Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 8 December 2016[1]

Case C-85/15 P, Joined Cases C-86/15 P and C-87/15 P, Cases C-88/15 P and C-89/15 P

Feralpi Holding SpA (C-85/15 P)
Ferriera Valsabbia SpA and Valsabbia Investimenti SpA (C-86/15 P)
Alfa Acciai SpA (C-87/15 P)
Ferriere Nord SpA (C-88/15 P)
Riva Fire SpA, in liquidation (C-89/15 P)
v

European Commission

(Appeals — Competition — ECSC Treaty — Rights of the defence — Statement of objections — Oral hearing — Advisory Committee — Excessive length of the proceedings before the General Court — Repeated infringement — Public distancing

Unlimited jurisdiction

1. In their appeals, Feralpi Holding ('Feralpi'), Ferriera Valsabbia and Valsabbia Investimenti ('Valsabbia'), Alfa Acciai, Ferriere Nord and Riva Fire (collectively, 'the appellants') essentially ask the Court to set aside the judgments of the General Court[2] by which the latter dismissed (in whole, or in large part) their actions for annulment of a Commission decision, adopted pursuant to Articles 7(1) and 23(2) of Council Regulation (EC) No 1/2003,[3] which fined them for taking part, between 1989 and 2000, in a cartel on the market for concrete reinforcing bars.

2. These appeals raise a number of procedural issues, such as the proper manner to conduct the procedure under Regulation No 1/2003 and Regulation (EC) No 773/2004,[4] the conditions under which the aggravating circumstance of a repeated infringement is applicable, and the remedies available in case of the excessive length of the proceedings before the General Court. For reasons of procedural economy, those issues will be examined jointly in the present Opinion.

1 Original language: English.

2 Judgments of 9 December 2014, *Feralpi* v *Commission*, T-70/10, not published, EU:T:2014:1031; *Riva Fire* v *Commission*, T-83/10, not published, EU:T:2014:1034; *Alfa Acciai* v *Commission*, T-85/10, not published, EU:T:2014:1037; *Ferriere Nord* v *Commission*, T-90/10, not published, EU:T:2014:1035; and *Ferriera Valsabbia and Valsabbia Investimenti* v *Commission*, T-92/10, not published, EU:T:2014:1032 ('the judgments under appeal').

3 Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

4 Commission Regulation of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

I – Legal framework

A – The Treaty establishing the European Coal and Steel Community

3. According to Article 65 CS:

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

(a) to fix or determine prices;

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

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

…

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

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

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

4. By virtue of its Article 97, the ECSC Treaty expired on 23 July 2002.

B – Regulation No 1/2003

5. Article 7(1) (‘Finding and termination of infringement’) of Regulation No 1/2003 provides:

‘Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of [Article 101 or of Article 102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. …’

6. According to Article 14 (‘Advisory Committee’) of the same regulation:

‘1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. …

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. … The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. …

…

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account. …'

7. Under the terms of Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, inter alia, they either intentionally or negligently infringe Article 101 or Article 102 TFEU.

8. Finally, Article 27(1) of Regulation No 1/2003 provides:

'Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. …'

C – Regulation No 773/2004

9. Article 10 of Regulation No 773/2004[5] ('Statement of objections and reply'), provides:

'1. The Commission shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. …

3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. …'

10. Under the terms of Article 11 ('Right to be heard') of Regulation No 773/2004:

'1. The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.'

5 As in force at the material time.

11. In accordance with Article 12 of Regulation No 773/2004:

'The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.'

12. Pursuant to Article 14(3) ('Conduct of oral hearings') of the same regulation, the Commission is to 'invite the competition authorities of the Member States to take part in the oral hearing'.

II – Background to the proceedings

13. From October to December 2000, the Commission carried out a number of inspections at the offices of certain Italian undertakings engaged in the production of reinforcing bars and at the offices of an association of Italian steel undertakings. It also requested them to supply information pursuant to Article 47 CS. On 26 March 2002, the Commission commenced the administrative procedure and adopted its objections under Article 36 CS. The applicants lodged written comments on the statement of objections and were heard at a hearing on 13 June 2002. On 12 August 2002, the Commission issued a supplementary statement of objections. In that supplementary statement of objections the Commission explained its position concerning the further proceedings following the expiry of the ECSC Treaty and declared that it had initiated a procedure under Regulation No 17/62.[6] The applicants submitted written comments on the supplementary statement of objections. A second hearing, in the presence of representatives of the Member States, took place on 30 September 2002.

14. On 17 December 2002, the Commission adopted Decision C(2002) 5087 final relating to a proceeding under Article 65 CS (Case COMP/37.956 — Reinforcing bars; 'the 2002 decision') in which it found that several undertakings (including the appellants) had breached Article 65(1) CS and imposed fines on them. A number of those undertakings challenged the 2002 decision before the General Court.

15. By judgments of 25 October 2007 ('the 2007 judgments'), the General Court annulled the 2002 decision.[7] The General Court considered that, having regard to the complete absence of any reference to Article 3 and Article 15(2) of Regulation No 17/62, the procedural legal basis of that decision was Article 65(4) and (5) CS. It then pointed out that, according to settled case-law, the provision constituting the legal basis of a measure must be in force at the time of its adoption, and observed that Article 65(4) and (5) CS had expired on 23 July 2002. The General Court thus concluded that the Commission no longer had competence to establish an infringement of Article 65(1) CS, and to impose fines on the undertakings responsible, on the basis of Article 65(4) and (5) CS after the expiry of the ECSC Treaty.

16. By letter of 30 June 2008, the Commission informed the appellants and the other undertakings concerned of its intention to re-adopt a decision on the basis of a different legal provision. The Commission also stated that, given the limited scope of the 2007 judgments, the new decision would be based on the evidence presented in the statement of objections and in the supplementary statement of objections sent to the undertakings concerned in 2002. The undertakings concerned were given a deadline to submit their observations, which they did.

6 EEC Council Regulation [of 6 February 1962]: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

7 Judgments of 25 October 2007, *SP and Others* v *Commission*, T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317; *Riva Acciaio* v *Commission*, T-45/03, not published, EU:T:2007:318; *Feralpi Siderurgica* v *Commission*, T-77/03, not published, EU:T:2007:319; and *Ferriere Nord* v *Commission*, T-94/03, not published, EU:T:2007:320.

17. On 30 September 2009, the Commission adopted Decision C(2009) 7492 final relating to a proceeding under Article 65 CS (Case COMP/37.956 — Reinforcing bars, re-adoption). That decision was subsequently amended by Decision C(2009) 9912 final of 8 December 2009.[8] In the contested decision, the Commission found an infringement of Article 65 CS on the part of the appellants and imposed on them a fine.

III – Procedure before the General Court and judgments under appeal

18. By their actions under Article 263 TFEU, lodged respectively on 17 February 2010 (T-92/10), 18 February 2010 (T-85/10) and 19 February 2010 (T-83/10, T-70/10, and T-90/10), the appellants requested the General Court to annul the contested decision.

19. The General Court gave judgment in all five cases on 9 December 2014, dismissing, in whole or in large part, those actions.

IV – Procedure before the Court and forms of order sought

20. By appeals lodged, respectively, on 19 February 2015 (C-85/15 P), 20 February 2015 (C-86/15 P, C-87/15 P and C-88/15 P), and 24 February 2015 (C-89/15 P), each appellant requests the Court to set aside the judgment delivered by the General Court at first instance concerning it, annul the contested decision or reduce the fines imposed on it (or, in the alternative, refer the case back to the General Court for a fresh review), and order the Commission to pay the costs. Riva Fire also requests the Court to declare that, because of their length, the proceedings before the General Court breached Article 47(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6(1) of the European Convention on Human Rights ('the ECHR'). Feralpi, Valsabbia and Alfa Acciai also request the Court to rule that there has been a breach of Article 47(2) of the Charter and Article 6(1) of the ECHR, in the event that the Court were not to reduce the fine on that ground.

21. In each case, the Commission requests the Court to dismiss the appeal and order the appellant to pay the costs.

22. By decision of the President of the Court of Justice of 7 June 2016, Cases C-86/15 P and C-87/15 P were joined for the purposes of the oral procedure and the judgment. The appellants and the Commission presented oral argument at a joint hearing held on 20 October 2016.

V – Assessment of the grounds of appeal

23. In their applications, the appellants put forward, respectively, six grounds of appeal (C-85/15 P), seven grounds of appeal (Joined Cases C-86/15 P and C-87/15 P), nine grounds of appeals (C-88/15 P) and four grounds of appeal (C-89/15 P).

