JUDGMENT OF THE COURT (First Chamber)

14 July 2005 *

In Case C-57/02 P,

APPEAL under Article 49 of the ECSC Statute of the Court of Justice, brought on 22 February 2002,

Compañía española para la fabricación de aceros inoxidables SA (Acerinox), established in Madrid (Spain), represented by A. Vandencasteele and D. Waelbroeck, avocats,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by A. Whelan, acting as Agent, and J. Flynn, Barrister, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas, R. Silva de Lapuerta, K. Lenaerts and S. von Bahr (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 By its appeal, Compañía española para la fabricación de aceros inoxidables SA (Acerinox) ('Acerinox') seeks annulment of the judgment of the Court of First Instance of the European Communities of 13 December 2001 in Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859 ('the contested judgment') which only partially upheld its application for the annulment of Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy Surcharge) (OJ 1998 L 100, p. 55, hereinafter 'the contested decision').

Facts

2 The facts giving rise to the proceedings before the Court of First Instance, as described by latter Court, may be summarised as follows for the purposes of this judgment.

3 Acerinox is a company incorporated under Spanish law operating in the stainless steel sector, producing flat products in particular.

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

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

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

7 In December 1996 and January 1997, after the Commission had carried out a number of on-site inspections, lawyers or representatives of a number of undertakings, including Acerinox, informed the Commission of their wish to cooperate. On 17 December 1996, Acerinox sent a statement to the Commission to that effect.

8 On 24 April 1997, the Commission served on those undertakings a new statement of objections replacing that of 19 December 1995.

9 On 21 January 1998, the Commission adopted the contested decision.

10 According to that decision, the prices for alloys and stainless steel fell sharply in 1993. When nickel prices started to rise in September 1993, producers' profits were considerably reduced. To remedy this, most of the producers of stainless flat products agreed, at a meeting held in Madrid on 16 December 1993 (hereinafter 'the Madrid meeting'), to increase their prices on a concerted basis by changing the parameters for calculating the alloy surcharge. To that end they decided to apply, as from 1 February 1994, an alloy surcharge based on the method last used in 1991, taking as reference values prices prevailing in September 1993 for all producers, when the price of nickel had reached an historical low.

11 The contested decision states that the alloy surcharge calculated on the basis of the newly determined reference values was applied by all producers to their sales in Europe as from 1 February 1994, except in Spain and Portugal.

12 In Article 1 of the contested decision, the Commission found that Acerinox, ALZ NV, Acciai speciali Terni SpA ('AST'), Avesta Sheffield AB ('Avesta'), Hoesch Stahl AG, which became Krupp Thyssen Nirosta GmbH as from 1 January 1995, Thyssen Stahl AG, which became Krupp Thyssen Nirosta GmbH as from 1 January 1995, and Ugine SA, then known as Usinor SA ('Usinor'), had infringed Article 65(1) of the ECSC Treaty from December 1993 to November 1996 in the case of Avesta and in the case of all the other undertakings up to the date of the decision, by modifying and by applying in a concerted fashion the reference values used to calculate the alloy surcharge. It considered that that practice had both the object and the effect of restricting and distorting competition within the common market

13 Under Article 2 of the contested decision, the following fines were imposed:

— Acerinox: ECU 3 530 000

— ALZ NV: ECU 4 540 000

— AST: ECU 4 540 000

— Avesta: ECU 2 810 000

— Krupp Thyssen Nirosta GmbH: ECU 8 100 000 écus, and

— Usinor: ECU 3 860 000.

The action before the Court of First Instance and the contested judgment

14 By application lodged at the Registry of the Court of First Instance on 13 March 1998, Acerinox brought an action for annulment of the contested decision in so far as it concerned the applicant and, in the alternative, for a substantial reduction of the fine imposed on it by that decision.

15 By the contested judgment, the Court of First Instance largely confirmed the contested decision.

16 The Court of First Instance held, in paragraph 45 of the contested judgment, that Acerinox must be regarded as having participated in the agreement relating to the application of an alloy surcharge calculated on the basis of reference values agreed at the Madrid meeting (hereinafter 'the agreement') as from 16 December 1993 in the case of the Member States other than the Kingdom of Spain and, as regards the latter Member State, as from no later than 14 January 1994. In paragraph 64 of the contested judgment, it concluded that the Commission had been fully entitled to consider that the agreement was not applied on a sporadic basis but lasted until the adoption of the contested decision.

