OPINION OF ADVOCATE GENERAL GEELHOED delivered on 12 September 2006 [1]

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I — Introduction

1. This case concerns the appeal brought by Salzgitter Mannesmannröhren-Werke GmbH, formerly Mannesmannröhren-Werke AG, ('Mannesmann') against the judgment of the Court of First Instance of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke* v *Commission.* [2]

2. In the contested judgment, the Court of First Instance reduced the fine which had been imposed on the applicant by Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B — Seamless steel tubes) [3] (the 'decision') and dismissed the remainder of the application for annulment of that decision.

II — The decision at issue

3. For the facts on which the decision at issue is based, I refer to my Opinion in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission*, points 3 to 12.

2 — [2004] ECR II-2223.

3 — OJ 2003 L 140, p. 1.

4. In so far as is relevant to the present appeal, the operative part of the decision reads as follows:

'*Article 1*

1. Mannesmannröhren-Werke AG ... [has] infringed the provisions of Article 81(1) of the EC Treaty by participating, in the manner and to the extent set out in the grounds to this decision, in an agreement providing, inter alia, for the observance of their respective domestic markets for seamless standard threaded OCTG pipes and tubes and project line pipe.

2. The infringement lasted from 1990 to 1995 in the case of Mannesmannröhren-Werke AG ...

Article 2

1. Mannesmannröhren-Werke AG ... infringed Article 81(1) of the EC Treaty by concluding, in the context of the infringement mentioned in Article 1, contracts which resulted in a sharing of the supplies of plain end OCTG pipes and tubes to British Steel Limited ...

2. ... In the case of Mannesmannröhren-Werke AG, the infringement lasted from 9 August 1993 to 24 April 1997.

...

Article 4

The following fines are imposed on the firms mentioned in Article 1 on account of the infringement established therein:

1. Mannesmannröhren-Werke AG	EUR 13 500 000

...'

III — The procedure before the Court of First Instance and the contested judgment

5. By seven applications lodged at the Registry of the Court of First Instance between 28 February and 3 April 2000, seven of the eight undertakings fined, including Mannesmann, brought actions against the decision.

6. Mannesmann claimed that the Court of First Instance should annul the contested decision, in the alternative that it should reduce the fine imposed on it, and that it should order the Commission to pay the costs.

7. In the contested judgment, the Court of First Instance:

— annulled Article 1(2) of the decision in so far as it found that the infringement imputed existed before 1 January 1991;

— set the amount of the fine imposed on the applicant at EUR 12 600 000;

— dismissed the remainder of the application;

— ordered the parties to bear their own costs.

IV — The procedure before the Court of Justice

8. In the appeal, Mannesmann claims that the Court should:

— set aside the contested judgment in so far as it dismisses the action for annulment of the decision;

— annul the decision;

— in the alternative, reduce the fine fixed in Article 4 of the decision;

— reduce the default interest specified in Article 5 of the decision;

— in the further alternative, refer the case back to the Court of First Instance for a fresh judgment complying with the judgment of the Court of Justice;

— order the Commission to pay the costs.

9. The Commission contends that the Court should dismiss the appeal in its entirety and order the appellant to pay the costs.

V — The appellant's pleas and arguments of the parties

10. Mannesmann puts forward three pleas in support of its claim that the contested judgment should be set aside, alleging, respectively, breach of the principle of the right to a fair hearing, misapplication of Article 81 EC in respect of Article 2 of the decision and breach of the principle of equal treatment.

11. I shall discuss the appellant's pleas in that order below.

A — *The first plea: breach of the principle of the right to a fair hearing*

1. The reasoning of the Court of First Instance

12. At first instance, the appellant contested the admissibility of the sharing key document as evidence of the infringements of Article 81 EC established in the decision. Since the Commission did not disclose the identity of the author of the document, its authenticity and probative value had to be treated with caution.

13. The Commission should, at the very least, have stated the circumstances in which it obtained that document, which it invoked as direct evidence of an unlawful act.

14. Since none of the undertakings concerned recognised the authenticity of that document, and the Commission had also failed otherwise to demonstrate that it was authentic, it was not entitled to use it against Mannesmann. That constituted a breach of the rights of the defence and a ground for annulling the contested decision.

15. In paragraphs 81 to 85, the Court of First Instance examined in detail those arguments put forward by the appellant against the admissibility of the sharing key document:

'81 First of all, the Court notes that in the grounds of the contested decision dealing with the existence of the infringement found in Article 1, the Commission relies to a large extent on Mr Verluca's statement of 17 September 1996 ... Although the Commission also relies in this context, especially in recitals 85 and 86 to the contested decision, on the sharing key document, that document must be regarded as being of less importance in the general scheme of the contested decision than Mr Verluca's statements.

82 It is therefore necessary to reject outright Mannesmann's argument that the Commission relied principally on that document in order to establish the existence of the infringement referred to in Article 1 of the contested decision. ...

83 [In this paragraph, the Court of First Instance gives a summary of recitals 85 and 86 to the contested decision, explaining how the Commission came into possession of the sharing key document and its relevant content.]

84 It should be stated at the outset, as regards the admissibility of the sharing key document as evidence of the infringement referred to in Article 1 of the contested decision, that the principle that prevails in Community law is that of the unfettered evaluation of evidence and that it is only the reliability of the evidence that is decisive when it comes to its evaluation (Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867 at II-869, II-954; see also, to that effect, judgments in Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraph 29, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and Tecnagrind* v *Commission* [2002] ECR II-4547, paragraph 223). It may also be necessary for the Commission to protect the anonymity of informants (see, in that regard, *Adams* v *Commission* ..., paragraph 34) [4] and that circumstance cannot suffice to require the Commission to disregard evidence in its possession.

