Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 3 September 2015 [1]

Case C-154/14 P

SKW Stahl-Metallurgie GmbH
SKW Stahl-Metallurgie Holding AG
v

European Commission

(Appeal — Article 27 of Council Regulation (EC) No 1/2003 — Articles 12 and 14 of Commission Regulation (EC) No 773/2004 — Procedural rules applicable to investigations of breaches of the EU competition rules — Right to be heard — Oral hearing — In camera hearing before the Commission)

1. Undertakings undoubtedly have a right to be heard in connection with investigations of breaches of the EU competition rules. However, is there a right to be heard in private? That is the essential question raised by this appeal. For the reasons provided below, it is my opinion that that question ought to be answered in the negative.

2. The appellants request the Court to set aside a judgment of the General Court, [2] which upheld a Commission decision [3] fining them the sum of EUR 13 300 000 for having participated in a cartel in the calcium carbide and magnesium sectors. The appellants' central claim is that the General Court erred in law by not admonishing the Commission for having refused their request for an oral hearing *in camera* [4] in the course of the administrative procedure.

3. As for the other grounds of appeal put forward by the appellants, I will consider them summarily, voluntarily narrowing my focus on the first ground of appeal.

1 — Original language: English.

2 — Judgment of 23 January 2014 in *SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie* v *Commission*, T-384/09, EU:T:2014:27 ('the judgment under appeal').

3 — Commission Decision of 22 July 2009 (C(2009) 5791 final) relating to a proceeding under Article 81 of the [EC] Treaty and Article 53 of the [Agreement on the European Economic Area; OJ 1994 L 1, p. 3 (the 'EEA Agreement')] (COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries; OJ 2009 C 301, p. 18, 'the contested decision').

4 — In the present Opinion, by '*in camera* hearing', I intend to mean a meeting between a party and the decision-making authority without other parties being present (*ex parte in camera*), rather than a hearing which is not open to the public.

I – Legal framework

4. Article 27 of Regulation (EC) No 1/2003[5] ('Hearing of the parties, complainants and others') provides:

'1. 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. …

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. …'

5. Pursuant to Article 33(1)(c) of Regulation No 1/2003, the Commission issued implementing provisions on, inter alia, the practical arrangements for the hearings provided for in Article 27 thereof. Those provisions are to be found in Regulation No 773/2004.[6] Under the heading 'Right to be heard', Article 12(1) of Regulation No 773/2004 provides that the Commission is to give the parties to whom it addresses a statement of objections ('SO') the opportunity to develop their arguments at an oral hearing, if so requested in their written submissions.

6. Article 14 of Regulation No 773/2004 ('Conduct of oral hearings') states:

'6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow the parties to whom a [SO] has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.'

7. Lastly, Article 16(1) of Regulation No 773/2004 provides that information, including documents, is not to be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

II – Background to the proceedings

A – *Outline*

8. As far as is relevant for the present proceedings, according to the judgment under appeal,[7] the Commission considered, in the contested decision, the principal suppliers of calcium carbonate and magnesium intended for the steel and gas industries to have infringed Article 81 EC and Article 53 of the EEA Agreement by participating, from 7 April 2004 until 16 January 2007, in a single and

5 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), as amended.

6 — Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 2006 L 362, p. 1), as amended.

7 — Reference is made to paragraphs 1 to 4 of the judgment under appeal (available only in German and French).

continuous infringement of those provisions. The infringement consisted of market sharing, quotas, customer allocation, price fixing and exchanges of sensitive commercial information between suppliers of calcium carbide and magnesium granulates on a substantial part of the market of the European Economic Area ('the infringement at issue').

9. In particular, the Commission found, in Article 1(f) of the contested decision, that SKW Stahl-Metallurgie GmbH ('SKW') had participated in the infringement at issue from 22 April 2004 until 16 January 2007, and that SKW Stahl-Metallurgie Holding AG ('SKW Holding') had participated in the infringement from 30 August 2004 until 16 January 2007. The Commission was of the opinion that employees of SKW had been directly involved in the cartel agreements and/or concerted practices described in the contested decision in the aforementioned period. Between 30 August 2004 and 16 January 2007, SKW Holding directly owned 100% of SKW. This led the Commission to consider, on the basis of a presumption triggered by that ownership, that SKW Holding exercised effective control over SKW — a presumption which, in the Commission's view, was 'confirmed' by further factual elements [8] — and that SKW Holding formed part of a single economic unit with SKW, and could accordingly be held liable for the infringement of the competition rules committed by SKW.

B – *The administrative procedure before the Commission* [9]

10. In their reply of 6 October 2008 to the Commission's SO of 24 June 2008, the appellants argued that, in reality, Degussa and not SKW Holding had exercised decisive influence over SKW, and requested an oral hearing to explain this. Having been invited to appear at an oral hearing, the appellants requested, by email of 31 October 2008, to be heard *in camera* as regarded their line of argument relating to Degussa's role. The appellants justified their request on the view that the economic survival of SKW depended on Degussa, which supplied it with the near-totality of its trade in calcium carbide and that SKW was currently negotiating a new supply contract with Degussa. The appellants further argued that submitting their point of view in the presence of Degussa would seriously jeopardise their commercial relations and might lead to reprisals. By email of 5 November 2008, the appellants suggested, as a practical solution, giving Degussa access to their *in camera* presentation after the end of the year 2008 or after the conclusion of a new supply agreement. The appellants sent a further email on 6 November 2008 to the Hearing Officer ('HO'), reiterating these issues.