17 The Court of First Instance also held, in paragraph 91 of the contested judgment, that, because of the gravity of the infringement, the amount of the fine imposed on Acerinox could not be regarded as disproportionate. It considered that Acerinox's conduct was not such as to allow reduction of the fine to the same extent as for Usinor and Avesta which, for their part, had admitted the existence of concertation.

18 On the other hand, the Court of First Instance held, in paragraph 141 of the contested judgment, that the Commission had infringed the principle of equal treatment by taking the view that Acerinox and two other undertakings had not provided any new information within the meaning of the Commission's Notice on

the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, hereinafter 'the Leniency Notice') even though they had admitted the existence of the Madrid meeting. In paragraph 152 of that judgment, the Court of First Instance considered that it was appropriate to grant those undertakings a reduction of the fines imposed on them of 20% rather than the 10% allowed in the contested decision.

19 The Court of First Instance thus reduced the fine imposed on Acerinox by setting it at EUR 3 136 000 and for the rest dismissed the action.

20 The Court of First Instance ordered Acerinox to bear its own costs and to pay two thirds of the Commission's costs. It ordered the Commission to bear one third of its own costs.

The form of order sought and the pleas in law on which the appeal is based

21 Acerinox claims that the Court of Justice should:

— set aside the contested judgment;

— annul the contested decision or, at least, substantially reduce the amount of the fine or, in the alternative, refer the case back to the Court of First Instance, and

— order the Commission to pay the costs.

22 The Commission contends that the Court of Justice should:

— dismiss the appeal;

— in the alternative, if the contested judgment is set aside in part, reject the claim for annulment of the contested decision, and

— order Acerinox to pay the costs.

23 Acerinox puts forward the following six pleas in support of its appeal:

— manifest error of interpretation leading to an incorrect statement of reasons concerning its alleged participation in the cartel in Spain;

— incorrect statement of reasons for rejection of the argument concerning the existence of parallel conduct outside Spain;

— error of law concerning assessment of the duration of the alleged infringement;

— lack of a statement of reasons for rejecting an argument concerning the duration of the alleged infringement;

— incorrect statement of reasons concerning the proportionality of the fine, and

— breach of fundamental rights of the defence regarding reduction of the amount of the fine.

The request for leave to submit observations in response to the Advocate General's Opinion and, in the alternative, for reopening of the oral procedure

24 By a document lodged at the Registry of the Court of Justice on 2 December 2004, Acerinox sought leave to submit written observations in response to the Advocate General's Opinion and, in the alternative, requested the Court of Justice to order the reopening of the oral procedure under Article 61 of the Rules of Procedure.

25 Acerinox wishes to give its views on the parts of that Opinion concerning, first, the evidential value of the fax mentioned in paragraph 37 of the contested judgment, which had been sent on 14 January 1994 by Avesta to its subsidiaries (hereinafter 'the January 1994 fax'), and, second, the reasoning in paragraph 90 of that judgment.

26 In that connection, it must be borne in mind that the Statute of the Court of Justice and its Rules of Procedure do not make any provision for parties to submit observations in response to the Opinion of the Advocate General (see the order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 2).

Accordingly, the request for leave to submit written observations in response to the Advocate General's Opinion must be rejected.

27 Furthermore, the Court of Justice may, on its own initiative or on a proposal from the Advocate General, or at the request of the parties, order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 33, and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25). However, in this case, the Court, after hearing the views of the Advocate General, considers that it has all the information it needs to decide the present appeal. Consequently, the request that the oral procedure be reopened must be rejected.

The appeal

The first plea in law

Arguments of the parties

28 By its first plea, Acerinox criticises the Court of First Instance for interpreting in a manifestly incorrect way its arguments concerning the question of its participation in an alleged cartel in Spain and for giving incorrect reasons on that point in the contested judgment.

29 This plea is concerned with paragraphs 37 and 38 of the contested judgment, in which the Court of First Instance held as follows:

'37 It is clear from the file that, as pointed out in paragraph 33 of the Decision, Avesta, by fax of 14 January 1994, informed its subsidiaries, including the one in Spain, of the position taken by some of its competitors concerning the date for application of the alloy surcharge on their domestic markets. With regard more specifically to Acerinox, it is stated:

"Acerinox have announced that surcharges will apply from 1 April 1994 (yes, April!)".

