JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 December 2001 *

In Case T-48/98,

Compañía Española para la Fabricación de Aceros Inoxidables SA (Acerinox), established in Madrid, Spain, represented by A. Vandencasteele and D. Waelbroeck, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by W. Wils and K. Leivo, acting as Agents, with an address for service in Luxembourg,

defendant,

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),

* Language of the case: English.

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, Administrator,

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

gives the following

Judgment

Facts

1 Compañía Española Para La Fabricación de Aceros Inoxidables SA (hereinafter 'Acerinox' or 'the applicant') is a company incorporated under Spanish law operating in the stainless steel sector, producing flat products in particular. It controls the Spanish producer of stainless steel long products, Roldán SA, and a United States producer of stainless steel flat products.

2 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.

3 On 16 March 1995, following reports in the specialised press and complaints from several 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'.

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

5 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.

6 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.

7 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 Acerinox, informed the Commission of their wish to cooperate. For that purpose, statements were sent to the Commission: on 17 December 1996 by Acerinox, ALZ NV, Avesta Sheffield AB ('Avesta'), Krupp Thyssen Nirosta GmbH ('KTN'), Usinor SA ('Usinor' or 'Ugine'), and on 10 January 1997 by Acciai Speciali Terni SpA ('AST').

8 The Commission served a new statement of objections replacing the statement of 19 December 1995 on those undertakings and on Thyssen Stahl AG on 24 April 1977.

9 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').

10 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.

11 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, 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 compare 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.

12 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.

13 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.'

14 By fax of 21 January 1998 the Commission notified the operative part of the Decision to the applicant. 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. On 5 February 1998, the Decision, thus amended, was formally notified to its addressees.

Procedure

15 By application lodged at the Registry of the Court of First Instance on 18 March 1998 the applicant instituted the present proceedings. Krupp Thyssen Stainless GmbH, formerly KTN, and AST also brought proceedings against the Decision (Cases T-45/98 and T-47/98 respectively).

16 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.

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

Forms of order sought

18 The applicant claims that the Court of First Instance should:

— annul the Decision;

— in the alternative, substantially reduce the fine imposed;

— order the Commission to pay the costs.

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

— dismiss the action;

— order the applicant to pay the costs.

The claim for annulment of the Decision

20 In support of its claim for annulment of the Decision, the applicant raises two pleas in law: first, that it did not participate in the infringement and, second, that the infringement was sporadic in nature.

1. *The first plea: non-participation in the infringement*

Arguments of the parties

21 The applicant maintains, first, that no agreement was concluded at the Madrid meeting relating to the application of the alloy surcharge on the Spanish market.

As is clear from paragraphs 27, 44 and 54 of the Decision, at that meeting the applicant informed its competitors of its intention not to apply the alloy surcharge on the Spanish market in view of the critical situation prevailing there.

22 It maintains that the Commission did not demonstrate or even claim that there was any agreement or concerted practice relating to application of the alloy surcharge on the Spanish market.

23 In the applicant's view, the argument that a statement made by it at the Madrid meeting did not in any way detract from the principle of the agreement or the concerted practice but was merely indicative of deferment of the introduction of the alloy surcharge on the Spanish market is not only without merit but is also inadmissible, having been raised for the first time before the Court of First Instance (Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405).

24 In any event, the statement by Avesta in its fax of 14 January 1994 according to which 'Acerinox have announced that surcharges will be applied from 1 April 1994' (paragraph 33 of the Decision) merely confirms the absence of any agreement or concerted practice relating to deferred implementation of the alloy surcharge in Spain. As to the finding in paragraph 82 of the Decision that the applicant reintroduced the alloy surcharge on the Spanish market in June 1994, the Decision does not explain why there was no other plausible explanation for such conduct than implementation of an agreement reached at the Madrid meeting.

25 As regards, second, the application of the alloy surcharge in the other countries of Europe, the applicant states that since all the other undertakings notified to the Commission the amounts of the alloy surcharges which they intended applying with effect from 1 February 1994, it was itself able to take account of them in

order to adopt parallel conduct. The right of operators to adapt themselves intelligently to the conduct of their competitors is upheld by the case-law (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 173 and 174, and 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). In this case such conduct was accounted for by the oligopolistic structure of the market in stainless steel flat products in Europe and by the transparency rules in Article 60 of the ECSC Treaty. In particular, the applicant maintains that the parallel conduct in which it engaged was based on public announcements made by its competitors under the ECSC Treaty rules, which were also widely reported in the specialised press as early as January 1994. Although it in fact applied the alloy surcharge in Denmark as from February 1994, it did so only because the negotiations with its Danish customers took place during that period.

26 Finally, the applicant submits that if the Commission considered that Outokumpu should be excluded from the action against the cartel even though, despite not having taken part in the Madrid meeting, it had been fully informed of the results thereof by Ugine's faxes of 20 December 1993 and 11 January 1994 (paragraphs 28 and 32 of the Decision) and adjusted its market conduct accordingly, the Commission should *a fortiori* have reached the same conclusion regarding the applicant which, although having taken part in that meeting, expressed its intention not to follow the approach discussed and did not do so on the market.

