JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

13 December 2001 *

In Joined Cases T-45/98 and T-47/98,

Krupp Thyssen Stainless GmbH, established in Duisberg (Germany), represented by M. Klusmann, O. Lieberknecht and K. Moosecker, lawyers, with an address for service in Luxembourg,

Acciai Speciali Terni SpA, established in Terni (Italy), represented by L. G. Radicato di Brozolo, lawyer, with an address for service in Luxembourg applicants,

applicants,

v

Commission of the European Communities, represented by W. Wils and K. Leivo, acting as Agents, assisted by H.-J. Freund and A. dal Ferro, lawyers, with an address for service in Luxembourg,

defendant,

* Language of the case: German and Italian.

APPLICATION for the annulment of Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy Surcharge) (OJ 1998 L 100, p. 55),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, M. Vilaras and N.J. Forwood, Judges,

Registrar: G. Herzig,

having regard to the written procedure and further to the hearing on 11 October 2000,

gives the following

Judgment

Facts

1 Krupp Thyssen Nirosta GmbH ('KTN'), a company incorporated under German law, came into being on 1 January 1995 as a result of a merger between Thyssen Stahl AG and Fried. Krupp AG Hoesch Krupp ('Krupp'), which manufactured stainless steel flat products resistant to acids and high temperatures. On

16 September 1997 its name was changed to Krupp Thyssen Stainless GmbH ('KTS').

2 Acciai Speciali Terni SpA ('AST'), a company incorporated under Italian law, whose principal activities include the production of stainless steel flat products, was set up on 1 January 1994 when the steel-making activities of the Italian group ILVA were split up into three undertakings with a view to subsequent sale. On 21 December 1994 the Commission authorised the joint acquisition of AST by Krupp, Thyssen Stahl, AFL Falck, Tadfin SpA and FI.RE. Finanziaria SpA (Riva group) (Commission Decision 95/421/EC of 21 December 1994 declaring a concentration to be compatible with the common market (Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST, OJ 1995 L 251, p. 18). In December 1995 Krupp increased its share in AST from 50% to 75% and then acquired all the shares in AST on 10 May 1996 (Commission Decision of 2 May 1996 declaring a concentration to be compatible with the common market (Case No IV/M.740 — KRUPP (II), OJ 1996 C 144, p. 3). Those shares were then transferred to KTN, which had become KTS.

3 Stainless steel is a type of special steel whose main property is resistance to corrosion. This resistance is achieved by the use of different alloying materials (chrome, nickel, molybdenum) in the production process. Stainless steel is used in the form of flat products (plates or coils, cold or hot rolled) or long products (bars, wire rod, sections, hot rolled or finished). Flat products account for 82% of sales of finished stainless steel products. Most of those products are ECSC products within the meaning of Article 81 of the Treaty.

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

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

6 The methods used for calculation of the alloy surcharge have varied depending on the period and the producer. In the course of inspections carried out under Article 47 of the ECSC Treaty and in certain letters to the Commission, the producers of stainless steel flat products stated that they had used the same formula for calculating the alloy surcharge, with the exception of the reference values (or 'trigger values'), since 1988. However, in 1991, following a drop in the prices of alloying materials below the trigger values, the producers applied a zero alloy surcharge.

7 On the basis of the information obtained, and particularly copies of circulars sent by the producers concerned to their customers announcing a change to the bases used to calculate the alloy surcharge, the Commission served a statement of objections on 19 undertakings on 19 December 1995. The replies given by those undertakings prompted the Commission to undertake further investigations under Article 47 of the ECSC Treaty.

8 In December 1996 and January 1997, after the Commission had carried out a number of inspections, lawyers or representatives of a number of undertakings, including Krupp and AST, informed the Commission of their wish to cooperate. For that purpose, statements were sent to the Commission: on 17 December 1996 by Compañía Española para la Fabricación de Aceros Inoxidables SA (Acerinox), ALZ NV, Avesta Sheffield AB ('Avesta'), KTN and Usinor SA ('Usinor' or 'Ugine', and on 10 January 1997 by AST.

9 On 24 April 1997 the Commission served a new statement of objections replacing the statement of 19 December 1995 on those undertakings and on Thyssen Stahl.

10 On 21 January 1998 the Commission adopted Decision 98/247/ECSC relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/35.814 - Alloy surcharge) (OJ 1998 L 100, p. 55, hereinafter 'the Decision').

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

12 Thus, according to the Decision, producers calculated the amount of the alloy surcharge to be applied in a given month (M) in the different Community currencies as follows: they calculated the average price of nickel, ferro-chromium and molybdenum in the two months preceding the month before the month of calculation (in other words, M-2 and M-3). Then they compared the values thus obtained with the reference values (or trigger values) since February 1994, namely: ECU 3 750/tonne for nickel, ECU 5 532/tonne for molybdenum and ECU 777/tonne for chromium. Under that system, if the difference between the average prices and the reference values is positive, a price supplement is added to the basic price of the steel concerned for the month M. If it is negative, no increase is applied. There is thus no negative alloy surcharge. Such a situation

occurred between 1991 and 1993, when alloy prices fell below the trigger values then applicable and producers applied a zero alloy surcharge. The amounts reflecting a positive difference are multiplied by the percentage of each alloy in the quality of steel concerned.

13 According to the Decision, the alloy surcharge calculated on the basis of the newly determined reference values was applied by all producers for their sales in Europe as from 1 February 1994, except in Spain and Portugal. In Spain the new alloy surcharge was applied in June 1994, Acerinox having indicated at the Madrid meeting that the immediate application of the new alloy surcharge in Spain would not help to increase demand and would not have a positive effect on Spanish industry which was in the depths of a severe crisis. However, Acerinox too applied the new alloy surcharge as from 1 February 1994 in the other Member States, and Denmark in particular. According to the Decision, that agreement led to a virtual doubling of stainless steel prices between January 1994 and March 1995.

14 The operative part of the Decision contains the following provisions:

'*Article 1*

[Acerinox], ALZ NV, [AST], [Avesta], Krupp Hoesch Stahl AG ([KTN] as from 1 January 1995), Thyssen Stahl AG ([KTN] as from 1 January 1995) and [Ugine] infringed Article 65(1) of the ECSC Treaty, in the case of [Avesta] from December 1993 to November 1996 and, in the case of the other undertakings, up to the date of this Decision, namely by modifying and by applying in a concerted fashion the reference values used to calculate the alloy surcharge, such practice having both the object and the effect of restricting and distorting competition within the common market.

Article 2

The following fines are hereby imposed in respect of the infringements described in Article 1:

[Acerinox]	ECU 3 530 000
ALZ NV	ECU 4 540 000
[AST]	ECU 4 540 000
[Avesta]	ECU 2 810 000
[KTN]	ECU 8 100 000
[Usinor]	ECU 3 860 000

Article 3

...

Article 4

[Acerinox], ALZ NV, [AST], [KTN] and [Usinor] shall immediately put an end to the infringements referred to in Article 1 and shall inform the Commission within three months of being notified of this Decision of the measures they have taken to that end.

The undertakings referred to in Article 1 shall refrain from repeating the acts or conduct specified in the said Article and from adopting any measure having an equivalent effect.'

15 By fax of 21 January 1998 the Commission notified the operative part of the Decision to the applicants. By decision of 2 February 1998 the Commission replaced by other numbers the bank account number appearing in the first paragraph of Article 3 of the operative part of the Decision notified on 21 January 1998 into which the fines imposed were required to be paid ('the decision of 2 February 1998'). On 5 February 1998, the Decision, thus amended, was formally notified to its addressees.

Procedure

16 By applications lodged at the Registry of the Court of First Instance on 11 March 1998 (Case T-45/98) and 13 March 1998 (Case T-47/98) KTS and AST instituted the present proceedings. Acerinox also brought proceedings against the Decision (Case T-48/98).

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure. As a measure of organisation of procedure, it asked the Commission to answer a number of written questions.

18 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 11 October 2000.

19 After the views of the parties were heard on the matter, the Court of First Instance decided that the present cases should be joined for the purposes of the judgment in accordance with Article 50 of the Rules of Procedure.

Forms of order sought

20 The applicant in Case T-45/98 claims that the Court of First Instance should:

— Annul the Decision, as amended by the defendant's decision of 2 February 1998, in so far as it concerns the applicant;

— In the alternative, cancel the fine imposed on the applicant by Article 2 of the Decision and annul the combined provisions of Article 4 and Article 1 of the Decision;

— In the further alternative, reduce the fine imposed on the applicant by Article 2 of the Decision and annul the combined provisions of Article 4 and Article 1 of the Decision;

— Grant its request for measures of organisation of procedure;

— Order the Commission to pay the costs.

21 The Commission contends that the Court of First Instance should:

— Dismiss the action;

— Reject the request for measures of organisation of procedure;

— Order the applicant to pay the costs.

22 The applicant in Case T-47/98 claims that the Court of First Instance should:

— Annul the Decision in so far as it concerns the applicant;

— In the alternative, annul Articles 2 and 4 of the Decision in so far as they relate to the applicant;

— In the further alternative, reduce the fine imposed on the applicant;

— Adopt the measures of organisation of procedure applied for;

— Order the Commission to pay the costs.

23 The Commission contends that the Court of First Instance should:

— Dismiss the action as unfounded;

— Order the applicant to pay the costs.

The requests for measures of organisation of procedure relating to Commission internal documents

Arguments of the parties

24 During the written procedure, KTS and AST asked the Court to order the Commission to produce its internal documents relating to the Decision in so far

as they might show that the Commission was aware of the application of the alloy surcharge. In support of their applications, they maintain that, because price lists were regularly notified to Commission officials in accordance with the ECSC Treaty, those officials were or should have been aware of the use of the single formula for calculation of the alloy surcharge.

25 AST adds that access to those documents would also enable it to contest the allegation in paragraph 50 of the Decision that the price concertation dated not from 1993 but from 1988.

26 Furthermore, KTS, after consulting the file forwarded to the Registry on 7 December 1998 by the Commission, requested, by letter lodged at the Registry on 10 June 1999, that, by way of measure of organisation of procedure, the Commission should be called on to prepare a complete list of the documents contained in folders XIX to XXII and to indicate, in each case, the reasons for which those documents could not be disclosed to it. In support of its application, KTS claims that such a measure is necessary to enable it to check whether those folders contained relevant documents which might justify its being granted access to them.

27 The Commission replies that it had no knowledge either of the single method of calculating the alloy surcharge or of the conditions for applying it, which were never notified to it, as the undertakings concerned merely notified to it the alloy surcharges applied by them respectively. Moreover, it is inappropriate to seek access to internal documents to verify the statement in paragraph 50 of the Decision that the infringement dated from about 1988 since, in the absence of adequate evidence, the Decision indicates that the infringement commenced in December 1993, the date of the Madrid meeting.

28 As regards KTS's application submitted by letter of 10 June 1999, the Commission, in the observations which it lodged at the Registry on 25 August 1999, requested that it be rejected on the grounds, first, that it is not required to supply a detailed list of its internal documents to which access is not authorised and, second, that it is not required to specify, for each document, the overriding reasons for which access to those parts of the file must be refused to the undertakings concerned. It contends, in that connection, that the order of the Court of First Instance of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94, and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293 (hereinafter 'the *Beams II* order') does not impose any such obligation on it.

Findings of the Court

29 Article 64(1) of the Rules of Procedure of Court of First Instance provides '[t]he purpose of measures of organisation of procedure shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions.'

30 According to Article 64(2)(a) and (b) of those rules, the purpose of measures of organisation of procedure is, in particular, to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence and also to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and (4) of those rules, the adoption of such measures may be proposed by the parties at any stage of the procedure and they may consist of requests that documents or any papers relating to the case to be produced.

31 However, to enable the Court to determine whether it is conducive to the proper conduct of the procedure to order the production of certain documents, the party requesting production must not only identify the documents requested but also provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] I-8417, paragraph 93).

32 As regards, first, the requests for access to internal Commission documents in the course of the proceedings before the Court, it must first be borne in mind that Article 23 of the ECSC Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of the first paragraph of Article 46 thereof, requires the defendant to transmit to the Community Court 'all the documents relating to the case before the Court' and not just the documents which the defendant itself considers relevant in the light of the factual and legal arguments raised by the parties. Accordingly, the Commission was under an obligation — which it fulfilled — to forward to the Court all the documents relating to the administrative procedure prior to adoption of the Decision, including its internal documents.

33 However, the purpose of Article 23 of the Statute of the Court of Justice is to enable the Community judicature to review the legality of the contested decision whilst ensuring that the rights of the defence are observed, and not to guarantee unconditional and unlimited access for all parties to the administrative file *(Beams II* order, paragraph 32).

34 In particular, according to settled case-law internal documents are not to be communicated to the applicants unless the circumstances of the case are exceptional and the applicants make out a plausible case for the need to do so (order of the Court of Justice of 18 June 1986 in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] Rec. p. 1899, paragraph 11, Case T-35/92 *Deere* v *Commission* [1994] ECR II-957, paragraph 31, and the *Beams II* order, paragraphs 35 and 36).

35 In the circumstances of this case, the arguments of KTS and AST that access to the internal documents of the Commission would enable them to show that the Commission was or should have been aware of the use of the calculation method for the alloy surcharge by the stainless steel producers are not based on any sound evidence, nor do they show the existence of exceptional circumstances within the meaning of the case-law cited above.