38 The applicant does not contest the truth of the statements attributed to it but confines itself to asserting that that statement shows even more clearly that no agreement or concerted practice existed at the date of the Madrid meeting concerning deferred application of the alloy surcharge in Spain. The fact nevertheless remains that such a statement constitutes evidence of the fact that, on 14 January 1994, Acerinox had in any event expressed its intention to apply an alloy surcharge in Spain in line with the terms agreed by the undertakings concerned at the Madrid meeting and had thus complied with that agreement.'

30 Acerinox claims that the Court of First Instance wrongly held, in paragraph 38 of the contested judgment, that it had not challenged the truth of the allegations made by Avesta in the January 1994 fax. It claims that it expressly contested the evidential value of that fax in its application to the Court of First Instance and that the reasoning in the contested judgment on that point is based on a distortion of the evidence.

31 The Commission contends that this plea is both inadmissible and unfounded. It is inadmissible in so far as Acerinox seeks to pass off as defective reasoning what is in fact an assessment of fact.

32 In any event, the Court of First Instance correctly deduced from that fax that if, in December 1993, Acerinox hesitated about participating in the cartel in Spain, its hesitations had disappeared by January 1994.

Findings of the Court

33 It must be noted that, in its application to the Court of First Instance for annulment of the contested decision, Acerinox states, with regard to the content of the January 1994 fax, that '[t]hat information ... with regard to the announcement made by [Acerinox], which itself would have been incoherent with the attitude adopted by the rest of the industry was inaccurate. No such "announcement" was made'.

34 It is thus clear from the actual terms of Acerinox's application to the Court of First Instance that the applicant contested the truth of the statements attributed to it in that fax. It follows that, by stating the opposite, the Court of First Instance incorrectly presented Acerinox's point of view.

35 The January 1994 fax constituted a decisive piece of evidence as to the fact that Acerinox participated in a cartel on the Spanish market.

36 It must therefore be considered, as the Advocate General observed in point 38 of his Opinion, that the Court of First Instance was not entitled to rely on the January 1994 fax as evidence without explaining why Acerinox's objection to that fax should be rejected. By failing to reply to the argument put forward by the applicant on that point, the Court of First Instance failed to fulfil its obligation to state reasons under Article 30 and the first paragraph of Article 46 of the ECSC Statute of the Court of Justice.

37 The first plea put forward by Acerinox must therefore be upheld to the extent to which it seeks to demonstrate that the contested judgment contained an incorrect statement of reasons concerning that undertaking's participation in a cartel in Spain.

38 It follows that the contested judgment must be annulled to the extent to which it concludes, on the ground that that undertaking did not contest the truth of the statements attributed to it in the January 1994 fax, that Acerinox participated in a cartel on the Spanish market.

39 However, since that annulment of the contested judgment is only partial, it is necessary to examine the remaining pleas in law.

The second plea

Arguments of the parties

40 By its second plea, Acerinox criticises the Court of First Instance for not adequately stating its reasons for rejecting the argument that its action in places other than Spain was merely a manifestation of parallel conduct and not the implementation of a concerted practice.

41 According to Acerinox, the Court of First Instance rightly found, in paragraph 42 of the contested judgment, that it applied an alloy surcharge at different times in various Member States. However, it was stated in several passages both in the contested decision and in the contested judgment itself that the objective of the Madrid meeting was, on the contrary, a simultaneous price increase by the amount of that alloy surcharge.

42 Acerinox considers that it is in that context that it is necessary to examine its argument to the effect that its conduct merely reflected adjustment to market conditions and did not derive from concertation between the undertakings concerned.

43 Acerinox considers that the Court of First Instance did not establish, in paragraph 43 of the contested judgment, the requisite causal link between the Madrid meeting and its conduct in the market, and that the Court of First Instance did not therefore give sufficient reasons for its finding of Acerinox's alleged participation in the infringement outside Spain. That finding should therefore, in its opinion, be set aside by the Court of Justice.

44 The Commission contends that the Court of First Instance rejected Acerinox's argument in reliance on matters of fact which cannot be re-examined by the Court of Justice, such as Acerinox's presence at the Madrid meeting, its attitude at that meeting, in that it did not distance itself from the other participants, and the reality and the dates of the application of the alloy surcharges in several Member States. The Court of First Instance thus found that the tariff applied by Acerinox in those States derived not from any adjustment to conduct observed on the market but from concertation.

