Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

9 November 2022*

(Competition – Agreements, decisions and concerted practices – Market for concrete reinforcing bars – Decision finding an infringement of Article 65 CS, after expiry of the ECSC Treaty, on the basis of Regulation (EC) No 1/2003 – Price fixing – Limiting and controlling output and sales – Decision taken following the annulment of earlier decisions – New hearing held in the presence of the competition authorities of the Member States – Rights of the defence – Principle of sound administration – Reasonable time – Obligation to state reasons – Proportionality – *Ne bis in idem* principle – Plea of illegality – Evidence of involvement in the cartel – Aggravating circumstances – Repeated infringement – Mitigating circumstances – Equal treatment – Unlimited jurisdiction)

In Case T-667/19,

Ferriere Nord SpA, established in Osoppo (Italy), represented by W. Viscardini, G. Donà and B. Comparini, lawyers,

applicant,

v

European Commission, represented by P. Rossi, G. Conte and C. Sjödin, acting as Agents, and by M. Moretto, lawyer,

defendant,

supported by

Council of the European Union, represented by O. Segnana and E. Ambrosini, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU for, primarily, annulment of Commission Decision C(2019) 4969 final of 4 July 2019 relating to a breach of Article 65 of the ECSC Treaty (Case AT.37956 – Reinforcing bars) or, in the alternative, a reduction in the amount of the fine imposed on the applicant,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

* Language of the case: Italian.

composed, at the time of deliberation, of S. Gervasoni, President, L. Madise, P. Nihoul (Rapporteur), R. Frendo and J. Martín y Pérez de Nanclares, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 4 June 2021,

gives the following

Judgment [1]

I. Background to the dispute

1 The applicant, Ferriere Nord SpA, is a company incorporated under Italian law which has operated in the concrete reinforcing bar sector since April 1992.

A. The Commission's first decision (2002)

2 From October to December 2000, the Commission of the European Communities carried out a number of checks pursuant to Article 47 CS at the premises of certain Italian undertakings engaged in the manufacture of concrete reinforcing bars, including the applicant, and at the premises of an association of undertakings, the Federazione Imprese Siderurgiche Italiane (Federation of Italian Steel Undertakings; 'Federacciai'). It also requested them to supply information under that provision.

3 On 26 March 2002, the Commission initiated a proceeding under Article 65 CS and formulated objections under Article 36 CS ('the statement of objections'), which were notified to the applicant, among others. The applicant replied to that statement of objections on 31 May 2002.

4 A hearing of the parties to the administrative procedure took place on 13 June 2002.

5 On 12 August 2002, the Commission sent the same addressees further objections ('the supplementary statement of objections') under Article 19(1) of Council Regulation No 17 of 6 February 1962: first regulation implementing Articles [81] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87). In that supplementary statement of objections, the Commission explained its position regarding continuation of the procedure following the expiry of the ECSC Treaty on 23 July 2002. The applicant replied to the supplementary statement of objections on 20 September 2002.

6 A new hearing of the parties to the administrative procedure was held on 30 September 2002 in the presence of the competition authorities of the Member States. It concerned the subject matter of the supplementary statement of objections, namely the legal consequences of the expiry of the ECSC Treaty for the continuation of the procedure.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

7 At the end of the administrative procedure, the Commission adopted Decision C(2002) 5087 final of 17 December 2002 relating to a proceeding under Article 65 of the ECSC Treaty (COMP/37.956 – Reinforcing bars) ('the 2002 decision'), addressed to Federacciai and eight undertakings, including the applicant. In that decision, the Commission found that, between December 1989 and July 2000, those entities had engaged in a single, complex and continuous restrictive practice on the Italian market for concrete reinforcing bars and coils ('concrete reinforcing bars') which had as its object or effect price fixing and limiting or controlling output or sales, contrary to Article 65(1) CS.

8 The Commission stated that the applicant's involvement in the infringement spanned the period from 1 April 1993 to 4 July 2000. On that basis, the Commission imposed a fine of EUR 3.57 million on the applicant. That amount included a 20% reduction of the fine in favour of the applicant, pursuant to Section D.1 of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), which provides for the possibility of reducing the fine which would have been imposed on an undertaking if it cooperates by providing the Commission, before a statement of objections is sent, with information, documents or other evidence which materially contribute to establishing the existence of the infringement.

9 On 10 March 2003, the applicant brought an action before the Court challenging the 2002 decision. The Court annulled that decision with regard to the applicant (judgment of 25 October 2007, *Ferriere Nord* v *Commission*, T-94/03, not published, EU:T:2007:320) and the other addressee undertakings, on the ground that the legal basis used, namely Article 65(4) and (5) CS, was no longer in force when the decision was adopted. Accordingly, the Commission did not have the power under those provisions to establish and penalise an infringement of Article 65(1) CS following the expiry of the ECSC Treaty. The Court did not examine the other aspects of that decision.

10 The 2002 decision became final with regard to Federacciai, which did not bring an action before the Court.

B. The Commission's second decision (2009)

11 By letter of 30 June 2008, the Commission informed the applicant and the other undertakings concerned of its intention to adopt a new decision, with a corrected legal basis. It also stated that that decision would be based on the evidence set out in the statement of objections and the supplementary statement of objections. At the Commission's request, the applicant submitted written observations on 1 August 2008.

12 By faxes of 24 July and 25 September 2008 and of 13 March, 30 June and 27 August 2009, the Commission requested information from the applicant concerning its ownership and asset situation. The applicant replied to those requests for information by letters dated 1 August and 1 October 2008 and 18 March, 1 July and 8 September 2009 respectively.

13 On 30 September 2009, the Commission adopted Decision C(2009) 7492 final relating to a proceeding under Article 65 of the ECSC Treaty (Case COMP/37.956 – Reinforcing bars, re-adoption), addressed to the same undertakings as the 2002 decision, including the applicant. That decision was adopted under the procedural rules of the EC Treaty and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1). It was based on the evidence referred

to in the statement of objections and the supplementary statement of objections and reproduced, in essence, the content and findings of the 2002 decision. In particular, the amount of the fine imposed on the applicant, totalling EUR 3.57 million, was unchanged.

14 On 8 December 2009, the Commission adopted an amending decision which included, in the annex thereto, tables illustrating price variations omitted from its decision of 30 September 2009 and correcting the numbered references to those tables in eight footnotes.

15 On 19 February 2010, the applicant brought an action before the Court challenging the Commission's decision of 30 September 2009, as amended ('the 2009 decision'). On 9 December 2014, the Court reduced the amount of the fine imposed on the applicant to EUR 3.42144 million, on the ground that it had not participated, for a period of three years, in the part of the cartel concerned with limiting or controlling output or sales, and dismissed the action as to the remainder (judgment of 9 December 2014, *Ferriere Nord* v *Commission*, T-90/10, not published, EU:T:2014:1035). The Court annulled the 2009 decision in part with regard to another of its addressees, reduced the fine imposed on one other addressee and dismissed the other actions brought.

16 On 20 February 2015, the applicant brought an appeal against the judgment of 9 December 2014, *Ferriere Nord* v *Commission* (T-90/10, not published, EU:T:2014:1035). By judgment of 21 September 2017, *Ferriere Nord* v *Commission* (C-88/15 P, EU:C:2017:716), the Court of Justice set aside the judgment of the General Court and annulled the 2009 decision with regard to, inter alia, the applicant.

17 In its judgment of 21 September 2017, *Ferriere Nord* v *Commission* (C-88/15 P, EU:C:2017:716), the Court of Justice held that, when a decision is adopted on the basis of Regulation No 1/2003, the procedure resulting in that decision must conform to the procedural rules laid down by that regulation and by Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), even if the procedure began before those regulations came into force.

18 The Court of Justice found that, in that case, the hearing of 13 June 2002, which was the only hearing on the substance of the procedure, could not be regarded as fulfilling the procedural requirements in relation to the adoption of a decision on the basis of Regulation No 1/2003, in the absence of participation by the competition authorities of the Member States.

19 The Court of Justice concluded that the General Court had erred in law in holding that the Commission was not obliged to organise a new hearing before adopting the 2009 decision, on the ground that the undertakings had already had the opportunity to be heard orally at the hearings of 13 June and 30 September 2002.