36 As stated by the Commission in paragraph 61 of the Decision, in response to a similar argument put forward in the administrative procedure, the undertakings concerned disclosed to it only the amounts of the alloy surcharges applied by each of them. However, they never disclosed the calculation method itself or the conditions for its application. That finding, which is not contested, shows to be entirely unfounded the claim that the Commission was aware of the infringement at issue, which, moreover, derived not from the use of a single method for calculation of the alloy surcharge incorporating variable calculation rates but from the introduction into that calculation method, as from the same date and by all the undertakings concerned, of the same reference values for the alloying materials (chrome, nickel and molybdenum) with a view to securing a price increase.

37 As regards AST's argument that access to the Commission's internal documents would enable it to contest the accusation that concertation began in 1988, it is entirely irrelevant, since in its Decision the Commission treated the concertation as dating back to December 1993, in the absence of adequate evidence (paragraphs 50 and 56 of the Decision).

38 Consequently, it must be held that KTS and AST have neither made out a plausible case nor demonstrated the existence of exceptional circumstances such as to justify an exception to the general rule that internal Commission documents are not available to applicants. Since they have thus failed to show that the measures applied for would be useful, the application must be rejected.

39 As regards, second, the separate application by KTS for production of a list of Commission internal documents, it must be pointed out that KTS made that application solely to establish whether the documents concerned were ones to which it considered that it should have access. Since that argument is also insufficient to prove the utility of the measure applied for, the application cannot be upheld.

40 It follows that the applications for measures of organisation of procedure relating to Commission internal documents must be rejected.

The claim for annulment of Article 1 of the Decision

I — *The pleas alleging breach of the rights of the defence*

A — *Access to the file*

Arguments of the parties

41 The applicants maintain that they did not have sufficient access to the file during the administrative phase, particularly in the case of documents classified as internal. In particular, KTS claims that the Commission likewise failed to give it any indication as to the content of the documents kept from it. As regards the other internal documents which were placed in the file after 8 November 1995,

the Commission likewise failed to give any information as to the number, importance and content of those documents, or even a list of them.

42 According to the applicants, the Commission did not comply with the case-law of the Court of First Instance on that point (order of the Court of First Instance of 19 June 1996 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537, hereinafter 'the *Beams I* order', paragraphs 62 to 78, and the *Beams II* order, paragraphs 30 to 39). Access to those Commission internal documents is relevant in order to demonstrate the 'complicity' of Commission staff who were, or should have been, aware of the use of the method for calculating the alloy surcharge by the stainless steel producers. According to KTS, it is also contrary to the principle of economy of procedure for its right of access to Commission internal documents to be exercisable only at the stage of court proceedings and not during the administrative phase.

43 The Commission contends that the applicants are not entitled to be granted access to its internal documents (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54). As regards the *Beams I* and *Beams II* orders, the Commission states that they concerned the scope of Article 23 of the Statute of the Court of Justice and in particular the question of the conditions under which applicants may have access to its internal documents in the context of proceedings before the Court.

Findings of the Court

44 It must be borne in mind, at the outset, that the general principles of Community law governing the right of access to the Commission file are intended to ensure effective exercise of the rights of the defence, including the right to be heard (Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4325, paragraph 76), which, in the case of competition proceedings initiated under the ECSC Treaty, is provided for in the first paragraph of Article 36 of that Treaty, according to

which the Commission, before taking a decision imposing one of the pecuniary sanctions provided for in that Treaty, must allow the person concerned an opportunity to submit his observations.

45 For the purpose of applying the competition rules of the EC Treaty, it is clear from settled case-law that the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively, on the basis of that information, on the conclusions reached by the Commission in its statement of objections (C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] I-865, paragraph 21, *Baustahlgewebe* v *Commission*, cited above, paragraph 89, and Case C-51/92 P *Hercules Chemicals* v *Commission*, cited above, paragraph 75).

46 It follows that the Commission has an obligation to make available to the undertakings to which a statement of objections has been addressed all documents, whether in their favour or otherwise, which it had obtained during the course of the investigation, with the exception of confidential documents, such as the internal documents of the Commission (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] II-389, paragraph 29, as confirmed by the judgment of the Court of Justice in *BPB Industries and British Gypsum* v *Commission*, cited above, paragraph 25; see also the judgment of 17 December 1991 in *Hercules Chemicals* v *Commission*, cited above, paragraph 54, Case T-221/95 *Endemol* v *Commission* [1991] ECR II-1299, paragraph 66). Those considerations are equally valid for the purpose of applying the competition rules of the ECSC Treaty.

47 In this case, it must be held that the applicants, which do not contest having had access to the documents in the file on which the Commission based the Decision, are merely claiming that they should also have had access to the internal documents of the Commission during the administrative procedure. However, as has been stated, the Commission is not obliged to make such documents available during the administrative procedure.

48 That conclusion is not undermined by the argument based on the *Beams I* and *Beams II* orders. It must be borne in mind that those orders concern the application of Article 23 of the ECSC Statute of the Court of Justice and, in particular, the conditions for access to internal Commission documents during proceedings before the Court. However, just as the general principles of Community law governing the right of access to the Commission's file during the administrative procedure do not apply, as such, to the procedure before Court (*Baustahlgewebe* v *Commission*, cited above, paragraph 90), the provisions governing the procedure before the Court cannot be applied to the administrative procedure before the Commission.

49 KTS's argument that it is contrary to the principle of economy of procedure not to grant access to internal Commission documents until the stage of proceedings before the Court is clearly irrelevant since, as already stated (see paragraphs 29 to 40 above), the conditions imposed by the case-law for such access to be available during the procedure before the Court are not, in any event, fulfilled.

50 It follows that the present plea is unfounded and must therefore be rejected.

B — *Infringement of KTS's right to be heard regarding the conduct of Thyssen Stahl*

Arguments of the parties

51 KTS maintains that the Commission infringed the first paragraph of Article 36 of the ECSC Treaty on the ground that its right to be heard regarding the conduct

imputed to Thyssen Stahl was not observed. It states that KTN, to which it was the successor, acquired as from 1 January 1995 the business of Thyssen Stahl in the stainless steel flat products sector and agreed, as purchaser, to accept liability for any infringements committed by that undertaking.

52 However, KTN never waived the right to be the subject of a new procedure in the event of the Commission imposing a fine on it for the conduct of Thyssen Stahl. It states, in that connection, that, during an inspection at the premises of KTN on 8 October 1996, the Commission did not disclose that the procedure against Thyssen Stahl would concern it as from that time. The Commission even notified the new statement of objections of 24 April 1997 not only to KTN but also to Thyssen Stahl, and the two undertakings expressed their views on it separately. In its reply of 30 June 1997 to the statement objections, KTN also expressly indicated that its views related only to the charges concerning it.

53 The Commission points out that, by letter of 23 July 1997, KTN declared that, following the takeover of Thyssen Stahl's stainless steel flat products business, it accepted liability for any conduct of the latter in respect of products covered by the present procedure and also 'for the period dating back to 1993'.

54 According to the Commission, it was precisely because it conducted a dual administrative procedure that it then asked KTN whether it was prepared to assume liability for the conduct of which Thyssen Stahl was accused. At the date of KTN's statement, Thyssen Stahl had moreover already expressed its views on the statement of objections. Accordingly, in the absence of any indication to the contrary, KTN's statement could relate only to the state of advancement of the procedure at that time, the reference number thereof being expressly mentioned in its statement. Consequently, according to the Commission, that statement was

concerned not with the assumption of liability to pay any fine that might be imposed on Thyssen Stahl but with the acceptance of liability for any conduct on the part of Thyssen Stahl relating to stainless steel flat products. That interpretation is confirmed by the fact that, if KTN had answered in the negative the question whether it assumed liability for Thyssen Stahl's conduct, the Commission would merely have imposed a fine on the latter but would not have initiated a new procedure against KTN.

Findings of the Court

55 The rights of the defence on which KTN relies are, in this case, safeguarded by the first paragraph of Article 36 of the ECSC Treaty, pursuant to which, before imposing any pecuniary sanction provided for by the Treaty, the Commission must give the party concerned the opportunity to submit its comments.

56 According to settled case-law, respect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be observed in all circumstances, even if the proceedings in question are administrative proceedings. The proper observance of that general principle requires that the undertaking concerned be afforded the opportunity, from the stage of the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents relied on by the Commission in support of its allegations (Joined Cases 100/80 to 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 10; see also Case T-30/91 *Solvay* v *Commission*, [1995] II-1775, paragraph 59, and the case-law there cited). It follows, in particular, that the Commission may rely only on facts on which the parties concerned have had an opportunity to make known their views (*Musique Diffusion Française*, paragraph 14).

57 It must also be borne in mind that it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the

infringement was adopted, another person had assumed responsibility for running the undertaking. (see, in particular Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78).

58 In this case, it is clear from the file, first, that on 24 April 1997, KTN and Thyssen Stahl were each addressees of the statement of objections and that each of those undertakings replied to it separately by letters from their respective representatives on 30 June 1997. In its reply to the statement of objections, KTN also expressly stated that it was submitting its observations 'in the name and on behalf of KTN'.

59 Second, it is clear that KTN, which was succeeded by the applicant KTS, agreed by its letter of 23 July 1997 to the Commission to be held liable for conduct imputed to Thyssen Stahl for the period from 1993, even though Thyssen Stahl's business in the product sector concerned had not been transferred to it until 1 January 1995.

60 In fact, in its abovementioned letter, KTN expressly stated:

'With regard to the abovementioned proceeding [Case IV/35.814 — KTN], you made a request to the legal representative of Thyssen Stahl... that [KTN] should expressly confirm that it took over liability for any acts done by Thyssen Stahl following the transfer of Thyssen Stahl's stainless steel flat products business, in so far as the stainless steel flat products at issue in these proceedings are concerned, and this also applies to the period dating back to 1993. We hereby expressly give you that confirmation.'

61 Finally, in paragraph 102 of the Decision, the Commission inferred from that statement that account should be taken of it in the operative part of the Decision. Consequently, the Commission considered KTN to be responsible for those acts of Thyssen Stahl which were regarded as contrary to Article 65(1) of the ECSC Treaty (Article 1 of the Decision) and therefore imposed on it a fine relating also to the acts imputed to Thyssen Stahl (Article 2 of the Decision). In that connection, the Commission expressed the view, in paragraph 78 of the Decision, that the duration of the infringement imputed to Thyssen Stahl extended from December 1993, the date of the Madrid meeting at which the concertation between the producers of stainless steel flat products commenced, to 1 January 1995, the date on which Thyssen Stahl ceased business in that sector.

62 It must be emphasised that it is undisputed that, in view of the statement made by KTN on 23 July 1997, the Commission was, by way of exception, entitled to impute to KTN liability for the unlawful conduct of which Thyssen Stahl was accused between December 1993 and 1 January 1995. It must be concluded that such a statement, which in particular takes account of economic considerations specific to concentrations of undertakings, implies that the legal person within whose sphere of responsibility the business of another legal person was brought after the date of the infringement deriving from that business should be required to be answerable for it, even though, in principle, it is incumbent upon the natural or legal person running the undertaking concerned at the time of the infringement to answer for it.

63 However, in so far as it constitutes an exception to the principle that a natural or legal person may be penalised only for acts imputed to it individually, such a statement must be interpreted strictly. In particular, unless he gives some indication to the contrary, the person making such a statement cannot be presumed to have waived the right to exercise his rights of defence.

64 However, contrary to what, in essence, the Commission contends, KTN's statement of 23 July 1997 could not be interpreted as implying, in addition, a

waiver of its right to be heard regarding the acts imputed to Thyssen Stahl in the statement of objections notified to Thyssen Stahl on 24 April 1997, for which KTN agreed from that time to be held responsible for the purposes of the imposition of any fine.

65 That is particularly true since the statement of objections was sent separately to KTN and Thyssen Stahl and, quite clearly, that statement did not attribute to KTN liability for the acts alleged against Thyssen Stahl.

66 It must therefore be held in this case that the Commission did not give KTN an opportunity to submit its comments on the reality and relevance of the acts imputed to Thyssen Stahl and that, consequently, KTN was not able to exercise its rights of defence in that connection.

67 Accordingly, as is clear from the case-law, the Commission was not entitled to attribute liability for the acts of Thyssen Stahl to KTN or, consequently, to impose a fine on KTN in respect of the acts attributed to Thyssen Stahl when, on that point, the statement of objections was addressed only to the latter (see Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others* v *Commission* [2000] ECR I-1365, paragraph 146).

68 In view of the foregoing, KTN's plea must be declared well founded and therefore Article 1 of the Decision must be annulled to the extent to which it imputes to KTN the infringement of which Thyssen Stahl was accused.

II — *The plea alleging a formal defect*

Arguments of the parties

69 The applicants maintain that the Decision was not properly adopted, on the ground that it was corrected and amended by the decision of 2 February 1998 without details being given of the errors of law affecting the Decision and without any indication being given whether those errors had been removed, which constitutes an infringement of the Commission's Rules of Procedure.

70 In addition, AST maintains that paragraph 38 and 40 of the Decision were omitted in the copy notified to it, which constitutes a severe formal defect in that AST was thus not in a position to be fully apprised of the Commission's reasoning and to defend itself.

71 Not having had access to the file in the administrative phase of the procedure, the applicants request that measures of organisation of procedure be ordered by the Court for that purpose.

