OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 26 September 2002 [1]

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1 — Original language: German.

I — Introduction

1. The present case is an appeal brought against the judgment delivered by the Court of First Instance on 11 March 1999 in Case T-148/94 ('the judgment under appeal'). [2]

2. Reference is made to the judgment under appeal for the historical background to relations between the steel industry and the Commission from 1970 to 1990, and in particular the rules adopted to deal with the manifest crisis and Commission Decision No 2448/88/ECSC of 19 July 1988 introducing a surveillance system for certain products of undertakings in the steel industry ('Decision No 2448/88'). [3] The surveillance system established pursuant to the said Decision expired on 30 June 1990 and was replaced by an individual and voluntary information scheme. [4]

3. On 16 February 1994 the Commission adopted against 17 European steel undertakings and one of their trade associations 'Commission Decision 94/215/ECSC... relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams' [5] (hereinafter 'the Decision'). The parties to which the Decision was addressed had, in the Commission's view, breached the competition law of the European Coal and Steel Community by establishing, in an anti-competitive manner, systems for the exchange of information and engaging in price-fixing and market-sharing. The Commission imposed fines on 14 of the undertakings. In the case of Preussag Stahl AG, now called Salzgitter Stahl AG (hereinafter 'the appellant'), the Commission imposed a fine of ECU 9 500 000.

4. Several of the undertakings concerned, including the appellant, together with the trade association, challenged the Decision before the Court of First Instance. The Court of First Instance ultimately allowed the appellant's claim in part and reduced the fine to EUR 8 600 000.

5. On 18 May 1999 the appellant lodged with the Court Registry an appeal against that judgment.

2 — Case T-148/94 *Preussag Stahl* v *Commission* [1999] ECR II-613.

3 — OJ 1998 L 212, p. 1.

4 — See paragraph 33 of the judgment of the Court of First Instance in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347.

5 — OJ 1994 L 116, p. 1.

II — Forms of order sought and grounds of appeal

6. In its appeal, the appellant claims that the Court should:

(1) set aside the judgment delivered on 11 March 1999 by the Court of First Instance in Case T-148/94 *Preussag Stahl AG* v *Commission* in so far as it dismisses the action brought by Preussag Stahl AG against Commission Decision C(94)321 final of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty;

(2) set aside or annul Articles 1, 3 and 4 of Commission Decision C(94)321 final of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty in so far as it is upheld by the judgment under appeal;

(3) order the Commission to pay the costs of the proceedings in the Court of First Instance and those of the present appeal.

In the alternative

reduce the amount of the fine imposed on Preussag Stahl AG under Article 4 of Commission Decision C(94)321 final, which was fixed at EUR 8 600 000 by the Court of First Instance in paragraph 2 of the judgment under appeal;

Again in the alternative,

refer the case back to the Court of First Instance of the European Communities.

The Commission contends that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs of the proceedings.

7. According to its statement of appeal, the appellant invokes the following *grounds of appeal*:

First ground of appeal: 'Wrongful composition of the Chamber for the pronouncement of judgment'

Second ground of appeal: 'Improper failure to consider evidence'

Third ground of appeal: 'Error in law in the authentication of the adoption and substance of the Decision'

Fourth ground of appeal: 'Infringement of the appellant's rights of defence by the Commission'

Fifth ground of appeal: 'Inadequate reasons for the Commission Decision (Article 15 of the ECSC Treaty)'

Sixth ground of appeal: 'Infringement of Article 65 of the ECSC Treaty in relation to the term "normal competition"'

Seventh ground of appeal: 'Infringement of Article 65 of the ECSC Treaty in relation to the assessment of the exchange of information'

Summary of the grounds of appeal and their component parts according to the essential issues of law involved

8. The submissions relating to the individual grounds of appeal and their component parts indicate that, summarised according to the issues of law raised, the appellant is of the opinion that

the Court of First Instance committed *procedural errors* in that:

— the judgment under appeal was pronounced by a *Chamber with the wrong composition* (*first* ground of appeal) and

— it wrongfully *failed to take evidence* (*second* ground of appeal)

and that the Court of First Instance breached *Community law* in that it:

— erred in law in accepting the *formal legality* of the Decision, even though

procedural rights had been infringed in the proceedings before the Commission (*fourth* ground of appeal) and

the Decision had not been adopted in the proper manner (*third* ground of appeal);

— erred in law in accepting the *substantive legality* of the Decision, even

though no breach of Article 65(1) of the ECSC Treaty had been committed, because

participation in the information exchange system [6] did not constitute a separate infringement of competition (*seventh* ground of appeal) and

the system for the exchange of information and the fixing of prices could not have had any detrimental effect on 'normal competition' (*sixth* ground of appeal);

— failed to take cognisance of the erroneous *grounds given for the fine* (*fifth* ground of appeal).