20 In its judgment of 21 September 2017, *Ferriere Nord* v *Commission* (C-88/15 P, EU:C:2017:716), the Court of Justice recalled the importance of holding a hearing, at the request of the parties concerned, to which the competition authorities of the Member States are invited, as failure to hold such a hearing constitutes infringement of an essential procedural requirement.

21 The Court of Justice held that, in so far as that right, as made explicit in Regulation No 773/2004, had not been respected, it was not necessary for the undertaking whose right had been infringed in that way to demonstrate that such infringement might have influenced the course of the proceedings and the content of the decision at issue to its detriment.

22 The Court of Justice also set aside a number of other judgments of the General Court of 9 December 2014 adjudicating on the legality of the 2009 decision and annulled that decision, with regard to four other undertakings, on the same grounds. However, the 2009 decision became final for the addressee undertakings which did not appeal against those judgments.

C. The Commission's third decision (2019)

23 By letter of 15 December 2017, the Commission informed the applicant of its intention to resume the administrative procedure and to organise, in that context, a new hearing of the parties to that procedure in the presence of the competition authorities of the Member States.

24 By letter of 1 February 2018, the applicant submitted observations in which it challenged the Commission's power to resume the administrative procedure and thus called upon the Commission to refrain from doing so.

25 On 23 April 2018, the Commission held a new hearing concerning the substance of the procedure, in which the applicant and three other addressee undertakings of the 2009 decision participated in the presence of the competition authorities of the Member States and the hearing officer.

26 By letters of 19 November 2018 and of 17 January and 6 May 2019, the Commission sent three requests for information to the applicant concerning its ownership and asset situation. The applicant replied to those requests for information by letters dated 10 December 2018 and 31 January and 9 May 2019 respectively.

27 On 21 June 2019, the applicant attended a meeting with the Commission's services during which the latter stated that they had decided to propose to the College of Commissioners that a new penalty decision be adopted, but that, in the light of the objectively long time taken, they would suggest that an extraordinary mitigating circumstance be applied.

28 On 4 July 2019, the Commission adopted Decision C(2019) 4969 final relating to a proceeding under Article 65 of the ECSC Treaty (Case AT.37956 – Reinforcing bars) ('the contested decision'), addressed to the five undertakings in respect of which the 2009 decision had been annulled, namely, in addition to the applicant, Alfa Acciai SpA, Feralpi Holding SpA (formerly Feralpi Siderurgica SpA and Federalpi Siderurgica SRL), Partecipazioni Industriali SpA (formerly Riva Acciaio SpA and subsequently Riva Fire SpA; 'Riva') and Valsabbia Investimenti SpA and Ferriera Valsabbia SpA.

29 In the contested decision, the Commission found the same infringement as that forming the subject matter of the 2009 decision, but reduced the fines imposed on the undertakings to which it was addressed by 50% on account of the duration of the procedure. The applicant also received an additional reduction of 6% of the fine because it had not participated in the part of the cartel concerned with limiting or controlling output or sales during a certain period of time. By Article 2 of the contested decision, the Commission thus imposed a fine of EUR 2.237 million on the applicant.

30 On 8 July 2019, an incomplete copy of the contested decision, containing only the odd-numbered pages, was notified to the applicant, which informed the Commission thereof by letter of 9 July 2019.

31 On 18 July 2019, a complete version of the contested decision was notified to the applicant.

II. Procedure and forms of order sought

32 By application lodged at the Court Registry on 30 September 2019, the applicant brought the present action.

33 By document lodged at the Court Registry on 13 January 2020, the Council of the European Union applied for leave to intervene in support of the form of order sought by the Commission. By decision of 11 February 2020, the President of the Fourth Chamber of the Court granted the Council leave to intervene. The Council lodged its statement in intervention and the applicant lodged its observations on that statement within the prescribed period. The Commission did not submit observations on the statement in intervention.

34 On a proposal from the Fourth Chamber, the Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

35 On a proposal from the Judge-Rapporteur, the General Court (Fourth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties and requested them to produce documents. The parties replied to those questions and requests for the production of documents within the prescribed period.

36 The parties presented oral argument and answered the written and oral questions put by the Court at the hearing on 4 June 2021. During the hearing, following a question from the Court, the applicant agreed that the pleas in law raised in the application in support of the present action should be re-numbered for the purposes of drafting the judgment, formal note of which was taken in the minutes of the hearing.

37 The applicant claims that the Court should:

– principally, annul the contested decision in so far as it concerns the applicant;

– in the alternative, annul the contested decision in part and reduce the fine imposed on it;

– order the Commission and the Council to pay the costs.

38 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

39 The Council contends that the Court should:

– dismiss the action in so far as it is based on the plea of illegality in respect of Article 25 of Regulation No 1/2003;

– order the applicant to pay the costs.

III. Law

40 In support of the action, the applicant raises nine pleas in law, which may be divided into two groups.

41 The first group contains six principal pleas seeking annulment of the contested decision:

– the first alleges infringement of the rights of the defence and of procedural rules at the hearing of 23 April 2018;

– the second alleges that the Commission unlawfully refused to ascertain, before adopting the contested decision, whether that decision was compatible with the reasonable time principle;

– the third alleges failure to observe the reasonable time principle;

– the fourth alleges breach of the duty to state reasons, misuse of powers and failure to observe the principle of proportionality;

– the fifth alleges failure to observe the *ne bis in idem* principle;

– the sixth alleges that the rules on limitation laid down in Article 25 of Regulation No 1/2003 are unlawful.

42 The second group contains three final pleas raised in the alternative, seeking the annulment in part of the contested decision and a corresponding reduction in the fine imposed on the applicant:

– the seventh alleges failure to discharge the burden of proof and failure to observe the *in dubio pro reo* principle concerning the conduct of which the applicant is accused;

– the eighth alleges that the increase in the amount of the fine imposed for repeated infringement was unlawful;

– the ninth alleges failure to observe the principle of equal treatment as regards the taking into account of mitigating circumstances and of the belated nature of the reasons justifying a reduction of the fine.

A. Claims for annulment

…

2. Second plea in law, alleging that the Commission unlawfully refused to ascertain, before adopting the contested decision, whether that decision was compatible with the reasonable time principle

…

(a) First complaint, alleging error of law

199 The applicant submits that the Commission infringed Article 41 of the Charter by refusing to assess, before adopting the contested decision, whether its adoption was compatible with the reasonable time principle.

200 In that regard, it must be observed that, as the applicant points out, the Commission is required to observe the reasonable time principle laid down in Article 41 of the Charter (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 179, and of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T-214/06, EU:T:2012:275, paragraph 285).

201 Thus, the time elapsed must be taken into account where, in exercising the discretion conferred on it by EU law, the Commission assesses whether, within the framework of the application of the competition rules, proceedings must be initiated and a decision adopted.

202 It follows from the contested decision that, contrary to the applicant's claims, the Commission did not breach the obligation to take account of the time elapsed when assessing whether such proceedings must be initiated and a penalty decision adopted. The contested decision states that, before taking a view, the Commission examined whether, in the present case, the procedure could be resumed and whether it could lead to the adoption of such a decision imposing a fine.

…

213 Thus, it is apparent from the contested decision that, contrary to the applicant's claims, the Commission ascertained, before adopting that decision, whether the reasonable time principle had been observed, by analysing the length of the administrative procedure, including the administrative stages and interruptions due to judicial review, the possible reasons for the duration of the procedure and the inferences that might be drawn from it.

214 The applicant disputes that conclusion, arguing that, in the contested decision, the Commission refused to take a view on the unreasonable length of the procedure on the ground that responsibility for that assessment lies with the EU Courts and it is unable to make any determination on that matter.

215 In that regard, it must be observed that questions relating to the length of procedures may be referred to the EU Courts. In actions for liability, the EU Courts must find against the institutions, bodies, offices or agencies of the European Union where they have caused damage by failing to observe the reasonable time principle (judgments of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 94, and of 11 July 2019, *Italmobiliare and Others* v *Commission*, T-523/15, not published, EU:T:2019:499, paragraph 159). In actions for annulment, the length of a procedure may result in the annulment of a contested decision if two cumulative conditions are met: first, the length must appear to have been unreasonable and, second, the excessive time taken must have interfered with the exercise of the rights of the defence (judgments of 21 September 2006, *Technische Unie* v *Commission*, C-113/04 P, EU:C:2006:593, paragraphs 47 and 48; of 8 May 2014, *Bolloré* v *Commission*, C-414/12 P, not published, EU:C:2014:301, paragraphs 84 and 85; and of 9 June 2016, *PROAS* v *Commission*, C-616/13 P, EU:C:2016:415, paragraphs 74 to 76).