72 The Commission states that the alleged error of law corrected by the decision of 2 February 1998 related to the indication in the first paragraph of Article 3 of the Decision of the numbers of the bank accounts into which the fines imposed were to be paid. It emphasises that, in its letter of 5 February 1998 accompanying the formal notification of the Decision to the applicants and to the other undertakings, that correction was expressly mentioned. Moreover, the Decision, as forwarded to the parties by fax on 21 January 1998, was absolutely identical to the one served on them by letter of 5 February 1998.

Findings of the Court

73 It is clear from the case-law that the operative part and reasoning of the decision notified to the addressee or addressees of the decision must correspond to those of the decision adopted by the College of Commissioners, exception being made for any corrections merely of spelling and grammar which may still be made to the text of an act after its formal adoption by that college (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 62 to 70).

74 In this case, the first paragraph of Article 3 of the operative part of the Decision, as forwarded to the parties on 21 January 1998, contained a bank account number for payment of the fines imposed. By its decision of 2 February 1998 the Commission replaced that number by several different account numbers. That change, the only one made by the decision of 2 February 1998, was included in the text of the Decision formally notified to the applicants on 5 February 1998 together with a letter in which the correction made by the College of Commissioners was also expressly mentioned. It is undisputed that no other change was made to the Decision. Consequently, since the Decision, as notified to the applicants, corresponds to the one adopted by the College of Commissioners, the argument alleging irregularities in the adoption of the Decision is unfounded.

75 As regards the alleged omission of paragraphs 38 and 40 of the Decision, as notified to AST, it need merely be stated that it derived from a simple error of numbering to which no importance can be attached because, in the text of the Decision notified to AST, those paragraphs corresponded to the second subparagraphs of paragraph 37 and paragraph 39 respectively.

76 In those circumstances, the present plea must be rejected and there is no reason to grant the request for measures of organisation of procedure.

III — *The pleas alleging inadequacy of the statement of reasons, manifest errors of assessment of the facts and errors in law*

A — *The origin of the infringement*

Arguments of the parties

77 The applicants maintain that the Decision is vitiated by errors of assessment and misuse of powers in that it is based on unproven statements concerning the origin of the method of calculating the alloy surcharge that were capable of influencing the appraisal of the infringement penalised by the Decision and the amount of the fine decided upon.

78 The applicants criticise the Commission for indicating, in paragraphs 19, 50 and 56 of the Decision, that a single method for calculating the alloy surcharge had been used by stainless steel producers since 1988 and was the result of concertation, so that the concerted change of the reference values, from 1994, was merely a development of that process. In that connection, they criticise it, in particular, for referring to Commission Decision 90/417/ECSC of 18 July 1990 relating to a proceeding under Article 65 of the ECSC Treaty concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (OJ 1990 L 220, p. 28).

79 In addition, AST considers that the Commission's statement in paragraph 55 of the Decision that the calculation values included in the alloy surcharge formula can be compared to recommendations within the meaning of the Commission notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises (*Journal Officiel* 1968 C 75, p. 3, hereinafter 'the 1968 notice') was made solely in order to imply that the purpose of the agreement was considerably more serious that it was in fact.

80 In order to examine the matters on which the Commission based all those findings, AST asks the Court to order production of the Commission's internal documents.

81 The Commission replies that no infringement of the competition rules is attributed to the applicants for the period before 1993. Moreover, the appraisal of facts dating back beyond that date had no impact on the assessment of the infringement or calculation of the fine.

Findings of the Court

82 It must be pointed out that the subject-matter of the agreement described, in particular, in paragraph 47 of the Decision was the use with effect from the same date by all the producers of stainless steel flat products of identical reference values in the method for calculating the alloy surcharge, a method that had been used previously, with a view to securing an increase in the price of stainless steel flat products.

83 Moreover, with regard to the duration of the infringement, it is important to note that the Commission stated, in paragraph 50 of the Decision, that although there were indeed reasons for thinking that the agreement originated in 1988, the date on which the undertakings used an identical calculation method for the alloy surcharge, the facts were not sufficiently established on that point. It inferred that the agreement, deriving from a concerted change in the reference values in that calculation method, had commenced at the Madrid meeting in December 1993 and continued until the date on which the Decision was adopted. Accordingly, with regard to the duration of the infringement, the Commission adopted a period of only four years, representing the period between the date of the Madrid meeting and the date of adoption of the Decision, except in the case of Avesta and Thyssen Stahl, for which it considered that the duration of the infringement was shorter (paragraph 78 of the Decision).

84 It follows that, contrary to the applicants' assertion, the fact that the Commission may have considered that the origin of the agreement dated back to 1988, when the undertakings used an identical formula for calculating the alloy surcharge, had no legal repercussions on either the characterisation of the infringement or the calculation of the fine. Consequently, that consideration is not such as to affect the legality of the Decision.

85 The same applies to the reference, in paragraphs 19 and 56 of the Decision, to Decision 90/417/ECSC, which, it must be held, was made only in order to describe the circumstances in which the method for calculating the alloy surcharge was used, and not in order to assess the purpose, effect or duration of the agreement covered by the Decision, or to calculate the fine.

86 The argument that the reference to the 1968 notice sought to establish that the purpose of the agreement was considerably more serious than it in fact was must also be rejected.

87 It must be concluded that the Commission referred to that notice in order to show that, contrary to the assertion of the undertakings concerned, its position on agreements concerning calculation models was necessarily known to them. In paragraphs 62 and 63 of the Decision, it thus observed that, under the 1968 notice, agreements having as their sole object the joint preparation of calculation models are not to be regarded as restricting competition but, that, on the other hand, that is not the case where such models contain specified rates of calculation. Referring, on that point, to its decision-making practice, it stated that models of that kind were comparable to recommendations restricting competition, in so far as such models are liable, by enabling undertakings to calculate their costs, to influence their pricing policy.

88 In this case, AST has not produced any evidence such as to indicate that those findings are not well founded, nor has it demonstrated that the Commission was pursuing any aim other than that of showing that the agreement covered by the Decision restricted competition.

89 Finally, it must be observed that AST has not made out any plausible case or demonstrated the existence of exceptional circumstances such as to justify an exception to the general rule that internal Commission documents are not available to applicants. Consequently, its request for the production of such documents must be rejected.

90 It follows from all the foregoing that the present plea must be rejected.

B — *The purpose of the agreement and the characterisation of it*

1. The description of the Madrid meeting

Arguments of the parties

91 The applicants maintain that the purpose of the Madrid meeting is incorrectly and imprecisely described in paragraph 44 of the Decision. The description given implies that the undertakings concerned acted in concert regarding not only the introduction and application of the reference values for the alloys covered by the calculation method for the alloy surcharge but also the adoption of an identical

calculation method. Such a finding contradicts the statement that the use of an identical method dated back to about 1988.

92 AST adds that the purpose of the agreement is described in a contradictory and imprecise manner. Whilst the wording of paragraph 70 of the Decision is correct, in that it indicates that the purpose of the agreement was only to change the reference values in the method of calculation of the alloy surcharge, without any commitment as to their being maintained thereafter, Article 1 of the operative part nevertheless defines the infringement as deriving not only from the change but also from the application of those values in a concerted manner. However, there is nothing to show that the Madrid meeting was also concerned with maintaining the reference values whose use had been decided upon.

93 The Commission considers that the applicants' arguments concerning the true purpose of the Madrid meeting are unfounded since it did not express any view in the Decision on the adoption of a single method for calculating the alloy surcharge but commented on the use, in the existing calculation method, of identical new reference values for all the undertakings in question. As regards AST's argument, it purports to deny the continuous nature of the infringement.

Findings of the Court

94 It must be pointed out that paragraph 44 of the Decision states:

'... the Madrid meeting had a single aim: to secure an across-the-board increase in stainless steel prices to offset the rise in the price of alloys. A discussion took place of the different methods used in the past to calculate the alloy surcharge and, following the meeting, all the undertakings took identical action. They applied to

their sales in Europe, except in Spain and Portugal, from 1 February 1994, an alloy surcharge based on the method last used in 1991, taking the September 1993 prices as reference values....'.

95 As is also confirmed by paragraph 45 the Decision, which refers to 'the reintroduction by the stainless steel producers of the alloy surcharge by deliberately identical methods as to value and date', the Commission's appraisal thus related not to the use of a single calculation method as such, whose origin pre-dated 1993, but to the incorporation in that calculation method of identical reference values for all the undertakings.

96 As already stated (see paragraph 82 above), it inferred, in paragraph 47 of the Decision, that the purpose of the agreement was the use by all the undertakings, as from the same date, of identical reference values in the method of calculating the alloy surcharge, a method used previously, with a view to securing an increase in stainless steel prices.

97 It follows that the Madrid meeting is not described, in the Decision, as relating to the adoption of a method for calculating alloy surcharge but as being concerned with the incorporation in that method of identical reference values for all the producers.

98 As regards AST's argument that the purpose of the agreement is defined in a contradictory and imprecise manner, in so far as there is no proof that it also related to maintenance of the reference values incorporated in the method of calculating the alloy surcharge, it too must be rejected. By stating that the purpose of the agreement was the use of the same reference values in that calculation method, the Commission necessarily took the view that the undertakings concerned were pursuing the aim of actually applying those values. The

question whether the Commission has shown, to the requisite legal standard, that that was the case is a matter to be examined in relation to the plea concerning the duration of the infringement (see paragraphs 174 to 184 below).

99 The present plea must therefore be rejected.

2. The alignment of prices and alloy surcharges

Arguments of the parties

100 The applicants consider that the Commission's findings concerning the way the alloy surcharge was applied in practice are irrelevant. They maintain that the Decision is vitiated by a manifested error of assessment of the facts and by an error in law on this point, in so far as it criticises the undertakings for having aligned their prices for stainless steel flat products, outside their national market, on the prices charged by a single producer (third subparagraph of paragraph 39 of the Decision).

101 The applicants claim that Article 60 of the ECSC Treaty expressly provides for a 'mechanism for the alignment' of prices under which, for prices applied outside their national market, producers align their prices on those of the national producer or, in the absence thereof, those of the main supplier. Since the alignment of prices is a result of independent conduct, it has no probative value as evidence to support a finding of the existence of an agreement within the meaning of Article 65 of that Treaty. Accordingly, the statements made by AST, cited in paragraphs 38 and 40 of the Decision, are also irrelevant in so far as they referred only to prices being aligned, and moreover 'not uniformly' aligned, according to paragraph 40 of the Decision.

102 AST also maintains that those views on the alignment of the prices of stainless steel flat products show that the Commission committed a manifest error of assessment regarding the purpose of the agreement by taking the view that it was also concerned with the prices of flat products rather than with the alloy surcharge alone.

103 Finally, the applicants consider that the erroneous and unreasoned nature of the Decision as regards assessment of the conduct of the undertakings on the market is confirmed by the linguistic differences between the German and Italian versions of the Decision. The German version of the Decision indicates in paragraph 39 that the undertakings reached agreement ('geeinigt') on the price list of the same producer, whereas according to the Italian version those undertakings aligned themselves ('si sono allineate'). The German version of the Decision is manifestly incorrect on this point since it does not correspond with AST's statements cited in support of that proposition either. In its reply, KTS states that the Commission itself admits that the expression 'geeinigt' may be misleading, but considers that the Commission does not draw the necessary inferences regarding the contradictory nature of the statement of reasons.

104 The applicants request, in any event, that an expert opinion be obtained under Article 25 of the Statute of the Court of Justice with a view to establishing whether substantial differences exist between the various language versions of the Decision and, in particular, between the German and Italian versions.

105 The Commission replies that the Decision is concerned not with an agreement as to the application of an identical price list for flat products but with an agreement concerning the use, under identical conditions, of the alloy surcharge calculation method. In that context, paragraph 39 of the Decision gives only one example of the way in which the alloy surcharge formula is applied and the question whether the undertakings did or did not agree on the prices for flat products is of no importance, particularly with regard to calculation of the fine. In that connection, it is clear from paragraphs 29 to 36 of the Decision that, following the Madrid

meeting, the undertakings decided to apply the alloy surcharge on all markets, both domestic and foreign, as is confirmed, moreover, by the memorandum from AST referred to in paragraph 38 of the Decision. As is clear, also, from paragraph 42 *et seq.* of the Decision, those arrangements for applying the alloy surcharge meant that every producer was in a position to know in advance the attitude which would be adopted by all the undertakings.

106 In those circumstances, the price alignment mechanism provided for in Article 60 of the ECSC Treaty was not in any way disregarded and paragraph 39 of the German version of the Decision could only have been misleading if considered in isolation.

Findings of the Court

107 It is necessary first to consider whether, as the applicants claim, the Decision was vitiated by errors of assessment regarding its description of the practical arrangements for applying the alloy surcharge, set out in paragraphs 37 to 41 of the Decision.

108 It must be pointed out at the outset that, contrary to their assertion, the Decision does not find against applicants for an infringement deriving from an agreement on the prices of stainless steel flat products but only, as has been stated (see paragraph 82 above), for their participation in an agreement concerning the introduction and application, in a concerted manner, of the same reference values for alloys in the formula for calculating the alloy surcharge.

109 Accordingly, the fact that reference was made in the third subparagraph of Article 39 of the Decision to the alignment by the undertakings concerned of prices for stainless steel flat products, outside their domestic markets, on the basis of the price list applied by one of the producers had no impact on the legal assessment of the infringement carried out by the Commission or on the determination of the fines, a fact which, moreover, the applicants do not dispute.