9. The examination which follows will base itself around this summary. The grounds of appeal put forward by the appellant and the subdivisions and arguments contained therein, together with the Commission's arguments, will be set out under these individual points.

6 — The appellant speaks of 'the monitoring of orders and deliveries' (in the singular) but is obviously referring to both the monitoring of orders and deliveries within the Poutrelles Committee and the exchange of information within the Walzstahl-Vereinigung. As the existence of two systems of information exchange which supplemented each other (see paragraph 371 of the judgment in Case T-141/94 [cited in footnote 4]) does not, in the appellant's case, appear to have had any bearing on the Decision, on the judgment under appeal or on the appellant's submissions, references in what follows shall uniformly be to 'the' information exchange system in the singular.

10. The grounds of appeal in the present proceedings substantively correspond in part to the grounds of appeal and their subdivisions submitted in Case C-194/99 P *Thyssen Stahl AG* v *Commission of the European Communities*. [7] My Opinion in that case is also being delivered today. Where the content of the submissions is the same I will refer in this Opinion to the appraisal that I have undertaken in my Opinion on Case C-194/99 P.

III — Examination of the case

A — *The grounds of appeal alleging errors of procedure by the Court of First Instance*

1. The wrongful composition of the Chamber (*first* ground of appeal)

Submissions of the parties

11. The *appellant* is alleging infringement of Article 46 in conjunction with Article 31 of the ECSC Statute of the Court of Justice and of Article 32(1) and (3), Article 33(3)

7 — [2003] ECR I-10821.

and (5) and Article 82(2) of the Rules of Procedure of the Court of First Instance (hereinafter, the 'Rules of Procedure').

12. The judgment under appeal was signed by three judges. It does not bear the signature of the President, who had in any event been President of the Chamber until the oral proceedings came to a close, nor the signature of another judge who was also present during the oral proceedings. As the President and the aforementioned judge both took part in the deliberations but did not sign the judgment, the appellant submits that there was a breach of Article 82(2) of the Rules of Procedure and of Article 31 of the ECSC Statute of the Court of Justice.

13. The reference to Article 32 of the Rules of Procedure made in paragraph 69 of the judgment under appeal does not justify the procedure that was adopted because Article 32(1) of the Rules of Procedure, which deals with the retirement of judges, does not cover participation in the adoption of the judgment but participation in the deliberations.

14. The principle that can therefore be derived from Article 32(1) in conjunction with Article 33(3) and (5) of the Rules of Procedure, the appellant argues, is therefore that: 'Whosoever does not participate in the judgment should not participate in the deliberations either'.

15. This means that either the judges whose terms of office risk coming to an end on a rotational basis before all the deliberations are concluded should, under Article 32(1) of the Rules of Procedure, resign before the deliberations take place, or that the Court of First Instance should schedule the final deliberations, including the adoption of the judgment, to give sufficient time to enable all of the judges to take part. There would have been enough time for this to be achieved because there was a period of almost six months between the oral proceedings and the end of the terms of office, on 17 September 1998, of two of the judges involved; furthermore, any documents required for the deliberations, such as transcripts of the testimony of the witnesses, had been available by June 1998. The appellant avers that the present case differs in this respect from that which formed the basis of the judgment by the Court of First Instance in *Finsider* v *Commission*.[8] In deciding that judgment, the Court of First Instance correctly relied on Article 32(1) of the Rules of Procedure as two of the judges had resigned before the deliberations began.