45 The Commission considers that, in any event, the Court of First Instance's reasoning in paragraphs 41 to 43 of the contested judgment clearly shows the existence of a causal relationship between the concertation deriving from the Madrid meeting and Acerinox's conduct in the market. That link cannot be called in question on the ground that Acerinox implemented the alloy surcharges slightly later than the planned date.

Findings of the Court

46 In the first place, the Court of First Instance correctly stated in paragraph 30 of the contested judgment the rule governing the burden of proof where the participation of undertakings in meetings of a manifestly anti-competitive character is established. Thus, it pointed out, relying on the judgments in Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and in Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181, that it is for the undertaking concerned to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

47 Secondly, the Court of First Instance took care to apply that rule to the circumstances of the case before it. It first observed, in paragraph 31 of the contested judgment, that it was undisputed that Acerinox had taken part in the Madrid meeting and also that that meeting involved concertation between certain producers of stainless steel flat products concerning part of the final price thereof, contrary to Article 65(1) of the ECSC Treaty.

48 The Court of First Instance then considered whether Acerinox had distanced itself from the other participants in that meeting by making clear its intention not to apply the alloy surcharge in the Member States other than the Kingdom of Spain.

49 In that connection, the Court of First Instance found, in paragraph 41 of the contested judgment, that Acerinox had not proved that it had distanced itself from the other participants. It observed, on the contrary, relying on a statement made by Acerinox in reply to questions from the Commission, that that company had not claimed to have adopted the same attitude, at the Madrid meeting, as the one

decided upon regarding application of the alloy surcharge in Spain, but conceded that '[a] majority of those present was in favour of applying the surcharge as soon as possible'. The Court made it clear in paragraph 42 of that judgment that Acerinox subsequently applied an alloy surcharge in various European countries, on various dates, between February and May 1994.

50 From the foregoing, the Court of First Instance inferred, in paragraph 43 of the contested judgment, that Acerinox could not properly claim that the alignment of its alloy surcharges with those applied by the other producers operating in those markets was the result merely of parallel conduct since that alignment had been preceded by concertation between the undertakings concerned, the purpose of which was the use and application of the same reference values in the method for calculating the alloy surcharge.

51 The Court of First Instance concluded, in paragraph 45 of the contested judgment, that Acerinox was to be considered as having participated in the agreement to the extent to which the latter was concerned with application of the alloy surcharge in the Member States other than Spain.

52 It is clear from the analysis made by the Court of First Instance that it correctly applied the rule of law set out in paragraph 46 of this judgment. It thus found, first, that Acerinox had taken part in a meeting of a manifestly anti-competitive nature; second, that no evidence been produced by that undertaking to show that it had distanced itself from the objectives of that meeting regarding calculation and use of the alloy surcharge; and, third, that Acerinox had applied alloy surcharges in accordance with the formula determined at that meeting, before dismissing the possibility that such application reflected parallel conduct.

53 The Court of First Instance thus established the existence of a link between the Madrid meeting and Acerinox's conduct in the Member States other than Spain and, therefore, gave full reasons for its conclusion that that undertaking was to be regarded as having participated in the agreement in those States.

54 It follows that the second plea must be rejected as unfounded.

The third plea

Arguments of the parties

55 By its third plea, Acerinox criticises the Court of First Instance for applying an incorrect legal criterion to assess the duration of the alleged infringement.

56 According to Acerinox, by holding, in paragraph 64 of the contested judgment, that the Commission was entitled to consider that the infringement lasted until January 1998, without mentioning the existence of any concertation whatsoever between the parties beyond the first months of 1994, even though the agreement had supposedly come to an end, the Court of First Instance misapplied the relevant case-law of the Court of Justice, as set out in paragraph 63 of that judgment. The duration of the infringement, in so far as there was one, was limited to the first half of 1994.

57 The abovementioned case-law shows that an infringement of Article 85 of the EC Treaty (now Article 81 EC) and, by analogy, Article 65 of the ECSC Treaty, continues only if a degree of concertation persists between the undertakings concerned. However, it has not been demonstrated that the alloy surcharge was the subject of regular and coordinated review by those undertakings.

58 The Commission contends that the third plea in law is based on a false premiss, in so far as no part of the contested judgment can be interpreted as a finding that the agreement had ceased to be in force a few months after the beginning of 1994.

59 According to the Commission, the Court of First Instance rightly held, in paragraph 61 of the contested judgment, that Acerinox's maintenance throughout the period concerned of the reference values agreed at the Madrid meeting cannot be explained otherwise than by the existence of concertation which lasted beyond the first months of 1994.

