JUDGMENT OF THE COURT (First Chamber)

25 January 2007 *

In Case C-411/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 23 September 2004,

Salzgitter Mannesmann GmbH, formerly Mannesmannröhren-Werke GmbH, established in Mülheim an der Ruhr (Germany), represented by M. Klusmann and F. Wiemer, Rechtsanwälte,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by A. Whelan and H. Gading, acting as Agents, and H.-J. Freund, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász, K. Schiemann and M. Ilešič (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2006,

gives the following

Judgment

1 By its appeal, Salzgitter Mannesmann GmbH, formerly Mannesmannröhren-Werke GmbH and before that Mannesmannröhren-Werke AG ('Mannesmann' or 'the appellant'), seeks to have set aside the judgment of the Court of First Instance of the European Communities of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223 ('the judgment under appeal'), in so far as it dismissed its action for annulment of Commission Decision 2003/382/EC of

8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003 L 140, p. 1; 'the contested decision').

The contested decision

The cartel

2 The Commission of the European Communities addressed the contested decision to eight undertakings producing seamless steel tubes. These undertakings included four European companies ('the European producers' or 'the Community producers'): Mannesmann, Vallourec SA ('Vallourec'), Corus UK Ltd (formerly British Steel Ltd; 'Corus') and Dalmine SpA ('Dalmine'). The other four addressees of the contested decision are Japanese companies ('the Japanese producers'): NKK Corp., Nippon Steel Corp., Kawasaki Steel Corp. and Sumitomo Metal Industries Ltd ('Sumitomo').

3 Seamless steel tubes are used by the oil and gas industry and consist of two major categories of products.

4 The first category includes borehole pipes and tubes, commonly known as 'Oil Country Tubular Goods' or 'OCTG'. These are sold either plain ended ('plain ends') or threaded. Threading is designed to enable OCTG tubes to be joined. It may be carried out according to the standards laid down by the American Petroleum Institute (API), tubes threaded according to that method being known as 'OCTG standard tubes', or according to special techniques, which are usually patented. In

the latter case, the threading or 'joints' are known as 'premium quality' or 'premium' (tubes threaded according to this method being hereinafter referred to as 'premium-thread OCTG tubes').

5 The second category of products consists of oil and gas pipes ('line pipe'); these are divided into pipes made to standard specifications and those made to order for specific projects ('project line pipes').

6 In November 1994, the Commission decided to initiate an investigation into the existence of anti-competitive practices concerning those products. In December of that year, it carried out inspections at the premises of a number of undertakings, including Mannesmann's. Between September 1996 and December 1997, the Commission carried out further investigations at the premises of Vallourec, Dalmine and Mannesmann. On the occasion of an investigation at Vallourec's premises on 17 September 1996, the head of Vallourec Oil & Gas, Mr Verluca, made certain declarations ('Mr Verluca's statement'). During an investigation at Mannesmann's premises in April 1997, the director of that undertaking, Mr Becher, also made a number of declarations ('Mr Becher's statement').

7 The Commission also sent requests for information, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), to a number of undertakings. As Dalmine refused to supply some of the information requested, Commission Decision C(97) 3036 of 6 October 1997 relating to a proceeding pursuant to Article 11(5) of Regulation No 17 was sent to it. Dalmine brought an action for annulment of that decision; its action was declared manifestly inadmissible by order of the Court of First Instance of 24 June 1998 in Case T-596/97 *Dalmine* v *Commission* [1998] ECR II-2383. Mannesmann too refused to supply some of the information requested by the Commission. Although

Commission Decision C(98) 1204 of 15 May 1998 relating to a proceeding pursuant to Article 11(5) of Regulation No 17 ('the decision of 15 May 1998') was adopted in respect of Mannesmann, it persisted in its refusal. It brought an action before the Court of First Instance against that decision. By judgment of 20 February 2001 in Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, the Court of First Instance annulled that decision in part and dismissed the remainder of the application.