27 The Commission replies that, although the applicant did not immediately apply the alloy surcharge on its domestic market, it nevertheless did so on the other markets, particularly in Denmark, as from 1 February 1994 (see paragraphs 37 and 82 of the Decision). Moreover, the applicant's participation in the agreement is also apparent from Avesta's abovementioned fax of 14 January 1994. According to the Commission, those facts indicate that an agreement came into being at the Madrid meeting or, at the very least, a concerted practice, in which the applicant participated in the same way as all the other addressees of the Decision, but which did not affect the Spanish market to the same extent.

28 According to the Commission, the applicant's argument that application of the alloy surcharge on the Spanish market in June 1994 was a reaction independent of the decisions of its competitors is not convincing. First, the applicant's announcement in May 1994 of the application of a new alloy surcharge in Spain as from June 1994 should not be seen in isolation since that announcement was preceded by the Madrid meeting, by the application of the alloy surcharge in other Member States as from 1 February 1994 and by the announcement to Avesta that it would apply the alloy surcharge as from 1 April 1994. Second, following the statement made by the applicant at the Madrid meeting, none of the other producers applied the new alloy surcharge in Spain, and that course of action was consistent with the attitude adopted whereby on each national market producers would follow the domestic or leading producer. Consequently, when the applicant applied the alloy surcharge on the Spanish market in June 1994 it was not engaging in parallel conduct but was signalling that the time had come to start applying the agreed increase there as well because the market circumstances had now made it possible to do so.

Findings of the Court

29 It must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58).

30 However, once it has been established that an undertaking has participated in meetings of a manifestly anti-competitive nature between undertakings, it is incumbent on that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in

those meetings in a spirit that was different from theirs (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181). In the absence of proof of such distancing, the fact that an undertaking does not abide by the outcome of those meetings is not such as to relieve it from full responsibility for the fact that it participated in the cartel (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] II-1751, paragraph 135, 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 — hereinafter 'the *Cement* judgment' — paragraph 1389).

31 In this case, it is not disputed that the applicant participated in the Madrid meeting of 16 December 1993 during which, as is clear from the Decision and the statements of various participants at that meeting, certain producers of stainless steel flat products agreed to use, from the same date, identical reference values for calculation of the alloy surcharge and, therefore, as to the determination of part of the final price of those products, contrary to Article 65(1) of the ECSC Treaty.

32 It is necessary to consider, however, whether the applicant has satisfactorily established that it distanced itself from that agreement and cannot therefore be accused of infringing Article 65(1) of the ECSC Treaty.

33 As regards, first, the arguments put forward by the applicant to show that the concertation between producers was not concerned with the application, on the Spanish market, of the alloy surcharge calculated in accordance with the method defined at the Madrid meeting, it should be observed that the Commission does not dispute that, at that meeting, Acerinox expressed its wish not to apply the alloy surcharge in Spain owing to the economic situation prevailing there.

34 In that connection, paragraph 27 of the Decision mentions, but does not challenge, the applicant's statement of 17 December 1996 in response to questions from the Commission, according to which at the meeting 'Acerinox said it did not plan to apply the surcharge in Spain because it considered the measure 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.'

35 Since it is therefore common ground that, at the date of the Madrid meeting, the applicant distanced itself from the agreement on the alloy surcharge in so far as it related to the Spanish market, the mere fact that it took part in that meeting is no basis for treating it as a party to an agreement whose object was to fix the reference values for the alloy surcharge on that market, contrary to Article 65(1) of the ECSC Treaty.

36 Since the aim of such an agreement was, at that date, contrary to Acerinox's interests, in so far as it related to the Spanish market, only proof of a commitment by that undertaking to apply the alloy surcharge on its domestic market would therefore represent adherence by it to an agreement concerning Spain (see, to that effect, the *Cement* judgment, paragraph 3444).

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

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

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

39 That conclusion is not undermined by the argument that the applicant did not thereafter apply the alloy surcharge on the Spanish market until 1 June 1994, rather than on 1 April 1994. Even if it were to be accepted that that postponement of two months might indicate that the applicant's conduct on the Spanish market was not in conformity with the conduct agreed upon, that would in no way affect its liability under Article 65(1) of the ECSC Treaty, in view of its prior adherence to the agreement no later than 14 January 1994 (*Mayr-Melnhof,* cited above, paragraph 135, and *Cement*, paragraph 1389).

40 As regards, second, the applicant's arguments as to the absence of proof of its participation in the agreement on the alloy surcharge in so far as it related to the other countries of the European Community, they are based on a misapprehension as to the requirements concerning proof laid down by Article 65(1) of the ECSC Treaty.

41 The Court holds that the applicant has not proved that, at the Madrid meeting, it distanced itself from the other participants in the meeting by stating its intention not to apply the alloy surcharge in the countries of the European Community other than Spain. It is clear from the file that, on the contrary, in its statement of

17 December 1996, in response to questions from the Commission, the applicant did not contend that, at the Madrid meeting, it had adopted the same attitude as the one decided upon regarding application of the alloy surcharge in Spain but conceded that '[a] majority of those present was in favour of applying the surcharge as soon as possible' (paragraph 2.4 of the statement mentioned above and paragraph 26 of the Decision).

42 Moreover, it is clear from that same statement that the applicant applied an alloy surcharge to its products as from February 1994 in Denmark; then, in March, in Germany, Norway and Sweden; then, in April, in Ireland, Portugal, the United Kingdom and Italy; and, finally, in France and Belgium in May 1994.