Findings of the Court

60 It need merely be pointed out that, contrary to Acerinox's allegations, the Court of First Instance did not consider that the agreement had come to an end before the adoption of the contested decision on 21 January 1998. On the contrary, it is clear from paragraphs 60, 61, 63 and 64 of the contested judgment that, according to the Court of First Instance, the agreement lasted until the adoption of that decision.

61 In paragraph 60 of the contested judgment, the Court of First Instance found that, until that date, Acerinox and the other undertakings continued to apply the reference values agreed at the Madrid meeting. In paragraph 61 of that judgment, it pointed out that the subject-matter of the infringement alleged against Acerinox was the determination of the amount of the alloy surcharge on the basis of the calculation formula embodying reference values identical to those of its competitors, determined jointly with other producers and in concertation with them. The Court of First Instance inferred that the maintenance by that undertaking of those reference values in the formula for calculating the alloy surcharge which it applied could not be accounted for otherwise than by the existence of concertation.

62 In paragraph 63 of the contested judgment, the Court of First Instance pointed out that the effects of the agreement lasted until the adoption of the contested decision without the agreement having been formally brought to an end. The Court of First Instance concluded, in paragraph 64 of that judgment, that, in so far as Acerinox had not, before the adoption of that decision, abandoned the application of the reference values agreed at the Madrid meeting, the Commission was entitled to consider that the infringement had lasted until that date.

63 It must therefore be considered, as stated by the Advocate General in point 107 of his Opinion, that Acerinox's argument that the Court of First Instance misapplied the case-law of the Court of Justice concerning the application of its competition rules to the effects of an agreement which has formally come to an end is, in any event, irrelevant since it is based on the false premiss that the agreement had ceased during 1994.

64 The third plea must therefore be rejected as unfounded.

The fourth plea

Arguments of the parties

65 By its fourth plea, which is concerned with paragraph 62 of the contested judgment, Acerinox criticises the Court of First Instance for not giving its reasons for rejecting the argument that, in July 1994, the price of nickel had reached its original level, so that the concerted practice at issue had ceased to have any effect whatsoever as from that date.

66 Acerinox claims that it is undisputed that the formula for calculating the alloy surcharge had been used for 25 years. Given that the purpose of the practice was merely to apply a downward adjustment to the trigger figure for a pre-existing alloy surcharge, the fact that the price of nickel reached, on a date in July 1994, the level at which the value had previously been fixed is relevant. According to Acerinox, it was on that date that the concerted practice of lowering the trigger figure automatically ceased to have any effect whatsoever since an alloy surcharge was in any event applicable by virtue of the pre-existing formula.

67 The Commission contends that Acerinox cannot merely assert that an alloy surcharge would have had to be paid in any event, whether based on the method used before the implementation of the agreement or afterwards. The fact that the July 1994 nickel price was the same as the old trigger value for an alloy surcharge was a matter of random economic circumstances and depended on developments in the nickel market. What is important, in the Commission's view, is that the alloy surcharge applicable under the new calculation method was always higher than that payable under the earlier method, regardless of the price of nickel.

Findings of the Court

68 In paragraph 62 of the contested judgment, the Court of First Instance considered that, in so far as the reference values for the alloying materials involved in the infringement remained unchanged, the fact that the price of nickel returned, on a particular date, to its 'initial level' did not mean that the infringement had then ceased to produce its anti-competitive effects but simply that the calculation of the alloy surcharge had to take account of that development. For that reason, the Court of First Instance rejected Acerinox's argument as irrelevant.

69 In that connection, it must be held that, when the Court of First Instance rejected Acerinox's argument, it stated its reasons for doing so. It is clear from paragraph 62 of the contested judgment that the concerted reduction of the reference value for nickel meant that an alloy surcharge would be applicable if the price of that raw material was higher than that new value. However, Acerinox has not given any explanation as to why the fall in the price of nickel as from July 1994 prevented the agreement from producing its effects.