8 In the light of Mr Verluca's and Mr Becher's statements and of other evidence, the Commission found in the contested decision that the eight undertakings to which the decision was addressed had concluded an agreement having as its object, in particular, respect for domestic markets. Under the terms of that agreement, each undertaking was prohibited from selling OCTG standard tubes and project line pipes on the domestic market of another party to the agreement.

9 The agreement was alleged to have been concluded at meetings between Community and Japanese producers known as the 'Europe-Japan Club'.

10 The principle of respect for domestic markets was designated by the term 'fundamental rules' ('fundamentals'). The Commission established that the fundamental rules had in fact been observed and that, accordingly, the agreement in question had had anti-competitive effects on the common market.

11 The agreement consisted, in all, of three parts, the first part being represented by the fundamental rules on respect for domestic markets, described above, which constitute the infringement found in Article 1 of the contested decision, the second part consisting in the fixing of prices for tenders and minimum prices for 'special markets' and the third consisting in sharing the other world markets, with the exception of Canada and the United States of America, by means of 'sharing keys'.

12 As regards the existence of the fundamental rules, the Commission relied on a series of documentary indicia set out at points 62 to 67 of the grounds of the contested decision and also in the table at point 68 thereof. That table shows that the share of the domestic producer in deliveries made by the addressees of the contested decision to Japan and to the domestic market of each of the four Community producers is very high. The Commission inferred that, overall, the domestic markets were in fact respected by the parties to the agreement.

13 The members of the Europe-Japan Club met in Tokyo on 5 November 1993 in order to attempt to reach a new market-sharing agreement with the Latin American producers. The terms of the agreement adopted on that occasion were set out in a document handed to the Commission on 12 November 1997 by an informant not involved in the proceedings and containing, in particular, a 'sharing key' ('the sharing key document').

The duration of the cartel

14 The Europe-Japan Club met from 1977, approximately twice each year, until 1994.

15 The Commission considered, however, that 1990 should be taken as the starting point of the cartel for the purpose of fixing the amount of the fines, owing to the existence, between 1977 and 1990, of an agreement between the European Community and Japan on the voluntary restraint of exports. According to the Commission, the infringement came to an end in 1995.

The fines

16 For the purpose of setting the amount of the fines, the Commission characterised the infringement as very serious on the ground that the agreement was intended to ensure observance of domestic markets and thus jeopardised the proper functioning of the single market. On the other hand, it noted that sales of seamless steel tubes in the four Member States in question by the undertakings concerned amounted only to around EUR 73 million a year.

17 On the basis of those factors, the Commission set the amount of the fine intended to reflect the gravity of the infringement at EUR 10 million for each of the eight undertakings. As they were all large undertakings, the Commission considered that there was no need to differentiate between the amounts adopted.

18 The Commission considered that the infringement was of medium duration and increased by 10% for each year of its participation in the infringement the amount of the fine established on the basis of gravity in order to set the basic amount of the fine imposed on each of the undertakings. However, taking into account the fact that the steel pipe and tube industry had been in crisis for a long time and that the situation in the sector had deteriorated since 1991, the Commission reduced the basic amounts by 10%, on the ground of attenuating circumstances.

19 Last, the Commission reduced Vallourec's fine by 40% and Dalmine's by 20% in accordance with point D.2 of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), in order to take account of the fact that both undertakings had cooperated with the Commission during the administrative procedure.

The operative part of the contested decision

20 According to Article 1(1) of the contested decision, the eight undertakings to which the decision was addressed 'infringed the provisions of Article 81(1) of the EC Treaty by participating ... in an agreement providing, inter alia, for the observance of their respective domestic markets for seamless standard threaded OCTG pipes and tubes and project line pipe'.

21 Article 1(2) of the contested decision states that the infringement lasted from 1990 to 1995 in the case of Mannesmann, Vallourec, Dalmine, Sumitomo, Nippon Steel Corp., Kawasaki Steel Corp. and NKK Corp. In the case of Corus, the infringement is stated to have lasted from 1990 to February 1994.