43 The applicant's claim that the alignment of its alloy surcharges with those applied by the other producers operating on those markets derived from mere parallelism of conduct attributable to the oligopolistic structure of the market in stainless steel flat products and to the transparency rules in Article 60 of the ECSC Treaty is unconvincing. Whilst it may follow from the case-law that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct (*Ahlström Osakehtiö and Others*, cited above, paragraph 71), the fact nevertheless remains, in this case, that the Commission has produced proof of prior concertation between the undertakings concerned, which involved the use and application of identical reference values in the formula for calculating the alloy surcharge.

44 The argument that no action was taken against Outokumpu has no bearing on the appraisal of the present infringement. Even if the situation of that undertaking could be compared with that of the applicant, the fact that no finding of infringement was made against it by the Commission could not in any event be a

ground for setting aside the finding of an infringement by the applicant, assuming that it was properly established (*Ahlström Osakehtiö and Others*, paragraph 146).

45 It follows that the applicant must be regarded as having participated in the agreement, in so far as it related to the application, in the Member States of the Community other than Spain, of an alloy surcharge calculated on the basis of reference values agreed between undertakings as from 16 December 1993, the date of the Madrid meeting, and, in so far as that agreement related to the application of the alloy surcharge in Spain, as from its adherence to the agreement, no later than 14 January 1994. The duration of its participation in the agreement will be examined in relation to the second plea.

46 In short, as the applicant's participation in the agreement has been proved, the plea is unfounded and must be rejected.

2. *The second plea: the sporadic nature of the infringement*

Arguments of the parties

47 The applicant maintains that, even if it could be regarded as having participated in an infringement, it was merely a sporadic infringement.

48 It states that the Commission has not proved that the infringement consisted, in addition to application of the alloy surcharge as from 1 February 1994, in keeping it in force after that date for an indefinite period. In the absence of contacts between the undertakings, mere parallel behaviour cannot be sufficient to establish that the concerted practice continued beyond 1 February 1994 (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 153). Moreover, in the absence of evidence capable of directly establishing the duration of infringement, the Commission must, at least, produce evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR 441, paragraph 79). Otherwise, the 'presumption of innocence militating in favour of the applicant' requires that it be assumed that the infringement has terminated (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraphs 73 to 75, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraphs 83 to 85).

49 According to the applicant, the concertation can be said to have lasted at most until July 1994 when nickel prices had returned to their original level. On the other hand, the Commission has no grounds for considering that the mere introduction of a different formula from the one which had been traditionally used in the industry was capable of bringing the alleged infringement to an end (see paragraph 70 of the Decision).

50 Finally, the applicant submits that the judgment of the Court of First Instance in Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 95, cited by the Commission, has no relevance to this case since the view was taken that the effects of the concertation lasted until the adoption of the Decision without its having been formally brought to an end.

51 The Commission contends that the applicant's reasoning regarding the duration of the infringement misrepresents the nature of the infringement and the evidence available.

52 As regards evidence, the Commission did not try to prove an infringement solely on the basis of parallel behaviour. On the contrary, it has direct evidence of the agreement decided upon at the Madrid meeting and of its implementation in most of the Member States as from February 1994 and in Spain as from June 1994. On the date of adoption of the Decision, moreover, only Avesta had stopped applying the alloy surcharge thus agreed.

53 As regards the nature of the infringement, the Commission maintains that the agreement at issue, designed to introduce the alloy surcharge based on fixed reference values, was concluded for an indefinite period or at least 'until further notice', in contrast to traditional price agreements which are necessarily reviewed regularly in accordance with market conditions.

54 The Commission concludes from this that where, as in this case, the infringement consists of an agreement or concerted practice decided upon at one point in time but to be executed over a prolonged period, the whole period of application should be regarded as included in the duration of the infringement. To hold otherwise would imply that most infringements of Article 65 of the ECSC Treaty and of Article 85 of the EC Treaty would last only for one day, namely the day the agreement or concerted practice was concluded or decided upon. In any event, according to the case-law regarding cartels that are no longer in operation, it is sufficient, for Article 85 to be applicable, that they continue to produce their effects after they have formally ceased to be in operation (*SCA Holding* v *Commission*, cited above, paragraph 95).

Findings of the Court

55 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 *Dunlop Slazenger* v *Commission*, cited above, paragraph 79, and *Cement*, cited above, paragraph 2802).

56 It is therefore necessary in this case to consider whether the Commission, having found in paragraph 50 of the Decision that the concertation continued until the date of adoption of the Decision, discharged the burden of proof which lay upon it.

57 It should be remembered that in the Decision, and in particular in paragraph 44, the Commission considered that the agreement commenced at the Madrid meeting of 16 December 1993, because it was on that date that the participating undertakings agreed to apply an alloy surcharge as from 1 February 1994, taking as the reference values for the alloying materials in the calculation method used for the last time in 1991 the values they had reached in September 1993.

58 The Decision then found that, as from that date, the undertakings actually applied the alloy surcharge, thus agreed and calculated, to their sales in Europe. In the particular case of the applicant, it complied with the decision taken at the Madrid meeting by applying the abovementioned alloy surcharge as from 1 February 1994 to its sales in the other Member States, and particularly in Denmark (paragraphs 54 and 82 of the Decision).

59 As regards the date on which the infringement ceased, the Commission relied in paragraph 50 of the Decision on the fact that only Avesta had announced, in November 1996, that it was bringing the agreement to an end by using another method for calculation of the alloy surcharge.