11. By letter of 6 November 2008, the HO rejected the request for an *in camera* hearing. Considering that the request was not based, *stricto sensu*, on the protection of the appellants' business secrets and other confidential information, the HO analysed it from the point of view of the right to be heard. Noting that the argument raised by the appellants concerned Degussa's behaviour and needed, in order to be taken into account as a mitigating circumstance, [10] to be verified against a statement to be obtained from Degussa, the HO also held that a hearing *in camera* would deprive Degussa of its right to respond orally to the allegations made by the appellants. Lastly, the HO did not consider the practical solution suggested by the appellants to be feasible, as neither the outcome nor the duration of the negotiations was certain.

12. An oral hearing took place on 10 and 11 November 2008.

8 — Those elements included (i) that SKW formed part of the Powders and Granulates division of SKW Holding; (ii) that SKW Holding was involved in the daily business contacts of its subsidiaries; (iii) that SKW Holding was responsible for the strategic development of SKW; (iv) that SKW Holding took decisions relating to personnel, recruiting and financing; (v) that SKW reported financial data to SKW Holding on a monthly basis; (vi) that SKW needed the signature of a member of the board of SKW Holding to contract with banks; and (vii) that SKW's income contributed to the economic performance data of SKW Holding. The Commission did not find support for the view that SKW Holding was merely a sales representative for Evonik Degussa GmbH ('Degussa') or a financial investor.

9 — Reference is made to paragraphs 24 to 33 of the judgment under appeal.

10 — I would point out that the letter of the HO of 6 November 2008 actually mentions that the information on Degussa's behaviour might be relevant 'to relieve [the appellants] from liability *or* as a mitigating factor' (emphasis added). It contains no statement to confirm the view that the HO considered the appellants' line of argument only as an argument in mitigation (see point 31 below).

13. By letter of 28 January 2009, the appellants informed the HO of the fact that a new supply agreement had been concluded between SKW and Degussa, and that no impediment existed to an oral hearing in the presence of Degussa. Accordingly, they requested the opportunity to present their views on Degussa's behaviour, which they had refrained from doing at the oral hearing, at an additional oral hearing.

14. By letter of 3 February 2009, the HO denied the request for an additional oral hearing, taking the view that the right to be heard is triggered by the issue of a SO and is afforded on one occasion only. However, the HO did allow the appellants to submit additional written comments on that issue within a further deadline.

15. Lastly, by letter of 10 February 2009 to the HO, the appellants expressed their disagreement with the HO's view. They argued that the right to be heard orally is not a 'one-off affair' to be granted on a single occasion, but must be ensured throughout the entire procedure. In view of the fact that the written arguments the appellants had already presented had failed to direct the Commission's attention towards Degussa's role and SKW's dependency on Degussa, the appellants objected to the idea that the possibility of providing a written statement might replace the right to be heard orally.

16. On 9 July 2009, the HO issued her final report on the draft decision relating to the infringement at issue,[11] which included her observations on the appellants' request for an *in camera* oral hearing. The HO concluded in her report that the draft decision related only to objections in respect of which the parties have been afforded the opportunity to make their views known, and that the right to be heard of all participants to the proceedings had been respected.

III – Procedure before the General Court

17. By application lodged on 1 October 2009, the appellants brought an action seeking the annulment of the contested decision. The appellants put forward six grounds of annulment consisting of (i) breach of the right to be heard; (ii) wrongful application of Article 81 EC; (iii) breach of the duty to give reasons; (iv) breach of the principle of equal treatment; (v) infringement of Articles 7 and 23 of Regulation No 1/2003, as well as of the principle of proportionality and the principle of the lawfulness of penalties; and (vi) infringement of Article 23(2) of Regulation No 1/2003.

18. Following a public hearing held on 16 April 2013, the General Court dismissed, in the judgment under appeal, all the grounds for annulment and, consequently, the action. Furthermore, it ordered the appellants to bear their own costs and those of the Commission.

IV – Procedure before the Court and forms of order sought

19. By their appeal, lodged with the Court on 2 April 2014, the appellants claim that the Court should:

— set aside the judgment under appeal in its entirety in so far as it dismissed the appellants' claims, and grant in its entirety the form of order sought at first instance;

— in the alternative, set aside the judgment under appeal in part;

— in the further alternative, reduce, as the Court sees fit, the fines imposed on the appellants under Article 2(f) and (g) of the contested decision;

11 — OJ 2009 C 301, pp. 16 and 17.

— in the further alternative, set aside the judgment under appeal and refer the case back to the General Court; and

— order the Commission to pay the costs.

20. In its response, lodged with the Court on 13 June 2014, the Commission requests the Court to:

— dismiss the appeal; and

— order the appellants to pay the costs.

21. The appellants and the Commission presented oral argument at the hearing held on 13 May 2015.

V – Analysis

A – *Introductory remarks*

22. The appellants raise four grounds of appeal in support of the form of order sought, the substance of which is as follows: (i) by not penalising the Commission's infringement of the procedural rights of the appellants during the administrative procedure, such as the right to a fair hearing, the General Court erred in law and, moreover, breached the principle of proportionality and the prohibition of the anticipatory assessment of evidence; (ii) by disregarding the fact that the Commission misapplied both Article 101 TFEU and the duty to give reasons under Article 296 TFEU, the General Court also erred in law; (iii) by upholding the contested decision, the General Court acted in breach of the principles that penalties must be clear and that they must be appropriate to the offender and to the offence; lastly, (iv) the General Court erred in law in ruling that an argument raised by the appellants during the proceedings was new and therefore inadmissible. I will deal with the second to fourth grounds summarily and immediately.