110 It should next be noted that, in the Decision, the Commission described the practical arrangements for application of the alloy surcharge by reference to circumstances other than those relating to the alignment of prices for stainless steel flat products, which was only one aspect of the context in which concertation took place.

111 The Decision relies principally on an Avesta memorandum of 17 January 1994 describing, following the Madrid meeting, the arrangements for applying the alloy surcharge, which states, in particular, as follows (paragraph 38 of the Decision): 'We will follow the rules set by the home producer in any given producer market, including applying the surcharge they declare.' According to the Decision, that memorandum also stated (paragraph 40 of the Decision): 'In the national markets in which [Avesta] was neither the domestic producer nor, in markets with no domestic producer, the leading supplier, typically, but not uniformly, [Avesta] would align on the domestic producer or leading supplier as was traditional in the stainless steel industry generally'.

112 It is also stated, in paragraph 41 of the Decision, that several producers sent letters to their customers announcing, following the Madrid meeting, changes to the reference values to be used for calculation of the alloy surcharge. In one of those letters, dated 31 January 1994, one of the producers indicates, in particular, that 'we have no choice but to implement alloy surcharges on all stainless flat products in line with all other manufacturers'.

113 In the light of the above evidence, it has not therefore been shown that the Decision, in finding that the undertakings concerned in fact voluntarily aligned the alloy surcharges following the Madrid meeting, is vitiated by errors of assessment.

114 Since, in addition, the Decision clearly set out the Commission's reasoning in reaching that conclusion, the argument that the statement of reasons was inadequate on that point cannot be upheld.

115 It is necessary, second, to consider whether, as claimed by the applicants, the Decision is vitiated by an error of law in that it disregarded the mechanism for the alignment of prices provided for by Article 60 of the ECSC Treaty.

116 In that connection, it must be borne in mind that, according to settled case-law, the purpose of the compulsory publication of prices under Article 60(2) of the Treaty is, first, as far as possible to prevent prohibited practices; second, to enable purchasers to learn exactly what prices will be charged and be able themselves to check whether any discrimination has taken place; and, third, to enable undertakings to have accurate knowledge of the prices of their competitors so as to enable them to align their prices (Case 1/54 *France* v *High Authority* [1954] ECR 7, p. 9, and Case 149/78 *Rumi* v *Commission* [1979] ECR 2523, paragraph 10).

117 However, the prices on the lists must be fixed by each undertaking independently, without any agreement, even tacit, between them. In particular, the fact that the provisions of Article 60 tend to restrict competition does not prevent application of the prohibition of agreements under Article 65(1) of the ECSC Treaty (*France* v *High Authority*, cited above, p. 14, and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] II-347, paragraph 312).

118 Moreover, Article 60 of the ECSC Treaty does not provide for any contact between undertakings, prior to the publication of price lists, for the purpose of exchanging information on their future prices. In so far as such contacts prevent price lists being fixed independently, they are liable to distort normal competition within the meaning of Article 65(1) of the Treaty (*Thyssen Stahl* v *Commission*, cited above, paragraph 313).

119 In this case, it may indeed be undisputed that, pursuant to Article 60(2)(a) of the ECSC Treaty, the stainless steel producers released themselves from the obligation to publish their prices and conditions of sale by sending details of them regularly to the Commission and that, on that basis, those undertakings each notified the Commission of the amounts of the alloy surcharges which they were going to apply as from 1 February 1994 (paragraph 37 of the Decision).

120 However, the applicants cannot properly invoke the alignment mechanism provided for by the abovementioned provisions since the alignment of the reference values to be used in calculating the alloy surcharge referred to in the documents cited by the Commission in paragraphs 38, 40 and 41 of the Decision resulted not from the publication of price lists but from prior concertation between producers, at the Madrid meeting, whereby it was agreed to adopt identical reference values with a view to facilitating upward harmonisation of the alloy surcharges.

121 It follows that the Commission did not disregard the mechanism for price alignment provided for in Article 60 of the ECSC Treaty and that, therefore, the Decision is not vitiated by any error of law in that respect.

122 As regards the argument concerning differences between the German and Italian versions of the Decision, it need merely be pointed out that the wording used in paragraph 39 of the German version of the Decision regarding alignment of the prices of stainless steel flat products had no influence on the characterisation of the conduct imputed to the undertakings in question which, as already stated,

related to the arrangements for applying the method of calculating the alloy surcharge and not to the final price of the abovementioned products. Therefore, the request for an expert opinion must be rejected.

123 It follows from the foregoing considerations that the present plea is unfounded and must be rejected.

3. Inadequacy of the statement of reasons concerning the definition of agreement or concerted practice

Admissibility of the plea

124 The Commission contends that, since this plea was not raised by KTS until the stage of its reply, it is a new plea which must be rejected as inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance.

125 According to the case-law, a plea alleging absence of reasons or inadequacy of the reasons stated involves a matter of public policy which must be raised by the Community judicature of its own motion (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67) and, consequently, may be raised by the parties at any stage of the procedure (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 25).

126 The plea is therefore admissible.

The substance of the plea

Arguments of the parties

127 KTS maintains, in its reply, that the Commission infringed Article 15 of the ECSC Treaty, which requires it to give reasons for its decisions, since it merged the charges concerning a concerted practice and an agreement.

128 The Commission replies that the fact of defining a consensus as an agreement and, in the alternative, as a concerted practice does not constitute an ambiguous statement of reasons within the meaning of the case-law (Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraphs 119 to 124).

Findings of the court

129 The statement of reasons required by Article 15 of the ECSC Treaty must, first, be such as to enable the person concerned to ascertain the matters relied upon to justify the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded and, secondly, enable the Community judicature to exercise its power of review of legality. The requirement of a statement of reasons must be viewed in the context of the circumstances of the case, in particular the terms of the measure in question, the nature of the reasons relied on and the context in which the measure was adopted (Case T-57/91 *NALOO* V *Commission* [1996] ECR II-1019, paragraphs 298 and 300).

130 In this case, it is necessary to decide whether the definition of the consensus as an agreement and, in the alternative, as a concerted practice, within the meaning of

Article 65(1) of the ECSC Treaty, constitutes a sufficient statement of reasons. To that end, it is necessary to consider whether the Decision adequately explains whether the preconditions for using each of those two terms are fulfilled.

131 As regards the characterisation of the consensus as an agreement, the Decision states that Article 65 of the Treaty is infringed if the parties reach a consensus which limits or is likely to limit their commercial freedom by determining the lines of their mutual action on the market or abstention from action on the market, adding that no contractual sanctions or enforcement procedures are required, nor is it necessary for such a consensus to be made in writing (paragraph 43 of the Decision).

132 With regard to the facts of this case, paragraph 44 of the Decision indicates the elements which show the existence of a consensus between the undertakings concerned. In that connection, it states first that the aim of the Madrid meeting was to secure an across-the-board increase in stainless steel prices to offset the rise in the price of alloys and that, at that meeting, a discussion took place of the different methods used in the past to calculate the alloy surcharge. It then states that, after that meeting, all the undertakings took identical action, consisting of the application to their sales in Europe as from 1 February 1994, except in Spain and Portugal, of an alloy surcharge based on the method used in 1991, taking the September 1993 prices of alloying materials as reference values.

133 Finally, the Decision observes that the consensus was confirmed in the fax from Ugine of 20 December 1993 addressed to all the producers present at the Madrid meeting, and to Outokumpu, which reflects the conclusions of that meeting, giving details of the calculation of the alloy surcharge, including the trigger values, the ECU/USD and USD/ECU rates of exchange for alloying materials (nickel, chrome, molybdenum), the reference months and the standard alloy contents.

134 In that connection, the Decision also mentions that the characterisation of the consensus as an agreement is confirmed by the contents of the circulars referred to in paragraph 41 of the Decision by which the various producers announced to their customers the reintroduction of the alloy surcharge. In one of those letters, dated 28 January 1994, Ugine Savoie UK indicated that '... it has therefore been decided at a European level to reactivate the surcharge system to take into account the increase in alloy costs since September 1993, and this surcharge will be applied generally from 1 February 1994'. In another letter, dated 31 January 1994, Thyssen Fine Steels Ltd announced to its customers that 'we have no choice but to implement alloy surcharges on all stainless flat products in line with all other manufacturers. As in the previous surcharge situation, a clear basis for surcharge has been agreed to account for the changes in relationship between prices and costs'.

135 As regards, next, characterisation of the consensus as a concerted practice, the Decision emphasises, in paragraph 45, that in any event, 'if the definition of the consensus as an agreement is disputed, the reintroduction by the stainless steel producers of the alloy surcharge by deliberately identical methods as to value and date is at the very least and without any doubt a concerted practice'. In that connection, it is stated that anti-competitive collusion, by which undertakings inform each other in advance of the attitude each intends to adopt, so that each can regulate its commercial conduct in the knowledge that its competitors would behave in the same way cannot escape the prohibition of concerted practice.

136 Consequently, it is clear from those paragraphs of the Decision that it adequately explained the principal elements of fact and of law which prompted the Commission to take the view that the consensus in question could be defined as an agreement or, in the alternative as a concerted practice within the meaning of Article 65(1) of the ECSC Treaty. In particular, contrary to KTS's claim, the Decision clearly distinguishes between the definitions of agreement and concerted practice by characterising the constituent elements of each of them.

137 It follows that the present plea must be rejected.

C — *The effects of the agreement on prices*

Arguments of the parties

138 The applicants submit that the Commission has not sufficiently proved the effects of the alloy surcharge formula on the price of stainless steel flat products and, therefore, the alleged restriction of competition. They consider that the reasons given on that point are incorrect and, in any event, inadequate.

139 According to KTS, the Commission merely found, in paragraph 48 of the Decision, that the alloy surcharge might represent up to 25% of the total price of stainless steel. However, that assessment overlooks the fact that, in practice, each customer is free to purchase products on a fixed-price, rather than a variable-price, basis.

140 AST, for its part, states that the alloy surcharge is only one of the components of the final price of stainless steel and takes account of variations in the prices of the alloys only above a certain level. The major part of the final price of stainless steel was not the subject of any agreement.

141 It also considers that the Commission made unreasoned and unsupported allegations. Thus, it did not respond to the argument that the increase in stainless steel prices as from 1994 was largely attributable to the very strong increase demand — about 30% — recorded at that time. Nor did it take account of the

fact that the change to the reference values agreed in Madrid ceased to have any effect as from June 1994 since the prices of alloying materials returned to the values originally specified in the calculation formula for the alloy surcharge before they were changed.

142 AST also maintains that, when assessing the restrictive effects of an agreement, account must be taken of the actual application of the new prices to customers and not of the date on which those new prices were notified to the Commission. AST did not start applying the alloy surcharge until April 1994, that is to say more than two months later than the other producers.

143 Finally, the applicants maintain that the contradictory nature of the statement of the reasons on which the Decision was based, regarding the effects of the agreement on prices, is confirmed by the differences between the German and Italian versions of paragraph 49 of the Decision. According to the German version of the Decision, the change to the alloy surcharge reference values was not the cause of the increase in price levels for stainless steel which occurred between January 1994 and March 1995, whereas, according to the Italian version, there was a specific causal link between that increase and the change in the alloy surcharge reference values. Consequently, KTS requests that an expert opinion be obtained under Article 25 of the ECSC Statute of the Court of Justice, and AST seeks the production of any relevant documents pursuant to Article 24 of the Statute of the Court Justice.

144 The Commission replies that the Decision is not vitiated by any error of assessment or any inadequacy of reasoning on that point.

145 In particular, the Decision explained clearly that the alloy surcharge constitutes a component of the final price of the products concerned and that, consequently, the aim of the agreement is to fix a part of the price. The Commission observes that it is not disputed that the alloy surcharge may represent up to 25% of the

final price of the products. The information disclosed during the administrative procedure shows, in any event, that, in March 1995, the alloy surcharge accounted for 24% of the final price of cold rolled sheets and 25% of the final price of hot rolled sheets and that, for other steel qualities with a higher nickel content, the price component represented by the alloy surcharge was even higher.

146 KTS's efforts to minimise the economic importance of the infringement are negated by the statements made by KTN during the procedure to the effect that the agreement was intended to cope with a catastrophic economic situation. Moreover, the fact that the Decision does not contain any express indication that customers might buy on a fixed-price rather than a variable-price basis does not mean that the Commission did not take that into account. However, according to the case-law, the Commission is not required to discuss, in a decision, all the points of fact and law relied on by the parties during the administrative procedure.

147 The Commission also contends that the effects of the agreement on the final price of their products were not exaggerated since the Decision indicates, in that connection, that the considerable increase in stainless steel prices cannot be attributed solely to changes in the trigger values for the alloy surcharge, even if there is also a finding that the latter nevertheless made a considerable contribution to it.

148 As regards AST's alleged delay in applying the new reference values, the Commission replies that AST itself officially informed it that the new figure for the alloy surcharge, calculated on the basis of the new reference values, would be applied as from 1 February 1994. In any event, that alleged delay in implementing the agreement cannot detract from its participation in the agreement.

149 The applicants' argument based on the alleged linguistic differences in paragraph 49 of the German and Italian versions of the Decision has no basis. Even if it were

accepted that the second sentence of paragraph 49 of the German version of the Decision did not indicate a causal link between application of the method for calculating the alloy surcharge and the price increase which ensued, the fact remains that the next sentence expressly states that although admittedly the increase in the price of stainless steel cannot be attributed ('zurückgeführt') only to changes in the trigger levels for the alloy surcharge, the latter nevertheless made a considerable contribution to it.