60 In that connection, the Court would point out that the applicant does not deny that the reference values for the alloy surcharge, as agreed at the Madrid meeting, were not changed before the Decision was adopted. Thus, as the applicant and the other undertakings concerned continued in practice to apply the reference values on which they had agreed at that meeting, the fact that no express decision was taken at that time as to the period of implementation of the agreement cannot prove that the agreement was sporadic rather than continuous.

61 The applicant's argument that the application of an alloy surcharge derived from price transparency and parallelism of behaviour on the part of the undertakings concerned is unfounded and must be rejected. The infringement attributed to the applicant consisted not in the application of an alloy surcharge as such but in the determination of its amount on the basis of a calculation method embodying reference values identical to those of its competitors, determined jointly with other producers and in concertation with them. Accordingly, the fact that the applicant maintained those reference values in its calculation method for the alloy surcharge cannot be accounted for otherwise than by the existence of such concertation.

62 Similarly, the applicant's argument that the agreement lasted, at most, until July 1994 when nickel prices 'reached their original level' is entirely irrelevant and must be rejected. Since the reference values of the alloying materials to which the infringement related remained unchanged, the inference to be drawn from the fact that, on a given date, the price of nickel reached its 'original level' is certainly not that the infringement then ceased to have anti-competitive effects but simply that the calculation of the alloy surcharge then had to take account of that development.

63 Finally, it must be borne in mind that, with regard to cartels which are no longer in operation, it is sufficient, for Article 85 of the EC Treaty to be applicable, and, by analogy, Article 65 of the ECSC Treaty, that they continue to produce their effects after they have formally ceased to be in force (Case 51/75 *EMI Records* [1976] ECR 811, paragraph 30, 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 the adoption of the Decision, without the agreement having been formally brought to an end.

64 It follows that, in so far as the applicant had not abandoned the application of the reference values agreed at the Madrid meeting before the adoption of the Decision, the Commission was fully entitled to consider that the infringement lasted until that date.

65 The fact that in the applicant's case the date of commencement of the infringement cannot be fixed until 14 January 1994, rather than 16 December 1993, in so far as the agreement concerned the application of the alloy surcharge in Spain (see paragraph 45 above) cannot, in those circumstances, affect the validity of the Decision. Because the Decision was adopted on 21 January 1998, the Commission in any event considered, for the purposes of calculating the fine, that the duration of the infringement attributable to the applicant was four years. Consequently, in paragraph 78 of the Decision, the Commission proceeded, in accordance with its 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, page 3, hereinafter 'the Guidelines'), to apply an increase of 10% for each year that had elapsed, amounting in this case to an increase of 40%. Moreover, it must also be remembered that, since the agreement in which the applicant participated also covered the other Member States of the Community, the Commission was fully entitled to consider that the infringement commenced on 16 December 1993, the date of the Madrid meeting.

66 It follows that the plea alleging that the infringement was merely sporadic must be rejected.

The claim that the amount of the fine should be reduced

A — *The pleas alleging miscalculation of the fine*

1 — *The gravity of the infringement*

Arguments of the parties

67 The applicant maintains, first, that the fines imposed by the Commission do not take account of the comparative importance of the parties.

68 It states that, as a departure from its earlier practice of reflecting the gravity of the infringement by calculating the fines as a percentage of the turnovers of the companies involved, the Commission decided to adopt, in this instance for the purpose of the gravity of the infringement, a uniform starting point for calculation of the fine for all the parties concerned of ECU 4 million, because the companies concerned were all large, albeit with significant differences in their sizes.

69 The applicant provided the following table in order to compare the turnovers of the 'companies' concerned for 1996:

	1996		
	Rate of exchange		ECU
AVESTA	SEK 8.7222	17 740	2 033.89
ALZ	BEF 40.795	28 900	708.42
USINOR	FRF 6.635	71 10	10 715.90
KRUPP	DEM 1.983	27 679	13 958.14
THYSSEN	DEM 1.983	38 673	19 502.27
ACERINOX	PTE 167.432	180 892	1 080.39

Unlike the Commission, the applicant considers that the relevant turnover for the purpose of calculating the fine is that of the 'companies' and not that of the 'undertakings', given that the companies are the addressees of the Decision and they are the economic entities which are to pay the fines.

70 The applicant also provided a table showing the parties' respective shares of the relevant market as follows:

	1995	January-September 1996
KTN	24.15%	24.04%
AST	15.32%	15.10%
ALZ	9.51%	9.87%
ACERINOX	11.62%	11.11%
OUTOKUMPU	8.49%	8.38%
UGINE	17.39%	18.20%
AVESTA/BRITISH STEEL	13.49%	13.27%

71 As a result, by taking the same starting point for all the participating companies, the Commission in fact imposed a much heavier sanction on those companies

with a smaller turnover and a more limited market share. On the basis of that table, the market shares of Ugine, AST and Avesta exceed the applicant's market share by 63.8%, 35.9% and 19.4% respectively.

72 The applicant thus maintains that the Commission should have relied on the turnover and market share of each company covered by the Decision, which would have enabled it to avoid making the fines imposed disproportionate to the size of the 'undertaking' and to take adequately into account the size and economic power of the 'undertakings concerned' and therefore their influence on the market (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 119 and 120).