4 — Case 145/83 [1985] ECR 3539.

85 Consequently, although Mannesmann's arguments may be relevant to the evaluation of the reliability and therefore the probative value of the sharing key document, that document cannot be regarded as inadmissible evidence which must be removed from the file.'

2. The appellant's complaints

16. The appellant puts forward in essence two arguments in support of this plea:

— in paragraph 84 of the contested judgment, the Court of First Instance misinterpreted the relevant case-law of the Court of Justice and the Court of First Instance itself. According to that case-law, when evidence is evaluated, the origin of the evidence must be verified;

— by permitting the sharing key document to be used as evidence, the Court of First Instance disregarded the relevant case-law of the European Court of Human Rights on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') as regards the permissibility of using anonymous witnesses and anonymous documentary evidence.

17. The appellant, which in this connection cites the judgment in *Vela and Tecnagrind* v *Commission*, [5] paragraph 223, submits that, under Community law, when evidence is evaluated, the origin of that evidence must be ascertained.

18. The defendant in an administrative investigation must be able, without restriction, to ascertain the authenticity of the content of a document, as well as the credibility of the informant. If the opposite were the case, the defendant would be unable to ascertain whether the informant was speaking the truth, or whether there had been manipulation by third parties intending to inflict damage on the undertaking concerned. The use of documentary evidence the author and origin of which are unknown is, moreover, contrary to the principle of the rule of law, as enshrined in Article 6(1) EU.

19. That is not contradicted in *Adams* v *Commission*, [6] which concerns 'anonymous' information which was used in carrying out an investigation in order to find other — admissible — documentary evidence.

5 — Cited in point 15.
6 — Cited in footnote 4.

20. It follows from Article 6(2) EU that in the application of Community law account must be taken of the fundamental rights enshrined in the ECHR. That is, moreover, expressly reaffirmed by the Charter of Fundamental Rights of the European Union. [7] Articles 46 and 47 of that Charter correspond to Article 6 of the ECHR and guarantee the right of the citizens concerned to a fair hearing.

21. Furthermore, Article 52(3) of the Charter specifies that the interpretation of the Charter by the courts must guarantee a level of protection which is not lower than that provided by the ECHR. Official declarations concerning Article 52(3) have also added that a reference to the ECHR also relates to the relevant case-law of the European Court of Human Rights.

22. In its case-law, the European Court of Human Rights has repeatedly set clear limits to the use of statements by an anonymous third party. According to that case-law, the defendant must have the opportunity to challenge not only the authenticity of such statements, but also the credibility of the person protected by his anonymity. In that connection, the appellant cites the judgments of the European Court of Human Rights in *Kostovski v. Netherlands*, [8] *Van Mechelen v. Netherlands*, [9] and *Windisch v. Austria*. [10]

23. That case-law confirms, moreover, that the use of anonymous statements is certainly permissible at the investigation stage of proceedings, but that such statements must not be used as evidence against an accused.

24. As regards a document containing the statement of an anonymous witness, the case-law is summarised as follows in the recent judgment in *Visser v. Netherlands*: [11] such a document may be used in evidence if (a) the defence has not at any stage of the proceedings asked to be allowed to question the witness concerned, (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and (c) the trial court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection.

7 — OJ 2000 C 364, p. 1.

8 — See Eur. Court HR judgment of 20 November 1989, Series A No 166.

9 — See Eur. Court HR judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III.

10 — See Eur. Court HR judgment of 27 September 1990, Series A No 186.

11 — See Eur. Court HR judgment of 14 February 2002, *Reports of Judgments and Decisions* 2002, § 32.

25. In this case, the Court of First Instance did not comply with those requirements. It is not specified what value as evidence the Court of First Instance attributed to the sharing key document. Moreover, it is apparent from paragraphs 85 to 94 of the contested judgment that that document occupies a central place among the evidence produced.

26. The appellant concludes with the claim that, by using the sharing key document against it, the Court of First Instance infringed the principle of the right to a fair hearing. According to that principle, the rights of the defence may be restricted only in so far as is necessary and proportionate. [12] Since the Court of First Instance knew neither the identity nor the motives of the anonymous informant, it was also unable to form a view as to whether, in this case, such a restriction of the rights of the defence was justified.

3. The Commission's arguments

27. The Commission considers this plea inadmissible since the appellant is alleging for the first time on appeal a breach of the ECHR and of the Charter. At first instance, the appellant confined itself to the claim that the admission of the sharing key document as evidence constituted an infringement of the rights of the defence. In any event, it was impossible for the appellant to impute an infringement of the Charter to the Commission at first instance. The Charter was not adopted until 7 December 2000, whereas the contested decision dates from 8 December 1999.

28. In essence, the Commission disputes the claim that the Court of First Instance infringed the rights of the defence. Under no circumstances can it be inferred from the case-law cited by the appellant [13] that a document may not be used as evidence when its author is unknown. According to that case-law, the origin of a document is one of a number of criteria by which its probative value must be assessed.

29. In the same way as the defence, the Court of First Instance will have to assess on the basis of all the available information whether or not a piece of documentary evidence is authentic and whether its content properly represents the facts or misrepresents them.