216 As the applicant points out, the jurisdiction thus conferred on the EU Courts cannot relieve the Commission of the assessment it must carry out when determining the action to be taken in response to an annulling judgment pursuant to Article 266 TFEU.

217 As stated above, when it carries out that assessment, the Commission is required to take into account all the aspects of the case, including the appropriateness of adopting a new decision, of imposing a penalty and, where relevant, of reducing the envisaged penalty if it appears, in particular, that without itself constituting a culpable breach of obligations, the duration of the procedure, inasmuch as it involved administrative stages and also, as the case may be, interruptions due to judicial review, may have had an effect on the factors to be taken into account in setting the amount of the fine and, especially, on the potential for the fine to act as a deterrent when it is imposed long after the events constituting the infringement took place.

218 That assessment, which covers inter alia the overall duration of the procedure, including the judicial stages, was mainly carried out in recital 528 of the contested decision.

219 It follows that, contrary to what the applicant claims, the Commission did ascertain, in the contested decision, whether the length of the procedure could prevent its resumption, while acknowledging that such an assessment could be reviewed by the EU Courts in actions concerning lawfulness and, where appropriate, actions for liability.

…

223 The complaint must therefore be dismissed.

…

3. Third plea in law, alleging failure to observe the reasonable time principle

229 The applicant submits that the contested decision must be annulled because it was adopted at the end of a procedure which exceeded a reasonable time. According to the applicant, the excessive duration of the procedure means that the Commission no longer had the power to impose penalties and that that decision is therefore also unlawful on the ground of misuse of powers. In essence, the applicant puts forward three complaints concerning, respectively, the duration of the administrative stages, the overall duration of the procedure and the effect of the procedure's length on the rights of the defence, all of which are disputed by the Commission.

230 Before examining those complaints, it should be recalled that, according to the Court, the length of a procedure may result in the annulment of a contested decision if two cumulative conditions are met: first, the length must appear to have been unreasonable and, second, the excessive time taken must have interfered with the exercise of the rights of the defence (see paragraph 215 above).

231 It follows that a Commission decision cannot be annulled solely because of the excessive time taken if the time taken did not affect the applicant's rights of the defence. Therefore, the applicant's argument that the excessive time taken should in itself have prompted the Commission to refrain from adopting the contested decision must be rejected at the outset.

…

(a) First complaint, concerning the duration of the administrative stages

233 The applicant submits that the duration of the administrative stages, which spanned over six years, was contrary to the reasonable time principle. It takes issue, in particular, with the length of time the Commission took to respond to the successive annulments ordered by the General Court and the Court of Justice:

– between the delivery of the judgment of 25 October 2007, *Ferriere Nord* v *Commission* (T-94/03, not published, EU:T:2007:320), and the adoption of the 2009 decision, namely over a period of more than two years, the Commission merely sent the letter of 30 June 2008 referred to in paragraph 11 above, in which it announced the resumption of the procedure and requested information, and there was no further statement of objections or a new hearing during that period, even though the Commission could easily have rectified the defect which had invalidated the annulled decision, that defect having been clearly identified by the Court;

– similarly, between the judgment of 21 September 2017, *Ferriere Nord* v *Commission* (C-88/15 P, EU:C:2017:716), and the adoption of the contested decision, namely over a period of one year and nine months, the Commission's activities were confined to sending the letter of 15 December 2017 announcing the resumption of the procedure, sending letters announcing and explaining the hearing of 23 April 2018, and making limited requests for information on the applicant's asset situation.

234 The applicant also claims that the administrative stages of the procedure are vitiated by numerous management errors by the Commission, which contributed to an unjustifiable extension of the procedural time limits.

235 In that regard, it must be observed that EU law requires the institutions to deal with cases within a reasonable time in administrative procedures conducted by them (see, to that effect, judgment of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T-214/06, EU:T:2012:275, paragraph 284).

236 The obligation to conduct administrative procedures within a reasonable time is a general principle of law set out, in particular, in Article 41(1) of the Charter (judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 167; of 11 April 2006, *Angeletti* v *Commission*, T-394/03, EU:T:2006:111, paragraph 162; and of 7 June 2013, *Italy* v *Commission*, T-267/07, EU:T:2013:305, paragraph 61).

237 In the present case, it is apparent from the documents before the Court that four stages, lasting a total of six years and one month, took place before the Commission in the course of its handling of the case:

– the first stage, lasting one year and five months, covered the period between the initial investigative measures and the notification of the statement of objections to Federacciai and the undertakings concerned;

– the following three stages culminated in the adoption of the 2002 decision, the 2009 decision and the contested decision respectively, and lasted nine months, two years and one month, and one year and nine months respectively.

238 According to the case-law, the reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraphs 187 and 188).

239 In the first place, concerning the importance of the case for the person concerned, it should be recalled that, in the case of a dispute involving an infringement of competition law, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant and his or her competitors but also for third parties, in view of the large number of persons concerned and the financial interests involved (see judgment of 1 February 2017, *Aalberts Industries* v *European Union*, T-725/14, EU:T:2017:47, paragraph 40 and the case-law cited).

240 In the present case, the Commission found in the contested decision that the applicant had infringed Article 65(1) CS by taking part, from 1 April 1993 to 4 July 2000, in a continuous agreement or concerted practices in respect of concrete reinforcing bars, with the object or effect of price fixing and limiting or controlling output or sales in the internal market.

241 Based on that finding, the Commission imposed a fine of EUR 2.237 million on the applicant.

242 In the light of those factors, it is legitimate to consider that the case was important for the applicant.

243 In the second place, as regards the complexity of the case, it must be obseved that the errors made by the Commission concern the inferences to be drawn, for the procedure, from the expiry of the ECSC Treaty.

244 It must be borne in mind that the questions relating to the rules applicable to the facts of the case, as regards both the substance and the procedure, arising from the expiry of the ECSC Treaty, involved some complexity, as the Commission pointed out.

245 Moreover, the cartel covered a relatively long period (10 years and 7 months), involved a significant number of operators (8 undertakings comprising a total of 11 companies and one trade association) and generated a large volume of documents provided or obtained during inspections (approximately 20 000 pages).

246 In the light of those factors, the case must be regarded as a complex one.

247 In the third place, concerning the conduct of the parties, it must be observed that the Commission was continuously active due to the large number of requests it received from the parties to the administrative procedure.

248 Thus, in the context of the adoption of the contested decision, the Commission was required to deal with numerous letters and, at the same time, had to prepare for the hearing of 23 April 2018 and examine a settlement submission filed by some of the parties to the administrative procedure on 4 December 2018.

249 The applicant submits that the Commission made two management errors which unjustifiably extended the duration of the procedure:

– an error in the preparation of the CD-ROMs annexed to the statement of objections;

– the incorrect notification of the 2009 decision and the contested decision.

250 Although the applicant does not specify how much extra time was taken up by the two errors made by the Commission referred to above, it is clear from paragraphs 13 and 14 above that the second error extended the procedure by just two months and one week.

251 Accordingly, the applicant has not adduced evidence to show that the errors complained of had a major impact on the length of the procedure.

252 Taken as a whole, it follows that the duration of the administrative stages of the procedure does not appear to have been unreasonable in the light of the circumstances specific to the case and, in particular, its complexity, in a context in which no unexplained period of inactivity can be attributed to the Commission during the milestones marking those administrative stages.

253 The complaint must therefore be dismissed.

(b) Second complaint, concerning the overall duration of the procedure

254 The applicant challenges the overall length of time required to deal with the case, from the initial investigative measures to the adoption of the contested decision. It claims that since, when that decision was adopted, the duration of the procedure stood at 19 years and concerned conduct some of which had taken place more than 30 years previously, that duration was contrary to the reasonable time principle.