Findings of the Court

150 Article 65(1) of the ECSC Treaty prohibits '[a]ll 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..., and in particular those tending:

(a) to fix or determine prices;

...'

151 According to settled case-law relating to the application of Article 85 (1) of the EC Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the meaning of that article (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 99, Case C-199/92 P *Hüls* v *Commission* [1991] ECR I-4287, paragraph 178, and Case C-235/92 P *Montecatini* v *Commission* [1991] ECR I-4539, paragraph 122).

152 Similarly, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (*Commission* v *Anic Partecipazioni*, paragraphs 123 and 124, *Hüls* v *Commission,* paragraphs 164 and 165, and *Montecatini* v *Commission*, paragraphs 124 and 125). Also, where the Commission has established to the requisite legal standard that an undertaking has taken part in concertation intended to restrict competition, it does not have to adduce evidence that such concertation had manifested itself in conduct on the market or that it had effects restrictive of competition. On the contrary, it is for the undertaking concerned to prove that the concertation did not have any influence whatsoever on its own conduct on the market (*Commission* v *Anic Partecipazioni*, paragraph 126, and *Hüls* v *Commission,* paragraph 167).

153 Those principles also apply to the application of Article 65(1) of the ECSC Treaty. Since that provision refers to agreements tending to distort normal competition, it must be concluded that that expression includes the formula have as their object found in Article 85(1) of the EC Treaty (*Thyssen Stahl* v *Commission*, cited above, paragraph 277).

154 It follows that the Commission is not obliged, in order to establish an infringement of Article 65(1) of the ESCS Treaty, to demonstrate that there was an adverse effect on competition, provided that it has established the existence of an agreement or concerted practice intended to restrict competition (*Thyssen Stahl* v *Commission*, paragraph 277).

155 In this case, the applicants' various arguments, which merely assert that there has been no adverse effect on competition, must be rejected, in so far as they are based on a misconceived view of the evidential requirements laid down by Article 65(1) of the ECSC Treaty. The applicants do not contest the truth of the findings in paragraphs 47 and 48 of the Decision to the effect that the purpose of the agreement at issue was to restrict competition.

156 However, before examining, for the sake of completeness, the anti-competitive effects of the agreement, the Commission rightly considered that it constituted a cartel caught by the prohibition laid down by Article 65(1) of the ECSC Treaty, since its aim was to fix a component of the final price of stainless steel flat products through the use by the producers concerned, as from the same date, of the same reference values for alloying materials in the method for calculating the alloy surcharge.

157 As is confirmed by the case-law on the application of Article 85(1)(a) of the EC Treaty, the prohibition of agreements and concerted practices which directly or indirectly fix prices also extends to agreements relating to the fixing of a part of the final price (see, in particular, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 146). It follows, in particular, that AST's argument that most of the final price of stainless steel was not the subject of an agreement is irrelevant.

158 In this case, the Commission also found, in paragraph 48 of the Decision, that the agreement was liable to affect competition considerably, since, first, the undertakings concerned represented more than 90% of sales of stainless steel flat products and, second, the increase brought about by the alloy surcharge could represent up to 25% of the final price of those products.

159 It must be observed that the applicants do not contest the truth of that assessment. In that connection, KTS merely argues that the portion of the final price accounted for by the alloy surcharge was less than 25% when its customers made fixed-price rather than variable-price purchases. However, apart from the fact that such an argument does not change the fact that the price supplement represented by the alloy surcharge, calculated on the basis of the reference values agreed at the Madrid meeting, was, in principle, likely to represent a substantial part of the final price of the products, KTS does not deny that the alloy surcharge thus calculated actually had an impact on the final price of its products when its customers did not make fixed-price purchases.

160 In any event, it is important to note that the applicants have not demonstrated that the Decision is vitiated by a an error of assessment in so far as it relates to the real effects of the agreement on the market.

161 In particular, there are no grounds for alleging that the Commission exaggerated or, on the contrary, disregarded the effects of the agreement on the final price of the products. In that connection, it took the view, in paragraph 49 of the Decision, including the German version thereof, that the near doubling of the price of stainless steel between January 1994 and March 1995 could not be attributed solely to the change to the reference values for the alloy surcharge but that that change had nevertheless made a considerable contribution to it. Therefore, the argument that the German version of the Decision does not indicate a causal link between the agreement and the price rise must be rejected, and there is no need to grant the applicants' request for an expert opinion or the production of documents.

162 The argument that the change to reference values agreed in Madrid ceased to take effect when the prices of the alloying materials returned to where they stood before they were changed must also be rejected. As the Commission observed in paragraph 70 of the Decision, the fact that the price of an alloy component reached its former reference values is irrelevant since the increase in the price resulting from the alloy surcharge was necessarily higher than if the reference values had not been changed.

163 AST's argument that it applied the new reference values after a time-lapse of two months cannot be upheld. It is undisputed that AST officially informed the Commission that it would apply the new alloy surcharge with effect from 1 February 1994. Moreover, even if it were substantiated, that argument would only prove that the concertation, in which it does not deny having participated, actually influenced its own conduct on the market (see paragraph 151 above).

164 Finally, since the Decision clearly set out the reasoning followed by the Commission, the argument that the statement of reasons was inadequate must be rejected.

165 It follows from all the foregoing that the present pleas must be rejected.

D — *The duration of the infringement*

Arguments of the parties

166 The applicants maintain that the Commission did not properly assess the duration of the infringement and did not explain its assessment in the Decision, taking the view that the concertation commenced at the Madrid meeting in December 1993 and continued until the day on which the Decision was adopted. According to the applicants, the change to the reference values in the alloy surcharge formula decided on at the Madrid meeting was sporadic rather than continuous.

167 In that connection, they state that, neither during that meeting nor at any later stage was there any discussion concerning the maintenance of those values. It is wrong to take the view that a concerted practice continues until it is expressly brought to an end. In this case, once the price was increased, the undertakings were free to decide on their price levels taking account of market conditions, the latter being the same for all the undertakings.

168 KTS submits, in particular, that, whilst it admitted that the uniform change at the Madrid meeting to the reference values contained in the alloy surcharge formula could be regarded as a concerted practice within the meaning of Article 65(1) of the ECSC Treaty, that concertation was merely sporadic because subsequently it regularly took individual decisions changing the amounts of the alloy surcharges and the final prices. Moreover, with regard to the assessment of the duration of the infringement, the decisive factor is determination not of the alloy surcharge as a component of the final price but of the final price itself, as it is applied on the market. The infringement could not therefore be regarded as ongoing.

169 KTS adds that the Commission was not entitled to rely on its own contacts with other producers after the Madrid meeting. Paragraph 33 of the German version of the Decision contains, in that regard, a translation error which gives the impression that the author of the fax in question was still awaiting information from Krupp concerning the alloy surcharges that Krupp was going to apply ('noch keine Informationen'), whereas it merely stated that it had no information ('we have no current information').

170 AST, for its part, claims that, although the reference values in the alloy surcharge formula were not changed following the Madrid meeting, that fact is attributable not to any agreement to prolong the infringement but to the ECSC system of price transparency and to the parallel conduct of the undertakings concerned.

171 As regards the case-law cited by the Commission, it is irrelevant since it relates to situations in which the agreements penalised continued to produce effects after they came to an end.

172 The Commission replies that, after the Madrid meeting, the alloy surcharge reference values were not changed by the applicants. The only plausible

explanation for the maintenance of those values must be that the parties to the agreement continued to agree that they would not change them again. That, moreover, is confirmed by the fact that only Avesta brought the infringement to an end before the Decision, by radically changing the method for calculating the alloy surcharge, whereas KTS and AST did not formally bring the infringement to an end until 1 April 1988, when, pursuant to Article 4 of the Decision, they applied new trigger levels for the alloying materials for the purpose of calculating the alloy surcharge. All the other price changes referred to by the applicants are irrelevant since they concern only the final prices of the stainless steel flat products charged to their customers.

173 Finally, the Commission contends that, in any event, it is clear from the case-law on Article 85(1) of the EC Treaty that that article is applicable if parallel conduct by certain undertakings, originally deriving from an agreement, continues even after the agreement has come to an end (Case 51/75 *EMI Records* [1976] ECR 811, paragraph 30). That applies, by analogy, to Article 65(1) of the ECSC Treaty.

Findings of the Court

174 As is clear from the case-law, it is incumbent on the Commission to prove not only the existence of the agreement but also its duration (see Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 2802).

175 In this case, it is therefore appropriate to consider whether the Commission, in finding in paragraph 50 of the Decision that the concertation continued until the

date on which the Decision was adopted, discharged the burden of proof attaching to it and included an adequate statement of reasons in the Decision.

176 It is important, first, to bear in mind that the purpose of the agreement was to ensure that, in the method for calculating the alloy surcharge, the producers of stainless steel flat products used identical reference values with a view to raising the final price, of which the alloy surcharge constitutes a significant part.

177 As is clear from the Decision, in particular paragraph 44, that agreement commenced at the Madrid meeting of 16 December 1993, on which date the participating undertakings decided to apply the alloy surcharge thus calculated as from 1 February 1994. It also found that, as from the latter date, those undertakings, which included KTS and AST, had in fact applied to their sales in Europe, with the exception of Spain and Portugal, an alloy surcharge calculated in accordance with the method based on the reference values agreed at the Madrid meeting. Finally, it observed in paragraph 50 of the Decision that only Avesta had announced, in November 1996, that it would use a different method for calculating the alloy surcharge.

178 It must be observed that the applicants do not deny, and did not deny during the administrative procedure, that the reference values for the alloy surcharge, as agreed at the Madrid meeting, were not changed before the adoption of the Decision. Since the undertakings in question continued actually to apply the reference values on which they had agreed at that meeting, the fact that no express decision was then taken regarding the period for which the agreement would be applied cannot prove that the agreement was sporadic rather than continuous.

179 In that connection, the argument that the undertakings regularly changed the prices charged to their customers is irrelevant since it concerns the final price for

stainless steel flat products charged by the undertakings, of which the alloy surcharge is merely one component. Similarly, regular changes to the alloy surcharge itself do not constitute proof that the agreement came to an end, since those changes were merely the result of calculations made on the basis of the formula containing the same reference values for all producers. The alleged translation error referred to by KTS as demonstrating the absence of contacts with the other producers after the Madrid meeting likewise has no probative force, it having been admitted, moreover, that the undertaking in question calculated the alloy surcharge in accordance with the arrangements agreed at that meeting.

180 AST's argument that maintenance of the reference values agreed at the Madrid meeting is a result of price transparency and parallel conduct on the part of the undertakings concerned must also be rejected. Whilst it is true that, according to the case-law, parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 71), the fact remains that, in this case, the maintenance by the undertakings in question of the same reference values in the calculation formula for the alloy surcharge is accounted for by concertation since those values were determined jointly in the course of discussions between producers in December 1993.

181 Finally, it is important to bear in mind that, with regard to cartels which are no longer in force, it is sufficient, for Article 85 of the EC Treaty, and by analogy Article 65 of the ECSC Treaty, to be applicable that they continue to produce their effects after they have formally ceased to be in force (*EMI Records*, cited above, paragraph 15, and Case 243/83 *Binon* [1985] 2015, paragraph 17; Case T-2/89 *Petrofina* v *Commission* [1991] II-1087, paragraph 212, and *SCA Holding* v *Commission*, cited above, paragraph 95). The same applies *a fortiori* where, as in this case, the effects of the agreement lasted until adoption of the Decision, without the agreement having been formally brought to an end.

182 It follows that, since KTS and AST did not cease applying the reference values agreed at the Madrid meeting before the adoption of the Decision, the Commission was entitled to take the view that the infringement had lasted until that date.

183 Since, moreover, the Decision clearly set out the reasoning followed by the Commission in reaching that conclusion, the argument alleging inadequacy of the statement of reasons on that point cannot be upheld.

184 It follows that the present pleas must be rejected.

The claims, in the alternative, that Article 2 of the Decision should be annulled or the amount of the fine should be reduced

I — *The pleas alleging incorrect calculation of the fines*

A — *The imposition of different fines on KTS and AST*

Arguments of the parties

185 The applicants criticise the Commission for not having taken account of the group relationship between them for the purposes of calculating the fine, even though it was aware of that situation.

186 They consider that, since the Commission did not set the amount of the fine by reference to the turnover of the undertakings concerned but took as a basis a fixed sum of ECU 4 million for each of them, it was necessary to impose a single fine on KTS covering at the same time its business, that of ATS and the business taken over from Thyssen Stahl. In this case, the course followed was misconceived and discriminatory in that in practice it led to three fines being imposed on a single economic entity, namely KTN. Therefore, the Decision is vitiated by an error of law.

187 As regards the Commission's argument that KTN and AST always acted independently throughout the duration of the agreement, KTS replies that that fact does not mean that separate fines of the same amount can be imposed on them. AST, for its part, states that it is undeniable that KTN did not determine its conduct, but that the Commission should not thereby regard them as equivalent entities for purpose of calculating the fine.

188 The Commission replies that separate fines were imposed on KTS and AST because those companies were independent from each other when the agreement came into being, at the Madrid meeting. Moreover, even after KTN acquired all the shares in AST on 10 May 1996, AST continued to act independently on the market. Finally, the argument concerning KTN's control of AST was not raised at any time during the administrative procedure. In particular, AST never stated that its decisions were attributable to its parent company. It follows, in the Commission's view, that, in so far as the subsidiary's conduct remained independent of that of the parent company, it was proper to impose separate penalties.