22 The other relevant provisions of the operative part of the contested decision are worded as follows:

'*Article 2*

1. [Mannesmann], Vallourec ..., [Corus] and Dalmine ... infringed Article 81(1) of the EC Treaty by concluding, in the context of the infringement mentioned in Article 1, contracts which resulted in a sharing of the supplies of plain end OCTG pipes and tubes to [Corus] (to Vallourec ... from 1994).

2. In the case of [Corus], the infringement lasted from 24 July 1991 to February 1994. In the case of Vallourec ..., the infringement lasted from 24 July 1991 to 30 March 1999. In the case of Dalmine ..., the infringement lasted from 4 December 1991 to 30 March 1999. In the case of [Mannesmann], the infringement lasted from 9 August 1993 to 24 April 1997.

...

Article 4

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

1. [Mannesmann] EUR 13 500 000

2. Vallourec ... EUR 8 100 000

3. [Corus] EUR 12 600 000

4. Dalmine ... EUR 10 800 000

5. Sumitomo ... EUR 13 500 000

6. Nippon Steel ... EUR 13 500 000

7. Kawasaki Steel ... EUR 13 500 000

8. NKK ... EUR 13 500 000'.

The procedure before the Court of First Instance and the judgment under appeal

23 By applications lodged at the Registry of the Court of First Instance, seven of the eight undertakings on which sanctions were imposed by the contested decision, including Mannesmann, brought actions seeking annulment, in whole or in part, of that decision and, in the alternative, annulment of the fine imposed on them or reduction in the amount thereof.

24 By the judgment under appeal, the Court of First Instance:

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

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

— dismissed the remainder of the application;

— ordered the parties to bear their own costs.

The procedure before the Court of Justice

25 In its appeal, Mannesmann claims that the Court should:

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

— annul the contested decision;

— in the alternative, reduce the fine set in Article 4 of the contested decision and the interest fixed in Article 5 of that decision;

— furthermore, in the alternative, refer the case back to the Court of First Instance for a fresh judgment based on the decision of the Court of Justice;

— order the Commission to pay the costs.

26 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

27 Mannesmann puts forward three pleas in law in support of its appeal, alleging breach of the right to a fair legal process, incorrect application of Article 81 EC in Article 2 of the contested decision and breach of the principle of equal treatment.

First plea, alleging breach of the right to a fair legal process

Arguments of the parties

28 Mannesmann maintains that the Court of First Instance was wrong to consider that the sharing key document referred to at paragraph 13 of the present judgment and on which the Commission based the contested decision, in particular points 85 and 86 of the grounds thereof, was admissible as incriminating evidence.

29 The Court of First Instance thus failed to observe the right to a fair legal process. As that document was transmitted to the Commission by a third party not known to Mannesmann, the appellant was unable to ascertain its authenticity and was unable to defend itself effectively.

30 Furthermore, as that third party informed the Commission that he had obtained the sharing key document from a commercial agent of one of the undertakings concerned, without identifying that agent, the Commission, too, is unaware of the identity of the person with whom the document originated.

31 Mannesmann submits that it is settled case-law that evidence cannot be used if its author is not revealed. The Court of First Instance did not correctly interpret the case-law which establishes that when assessing evidence it is necessary to ascertain the origin of that evidence. In that regard, Mannesmann observes that it cannot be precluded that third parties will provide the Commission with false evidence in order to harm an undertaking for personal or business reasons. Consequently, the undertaking concerned must be able to express its views on the credibility of the informant.

32 Mannesmann also relies on the case-law of the European Court of Human Rights on the right to a fair legal process, which is laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). According to that case-law, a defendant must have the opportunity to challenge not only the authenticity of anonymous statements but also the credibility of the person protected by anonymity. Furthermore, that case-law confirms that even if the use of anonymous statements is permissible during the investigation stage of a procedure, such statements cannot be used as incriminating evidence against the accused.