24. In the present Opinion, I shall examine, in the first place, a ground of appeal which is common to all the appeals and concerns respect for the appellants' rights of defence and the proper conduct of the administrative procedure. For the reasons described below, I take the view that that ground of appeal is well founded and, as such, the judgments under appeal, as well as the contested decision, should be set aside.

8 The first decision as amended by the amending decision will be referred to as 'the contested decision'.

25. In case the Court disagrees with my assessment of that ground of appeal, I will also examine the other grounds of appeal put forward by the appellants. Most of those grounds will, however, be examined only briefly, since they appear manifestly inadmissible or unfounded.

A – Rights of the defence and proper conduct of the administrative procedure

26. The appellants criticise the General Court for having dismissed their claims alleging a breach of their rights of defence and of a number of provisions of Regulation No 773/2004.[9] Although their respective arguments differ slightly,[10] the appellants essentially argue that the General Court failed to censure the Commission's failure to follow the procedure set out in Regulations Nos 1/2003 and 773/2004 before the adoption of the contested decision.

27. The Commission defends the General Court's findings. The Commission considers that it strictly adhered to the principle of *tempus regit actum*, applying the procedural rules in force at the material time, and that the appellants were duly given the opportunity to present their views on all the substantive and procedural aspects of the case. The Commission also contends that the annulment of the 2002 decision did not invalidate the procedural steps undertaken prior to the adoption of that decision, including those undertaken when the ECSC Treaty was still in force.

28. At the outset, it seems useful to recall that, according to settled case-law, Regulation No 1/2003 enables the Commission to find and penalise, after 23 July 2002, agreements between undertakings in sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis* even though the provisions of Regulation No 1/2003 do not expressly refer to Article 65 CS. However, that is possible only where a decision under Articles 7(1) and 23(2) of Regulation No 1/2003 has been adopted following a procedure carried out in accordance with that regulation.[11] Full compliance with Regulation No 1/2003 implies — it is hardly necessary to add — compliance with its implementing Regulation No 773/2004 also.[12]

29. Against that background, it is my view that the appellants' claims on this point are well founded. As will be explained in the following, the Commission did not fully follow the procedure set out in Regulations Nos 1/2003 and 773/2004 before adopting the contested decision. A number of key procedural steps were, indeed, taken under the provisions in force under the ECSC Treaty (and only under those provisions). Yet, even if those provisions are similar, they are not identical to those laid down for the application of Articles 101 and 102 TFEU. As a result, the procedure followed by the Commission in the present cases has adversely affected the possibility for the Member States' competition authorities to participate in it. That participation is important and the failure by the Commission to ensure it cannot be overlooked.

9 *Second ground of appeal* in Case C-85/15 P, *first and second grounds of appeal* in Cases C-86/15 P and C-87/15 P, *second ground of appeal* in case C-88/15 P, and *first ground of appeal* in Case C-89/15 P.

10 In any event, the issue raised by the present grounds of appeal consist in an alleged breach of an essential procedural requirement and, accordingly, can be raised by the Court of its own motion. See, to that effect, judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, 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, EU:T:2000:77, paragraphs 477 to 488.

11 See, judgments of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission and Commission* v *ArcelorMittal Luxembourg and Others*, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 74, and *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 87.

12 See, to that effect, Article 33(1) of Regulation No 1/2003 and Recital 1 of Regulation No 773/2004.

1. Was the procedure set out in Regulations Nos 1/2003 and 773/2004 followed after the annulment of the 2002 decision?

30. In the present case, the contested decision states, in recital 370, that it was 're-adopted in conformity with the procedural rules of the [FEU Treaty] and of the secondary legislation deriving from that Treaty, in particular Regulation No 1/2003'. Therefore, it must first of all be determined whether that statement is accurate.

31. In that regard, it is not disputed that, after the annulment of the 2002 decision, there were no steps carried out in conformity with the procedure set out in Regulations Nos 1/2003 and 773/2004, with the exception of the consultation of the Advisory Committee. Indeed, a new decision — based on Articles 7(1) and 23(2) of Regulation No 1/2003 — was adopted after giving the appellants the possibility to submit their comments on the letter of 30 June 2008. No new statement of objections was issued and no new oral hearing was held before the adoption of the decision.

32. At this juncture, it may be worth pointing out that Regulations Nos 1/2003 and 773/2004 do not provide any general exception with regard to the performance of those two steps. Article 27(1) of Regulation No 1/2003 states that, before taking decisions as provided for, inter alia, in Articles 7 and 23, the Commission is to give the undertakings under investigation 'the opportunity of being heard on the matters to which the Commission has taken objection'. The Commission can base its decisions 'only on objections on which the parties concerned have been able to comment'. Article 27(2) of the same regulation provides that 'the rights of defence of the parties concerned shall be fully respected in the proceedings'. In turn, Articles 10 to 14 of Regulation No 773/2004 concern the obligation of the Commission to issue a statement of objections and, if so requested, to hold an oral hearing. The imperative mood ('the Commission shall') used in those provisions leaves no doubt as to the compulsory nature of those requirements.

33. The Commission takes the view, however, that those steps under Regulations Nos 1/2003 and 773/2004 were unnecessary in the procedures at issue since analogous steps had been undertaken before the adoption of the 2002 decision. The annulment of the 2002 decision does not, in its view, invalidate those steps. In support of its argument, the Commission refers to the case-law cited by the General Court in its judgments and, in particular, to the *PVC II* case. [13]

34. In *PVC II*, the Court dismissed the applicants' claims that their rights of defence had been breached on the ground that the Commission, after the annulment of a first decision, had not held a new hearing before adopting a fresh decision and had not consulted the Advisory Committee again. In particular, the Court recalled settled case-law according to which the annulment of an EU measure does not necessarily affect the preparatory acts, since the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred. [14]

35. Accordingly, it must be examined whether that case-law is applicable to the present cases. In my view, that case-law would be applicable in two situations: (i) if the procedure now set out in Regulations Nos 1/2003 and 773/2004 had been correctly followed before the annulment of the 2002 decision; or (ii) if the procedural steps undertaken on the basis of different procedural rules could be considered equivalent to those that ought to have been taken under Regulations Nos 1/2003 and 773/2004. These two hypotheses will be tested in turn.

13 Judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582 ('*PVC II*').

14 See, paragraphs 70 to 119 and, in particular, paragraph 73 of the judgment in *PVC II*.

2. Was the procedure set out in Regulations Nos 1/2003 and 773/2004 followed before the annulment of the 2002 decision?

36. Since Regulations Nos 1/2003 and 773/2004 were not in force at the material time, one must refer to the corresponding provisions of Regulations Nos 17/62 and 2842/98.[15]

37. This question has, however, a very straightforward answer. Recital 352 of the 2002 decision reads:

'From this perspective, the application of Regulation No 17 to the remaining part of the procedure follows the principle that the applicable procedural laws are the one[s] in force at the moment of the adoption of the measure in question. Following the same reasoning, it did not appear necessary to repeat the first hearing in which the representatives of the Member States did not participate, because the ECSC procedural law, which was in force at that time, did not provide for such participation. Moreover, as stated in the Communication [of 18 June 2002] … we should consider that the procedural measures correctly taken under ECSC provision[s] may satisfy, once the ECSC Treaty expired, the requirements of the corresponding procedural provisions of the EC Treaty. Lastly, it must be underlined that there is no formal link between the provisions concerning the participation of the Member States at [a] hearing … and those concerning the consultation of the Advisory Committee …'[16]

38. Thus, in essence, the Commission expressly stated that it had not entirely followed the procedure set out in Regulations Nos 17/62 and 2842/98. It did not consider it necessary to do so because, in its view, the procedural steps taken in the context of the ECSC framework satisfied the standards required by the corresponding EC provisions.

39. At this juncture, it must be verified whether those statements are correct. However, before doing that, I must mention the following.

40. Even prior to the adoption of the 2002 decision, the Commission did take certain procedural steps pursuant to Regulation No 17/62. In particular, as mentioned in point 13 above, the Commission adopted a supplementary statement of objections on 12 August 2002 and a second hearing, in the presence of representatives of the Member States, was held on 30 September 2002.

41. Nevertheless, it is not disputed that those steps concerned only the applicable procedural provisions and the consequences stemming from those provisions. The substantive aspects of the cases were generally not discussed, either in the supplementary statement of objections or in the second hearing. Thus, if there was a valid procedure under the EC rules, that procedure dealt only with issues of a procedural nature and not of substance.