255 In that regard, it should be pointed out that the duty to act within a reasonable time applies to each stage of a procedure and to the procedure taken as a whole (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraphs 230 and 231, and Opinion of Advocate General Kokott in *Solvay* v *Commission*, C-109/10 P, EU:C:2011:256, point 239).

256 In the present case, it must be found that the administrative procedure as a whole took an exceptionally long time to complete, which, moreover, resulted in the Commission reducing the fine ultimately imposed on the applicant (see paragraph 212 above).

257 Nonetheless, the overall length of the administrative procedure may be explained, in the present case, by the complexity of the case, given that, in some respects, the procedure's length was due to factors relating to the case itself, while, in others, it was linked to the context of which the case formed part, namely the expiry of the ECSC Treaty (see paragraphs 243 to 246 above).

258 It is true that the Commission made errors in assessing the inferences to be drawn from the expiry of the ECSC Treaty and those errors gave rise to a series of annulments ordered by the General Court and then the Court of Justice.

259 However, those errors and the impact they may have had on the duration of the administrative procedure must be appraised having regard to the complexity of the questions which arose.

260 Furthermore, the overall duration of the administrative procedure was attributable in part to the interruptions due to judicial review and, therefore, is related to the number of actions brought before the EU Courts on the various aspects of the case.

261 In that regard, it must be observed that the possibility for undertakings, in a situation such as that of the applicant, to have their cases examined more than once by the EU administrative authorities and, where necessary, by the EU Courts, is an integral part of the system put in place by the drafters of the Treaties to scrutinise competition-related conduct and transactions.

262 Thus, the obligation on the administrative authority to complete a number of procedural formalities and steps before it is able to adopt a final decision in the field of competition, and the possibility that those procedural formalities and steps might give rise to legal action cannot be used by an undertaking to argue at the end of the process that a reasonable period was exceeded (see, to that effect, Opinion of Advocate General Wahl in *Feralpi and Others* v *Commission*, C-85/15 P, C-86/15 P and C-87/15 P, C-88/15 P and C-89/15 P, EU:C:2016:940, point 70).

263 In those circumstances, it cannot be held that, viewed as a whole, the length of the administrative procedure was excessive and, therefore, that it could prevent the Commission from adopting a new decision imposing a fine.

264 Therefore, the complaint must be dismissed.

(c) Third complaint, concerning the effect of the length of the procedure on the rights of the defence

265 The applicant submits that the length of the administrative procedure affected its rights of the defence. It claims that, because of the procedure's length, the hearing of 23 April 2018 did not allow the competition authorities of the Member States to hear all the operators whose opinions might have affected its ability to defend itself. Furthermore, if the hearing had taken place in accordance with the rules applicable before the adoption of the 2002 decision or even the 2009 decision, the Court would not have adjudicated on whether the conduct complained of had actually occurred and the Member States' representatives would therefore have been free from any influence or bias.

266 In that regard, it must be recalled that, as stated in paragraph 230 above, two conditions must be satisfied for a decision adopted by the Commission to be annulled on the ground of failure to observe the reasonable time principle. Since the first condition (unreasonable length of the procedure) is not satisfied, it is not necessary, in principle, to ascertain, in response to the third complaint, whether the length of the administrative procedure interfered with the exercise of the rights of the defence. Nevertheless, that examination should be carried out for the sake of completeness in order to address fully the concerns raised by the applicant.

267 First, it must be observed that, in the course of the procedure viewed as a whole, the applicant had, on at least seven occasions, the opportunity to express its views and put forward its arguments (see paragraphs 3 to 6, 11, 24 and 25 above).

268 In particular, the applicant was able to express its views, during the third administrative stage, in its observations of 1 February 2018 and at the hearing of 23 April 2018 (see paragraphs 24 and 25 above).

269 Second, the examination of the first plea has established that the applicant's rights of the defence were not affected either by the fact that some of the operators that participated in the earlier hearings were not present at the hearing of 23 April 2018, or by the fact that the representatives of the Member States' competition authorities knew, when they gave their opinion in the Advisory Committee, that two decisions, one of which had been confirmed by the Court, had previously been adopted against the undertakings concerned, or by the fact that the Commission had already ruled twice on the facts at issue and that its position in that regard had been confirmed by the Court (see paragraphs 59 to 162 above).

270 It follows from those considerations that, even if the duration of the administrative procedure could be regarded as contrary to the reasonable time principle, the conditions to be satisfied in order to secure the annulment of the contested decision would not be met, since the applicant has not been able to establish that the procedure's duration interfered in any way with its rights of the defence.

271 In those circumstances, it must be held that none of the requirements for the Court to be able to annul the contested decision on the ground of failure to observe the reasonable time principle has been fulfilled.

272 The complaint must therefore be dismissed, as must the third plea in law in its entirety.

4. Fourth plea in law, alleging infringement of the obligation to state reasons, misuse of powers and failure to observe the principle of proportionality

…

(a) First complaint, concerning the lack of an adequate explanation of the reasons which led the Commission to adopt a new decision imposing a fine

274 The applicant submits that the Commission did not provide an adequate explanation of its reasons for reopening the procedure, thus arbitrarily exercising the discretion it enjoys in that respect. It also claims, in that context, that the Commission considered that the adoption of the contested decision continued to have a significant deterrent effect, without explaining why deterrence was necessary for the present and the future and without giving reasons in the contested decision as to why a deterrent effect was, as it stated, 'particularly desirable in a market such as the Italian market for concrete reinforcing bars'.

275 It must be observed that Article 105(1) TFEU entrusts the Commission with the task of ensuring the application of Articles 101 and 102 TFEU.

276 In that regard, the Commission is responsible for defining and implementing, in accordance with the case-law, the competition policy of the European Union (see, to that effect, judgment of 16 October 2013, *Vivendi* v *Commission*, T-432/10, not published, EU:T:2013:538, paragraph 22 and the case-law cited).

277 In that context, the Commission enjoys a broad discretion, as evidenced by Regulation No 1/2003, according to which, if it finds the existence of an infringement, it 'may' require the undertakings concerned to bring the infringement to an end (Article 7(1)) and impose fines on the infringing undertakings (Article 23(2)).

278 In competition matters, the Commission was thus entrusted, irrespective of how the case was brought to its attention, namely following a complaint or acting on its own initiative, with the power to decide whether conduct should be the subject of proceedings, a decision and a fine, depending on the priorities it defines within the framework of its competition policy.

279 However, the existence of that power does not relieve the Commission of its obligation to state reasons (see, to that effect, judgment of 12 March 2020, *LL-Carpenter* v *Commission*, T-531/18, not published, EU:T:2020:91, paragraph 90 and the case-law cited).

280 In circumstances where, as here, first, a decision taken by the Commission has twice been annulled and, second, the lapse of time between the initial investigative measures and the adoption of the decision was exceptionally long, it is for that institution, in accordance with the principle of sound administration, to take account of the procedure's duration and its possible consequences for the Commission's decision to initiate proceedings against the undertakings concerned, and that assessment must then be reflected in the statement of reasons for the decision.

281 That is exactly what the Commission did when it gave a detailed explanation, in recitals 526 to 529 and 536 to 573 of the contested decision, of the reasons why it considered it necessary to adopt a new decision finding the existence of the infringement and imposing a fine on the undertakings concerned.

282 Thus, the Commission stated, first of all, that the duration of the procedure did not, in its view, entail any failure to observe the reasonable time principle (recitals 528 and 555 of the contested decision) and that there had been no infringement of the undertakings' rights of the defence, since they had been able to submit their observations on the resumption of the procedure and had also set out their arguments at the hearing of 23 April 2018. In that regard, the Commission explained that the applicant had not provided any solid evidence in support of its claim that it was not in a position to exercise its rights of the defence to the full (recitals 556 and 557 of the contested decision).

283 However, the Commission admitted that it had made procedural errors and acknowledged that those errors might have contributed to extending the duration of the procedure.

284 It was at that juncture that, in the contested decision, the Commission weighed the public interest in ensuring the effective application of the competition rules against the need to mitigate the possible consequences of the procedural errors made (recital 559 of the contested decision).