33 The appellant also relies on Articles 46 and 47 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1; 'the Charter'), which correspond with Article 6 of the ECHR and guarantee the right to a fair legal process. It contends that, under Article 52(3), the Charter must be interpreted by the courts in such a way as to ensure a level of protection which is not lower than that offered by the ECHR.

34 Mannesmann further submits that the use of evidence of anonymous origin is incompatible with the principle of the rule of law, as enshrined in Article 6(1) EU. Where it cannot be ascertained that the evidence in question was in fact transmitted to the Commission by a third party, there is a risk of manipulation and unfairness.

35 The Commission contends that this plea is inadmissible, since the appellant is pleading for the first time a violation of the ECHR, whereas before the Court of First Instance it claimed generally that there had been a breach of the rights of the defence. Nor can Mannesmann criticise the Commission for having infringed the Charter, which was not proclaimed until 7 December 2000, whereas the contested decision is dated 8 December 1999.

36 In any event, the case-law of the European Court of Human Rights cited by Mannesmann is irrelevant in the present case, since it concerns the use of anonymous statements in criminal proceedings, whereas the present case concerns a procedure relating to the imposition of a fine under competition law.

37 Next, the Commission claims that a breach of the rights of the defence could be taken into consideration only if the Court of First Instance was able to assess evidence adduced before it on the basis of information on which the defence was not able to comment. In fact, Mannesmann was able to comment on the arguments set out by the Commission at points 121 and 122 of the grounds of the contested decision on the authenticity of the document in question. Nor did the anonymity of the author of that document and of the third party who transmitted it to the Commission prevent the appellant from ascertaining the plausibility and the relevance of the content of that document.

38 The Commission further submits that the Court of First Instance considered that the document in question was of only limited reliability precisely because the context in which it was drawn up was largely unknown. If the Court of First Instance none the less considered that the document had a certain probative value, it did so because it contained specific information consistent with the information in other documents.

39 Last, the Commission claims that even if it had not been permitted to use the document as evidence against Mannesmann, that would not have altered the finding of the infringements described in Articles 1 and 2 of the contested decision. The exclusion of certain documents used by the Commission in breach of the rights of the defence is significant only to the extent to which the objections formulated by the Commission could be proved only by reference to those documents, which is not the case here.

Findings of the Court

40 The Court has recognised the general principle of Community law that everyone is entitled to a fair legal process (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21; Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 17; and Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 65).

41 It has also held that that principle is inspired by the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional principles common to the Member States and from the guidelines supplied, in particular, by the ECHR (*Eurofood IFSC*, paragraph 65).

42 However, as the Commission rightly claims, the case-law of the European Court of Human Rights cited by the appellant is not decisive in the present case. As the Advocate General observed at points 54 to 56 of his Opinion, that case-law concerns, in particular, evidence in criminal proceedings, whereas the present case concerns a written document in the context of a proceeding under Article 81 EC. In Community competition law cases, oral evidence plays only a minor role, whereas written documents play a central role.

43 As the Advocate General also observed at points 57 to 60 of his Opinion, the taking of evidence in Community competition law cases is characterised by the fact that the documents examined often contain business secrets or other information that cannot be disclosed or the disclosure of which is subject to significant restrictions.

44 In those conditions specific to the Commission's investigations into anti-competitive practices, the principle that everyone has the right to a fair legal process cannot be interpreted as meaning that documents containing incriminating evidence must automatically be excluded as evidence when certain information must remain confidential. That confidentiality may also relate to the identity of the authors of the documents and also to persons who transmitted them to the Commission.

45 In the light of the foregoing considerations, the Court of First Instance was correct to hold:

'84 ..., as regards the admissibility of the sharing key document as evidence of the infringement referred to in Article 1 of the contested decision, that the principle

that prevails in Community law is that of the unfettered evaluation of evidence and that it is only the reliability of the evidence that is decisive when it comes to its evaluation ... . It may also be necessary for the Commission to protect the anonymity of informants and that circumstance cannot suffice to require the Commission to disregard evidence in its possession.