3. Are the procedural steps taken under the provisions of the ECSC Treaty valid preparatory acts for the contested decision?

42. It must now be examined whether — as the Commission claims — the procedural steps undertaken in the context of the ECSC framework before the adoption of the 2002 decision meet the requirements of the corresponding EC/EU provisions. Indeed, as in *PVC II*, there is no doubt that in the present cases the procedural steps undertaken prior to the adoption of the 2002 decision remain, in principle, valid.

15 Commission Regulation (EC) of 22 December 1998 on the hearing of parties in certain proceedings under Articles [101 and 102 TFEU] (OJ 1998 L 354, p. 18).

16 See paragraphs 20 of the 2007 judgments.

43. Since the procedural steps invoked by the Commission were taken, for the most part, with a view to adopting a decision based on Article 65(4) and (5) CS, it must be verified whether they can be regarded as 'preparatory acts'[17] for the purpose of the adoption of a decision based on Articles 7(1) and 23(2) of Regulation No 1/2003.

44. I am of the view that they cannot. In fact, I see certain significant differences between the situation examined by the Court in *PVC II* and that in the present cases.

45. First, in the former case, the Court examined two successive decisions which had the same legal bases and which were essentially identical. Paragraph 98 of the judgment is particularly instructive in that regard; it reads: 'where, following the annulment of a decision in a competition matter, the Commission chooses to rectify the illegality or illegalities found and to adopt a new identical decision which is not vitiated by those illegalities, that decision relates to the same objections as those in respect of which the undertakings have already submitted observations'. In the present cases, however, the contested decision is not 'identical' to the previous decision annulled by the General Court. The two decisions are based on different legal provisions, which belong to two, admittedly similar and closely-related, but nonetheless also distinct, sets of rules.

46. That is no minor detail. In the system created by the EU Treaties, which is based on the principle of conferral, the choice of the correct legal basis for an act of the institutions is of constitutional significance. That choice determines whether the Union has the power to act, for what purposes it may act and the procedure that it will have to follow in the event that it acts.

47. When the Commission adopted the contested decision, it used the powers conferred on it by Regulations Nos 1/2003 and 773/2004. That is a different set of powers from those that the ECSC Treaty conferred on it prior to its expiry. As mentioned, although the two systems are largely similar, they are not identical. The use of one or another set of powers may have certain legal consequences: for example, the upper limit to the fines which the Commission may impose — an issue widely debated during the procedure before the Commission and at first instance. Obviously, there may be others.

48. In its letter of 30 June 2008, the Commission minimised the significance of this issue, stating that the annulment of the 2002 decision had limited consequences, requiring merely the use of a different legal basis. Regardless of whether that is true, the appellants were of another opinion and, arguably, they were entitled to develop their arguments in the context of the procedure laid down in Regulations Nos 1/2003 and 773/2004. It seems to me that replacing the legal basis of an act can hardly be classified as a mere 'rectification of [an] illegality', the situation which the Court was confronted with in *PVC II*.

49. Second, and more importantly, as mentioned in point 38 above, there was no procedure — carried out under the provisions of Regulations Nos 17/62 and 2842/98 corresponding to those now provided for in Regulations Nos 1/2003 and 773/2004 — that the Commission could resume so as to *immediately* proceed to the adoption of the new decision. In other words, it cannot be disputed that the procedure laid down in Regulations Nos 17/62 and 2842/98 had not been completely and consistently followed prior to the adoption of the 2002 decision.

17 Cf. judgment of 12 November 1998, *Spain* v *Commission*, C-415/96, EU:C:1998:533, paragraph 32 and the case-law cited.

50. In this context, it may be worth pointing out that Article 34(2) ('Transitional provisions') of Regulation No 1/2003 states: 'Procedural steps taken under Regulation No 17 … shall continue to have effect for the purposes of applying this Regulation'.[18] No express mention is made of steps taken under the provisions of the ECSC Treaty, in spite of the fact that that treaty had expired only a few months before Regulation No 1/2003 was adopted.

51. On that basis, the appellants claim that a new statement of objections should have been issued prior to the adoption of the contested decision.

52. In that regard, I would observe, once again, that the supplementary statement of objections of 12 August 2002 did include a reference to Regulation No 17/62 but concerned only the choice of the appropriate legal basis and other issues stemming from that. That said, it could perhaps be argued that the original statement of objections of 26 March 2002, as supplemented by the letter of 30 June 2008, might satisfy the requirements of Regulation No 1/2003.

53. On the one hand, it is true that the Court has repeatedly emphasised the key role played by the statement of objections in proceedings for infringement of the competition rules, referring to that act as an *essential procedural safeguard* to ensure respect for the undertakings' rights of defence.[19] On the other hand, however, there seems to be no major difference between a statement of objections adopted under the ECSC rules and one adopted under the EC/EU rules. In addition, although the letter of 30 June 2008 was not formally labelled 'supplementary statement of objections', it did inform the parties concerned of the objections raised against them (even if only by reference to the previous statement of objections), giving them an opportunity to comment, as required under Article 27(1) of Regulation No 1/2003 and Article 10(1) of Regulation No 773/2004.

54. Nevertheless, whether the Commission issued a statement of objections in conformity with the provisions of Regulations Nos 1/2003 and 773/2004 does not need to be discussed further since, in any event, it is clear that at least one other procedural step taken under the ECSC rules does not comply with the requirements laid down in the EC/EU rules.

55. According to Article 12 of Regulation No 773/2004, the Commission must give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they have so requested. By not issuing a new supplementary statement of objections, the Commission essentially deprived the parties of their right to request such a hearing. It is undisputed, as stated above, that no new hearing took place before the adoption of the contested decision.

56. The holding of an oral hearing is, however, a procedural step of great significance within the scheme laid down by the EU legislature for the enforcement of EU competition rules. One of the main reasons is that, pursuant to Article 14 of Regulation No 773/2003, the competition authorities of the Member States are invited to take part in the oral hearing. Their attendance at the oral hearing is not a pure formality since the representatives of those authorities form part of the Advisory Committee which, in accordance with Article 14(1) of Regulation No 1/2003, must be consulted by the Commission prior to taking any decision under, inter alia, Articles 7 and 23 of the same regulation. Although it is true, as the Commission argues, that there is no express link between those two procedural steps, it is undeniable that the first is very much instrumental to the second.

57. Therefore, the appellants should have had the opportunity to develop their arguments against the Commission's proposed decision orally, in the presence of representatives of the Member States' competition authorities. The possibility that the outcome of the proceedings would have been, at least to some extent, different cannot be ruled out since those authorities could have influenced the

18 A similar rule features in Article 19 ('Transitional provisions') of Regulation No 773/2004.

19 See, to that effect, judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraphs 93 to 95 and the case-law cited.

Commission through the Advisory Committee, which did meet before the adoption of the contested decision. As Article 14(5) of Regulation No 1/2003 states, the Commission ought to 'take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account'. The role of the Advisory Committee is — I might add — particularly important in the decentralised system of enforcement established with the entry into force of Regulation No 1/2003, as recital 19 of Regulation No 1/2003 witnesses.

58. Crucially, the General Court itself recognised that the oral hearing in which the representatives of the Member States' competition authorities participated prior to the adoption of the 2002 decision did not concern the substance of the case but only the application *ratione temporis* of the ECSC and EC Treaties to the alleged infringements.[20] Accordingly, the oral hearings held prior to the adoption of the 2002 decision cannot be considered to fulfil the requirements of Article 14 of Regulation No 773/2004, contrary to what the General Court held.

59. A debate which would have more fully involved the competition authorities of the Member States, especially the Italian one — both during the hearing and within the Advisory Committee — would have been, in my view, all the more appropriate in the present case since the alleged infringements relate to the territory of only one Member State, namely Italy. Moreover, I do not think that such a formal requirement would have meant imposing a particularly onerous or time-consuming burden on the Commission.

60. The fact that the Commission kept those authorities — to use the expression employed by the General Court in the judgments under appeal — 'fully informed' of the development of the procedure through other means is manifestly irrelevant.[21] The Commission cannot follow a *sui generis* procedure which involves the competition authorities of the Member States informally, instead of complying with the procedure laid down by the EU legislature in Regulations Nos 1/2003 and 773/2004.

61. On the basis of the above, I take the view that the procedure followed by the Commission for the adoption of the contested decision did not comply with the provisions of Regulations Nos 1/2003 and 773/2004. In particular, I am of the opinion that there has been a breach of Article 12(1) of Regulation No 773/2004 and, consequently, a breach of the appellants' rights of defence.