73 The Commission observes, first, that the Decision is one of the first in which the Guidelines have been applied.

74 It explains that, under the Guidelines, fines are no longer set as a percentage of the turnover of the undertakings concerned but take as a starting point an absolute figure, calculated according to the gravity of the infringement. Moreover, for a fine to be imposed on undertakings which have together committed only one infringement, differentiation is based on the respective roles ('leadership' or 'follower role') played by each of the undertakings and the respective degrees of co-operation with the Commission's investigation. The new method also takes account of the considerable disparities in the size of undertakings.

75 The Commission adds that the second feature of the new method of setting fines is that it takes into account more systematically the duration of the infringement. Finally, as indicated in the Guidelines, the Commission continues to take into account all relevant aggravating or extenuating circumstances and to apply its

leniency policy, in accordance with its Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, hereinafter 'the Notice on Cooperation').

76 In this case, the applicant's argument that the Commission failed, in the Decision, to take account of the different sizes of the undertakings concerned is unfounded, in that the Commission took the view that all the undertakings concerned were large (paragraph 77 of the Decision). The Commission emphasises that the first table produced by the applicant relates to 'companies' and not to 'undertakings'. However, only the concept of 'undertaking' is relevant for the purpose of applying the competition rules. Consequently, only the second table produced by the applicant, which shows that the undertakings concerned have comparable market shares, is relevant to this case.

Findings of the Court

77 It must be borne in mind first of all that in the Decision the Commission determined the amount of the fines imposed on the undertakings concerned, and particularly on the applicant, by applying the method defined in the Guidelines.

78 Under that method, the Commission takes as the starting point a given amount determined by reference to the gravity of the infringement. The appraisal of the gravity of the infringement must take account of the actual nature of the infringement, its specific impact on the market, where it can be measured, and the size of the relevant geographical market (Section 1 A, first paragraph). In that context, infringements are divided into three categories, namely 'minor infringements', for which the likely fines are between ECU 1 000 and ECU 1 million,

'serious infringements', for which the likely fines are between ECU 1 million and ECU 20 million, and 'very serious infringements' for which the fines are likely to exceed ECU 20 million (Section 1 A, first to third indents). Within each of those categories, and in particular the categories described as serious and very serious, the scale of fines allows differential treatment to be applied to undertakings according to the nature of the infringements committed (Section 1 A, third paragraph). It is also necessary to take account of the effective economic capacity of the offenders to cause significant damage to other operators, in particular consumers, and to set the amount of the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph).

79 Next, account may be taken of the fact that large undertakings have in most cases infrastructures capable of providing them with legal and economic information on the basis of which they can better appreciate the unlawful nature of the conduct and the consequences stemming from it under competition law (Section 1 A, fifth paragraph).

80 Within each of the three abovementioned categories, it may be appropriate in particular cases to apply weightings to the amounts decided on so as to take account of the specific weight and therefore the real impact on competition of the unlawful conduct of each undertaking, especially where there is considerable disparity in the sizes of the undertakings that have committed an infringement of the same nature and to make consequential adjustments to the basic amount depending on the specific characteristics of each undertaking (Section 1 A, sixth paragraph).

81 In this case, the Commission considered, having regard to the gravity of the infringement, that the basic amount of the fines should be set at ECU 4 million for all the undertakings concerned (paragraph 76 of the Decision). In making that appraisal, the Commission took account of the nature of the infringement which, aiming as it did at a uniform increase of a price component by almost all the

producers of stainless steel flat products, constituted a serious infringement of Community law (paragraph 74 of the Decision). However, in view of the 'economic and legal elements' of the agreement and the relative gravity of the offence, the Commission did not consider that it should involve very substantial fines. Finally, in considering whether there was 'considerable disparity' between the undertakings involved in the infringement, the Commission considered that all the undertakings were large and that, consequently, it was not necessary to vary the amounts of the fine for the infringement (paragraph 77 of the Decision).

82 Contrary to the applicant's assertion, the Commission was not required to appraise the gravity of the infringement by reference to the turnover of each of the companies concerned: no such criterion is imposed by the by Article 65(5) of the ECSC Treaty or by the Guidelines.

83 It is clear from Article 65(5) of the ECSC Treaty that the turnover of the undertakings concerned is to be considered by the Commission only for the purpose of observing the maximum limit on the final amount of the fine, which is defined as 'twice the turnover on the products [in question]... however,... this maximum may be raised to 10% of the annual turnover of the undertakings in question...', as is also stated in Section 5(a) of the Guidelines. However, it has not been alleged, or *a fortiori* shown, that the fine finally imposed on the applicant exceeded the limit thus defined.

84 In that connection, any reference to the previous decision-making practice of the Commission is irrelevant.

85 First, that practice, however consistent, cannot in itself provide a legal framework for the method of calculating fines since, as the infringements are covered by

Article 65 of the ECSC Treaty, that method is defined by Article 65(5). Second, in view of the discretion granted to the Commission by Article 65(5) of the ECSC Treaty, the Commission cannot be criticised for having introduced a new method for calculating fines, provided that the fines do not exceed the maximum limit laid down by Article 65(5) of the ECSC Treaty.

86 Furthermore, it must be remembered that, 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; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] I-4411, paragraph 33; see also Case T-295/94 *Buchmann* v *Commission* [1998] II-813, paragraph 163). Thus, the Community judicature has found to be lawful a calculation method under which the Commission first determines the overall amount of the fine to be imposed and then divides that total among the undertakings concerned depending on their activities in the sector concerned (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] 3369, paragraphs 48 to 53).