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

46 It is also apparent from the judgment under appeal that the Court of First Instance, in assessing the credibility of the sharing key document, took the anonymous origin of that document into account. It was held at paragraph 86 of the judgment under appeal that 'in so far as Mannesmann derives from its arguments concerning the admissibility of that document a complaint in respect of its credibility, it must be held that its credibility is necessarily reduced by the fact that the context in which it was drafted is largely unknown and because the Commission's assertions in that regard cannot be verified'.

47 The Court of First Instance further recognised that evidence of anonymous origin, such as the sharing key document, cannot in itself establish the existence of an infringement of Community competition law. That Court held at paragraph 87 of the judgment under appeal that only 'in so far as the sharing key document contains specific information corresponding to the information in other documents, in particular Mr Verluca's statements, [must] those matters ... be regarded as mutually supporting'. The Court of First Instance had already emphasised, at paragraphs 81 and 82 of the judgment under appeal, that the sharing key document formed part of a body of evidence and that it was of only ancillary importance. That assessment is also to be found at paragraph 94 of the judgment, where the Court of First Instance concludes that that document retains probative value only 'as one of a number of coherent indicia identified by the Commission which corroborate certain of the essential assertions in Mr Verluca's statements'.

48 Regard being had to the limits which the Court of First Instance thus placed on the probative value of the sharing key document, it must be concluded that no error of law was made in the analysis of the admissibility and relevance of that document as evidence.

49 Incidentally, it is common ground that Mannesmann was given the opportunity to comment on the sharing key document and to put forward its arguments on the probative value of that document, in the light of its anonymous origin.

50 In the light of all of the foregoing, the first plea must be rejected, without it being necessary to adjudicate on the question whether Mannesmann had invoked, in substance, the right to a fair legal process before the Court of First Instance or on the question whether it could rely in the present case on the Charter, which was proclaimed after the adoption of the contested decision.

Second plea, alleging incorrect application of Article 81 EC in Article 2 of the contested decision

Arguments of the parties

51 According to Mannesmann, the Court of First Instance was wrong to confirm the existence of the breach of competition law described in Article 2 of the contested decision. It maintains that the Commission did not demonstrate that, in concluding a supply contract with Corus in 1993, Mannesmann had concluded a horizontal

agreement with Vallourec and Dalmine or established a concerted practice with those undertakings. In particular, it failed to prove that Mannesmann was aware of the existence of the supply contract concluded between Corus and Vallourec and also of the contract concluded between Corus and Dalmine, and of the global plan alleged to have been drawn up by Vallourec. In Mannesmann's submission, the Court of First Instance confirmed that incorrect and incomplete presentation of evidence by the Commission.

52 The Court of First Instance made a further error in not taking account of the fact that the supply contracts in question were not concluded at the same time, in considering that the relatively long duration of those contracts demonstrated the existence of a horizontal agreement and in holding that no exemption was applicable in this instance.

53 On that last point, the appellant observes that the Court of First Instance wrongly rejected its arguments relating to the applicability to the vertical relations between Corus and Mannesmann of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21). The Court of First Instance further failed to take into account Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1) and Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5) and to reject on those grounds the application of Article 81(1) EC to the contract between Mannesmann and Corus.

54 The Commission contends that this plea is inadmissible, since it relates to the appraisal of the facts. Furthermore, even if this plea were admissible and well founded, the judgment under appeal could be set aside and the contested decision annulled only in so far as Article 2 of that decision is concerned.

Findings of the Court

55 It must be borne in mind that in an appeal the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 22). Save where the evidence adduced before the Court of First Instance has been distorted, the appraisal therefore does not constitute a point of law which is subject to review by the Court of Justice (Case C-53/92 P *Hilti and Others* v *Commission* [1994] ECR I-667, paragraph 42, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 49).