62. In the light of the foregoing, I conclude that the judgments under appeal erred in dismissing the appellants' claim on this issue, and should thus be set aside and the contested decision annulled.

B – Other grounds of appeal

63. If the Court disagrees with my assessment of the grounds of appeal examined above, I consider that the Court should dismiss the appeals in their entirety, with one (limited) exception as concerns Ferriere Nord's appeal. In the following, I shall address only three of the issues raised by the appeals in further detail. Most grounds of appeal will, instead, be treated only concisely since, as mentioned above, they appear manifestly inadmissible or unfounded.

20 See judgment of 9 December 2014, *Alfa Acciai* v *Commission*, T-85/10, not published, EU:T:2014:1037, paragraph 148.

21 See judgment of 9 December 2014, *Alfa Acciai* v *Commission*, T-85/10, not published, EU:T:2014:1037, paragraph 149.

1. Excessive length of the proceedings before the General Court

64. With the exception of Ferriere Nord, all the other appellants take issue with the length of the procedure at first instance.[22] They emphasise that the overall proceedings lasted for almost five years, and point out that three years and two months elapsed between the end of the written procedure and the opening of the oral procedure. In their view, the General Court failed to rule on their cases within a reasonable time, thereby breaching Article 47(2) of the Charter and Article 6(1) of the ECHR. For that reason, Feralpi, Valsabbia and Alfa Acciai request the Court to reduce the fine imposed on them, in line with the Court's judgment in *Baustahlgewebe*.[23] Alternatively, those companies request that the Court declare that, because of their length, the proceedings before the General Court breached Article 47(2) of the Charter and Article 6(1) of the ECHR. Riva Fire makes the same request to the Court.

65. I am of the view that those requests should not be granted. With regard, first, to the request for a reduction in the fines, I would observe the following.

66. As the appellants themselves acknowledge, the Court has, in a number of judgments, clarified the remedies available to private parties which consider that the Court of Justice of the European Union (that is, the Court as an institution), or more specifically one of its courts, has infringed their fundamental right to a hearing within a reasonable time. Faced with an alleged breach of that right by the General Court, in *Der Grüne Punkt* and *Gascogne Sack* the Court decided that, where there is no indication that the excessive length of the proceedings affected the outcome of the judgment under appeal, a failure to deliver judgment within a reasonable time cannot lead to the setting aside of the judgment in question. In addition, the Court held that an appellant cannot invoke again the question of the validity or the amount of a fine on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its claims directed against the General Court's findings concerning the amount of that fine and the conduct that it penalised have been rejected.[24]

67. The Court has also explained that its decision in *Baustahlgewebe* was justified by reasons of pragmatism and judicial economy but that, in principle, a claim for compensation for the damage caused by the failure by the General Court to adjudicate within a reasonable time may not be made directly to the Court in the context of an appeal. Such a claim must be brought before the General Court under Articles 268 and 340 TFEU.[25]

68. In essence, the *Baustahlgewebe* case-law seems to me to have been overruled by the Court. In any event, I do not see, in the present cases, any reason which could justify returning to that line of case-law — were it considered to be still applicable in exceptional circumstances.

69. The appellants argue that it would be appropriate to follow the *Baustahlgewebe* case-law in the present cases because the lengthy proceedings before the General Court constituted the last step of the overall procedure which included two administrative phases before the Commission[26] and another set of proceedings before the EU Courts.

22 *Sixth ground of appeal* in Case C-85/15 P and *fourth ground of appeal* in Cases C-86/15 P and C-87/15 P. As for Case C-89/15 P, Riva Fire does not refer to it as a ground of appeal but as an 'incidental request'.

23 Judgment of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608.

24 Judgments of 16 July 2009, *Der Grüne Punkt — Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraphs 190 to 196, and of 26 November 2013, *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768, paragraphs 81 to 85.

25 Judgment of 26 November 2013, *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768, paragraphs 86 to 89.

26 Incidentally, I note that both the first and the second procedures before the Commission were relatively fast (see above points 13 to 17 of this Opinion).

70. The situation in which the appellants found themselves may be unfortunate, but it is by no means exceptional. The possibility for undertakings, in a situation such as that of the appellants, to have their cases examined more than once by the EU administrative authorities and, as the case may be, by the EU judicial authorities is the natural consequence of how the drafters of the Treaties and the EU legislature conceived the system of governance in this field. In point of fact, the requirement to complete a number of procedural steps (which may well be time-consuming) before a final decision is adopted by the competent authority is intended to ensure not only a correct outcome but also the fairness of the procedure itself.

71. The length of the overall administrative and judicial procedures is, at most, an element which the EU Courts may take into account, in the context of proceedings started under Article 268 TFEU, to determine whether the appellants have a right to damages under Article 340(2) TFEU and, if so, the amount of those damages.

72. I would thus conclude that the Court should, regardless of the merit of their allegations, dismiss the request of Feralpi, Valsabbia and Alfa Acciai to reduce the amount of the fines imposed on them. As concerns, finally, the appellants' request that the Court merely declare that there has been such a breach, I suggest that the Court dismiss that request too.

73. Admittedly, in a number of cases, the Court has stated that, where it is clear in the case before it, without there being any need for the parties to adduce evidence in that regard, that the General Court breached, in a sufficiently serious manner, its obligation to adjudicate on the case within a reasonable time, the Court may note that fact in its judgment.[27]

74. I am not persuaded by the Court's approach in those cases. In those cases, the Court ruled on that issue without hearing the party responsible for the alleged breach: indeed, the other party to the appeal procedure was the Commission, not the Court of Justice of the European Union. However, as the General Court has recently confirmed, in a possible action for breach of the right to a hearing within a reasonable time by the Court of Justice of the European Union, or more specifically by one of its courts, it is that institution which should be the defendant.[28] I agree. As early as in 1973, the Court held that, 'where [the Union's non-contractual liability] is involved by reason of the act of one of its institutions, it should be represented before the court by the institution or institutions against which the matter giving rise to liability is alleged'.[29] It is, after all, only the institution responsible for the alleged breach that has not only the authority, but also the material capacity, to put forward the legal and factual arguments in its defence.

75. Therefore, it seems to me that the Court's case-law referred to by the appellants — which I do not encourage the Court to follow again in the future — makes sense only if it is limited to truly exceptional circumstances in which the length of the procedure is so manifestly and unquestionably unreasonable that, objectively, it could not be justified under any circumstance. Save in those exceptional cases, a claim of a breach of the right to a hearing within a reasonable time should necessarily be ruled on only after an *inter partes* procedure in which the defendant has been permitted to put forward its counter-arguments and, where appropriate, to offer evidence in support. As the Court has consistently stated, 'the reasonableness of a period must be appraised in the light of

27 Judgments of 26 November 2013, *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768; of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363; of 9 June 2016, *CEPSA* v *Commission*, C-608/13 P, EU:C:2016:414; and of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission*, C-617/13 P, EU:C:2016:416.

28 See, inter alia, orders of 6 January 2015, *Kendrion* v *Court of Justice*, T-479/14, not published, EU:T:2015:2; of 9 January 2015, *Marcuccio* v *European Union*, T-409/14, not published, EU:T:2015:18; and of 13 February 2015, *Aalberts Industries* v *European Union*, T-725/14, not published, EU:T:2015:107.

29 Judgment of 13 November 1973, *Werhahn Hansamühle and Others* v *Council and Commission*, 63/72 to 69/72, EU:C:1973:121, paragraph 7, confirmed in the judgment of 23 March 2004, *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174.

the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities'.[30] It seems to me that, in most cases, this assessment of all the circumstances is by no means a simple and straightforward exercise.

76. That said, I must emphasise that, although significant, a period of almost five years to rule on a group of cases such as the present ones is not necessarily unreasonable. All the more so since the troubled and lengthy history of the reinforcing bars cartel before the Commission and EU Courts appears to point to a rather complex legal situation.

77. Moreover, contrary to what the appellants allege, a period of three years and two months between the end of the written procedure and the start of the oral procedure does not indicate that the General Court has been inactive during that period. As is well known, a number of procedural steps are undertaken in that period, although they may not be apparent to the parties. Personally, I am rather sceptical that the length of the period between the end of the written procedure and the start of the oral procedure can be taken at all as a sign of inertia on the part of the General Court.[31] More generally, it seems artificial to me to try to split up the overall procedure into different phases, in order to assess the reasonableness of the duration of one or more of those phases in 'clinical isolation' from the other phases: the overall duration of the proceedings seems to me a more appropriate point of reference.