30. What is important is whether the appellant was able to express its view as to the authenticity and reliability of the evidence being assessed by the Court of First Instance before the Court arrived at its

12 — In this context, the appellant refers to Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21.

13 — Cited in point 15 and footnote 4.

assessment of that evidence. That was the case in this instance, both in the procedure which led to the Commission's decision, and in the procedure before the Court of First Instance.

31. There may certainly be consequences for the probative value of a document if the author, the addressee and the circumstances in which a document originated are not known or may not be disclosed by the Commission by virtue of its obligation of secrecy under Article 287 EC.

32. The Court of First Instance thus certainly took proper account of its evaluation of the evidence in the contested judgment by, on the one hand, finding in paragraph 86 of the contested judgment that the sharing key document had only limited probative value since the circumstances in which it originated remained unknown and, on the other hand, finding in paragraphs 87 and 94 of that judgment that it did have such — limited — probative value since it contained specific information corresponding to the information in other documents.

33. Moreover, the appellant's inference from the judgment in *Adams* v *Commission* [14] is incomplete. Although, as a consequence of that judgment, the Commission does have an obligation of confidentiality when an informant asks to remain anonymous, that obligation is relevant only at the time when the information in question is to be used.

34. The Commission disputes the claim that the Court of First Instance infringed Article 6 of the ECHR and Articles 47 and 48 of the Charter.

35. With regard to the Charter, it points out that it is not — yet — legally binding. [15] Moreover, the right to a fair hearing, as set out in the second paragraph of Article 47 of the Charter, has no separate meaning, since, pursuant to Article 52(3), the scope of that provision does not extend further than that of Article 6 of the ECHR. It is therefore unnecessary in this context to devote further separate attention to Article 47 of the Charter.

36. Even though the ECHR is not part of Community law, [16] the right to a fair trial is certainly one of the fundamental rights which are an integral part of Community law and when interpreting them the Community judicature must certainly take

14 — Cited in footnote 4.

15 — Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris and Others* v *Commission* [2003] ECR II-1, paragraph 122.

16 — Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 59.

account of the case-law of the European Court of Human Rights. [17]

37. The case-law of the European Court of Human Rights cited by the appellant concerns the use of anonymous statements in criminal proceedings, whereas this case concerns the use of a document, the author of which is not identified, in the context of a procedure for administrative fines under competition law.

38. Mannesmann wrongly equates evidence of witnesses with documentary evidence. It is not apparent from any of the judgments of the European Court of Human Rights cited by the appellant [18] that documents can be used only if their author is known and can be questioned by the defence and the competent court.

39. In the Commission's view, the basic premiss of that case-law is that, in principle, all evidence must be produced at a public hearing with a view to adversarial argument. [19]

40. It points out that it does not have the power to compel persons to appear as witnesses during the administrative investigation. Decisions in competition cases are therefore based primarily on documentary evidence. In the light of those special characteristics of the procedure, the Commission complies with the aforementioned basic premiss by making all the evidence available so that the undertaking concerned can inspect it and respond to it, either in writing or orally. This is the adversarial argument which the Commission must facilitate when applying the abovementioned principle during the administrative procedure.

41. The Commission further disputes Mannesmann's assertion that the sharing key document played a central role in the production of evidence.

42. That assertion was refuted by the Court of First Instance in paragraphs 81 and 82 of the contested judgment. In paragraph 87, the Court of First Instance further elaborates on

17 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P *Limburgse Vinylmaatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 273 and 274.

18 — The Commission refers here to the *Kostovski v. Netherlands* (cited in footnote 8, § 41), *Van Mechelen v. Netherlands* (cited in footnote 9, § 51) and *Windisch v. Austria* (cited in footnote 10, § 26) judgments, as well as to the *Äsch v. Austria* judgment of 26 April 1991, Series A No 203, § 27, and the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A No 238, § 47.

19 — This basic premiss is to be found in all the specified paragraphs of the case-law cited in the previous footnote.

that view by stating that, in so far as the sharing key document contains specific information corresponding to the information in other documents, in particular Mr Verluca's statements, those items of evidence are mutually supporting. [20]

4. Assessment

43. Must the general principle of Community law that everyone has the right to a fair hearing be interpreted, for the purposes of Community competition law, as meaning that documents containing information incriminating the undertakings concerned are inadmissible as evidence if the identity both of their authors and of the person who handed them over to the Commission must remain secret?

44. That, in essence, is the point of law which the appellant raises by its first plea and which it considers to have been incorrectly answered by the Court of First Instance.

45. In a consistent line of decisions, the Court of Justice has recognised the principle that everyone has the right to a fair hearing as a general principle of Community law, usually referring in that connection both to the constitutional traditions common to the Member States and to the ECHR. [21]

46. Having regard to the last phrase, no great significance seems to me to attach to the fact that the appellant omitted to invoke Article 6 of the ECHR explicitly in the proceedings at first instance.

47. As the Court of Justice has consistently pointed out, the legal principle of the right to a fair hearing, as a general principle of Community law, is derived from fundamental rights which are also based in part on the ECHR, and in particular Article 6 of that Convention.

48. It may therefore be assumed that, if the legal principle of the right to a fair hearing is invoked before the Community judicature — as it was by the appellant at first instance [22] — that also includes, by implication, a reference to Article 6 of the ECHR.