56 It must be held that, in examining the existence of the infringement described in Article 2 of the contested decision, the Court of First Instance made findings of fact which the Court of Justice has no jurisdiction to review in an appeal. Consequently, since there is no allegation of distortion of the evidence, a material inaccuracy or a failure to observe the rules on the burden of proof and the taking of evidence, the appellant's argument relating to the questions whether, first, it had concluded a horizontal agreement or established a concerted practice with Vallourec and Dalmine and, second, it was aware of the contracts between Vallourec and Dalmine or of a global plan drawn up by Vallourec must be rejected as inadmissible. The same applies to its argument that the Court of First Instance ought to have made a different assessment of certain circumstances of fact, such as the duration of the contracts in issue and the fact that those contracts had not been concluded at the same time.

57 As regards Regulations No 1983/83 and No 1984/83, they were relied on for the first time in the appeal. The complaint based on those regulations is therefore inadmissible.

58 In so far as the appellant relies on Regulation No 2790/1999, it is sufficient to state that the Court of First Instance was correct to hold, at paragraph 171 of the judgment under appeal, that 'that regulation cannot apply directly in the present case, since the contested decision was adopted on 8 December 1999 and Article 2 thereof relates, so far as Mannesmann is concerned, to a period beginning in 1993 and ending in 1997, [that is to say,] to a period preceding the entry into force of the relevant provisions of Regulation No 2790/1999 on 1 June 2000'. At paragraph 172 of that judgment, the Court of First Instance went on to state, also correctly, that 'in so far as that regulation may none the less be of some assistance in the present case, in that it represents a position adopted by the Commission in December 1999 to the effect that little damage is caused to competition by vertical agreements, it must be pointed out that that regulation applies Article 81(3) EC. However, Article 4 of Regulation No 17 provides that agreements between undertakings can benefit from an individual exemption under Article 81(3) EC only if they have been notified [to] the Commission for that purpose, which was not done in the present case'.

59 It follows from all of the foregoing that the second plea must be rejected as inadmissible in part and unfounded in part.

Third plea, alleging breach of the principle of equal treatment

Arguments of the parties

60 Mannesmann claims that the Court of First Instance breached the principle of equal treatment by not granting it a reduction in the fine on the basis of the Leniency Notice.

61 In that regard, Mannesmann observes that, with Mr Becher's statement, it contributed to the establishment of the facts and that it did not contest the facts established in the statement of objections. It points out that Vallourec obtained a reduction of 40% of the amount of the fine for cooperation since, by Mr Verluca's statements, it had contributed to the establishment of the facts and that Dalmine obtained a reduction of 20%, as it had not contested the facts. The fact that Mannesmann was not granted a reduction therefore constitutes unequal treatment.

62 The appellant also challenges the Court of First Instance's assessment of the scope of its action, mentioned at paragraph 7 of this judgment, against the decision of 15 May 1998.

63 It maintains, first of all, that the grounds of the judgment under appeal relating to that action have no connection with the present case.

64 The Court of First Instance also, in the appellant's submission, drew incorrect consequences from the closure of the dispute concerning the decision of 15 May 1998. In that regard, the appellant observes that it agreed to withdraw its appeal against the judgment delivered by the Court of First Instance in that case only after it concluded an agreement with the Commission, under which the Commission withdrew its request for information.

65 Mannesmann also observes that its action against the decision of 15 May 1998 was declared founded in part. Last, it points out that, contrary to the finding made by the Court of First Instance at paragraph 310 of the judgment under appeal, it cannot be criticised for having maintained its refusal to provide the information requested.

66 The Commission contends that this plea concerns the assessment of the facts and that it is therefore inadmissible. In that regard, it observes that the appellant does not claim that the Court of First Instance distorted the facts or the evidence in finding, at paragraph 309 of the judgment under appeal, that Mannesmann has not shown that its cooperation genuinely facilitated the Commission's task of finding and putting an end to infringements.