78. Therefore, I am of the view that, in the present cases, the Court does not find itself in the situation referred to in point 73 above. In the cases in point, the production by the parties of additional arguments and evidence in the course of an *inter partes* procedure seems necessary to enable the Court to adjudicate on whether the duration of the procedure before the General Court was unreasonable.[32]

79. In conclusion, this ground of appeal should be dismissed. Should the appellants consider that, in handling their case, the General Court infringed Article 47(2) of the Charter, they may lodge an action seeking damages for non-contractual liability of the Union under Article 268 and the second paragraph of Article 340 TFEU.

2. Repeated infringement

80. By its *seventh ground of appeal*, Ferriere Nord argues that the General Court erred in law in dismissing its claim that the increase of the fine imposed on grounds of repeated infringement was illegitimate because the Commission did not expressly refer to that aggravating circumstance in its statement of objections of 26 March 2002. The Commission merely stated that it would take into account all mitigating and aggravating circumstances when setting the fines, in the light of the conduct of each undertaking. Such a vague statement is, Ferriere Nord claims, inadequate to permit an undertaking to exercise its rights of defence.

30 See, inter alia, judgments of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 29; and *PVC II*, paragraph 210.

31 The chamber competent to rule on a case may well decide to 'frontload' as much as possible the work before the hearing takes place or, conversely, to hold a hearing soon after the closing of the written procedure, leaving significant parts of the work to be completed after the hearing. The choice between these options may depend on several factors: the working methods of the judges sitting in the adjudicating chamber, their case-load at any given moment and the specific characteristics of each case (e.g., whether there are many issues to be clarified at the hearing or not). Obviously, a short period of time between the written and the oral procedure helps the parties little if, subsequently, the deliberation is particularly long.

32 Cf. judgment of 14 September 2016, *Trafilerie Meridionali v* Commission, C-519/15 P, not published, EU:C:2016:682, paragraph 68.

81. In addition, by its *eighth ground of appeal*, Ferriere Nord criticises the General Court for holding that the period to be taken into account for a review of the application of that aggravating circumstance is the period between the establishment of the first infringement by the Commission and the beginning of the new unlawful conduct by the same undertaking. Ferriere Nord takes the view that that period should instead start on the day on which the first infringement ended. In its case, that would mean that some 13 years elapsed between the first and the second infringement. Arguably, given the length of that period, it is not impossible that its management was unaware of the first Commission decision and, thus, in accordance with the principle of *in dubio pro reo*, the aggravating circumstance for repeated infringement should not have been applied.

82. Finally, by its *ninth ground of appeal*, Ferriere Nord claims that — if the Court were to accept its fourth ground of appeal [33] — the infringement would have to be considered less serious than that alleged in the contested decision. If that is so, the General Court erred in interpreting and applying the principle of proportionality: an increase of 50% of the fine for less serious conduct appears out of proportion.

83. I shall start with the *eighth ground of appeal*.

84. From the outset, I would call to mind that, according to settled case-law, the fact that infringements are repeated (commonly known as 'recidivism') is one of the factors to be taken into consideration in the analysis of the gravity of an infringement of EU competition rules for the purposes of determining the amount of the fine to be imposed upon the offender. [34] The reason, as explained by the General Court, is that 'a repeated infringement constitutes proof that the sanction previously imposed was not sufficiently deterrent'. [35] Recidivism is, accordingly, generally regarded as justifying higher fines, [36] with a view to inducing the offender to change its future conduct. [37]

85. However, the Court has also made clear that, in order to respect the principles of legal certainty and proportionality, any increase in the fine imposed upon an undertaking on grounds of recidivism cannot be automatic. In that context, the Commission is to take into account all the circumstances of each case and notably the time elapsed between the infringement being investigated and a previous breach of the competition rules. [38]

86. Against that background, Ferriere Nord's *eighth ground of appeal* seems unfounded. First, I am of the view that the method followed by the General Court to calculate the period in question — the time elapsed between the establishment of the first infringement by the Commission, and the beginning of the new unlawful conduct by the same undertaking — is correct, for the reasons explained in paragraphs 342 and 343 of the judgment under appeal: a repeated infringement necessarily requires a finding by the Commission of a previous infringement, and comes into existence when the conduct in breach of Article 101 or 102 TFEU begins. Therefore, the General Court was correct in holding that the period in question in the present case amounted to less than four years.

33 That ground of appeal concerns the nature and duration of Ferriere Nord's participation in the infringement: see point 117 below of this Opinion.

34 See, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, 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, EU:C:2004:6, paragraph 91; of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraphs 26, 29 and 39; and of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraphs 61 to 65.

35 Judgment of 27 June 2012, *YKK and Others* v *Commission*, T-448/07, not published, EU:T:2012:322, paragraph 211 and the case-law cited.

36 See, for example, OECD, Roundtable on promoting compliance with competition law — Issues paper by the Secretariat, DAF/COMP(2011)4 of 1 June 2001, item 2.

37 Judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 39.

38 Judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 39, and judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraphs 69 and 70.

87. Second, the fact that one or more persons within the current management of the company may have ignored the existence of that decision, or the legal consequences stemming from it, is of no importance.[39] To begin with, the allegation that Ferriere Nord's senior management might have been unaware of the previous Commission decision is hard to believe. On the one hand, the Commission referred at the hearing to a document, mentioned in the contested decision, which showed that, in 1997, Ferriere Nord's management was aware of the previous Commission decision as well as of the new and ongoing infringement. Ferriere Nord did not dispute that. On the other hand, the decision 89/515/EEC[40] was challenged before the EU Courts by Ferriere Nord in procedures which ended in July 1997.[41] In this context, it may be worth pointing out that financial statements require a company to disclose contingent liabilities which include losses and fines expected from litigation outcomes.[42] Therefore, it seems to me that a diligent and prudent businessman could not, and should not, have ignored the existence of the previous decision.

88. More importantly, however, management is generally presumed to know how the undertaking behaves — or has behaved, in the recent past — on the market. There is no basis to contend that an undertaking should escape liability for the mere fact that its management may have been ignorant of certain conduct. An undertaking must be held legally responsible for its past and present conduct, independently of whether or not certain individuals within its management (or some organs of the company) are aware of some specific conduct of the undertaking. It should be emphasised, in this context, that the present cases concern, inter alia, a penalty imposed on Ferriere Nord and not one imposed on individuals who held certain positions within that company.

89. Next, with regard to its *seventh ground of appeal*, I would point out that, in *Versalis*, dealing specifically with the aggravating circumstance of recidivism, the Court has clarified that where the Commission intends to impute that aggravating circumstance to an undertaking responsible for an infringement of competition law, 'the statement of objections must contain all the information necessary for that person to defend itself'. The Court also stated that the Commission is to provide, already in the statement of objections, the elements in support of its allegation that the conditions for the application of that aggravating circumstance are satisfied.[43]

90. That case-law implies that the Commission is not necessarily required, in every case, to refer *explicitly* in the statement of objections to all the aggravating circumstances which it may apply to an undertaking under investigation. On the other hand, however, as the Commission itself acknowledges in its submissions, there may be situations in which it may indeed be required to explicitly mention an aggravating circumstance which it intends to apply to a given undertaking. I agree: the Commission's intentions might not be easily discernible on the basis of the information included in the statement of objections. And, indeed, it is not the task of an undertaking to second-guess the Commission's intentions and put forward every conceivable line of defence against all possible

39 The Court has not excluded that 'structural changes in an undertaking' may be taken into account when reviewing the application of the aggravating circumstance of recidivism (see judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 97). However, the Court referred to that element in a different context, one in which the Commission had applied the aggravating circumstance of repeated infringement to a legal person which was not the subject of proceedings for the first infringement. In other words, the Court seems to refer to intra-group structural changes and not to changes of management implemented within the same company. In the latter situation, the weight of possible structural changes is far less significant than in the former situation.

40 Commission Decision of 2 August 1989 relating to a proceeding under Article [101 TFEU] (IV/31.553, Welded steel mesh) (OJ 1989 L 260, p. 1).

41 See, judgment of 6 April 1995, *Ferriere Nord* v *Commission*, T-143/89, EU:T:1995:64 and, on appeal, judgment of 17 July 1997, *Ferriere Nord* v *Commission*, C-219/95 P, EU:C:1997:375.