87 The applicant's argument that the fines imposed do not take account of the respective strengths of the undertakings concerned on the basis of their market shares must be also rejected.

88 It is true that an undertaking's market shares may be relevant in order to determine what influence it may exert on the market but they cannot be a decisive

factor in concluding that an undertaking belongs to a powerful economic entity (see *Baustahlgewebe* v *Commission*, cited above, paragraph 139).

89 However, according to settled case-law, the factors on the basis of which the gravity of an infringement may be assessed may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking (*Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 120 and 121; Case T-77/92 *Parker Pen* v *Commission* [1994] II-549, paragraph 94, and *SCA Holding* v *Commission*, cited above, paragraph 176).

90 Accordingly, in this case, the Commission was fully entitled to rely, *inter alia*, on the size and economic strength of the undertakings concerned, having found them all to be large on the basis that the six undertakings concerned accounted for more than 80% of European production of finished stainless steel products (paragraph 9 of the Decision). In that regard, the comparison drawn by the applicant between its market share of about 11% and those of Ugine, AST and Avesta of about 18%, 15%, and 14% respectively is not such as to disclose any 'considerable disparity' between those undertakings, within the meaning of Section 1 A, sixth paragraph, of the Guidelines, such as to render differentiation necessary in the appraisal of the gravity of the infringement.

91 In those circumstances, the amount of the fine imposed on the applicant cannot be regarded as disproportionate, given that the starting point for calculation of the amount of the fine, determined by reference to the gravity of the infringement, is justified in the light of the criteria laid down in the Guidelines, as adopted by the Commission for appraisal of the nature and subject-matter of the infringement, its impact on the market and the size of the undertakings concerned.

92 It follows that this plea in law is unfounded and must be rejected.

2 — *The duration of the infringement*

Arguments of the parties

93 The applicant maintains that since the infringement was sporadic or of short duration, the Commission should have reduced the fine and not increased it by ECU 1.6 million in respect of the allegedly long duration of the infringement.

94 The Commission replies that the increase takes account of the duration of the infringement which, in applicant's case, and in that the most of the other addressees of the Decision, was four years.

Findings of the Court

95 In determining the amounts of fines, account must be taken of the duration of the infringements and of all factors capable of affecting the assessment of their gravity (see in particular *Musique Diffusion Française and Others* v *Commission,* cited above, paragraph 129).

96 As regards 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 relating to gravity of the infringement should not be increased, infringements of medium duration (in general 1 to 5 years), for which that

amount may be increased by up to 50%, and infringements of long duration (in general more than five years), for which that amount may be increased by 10% for each year (Section 1 B, first to third indents).

97 In this case, it is important to remember that, as stated in paragraphs 64 and 65 above, the Commission properly considered that the infringement lasted until the date of adoption of the Decision, 21 January 1998, so that the duration of the applicant's participation in the infringement was necessarily estimated as four years.

98 Consequently, the Commission was correct to apply, in accordance with the Guidelines, an increase of 10% of the amount of the fine imposed for gravity of the infringement for each year that had elapsed, namely an increase of 40% reflecting the actual duration of the infringement.

99 It follows that this plea must be rejected.

3 — *Extenuating circumstances*

Arguments of the parties

100 The applicant maintains that the Commission did not take account of a number of extenuating circumstances which should have justified a lower fine than that imposed. It refers to the oligopolistic structure of the steel market, the transparency of that market resulting from the rules on publication of prices in Article 60 of the ECSC Treaty, the existence of the same method for calculation

of the alloy surcharge for over 25 years and the fact that it was known to most customers, and, finally, the relatively small part of the final prices of stainless flat products represented by the alloy surcharge.

101 The Commission considers, first, that this plea in law is not in any way substantiated or explained and must be rejected as inadmissible.

102 In any event, the Commission contends that the oligopolistic structure of a market is not capable of having an impact on the amount of the fines and that the other circumstances referred to by the applicant were examined and rejected in paragraphs 55, 56, 58, 59, 64, 65 and 66 of the Decision, in so far as they did not call in question in the existence of the infringement. However, the Commission took account of those same circumstances in appraising the gravity of the infringement and, in particular, the amount of the fines, even if it did not formally describe them as extenuating circumstances (see paragraphs 74 and 75 of the Decision).

Findings of the Court

103 At the outset, the Court holds that this plea meets the requirements of Article 44 of the Rules of Procedure of the Court of First Instance and must therefore be declared admissible.

104 In this case, the Court concludes that the Commission was entitled to take the view that none of the circumstances relied on by the applicant justified any further decrease of the basic amount of the fine imposed on it.

105 In the first place, the Court would point out that the oligopolistic structure of the market in stainless steel flat products cannot constitute an extenuating circumstance for the purpose of determining the amount of the fine. As the Commission found in paragraph 48 of the Decision, the fact that the undertakings participating in the agreement accounted for almost 90% of the sales of such products considerably exacerbated the restriction of competition on the market resulting from the concerted increase in the price of stainless steel brought about by the joint determination of reference values for alloying materials.

106 The Court observes, next, that the rules in Article 60 of the ECSC Treaty cannot justify participation in an agreement or a concerted practice designed to coordinate the amount of the alloy surcharge.

107 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 ECSC 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 an 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 1, p. 9, and Case 149/78 *Rumi* v *Commission* [1979] ECR 2523, paragraph 10).

