for the infringement.

148 As is apparent from the very wording of the statement of 23 July 1997, mentioned in paragraph 15 above, the appellant made that statement in response to a request to assume in writing liability for the unlawful conduct of which Thyssen Stahl was accused. That statement, according to its own words, first, was made both with respect to the proceedings brought against the cartel in question and at the request of the Commission and, secondly, referred to the appellant's liability, following the transfer of the business in question, for the acts done by Thyssen Stahl.

149 In view of that wording, the appellant's claims that the Commission had requested it to make a statement without informing it of its intention to use the statement in support of the transfer of liability to pay the fine, so that the request was understood as referring only to civil liability, must be rejected. It is clear that by that statement the appellant expressly confirmed that it wished, as an undertaking carrying on the economic activities the subject of the cartel, to assume liability for the unlawful conduct with a view to the fine that the Commission could impose in the proceedings brought in respect of that cartel.

150 In those circumstances, the legal consequence of the transfer of liability which the appellant assumed by the statement of 23 July 1997 was perfectly precise and foreseeable, contrary to what it asserts.

151 Moreover, the case-file shows, first, that the Commission relied on that statement to impose on the appellant the fine for which Thyssen Stahl was in principle liable and, secondly, that the appellant did not, in its action against the initial decision, contest that legal step taken by the Commission or, in its appeal against the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, call into question the General Court's finding in paragraph 62 of that judgment that, having regard to that statement, the Commission was exceptionally entitled to attribute liability to it for the unlawful conduct of Thyssen Stahl.

152 As the Commission submits, the appellant first made the submission that it had not, by the statement of 23 July 1997, assumed liability for the unlawful conduct of Thyssen Stahl in its reply to the statement of objections in the procedure which led to the adoption of the contested decision, in other words at a stage at which the limitation period for proceedings relating to the unlawful conduct had already expired with respect to Thyssen Stahl. Moreover, the appellant first stated that it was revoking the statement at the hearing before the General Court in the proceedings in which the judgment under appeal was delivered.

153 In the special and particular circumstances of the present case, namely, first, the transfer to the appellant of the entity belonging to Thyssen Stahl which operated in the stainless steel flat products market, secondly, the statement of 23 July 1997 by which the appellant expressly confirmed to the Commission that it wished, as the acquirer of that entity, to assume liability for the unlawful conduct with a view to the fine that the Commission could impose, and, thirdly, the fact that the appellant,

despite having several opportunities to do so, did not challenge the Commission's interpretation of that statement before the limitation period for proceedings relating to the unlawful conduct expired with respect to Thyssen Stahl, it must be concluded that the Commission could attribute liability to the appellant for the conduct of which Thyssen Stahl was accused and impose the fine at issue on it.

154 It must also be stated, contrary to the appellant's submissions, that revocation of the statement of 23 July 1997 was no longer possible at the stage of the hearing before the General Court. The content of that statement, which was intended to enable the Commission to impose the fine on the appellant rather than on Thyssen Stahl, precluded such a possibility at a time when the Commission, on the basis of that statement, had actually imposed a fine on the appellant by adopting the contested decision.

155 In this respect, it must be noted that the subsequent irrevocability of the statement of 23 July 1997 does not prevent the appellant from contesting, by an action before the European Union judicature, the interpretation of the content of the statement, as set out in paragraphs 64 to 66 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, or the express or implied acknowledgment of matters of fact or law during the administrative procedure before the Commission, since that cannot restrict the actual exercise of the right of a natural or legal person to bring proceedings before the General Court under the fourth paragraph of Article 230 EC (Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 90).

156 Having regard to all the foregoing, the second argument in support of the second part of the second ground of appeal, which essentially repeats the appellant's fourth plea in law before the General Court, and the second part of the third ground of appeal must be rejected.

157 In those circumstances, since the reasoning of the judgment under appeal discloses an infringement of European Union law but the operative part of that judgment is well founded on other legal grounds, so that the appeal must be dismissed (see, to that effect, *Salzgitter* v *Commission*, paragraph 58), the error of law committed by the General Court, found in paragraph 134 above, has no effect on the examination of the appeal.