70 In those circumstances, the Court of First Instance was right to reject Acerinox's argument as irrelevant.

71 The fourth plea must therefore be rejected as manifestly unfounded.

The fifth plea

Arguments of the parties

72 By its fifth plea, Acerinox criticises the Court of First Instance for failing, in paragraph 90 of the contested judgment, to take account of the respective weight of the undertakings concerned in assessing the proportionality of the fine. It maintains, in particular, that the Court of First Instance took no account of its argument that the difference between its percentage market share and that of Usinor, which is 7 points, represented 65% of its market share and should therefore be regarded as very large. Moreover, the fact that that difference is considerable is only one of the relevant criteria for assessing the weighting to be applied in accordance with the Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, hereinafter 'the Guidelines'). The Court of First Instance therefore, in Acerinox's view, did not give sufficient reasons for its assessment of the proportionality of the fine imposed on Acerinox.

73 The Commission contends that the figure of 65% is misleading and that the Court of First Instance was right to hold that the Commission had not made any error of assessment in taking the view that the difference between the market shares of the undertakings concerned was not considerable and did not justify applying weightings to the amount of the fines.

Findings of the Court

74 The Court of First Instance verified the merits of the method used by the Commission to determine the amount of the fine and referred, in paragraph 77 of the contested judgment, to the Guidelines. In paragraphs 78 and 81 thereof, it observed that the Commission had fixed the starting point for the fine by reference to the gravity of the infringement, in accordance with the Guidelines.

75 As regards the Commission's decision not to apply different weightings to that amount for the various undertakings concerned, the Court of First Instance held, in paragraph 90 of the contested judgment, that the Commission was fully entitled to rely, inter alia, on the size and economic strength of those undertakings, having found them all to be large on the basis that the six undertakings concerned accounted for more than 80% of European production of finished stainless steel products.

76 The Court of First Instance made it clear, also in paragraph 90, that the comparison made by Acerinox between its market share of about 11% and those of Usinor, AST and Avesta of about 18%, 15%, and 14% respectively is not such as to disclose any considerable disparity between those undertakings, within the meaning of the sixth paragraph of Section 1 A of the Guidelines, such as to render differentiation necessary in the appraisal of the gravity of the infringement.

77 In that connection, it is necessary to refer to the Guidelines. The sixth paragraph of Section 1 A thereof states that, where an infringement involves several undertakings, after the basic amount of the fine has been determined according to the seriousness of the infringement 'it might be necessary in some cases to apply weightings to the

amounts determined ... in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'.

78 By holding that the difference between Acerinox's market share, which is about 11%, and those of Usinor, AST and Avesta, which represent between 14% and 18% of the same market, was not considerable and by not accepting the figure of 65% put forward by Acerinox, the Court of First Instance did not make any error of assessment. As the Commission rightly submits, that percentage is misleading in that it gives a disproportionately large impression of the difference between the respective market shares of the undertakings concerned, on the basis of an irrelevant comparison.

79 Moreover, apart from the allegedly considerable difference between the respective market shares of Usinor and Acerinox, the latter has put forward no argument such as to justify the application of weightings to the amount of the fines in accordance with the sixth paragraph of Section 1 A of the Guidelines.

80 Consequently, it must be held that the Court of First Instance properly gave the reasons for its conclusion by stating that the difference between the market shares of the undertakings concerned was not such as to justify applying weightings to the fine imposed on Acerinox, and that it was right to hold that the amount of the fine was not disproportionate.

81 In those circumstances, the fifth plea must be rejected as unfounded.

The sixth plea

Arguments of the parties

82 By its sixth plea, Acerinox alleges that the Court of First Instance erred in law by refusing to grant it a reduction of the fine imposed on it of the same magnitude as that allowed to the other undertakings that were parties to the agreement, on the ground that it contested the objections made against it, even though it cooperated with the Commission in a manner comparable to that of those undertakings. That refusal is, in its view, discriminatory and constitutes a breach of its fundamental rights of defence.

83 Acerinox claims that the Court of First Instance accepted, in paragraph 139 of the contested judgment, that the degrees of cooperation with the Commission shown by those undertakings were comparable as regards substantially admitting the facts, namely their participation in the Madrid meeting, the nature of the discussions at that meeting and the measures taken to apply the alloy surcharge. The Court of First Instance nevertheless limited to 20% the reduction of the fine granted to Acerinox even though the reduction was 40% for Usinor. Acerinox maintains that the Court of First Instance's approach is tantamount to treating the undertakings differently according to the way in which they decided to exercise their rights of defence in response to the statement of objections.

84 The Commission considers that, since Usinor and Avesta cooperated by admitting their participation in the concertation, Acerinox was not entitled to the same reduction of the fine as that granted to those two undertakings.