23. Putting to one side the question of the admissibility of the *first part of the second ground of appeal* — which the Commission takes issue with — the appellants claim that the General Court failed to take account of the fact that SKW Holding allegedly lacked economic interest in the infringement at issue. However, the Court has held that where the Commission has succeeded in gathering evidence in support of the alleged infringement, and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question whether the undertaking concerned had a commercial interest in the agreement.[12] This part of the second ground of appeal is therefore ineffective.

24. By the *second part of their second ground of appeal*, the appellants allege that in upholding the contested decision, the General Court misconstrued Article 296 TFEU. Specifically, they submit that the General Court failed to take issue with the Commission for not considering all their arguments, in breach of the latter's 'reinforced' duty to state reasons in relation to the imposition of liability on a parent company for the behaviour of its subsidiary. However, as I have mentioned elsewhere, I do not believe that the Court has explicitly held there to be a reinforced duty to give reasons in such a situation.[13] At any rate, I believe that the General Court adequately considered the reasoning of the contested decision, discarding one of the reasons provided by the Commission in the process as erroneous (albeit superfluous). Hence, the General Court did not misinterpret Article 296 TFEU, and the second part of the second ground of appeal is therefore ill-founded as well.

12 — Judgment in *Sumitomo Metal Industries and Nippon Steel* v *Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 46. See also, to that effect, the judgment in *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 335.

13 — See my Opinion in *Total* v *Commission*, C-597/13 P, EU:C:2015:207, point 133.

25. The argument raised by the appellants in *their third ground of appeal*, that the Commission ought to have specified the individual apportionment — *inter partes* — of the fine among the cartel participants, has been rejected in *Commission* v *Siemens Österreich and Others*,[14] delivered after the lodging of this appeal. It follows from that ruling that this ground of appeal is not founded either, despite the appellants' attempt, at the hearing, to nuance their point of view.

26. Lastly, it is futile to consider the *fourth ground of appeal*. By that ground of appeal, the appellants rebuke the General Court for declaring inadmissible the very same argument as to the apportionment of the fine raised in the context of the third ground of appeal. The fourth ground of appeal is therefore ineffective, given the aforementioned judgment.

27. On that basis, I turn to the first ground of appeal.

B – *The first ground of appeal*

1. Findings of the judgment under appeal[15]

28. In paragraphs 35 to 40 of the judgment under appeal, having initially recalled the importance of the rights of the defence and the privilege attaching to business secrets and other confidential information, the General Court proceeded to interpret Article 14(6) of Regulation No 773/2004. Considering it not to be excluded, under that provision, for hearings to be conducted in the presence of others, the General Court further observed that account is to be taken of the legitimate interest of undertakings in the non-disclosure of their business secrets and other confidential information. This led the General Court to charge the Commission with the duty of striking an appropriate balance, case by case, between, on the one hand, the aim of protecting the rights of the defence of undertakings alleged to have infringed the EU competition rules and, on the other, the lawful interest of third parties in the non-disclosure of their business secrets and other confidential information in the course of the investigation.

29. The General Court then assessed, in paragraph 41 of the judgment under appeal, whether the line of argument that the appellants wished to present *in camera* was crucial to their defence.

30. In that regard, the General Court held, in paragraphs 42 to 44 of the judgment under appeal, that the Commission had found that only the staff or management of SKW had directly participated in the infringement at issue. In contrast, SKW Holding's liability for the same breach of the competition rules stemmed from the fact that it exercised decisive influence over SKW. The General Court then considered, at paragraphs 47 to 52 of the judgment under appeal, that the appellants had not explained in what way the possibility that Degussa might have exercised decisive influence over SKW would relieve the appellants of their own liability. Specifically, the court below held that the question whether Degussa exercised such influence over SKW was irrelevant to the issue of whether SKW Holding had effectively rebutted the presumption of exercise of decisive influence attaching to its 100% ownership of SKW.

31. On that basis, the General Court concluded, in paragraphs 53 to 56 of the judgment under appeal, that the arguments of the appellants could at any rate not absolve them of their liability. The General Court inferred from this that the HO, in her letter of 6 November 2008 (see point 11 above), had rightly considered the request for an *in camera* hearing solely from the perspective of the role of

14 — C-231/11 P to C-233/11 P, EU:C:2014:256, overturning the judgment in *Siemens and VA Tech Transmission & Distribution* v *Commission*, T-122/07 to T-124/07, EU:T:2011:70.

15 — Reference is made to paragraphs 19 to 63 of the judgment under appeal.

Degussa as a mitigating circumstance, as the appellants' line of argument relating thereto could only be of benefit to them from that point of view. In that regard, the General Court considered that the analysis of Degussa's involvement as a mitigating factor for the appellants' liability ought to be assessed in the second part of their fifth ground of annulment.

32. As concerns the first ground of annulment, the General Court considered, in paragraphs 57 to 63 of the judgment under appeal, that the argument that Degussa's role ought to be taken into account as a mitigating circumstance as regards the appellants would lead, conversely, to Degussa's liability being increased. Therefore, the HO was right to conclude that an *in camera* hearing could not be granted, as Degussa was entitled to respond to such allegations. The General Court agreed with the HO that the practical solution proposed by the appellants did not satisfy Degussa's right to reply to the appellants' accusations orally at the hearing. Taking account of the fact that the proper conduct of the administrative procedure requires the adoption of a decision within a reasonable time, the General Court considered that the HO could lawfully refuse to hold an additional oral hearing, the parties not being entitled, in the view of that court, to a new hearing every time an obstruction to the submission of a line of argument falls away. Considering, lastly, that the HO had granted the appellants the opportunity to present additional written comments, the General Court rejected the appellants' first ground of annulment.