20 — Paragraph 87 of the contested judgment reads: 'However, in so far as the sharing key document contains specific information corresponding to the information in other documents, in particular Mr Verluca's statements, those matters must be regarded as mutually supporting.'

21 — For very recent confirmation of that case-law, see Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 65.

22 — See, in more detail, paragraph 77 of the contested judgment.

49. I am therefore of the opinion that this plea is admissible.

50. In the course of time, the legal principle of the right to a fair hearing has been increasingly elaborated and specified with respect to the Commission's administrative investigations into infringements of Articles 81 EC and 82 EC. It is the result of interaction between the Community judicature, the Commission in the exercise of its administrative practice and the Community legislature, which has codified the development of administrative practice and case-law in the relevant procedural provisions. [23]

51. The principle of the right to a fair hearing implies at least the following rights for the undertakings against which the investigation is directed:

— the guarantee of advance notice of the objections to which the undertakings concerned must have an opportunity to respond; [24]

— the right of access to the file: the Commission is obliged to disclose the documentary evidence with which it substantiates its allegations, unless that evidence contains business secrets and other confidential information that must not be disclosed; [25]

— the right to have an opportunity to respond in writing to the objections; [26]

— the right to an oral hearing. The undertakings concerned are entitled to make known orally at a hearing their views on the objections raised against them. [27]

52. The production of evidence in competition cases is characterised by special problems, which were recently summarised again

23 — This is clearly expressed in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), and in Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 2004 L 123, p. 18).

24 — The requirements with which the statement of objections must comply have already been set out in an extensive body of previous decisions including, inter alia, Case 41/69 *ACF Chemiefarma* v *Commission*, *'Quinine cartel'* [1970] ECR 661, paragraphs 90 to 96; Case 48/69 *ICI* v *Commission*, *'Dyestuffs'* [1972] ECR 619, paragraphs 21 to 25; Joined Cases 100/80 to 103/80 *Musique Diffusion française* v *Commission* [1983] ECR 1825, paragraphs 12 to 17. They are now laid down in Article 27(1) of Regulation No 1/2003 and Article 11(2) of Regulation No 773/2004 (cited in footnote 23).

25 — This right has been recognised in principle by the Court of Justice in Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 11; *Musique Diffusion française* v *Commission* (cited in footnote 24), paragraphs 24 to 30; Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraphs 21 to 30; and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 68. The right of access to the file is now enshrined in Article 27(2) of Regulation No 1/2003 and Article 15 of Regulation No 773/2004 (cited in footnote 23).

26 — This right has now been codified in Article 10 of Regulation No 773/2004 (cited in footnote 23).

27 — This right has now been codified in Article 12 of Regulation No 773/2004.

by the Court of Justice in the *Aalborg-Portland* judgment: [28]

— it is normal for activities connected with anti-competitive practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum;

— even the few documents evidencing unlawful contact between traders will normally be only fragmentary and sparse;

— in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

53. In addition to those inherent evidential problems, there are also the limitations to which the Commission is subject in the exercise of its powers of investigation. I have in mind here inter alia the limitation *ratione loci* of those powers to the territory of the Community and the limitations arising from the right of addressees of the investigation to remain silent and not to incriminate themselves, which also played a role in the investigation leading to the Commission decision on which this case is based. [29]

54. A particular limitation of the Commission's powers in its investigation of anti-competitive practices was that it did not have the power to question persons in order to obtain information relevant to that investigation. Since the entry into force of Regulation No 1/2003, it has certainly had that power, provided that the persons concerned consent to be interviewed. [30] The relative weakness of that power is clear from the fact that the Commission cannot summon persons to give evidence or examine them under oath, and cannot impose fines if the information given is incorrect or misleading.

55. Consequently, oral evidence, which is so important in national criminal proceedings and to which the case-law of the European Court of Human Rights cited by the

28 — Cited in footnote 25, paragraphs 55 to 57.

29 — See *Mannesmannröhren-Werke* v *Commission* (cited in footnote 16).

30 — Article 19(1) of Regulation No 1/2003 and Article 3 of Regulation No 773/2004 (cited in footnote 23).

appellant relates, can play only a very minor role in the investigation of, and imposition of penalties for, anti-competitive practices.

56. The main focus for the production of evidence in investigations under, and the enforcement of, Community competition law must therefore be on written documents, however difficult it may be in practice to secure them.

57. Where the production of evidence is based on written documents, the complication arises that those documents may contain business secrets or other information which must not be disclosed or may be disclosed only under great restrictions. So far as concerns material obtained from undertakings which are the subject of investigation, the observance of that confidentiality, for the protection of the legitimate interests of the defendant undertakings, is one of the aspects of the legal principle of the right to a fair hearing. The Community judicature monitors its observance strictly. [31]

58. It is not only the undertakings under investigation that may have obvious economic and legal interests in the confidentiality of the information provided by them or in the non-disclosure of their identity, but also other natural and legal persons who are involved in the investigation as injured parties, complainants or informants. The Court of Justice has also acknowledged that in its case-law. [32]

59. In view, on the one hand, of the importance which documentary evidence provided by third parties may have in the investigation of anti-competitive agreements and practices and for the construction of the evidence of the existence of such agreements and practices, and, on the other hand, of the interest of the third parties concerned in the non-disclosure of their identity or of information from which their identity may be deduced, I am of the opinion that the case-law of the European Court of Human Rights cited by the appellant, which relates to the permissibility in criminal proceedings of using anonymous witness statements or documents in which those statements are recorded, cannot be used to dispute the admissibility as evidence of documents which have been provided by third parties whose anonymity must be safeguarded.