42 For example, under the Generally Accepted Accounting Principles (GAAP) potential losses which are 'probable', 'reasonably possible' must be declared along with an estimate of the loss. Similar rules exist under the International Financial Reporting Standards (IFRS).

43 Judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraphs 96 and 98.

aggravating factors that the Commission might envisage applying. Whether the information included in a given statement of objections is sufficient to enable an undertaking to exercise in full its rights of defence, in spite of the fact that no express mention is made in the statement of objections, thus depends on the specific circumstances of each case.

91. In the present case, as Ferriere Nord points out, the indication in the first statement of objections — to the effect that the Commission would take into account all mitigating and aggravating circumstances when setting the fines, in the light of the conduct of each undertaking — is rather vague. However, that does not mean that it is inevitably inadequate. Such a reference may be considered adequate if, in the light of its specific situation and the information provided in the statement of objections, the undertaking was nonetheless capable of anticipating the likely application of a given aggravating circumstance and the reasons therefor.

92. It is true that, in the case at hand, the company which committed the repeated infringement was, unlike in *Versalis*, the very same company: in 1989 Ferriere Nord was indeed found responsible for an infringement of (what is now) Article 101 TFEU in a decision which was — as Ferriere Nord concedes — mentioned in the statement of objections, even if only in passing. It is also true that, as explained in point 86 above, the period that elapsed between the adoption of the previous Commission decision and the beginning of the new infringement is relatively short. However, the Commission should, as a minimum, have indicated the reasons for which it took the view that the previous infringement and the new infringement constituted an 'infringement of the same type' for the purposes of the 1998 Guidelines.[44] Although that may, nowadays, appear relatively obvious, there was hardly any case-law dealing with repeated infringements in 2002. The absence of any indication on this point in the statement of objections made the exercise of Ferriere Nord's rights of defence quite difficult.

93. Accordingly, I take the view that, should the Court disagree with my assessment of Ferriere Nord's *second ground of appeal*, it should however accept its s*eventh ground of appeal*. Therefore, the judgment in Case T-90/10 should be set aside in the part which concerns the application of the aggravating circumstance of the repeated infringement. The Court should also, in my view, annul the contested decision on this point, and re-determine the fine imposed on Ferriere Nord without taking into account the aggravating circumstance of the repeated infringement.

94. In those circumstances, there is no need to examine Ferriere Nord's *ninth ground of appeal*. At any rate, I consider that ground of appeal unfounded since, as I shall explain in point 117 of this Opinion, the *fourth ground of* appeal too is to be dismissed.

3. Public distancing

95. Feralpi, Valsabbia and Alfa Acciai[45] argue that the General Court erred in applying the concept of 'public distancing', and thus wrongly confirmed their participation in some parts of the infringement, despite the fact that they had published prices that differed from those agreed with their competitors. In that context, they point out that Article 60 CS prohibited companies from discriminating between customers and from departing from the published prices.

96. Although I am not convinced by this argument, it nevertheless deserves a more in-depth analysis.

44 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).

45 *Fourth ground of appeal* in Case C-85/15 P, and *fifth ground of appeal* in Cases C-86/15 P and C-87/15 P.

97. In my Opinion in *Total Marketing Services*, I had the opportunity to point out that the absence of public distancing is an element which may lend support to a presumption, based on specific indicia gathered by the Commission, that an undertaking which has participated in anticompetitive meetings can be considered to have participated in an infringement of Article 101(1) TFEU. In other words, if an undertaking participates with its competitors in meetings from which an anticompetitive agreement emerges, the technique of presumptions makes it possible to infer, unless the contrary is expressly shown, that that undertaking took part to the infringement. On the other hand, the fact that an undertaking does not publicly distance itself does not make up for a lack of evidence of participation, albeit passive, in an anticompetitive meeting. [46]

98. A different conclusion would, indeed, breach the presumption of innocence recognised in Article 48(1) of the Charter and be inconsistent with Article 2 of Regulation No 1/2003. [47] By the same token, in reviewing the evidence submitted regarding an alleged public distancing by an undertaking, the concept of 'public distancing' that falls to be applied cannot be so narrow and rigid that it becomes virtually impossible for that undertaking to rebut the presumption.

99. The thrust of the criticism in the present cases, however, is not that the General Court has wrongly interpreted or applied the concept of 'public distancing'. Feralpi, Valsabbia and Alfa Acciai did attend, in the period in question, one or more anticompetitive meetings [48] and there were other indicia that pointed to their participation in the collusive behaviour. [49] Nor are Feralpi, Valsabbia and Alfa Acciai arguing that the General Court placed an impossible burden of proof on them. They essentially take issue with the fact that the General Court considered that a certain conduct (publication of prices different from those agreed with their competitors) did not fulfil the requirement of 'public distancing'.

100. That is not, however, an error of law subject to review on appeal. As the Court has held in *Toshiba*, [50] the concept of 'public distancing' reflects a factual situation, the existence of which is determined by the General Court, on a case-by-case basis, on the basis of an overall assessment of all the relevant evidence and indicia. Provided that that evidence has been properly obtained and that the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. [51]

101. In the case at hand, the General Court took the view that, as regards the period contested by Feralpi, Valsabbia and Alfa Acciai, the Commission had adequately proven those undertakings' participation in the infringement on the basis of a number of indicia (including their attendance at one or more anticompetitive meetings). The fact that Feralpi, Valsabbia and Alfa Acciai communicated to the public prices that differed from those agreed with the other cartelists was not considered by the General Court to constitute, by itself, an act of 'public distancing' capable of rebutting the conclusion drawn from those other indicia.

46 See my Opinion in *Total Marketing Services* v *Commission*, C-634/13 P, EU:C:2015:208, points 43 to 61. See, in the same sense, Opinion of Advocate General Wathelet in *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2015:427, points 123 to 136, and Opinion of Advocate General Ruiz-Jarabo Colomer in *Aalborg Portland and Others* v *Commission*, C-204/00 P, EU:C:2003:85, points 127 to 131.

47 According to the latter provision, it is for the Commission to prove an infringement of Article 101(1) TFEU.

48 Judgments of 9 December 2014, *Feralpi* v *Commission*, T-70/10, not published, EU:T:2014:1031, paragraphs 231 to 234; *Ferriera Valsabbia and Valsabbia Investimenti* v *Commission*, T-92/10, not published, EU:T:2014:1032, paragraphs 218 to 221; and *Alfa Acciai* v *Commission*, T-85/10, not published, EU:T:2014:1037, paragraphs 217 to 220.

49 For example, there were elements pointing to the fact that the undertakings in question did align their prices with those agreed in those meetings (see, judgment of 9 December 2014, *Feralpi* v *Commission*, T-70/10, not published, EU:T:2014:1031, paragraphs 231 to 233) or more generally complied with what had been agreed in those meetings (see, judgments of 9 December 2014, *Alfa Acciai* v *Commission*, T-85/10, not published, EU:T:2014:1037, paragraph 220, and, *Ferriera Valsabbia and Valsabbia Investimenti* v *Commission*, T-92/10, not published, EU:T:2014:1032, paragraph 221.

50 Judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26

51 Judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 63.

102. Defining what, a priori, may constitute an adequate act of 'public distancing' is certainly not easy. Whether or not a given conduct fulfils that requirement turns, in my view, very much on the specific circumstances of each case. In the present cases, I find no fault in the judgments under appeal: I see no distortion of the clear sense of the evidence, no breach of any general principle of law or rule of procedure and no contradiction in the General Court's reasoning. Its findings seem, moreover, consistent with the Court's case-law according to which, in order to assess whether an undertaking has actually distanced itself, the other cartel participants' understanding of that undertaking's intention is one of the key elements.[52] Accordingly, if in the present case there was no element pointing to the fact that the publication of those prices was understood by the other cartelists as an unambiguous signal that Feralpi, Valsabbia and Alfa Acciai did not intend to adhere to the collusion, that fact strongly supports the conclusion that there was no public distancing for the purposes of the Court's case-law.

4. Remaining grounds of appeal

103. Most of the remaining grounds of appeal deserve, in my opinion, to be given only short shrift.

a) Case C-85/15 P

104. By its *first ground of appeal*, Feralpi alleges that the General Court erred in law in dismissing its claim of a breach of the principle of collegiality by the Commission. That breach allegedly stemmed from the fact that the decision of 30 September 2009, as adopted by the college of Commissioners, was incomplete since its annexes lacked certain tables. That ground of appeal is, in my view, partly inadmissible (to the extent that it calls into question the assessments of facts included in paragraphs 62 to 81 of the judgment in Case T-70/10) and partly unfounded (since the amending decision of 8 December 2009 was also adopted by the college of Commissioners).