2. Arguments of the parties

33. The appellants submit that the General Court failed to acknowledge that the Commission's refusal of their request for an *in camera* hearing amounts to a breach of an essential procedural requirement. The refusal was grossly disproportionate, inter alia, as their request was entirely reasonable and did not impinge on the procedural rights of others. Accordingly, the General Court disregarded the rights of the defence, even though Article 27(2) of Regulation No 1/2003 provides that '[t]he rights of defence of the parties concerned shall be fully respected in the proceedings'. An oral hearing in the presence of Degussa would not give the appellants the possibility of explaining their point of view to the Commission, as they feared the retaliatory measures which Degussa might take. That is why the appellants requested a brief meeting *in camera* lasting approximately 30 minutes. Furthermore, the appellants put forward — to no avail — several alternative solutions which would arguably have observed their right to be heard.

34. The appellants contend that the General Court, like the Commission before it, manifestly disregarded their legitimate interests. They refer to Article 14(6) of Regulation No 773/2004 regarding the interest of undertakings in their business secrets not being disclosed. They further submit that if an *in camera* hearing can be granted in order to protect business secrets (and must be granted where no other possibility exists of protecting such secrets), it must all the more so be granted where such a hearing will ensure, in all likelihood, adequate protection of the rights of the defence of the undertaking concerned and that, failing such a hearing, the very existence of that undertaking is threatened.

35. The appellants argue that only an oral hearing gives the possibility of engaging in a dialogue with the Commission in order to eliminate doubt and to reply to any questions which might arise. Although the General Court was correct, in paragraphs 38 to 62 of the judgment under appeal, in holding that the interests of the undertaking requesting an *in camera* hearing must be weighed against those of other undertakings in being able to defend themselves against possible accusations, that court was wrong to hold that the interests of the latter were more important and justified refusing the alternative solutions proposed by the appellants. In doing so, the General Court erred in not obliging the Commission to give priority to the solution which would have accommodated the interests of all parties involved and, in consequence, the General Court performed a balancing test in a manner disproportionately unfavourable to the interests of the appellants.

36. The appellants go on to state that by holding that their line of argument was not capable of relieving them of their liability, and that the issue of Degussa's control over SKW was irrelevant when considering the liability of SKW Holding, the General Court, on the one hand, unlawfully pre-assessed the evidence. On the other hand, the General Court disregarded the fact that the proof of the continuous exercise of control by a company over its former subsidiary is capable of putting the new parent company's influence over the subsidiary into question. They further submit that their argument relating to Degussa's role was not merely an argument in mitigation, but also in support of the view that SKW Holding had not incurred any liability.

37. Lastly, as concerns the effects of the breach of their procedural rights, the appellants submit that, as stated at first instance, it is sufficient to annul the contested decision that, had it not been for the procedural error committed by the Commission, it was conceivable that the administrative procedure might have had a different outcome.

38. The Commission contests the arguments of the appellants in their entirety. As regards the influence exercised by SKW Holding over SKW, the Commission submits that the appellants do not object to the application of an erroneous standard of proof but rather to the General Court's findings of fact and assessment of the evidence without alleging a distortion of evidence, which is inadmissible on appeal.

3. Assessment

a) Admissibility

39. As for the objection of inadmissibility raised *en passant* by the Commission (see point 38 above), I would call to mind that, by their first ground of appeal, the appellants do not call into question the liability of SKW Holding owing to its exercise of decisive influence over SKW (which is instead at the heart of their second ground of appeal), but rather a breach of their procedural rights, namely, the right to be heard efficaciously. In their view, the General Court erred in law when striking the appropriate balance between the interests of the appellants in obtaining an *in camera* hearing against those of the other parties — specifically Degussa — in being able to respond to the appellants' allegations, as well as when rejecting their alternative proposals. That is a point of law which the Court has jurisdiction to hear, pursuant to Article 256(1) TFEU and Article 58 of the Statute.

b) General considerations regarding the right to be heard in administrative proceedings before the Commission

40. The administrative procedure before the Commission in proceedings under Article 101 TFEU is divided into two distinct and successive stages, each with its own logic: a preliminary investigation stage and an *inter partes* stage. The preliminary investigation, covering the period up to notification of the SO, is intended to enable the Commission to gather all the relevant evidence confirming that there has or has not been an infringement of the competition rules and to adopt an initial position on the course which the procedure is to follow. The *inter partes* stage, which covers the period from notification of the SO to adoption of the final decision, is intended to enable the Commission to reach a final decision on the alleged infringement. It is not until the beginning of the *inter partes* stage that the party concerned is informed, via the SO, of all essential elements on which the Commission relies at that stage of the procedure. Consequently, it is only after the SO has been issued that that party can rely in full on its rights of defence. [16]

16 — See the judgment in *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 113 and 115.

41. As regards the *inter partes* stage, the right to be heard may be exercised in two consecutive steps: in writing, and orally.

42. As for the first step, under Article 10(1) of Regulation No 773/2004, the Commission is to inform the parties concerned of the objections raised against them, and the SO is notified in writing to each of the parties against whom objections are raised. Article 10(2) and (3) of that regulation lays down the right to reply to the SO in writing within a deadline set by the Commission, by setting out all facts of relevance to the defence. The Commission is not required to consider written submissions received thereafter.