67 As regards the substance, the Commission observes that the Court of First Instance correctly found, at paragraphs 302 and 305 of the judgment under appeal, that the information provided to the Commission by Mannesmann is not comparable to that provided by Vallourec and that, unlike Dalmine, Mannesmann did not expressly indicate that it did not dispute the facts.

Findings of the Court

68 It must be borne in mind that although, in the context of an appeal, it is not open to the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law, the exercise of that jurisdiction in respect of the determination of those fines cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 81(1) EC (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 96 and 97, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 617).

69 However, the appeal must indicate the legal arguments advanced in support of the plea alleging breach of the principle of equal treatment, failing which the plea is inadmissible (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 618).

70 It must be held that, in so far as the appellant challenges the Court of First Instance's finding, made at paragraph 301 of the judgment under appeal on the grounds set out at paragraphs 297 to 300 thereof, that 'the usefulness of Mr Becher's declaration lies exclusively in the fact that he corroborates to a certain extent Mr Verluca's declarations which the Commission already had at its disposal and that, consequently, his declaration did not facilitate the Commission's task significantly and therefore sufficiently to justify a reduction in the fine on grounds of cooperation', its argument is factual by nature and must therefore be rejected as inadmissible. Accordingly, it is not for the Court of Justice, in the context of the present appeal, to review the finding made by the Court of First Instance at paragraph 302 of the judgment under appeal that 'the information provided to the Commission by Mannesmann before the statement of objections was sent is not comparable to that provided by Vallourec' and that '[i]n any event, that information is not sufficient to justify a reduction in the amount imposed under the Leniency Notice'.

71 As regards, next, the comparison with the cooperation shown by Dalmine, the Court of First Instance held, at paragraphs 303 to 305 of the judgment under appeal, that 'in order to receive a reduction in the fine on the ground of not contesting the facts, in accordance with point D.2 of the Leniency Notice, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections'. That finding by the Court of First Instance is consistent with the case-law of the Court of Justice, according to which a distinction must be drawn between express admission of an infringement and a mere failure to deny it, which does not contribute to facilitating the Commission's task of finding and bringing to an end infringements of the Community competition

rules (Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 58). Accordingly, in the absence of such an express admission on the appellant's part, the latter's argument alleging discrimination by comparison with Dalmine must be rejected as unfounded.

72 As regards the action which Mannesmann brought against the decision which the Commission adopted under Article 11(5) of Regulation No 17, the Court of First Instance held at paragraphs 310 and 311 of the judgment under appeal that even though 'Mannesmann's approach, consisting in contesting the legality of the decision of 15 May 1998, was of course perfectly lawful and cannot be regarded as indicative of an absence of cooperation', the fact remains that its action on that point was largely rejected by the judgment in Case T-112/98 *Mannesmannröhren-Werke* v *Commission*, on the ground that 'the majority of the information which Mannesmann refused to produce had been properly requested by the Commission'.

73 In those circumstances, the Court of First Instance was entitled to conclude, at paragraph 312 of the judgment under appeal, that 'owing to Mannesmann's unlawful conduct, the Commission never received a significant amount of information which it had lawfully requested Mannesmann to produce at the stage of the administrative procedure' and that, consequently, 'Mannesmann's attitude during the administrative procedure, taken as a whole, cannot be considered to constitute effective cooperation in this instance'. Nor is that conclusion invalidated by the fact that the appeal which Mannesmann initially lodged against the judgment in Case T-112/98 *Mannesmannröhren-Werke* v *Commission* was removed from the register following an agreement between the parties.

74 It follows from all of the foregoing that the third plea must also be rejected.

75 As none of the pleas put forward by the appellant has been upheld, the appeal must be dismissed.

Costs

76 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2) of those Rules of Procedure, which, pursuant to Article 118 thereof, is applicable to the procedure on appeal, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has requested that Mannesmann be ordered to pay the costs and as Mannesmann has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Salzgitter Mannesmann GmbH to pay the costs.

[Signatures]