60. Apart from the fact that those judgments of the European Court of Human Rights provide no basis for the application of the

31 — Inter alia, the order of the Court of First Instance in Joined Cases T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537.

32 — *Adams* v *Commission* (cited in footnote 4) and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 26.

criteria they lay down for statements by anonymous witnesses in criminal cases [33] to the documentary evidence which is adduced to substantiate an infringement during administrative investigation and enforcement procedures under Community competition law, such an application by analogy could seriously complicate the already difficult task of producing evidence for infringements.

61. I would further observe in this connection that by no means will it always be possible to ascertain the author(s) and precise origin of documentary evidence obtained, not from third parties, but from defendant undertakings, since there may be obvious reasons for concealing those particulars.

62. The above does not affect the possibility of complying with the legal principle of the right to a fair hearing. For that purpose, three conditions must be satisfied.

63. Firstly, where documents whose source must remain anonymous are adduced in evidence against undertakings, they must be afforded the opportunity to inspect those documents and to oppose them both in writing and orally and be able to adduce documents or other evidence in rebuttal.

64. Secondly, both the Commission during the investigation and the Court of First Instance in its assessment at first instance must adopt a critical approach in assessing the probative value of such documents, and look carefully into any indicia which may cast doubt on their reliability and authenticity.

65. Thirdly, when applying the principle of the unfettered adduction of evidence established in the case-law, [34] it is essential to guard against infringements of the competition provisions of the EC Treaty being substantiated exclusively or predominantly by means of documents whose origin or authors must remain unknown to the defendant.

66. To conclude my assessment of this plea, I find that the Court of First Instance satisfied those three conditions in the contested judgment.

33 — Those criteria are listed in paragraph 32 of the judgment of the European Court of Human Rights in *Visser v. Netherlands* (cited in footnote 11) in which the earlier case-law of the European Court of Human Rights is summarised by the Netherlands Supreme Court.

34 — See, in this connection, the Opinion of Judge Vesterdorf acting as Advocate General in *Rhône-Poulenc* v *Commission* (cited in point 15 above) at II-869 and II-954, and *Met-Trans and Sagpol* (also cited in point 15), paragraph 27.

67. The appellant was afforded the opportunity to bring forward its arguments against the probative value of the sharing key document.

68. The Court of First Instance then assessed those arguments and concluded in paragraph 86 of the contested judgment 'that [the sharing key document's] credibility is necessarily reduced by the fact that the context in which it was drafted is largely unknown and because the Commission's assertions in that regard cannot be verified'.

69. Finally, in paragraph 94, the Court of First Instance expressly confirmed that the sharing key document was of only incidental significance in the evaluation of the evidence for the existence of the infringement at issue: 'It follows from all of the foregoing that the sharing key document retains a certain probative value as one of a number of coherent indicia identified by the Commission which corroborate certain of the essential assertions in Mr Verluca's statements concerning the existence of a market-sharing agreement affecting seamless OCTG tubes. ...'

70. I therefore conclude that the appellant's first plea is unfounded.

B — *The second plea: misapplication of Article 81 EC in respect of Article 2 of the decision*

1. The reasoning of the Court of First Instance

71. The second plea concerns the part of the contested judgment in which the Court of First Instance held that Mannesmann had indeed committed the infringement of Article 81(1) EC referred to in Article 2 of the decision.

72. That part consists of extensive passages (paragraphs 135 to 206) of the contested judgment, which cannot be reproduced in full here.

73. Briefly summarised, the Court of First Instance held that, by concluding an agreement for the supply of plain end OCTG pipes and tubes with Corus, the appellant infringed the prohibition on the conclusion of — horizontal — agreements which restrict competition. The Court of First Instance based that conclusion on the fact that Vallourec and Dalmine had concluded similar agreements with Corus approximately two years earlier. The three European producers thus shared among themselves the supply to Corus of plain end OCTG pipes and tubes. [35]

35 — Paragraph 188 of the contested judgment.

74. The Court of First Instance accepted the following as further evidence of the existence of restrictive agreements between those three of Corus's suppliers:

— the existence of similar indexation clauses in the supply contracts which they had concluded with Corus; [36]

— the existence of a document entitled 'Reflections on the VAM contract', dated 23 March 1990, the content of which accurately reflects the agreements which Corus subsequently concluded with the three other European producers; [37]

— a meeting between the four European producers in 1993 in order to coordinate their position, partly in the light of the forthcoming closure by Corus of its threading facility; [38]

— the unusually long duration of the supply contracts between Corus and the three other European producers. [39]

75. The Court further held that Regulation No 2790/1999 [40] could not apply to the infringement imputed to Mannesmann, since the contested decision was adopted on 8 December 1999 and Article 2 of the decision relates, so far as Mannesmann is concerned, to a period beginning in 1993 and ending in 1997, that is, to a period which ended before the entry into force of Regulation No 2790/1999 on 1 June 2000. Even if, in the light of that regulation, an exemption could be considered, that would have required a request for exemption under Article 4 of Regulation No 17. In the absence of such a request, there is no need to consider whether Article 81(3) EC is applicable. [41]

2. The appellant's complaints

76. The appellant puts forward four complaints against the finding of the Court of First Instance in paragraph 206 of the contested judgment that the Commission was correct to conclude that the supply contracts constituted the infringement found in Article 2 of the contested decision and therefore established its existence to the requisite legal standard, and that the add-

36 — Paragraphs 165 and 166 of the contested judgment.