Findings of the Court

85 In order to establish whether the Court of First Instance erred in law by granting to Acerinox a smaller reduction of its fine than that granted to Usinor and Avesta, it is necessary to refer to the case-law of the Court of Justice concerning the extent of the Commission's powers in preliminary investigation procedures and administrative procedures, having regard to the need to respect the rights of the defence.

86 According to the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 34 and 35, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

87 However, while the Commission may not compel an undertaking to admit its participation in an infringement, it is not thereby prevented from taking account, when fixing the amount of the fine, of the assistance given by that undertaking, of its own volition, in order to establish the existence of the infringement.

88 In that connection, it is clear from the judgment in Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, and in particular from paragraphs 56, 59 and 60 thereof, that the Commission may, when fixing the amount of a fine, take account of the assistance given to it by the undertaking concerned by which it is able to establish the existence of the infringement with less difficulty and, in particular, of the fact that an undertaking admitted its participation in the infringement. It may grant an undertaking that has assisted it in that way a significant reduction of the amount of its fine and grant a substantially lesser reduction to another undertaking which merely did not deny the main factual allegations on which the Commission based its objections.

89 As the Advocate General observed in point 140 of his Opinion, an undertaking's admission of an alleged infringement is entirely voluntary. It is not in any way coerced to admit the existence of the cartel.

90 It must therefore be considered that the fact that the Commission took account of the degree of cooperation with it shown by the undertaking concerned, including admission of the infringement, for the purpose of imposing a lower fine, does not constitute a breach of its rights of defence.

91 That is the construction to be placed on the Leniency Notice and, in particular part D thereof, according to which the Commission may grant an undertaking a reduction of 10 to 50% of the amount of the fine that it would have imposed in the absence of cooperation, in particular where that undertaking informs the Commission that it does not substantially contest the facts on which the Commission has based its allegations. Thus, the type of cooperation, capable of giving rise to a reduction of the fine, which the undertaking concerned may provide is not limited to admitting the nature of the facts but also involves admitting participation in the infringement.

92 In this case, the Court of First Instance pointed out, in paragraph 146 of the contested judgment, that, according to the contested decision, only Usinor and Avesta had admitted the existence of concertation. It made it clear that, according to that decision, Acerinox admitted that concertation had taken place but denied participating therein, so that its cooperation with the Commission was more limited than that of Usinor and Avesta.

93 The Court of First Instance found, in paragraph 147 of the contested judgment, that, although Acerinox substantially admitted the facts on which the Commission relied, so as to justify a reduction of 10% of the amount of the fine imposed on that company, there was absolutely nothing in the documents before the Court to show that it also expressly admitted its involvement in the infringement.

94 Relying on the case-law of the Court of Justice, the Court of First Instance observed, in paragraph 148 of the contested judgment, that a reduction of the fine imposed is justified only if the conduct of the undertaking concerned enabled the Commission to ascertain the infringement more easily and that that is not the case where, in its response to the statement of objections, that undertaking denies any participation in the infringement.

95 The Court of First Instance properly concluded therefrom, in paragraph 149 of the contested judgment, that the Commission correctly took the view, having regard to Acerinox's response to the statement of objections, that the latter did not behave in such a manner as to justify an additional reduction of the amount of the fine for its cooperation in the administrative procedure.

96 The sixth plea must therefore be rejected as unfounded.

97 It follows from all the foregoing considerations that only the first plea in law on which Acerinox bases its appeal is well founded.

The consequences of the partial annulment of the contested judgment

98 Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, if an appeal is well founded and the Court of Justice quashes the decision of the Court

of First Instance, it may itself then give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

99 In the present case, the state of the proceedings is such that judgment can be given with regard to Acerinox's plea in law concerning the lack of evidence of its participation in the infringement in the Spanish market and in particular the lack of evidential value of the January 1994 fax.

Arguments of the parties

100 Before the Court of First Instance, Acerinox maintained that, although it took part in the Madrid meeting, it refused at that meeting to subscribe to the common system for the alloy surcharge and consequently it never participated in any agreement to apply that alloy surcharge. In its view, the January 1994 fax which, according to recital 33 in the preamble to the contested decision, stated that 'Acerinox have announced that surcharges will be applied from 1 April 1994 (yes April!)' does not constitute any proof whatsoever of its participation in the agreement, in particular in the Spanish market.