43. Under Article 16(2) of Regulation No 773/2004, parties responding to the SO must indicate any material considered to be confidential, give reasons therefor and provide a separate non-confidential version within the deadline for responding to the SO. Pursuant to Article 16(3) thereof, the Commission may, of its own motion, require parties to do the same. Failing indications to the contrary, the Commission may assume that the material is not confidential under Article 16(4) thereof. In that connection, it must be borne in mind that parties may request access to the file under Article 15(1) of the regulation as regards non-confidential information.

44. It follows from the above that it is up to the parties to consider exactly how much or how little information they wish to provide the Commission with in their written reply. When doing so, they must determine whether they wish to provide information of a confidential nature and, if so, indicate this. Inevitably, in the event that the Commission disagrees on the confidential nature of the information — subject to possible judicial review by the EU Courts — a party providing such information runs the commercial risk that another party might obtain that information by accessing the file.

45. As for the second step, namely, the right to be heard orally — which has not always been an inherent right[17] — parties are entitled, under Article 12(1) of Regulation No 773/2004, to appear at an oral hearing before the Commission, on condition that they have put forward a request to that effect in their reply to the SO.

46. The oral hearing takes place in accordance with Article 14 of Regulation No 773/2004. Under Article 14(6) thereof, persons may be heard either separately or in the presence of others, having regard to any legitimate interest in the protection of business secrets and other confidential information. The statements made by each person are to be recorded under Article 14(8) of the regulation, and such recordings may be made available to persons who attended the hearing, again having regard to the protection of the confidential information of the parties.

47. It is thus optional for the parties who have responded to a SO to request to be heard orally. Exercising that option amounts to another business decision, in respect of which account must be taken of the possibility of other parties being present, and that the information divulged might fall into the hands of others. However, I must stress that there is no obligation to attend an oral hearing.

17 — The state of the law has fluctuated over time. Article 7(1) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ English Special Edition 1963-1964(I), p. 47) stated that the Commission 'shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment'. Later, Article 8 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty (OJ 1998 L 354, p. 18) simply stated that the Commission 'may, where appropriate, afford to applicants and complainants the opportunity of orally expressing their views, if they so request in their written comments'.

48. Last but not least, the right to be heard has a vital substantive aspect: the effective procedural protection of the parties concerned. Indeed, in proceedings in which fines may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be complied with, even in administrative proceedings.[18] Under Article 11(2) of Regulation No 773/2004, the Commission is to deal in its decisions solely with objections in respect of which the parties to whom it addresses a SO have been able to comment.

49. However, the particularity of this case is that, in reality, it turns on the question of what *form* the right to be heard before the Commission ought to take, rather than its substance. In that regard, being heard in writing, rather than orally, is not in itself problematic. According to the case-law of the European Court of Human Rights ('ECtHR'), in administrative proceedings which may lead to the imposition of a penalty, it is sufficient for parties to be entitled to an oral hearing afterwards before an impartial and independent court or tribunal.[19]

c) Consideration of the first ground of appeal

50. I discern two main arguments in the appellants' first ground of appeal, both based on the right to be heard: first, the General Court unlawfully failed to penalise the Commission for refusing their request for an *in camera* hearing, illegally pre-assessing the evidence in the process. Second, that court acted disproportionately by failing to reprimand the Commission for not agreeing to the alternative solutions proposed by the appellants. I will consider each in turn below.

i) A right to an *in camera* hearing?

51. Let me begin by pointing out that the HO seems to have considered that the information based on which the appellants sought to justify their request for an *in camera* hearing was capable, in qualitative terms, of granting them such a hearing.[20]

52. Be that as it may, as far as I can tell, there is no right to an *in camera* hearing.[21]

53. Nowhere in Regulation No 1/2003 or in Regulation No 773/2004 is such a right indicated. In particular, Article 12(1) of Regulation No 773/2004 simply states that the Commission is to give the parties to whom it addresses a SO the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions. However, that provision is silent as regards an *in camera* hearing.

54. In a similar fashion, neither the wording, nor the context, nor the purpose of Article 14 of Regulation No 773/2004 — specifically Article 14(6) — provides for such a right.

18 — See the judgment in *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraph 30 and case-law cited.

19 — See, inter alia, *Flisar v. Slovenia*, no. 3127/09, §§ 33 to 35, 29 September 2011. Moreover, oral hearings are not always compulsory in all judicial proceedings involving criminal penalties; see, inter alia, *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIII.

20 — Nevertheless, that did not prevent the Commission from reiterating, first, that the appellants acknowledged that Degussa must have been aware that the appellants had responded to the SO in a manner unfavourable towards Degussa and, second, that Degussa must furthermore have been aware of the reasons why the appellants claimed that Degussa was controlling SKW at a distance, thus casting doubt on the confidential nature of the information vis-à-vis Degussa.

21 — Short of waiving altogether the right to an oral hearing, nor is there, for that matter, a right *not* to be heard *in camera*.

55. The *wording* of Article 14(6) of Regulation No 773/2004 provides that each person *may* be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information. More than a mere authorisation, this implies a choice, not an obligation. Judging from the second sentence of Article 14(6) of that regulation, that choice will depend on the Commission's evaluation of the interest of the undertakings in the protection of their business secrets and other confidential information.

56. As I understand the appellants, they essentially argue that 'may' must, in this instance, be read as 'shall'. However, apart from being counter-intuitive, that argument fails for a number of reasons.