C — *Fourth ground of appeal: infringement of the rules on limitation periods*

1. Arguments of the parties

158 The appellant submits that, by rejecting its seventh plea in law in paragraphs 193 to 214 of the judgment under appeal, the General Court infringed 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).

159 The appellant submits that, since that provision lays down a limitation period for proceedings of five years from the cessation of the infringement and the infringement in question ceased on 31 December 1994 when the business of Thyssen Stahl was transferred to the appellant, the limitation period for the infringement expired in 1999. It adds that, if the date of cessation were fixed at the date on which the other participants ceased the infringement, during 1998, the limitation period would have expired in 2003. The same would be the case if Article 25 of Regulation No 1/2003 or of 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) applied.

160 The appellant submits that no action interrupting the limitation period under Article 2 of Decision No 715/78 occurred with respect to Thyssen Stahl. Nor was the limitation period suspended under Article 3 of that decision, since Thyssen Stahl did not bring proceedings against the initial decision and the proceedings brought by the appellant did not entail a suspension of the limitation period with respect to Thyssen Stahl, as suspension has effect only *inter partes*.

161 In so far as the General Court found that the suspension of the limitation period should be assessed with respect to the appellant, because the appellant was deemed to have committed the infringement in question itself, having regard to the statement of 23 July 1997, the appellant observes that in its view the liability which was attributed to it is not a liability of the kind incurred by an undertaking which is the successor to another undertaking but at most a liability by substitution. The infringement committed by Thyssen Stahl is a separate infringement, liability for which was subsequently transferred to the appellant.

162 The appellant argues that the General Court itself found that the assumption of Thyssen Stahl's liability by the statement of 23 July 1997 did not mean that the two infringements committed by the appellant and Thyssen Stahl could be regarded as a single infringement. It concludes that, as regards the limitation period too, the two infringements cannot be regarded as a single infringement whose legal effect depends solely on the appellant's procedural actions.

163 Moreover, the General Court's reference to Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065 is, in the appellant's view, immaterial because, in that case, the Court of Justice had to decide whether it was possible to impose a fine jointly and severally on two undertakings by reason of the economic unity between them. Those circumstances have no connection with those of the present case, which concerns the attribution of liability solely on the ground of the statement of 23 July 1997.

164 Finally, even if the appellant could be deemed to have committed the infringement in question itself, that would have no effect on the limitation period. It follows from the case-law that, in the law of cartels, a transfer of liability presupposes that a person is attributed liability for the anti-competitive conduct of another person. The appellant concludes that, even if the obligation to pay the fine is transferred, the legal consequences of that liability for another person's conduct continue to depend on the procedural actions of the original perpetrator of the infringement.

165 The appellant states that it is for that reason that the actions of the original perpetrator of the infringement that allow its liability to be removed or reduced, such as appeals for clemency, bind and have effect on a third party to whom liability has been transferred. Similarly, if the infringement committed by the original perpetrator is statute-barred with respect to him, that legal consequence cannot be avoided by a transfer of liability to a third party.

2. Findings of the Court

166 Both Article 1(1) of Decision No 715/78 and Article 25(1) of Regulation No 1/2003 subject the Commission's power to impose fines for infringements of competition law

to a limitation period of five years running, in accordance with Article 1(2) of Decision No 715/78 and Article 25(2) of Regulation No 1/2003, from the day on which the infringement was committed or ceased, which may, under Articles 2 and 3 of Decision No 715/78 and Article 25(3) to (6) of Regulation No 1/2003, be interrupted or suspended.

167 The contested decision imposes a fine on the appellant alone. In those circumstances, the limitation period can be assessed only in relation to the appellant.

168 In particular, while the appellant is correct in stating that certain actions of Thyssen Stahl may continue to have effects for it, and that the expiry of a limitation period in respect of that undertaking cannot be avoided by a transfer of liability, it does not follow that the limitation period should be assessed in relation to that undertaking.

169 It follows that the appellant's argument that the General Court should have ruled on the limitation period in relation to Thyssen Stahl must be rejected.

170 Consequently, since the appellant does not dispute that the Commission adopted the initial decision against it within the five-year limitation period and has not adduced any arguments as to errors allegedly committed by the General Court in assessing the times during which the limitation period was suspended or interrupted with respect to it, the fourth ground of appeal must be rejected.