285 In that regard, the Commission found that the undertakings at issue had participated, over an 11-year period, in an infringement considered to be one of the most serious restrictions of competition. It stated that, against that backdrop, failure to re-adopt the decision finding that the undertakings had participated in that infringement would be contrary to the public interest in ensuring the effective application of EU competition law and would go beyond the interest in mitigating the consequences of any breach of the fundamental rights of the addressee undertakings (recitals 560 and 561 of the contested decision).

286 Following that balancing exercise, the Commission reached the conclusion that, since an infringement had been committed, it was only by adopting the contested decision that it could ensure that the infringers would not be left unpunished and would actually be deterred from engaging in similar conduct in the future (recitals 563 to 569 of the contested decision).

287 At the end of the analysis, the Commission stated that, in order to mitigate the possible adverse effects arising from the length of the procedure, which was intended to correct the procedural defects that had occurred during the investigation which were not attributable to the undertakings at issue, it had decided to reduce the fines imposed by 50% (recitals 570 to 573 of the contested decision).

288 It is thus apparent that, in the contested decision, the Commission provided a detailed statement of reasons setting out clearly and unequivocally the reasoning it had followed to justify the adoption of a new decision despite the two previous annulments.

…

296 It can be concluded from those considerations that the statement of reasons provided by the Commission in the contested decision sets out clearly and unequivocally the reasoning it followed to justify the adoption of a new decision imposing a fine, with the result that the complaint must be dismissed.

…

(e) Fifth complaint, concerning failure to observe the principle of proportionality

316 The applicant submits that the Commission failed to observe the principle of proportionality, since initiating proceedings and imposing penalties in respect of the conduct at issue in the dispute cannot be regarded as proportionate having regard to the time elapsed and the damage – now much diminished or even non-existent – allegedly caused to competition.

317 In that connection, it should be borne in mind that the principle of proportionality, which is among the general principles of EU law, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the desired objective. However, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments of 13 November 1990, *Fédesa and Others*, C-331/88, EU:C:1990:391, paragraph 13, and of 14 July 2005, *Netherlands* v *Commission*, C-180/00, EU:C:2005:451, paragraph 103).

318 In the present case, it is necessary, in order to adjudicate on the Commission's alleged failure to observe the principle of proportionality, to have regard to the following.

319 First, where a measure is annulled, as the 2009 decision was, the institution which adopted it may resume the administrative procedure at the stage at which the irregularity occurred (see paragraphs 53 and 54 above).

320 Second, the duration of a procedure does not in itself render unlawful a finding of infringement made by the Commission or the amount of the fine imposed. That may occur only if, first, the duration of the procedure fails to observe the reasonable time principle and, second, the

excessive time taken interferes with the exercise of the rights of the defence (see paragraph 230 above). In the present case, it follows from the analysis of the first and third pleas in law that the applicant cannot plead such infringements.

321 Third, the following reasons, relied on by the Commission to justify the adoption of the contested decision notwithstanding the time elapsed, appear to be relevant and well founded:

– to ensure the effective application of competition law and to avoid leaving the undertakings at issue unpunished;

– to deter the undertakings involved from committing further infringements of competition law;

– to facilitate claims for compensation brought by potential victims of the cartel.

322 Fourth, the Commission ensured that the consequences of the length of the procedure for the undertakings concerned were mitigated, by reducing the fine by 50%.

323 The complaint must therefore be dismissed, as must the fourth plea in law in its entirety.

5. Fifth plea in law, alleging failure to observe the ne bis in idem *principle*

324 The applicant submits that the *ne bis in idem* principle precluded the adoption of the contested decision.

325 The Commission disputes the applicant's arguments.

326 As a preliminary point, it must be observed that the applicant concedes that it was not subject to a duplication of penalties, but only a duplication of procedures, arguing that such duplication is also prohibited by the *ne bis in idem* principle.

327 In that regard, the *ne bis in idem* principle is enshrined:

– in Article 50 of the Charter, which provides that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law';

– in Article 4(1) of Protocol No 7 to the ECHR.

328 As a corollary to the *res judicata* principle, the *ne bis in idem* principle ensures legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he or she will not be tried again for the same offence (judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraph 33).

329 In competition matters, in particular, the *ne bis in idem* principle precludes, as a rule, an undertaking from being found guilty or from having proceedings brought against it a second time on the grounds of anticompetitive conduct in respect of which it has been penalised or declared not liable by an earlier decision that can no longer be challenged (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*,

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, EU:C:2002:582, paragraph 59, and of 1 July 2009, *ThyssenKrupp Stainless* v *Commission*, T-24/07, EU:T:2009:236, paragraph 178).

330 The application of the *ne bis in idem* principle presupposes in particular that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed (judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 60).

331 If that requirement is met, the *ne bis in idem* principle prohibits a fresh assessment in depth of the alleged commission of an offence where that assessment would result in the imposition of either:

– a second penalty, in addition to the first, in the event that liability is established a second time; or

– a first penalty in the event that liability not established by the first decision is established by the second (judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 61).

332 On the other hand, the *ne bis in idem* principle does not preclude the resumption of proceedings in respect of the same anticompetitive 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 (judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 62, and of 1 July 2009, *ThyssenKrupp Stainless* v *Commission*, T-24/07, EU:T:2009:236, paragraph 190).

333 In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them (judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 62, and of 1 July 2009, *ThyssenKrupp Stainless* v *Commission*, T-24/07, EU:T:2009:236, paragraph 190).

334 In the present case, it must be observed that, to date, no decision has yet given a definitive ruling on the substance of the case as regards the applicant's involvement in the infringements of which it is accused. The 2002 decision was annulled by the General Court on account of the legal basis used by the Commission and the 2009 decision was annulled for infringement of essential procedural requirements, without, in either case, a definitive position having been adopted on the substantive pleas raised by the applicant in connection with its involvement in the conduct complained of. The judgment of 9 December 2014, *Ferriere Nord* v *Commission* (T-90/10, not published, EU:T:2014:1035), is the only judgment to have ruled on those pleas, but it was set aside in its entirety by the Court of Justice. Accordingly, the view cannot be taken that, by adopting the contested decision, the Commission penalised the applicant twice or initiated a second procedure against it on the basis of the same facts (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 63).

335 For its part, the penalty imposed on the applicant in the contested decision replaces that imposed in the 2009 decision, which had itself replaced the penalty imposed in the 2002 decision. The amounts paid by the applicant in respect of the fine imposed in the 2002 decision and then in the 2009 decision were repaid to it following the annulment of those two decisions.

336 In those circumstances, there was no failure to observe the *ne bis in idem* principle.

…

342 It follows from the foregoing that the *ne bis in idem* principle did not preclude the adoption of the contested decision. Consequently, the fifth plea in law must be dismissed.

6. Sixth plea in law, alleging that the rules on limitation laid down in Article 25 of Regulation No 1/2003 are unlawful

343 The applicant seeks to have the limitation period laid down in Article 25 of Regulation No 1/2003 declared inapplicable on the ground that it fails to observe the reasonable time principle and the principle of proportionality.

344 The Commission challenges the admissibility and substance of that plea.

345 On the question of admissibility, the Commission, supported by the Council, submits that the plea of illegality is not substantiated to a sufficient degree and that it is presented in an incoherent manner.

346 In that regard, it must be observed that, in its written pleadings, the applicant clarified the complaints it relied on to challenge Article 25 of Regulation No 1/2003, setting out, first, their legal basis, namely failure to observe the reasonable time principle and the principle of proportionality, and, second, the arguments put forward in support of that proposition, which are, in essence, that Article 25 of Regulation No 1/2003 is unlawful inasmuch as it allows the Commission to adopt a penalty decision in breach of those principles.

347 It is also apparent from their written pleadings that the Commission and the Council were in a position to understand the arguments put forward by the applicant.

348 The present plea is therefore admissible.

349 As to the substance, the applicant puts forward two arguments.

350 In the first place, it submits that the EU legislature failed to observe the reasonable time principle by failing to provide, in Article 25 of Regulation No 1/2003, that after a reasonable time has elapsed, the Commission is time-barred from adopting a decision finding an infringement and, in any case, from imposing a fine, irrespective of the 5- or 10-year limitation period and irrespective of any suspensions in the event of court proceedings.