37 — Paragraphs 182 and 183 of the contested judgment.

38 — Paragraph 187 of the contested judgment.

39 — Paragraph 164 of the contested judgment.

40 — Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21).

41 — Paragraphs 172 and 173 of the contested judgment.

itional evidence confirms the correctness of the Commission's argument that those contracts formed part of a wider common policy affecting the market in standard OCTG tube.

77. Firstly, it has not been established to the requisite legal standard that the producers concerned were aware of each other's supply contracts with Corus. In its evaluation of the relevant evidence, the Court of First Instance did not observe the — stringent — requirements which, according to the case-law, [42] must be applied to a finding of the existence of mutually coordinated conduct.

78. Secondly, the Court of First Instance wrongly attached no significance to the fact that Vallourec's, Dalmine's and Mannesmann's supply contracts with Corus were not concluded at the same time.

79. Thirdly, the Court of First Instance wrongly concluded from the duration of the contracts and from the price indexation formulae connected with those contracts that there was horizontal coordination between the suppliers concerned.

80. Fourthly, the considerations relied on by the Court of First Instance with regard to the applicability of Regulation No 2790/1999 are either incorrect or incomplete. The Court should have taken into account Regulations Nos 1983/83 and 1984/83, [43] which were in force at the time, and accordingly excluded the application of Article 81(1) EC to the contract between the appellant and Corus.

3. The Commission's arguments

81. The Commission submits that this plea cannot succeed in so far as it is directed against the findings of the Court of First Instance with regard to the horizontal nature of the supply agreement. In paragraph 179 of the contested judgment, the Court of First Instance states that the existence of the infringement found in Article 2 of the contested decision is established to the requisite legal standard and that there is, strictly speaking, no need to examine further the Commission's reasoning as regards the collusion between the four European producers.

42 — The appellant refers here to Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 65, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 4027.

43 — Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ L 173, p. 1) and Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (OJ L 173, p. 5).

82. Only two complaints could succeed, namely, that the price formula in the contracts does not give rise to any objections from a point of view of competitive relations and the claim that the Court of First Instance should not have examined the lawfulness of the agreement concluded with Corus solely on the basis of Article 81(1) EC, but also on the basis of Article 81(3) EC, and in particular of Regulations Nos 1983/83 and 1984/83 relating to block exemptions.

83. As regards the admissibility of the first three of the appellant's complaints, the Commission observes that they are primarily directed against its decision and not against the assessment by the Court of First Instance of the probative value of the evidence. In so far as these complaints are expressly directed at the contested judgment, they contain only a rejection of the findings of fact made by the Court of First Instance, without showing how, in its assessment of the facts, the Court incorrectly assessed the probative value of the various items of evidence.

84. This is in fact a disguised attempt to elicit a reassessment of the factual context assessed by the Court of First Instance. These complaints therefore exceed the scope of an appeal which, pursuant to Article 58 of the Statute of the Court of Justice, must be limited to points of law.

85. These arguments also apply in full to the arguments which the appellant puts forward against the conclusions which the Court of First Instance drew from the price formula in the contracts.

86. Finally, the complaint to the effect that the Court of First Instance should automatically have exempted the supply contract from the application of Article 81(1) EC is being put forward on appeal for the first time and is therefore inadmissible.

4. Assessment

87. The Commission has, in my view, rightly pointed out that a considerable part of the complaints in support of this plea cannot succeed. The complaints in question are those by which the appellant seeks to show that the Court of First Instance wrongly concluded that the agreement for the supply of plain end, standard OCTG pipes and tubes which it concluded with Corus in 1993 formed part of a horizontal agreement by which the four European producers shared the British market for standard OCTG pipes and tubes among themselves.

88. The Court's observation in paragraph 179 of the contested judgment to the effect that the infringement found in Article 2 of

the decision at issue is established to the requisite legal standard, from which it follows that 'there is, strictly speaking, no need to examine further the Commission's reasoning as regards the collusion between the four European producers', admits of no other conclusion than that the Commission's reasoning in question is, at best, of subordinate importance in the opinion of the Court of First Instance.

89. That is confirmed in paragraph 206 of the contested judgment, which reads as follows: 'In the light of the foregoing, it must be concluded that the Commission was correct to conclude in the contested decision that the supply contracts constituted the infringement found in Article 2 of the contested decision and therefore established its existence to the requisite legal standard. It should also be noted, *for the record,* [44] that the additional evidence taken into account by the Commission confirms the correctness of its argument that those contracts form part of a wider common policy affecting the market in standard OCTG tube.'

90. I therefore conclude that the complaints in question, namely those set out in points 77 and 78 above, as well as that set out in point 79 in so far as it relates to the duration of the supply contracts, can be disregarded as they are ineffective.

91. As for the part of the complaint set out in point 79 that relates to the conclusions which the Court of First Instance drew in paragraphs 165 to 167 from the price indexation formulae included in the supply contracts, I am of the opinion that it is inadmissible.

92. The appellant substantiates that complaint with the rather laconic assertion that that price indexation formula is unobjectionable from the point of view of competition. In particular, neither the Commission nor the Court of First Instance has established that, in that regard, any illegal exchange of information took place between the parties concerned.