105. By its *third ground of appeal*, Feralpi criticises the General Court for not censuring the excessive length of the procedure before the Commission. However, in paragraphs 152 to 161 of the judgment under appeal, I find neither an error of law, nor an inadequate statement of reasons. In addition, to the extent that Feralpi complains about the assessment of the factual circumstances mentioned in paragraphs 157 to 160 of the judgment under appeal, this ground of appeal is inadmissible.

106. In its *fourth ground of appeal*, Feralpi bundles together various criticisms of the judgment under appeal relating to the evaluation of Feralpi's participation in the infringement during the 1989-1995 period. In its view, the General Court has misinterpreted Article 65(1) CS, the principles relating to the allocation of the burden of proof, and the presumption of innocence. In addition, the judgment under appeal, according to Feralpi, lacks an adequate statement of reasons and distorts certain facts.

107. One of those arguments has already been dealt with in points 95 to 102 above. With regard to the other arguments, I take the view that, as the Commission points out, despite invoking alleged errors of law, Feralpi mainly calls into question assessments of fact made by the General Court so far as concerns Feralpi's involvement in the above mentioned period. Given that the appellant is unable to show any clear distortion of facts or evidence committed by the judges at first instance, this ground of appeal is largely inadmissible. As concerns the evidence relied on by the General Court to confirm the Commission's analysis, Feralpi disregards several passages of the judgment under appeal in which the General Court does mention evidence other than Feralpi's participation in the meeting of 6 December 1989: in paragraphs 240 to 246 and 250 to 252, the General Court refers to other indicia and explains why the alternative explanation submitted by the appellant was unconvincing.

52 Judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 62 and the case-law cited.

108. The *fifth ground of appeal* concerns the method of setting the fines adopted by the Commission, which divided the undertakings responsible into three groups, on the basis of their respective market share during the relevant period. In this ground of appeal Feralpi, once again, combines different alleged errors of law. However, its arguments are only briefly outlined and the criticism seems mainly directed against the Commission and not the General Court. I thus take the view that this ground of appeal is inadmissible.

109. At any rate, the claim that the General Court should have censured the Commission for a breach of the principle of equal treatment appears illogical. It is true that the General Court found that there was an error in the calculation of the market shares of one of those three groups. However, that error does not mean that the fines of the undertakings belonging to the other two groups (including Feralpi) should have been adjusted. That error rather implies that the fines imposed on the undertakings belonging only to the first mentioned group could be altered. Insofar as the method of calculation of the fines imposed on the undertakings belonging to the other two groups is correct, the General Court cannot be criticised for dismissing a request for reduction of the fines.

b) Joined Cases C-86/15 P and C-87/15 P

110. By their *third ground of appeal*, Valsabbia and Alfa Acciai submit that the General Court erred in law in dismissing their claims alleging a breach of the principle of collegiality by the Commission. For the reasons explained in point 104 above, this ground of appeal is partly inadmissible and partly unfounded.

111. By their *sixth ground of appeal*, Valsabbia and Alfa Acciai argue that the General Court erred in law in dismissing their claims alleging a breach of Article 47 of the Charter and refusing to decrease the amount of the fine. In their view, the length of the administrative procedure before the Commission should have been considered excessive. For the same reasons as those explained in point 105 above, I find this ground of appeal partly inadmissible and partly unfounded.

112. The *seventh ground of appeal* of Valsabbia and Alfa Acciai is, essentially, analogous to Feralpi's fifth ground of appeal: it concerns the General Court's refusal to reduce the amount of the fines on the grounds of an alleged breach of the principle of equal treatment because of an error in the calculation of the fines with regard to other undertakings. I have already explained in point 109 above that this claim finds no basis in law.

c) Case C-88/15

113. By its *first ground of appeal*, Ferriere Nord argues that the contested decision is substantially different from the 2002 decision because the former refers to a breach of the competition rules in the common market whereas the latter refers to a breach in the Italian market. For that reason, the General Court erred in law in concluding that a new statement of objections was not required before the adoption of the contested decision.

114. This argument seems to be based on a misinterpretation of the relevant provisions in the ECSC and FEU Treaties, or at least on a misunderstanding of the judgment under appeal. Had the Commission changed the substantive legal basis of its decision, from Article 65(1) CS to Article 101(1) TFEU, the argument would have deserved closer scrutiny. Indeed, unlike Article 65(1) CS, Article 101(1) TFEU is only applicable to agreements that 'affect trade between Member States'. However, both decisions concern a breach of Article 65(1) CS which prohibits agreements which distort competition 'within the common market'. Therefore, it is immaterial whether the text of the decision (or of the statement of objections) refers to a distortion of competition in the Italian market

(as the 2002 decision does) or to a distortion of competition in the common market (as the contested decision does). It is almost unnecessary to point out, in this context, that an agreement which covers the Italian territory does fulfil that criterion since the Italian market is a significant part of the common market.

115. By its *third ground of appeal*, Ferriere Nord argues that the General Court erred in law by not censuring an alleged breach of the Commission's rules of procedure. Ferriere Nord indicates that the report of the Hearing Officer annexed to the draft decision submitted to the college of Commissioners for its meeting of 30 September 2009 was produced only in English, French and German, and not in Italian. That, it claims, is in breach of the Commission's rules of procedure.

116. I agree with the General Court that Ferriere Nord's arguments on this point are ineffective. The EU Courts have consistently stated that the failure by an institution to comply with a merely internal procedural rule cannot render the final decision unlawful unless it is sufficiently substantial and has had a harmful effect on the legal and factual situation of the party alleging a procedural irregularity.[53] There is, in my opinion, no element which casts doubts on the assessment of the facts and evidence made by the General Court to arrive at the conclusion that no such harmful effects on the position of Ferriere Nord had been demonstrated.

117. Ferriere Nord's *fourth ground of appeal* — which concerns the General Court's findings as regards the nature and duration of that undertaking's participation to the infringement — is in my view inadmissible. The arguments, again, essentially call into question assessments of fact made by the General Court.

118. By its *fifth ground of appeal*, Ferriere Nord claims that the General Court's decision to reduce the basic amount of the fine by 6% to take into account the fact that Ferriere Nord did not participate in part of the anticompetitive agreement for three years is inadequate. However, according to settled case-law, it is not for the Court, in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU competition rules.[54] In the present case, I do not see any element that shows that the final amount of the fine imposed on Ferriere Nord might be disproportionate or excessive. Nor do I see, in the judgment under appeal, any lack of, or contradiction in, the reasoning.

119. Lastly, by its *sixth ground of appeal*, Ferriere Nord alleges that the General Court made an error in calculating the amount of the fine which it reduced by 6%. Whereas it stated that the reduction would be applied to the basic amount, it then applied it as a mitigating circumstance, thereby arriving at a somewhat smaller reduction.

120. At the outset, I should like to point out that the precise contours of the concept of unlimited jurisdiction are not yet clear. Whether a party can challenge the amount of a fine independently of an alleged error made by the Commission is still an open question. That is, however, not at issue in the present proceedings since the General Court did find an error in the contested decision as concerns Ferriere Nord's participation in the infringement and, as a consequence, decided to reduce the amount of the fine imposed by the Commission on that undertaking. The real question here appears rather to be whether the General Court is bound to follow certain criteria or principles when revising a fine because of the errors found in a decision challenged by an applicant.

53 See the case-law cited in point 158 in judgment of 9 December 2014, *Ferriere Nord* v *Commission*, T-90/10, not published, EU:T:2014:1035.
54 Judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 72 and case law cited.

121. The judgment of the Court in *Galp*[55] seems to indicate that there are limits to what the EU Courts are allowed to do when exercising unlimited jurisdiction over the fines imposed by the Commission under Regulation No 1/2003. I agree. Although there is no need to delve into this issue further, I should at least say that certain constraints on the EU Courts' powers under Article 261 TFEU and Article 31 of Regulation No 1/2003 must necessarily stem from principles such as, for example, proportionality, legal certainty and equal treatment. That said, in the present case I do not see any convincing argument as to how the General Court might have wrongly exercised its jurisdiction pursuant to Article 261 TFEU and Article 31 of Regulation No 1/2003.

122. Although the text of the judgment under appeal may not be a model of clarity on this point, it is indisputable that the General Court determined the reduced amount of Ferriere Nord's fine by exercising its powers of unlimited jurisdiction, and that, in principle, it chose to follow the method proposed by the Commission in the 1998 Guidelines (which is, obviously, also the method applied in the contested decision).