D — *Fifth ground of appeal: breach of the principles governing the calculation of the fine*

1. Arguments of the parties

171 The appellant submits that, by rejecting the tenth plea in law in paragraphs 295 to 315 of the judgment under appeal, the General Court infringed the cooperation notice. In its view, its complete cooperation during the proceedings should have led to an additional reduction of the fine over and above the 20 % deducted on the basis of section D of that notice for its cooperation in the procedure in which the initial decision was adopted. It points out that it accepted that the facts were correct and that Article 65(1) CS had been infringed.

172 None of the considerations which led the General Court to conclude that the appellant's conduct did not demonstrate a genuine spirit of cooperation can disprove the appellant's arguments.

173 As regards the argument that the non-contestation of the facts did not refer to the period 1993/94 and was of no assistance, since the appellant did not accept that it was liable for the infringement committed by Thyssen Stahl, the appellant observes that it submitted before the General Court that its non-contestation referred to that period. It also submits that proof of the infringement in question had to be provided in the second procedure and that its non-contestation therefore assisted the Commission as regards proving the facts.

174 As regards the consideration that the appellant challenged the Commission's power after 23 July 2002 to impose a penalty under Article 65(1) CS, the appellant submits that that question concerns not the proof of facts but an assessment of a legal nature, and hence a point of law. Since the Commission must in any event make a correct legal assessment of the facts that have been found, whether or not the persons concerned contest that assessment can be neither a hindrance nor a help.

175 As regards the fact that the appellant denied the validity of the statement of 23 July 1997 for the first time since the opening of the initial procedure, the appellant observes, first, that it did not contest the existence of that statement but merely defended the legal assessment that the statement did not permit liability to be attributed to it for the infringement committed by Thyssen Stahl. It claims, secondly, that it argued before the General Court that from the time of the procedure in which the initial decision was adopted it had maintained that the statement could not be interpreted as justification for the transfer of liability for payment of the fine.

2. Findings of the Court

176 In accordance with the case-law, a reduction of the fine on the basis of the cooperation notice can be justified only if the information provided and the conduct of the undertaking concerned may be regarded as demonstrating genuine cooperation on its part (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).

177 Moreover, under Article 229 EC and Article 31 of Regulation No 1/2003, the General Court may cancel, reduce or increase the fine or periodic penalty payment imposed, since it has unlimited jurisdiction to review decisions by which the Commission has fixed a fine or periodic penalty payment.

178 Consequently, when the General Court held in paragraphs 305 to 314 of the judgment under appeal that the Commission had been entitled to consider that the appellant should not enjoy an additional reduction of the fine beyond the 20 % already allowed, it made an assessment of fact in the exercise of its unlimited jurisdiction. The Commission is therefore right to submit that, by this ground of appeal, the appellant is contesting findings of fact and assessments of the evidence by the General Court.

179 It should be recalled that it follows from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51, and order of 29 September 2010 in Joined Cases C-74/10 P and C-75/10 P *EREF* v *Commission*, paragraph 41).

180 The Court has also stated that the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 85, and order in *EREF* v *Commission*, paragraph 42).

181 The appellant has not put forward any argument capable of showing that the General Court distorted the clear sense of the evidence.

182 As regards the argument that the General Court was wrong to consider that the non-contestation of the facts did not refer to the period 1993/94, it must be observed that it is apparent from paragraph 306 and the first sentence of paragraph 307 of the judgment under appeal that, in the second sentence of paragraph 307, the General Court considered not that point 75 of the reply to the statement of objections did not extend to that period but that point 75 was not specific and clear enough to be of assistance to the Commission.

183 Moreover, in so far as the appellant submits that it had maintained, from the start of the procedure in which the initial decision was adopted, that the statement of 23 July 1997 could not be interpreted as justification for the transfer of liability to pay the fine in question, it has already been found in paragraph 152 above that that was not the case.

184 In those circumstances, the fifth ground of appeal must be rejected.

185 It follows that the appeal must be dismissed in its entirety.

VII — Costs

186 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, 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 Commission has applied for costs and the appellant has been unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds, the Court (Grand Chamber) hereby

1. Dismisses the appeal;

2. Orders ThyssenKrupp Nirosta GmbH to pay the costs.

[Signatures]