351 In that regard, it should be recalled that, in competition matters, the limitation period is governed by Article 25 of Regulation No 1/2003 as follows:

– that period is 5 years (Article 25(1)(b), read in conjunction with Article 23(2)(a) of that regulation);

– it may be interrupted by any action taken by the Commission for the purpose of the investigation or proceedings in respect of the infringement (Article 25(3)); in that case, the interruption retroactively erases the time that has already elapsed and marks the starting point of a fresh period; in the event of interruption, the limitation period expires at the latest upon the expiry of a period of 10 years without the Commission having imposed a fine or periodic penalty payment (Article 25(5));

– the limitation period is suspended for the duration of review proceedings brought before the Court against the Commission's decision, in which case that period is extended by the time for which the suspension lasted (Article 25(6)).

352 As for the reasonable time principle, the concept of 'reasonable time' is not fixed or determined in advance in an abstract manner for all procedures to which it might apply, but must be appraised in the light of the circumstances specific to each case, in particular the importance of the case, its complexity and the conduct of the applicant and of the competent authorities (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraphs 187 and 188).

353 The applicant complains that the EU legislature did not lay down, in Article 25 of Regulation No 1/2003, a maximum period beyond which any action by the Commission would be precluded even if the limitation period had been suspended.

354 In that regard, it must be observed that, as drafted, Article 25 of Regulation No 1/2003 is the result of the reconciliation by the EU legislature, in the exercise of the powers conferred on it, of two objectives potentially requiring conflicting measures, namely, first, the need to ensure legal certainty by preventing situations which arose a long time previously from being indefinitely brought into question and, second, the requirement to ensure observance of the law by pursuing, establishing and penalising infringements of EU law (see, to that effect, judgment of 6 October 2005, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, T-22/02 and T-23/02, EU:T:2005:349, paragraph 82).

355 The applicant has not shown, in the present case, that the EU legislature, in its reconciliation of those objectives, exceeded the leeway which it must be allowed in that context. The power to conduct inspections and impose penalties is subject to strict limits. It is true that the limitation period is suspended when an action is brought before the EU Courts. However, if that possibility is to be triggered, it requires a step to be taken by the undertakings themselves. The EU legislature cannot be criticised if, after the bringing of several actions by the undertakings concerned, the decision taken at the end of the procedure is adopted after a certain period of time.

356 The reconciliation thus carried out by the EU legislature seems all the more appropriate since individuals who complain that a procedure was unreasonably long may challenge its duration by seeking annulment of the decision adopted at the end of that procedure, such annulment being reserved for situations in which the excessive time taken has interfered with the exercise of the rights of the defence, or, where no such interference has occurred, by bringing an action for damages before the EU Courts (see paragraph 215 above).

357 The argument must therefore be dismissed.

358 In the second place, the applicant submits that Article 25 of Regulation No 1/2003 fails to observe the principle of proportionality because it engenders a situation whereby undertakings are left in a state of uncertainty for too long by allowing the Commission to initiate proceedings against them at the end of a period that has, as the case may be, been suspended or interrupted.

359 In that regard, it should be borne in mind that, as stated in paragraph 317 above, the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the desired objective. However, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments of 13 November 1990, *Fédesa and Others*, C-331/88, EU:C:1990:391, paragraph 13, and of 14 July 2005, *Netherlands* v *Commission*, C-180/00, EU:C:2005:451, paragraph 103).

360 As stated in paragraph 351 above, the limitation period is five years.

361 It is interrupted by any action taken by the Commission for the purpose of the investigation or proceedings in respect of the infringement, in which case the limitation period expires at the latest after 10 years. In establishing such a limitation period, the Commission's actions are thus strictly limited in time.

362 Moreover, as the Court has also stated in paragraph 351 above, the limitation period is extended by the time for which limitation was suspended during review proceedings against the Commission's decision. According to the case-law, that suspension prevents proceedings in respect of infringements from being obstructed by other proceedings beyond the Commission's control (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 144).

363 Thus, Article 25(6) of Regulation No 1/2003 concerns situations in which the Commission's inaction is not the result of a lack of diligence on its part (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 144).

364 In order to determine whether Article 25 of Regulation No 1/2003 is vitiated by the illegality alleged by the applicant, it should be noted that the limitation period, by preventing situations which arose a long time previously from being indefinitely brought into question, tends to strengthen legal certainty but can also allow the acceptance of situations which at least in the beginning were unlawful (judgment of 6 October 2005, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, T-22/02 and T-23/02, EU:T:2005:349, paragraph 82).

365 To round off the Court's analysis, it should be recalled that individuals who complain that a procedure was unreasonably long may challenge its duration by seeking annulment of the decision adopted at the end of that procedure, such annulment being reserved for situations in which the excessive time taken has interfered with the exercise of the rights of the defence, or, where no such interference has occurred, by bringing an action for damages before the EU Courts.

366 In those circumstances, the view cannot be taken that, in assessing the objectives to be achieved in the context of the rules on limitation, the EU legislature established a system incorporating unnecessary or even inappropriate measures, or measures which could be replaced by other equally effective measures to protect undertakings which may be subject to them, without hampering, to an unacceptable extent, the effectiveness of investigations or proceedings.

367 Consequently, the sixth plea in law must be dismissed, as must, therefore, the first head of claim seeking annulment of the contested decision.

B. The alternative head of claim seeking a reduction in the amount of the fine imposed

…

2. Eighth plea in law, alleging that the increase in the amount of the fine imposed for repeated infringement was unlawful

…

(a) First complaint, alleging infringement of the rights of the defence in taking repeated infringement into account

535 The applicant submits that the 50% increase in the basic amount of the fine, which the Commission applied for repeated infringement, is unlawful because the applicant was not given the opportunity to submit observations in that regard during the administrative procedure, in breach of its rights of the defence.

536 More specifically, the Commission did not disclose its intention to invoke that aggravating circumstance in the statement of objections, which contained only:

– a general assertion, applicable to all the undertakings, that the Commission would take any aggravating circumstance into account;

– a reference to an earlier penalty decision, namely Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 – Welded steel mesh) (OJ 1989 L 260, p. 1), unrelated to the possibility of taking repeated infringement into account, since it appeared in a footnote for the purposes of defining the relevant products in that case.

537 The applicant claims that no further details were provided thereafter even though the Commission had several opportunities to brief the undertakings concerned in that respect, including the applicant, in particular in the supplementary statement of objections, in the letter of 15 December 2017 announcing the resumption of the procedure, in the subsequent requests for information, at the hearing of 23 April 2018 or at the meeting of 21 June 2019, mentioned in paragraph 27 above, which took place with the Commission's services.

538 In that regard, it should be pointed out that, where the Commission intends to impute an infringement of competition law to a legal person and seeks, in that context, to invoke repeated infringement against it as an aggravating circumstance, the statement of objections addressed to

that person must contain all the information enabling it to defend itself, in particular the information demonstrating that the conditions for a finding of repeated infringement are satisfied (see, to that effect, judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 96).

539 To that effect, the Commission undertook, in paragraph 84 of its Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6), to mention in the statement of objections, 'in a sufficiently precise manner', the facts which may give rise to aggravating circumstances.

540 Repeated infringement must be viewed, according to settled case-law, as a circumstance that may be in the nature of an aggravating circumstance (see, to that effect, judgments of 11 March 1999, *Thyssen Stahl* v *Commission*, T-141/94, EU:T:1999:48, paragraph 618, and of 11 March 1999, *Unimétal* v *Commission*, T-145/94, EU:T:1999:49, paragraph 585).

541 The obligation described in paragraphs 538 to 540 above derives from the obligation to respect the rights of the defence, which is subject to a general principle that, in any procedure in which sanctions, especially fines or penalty payments, may be imposed, the undertakings and associations of undertakings concerned must be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances alleged against them (see, to that effect, judgment of 20 March 2002, *LR AF 1998* v *Commission*, T-23/99, EU:T:2002:75, paragraph 189 and the case-law cited).

542 When reviewing whether the rights of the defence have been respected, the EU Courts must take into account all the circumstances of the case in order to ensure that the Commission's intention to find that an infringement was committed or that a given circumstance existed was sufficiently foreseeable from the point of view of the undertaking concerned, so that the latter can be regarded as having been afforded the opportunity to submit its comments on the matter under consideration.