108 However, the prices appearing in the price 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).

109 Moreover, Article 60 of the ECSC Treaty does not provide for any contact between undertakings prior to publication of the price lists, for the purpose of exchanging information on their future prices. In so far as such contacts prevent those 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).

110 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).

111 However, the alignment of the reference values intended to be used in the calculation of the alloy surcharge undertaken by the applicant in the Member States of the Community derived not from publication of the price lists by the Commission but from prior concertation between producers whereby it was agreed to adopt identical reference values with a view to facilitating upward harmonisation of the alloy surcharges.

112 Accordingly, the applicant cannot invoke, as an extenuating circumstance, the transparency of the market resulting from the rules in Article 60 of the ECSC Treaty.

113 As regards the fact that the method for calculating the alloy surcharge had existed for 25 years, it need merely be pointed out that the purpose of the contested agreement was not the use of the same calculation formula, which was not proved to have derived from concertation as such, but the use in that formula, as from

the same date and by all the undertakings, of identical reference values with a view to securing higher prices (paragraphs 47 and 56 of the Decision). Furthermore, the fact that some of the customers of those undertakings may have been aware of the calculation method used is irrelevant, particularly since it was precisely on the basis of complaints from certain customers that the Commission undertook investigations under Article 47 of the ECSC Treaty.

114 As regards the fact that the agreement related to only one element of the final price of stainless steel flat products, that too is not capable of justifying, in this case, a further reduction of the amount of the fine.

115 It must be borne in mind that Article 65(1) of the ECSC Treaty prohibits, in particular, agreements and concerted practices between undertakings tending directly or indirectly to prevent, restrict or distort normal competition within the common market and, in particular, to fix or determine prices. As is clear from the case-law, the prohibition of agreements which, directly or indirectly, involve price fixing also extends to agreements relating to the fixing of a part of the final price (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 146).

116 Since, moreover, it has been found that the increase of price stemming from the alloy surcharge could amount to up to 25% of the final price of the products (paragraph 48 of the Decision), the agreement's restrictive effect on competition cannot be underestimated.

117 For those reasons, this plea in law must be rejected.

4 — *Cooperation by the applicant during the procedure*

(a) Preliminary observations

118 In paragraph 96 of the Decision, the Commission expressed the view that all the undertakings might benefit to varying degrees from the provisions of Section D of the Notice on Cooperation, entitled 'Significant reduction in a fine'.

119 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 it 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). Second, with respect to the other undertakings and, in particular, Acerinox, the Decision indicates that the latter's statements and its reply to the statement of objections provided nothing new and denied its involvement in the infringement (paragraphs 99 and 100 of the Decision).

120 In the Decision, the Commission infers from this that Usinor and Avesta cooperated extensively but nevertheless did so very belatedly. As regards the other undertakings, and Acerinox in particular, their cooperation was regarded as more limited than that of the first-mentioned undertakings since no documentary evidence not already in the possession of the Commission was supplied and those undertakings did not acknowledge the infringement (paragraph 100 of the Decision).

121 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%.

122 The applicant criticises the Commission for granting it a reduction of only 10% of its fine on the incorrect basis that its statements and its reply to the statement of objections, first, provided no new documentary evidence and, second, denied the existence of the infringement.

(b) The failure to provide new information in the administrative procedure

Arguments of the parties

123 The applicant submits that the Commission infringed the principle of equal treatment by taking the view that its statement provided nothing new in that it furnished no new documentary evidence or facts not already in the possession of the Commission.

124 The applicant states that, in its statement to the Commission of 17 December 1996 in response to the question sent to it, it acknowledged the facts and, in particular, the holding of the Madrid meeting, in the same way as Usinor. Moreover, the more limited extent of its cooperation, as compared with that of Avesta and Usinor, was accounted for by its more limited knowledge of the operation of the contested agreement, a situation which inevitably had

repercussions on the value and nature of its participation in the Commission investigation. However, the applicant considers that it should not be penalised for failing to produce documentary evidence which it did not possess.

125 The Commission contends that it was not until 17 December 1996 that the applicant manifested its wish to co-operate, that is to say eight days after Usinor informed the Commission of the Madrid meeting, without thereby having ever acknowledged its involvement in the infringement or even provided evidence not already in possession of the Commission.

Findings of the Court

126 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).

127 As regards the applicant's case, it is not contested that it does not fall within the scope of Section B of the Notice on Cooperation, 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).

128 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'.

129 According to Section D(1), '[w]here 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.'

130 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.'

131 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).

132 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.

133 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, Acerinox's statement admitted, in particular, the holding of the Madrid meeting of 16 December 1993.

134 However, the Commission considered that the cooperation shown by Acerinox was more limited than that of Avesta and Usinor since its statement disclosed nothing new. 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 the applicant, had thus not provided any documentary evidence or facts not already in the possession of the Commission (paragraph 100 of the Decision).

135 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.

136 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.

137 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 Acerinox on 10 December 1996 at a meeting with Commission staff.

138 Moreover, it is important to point out that it has not been shown, or indeed alleged, that Acerinox was 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.

139 It is clear from the above that the extent of the cooperation provided by the applicant 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.

140 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.

141 It follows that, in so far as it considered that the applicant 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.

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

(c) Acknowledgement of the existence of the infringement

Arguments of the parties

143 The applicant maintains that it should have benefited from the same reduction of 40% of the fine as was granted to Avesta and Usinor for having acknowledged the existence of the infringement. According to the applicant, the Commission could not accuse it of failing to acknowledge its involvement in an agreement when it manifestly was not even accused of having participated in it.

