

Final report of the Hearing Officer in Case COMP/F/39.234 — Alloy Surcharge Re-adoption

(pursuant to Articles 15 and 16 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings — OJ L 162, 19.6.2001, p. 21)

(2007/C 159/07)

The draft Decision in the above-mentioned case gives rise to the following observations:

The background of the case

The draft Decision is a readoption of Commission Decision 98/247/ECSC of 21 January 1998 ⁽¹⁾ which the Commission had addressed, among others, to ThyssenKrupp Stainless GmbH ('TKS'). The Decision of 21 January 1998 established their participation in a price cartel in the steel sector and imposed a fine of EUR 4 536 000 million on TKS for its own cartel infringement, and a fine of EUR 3 564 000 on TKS for the cartel infringement committed by Thyssen Stahl AG ('TS-AG'). TKS had accepted responsibility for TS-AG's actions for the period from December 1993 to 1 January 1995 in a letter dated 23 July 1997.

The Commission Decision was annulled on procedural grounds, as far as concerns TKS's liability for this infringement of Article 65 of the ECSC Treaty, by the CFI's judgment of 13 December 2001 in Joined Cases T-45/98 and T-47/98. This judgment was confirmed upon appeal and cross-appeal in the ECJ's judgment of 14 July 2005 in Joined Cases C-65/02 P and C-73/02.

The procedural defect identified by the Community Courts which led to the annulment related to the exercise of the rights of defence by TKS in respect of the fine imposed on them for the conduct of TS-AG. The Commission had sent separate Statement of Objections ('SO') to the two parties. This was followed by a statement of TKS according to which it had explicitly assumed liability for the infringing actions of TS-AG. The Courts held that the Commission, by neglecting to ask TKS whether it wished to submit observations concerning the objections addressed specifically to TS-AG (for which TKS ultimately was fined), violated TKS's rights of defence. Since the Commission sent separate SOs to TKS and TS-AG, and they replied separately, 'it was incumbent on the Commission to question and hear the views of TKS concerning [TS-AG's] actions before deeming it to be responsible for the latter and imposing on it a fine for the infringement attributed to [TS-AG].'⁽²⁾

The service of the SO and the reply time

A new SO was sent on 5 April 2006 and was received by TKS on 6 April 2006. It essentially took up the objections as set out in the initial SO which had been sent to TKS in April 1997. In addition, this SO sought to remedy the procedural defect by putting TKS in a position to comment on the allegations for which it had accepted liability in principle. TKS was first given the opportunity to comment by 18 May 2006. TKS' comments were received on 17 May 2006.

Access to file and oral hearing

Access to the Commission's file was first granted on 24 April 2006 by allowing TKS's representatives to access the file at the Commission's premises. On 2 May 2006, the relevant Commission service supplemented the access to file by submitting further documents which had been considered confidential in the first place. In response to issues raised in TKS's reply to the SO and further to an exchange of letters between the relevant Commission service, TKS and me, the Commission granted access to some further documents, which had also been classified as confidential in the first place.

In view of the fact that TKS maintained their request, I decided to verify the remaining confidentiality requests. I came to the conclusion that one of the information provider's requests for confidentiality did not seem to be sufficiently reasoned. After their representatives were contacted, the company provided a more meaningful non-confidential version for certain pages of the Commission's file which had not been submitted to TKS up until this stage. I sent this additional information to TKS on 20 September 2006.

⁽¹⁾ OJ L 100, 1.4.1998, p. 55.

⁽²⁾ Judgment of the ECJ in Joined Cases C-65/02 P and C-73/02 P, ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni SpA v Commission, 14 July 2005, par. 86.

By contrast, contrary to the view of TKS's legal representative, I took the view that a request for access to documents in the file not disclosed in the first place because of their *prima facie* confidential contents requires reasons that explain why the information in question could be useful for the company's defence. This necessity becomes evident when bearing in mind that only such a reasoned request puts the Commission in a position to balance the interest in obtaining information for purposes of a company's defence and a third party's legitimate interest in confidentiality. In order to put TKS in a position to submit such a reasoned request, I verified that TKS had been provided with appropriate non-confidential versions of the documents classified as confidential. However, as TKS did not provide any substantial reasoning as to why they needed the *prima facie* confidential documents for its defence, I decided not to disclose them.

The oral hearing took place on 15 September 2006.

The draft Decision

The draft Decision is based on the final Decision of 21 January 1998. In addition, it addresses legal issues which arise in view of the time that elapsed and in view of the judgments of the Court of First Instance and Court of Justice that were taken between 21 January 1998 and the intended readoption of the Decision.

In particular, the draft decision provides further explanations on the following points:

- The Commission's power to impose fines is subject to a limitation period of five years which starts to run on the day when the infringements ceased. The Commission takes the view that a possible prescription vis-à-vis TS-AG would not exclude fining TKS for TS-AG's behaviour, as TKS's liability for TS-AG's behaviour is not necessarily of derivative, accessory or subsidiary nature, as has been alleged by TKS.
- The ECSC Treaty expired on 23 July 2002. However, it is considered that by virtue of the principle of succession of norms within a single legal order, the Commission remains competent to sanction the infringement committed before the date of expiry.

The draft Decision submitted to the Commission only contains objections in respect of which the parties have been afforded the opportunity of making known their views.

I conclude that the rights of the parties to be heard have been respected in the present case.

Brussels, 12 December 2006.

Karen WILLIAMS