93. Since the appellant omits here to explain whether and how the Court of First Instance made errors in this respect in the evaluation of the evidence on which it based its findings, I cannot see this part of the complaint in question as anything but a disguised request for a review of the assessment of the facts by the Court of First Instance. According to the settled case-law of the Court of Justice, such a request is inadmissible. [45]

94. I am of the view that the last complaint, which is set out in point 80 above, is inadmissible since it was raised too late.

44 — Emphasis added.

45 — Of the now abundant case-law, I shall confine myself to a reference to Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraph 43.

95. I can find no objection to the response, in itself, of the Court of First Instance, in paragraphs 172 and 173 of the contested judgment, to the arguments which the appellant bases on Regulation No 2790/1999.

96. I do not consider it plausible to claim that the Court of First Instance should then have gone on to ascertain of its own motion whether Regulations Nos 1983/83 and 1984/83, which were in force at the time of the conclusion of supply agreements, were applicable to those agreements.

97. I find no support for that claim in the existing case-law, whereas I do find precedents which are against it. [46]

98. It was, moreover, for the appellant, if it was of the opinion that, pursuant to Regulations Nos 1983/83 and 1984/83, the supply agreements should have been covered by the block exemptions provided for in those regulations, to put forward that argument during the administrative investigation and the proceedings at first instance.

99. The discussion at the hearing between the appellant and the Commission as to whether, in the light of their purpose and meaning, the aforementioned agreements might in fact fall within the scope of the relevant block exemptions, serves only to illustrate the point that the latter were being invoked at the wrong time and before the wrong court.

100. I therefore conclude that part of the appellant's second plea is inadmissible and that the remainder cannot succeed.

C — *The third plea: breach of the principle of equality in the assessment of the fine imposed*

1. Relevant passages of the contested judgment

101. In paragraph 295 et seq. of the contested judgment, the Court of First Instance examines in detail the appellant's claim that it cooperated in the investigation carried out by the Commission, which led to the decision at issue. The Commission assessed that attitude as unsatisfactory:

— compared with Vallourec, which on account of its cooperation obtained a 40% reduction in the fine;

46 — Case C-265/97 P *VBA* [2000] ECR I-2061, paragraph 114.

— compared with Dalmine, which on account of its cooperation obtained a 20% reduction in the fine.

In addition, the Commission wrongly held against the appellant the fact that it had brought an action before the Court of First Instance against a Commission decision pursuant to Article 11(5) of Regulation No 17,[47] whereas it adopted a much more lenient position towards Dalmine, which had brought a similar action.

102. In paragraphs 297 to 301 of the contested judgment, the Court of First Instance compares the cooperation which Vallourec gave in its investigation, in particular in the person of Mr Verluca, with the cooperation given by Mannesmann, in particular in the person of Mr Becher.

103. In paragraph 302, the Court of First Instance then concludes that the information which the Commission received from Mannesmann before the statement of objections was issued was not comparable to that provided by Vallourec.

47 — *Mannesmannröhren-Werke* v *Commission* (cited in footnote 16).

104. In paragraphs 303 to 305, the Court of First Instance then compares Dalmine's cooperation with the Commission with Mannesmann's, and concludes in paragraph 306 that Mannesmann's line of argument does not justify the application of the second indent of Section D.2 of the Leniency Notice with a view to reducing the fine imposed on it.

105. In paragraphs 307 to 309, the Court of First Instance goes on to explain why there is no justification for a reduction in the fine under Section 3 of the guidelines on the method of setting fines.

106. Finally, the Court of First Instance assesses Mannesmann's conduct as a party to the proceedings in Case T-112/98, and in paragraph 312 considers it, taken as a whole, to have been uncooperative.

2. The appellant's complaints

107. In support of this plea, the appellant puts forward three complaints, the first two of which concern differences which were, in its view, unjustified in the assessment of

Vallourec's or, as the case may be, Dalmine's conduct as compared with its own conduct during the administrative procedure. The third complaint is directed against the conclusions which the Court of First Instance draws from the procedure in Case T-112/98.

108. Invoking the principle of equal treatment in the imposition of fines in competition proceedings, as developed in the case-law, [48] the appellant claims that the Court of First Instance minimised its contribution, as compared with Vallourec's, to the Commission's investigation.

109. More specifically, the Court of First Instance acted in contravention of the rule that account must be taken, in the application of the Leniency Notice, of any contribution which makes the Commission's task easier before sending the statement of objections. [49]

110. In the present case, Mannesmann produced Mr Becher's statement, by which it confirmed its involvement in the presumed infringement of the competition rules, before the Commission had communicated its objections. Moreover, it is apparent from the decision itself that Mr Becher's statement was an important item of evidence for the Commission.

111. Although Mr Verluca's statements may have been rather more detailed and extensive, that — minor — difference does not justify such a substantial difference in treatment in the determination of the fine, since the Court of First Instance deemed a 40% reduction justified for Vallourec, whereas in contrast there is no reduction at all for Mannesmann.

112. The Court of First Instance also undervalued Mannesmann's attitude in compari son with Dalmine's. The former did not actually challenge the objections, whereas the latter expressly acquiesced in them. The appellant is of the opinion that the second indent of Section D.2 of the Leniency Notice does not require such express acceptance of the objections. In any case, it considers that a 20% reduction for Dalmine as opposed to no reduction for Mannesmann overvalues by far the mere formal difference between the two courses of conduct.