Findings of the Court

189 According to settled case-law, the anti-competitive conduct of an undertaking can be attributed to its parent company where it has not decided independently upon

its own conduct on the market, but has carried out, in all material respects, the instructions given to it by that undertaking, having regard in particular to the economic and legal links between them (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 49, and, most recently, Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] I-10065, paragraph 27).

190 In this case, it must be remembered, as has already been stated (see paragraph 2 above) that AST was taken over by Krupp and an Italian consortium jointly. Subsequently, in December 1995, Krupp increased its interest in AST from 50% to 75% and then acquired all the shares in AST on 10 May 1996. Those shares were then transferred to KTN, and then to KTS.

191 However, the applicants have not claimed or, *a fortiori*, proved that, after it was taken over, AST participated in the agreement covered by the Decision on the basis of instructions given by its parent company rather than independently. It must be observed, on the contrary, that they do not deny having acted independently throughout the duration of the agreement.

192 This plea must therefore be rejected.

B — *The gravity of the infringement*

Arguments of the parties

193 First, KTS criticises the Commission for refusing to impose only a symbolic fine on it, on the ground that the infringement was blatant. That criterion gives no

indication as to the need for a penalty, or even the amount of the fine, since any infringement which, as in this case, is acknowledged by its perpetrators or proved by evidence must be regarded as blatant. Moreover, that criterion is not included in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, hereinafter 'the Guidelines').

194 In response to the argument that the blatant nature of the infringement reflects its intentional nature, KTS states that a feature of any infringement of that kind is that it is committed intentionally, since the undertakings are aware of it. It is impossible to infringe Article 65 of the ECSC Treaty negligently.

195 Second, KTS claims that the Commission took account of the gravity of the infringement twice in calculating the fine. Even though the gravity of the infringement had already been considered in paragraphs 74 to 77 of the Decision in order to fix the basic amount of the fine as ECU 4 million, the Commission then applied that criterion again in paragraph 79 of the Decision to justify an increase of ECU 1.6 million over that basic amount.

196 The Commission contends, first, that symbolic fines are not justified in this case in view of the gravity and duration of the infringement and the belated and limited cooperation shown by KTS. The reference to the blatant nature of the infringement merely shows that the undertakings could not have been unaware that the infringement was contrary to competition law.

197 Second, with regard to the gravity of the infringement being considered twice, the Commission replies that, despite the clerical error in paragraph 79 of the

Decision, it is clear from the reasoning in paragraphs 78 to 80 that the contested increase was imposed in respect of the duration of the infringement.

Findings of the Court

198 According to settled case-law, the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54 and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] I-4411, paragraph 33).

199 In that connection, factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects (see the Opinion of Judge Vesterdorf, acting as Advocate General in *Rhône-Poulenc* v *Commission*, cited above, [1991] ECR II-869, especially at 1022, which covered the 'Polyproplylene' judgments: Cases T-2/89, T-3/89, T-4/89, T-6/89, T-7/89, T-8/89, [1991] ECR II-1087, II-1177, II-1523, II-1623, II-1711 and II-1833 respectively, and T-9/89 to T-15/89, [1992] ECR II-499, II-629, II-757, II-907, II-1021, II-1155 and II-1275 respectively) particularly where they relate to infringements which are intrinsically serious, such as price-fixing (*Thyssen Stahl* v *Commission*, cited above, paragraph 636, and Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 508).

200 In particular, an infringement of the competition rules may be regarded as having been committed intentionally if the undertaking could not have been unaware that the object of its conduct was the restriction of competition. It is not therefore

necessary for an undertaking to have been aware that it was infringing those rules (Case T-143/89 *Ferriere Nord* v *Commission* [1995] II-917, paragraph 41).

201 Finally, under the fourth and fifth indents of Section 3 of the Guidelines, the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct constitutes an infringement or the fact that the infringement was committed as a result of negligence or unintentionally may constitute extenuating circumstances justifying reduction of the basis amount of the fine calculated by the Commission.

202 In this case, the Commission took the view in paragraph 75 of the Decision that the infringement was blatant, after pointing out in paragraph 74 that the agreement aimed at a uniform increase of a cost component and therefore constituted a serious infringement of Community law, involving almost all the producers of stainless steel flat products. Since the Commission thus found that the undertakings in question had committed a serious infringement intentionally, without entertaining any doubts as to the unlawful nature of their conduct, the Commission's refusal to impose merely a symbolic fine cannot be regarded as vitiated by an error of law.

203 Accordingly, KTS's argument must be rejected.

204 As regards the argument alleging that the gravity of the infringement was taken into account twice, it need merely be stated that the use of the word 'gravity' instead of 'duration' in paragraph 79 of the Decision, in the part entitled 'Duration of the infringement', can only be regarded as a clerical error and did not give rise to a further increase of the fine.

205 It follows that this plea must be rejected.

C — *The duration of the infringement*

Arguments of the parties

206 The applicants argue that, since the infringement was of short duration, the Commission should have reduced rather than increased the fine. A reduction of the fine is particularly justified since it was not until it adopted the Decision that the Commission took the view, for the first time, that the infringement was of long duration. At no time during the administrative procedure did the Commission explain to them that the duration of the infringement included the duration of that procedure, which, according to AST, constitutes an infringement of the principle of the protection of legitimate expectations.

207 AST adds that, by failing to treat the infringement as sporadic, the Commission did not properly take account, by way of extenuating circumstances, of the critical situation in the sector. The infringement was in fact of only short duration, limited to the time of the Madrid meeting, since the critical economic situation in the sector necessarily had a much greater impact than that alleged by the Commission.

208 AST also claims that, in the Decision, the Commission does not take account of the fact that AST did not itself apply the change to the reference values in the alloy surcharge formula until April 1994, namely after a delay of two months, a fact which should also have justified a reduction of the fine.

209 The Commission replies that the infringement committed by the applicants lasted four years and was therefore of medium duration of such as to give rise to an increase of up to 50% of the amounts determined solely by reference to the gravity of the infringement, hence the increase of 10% (ECU 400 000) applied in this case for each year of the infringement. Contrary to the applicants' contention, the Commission never gave the impression that the infringement was of short duration and had even emphasised, in the statement of objections notified to the applicants, that the infringement was continuing.

210 As regards AST's argument concerning the economic situation in the sector, it is based on the incorrect assumption that the infringement was of short duration. However, the economic situation in the sector was not critical until the very moment at which concertation commenced, and it subsequently improved.

Findings of the Court

211 In determining the amounts of fines, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity (see, in particular, *Musique Diffusion Française and Others*, cited above, paragraph 129).

212 As regards the factor of the duration of the infringement, the Guidelines draw a distinction between infringements of short duration (in general less than one year), for which the amount determined in respect of gravity is not to be increased, infringements of medium duration (in general from 1 to 5 years), for which that amount may be increased by up to 50%, and infringements of long duration (in general over five years), for which the amount may be increased by 10% for each year (Section 1 B, first to third indents).

213 In this case the Commission found in the Decision that the duration of the applicants' infringement was four years and increased the amount decided on for the gravity of the infringement by 40%, namely 10% for each year.

214 As has already been observed (see paragraphs 174 to 184 above), the Commission correctly calculated the duration of the infringement attributed to the applicants.

215 It cannot be criticised for taking the view that the infringement was continuous, without informing applicants of that fact during the administrative procedure. In fact, in paragraph 50 of the statement of objections notified to them on 24 April 1997, the Commission clearly stated that 'concertation began at the Madrid meeting in December 1993 and has been pursued'. Since the Commission subsequently found that the infringement had continued during the administrative procedure, the duration of that procedure necessarily had to be included in the duration of the infringement.

216 Similarly, AST's argument that it did not apply the change to the values in the alloy surcharge method until April 1994 is not such as to call in question the duration relied on for the purpose of calculating the fine. It must be borne in mind that the starting point of the infringement committed was the date of the concertation between producers at the Madrid meeting of 16 December 1993 and not the date on which their decisions were actually put into effect on the market. Consequently, the Commission was fully entitled to consider that the infringement lasted four years until the adoption of the Decision.

217 As regards AST's argument that insufficient account was taken, by way of extenuating circumstance, of the economic situation in the sector, it must be pointed out, first, that the applicant does not deny that that situation was not critical until the end of 1993, the date on which concertation commenced between producers, and the infringement did not end until four years later, and,

second, that that situation was taken into account by the Commission by way of extenuating circumstance (see paragraphs 83 and 84 of the Decision). Accordingly, the Commission took sufficient account of the particular situation in the sector in taking the view that such a situation did not arise until the very commencement of the infringement.

218 It follows that this plea must be rejected.

D — *Cooperation during the administrative procedure*

1. Preliminary observations

219 In paragraph 96 of the Decision, the Commission expressed the view that all the undertakings concerned might benefit to varying degree years from Section D, entitled 'Significant reduction in a fine', of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996, C 207, p. 4, hereinafter 'the Notice on Cooperation').

220 In that connection, the Decision records the fact, first, that only Usinor and Avesta admitted the existence of the infringement. Moreover, Avesta forwarded to the Commission on 31 October 1996 documents evidencing the existence of contacts between the undertakings concerned and Avesta is the only undertaking to have brought the infringement to an end before the adoption of the Decision. Usinor, for its part, was the first to inform the Commission of the Madrid meeting (paragraph 97 of the Decision). On the other hand, with respect to the other undertakings and, in particular, KTN and AST, the Decision states that their statements and replies to the statement of objections provided nothing new and denied involvement in the infringement (paragraph 98 of the Decision).

221 In the Decision, the Commission infers from this that the cooperation of Usinor and Avesta was extensive but nevertheless very belatedly. As regards the other undertakings, in particular KTN and AST, their cooperation was regarded as more limited than that of the first-mentioned undertakings since no documentary evidence or any facts not already in the possession of the Commission were supplied and those undertakings did not acknowledge the infringement (paragraph 100 of the Decision).

222 In paragraph 101 of the Decision, the Commission concluded that those factors justified a reduction of the fine by 10% for all the undertakings, with the exception of Avesta and Usinor, to which it applied a reduction of 40%.

223 The applicants criticise the Commission for granting them a reduction of only 10% of the amount of their fines on the incorrect basis that their statements and their replies to the statement of objections, first, provided no new documentary evidence and, second, denied the existence of the infringement.

2. The failure to provide new information in the administrative procedure

Arguments of the parties

224 The applicants submit that the Commission disregarded Section D of the Notice on Cooperation and the principle of equal treatment by taking the view that their statements provided nothing new in that they furnished no new documentary evidence or facts not already in the possession of the Commission.

225 In the applicants' opinion, where several undertakings reply, at the same time or successively, to questions from the Commission in which they disclose facts that confirm its suspicions, the order in which the information requested is provided is not such as to justify treating the undertakings differently for the purpose of reducing the fine. Section D of the Notice on Cooperation takes account only of the fact that undertakings must have provided information contributing to establishing the existence of the infringement and not of the order in which such information was disclosed to the Commission. Moreover, even where the same information is provided simultaneously, cooperation on the part of the undertakings in question is definitely of interest to the Commission since its allegations thereby gain probative force. Otherwise the Commission would not consider it helpful to put the same questions to the various undertakings concerned.

226 In this case, KTN and AST, in their statements to the Commission of 17 December 1996 and 10 January 1997 respectively, in response to the questionnaires sent to them, acknowledged the facts and in particular the holding of the Madrid meeting, in the same way as Usinor. The fact that the latter disclosed the same facts first is not decisive since the Commission merely chose to question it first in the course of an inspection. Only if that undertaking had provided that information of its own free will would that privileged treatment have been justified.

227 KTS adds that, when KTN acknowledged the facts, it was unaware of the extent of the Commission's knowledge because the Commission does not disclose the answers provided by the other undertakings. AST also considers that, in so far as all the relevant documents were the same, the Commission could not require it to provide new ones.

228 The Commission replies that, for a fine to be reduced, nothing prevents it from attaching more importance to the disclosure of new facts than to mere

confirmation of what it knows already. In that connection, according to section D, first indent, of the draft Notice on Cooperation (OJ 1995, C 341, p. 13), the Commission may grant a reduction of the fine where, in particular, 'the undertaking is the first to come forward'.

229 An undertaking which cooperates fully with the Commission by disclosing unknown facts to it contributes more to the finding of an infringement than an undertaking which merely confirms subsequently matters of which the Commission already has knowledge. Since the information concerned is provided in the course of an investigation, the applicants have no right to ask the Commission to grant 'equality of opportunity' by questioning all the undertakings concerned simultaneously and then drawing a distinction according to whether or not an undertaking was able to produce additional documents. Moreover, there is no rule that the assessment of the cooperation shown by undertakings must be influenced by whether or not those undertakings were aware of what knowledge the Commission possessed.

230 In this case, the Commission points out that KTN did not give a detailed account of the facts until its letter of 17 December 1996, when the inspections at the various undertakings had already been completed. Moreover, that letter was accompanied by no documentary evidence and the information in it was already known to the Commission. As regards AST, it was only on 10 January 1997 that it gave details of its participation in the Madrid meeting.