543 In the present case, the statement of objections, dated 26 March 2002, stated in footnote 2 that the applicant had previously been the subject of a decision establishing that it had committed a serious infringement of the competition rules and imposing on it a specific penalty in that respect.

544 Moreover, the statement of objections made clear that the Commission intended to impose a fine on the addressee undertakings, including the applicant, taking various factors into account.

545 Thus, recital 314 of the statement of objections indicated that, in order to determine the amount of the fines, the Commission would consider the circumstances of the case and, in particular, the gravity and duration of the infringement, pointing out that an agreement or concerted practice such as a price and market-sharing cartel constituted a very serious infringement of EU law.

546 Also in recital 314 of the statement of objections, the Commission announced its intention that the amount of the fine to be imposed on each undertaking should reflect the aggravating or mitigating circumstances which might be applied to it and that that amount should be set at a level ensuring sufficient deterrence.

547 Subsequently, the Commission informed the applicant, in its letter of 15 December 2017 announcing the resumption of the administrative procedure, that it would base the decision to be taken at the end of the procedure on the objections set out in the statement of objections, which had led to the adoption of the 2002 and 2009 decisions.

548 Repeated infringement had been taken into account in those decisions in order to calculate the amount of the applicant's fine, under the head of aggravating circumstances.

549 In so far as is necessary, it should be added that, in the letter of 15 December 2017, the Commission emphasised that, during the hearing, the undertakings concerned would be able to discuss all the aspects of the case in detail and without limits, thus affording the applicant the opportunity, as one of the undertakings concerned, to put forward, where appropriate, its arguments as to why repeated infringement could not be invoked against it under the head of aggravating circumstances.

550 In those circumstances, the Court finds, following an examination of all the circumstances of the case, that in the present case the conditions were met, first, for the Commission's intention to take into account, under the head of repeated infringement, the penalty decision previously addressed to the applicant to be sufficiently foreseeable, and, second, for the applicant to have an opportunity to submit its observations in that regard.

551 The complaint must therefore be dismissed.

(b) Second complaint, concerning the period between the two infringements taken into account

552 The applicant claims that the relevant period for assessing the question of repeated infringement, namely the time elapsed between the finding of the first infringement and the date on which the undertaking concerned began to engage in the new unlawful conduct, was nine years in the present case, because its involvement in the cartel dated back to 1998, not 1993 as the Commission found in the contested decision. That period is too long to be able to invoke repeated infringement.

553 In that regard, it must be recalled that, in the context of deterrence, repeated infringement justifies, according to the case-law, a significant increase in the basic amount of the fine. It is evidence that the penalty previously imposed was not sufficiently deterrent (see judgment of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraph 398 and the case-law cited).

554 As regards the time which elapsed between the two infringements, neither Regulation No 1/2003 nor the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the 1998 Guidelines') establish a maximum period for taking repeated infringement into account, and the Court has held that the absence of such a period does not, in itself, infringe the principle of legal certainty (judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraphs 66 and 67).

555 However, although no limitation period precludes a finding of repeated infringement, the fact remains that, if the principle of proportionality is to be observed, the Commission cannot take into consideration one or more previous decisions penalising an undertaking without any limitation in time (judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 70).

556 It is thus for the EU Courts to determine whether, in the light of the facts of the case, the increase in the amount of the fine for repeated infringement is justified, in particular inasmuch as it shows a tendency on the part of the undertaking concerned to infringe the competition rules, having regard inter alia to the brief lapse of time between the previous infringement of the competition rules and the infringement at issue (see, to that effect, judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 70).

557 In the present case, given the Court's rejection of the seventh plea, by which the applicant disputed the evidence adduced by the Commission to demonstrate that it had participated in the infringement from 1 April 1993, the period between the two infringements was three years and eight months, not nine years as the applicant claims.

558 In that regard, it should be noted that, according to the case-law, a lapse of time of little under 10 years between the two infringements may be regarded as relatively short and shows a tendency on the part of an undertaking not to draw the appropriate conclusions from a finding that it has infringed the competition rules (judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 40).

559 Against that background, the Commission was entitled to find that an increase in the basic amount of the fine for repeated infringement was justified in the present case, in the light of the applicant's tendency to infringe the competition rules, as demonstrated by the brief lapse of time between the two infringements at issue, namely three years and eight months.

…

564 The complaint must therefore be dismissed.

(c) Third complaint, concerning the time elapsed between the infringements taken into account and the adoption of the contested decision

565 As a preliminary point, it must be observed that, in its consideration of the previous complaint, the Court was required to assess the lapse of time between the two infringements taken into account by the Commission under the head of repeated infringement.

566 In the third complaint, the applicant asks the Court to assess, in the light of the principle of proportionality, a different period, namely that which elapsed between the infringements relied on to take repeated infringement into account and the adoption by the Commission of the contested decision, in which it increased the basic amount of the fine for repeated infringement.

567 According to the applicant, since that period of time is excessively long, a finding of repeated infringement is not an appropriate way to ensure deterrence and thus to achieve its aim, with the result that the Commission failed to observe the principle of proportionality by invoking repeated infringement in the present case.

568 In support of its position, the applicant refers to the specific circumstances of the present case in which, as a result of the annulment of the 2002 and 2009 decisions, the Commission, under the head of repeated infringement, took account of conduct which began in 1985, namely 34 years previously, which was first classified as infringing conduct in 1989, namely 30 years previously, in order to penalise conduct which ceased in 2000, namely 19 years before the adoption of the contested decision.

569 In that regard, it should be borne in mind that, under the principle of proportionality, measures adopted by the institutions are not to exceed the limits of what is appropriate and necessary in order to attain the desired objective. However, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments of 13 November 1990, *Fédesa and Others*, C-331/88, EU:C:1990:391, paragraph 13, and of 14 July 2005, *Netherlands* v *Commission*, C-180/00, EU:C:2005:451, paragraph 103).

570 In the matter of repeated infringement, the case-law requires the Commission, when determining the amount of the fine, to ensure that its action is deterrent. One way of securing such deterrence is to invoke repeated infringement and increase the amount of the fine. The purpose of taking repeated infringement into account is thus to encourage undertakings which have demonstrated a tendency towards infringing the competition rules to alter their conduct (see, to that effect, judgment of 13 July 2011, *Shell Petroleum and Others* v *Commission*, T-38/07, EU:T:2011:355, paragraph 98 and the case-law cited).

571 According to the case-law cited in paragraph 553 above, repeated infringement justifies a significant increase in the basic amount of the fine because it is evidence that the penalty previously imposed was not sufficiently deterrent.

572 As stated in paragraph 555 above, the Commission is not bound by a limitation period when making a finding of repeated infringement. It cannot, however, take into consideration one or more previous decisions penalising an undertaking without any limitation in time.

573 The finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and the Commission may, in each case, when determining the amount of the increase for repeated infringement, take account of evidence tending to confirm an undertaking's propensity to ignore the competition rules (see, to that effect, judgment of 13 July 2011, *Shell Petroleum and Others* v *Commission*, T-38/07, EU:T:2011:355, paragraph 98).

574 Accordingly, the Commission cannot be criticised for having invoked repeated infringement in the present case in view of the lapse of time between the initial infringement or infringements established and the infringement penalised in the contested decision. That is what demonstrates the undertaking's tendency to infringe the competition rules and therefore justifies the intention to direct its conduct towards compliance with those rules (see, to that effect, judgments of 25 October 2005, *Groupe Danone* v *Commission*, T-38/02, EU:T:2005:367, paragraph 354, and of 13 December 2012, *Versalis and Eni* v *Commission*, T-103/08, not published, EU:T:2012:686, paragraph 266).

575 As stated in paragraph 557 above, the relevant period was a short one, lasting as it did three years and eight months. Since the applicant's tendency to infringe the rules of competition law was established, the Commission cannot validly be criticised for giving deterrent effect to the contested decision, despite the fact that the investigation lasted some time due to the judicial uncertainties surrounding it.

576 The applicant nonetheless maintains that, since the infringements took place in the distant past, the contested decision no longer had any deterrent effect when it was adopted. It also claims that it has not committed any infringement since 2000.