113. By its third complaint, Mannesmann contests the conclusions which the Court of First Instance drew from its action against

48 — Inter alia, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 237, and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 240.

49 — In the appellant's submission, the Court of First Instance confirmed the existence of this rule in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* [2004] ECR II-1181, paragraph 435.

the Commission's decision of 15 May 1998 in Case T-112/98. The fact that it successfully made use of its rights of defence in that case should not be held against it in the assessment of the reasonableness of the fine imposed on it.

3. The Commission's arguments

114. The Commission is of the opinion that the three complaints in support of the third plea are inadmissible, since the answer to the question whether an undertaking cooperated in the finding of an infringement of the competition rules and the assessment of the significance of that cooperation in comparison with that of other undertakings is factual in nature and implies an appraisal of facts. [50] The Court of First Instance alone has jurisdiction in that regard, and not the Court of Justice on appeal.

115. Moreover, the appellant has not claimed that the Court of First Instance made material errors in its appraisal of the facts or of the evidence.

116. The Commission then refers to the settled case-law that it is not for the Court of Justice, in the context of an appeal, to substitute its own assessment of the fairness of the amount of a fine for that of the Court of First Instance. [51]

117. In essence, the Commission challenges the first complaint by stating that, in paragraphs 299 and 300, the Court of First Instance carefully assessed the differences between the cooperation which the Commission received from Vallourec, through Mr Verluca, and from Mannesmann, through Mr Becher. Furthermore, the appellant has not shown that the Court of First Instance misapplied the law in its review of the use made by the Commission of the discretion to which it is entitled in the determination of the fines.

118. The second complaint is also clearly unfounded since it is based on a misinterpretation of the second indent of Section D.2 of the Leniency Notice. Under that provision, an undertaking may benefit from a reduction of 10 to 50% of the fine if, after receiving a statement of objections, it informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

50 — Order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4437, paragraph 39.

51 — Inter alia, Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 151.

119. Having regard also to the differences in the legal consequences attaching, in Community competition law, to whether or not the relevant facts are expressly admitted, [52] there was in this case no difference in treatment which the Court of First Instance should have rectified.

120. As regards the third complaint, the Commission points out that, since it concerns grounds added merely for the sake of completeness by the Court of First Instance, it cannot succeed and is therefore inadmissible.

121. Moreover, the account and assessment of the facts given by the Court of First Instance in paragraphs 311 and 312 of the contested judgment are correct and it was entitled to infer from them that Mannesmann did not cooperate effectively during the administrative procedure.

4. Assessment

122. I have reproduced the complaints and arguments of the parties in relative detail above in order thereby to convey the factual character of the arguments exchanged between the parties.

123. The factual character of those arguments stems from the fact that the assessment before the Court of First Instance of the relevant parts of the contested decision, dealing with the calculation of the fines and their reduction, is also concerned primarily with an appraisal of facts and circumstances, which is not subject to reassessment on appeal.

124. Viewed in that light, the arguments put forward by the Commission against the admissibility of all three complaints are prima facie convincing.

125. Only if, and in so far as, there is plausible prima facie evidence that the Court of First Instance made manifest errors in that appraisal and, for example, wrongly disregarded facts and circumstances which, had they been properly assessed as part of that appraisal, must have resulted in a different final appraisal, can that be rectified on appeal. [53]

126. However, the Court of First Instance did not, either in assessing the complaint at first instance that the Commission, in its application of the Leniency Notice, treated Mannesmann differently from Vallourec, or

52 — See Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10119, paragraph 39, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 227.

53 — See, inter alia, Case C-390/95 P *Antillean Rice Mills and Others* [1999] ECR I-769, paragraph 29, and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 49.

in comparing Mannesmann's response to the statement of objections with that of Dalmine, overlook facts which might support the claim that the principle of equality was infringed in the determination of the fines imposed.

127. In the comparison between Mannesmann and Vallourec, the Court of First Instance explains in a convincing manner, in paragraphs 299 to 301, why Vallourec's cooperation through Mr Verluca was both qualitatively and quantitatively of a completely different order from that of Mannesmann through Mr Becher.

128. In the comparison between Mannesmann and Dalmine, the Court of First Instance, having regard to the wording of the second indent of Section D.2 of the Leniency Notice, drew the correct conclusion from the fact that Mannesmann, unlike Dalmine, did not expressly inform the Commission that it did not explicitly contest the facts on which the Commission based its allegations. In the light of the differing legal consequences attaching to the different responses of the two undertakings, [54] the difference in the amount of the fines does not, therefore, constitute a legally relevant inequality of treatment.

54 — See point 119 and footnote 52 above.

129. I consider the third complaint inadmissible since it is directed against a consideration added merely for the sake of completeness and therefore automatically ineffective.

130. For the sake of completeness, I would add that the Court of First Instance was entitled to hold that a cooperative attitude was not displayed by conduct the net effect of which was that Mannesmann never provided the information which, with the exception of the action brought by it against the relevant decision and which gave rise to the judgment in Case T-112/98, it should have provided.

131. I therefore conclude that the third plea is inadmissible in its entirety.

VI — Costs

132. Since the appellant has been unsuccessful in all the pleas put forward by it and the Commission has applied for costs, I conclude accordingly, applying Article 69(2) of the Rules of Procedure.

VII — Conclusion

133. In the light of the foregoing, I propose that the Court should:

(1) dismiss the appeal in its entirety;

(2) order the appellant to pay the costs.