231 In contrast, Usinor was the first to inform it of the Madrid meeting and did so as early as 10 December 1996. KTN's argument that it would have been the first to disclose the Madrid meeting if the Commission had questioned it rather than Usinor first is irrelevant since it is a matter of speculation and is not supported by any facts.

Findings of the Court

232 It must be borne in mind, as a preliminary point, that in its Notice on Cooperation the Commission defined the conditions under which undertakings co-operating with it in an investigation into a cartel may be exempted from a fine or benefit from a reduction of the fine they would otherwise have had to pay (see Section A 3 of the Notice on Cooperation).

233 As regards the application of the Notice on Cooperation to the applicant's case, it is not contested that it does not fall within the scope of Section B of that notice, which deals with cases where an undertaking has reported a secret cartel to the Commission before the Commission has initiated an investigation (in which case there may be a reduction of at least 75% of the fine) or within Section C of that notice, which is concerned with undertakings that have reported a secret cartel after the Commission has undertaken an investigation which has failed to disclose sufficient grounds for initiating the procedure leading to a decision (in which case there may be a reduction of 50% to 75% of the fine).

234 Consequently, as is clearly indicated in paragraphs 93 to 96 of the Decision, since the applicant did not fulfil the conditions for the application of either Section B or Section C of the Notice on Cooperation, its conduct must be appraised by reference to Section D of that notice, entitled Significant reduction in a fine.

235 According to Section D(1), where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

236 Section D(2) states:

Such cases may include the following:

— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

237 As regards appraisal of the cooperation shown by undertakings, the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such

difference of treatment is objectively justified (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309 and the case-law there cited).

238 In this case, it is common ground that before the issue of the statement of objections on 24 April 1997, the applicant provided the Commission with information that helped confirm the existence of the infringement, in accordance with the first indent of Section D(2) of the Notice on Cooperation.

239 The Commission observes in paragraph 92 of its Decision that [s]tatements acknowledging the facts were sent to the Commission by those undertakings on 17 December 1996 (Acerinox, ALZ, Avesta, Krupp and Thyssen [KTN], [Usinor]) and on 10 January 1997 (AST). As is clear from the file, KTN's and AST's statements admitted, in particular, the holding of the Madrid meeting of 16 December 1993.

240 However, the Commission considered that the cooperation shown by KTN and AST was more limited than that of Avesta and Usinor since the applicants' statements disclosed nothing new (paragraph 98 of the Decision). In that connection, it found that Usinor had been the first to inform the Commission of the Madrid meeting (paragraph 97 of the Decision) and that the other undertakings, such as KTN and AST, had thus not provided any documentary evidence or facts not already in the possession of the Commission (paragraph 100 of the Decision).

241 It is necessary to determine whether, by making that finding, the Commission infringed the principle of equal treatment and, therefore, misapplied Section D(2) of the Notice on Cooperation.

242 It is clear from the file, first, that, as the Commission confirmed during the written procedure, Usinor informed it on 10 December 1996 of the holding of the Madrid meeting in response to a questionnaire given to it by Commission staff during an inspection carried out at the headquarters of that undertaking.

243 By way of measure of organisation of procedure, the Court of First Instance asked the Commission to state whether it had sent to all the addressees of the Decision the same questions as those put to Usinor. In its written reply, the Commission confirmed that all the addressees of the Decision had in fact received the same questionnaire. It stated in particular that those questions were put to KTN on 12 December 1996 and to AST on 18 December 1996.

244 Moreover, it is important to point out that it has not been shown, or indeed alleged, that KTN and AST were apprised of the answers given by Usinor which, by their nature, had to remain confidential, when it sent to the Commission its statement acknowledging the facts, in particular the holding of the Madrid meeting.

245 It is clear from the above that the extent of the cooperation provided by KTN, AST and Usinor must be regarded as comparable, in so far as those undertakings provided the Commission, at the same stage of the administrative procedure and in similar circumstances, with similar information concerning the conduct imputed to them.

246 Accordingly, the mere fact that one of those undertakings was the first to acknowledge the contested facts in response to the questions put by the Commission cannot constitute an objective reason for treating them differently. The appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors, such as the order in which they are questioned by the Commission.

247 In that connection, the Commission's argument based on the draft Notice on Cooperation is, in itself, irrelevant since it refers to a provision that does not now appear in Section D of the Notice on Cooperation. Moreover, it is clear from the foregoing considerations alone that an undertaking cannot be regarded as having been the first to cooperate with the Commission where it has provided the Commission, at the same stage of the administrative procedure as the other undertakings questioned and in similar circumstances, with information identical to that provided by the latter.

248 It follows that, in so far as it considered that KTN and AST had provided it with no new information, the Commission failed to observe Section D(2) of the Notice on Cooperation and infringed the principle of equal treatment.

249 Consequently, the first part of the plea must be upheld.

3. Acknowledgement of the existence of the infringement

Arguments of the parties

250 The applicants contest the findings in paragraphs 97 and 98 of the Decision to the effect that Usinor and Avesta are the only undertaking to have admitted concertation, whereas KTN and AST denied the existence thereof in their

statements and replies to the statement of objections. They consider, in that connection, that they were subjected to discriminatory treatment.

251 According to KTS, it is clear from its observations of 11 April 1996 and its letter of 30 June 1997 in response to the statement of objections that it not only confirmed the facts alleged but also expressly admitted the existence of a concerted practice. In that connection, it cannot be contended that its statements were ambiguous. By its repeated statements, it recognised that its representative at the Madrid meeting indicated to the other producers that the contested price increase could not be excluded and that that increase was then decided upon independently. That description of the Madrid meeting constitutes an admission of a concerted practice. The fact that it contested the existence of an agreement should not be regarded as decisive. Avesta's statement, cited by the Commission, likewise does not admit the existence of an agreement but merely that of 'liability within the meaning of Article 65 of the ECSC Treaty'. Moreover, the operative part of the Decision itself does not refer to the existence of an agreement.

252 For its part, AST contends that, in its memorandum of 2 July 1997, whilst it did maintain that the concertation deriving from the Madrid meeting could not be described as an agreement within the meaning of Article 65 of the ECSC Treaty, it did not, however, contest the fact that its conduct might be described as a concerted practice. Such failure to contest that point is tantamount to an admission on its part of one of the two charges contained in the statement of objections.

253 In any event, the applicants maintain that the failure by undertakings to object to the legal characterisation of the facts made by the Commission should not constitute a factor for reducing fines. Under Section D of the Notice on Cooperation, the condition imposed for availability of a reduction of the fine is that, as in this case, 'after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations'. Therefore, the fact of granting of a

reduction of the fines to Usinor and Avesta on the ground that they admitted the existence of the infringement, with the consequent penalisation of the applicants, is contrary to the Notice on Cooperation.

254 Moreover, according to KTS, the Commission's method runs counter to fundamental legal principles since its practical effect is to prevent the undertaking concerned from submitting its observations on the legal aspects of the facts which it has admitted.

255 According to AST, the Commission's assessment of the extent of its cooperation also runs counter to the principle of the protection of legitimate expectations. It submits that if it had known that the Commission wished to differentiate between operators who admitted the facts and those who also accepted the Commission's legal characterisation of the facts, it would have taken a different attitude in order to benefit from a maximum reduction of the fine.

256 The Commission replies that only Usinor and Avesta clearly and unambiguously admitted an infringement of Article 65 of the ECSC Treaty.

257 In KTS's case, the Commission contends that, in KTN's letter of 30 June 1997 in response to the statement of objections, there was no clear and frank statement admitting the infringement. Admittedly, KTN acknowledged in that letter the conduct attributed to it and indicated that it had already admitted the existence of a concerted practice in an earlier letter dated 17 December 1996. However, it continued to be equivocal by denying the existence of an agreement, stating that the undertakings concerned had decided independently to increase prices and that the information obtained in Madrid had only 'possibly' played a role. It was therefore normal for the Commission to have taken account of the greater frankness of Usinor and Avesta in calculating the reduction of their fine.

258 As regards AST, the Commission concedes that it did admit certain important facts and, to that extent, thus admitted the concertation underlying the infringement, which justified a reduction of the fine. However, AST always persisted in denying the illegality of the facts which it admitted.

259 As regards the applicants' argument that it penalised them because they did not admit the existence of an infringement, the Commission replies that it did not increase the fines but simply declined to reduce them by more than 10%.

Findings of the Court

260 It is necessary to determine, first, whether the Decision is vitiated by an error of fact or an error of assessment as to whether the applicants admitted the existence of an infringement of Article 65 of the ECSC Treaty during the administrative procedure.

261 It is important to bear in mind that, according to the Decision, 'only Usinor and Avesta acknowledged the existence of the concerted action' (paragraph 97 Decision). As regards KTN and AST, the Decision finds, on the contrary, that their statements and replies to the statement of objections 'dispute the existence of concerted action' (paragraph 98 of the Decision) and that consequently '[those undertakings] did not acknowledge the infringement' (paragraph 100 of the Decision). The Commission inferred from that fact in particular that the cooperation shown by the applicants was more limited than that shown by Usinor and Avesta and therefore justified a reduction of only 10% of their respective fines (paragraphs 100 and 101 of the Decision).

262 As regards the cooperation shown by KTN during the administrative procedure, it is clear from the file that neither in its letter of 30 June 1997 in response to the statement of objections nor in its earlier correspondence with the Commission did it admit the existence of an agreement within the meaning of Article 65(1) of the ECSC Treaty between the producers of stainless steel flat products present at the Madrid meeting but merely recognised the materiality of the facts alleged by the Commission.

263 In particular, KTN cannot validly claim to have denied the existence of an agreement whilst at the same time acknowledging its participation in a concerted practice. In that connection, the fact that KTN indicated that, at the Madrid meeting, its representative had envisaged the possibility of an increase of the reference values for the purpose of calculating the alloy surcharge but that the increase had then been decided upon and applied by it on an independent basis cannot constitute an express admission of the existence of a concerted practice.

264 According to settled case-law, the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the concept inherent in the Treaty provisions on competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers (Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 86, and the case-law there cited). By maintaining that the decision to change the reference values for the alloy surcharge had been adopted independently, KTN, by implication but undeniably, gave the impression that the criteria of coordination and cooperation specific to a concerted practice were absent and, in any event, did not exclude it.

265 Moreover, it must be noted that, in its reply to the statement of objections, KTN used contradictory expressions in stating, in particular, that it had taken its decisions 'independently' (paragraph III.2 of the letter of 30 June 1997), that 'the infringement, if such exists... did not commence in 1988 and, *a fortiori*, did not continue until today' (paragraph III.4 of the abovementioned letter), or again that

'the use of a formula, and likewise an identical price... may also, as is the case here, be the result of independent adjustment to the market and... is even lawful in such circumstances' (paragraph III.4 of the abovementioned letter).

266 In that context, the fact that it indicated, in its response to the statement objections, that it had already 'in its letter of 17 December 1996 disclosed all the facts and... recognised the existence of a concerted practice' cannot be regarded as an express admission of its participation in the infringement because neither that letter nor the arguments put forward in its response to the statement of objections enabled the Commission to corroborate such an interpretation.

267 It follows that the Commission was fully entitled to consider that KTN had denied the existence of concertation and, *a fortiori*, denied the existence of any infringement of Article 65(1) of the ECSC Treaty.

268 As regards the cooperation shown by AST during the administrative procedure, it is not disputed that AST also admitted the materiality of the facts on which the Commission relied, which justified a reduction of 10% of the fine imposed. However, contrary to AST's contention, there is nothing in the file to show that it admitted the existence of concertation.

269 In that connection, AST's argument that such an admission stems from the fact that it did not deny that its conduct might be described as a concerted practice cannot be upheld.

270 A reduction of the fine is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily and, where relevant, bring it to an end (*BPB de Eendracht* v *Commission*, cited above, paragraph 325, Case T-338/94 *Finnboard* v *Commission* [1998] II-1617, paragraph 363, confirmed on appeal on that point in Case C-298/98 P *Finnboard* v *Commission* [2000] I-10157, and *Mayr-Melnhof* v *Commission*, cited above, paragraph 330). However, in the absence of an express statement that it was not contesting the Commission's allegation of a concerted practice, AST did not facilitate the Commission's task of finding and bringing to an end infringements of Community competition law (*BPB de Eendracht* v *Commission*, paragraph 325, and *Mayr-Melnhof* v *Commission*, paragraph 332).

271 Accordingly, the Commission was right to consider that, by a giving that answer, the applicant had not behaved in such a manner as to justify an additional reduction of the fine for cooperation during the administrative procedure.

272 Second, in so far as the applicants still claim that the undertakings' failure to object to the legal characterisation of the facts made by the Commission should not constitute a factor to be relied on for reducing fines, it is necessary to determine whether, as they assert, the reduction made in that respect was contrary to the Notice on Cooperation and infringes the principle of the protection of legitimate expectations and the rights of the defence.

273 In the first place, it must be pointed out that, although section D(2), of the Notice on Cooperation does in fact refer to a case in which, following the statement of objections, an undertaking informs the Commission that it does not dispute the materiality of the facts on which the Commission bases its accusations, it cannot be interpreted as relating solely to that type of cooperation.

274 The list of the types of cooperation in Section D(2), of the Notice on Cooperation is merely indicative, as is confirmed by a the use of the expression 'may include'.

275 It must also be remembered that that notice also covers cases in which one of the undertakings concerned has reported a cartel to the Commission, either before the Commission has carried out an investigation (Section B of the notice) or after the Commission has conducted an investigation but has been unable to find a sufficient basis to justify initiating the procedure for the adoption of a decision (Section C of the notice). The fact that the notice thus expressly provides for the possibility of admitting an infringement at that stage of the administrative procedure does not mean that it cannot be admitted at a later stage.