57. First, the *context* of Article 14(6) of Regulation No 773/2004 confirms the view that granting an *in camera* hearing is at the HO's discretion. Article 14(7) of Regulation No 773/2004 states that the HO *may* allow the parties to whom a SO has been addressed, the complainants and other persons invited to the hearing to ask questions during the hearing. Also, the heading of Article 14 of Regulation No 773/2004 ('Conduct of oral hearings') suggests that the aim of Article 14 is mainly to set out rules to ensure the smooth running of oral hearings by the HO, which implies that the HO must have a measure of managerial discretion. Conversely, where undertakings are granted specific rights (or the HO is put under a specific obligation), that is clearly specified in the text itself, for instance Articles 12(1) or 14 of Regulation No 773/2004, the latter using, on several occasions, terms leaving no discretion. That is hardly a coincidence.

58. Furthermore, the *aim* of Regulation No 773/2004 does not suggest a right to an *in camera* hearing either. I would call to mind that it follows from Article 33(1)(c) of Regulation No 1/2003 that Regulation No 773/2004 is intended to lay down the practical arrangements to ensure that the undertakings which are the subject of the proceedings conducted by the Commission are *given the opportunity of being heard* on the matters to which the Commission has taken objection, and that final decisions are based only on objections on which the parties concerned *have been able to comment*. Conversely, it is not the purpose of the regulation to ensure that undertakings are *actually* heard (let alone in private) — crucially, that is a matter for the undertakings themselves to request. Besides, as mentioned, the absence of a right to an *in camera* hearing seems unproblematic from the perspective of fundamental rights (see above at point 49). I would also add that the fact that the appellants consider that it is more effective to be heard orally than in writing is a matter of preference, not of law.

59. On a more general level, the procedure before the Commission seems to reflect an unwritten principle that the power to decide whether a hearing ought to be held *in camera* belongs to the impartial body conducting the hearing (to be exercised of its own motion or following a request). Indeed, as the Court is fully aware, in proceedings before the EU Courts, the decision to hold a hearing *in camera* is not within the control of the parties, but rather of the adjudicating body.[22] The same is true for oral hearings before the ECtHR.[23] Besides, I would call to mind that in judicial proceedings, a request for an *ex parte* hearing *in camera* — that is to say, time spent alone with the adjudicating body — must be regarded as highly irregular.[24]

60. However, that unusual scenario is not relevant to the matter under consideration, it being crucial to bear in mind that the procedure before the Commission is administrative in nature and that that institution is no adjudicating body. If anything, the procedure is *inter partes* between the party concerned and the Commission, rather than adversarial between the private parties suspected of participating in a given infringement. One consequence of this is, for instance, that the Commission is

22 — See Article 31 of the Statute; Article 79(1) of the Rules of Procedure of the Court of Justice; Article 109 of the Rules of Procedure of the General Court; and Article 63(2) of the Rules of Procedure of the Civil Service Tribunal.

23 — See Rule 63 of the Rules of Court of 1 June 2015; cf. also Rule A1(5).

24 — See, to that effect, judgment in *ZZ*, C-300/11, EU:C:2013:363, paragraph 56.

not required to afford parties the opportunity to cross-examine witnesses and to analyse their statements at the investigation stage [25] (or, by the same logic, at the *inter partes* stage). However, this also means that the Commission may impose penalties only for competition law infringements in respect of which the parties have been able to comment. So, if a party wishes to divulge information which is confidential and liable to inculpate another party to the administrative proceedings, it is self-evident to me that, assuming that the Commission should want to rely on that information, it must issue a complementary SO to the other party [26] (the Commission not being required to 'prosecute' further heads of complaint). It follows that, in the case under consideration, there was no requirement to take any account of Degussa's interests: to the extent that the Commission had wished to penalise Degussa further by relying on the appellants' information, it would have been required to issue an additional SO. The reasons which the HO gave to refuse holding a hearing *in camera*, upheld by the General Court, were therefore incorrect. [27]

61. In light of the general comments made above, there is nothing surprising about the fact that it is up to the HO to decide whether to hold a separate oral hearing of that party where this seems appropriate, for instance, in order to protect the business secrets or other confidential information of a party. Indeed, EU officials have a duty to respect such secrets [28] and, as mentioned, the administrative proceeding is conducted according to rules designed for that purpose. However, interestingly, the wording of Article 14(6) of Regulation No 773/2004 makes no distinction, in terms of confidentiality, between *in camera* and joint hearings.

62. Which leads me to my next point: nothing in the wording of Regulation No 773/2004 substantiates the view that information provided at an *in camera* — or, to be more precise, a *separate* — hearing might automatically qualify as confidential. That depends solely on what is said at such a hearing. In fact, unlike requests for confidential treatment in respect of written observations on the SO, which require an *ex post* assessment, when receiving a request for an *in camera* hearing, the Commission must make a preliminary assessment *ex ante* as to whether the information which the party intends to impart to it is actually confidential. At the risk of stating the obvious, non-confidential information stated during an *in camera* hearing cannot lawfully be withheld from other parties seeking access to the file.

63. So, a party whose request for an *in camera* hearing is refused will have to consider carefully whether it still wishes to participate in the joint oral hearing and, if so, what to say. That party is not obliged to divulge confidential information in front of all the participants. Alternatively, that party could instead choose, at an earlier point in time, to submit confidential information in writing to the Commission in its reply to the SO, and request confidential treatment thereof. That might also involve taking a commercial risk but, depending on the circumstances, it might be a better option than requesting an *in camera* hearing. Accordingly, the administrative procedure ensures that parties may decide whether to present information which they deem confidential to the Commission and, if so, whether they ought to do so orally or in writing (even though, admittedly, they do not have the final say on the issue of confidentiality). Hence, the exercise of the right to be heard invariably involves commercial decisions for the parties. [29] The present case shows this: the appellants (understandably) chose to give priority to one commercial goal — economic survival — over another, that is to say, the possibility of lower fines.