577 In that regard, it should be borne in mind that, as stated in paragraphs 298 to 300 above, while it cannot be ruled out that the threat of penalty faced by the applicant throughout the investigation and the imposition of a penalty on two occasions may have had some deterrent effect, the fact remains that it is the penalty, namely the act of paying the fine imposed by the Commission, as increased for repeated infringement, which actually deters undertakings from committing further infringements of the competition rules.

578 Accordingly, the Commission did not fail to observe the principle of proportionality by ensuring, when it took repeated infringement into account, that the fine imposed on the applicant in the contested decision was sufficiently deterrent.

579 For all of those reasons, the complaint must be rejected.

…

4. Claim for a reduction of the fine

645 Since no irregularity or illegality vitiates the contested decision (see paragraphs 530, 606 and 643 above), the claim for a reduction of the fine cannot be upheld in so far as it asks the Court to draw the inference, with respect to the amount of the fine, from those illegalities or irregularities (see, to that effect, judgment of 17 December 2015, *Orange Polska* v *Commission*, T-486/11, EU:T:2015:1002, paragraph 226).

646 However, when exercising their unlimited jurisdiction provided for in Article 261 TFEU and Article 31 of Regulation No 1/2003, the EU Courts are empowered, in addition to the mere review of legality, which only permits dismissal of the action for annulment or the annulment (in whole or in part) of the contested measure, to take account of all the factual circumstances in order, where appropriate, to amend the amount of the penalty (see, to that effect, judgments of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86 and the case-law cited, and of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, under appeal, EU:T:2021:763, paragraph 605).

647 In the exercise of their unlimited jurisdiction, the EU Courts may cancel, reduce or increase the fine imposed (see judgment of 19 December 2013, *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 334 and the case-law cited).

648 Accordingly, the EU Courts may also, if necessary, make different findings from those made by the Commission to determine the amount of the fine imposed (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 75).

649 Thus, it is appropriate to ascertain, in the light of all the evidence in the file, especially that put forward by the applicant, whether the Court should substitute, under its unlimited jurisdiction, a different amount for the fine than that adopted by the Commission, on the ground that the latter amount is not appropriate (judgment of 17 December 2015, *Orange Polska* v *Commission*, T-486/11, EU:T:2015:1002, paragraph 227).

650 The applicant disputes the proportionality of the contested decision, arguing that, in view of the circumstances of the case, the Commission should have discontinued the procedure or, at least, if it had intended to adopt a decision, not have imposed a fine on the applicant.

651 It should be pointed out that, in the contested decision, the Commission, without making a finding of failure to act within a reasonable time or infringement of the rights of the defence, granted the applicant a reduction in the amount of the fine, which it justified as follows:

– 'in view of … the uncertainty created by the transition between the two treaties, an exceptional circumstance which, at the time, was not expressly governed by the case-law, … the Commission considers it appropriate that the addressees of this Decision should receive a reduction of the fine' (recital 570);

– that reduction was granted 'in order to mitigate the adverse consequences for those parties which might have arisen on account of the long duration of the procedure needed to remedy certain procedural defects that occurred in the course of the procedure and are not attributable to the addressees of this Decision' (recital 570);

– 'the spontaneous grant by the Commission of a reduction in the amount of the fine … must be regarded as sufficient … to mitigate any adverse effects suffered by the addressees as a result of the long duration of the procedure' (recital 572);

– 'the addressees will … be entitled to an appropriate reduction of the fines … in order to mitigate any adverse effects caused by the procedural errors committed by the Commission' (recital 573);

– 'the Commission … considers that the procedural errors it committed during the transition between the ECSC Treaty and the EC Treaty and the longer duration which may have resulted from those errors warrant appropriate compensation for the addressees of this Decision' (recital 991);

– 'in view of the discretion enjoyed by the Commission in setting fines, it may … [grant] the addressees of this Decision a reduction of the fine which should be calculated so as not to penalise the addressee undertakings for procedural errors not committed by them but which, at the same time, are not so serious as to undermine the principle that cartels are very serious infringements of competition law' (recital 992);

– 'in order to take due account of those factors, the Commission concludes that a 50% reduction of the fine for extraordinary mitigating circumstances should be applied to all the addressees of this Decision' (recital 994).

652 It follows that the Commission relied, in essence, on the following considerations in order to grant the reduction of the fine imposed on the applicant:

– the case was dealt with when the ECSC Treaty was in the process of expiring;

– that situation gave rise to difficulties as regards the identification of the applicable rules;

– those difficulties led to the annulment of the 2002 and 2009 decisions by the EU Courts;

– those annulments prolonged the length of the procedure to an extent capable of having an adverse effect on the situation of the undertakings concerned;

– those circumstances could be taken into account in determining the amount of the fine.

653 In that regard, it should be noted that, on several occasions in the recitals referred to in paragraph 651 above, the Commission used terms suggesting that, by reducing the amount of the fine at issue, it sought to 'mitigate' or 'compensate for' 'adverse effects', namely damage which may have been caused by 'errors' attributable to it.

654 Although such terms are generally associated with proceedings for damages, it is not apparent from the contested decision that, by granting the reduction in the amount of the fine at issue, the Commission's intention was to award compensation for damage caused by unlawful conduct. Nowhere in that decision does the Commission admit that it acted unlawfully, for example by failing to observe the reasonable time principle or by infringing the applicant's rights of the defence. On the contrary, in several passages of that decision it refers to the case-law according to which, where complaints are made concerning the duration of the procedure, the remedy must be an action for damages (recitals 568 and 578).

655 Thus, in the light of those different considerations, it must be held that the reduction in the amount of the fine at issue granted by the Commission was not intended to compensate for any unlawful conduct on its part; it simply sought to take account of the circumstances of the case in the context of the broad discretion which the Commission enjoys when imposing penalties, as recognised, in particular, by the judgment of 19 March 2009, *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 82) (see paragraph 651 above).

656 In the exercise of its unlimited jurisdiction, the Court considers that, in the present case, the fine cannot be cancelled owing to, inter alia, the need to ensure the full application of competition law to the particularly serious and significantly lengthy infringement found to have been committed by the applicant.

657 That being so, it must be borne in mind that the fine was imposed on the applicant not in the years immediately following the commission of the last instances of anticompetitive conduct established by the Commission, but almost 20 years later.

658 In that regard, in determining the amount of the fine, it is necessary in the present case to take into account, among all the relevant circumstances, the deterrent effect of the fine.

659 The deterrent effect of the fine is taken into account in order to ensure that the amount of the fine will act as a sufficient incentive to the undertaking concerned and, generally, to all economic operators to comply with the EU competition rules (see judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 102).

660 In the present case, the objective of deterrence has already been implemented in respect of the applicant, in part in any event, first, by the penalty imposed on it in the 2002 decision and then in the 2009 decision, and, second, by the prospect that that penalty could be maintained at the end of the procedure if the legal actions brought by the applicant against those decisions were dismissed or if, in the event of annulment of those decisions, a new decision again imposing a penalty were adopted (see paragraph 299 above).

661 In those circumstances, it must be held that, in the exercise of its unlimited jurisdiction, that in view of the time elapsed between the last instances of anticompetitive conduct and the adoption of the contested decision, the setting of the amount of the fine at a level below the basic amount of EUR 2.975 million determined by the Commission in the contested decision pursuant to the 1998 Guidelines, which are capable of guiding the EU Courts in their exercise of that jurisdiction (see,

to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 80), is sufficient, in the present case, to ensure the desired deterrent effect.

662 In the light of the foregoing, a reduction of 50% of the amount of the fine on account of the time elapsed between the last instances of anticompetitive conduct and the adoption of the contested decision is appropriate.

663 To conclude, the Court must:

– dismiss the action in so far as it seeks the annulment in whole or in part of the contested decision;

– dismiss the applicant's claim for a reduction in the amount of the fine, on the ground that the 50% reduction of the fine granted by the Commission in the contested decision was appropriate in view of the lessening of the necessary deterrent effect of the penalty on account of the time elapsed between the end of the infringement and the imposition of the fine.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Ferriere Nord SpA to bear its own costs and to pay those incurred by the European Commission;

3. Declares that the Council of the European Union is to bear its own costs.

Gervasoni Madise Nihoul

Frendo Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 9 November 2022.

[Signatures]