101 Acerinox made the following statement regarding that fax in its application to the Court of First Instance:

'That information ... with regard to the announcement made by [Acerinox], which itself would have been incoherent with the attitude adopted by the rest of the industry was inaccurate. No such "announcement" was made ... [T]he only country where Acerinox issues a public price list and thus makes price "announcements" is Spain. It is undisputed that no change was made to the price list before 20 May 1994 when the applicant announced to the Commission and to [its] clients its decision to

align, from June 1994, its alloy surcharge to the one already implemented by its competitors in other Member States since February.'

102 In its reply before the Court of First Instance, Acerinox added that the indication attributed to it in that fax instead 'confirms the absence of any agreement or concerted practice on a delayed implementation by the applicant. It is indeed undisputed that the information was wrong. Should there have been any agreement or concerted practice, one would have expected the statement to be correct'.

Findings of the Court

103 It must be borne in mind, as the Advocate General observed in point 200 of his Opinion, that, in the event of a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringement found by it and to adduce evidence such as to show, to a sufficient legal standard, the existence of circumstances constituting such an infringement.

104 In that connection, it is important to note that certain points were established by the Commission and have not been contested by Acerinox:

— first, the Commission makes it clear, in recital 21 to the contested decision, that Acerinox organised the Madrid meeting and that it was one of the participants;

— next, Acerinox — as it states — applied the alloy surcharges, using the same formula as that adopted at that meeting, from February 1994 in Denmark, then in other Member States between March and June of the same year. The application of the alloy surcharge in Spain was envisaged for June of that year;

— finally, the January 1994 fax, drawn up by Avesta's representative at the Madrid meeting, presents Acerinox as one of the undertakings that participated in that meeting and one that had already given notice of its intention to apply the alloy surcharges.

105 So far as concerns that fax, although Acerinox casts doubt on the interpretation made thereof, it does not contest either its existence or the fact that it was expressed in the terms stated. Since that fax was drawn up following the Madrid meeting and indicated that, as from January 1994, Acerinox had manifested its intention to apply the alloy surcharges adopted at that meeting, the Commission was right to consider that it constituted a document capable of proving that undertaking's participation in the infringement.

106 The fact that the date mentioned in that fax did not correspond with those of the actual application of the surcharges by Acerinox in the Member States is not a sufficient basis for rejecting the document as evidence of the intention manifested by Acerinox to proceed to apply it in that way.

107 In view of the facts referred to in paragraph 104 of the present judgment, the Commission was entitled, without committing any error of assessment, to reach the

conclusion that Acerinox had participated in the agreement in all the Member States concerned, including Spain.

108 It follows from the foregoing that the plea put forward by Acerinox in support of its application to the Court of First Instance, to the effect that the January 1994 fax cannot serve as proof of its membership of that cartel, is unfounded and must, therefore, be rejected.

109 Consequently, Acerinox's application to the Court of First Instance, to the extent to which it is based on that plea, must itself be rejected.

Costs

110 Under the first paragraph of Article 122 of the Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under the first subparagraph of Article 69(2) of the same rules, which is applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs to be awarded against Acerinox and the latter has been for the most part unsuccessful in its appeal and has failed in the sole plea relied on in its application to the Court of First Instance, which the Court of Justice considered following partial annulment of the contested judgment, it must be ordered to pay the costs of the present proceedings. As regards the costs of the proceedings at first instance which led to the contested judgment, they must be borne in the manner determined in paragraph 3 of the operative part of that judgment.

On those grounds, the Court (First Chamber) hereby:

1. **Annuls the judgment of the Court of First Instance of the European Communities of 13 December 2001 in Case T-48/98 *Acerinox* v *Commission* to the extent to which it rejected the plea in law put forward by Compañía española para la fabricación de aceros inoxidables SA (Acerinox) alleging the lack of a statement of reasons relating to its alleged participation in an agreement on the Spanish market;**

2. **For the rest, dismisses the appeal;**

3. **Dismisses the action for annulment brought by Compañía española para la fabricación de aceros inoxidables SA (Acerinox) to the extent to which it is based on a plea in law alleging that the Commission of the European Communities was wrong to attribute evidential value to the fax sent on 14 January 1994 by Avesta Sheffield AB to its subsidiaries;**

4. **Orders Compañía española para la fabricación de aceros inoxidables SA (Acerinox) to pay the costs of the present proceedings. The costs of the proceedings at first instance leading to the judgment of the Court of First Instance referred to in paragraph 1 of the operative part of this judgment shall be borne in the manner set out in paragraph 3 of the operative part of that judgment.**

[Signatures]