25 — See, to that effect, judgment in *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 200.

26 — See, to that effect, the judgment in *LG Display and LG Display Taiwan* v *Commission*, T-128/11, EU:T:2014:88, paragraph 110 and case-law cited (upheld by the judgment in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258).

27 — However, it ought to be clear that the duty to give reasons is a separate question from that of the merits of those reasons; see, inter alia, judgment in *Netherlands* v *Commission*, C-159/01, EU:C:2004:246, paragraph 65 and case-law cited.

28 — See Article 339 TFEU; Article 28 of Regulation No 1/2003 ('Professional secrecy'); and Article 16 of Regulation No 773/2004 ('Identification and protection of confidential information').

29 — This is illustrated by the fact that, in their letter of 28 January 2009 (point 13 above), the appellants mentioned that 'it remained from a commercial perspective impossible for our clients to discuss Degussa's role during a public session'.

64. Obviously, where the Commission unlawfully divulges confidential information, a party has the right to bring an action for damages under Article 268 TFEU.[30] However, it is paramount to bear in mind that the issue as to whether information might lawfully be divulged is unrelated to the exercise of the right to be heard. In other words, the unlawful divulging of confidential information does not necessarily affect the validity of a Commission decision imposing fines.

65. Lastly, although the decision to grant an *in camera* hearing remains at the discretion of the Commission, as a public body, that discretion must be exercised lawfully. Although I would believe that, where properly justified by the conduct of the administrative procedure, the EU Courts could only rarely criticise, on the merits, a decision on whether to hold an *in camera* hearing, that does not rule out the possibility of censure in case of misuse of powers, insufficient reasoning (including no response at all), incorrect factual assessment or perhaps even a manifest error of assessment.[31] However, apart from the fact that I expect the Commission to be mindful of the principle of good administration enshrined in Article 41 of the Charter when taking decisions on *in camera* hearings, it is not necessary in the matter under consideration to explore the exact limits to the judicial review of such decisions.

66. All the same, it follows from all the above that, by charging the Commission, at point 39 of the judgment under appeal, with the duty of striking an appropriate balance, case by case, between, on the one hand, the aim of protecting the rights of the defence of undertakings charged with violating the EU competition rules and, on the other, the lawful interest of third parties in the non-disclosure of their business secrets and other confidential information in the course of the investigation, the General Court erred in law.

67. However, it does not follow from that error that the first ground of appeal is founded. Indeed, the appellants' argument that they were entitled to an *in camera* hearing is equally flawed and was correctly dismissed at first instance. As we will see, the same holds true as regards the remaining part of this ground of appeal which is, together with the other grounds of appeal, equally ill-founded. It is settled that if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed.[32]

68. Accordingly, the main issue being one of pure law, I propose that the Court should replace the incorrect reasoning in paragraphs 35 to 59, 62 and 63 of the judgment under appeal with one according to which there is no right to be heard orally *in camera* before the Commission in investigations into breaches of the competition rules. Doing so would also have the effect of rejecting the argument that the General Court unlawfully pre-assessed the evidence and, consequently, the appellants' first main argument described above at point 50 ought to be dismissed.

ii) The alternative solutions proposed by the appellants

69. The appellants also contend that the General Court acted out of all proportion by refusing to criticise the Commission for not accepting the two alternative solutions which they proposed. To recall, those alternative solutions consisted, initially, in the possibility of giving Degussa access to their *in camera* presentation after either the end of 2008 or the conclusion of a new supply agreement. Following the conclusion of that agreement, the appellants requested an additional oral hearing, where Degussa would have the opportunity of being present.

30 — In accordance with the principle laid down in the judgment in *Adams* v *Commission*, 145/83, EU:C:1985:448.

31 — Compare with, concerning (i) the right to petition the European Parliament, judgment in *Schönberger* v *Parliament*, C-261/13 P, EU:C:2014:2423, paragraphs 23 and 24; (ii) complaints dismissed by the Commission relating to alleged anti-competitive behaviour, judgment in *Automec* v *Commission*, T-24/90, EU:T:1992:97, paragraphs 71 to 79; and (iii) actions for annulment of Commission decisions not to bring infringement proceedings against a Member State, order in *Ruipérez Aguirre and ATC Petition* v *Commission*, C-111/11 P, EU:C:2011:491, paragraphs 11 to 13 and case-law cited.

32 — See the judgment in *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187 and case-law cited.

70. As regards the first alternative solution, there is, as held above, no right to an oral hearing *in camera*. Moreover, this proposal is all the more intriguing as, in principle, the observance of the right to be heard is not a matter of give and take. In addition, it is not for the appellants to decide whether information is confidential or not, as this would limit the rights of other parties to obtain non-confidential information.

71. As for the subsequent proposal, I find that the General Court did not err in law when considering, at paragraph 61 of the judgment under appeal, that the proper conduct of the administrative procedure requires the adoption of a decision within reasonable time, and that there accordingly is no right to an additional oral hearing. Indeed, this is echoed in Article 10(2) of Regulation No 773/2004, pursuant to which the Commission is not obliged to take into account written information which is not provided within the deadline set for responding to the SO. The appellants were given the possibility of presenting their views orally (where, I might add, their speaking time was extended in case they might wish to give their *in camera* presentation). The right to be heard is intended to give undertakings the opportunity of being heard, not necessarily of being heard at the time of their best convenience.