123. Against that background, I am of the view that the General Court did not err in considering Ferriere Nord's lack of participation in part of the infringement as a mitigating circumstance. That is, indeed, the correct approach under the 1998 Guidelines. Those guidelines do refer to gravity and duration as elements which the Commission is to take into account when determining the basic amount. However, it is clear that those elements are to be appreciated with regard to the overall infringement. That is why the Commission, in the light of the gravity and duration of the overall infringement, grouped the undertakings responsible in three different groups, depending on their respective market shares. As the 1998 Guidelines specify, the differential treatment applied when determining the basic amount is determined mainly by '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'.

124. In the present case, there is no element indicating that Ferriere Nord's lack of participation, for a given period, in part of the infringement had an effect on the gravity (or duration) of the overall infringement. It was therefore correct, for the General Court, to take into account Ferriere Nord's individual contribution to the cartel as a factor that may be relevant in the context of the assessment of the mitigating circumstances.

125. In this context, it may be useful to recall that, in *Solvay Solexis*, the Court took the view that, under the 1998 Guidelines, the Commission is entitled to consider the lesser gravity of an undertaking's participation in an infringement, either for the purposes of applying differential treatment in order to determine the basic amount of the fine, or as mitigating circumstance for decreasing the basic amount.[56] That case-law should not be read, in my view, as giving the Commission *carte blanche* on this point. That case-law rather means that the question whether the lesser gravity of the participation of an undertaking in an infringement must be taken into account when calculating the basic amount, or when applying the mitigating circumstances, depends on the specific facts of each case. This principle seems to me applicable *a fortiori* to the General Court when it exercises unlimited jurisdiction over a fine imposed by the Commission.

d) Case C-89/15 P

126. By its *second ground of appeal*, Riva Fire takes issue with the General Court's reduction of the basic amount of the fine by 3%. Riva Fire considers that: (i) the reduction is inadequate and (ii) the reasoning of the judgment under appeal on this point is contradictory or in any event insufficient.

55 Judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:328.

56 Judgment of 5 December 2013, *Solvay Solexis* v *Commission*, C-449/11 P, not published, EU:C:2013:802, paragraph 78.

127. Riva Fire's main arguments correspond, to a large extent, to those developed in Ferriere Nord's fifth and sixth grounds of appeal and should accordingly be dismissed for the reasons explained in points 118 to 125 above. As regards Riva Fire's contention that the General Court erred in law by holding Riva Fire liable for the conduct of other undertakings, I find this argument inadmissible (insofar as it challenges findings of facts made by the General Court with respect to Riva Fire's participation in a single and continuous infringement) and unfounded (in the light of the case-law referred to in paragraphs 116 and 214 of the judgment in case T-83/10). Finally, Riva Fire's argument that the General Court erred in concluding that that undertaking had not publicly distanced itself from the cartel is inadmissible on appeal.[57]

128. By its *third ground of appeal*, Riva Fire claims that the General Court erred in law in confirming Riva Fire's participation in the agreement of December 1998 and, as a consequence, in taking that fact into account when determining the amount of the fine. This ground of appeal is, in my view, inadmissible since Riva Fire is, in substance, contesting the General Court's assessment of facts and evidence. In addition, whether Riva Fire disputed its participation in that agreement during the proceedings at first instance[58] is of no relevance, given that the General Court confirmed the Commission's analysis on the basis of documentary evidence, and not by means of presumptions, as wrongly alleged by Riva Fire.

129. Finally, by its *fourth ground of appeal*, Riva Fire criticises the General Court's finding concerning the 375% increase in the basic amount of the fine with a view to ensuring that the fine imposed had a deterrent effect. The General Court considered that the reference in point 604 of the contested decision to the involvement of Riva Fire's (and Lucchini/Siderpotenza's) senior management in the infringement was made merely for the sake of completeness. The amount of the increase was — according to the General Court — only based on the turnover of those companies in the relevant market.[59]

130. Admittedly, the meaning of point 604 of the contested decision is not crystal clear. However, the General Court's interpretation of that passage is one of the possible interpretations and Riva Fire does not submit any concrete element to show that the General Court has distorted the clear sense of the contested decision. In addition, the General Court examined the various arguments put forward by Riva Fire against the 375% increase and dismissed them on their merits.[60] Consequently, this ground of appeal is inadmissible or, at any rate, unfounded.

VI – Consequences of the assessment

131. As mentioned in points 23 to 25 and 63 above, if the Court agrees with my assessment of the grounds of appeal which concern the violation of the appellants' rights of defence, the judgments under appeal as well as the contested decisions ought to be set aside.

132. Should the Court, instead, disagree with my assessment of those grounds of appeal, the appeals should then be dismissed in their entirety, except as regards the application to Ferriere Nord of the aggravating circumstance of repeated infringement.

57 See also points 95 to 102 above.

58 As stated in paragraphs 222 and 223 of judgment of 9 December 2014, *Riva Fire* v *Commission*, T-83/10, not published, EU:T:2014:1034, which Riva Fire contests.

59 Judgment of 9 December 2014, *Riva Fire* v *Commission*, T-83/10, not published, EU:T:2014:1034, paragraph 276.

60 See judgment of 9 December 2014, *Riva Fire* v *Commission*, T-83/10, not published, EU:T:2014:1034, paragraphs 262 to 275 and 277.

VII – Costs

133. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party.

134. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138 and 184 of the Rules of Procedure, the Commission should, in principle, pay the costs of the present proceedings, both at first instance and on appeal.

135. However, I cannot help but notice that all the appeals lodged by the appellants are (excessively, in my view) lengthy and complex. Certain grounds of appeal are composed of several parts but the arguments for each part have not necessarily been well explained. In addition, certain criticisms have been repeated in almost every ground of appeal: for example, the allegation that the statement of reasons in the judgment under appeal was lacking or inadequate. Yet, invariably, I have found that the General Court explained why it has reached a given conclusion and, in substance, the appellants were challenging only the correctness of that reasoning. As obvious as it may seem, I must emphasise that there is a difference between alleging the General Court's failure to address (at all or adequately) a given claim and alleging that the General Court committed an error of law in dealing with a claim.

136. Finally, several grounds of appeal were manifestly inadmissible or unfounded. For example, despite invoking alleged errors of law, a number of grounds of appeal clearly challenged findings of fact made by the General Court. Moreover, on many issues raised by the appellants there is a well-established line of case-law that goes against the appellants' arguments. The appellants did not give any convincing argument to distinguish their cases from the precedents, or to justify a departure from them.

137. In brief, I cannot overlook the fact that the majority of the appellants' grounds of appeal are to be dismissed and that the appellants should have been aware of that. That is also true, *mutatis mutandis*, with respect to the proceedings at first instance. The appellants' stance in these proceedings does not, to my mind, contribute to the good administration of justice and, therefore, should be taken into account when deciding on the allocation of costs.

138. That said, it also cannot be ignored that the Commission contributed to the unnecessary complexity and length of the present proceedings by submitting a good number of objections of inadmissibility which were clearly without basis. In many instances, it was obvious that the appellants had raised an issue of law and were not challenging findings of facts or evidence. These observations too are, *mutatis mutandis*, valid with regard to the Commission's conduct at first instance. The Commission's 'padding out' of its submissions with pleas of inadmissibility on a 'just in case' basis is to be censured and must also be taken into account in the allocation of costs.

139. In the light of the above, and in accordance with Article 138(3) of the Rules of Procedure, I suggest that the Court: (i) order the Commission to bear its own costs and two thirds of the costs of the appellants, and (ii) order the appellants to bear one third of their own costs.

VIII – Conclusion

140. Having regard to all the above considerations, I propose that the Court:

– set aside the judgments of the General Court of 9 December 2014 in *Feralpi* v *Commission*, T-70/10; *Riva Fire* v *Commission*, T-83/10; *Alfa Acciai* v *Commission*, T-85/10; *Ferriere Nord* v *Commission*, T-90/10; and *Ferriera Valsabbia and Valsabbia Investimenti* v *Commission*, T-92/10;

– annul Commission Decision C(2009) 7492 final relating to a proceeding under Article 65 CS (Case COMP/37.956 — Reinforcing bars, re-adoption) of 30 September 2009;

– order the Commission to pay its own costs and two thirds of the costs of the appellants at first instance and on appeal;

– order the appellants to bear one third of their own costs.