144 The Commission replies that the applicant's situation is not comparable to those of Avesta and Usinor. Unlike those two undertakings, which acknowledged the existence of concertation (see paragraph 97 Decision), the applicant always denied its implication in the infringement (see paragraphs 87 and 100 of the Decision).

Findings of the Court

145 Since the applicant claims that its cooperation during the administrative procedure justified the same reduction of 40% of the fine as that granted to Avesta and Usinor, it is necessary to determine whether the Decision is vitiated by any error of fact or manifest error of assessment on this point.

146 It is important to bear in mind that, according to the Decision, '[o]nly Usinor and Avesta acknowledged the existence of the concerted action' (paragraph 97 of the Decision). With respect to the applicant, the Decision, after indicating that the applicant categorically denied having received any information (paragraph 87 of the Decision), then finds that, in its response to the statement of objections of 24 April 1997, 'Acerinox... acknowledges... that concerted action was taken, but denied its involvement' (paragraph 99 of the Decision). The Commission inferred, in particular, that the cooperation shown by the applicant, which had not acknowledged its implication in the infringement, had been more limited than that of Usinor and Avesta and therefore justified only a reduction of 10% of the fine (paragraphs 100 and 101 of the Decision).

147 It must be pointed out that, whilst it is undisputed that the applicant admitted the materiality of the facts on which the Commission relied, justifying a reduction of 10% of the fine, there is nothing in the file to show, contrary to the applicant's assertion, that it too expressly acknowledged its involvement in the infringement.

148 According to settled case-law, 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, as the case may be, to put an end to it (*BPB de*

Eendracht v *Commission*, cited above, paragraph 325, Case T-338/94 *Finnboard* v *Commission* [1998] II-1617, paragraph 363, confirmed on appeal in Case C-298/98 P *Finnboard* v *Commission* [2000] I-10157, and *Mayr-Melnhof* v *Commission*, cited above, paragraph 330). No reduction is justified where, in its response to the statement of objections, the undertaking denies any participation in the infringement (*BPB de Eendracht* v *Commission*, paragraph 326).

149 Accordingly, the Commission was correct to consider that, by 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.

150 It follows that the second part of the applicant's plea must be rejected.

151 Accordingly, the first part of the applicant's plea must be upheld.

152 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 its cooperation during the administrative procedure, the applicant should have been granted a reduction of 20% of the fine, as determined by the Decision before such cooperation was taken into account, because that undertaking informed the Commission of the holding of the Madrid meeting on the same basis as Avesta and Usinor but, unlike those undertakings, denied any participation in the infringement.

B — *The plea alleging breach of the principle of equal treatment*

Arguments of the parties

153 The applicant maintains that it was discriminated against as compared with Outokumpu, which was not even one of the addressees of the Decision despite having been involved in the procedure. Whilst it is true that Outokumpu did not participate in the Madrid meeting, it was nevertheless informed of the agreement concluded at that meeting and consequently adopted the method for calculating the alloy surcharge (paragraph 33 of the Decision). The fact that Outokumpu provided 'decisive evidence' as to the existence of the agreement during a Commission investigation carried out on 17 October 1996 could, at most, justify a reduction of the fine to be imposed on it of 50% to 75% in accordance with Section C of the Notice on Cooperation, but not total exoneration.

154 The Commission states that although Outokumpu was excluded from the procedure, that was not because it cooperated but because it did not attend the Madrid meeting. In any event, the Commission considers that the plea relating to the treatment of Outokumpu is irrelevant in this case, having regard to the case-law (*Ahlström Osakeyhtiö and Others* v *Commission,* cited above, paragraph 146).

Findings of the Court

155 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 (see paragraph 131 above).

156 Furthermore, 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).

157 The allegation that the Commission wrongly decided not to proceed against Outokumpu is therefore irrelevant to this case and must be rejected.

Exercise by the Court of its unlimited jurisdiction

158 The Court has upheld the first part of the applicant's plea concerning reduction of the fine for its cooperation during the administrative procedure (see paragraphs 126 to 142 above). For the reasons already given (see paragraph 152 above), the Court considers that it is appropriate to grant the applicant a reduction of 20% of the fine in that regard.

159 According to the Decision, before the deduction of 10% in respect of the applicant's cooperation during the procedure (paragraph 101 of the Decision), the basic amount of its fine was set, in view of the gravity and duration of the

infringement, at ECU 5.6 million and was then reduced by 30% in respect of extenuating circumstances (paragraph 84 of the Decision), namely a sum of ECU 3 920 000.

160 For the reasons given above, it is appropriate to grant the applicant a reduction of 20% of the intermediate amount of ECU 3 920 000 in respect of its cooperation during the procedure, which is equivalent to a reduction of ECU 784 000. Consequently, the total amount of the fine imposed on Acerinox will be set at ECU 3 136 000.

161 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

162 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. In this case, it is appropriate 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. **Sets the amount of the fine imposed on Compañía Española para la Fabricación de Aceros Inoxidables SA at EUR 3 136 000;**

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

3. **Orders Compañía Española para la Fabricación de Aceros Inoxidables SA to bear its own costs and to pay two-thirds of the Commission's costs 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

Registrar

B. Vesterdorf

President

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