72. Lastly, as correctly noted by the General Court, the HO gave the appellants the opportunity to submit additional written comments. This appears to be in line with current practice.[33] Therefore, the appellants had ample opportunity to make their views known, including orally.

73. On that basis, the argument that the General Court infringed the principle of proportionality as regards the appellants' right to be heard orally ought to be dismissed and, accordingly, so ought the appeal.

d) Considerations in the alternative: consequences arising from the breach of the appellants' procedural rights

74. In the event that the Court were — unlike me — to hold that the appellants were entitled to an *in camera* hearing, I would make the following remarks.

75. According to case-law, the rights of the defence are infringed where the outcome of the administrative procedure conducted by the Commission might have been different as a result of an error committed by it. An undertaking establishes that there has been an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, *but rather that the undertaking would have been better able to ensure its defence had there been no error*.[34]

33 — See Article 12(4) of the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29).

34 — See the judgment in *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraph 31 and case-law cited.

76. Admittedly, it is not always easy to establish that there has been an infringement. [35] The reasons for this might be manifold, such as the inadmissibility — in whole or in part — of a ground of appeal, or simply that no error of law was uncovered. [36] Contrariwise, where the procedural irregularity is clear, the Court has minutely reviewed the General Court's assessment as to whether, failing that irregularity, that undertaking would have been better able to ensure its defence, annulling where necessary. [37] And rightly so, for it is important that the burden of proof is not too high, and that any uncertainties are resolved in the applicant undertaking's favour. [38]

77. For the sake of argument, I find it open to question why the burden of proof ought to lie, as such, with the undertaking concerned. After all, the presumption of legality attaching to acts of the institutions ought not to be limitless. Once an applicant undertaking has shown that a Commission decision is procedurally flawed, that presumption ought no longer to apply. Instead, *it ought to be for the Commission* to prove that the error had no impact on the content of the decision.

78. The appellants omit to describe specifically in what way it was conceivable that the administrative procedure might have had a different outcome. Nonetheless, the judgment under appeal, as well as the appellants' written submissions (at first instance and on appeal) indicate that the appellants considered that a hearing *in camera* would allow them to attempt to convince the Commission that they did not incur any liability or, at most, only a reduced liability in respect of the infringement at issue, owing to Degussa's role. The hearing confirmed this.

79. In my view, there is a difference between considering whether a party might have been able to better defend itself, on the one hand, had it been given access to the entire case file and, on the other hand, had it been granted an *in camera* hearing. While the significance of unlawfully withheld documents can be appraised *ex post*, [39] that of an *in camera* hearing cannot: it is impossible to be entirely certain of what actually takes place during such meetings. There is also nothing to prevent a party from submitting other relevant confidential information to the Commission during such a meeting that has not been alluded to beforehand. Hence, if there is a right to an *in camera* hearing before the Commission, and if an oral hearing is held only once — as in the case under consideration — then the party who was entitled yet deprived thereof, *cannot be considered to have been heard at all*. [40] In the interest of justice being seen to done, I am thoroughly unconvinced by the idea of validating a pre-emptive reasoning denying an *in camera* hearing because it could not possibly have helped that party.

80. Moreover, it would be insufficient to give the deprived party, by way of compensation, the opportunity to provide an additional written statement. A written statement cannot replace an *in camera* hearing, if parties have a right thereto.

35 — See, by way of example, the judgment in *SGL Carbon* v *Commission*, C-308/04 P, EU:C:2006:433, paragraphs 97 and 98, concerning a claim of insufficient access to the file.

36 — See ibid., paragraphs 95 and 96.

37 — In the judgment in *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, the Court, disagreeing with the Opinion of Advocate General Sharpston (EU:C:2009:307), overturned the General Court's judgment, which, in spite of the Commission's breach of a 10 day minimum time-limit for submission of comments, had excluded the possibility of a different outcome of an antidumping procedure (see, in particular, paragraphs 88, 94, 96 and 102 to 104). Not awaiting the expiry of that time-limit before forwarding a proposal for definitive measures to the Council amounted to not hearing that undertaking at all.

38 — Concurring, see Craig, P., *EU Administrative Law*, 2nd ed., Oxford, 2012, p. 333.

39 — See, by way of example, judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 649 to 688.

40 — In that sense, the situation is therefore similar to the judgment in *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598.

81. Which leads me to my last point: I do not accept that it could somehow be held against the appellants that they did not appeal against the General Court's findings in relation to the second branch of their fifth ground of annulment, which concerned the alleged presence of mitigating circumstances relating to the role of Degussa. A decision not to appeal does not imply recognition. Besides, the only thing which the Court needs to be satisfied of is whether the appellants have shown that they would have been better able to ensure their defence, had they had the opportunity of being heard *in camera*.

82. I believe this to be the case. Accordingly, in the event that the Court were to hold that the appellants had a right to a hearing *in camera* before the Commission, then the judgment under appeal ought to be set aside for breach of an essential procedural requirement, namely Article 12(1) of Regulation No 773/2004, read in conjunction with Article 14(6) thereof. As the Court is sufficiently informed to rule upon the action brought at first instance, the contested decision ought to be annulled as well, in accordance with the original form of order sought.

83. However, my view is still that the appellants did not have such a right at all, and that the appeal ought accordingly to be dismissed.

VI – Costs

84. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

85. Since the Commission has applied for an order that the appellants pay the costs and the latter have been unsuccessful, they must be ordered to pay the costs.

VII – Conclusion

86. In the light of the above, I propose that the Court:

— dismiss the appeal;

— order the appellants to pay the costs.