276 Moreover, admission of the existence of a cartel facilitates the Commission's work in an investigation more than the mere admission of the materiality of the facts.

277 Since the Commission was required to assess the extent of the cooperation shown by the undertakings without infringing the principle of equal treatment, AST therefore had no reason to entertain any legitimate expectation that there would be no differentiation as between undertakings which admitted the facts and those which also admitted the existence of a cartel.

278 Finally, KTN's argument that the Commission in fact penalised undertakings which availed themselves of their rights of defence cannot be accepted. It has not been alleged that, by reducing the amount of the fines on account of cooperation, the Commission in this case compelled KTN to provide answers whereby it might have had to admit the existence of the infringement (see *BPB de Eendracht* v *Commission*, cited above, paragraph 324).

279 Accordingly, the second part of the plea raised by KTN and AST must be rejected.

280 Accordingly, only the first part of the plea put forward by KTN and AST must be upheld.

281 Consequently, having regard to all the foregoing considerations, the Court of First Instance, in the exercise of its unlimited jurisdiction, considers that, in respect of their cooperation during the administrative procedure, the applicants should be granted a reduction of 20% of the fine, as determined by the Decision before such cooperation was taken into account, since those undertakings informed the Commission of the holding of the Madrid meeting in circumstances similar to those surrounding the provision of the same information by Usinor.

II — *Breach of general principles of law in setting the amount of the fine*

A — *Breach of the principle of the protection of legitimate expectations*

Arguments of the parties

282 KTS maintains that, since the Commission was already aware of the existence of the alloy surcharge formula, as is apparent from paragraphs 60 to 63 of the

Decision and the reference made to Commission Decision 80/257/ECSC of 8 February 1980 relating to a proceeding under Article 65 of the ECSC Treaty in respect of a price-fixing system for the sale of rolled steel products ex stock by stock holders on the German market (OJ 1980 L 62, p. 28), and never expressed any adverse views in that connection, it could not impose a fine on it without giving the reasons for which that formula was now to be regarded as involving unlawful conduct. The Decision is therefore vitiated by breach of the principle of the protection of legitimate expectations.

283 The Commission states that the argument alleging its complicity and its knowledge of the alloy surcharge formula was rejected in paragraphs 61 to 63 of the Decision.

Findings of the Court

284 It must be borne in mind that, as the Commission found in paragraph 61 of the Decision, in response to a similar argument advanced in the administrative procedure, the undertakings concerned notified it only of the amounts of the alloy surcharges applied by them. On the other hand, they never disclosed the calculation formula itself or the conditions for its implementation. That finding, which, moreover, is not disputed, shows to be entirely untrue the claim that the Commission was aware of the infringement at issue, which involved not the use of a single formula for calculating the alloy surcharge but the inclusion in that formula, as from the same date and by all the undertakings concerned, of the same reference values for the alloying materials, with a view to securing a price increase.

285 Furthermore, the extract from Decision 80/257 cited by the Commission in paragraph 63 of the Decision specifically shows that the Commission did not criticised the undertakings concerned for adopting a single formula for calculating the alloy surcharge as such (see paragraph 87 above).

286 Accordingly, this plea must be rejected.

B — *Breach of the principle of equal treatment*

Arguments of the parties

287 The applicants maintain that they suffered unfavourable treatment compared with the other undertakings involved in the procedure, namely Usinor, Outokumpu and Acerinox.

288 With regard to Usinor, they refer to their arguments concerning the reduction of 40% granted to that company for cooperating in the administrative procedure and claim that they cooperated in the same way.

289 As regards Outokumpu, the Commission did not set out in the Decision the reasons for which it decided not to impose a fine on it, despite the fact that it had been informed of the discussions at the Madrid meeting and was involved in the contested practices in the same way as all the undertakings. In that connection, AST asks the Court to order the Commission to produce all its internal documents relating to the treatment accorded to Outokumpu.

290 As regards Acerinox, the applicants object to the reduction of 30% granted to it in respect of extenuating circumstances, contending that it was the main organiser of the Madrid meeting.

291 Finally, AST also claims to have suffered discriminatory treatment compared with Avesta. The latter was granted a reduction of 40% on the ground that it brought the infringement to an end in 1996. However, that reduction was based on an incorrect assessment of the duration of the infringement.

292 The Commission considers that the applicants have not suffered any unfavourable treatment compared with that accorded to the other undertakings involved in the procedure.

293 As regards Usinor, it refers to the arguments already put forward relating to the cooperation shown by the applicants in the administrative procedure.

294 As regards Outokumpu, the Commission states that it did not send it a statement of objections because it did not have sufficient information to demonstrate that undertaking's participation in the infringement. Moreover, it did not take part in the Madrid meeting.

295 As regards Acerinox, the Commission considers that its later application of the alloy surcharge on its domestic market was of greater importance in assessing the amount of its fine than the mere fact that it was responsible for logistic organisation of the Madrid meeting, which did not necessarily imply that it was the instigator of the meeting.

Findings of the Court

296 According to settled case-law, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified (*BPB de Eendracht* v *Commission*, cited above, paragraph 309 and the case-law there cited).

297 As regards the alleged discrimination by comparison with Usinor, it must be recalled that the Court has already upheld the first part of the applicants' plea concerning reduction of the fine for their cooperation in the administrative procedure. For the reasons stated (see paragraphs 232 to 249 and 281 above), the Court considered that a reduction of 20% should be granted to them for their cooperation because they provided information similar to that provided by Usinor concerning the Madrid meeting.

298 As regards the alleged discrimination by comparison with Outokumpu, it is important to remember that, according to the case-law, where an undertaking has acted in breach of Community competition law, it cannot escape being penalised altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court (see, in particular, *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 197).

299 The allegation that the Commission wrongly decided not to proceed against Outokumpu or did not give reasons for the failure to take action against it is therefore irrelevant to this case and must be rejected. Accordingly, the application for measures of organisation of procedure submitted in that connection by AST must also be rejected.

300 Similarly, the argument that Acerinox wrongly benefited from a reduction of 30% of the basic amount of the fine, by reason of extenuating circumstances, cannot be upheld. It must be remembered that the Commission stated in paragraph 82 of the Decision that that additional reduction was justified by the fact that Acerinox had not applied the alloy surcharge on its domestic market until a later stage. Even if it is assumed that such a reduction could be regarded as excessive in the circumstances of this case, the applicants do not in any event claim that they were in a similar situation to Acerinox.

301 As regards AST's complaint of discriminatory treatment as compared with Avesta, it must be stated, first, that it seeks once more to challenge the assessment of the duration of the infringement made by the Commission, which has, moreover, been accepted as correct and, second, that it fails to mention all the reasons for the 40% reduction granted to that undertaking and, in particular, the fact that it expressly admitted its participation in the concertation penalised.

302 This plea must therefore be rejected.

The claim for annulment of the combined provisions of Articles 1 and 4 of the Decision

Arguments of the parties

303 The applicants claim, first, that Article 4 of the Decision, ordering them to put an end to the infringements found in Article 1, is unlawful since, when the Decision was adopted, those infringements had already ceased.

304 Second, they assert that Article 4 of the Decision is imprecise since it is not apparent either from the operative part or from the grounds of the Decision what course of conduct should be followed in order to comply with it.

305 Finally, the combined provisions of Articles 1 and 4 of the Decision, in so far as they require them to adopt a particular course of conduct in the future, have no legal basis. Article 65(5) of the ECSC Treaty confers on the Commission only power to impose fines or periodic penalty payments on undertakings which have infringed the competition rules.

306 The Commission states, first, that the applicants' argument that the infringement was of a sporadic nature, so that Article 4 of the Decision is invalid, is unfounded.

307 Second, the infringement which the applicants are required to bring to an end is clearly defined in Article 1 of the Decision, namely the change to and application in a concerted manner of the reference values in the formula for calculating the alloy surcharge. It follows that, in order to comply with the Decision, the applicants should no longer apply the reference values decided on at the Madrid meeting in December 1993. The applicants clearly understood the meaning of that obligation since, in their letters of 11 March 1998, they informed the Commission that they had decided to apply new reference values for the alloying materials as from 1 April 1988 when calculating the alloy surcharge.

308 Third, the Commission denies that the instruction contained in Article 4 of the Decision unlawfully calls in question the future conduct of the applicants. It

submits that the legality of that instruction derives from its power to determine fines or periodic penalty payments under Article 65(5) of the ECSC Treaty.

Findings of the Court

309 It must be pointed out that Article 65(4) of the ECSC Treaty confers exclusive power on the Commission, subject to a right of appeal before the Community Court, to determine whether the agreements, decisions and concerted practices referred to in that article comply with its provisions. The Commission also has exclusive power to impose fines or periodic penalty payments to sanction the conduct mentioned in Article 65(1).

310 It is clear from the scheme of those provisions that the Commission is empowered to establish, by a decision, any infringement of Article 65(1) of the ECSC Treaty, as it did with regard to the applicants and the other undertakings concerned in Article 1 of the Decision.

311 By requiring the applicants, in Article 4 of the Decision, to put an end to the acts or conduct at issue and to refrain from repeating them and from adopting any measure having an equivalent effect, the Commission merely indicated the consequences, regarding their future conduct, of the finding of illegality in Article 1 (see, to that effect, *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 184).

312 That instruction was, moreover, sufficiently precise since the grounds of the Decision indicate the basis on which the Commission found to be illegal all the conduct referred to in Article 1 of the Decision. Moreover, as the Commission rightly emphasised, the applicants clearly understood the scope of their obligations since each of them applied new reference values as from 1 April 1998 for the purpose of calculating the alloy surcharge.

313 As regards the argument that the infringements had already ceased when the Decision was adopted, it need merely be pointed out that it seeks again to call in question the Commission's assessment of the duration of the infringement, which has in fact been upheld.

314 It follows that the applicants' claims for annulment of the combined provisions of Articles 1 and 4 of the Decision must be rejected.

Exercise by the Court of its unlimited jurisdiction

315 The Court has already annulled Article 1 of the Decision in so far as it imputes to KTN responsibility for the infringement of Article 65 of the ECSC Treaty for which Thyssen Stahl is criticised (see paragraph 55 *et seq.*, above). Accordingly, for the purpose of calculating KTN's fine, it is inappropriate to take account of the fine imposed on it for the infringement committed by Thyssen Stahl. In that connection, the Decision indicates that the fine set by the Commission in respect of the infringement committed by Thyssen Stahl was ECU 3 564 000. The basic amount of Thyssen Stahl's fine had been set at ECU 4.4 million in respect of the gravity and duration of the infringement (paragraph 80 of the Decision), less

10% in respect of extenuating circumstances relating to the situation in the sector (paragraph 84 of the Decision), and 10% for its cooperation during the procedure (paragraph 101 of the Decision).

316 The Court has also upheld the first part of the applicants' plea regarding reduction of the fine in respect of their cooperation in the administrative procedure (see paragraphs 232 to 249). For the reasons already given (see paragraph 281), the Court considers that it is appropriate to grant KTN and AST in that regard a reduction of 20% of the amount of the fine.

317 According to the Decision, before a reduction of 10% was made in respect of their cooperation during the procedure (paragraph 101 of the Decision), the basic amount of the fines, by reason of the gravity and duration of the infringement, had been set at ECU 5.6 million for KTN (regardless of the fine imposed on Thyssen Stahl) and for AST (paragraph 80 of the Decision), then reduced by 10% in respect of extenuating circumstances relating to the situation in the sector (paragraph 84 of the Decision), giving a sum of ECU 5 040 000 for each of those undertakings.

318 For both KTN and AST it is appropriate, for the reasons given above, to grant a reduction of 20% of the latter amount, being equivalent to a reduction of ECU 1 008 000. Consequently, the total fine imposed on KTN and that imposed on AST will be set at ECU 4 032 000.

319 In view of the foregoing considerations and of the entry into force on 1 January 1999 of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), the amount of those fines must be expressed in euro.

Costs

320 Under Article 87(3) of its Rules of Procedure, the Court of First Instance may, where each party succeeds on some and fails on other heads, order that the costs be shared.

321 In the present circumstances, it is appropriate in Case T-45/98 to order the parties to bear their own costs and, in Case T-47/98, to order the applicant to bear its own costs and two-thirds of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Joins Cases T-45/98 and T-47/98 for the purposes of the judgment;

2. Annuls Article 1 of Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy Surcharge) in so far as it attributes to Krupp Thyssen Nirosta GmbH responsibility for the infringement committed by Thyssen Stahl AG;

3. Sets the amount of the fines imposed on Krupp Thyssen Nirosta GmbH and Acciai Speciali Terni SpA by Article 2 of Decision 98/247 at EUR 4 032 000;

4. For the rest, dismisses the applications in Cases T-45/98 and T-47/98 in all other respects;

5. In case T-45/98, orders Krupp Thyssen Stainless GmbH and the Commission to bear their own costs;

6. In case T-47/98, orders Acciai Speciali Terni SpA to bear its own costs and to pay two-thirds of those of the Commission and orders the Commission to bear one-third of its own costs.

Vesterdorf Vilaras Forwood

Delivered in open court in Luxembourg on 13 December 2001.

H. Jung B. Vesterdorf

Registrar President

Table of contents