16. Nor is Article 32(1) of the Rules of Procedure relevant as this was not an instance of a judge being 'prevented from attending' since, although there were no compelling reasons for doing so, the timing of the final deliberations was arranged in such a way that it was foreseeable that certain judges would be prevented from attending due to the expiry of their terms of office. 'If a judge were deemed to be

8 — Judgment by the Court of First Instance in Case T-26/90 *Finsider* v *Commission* [1992] ECR II-1789.

prevented from attending in such circumstances, the President of the Chamber would be able to decide the composition of that Chamber because of the scheduling of the deliberations.' This kind of power would 'be contrary to the principle that the lawful judge must be determined before litigation is begun'.

17. The *Commission* refers to Article 33(5) of the Rules of Procedure, from which it follows that participation in the deliberations means participation in the final discussion and casting of votes. The participation of judges at the beginning of the deliberations is therefore not crucial to the decision of the Court of First Instance. Nor can there be any requirement for the judgment to be signed by those judges who only took part in deliberations at the beginning but were not present when the votes were finally cast.

18. According to the Commission, the appellant's criticism of the reference to Article 32 of the Rules of Procedure of the Court of First Instance in paragraph 69 of the judgment under appeal is unfounded. When the resignation of members of a Chamber is imminent it will often not be clear right from the start whether the final discussion and vote on the individual issues to be decided will take place before or after their resignation. In the present case it is not apparent that the President of the Chamber scheduled the deliberations in such a way that the final discussion and vote did not take place until after his resignation and the resignation of the other judge. Article 32 governs participation in the deliberations, including the final discussion and vote.

19. The Commission argues that the appellant has misconstrued the meaning and purpose of the signing of a judgment. Signature is intended to identify the judges who arrived at the decision and were responsible for it. It is therefore justifiable that only those judges who take part in the vote on the decision after the final discussion has taken place should sign the judgment.

20. The guarantee of a lawful judge has not been infringed because the judges who were ultimately to decide this case were foreseeable as clearly and accurately as possible from the composition of the Chamber. The fact that the deliberations had not been concluded by the date on which both judges resigned in September 1998 is immaterial. The consequences of the deliberations not being concluded by 17 September 1998 were clearly and precisely anticipated: the judgment would be pronounced by the three remaining judges.

Appraisal

21. In my opinion the appellant's argument is based on an incorrect understanding of the Rules of Procedure. The principle that 'whosoever does not participate in the judgment should not participate in the deliberations either', asserted by the appellant, cannot be inferred from the provisions of the Rules of Procedure quoted by it.

22. It is quite clear that Article 32(1) of the Rules of Procedure only applies in the eventuality of the resignation of one or more judges leaving an even number of judges to decide the judgment, as a result of which it might not be possible in certain circumstances to come to the majority decision required under Article 33(5) of the Rules of Procedure. As the appellant correctly states, this was the position in the *Finsider* case. [9] In the present case, however, because the two members of the Chamber resigned under the rotating procedure, Article 32(1) of the Rules of Procedure did not apply. Their resignations took place because their terms of office had come to an end but that still left an uneven number of judges in the Chamber.

23. The Rules of Procedure do not lay down as a whole any general rule as to how the Court of First Instance is to proceed where judges resign during the course of proceedings. The method of continuing the proceedings with the remaining number of judges, as chosen in this case, must therefore basically be considered compatible with the Rules of Procedure provided that it does not contravene the specific rules applicable where judges are prevented from attending during the proceedings.

24. In the case of judgments decided by a Chamber, these specific rules are contained in Article 32(1) and (3) and Article 33(2) of the Rules of Procedure. They provide that an uneven number of judges must take part in the deliberations (Article 32(1)), the judges must number at least three (Article 32(3)) and only those judges who were present at the oral proceedings may take part in the deliberations (Article 33(2)). Participation in voting on the judgment presupposes participation in the final deliberations (Article 33(5)). All of these conditions were fulfilled in the present case. Hence, the signatures on the judgment were those of (only) those judges who — as indicated — lawfully took part in the final deliberations and voted on the judgment, as required for a valid judgment under Article 82(2) of the Rules of Procedure.

25. The appellant is now apparently trying to go one step further in alleging that, because the Rules of Procedure are incomplete due to the absence of a general rule covering the resignation of judges during the course of proceedings, the Rules of Procedure are open to abuse — at least in cases in which resignation is foreseeable (for example, as a result of a term of office coming to an end by rotation). This would require an additional interpretation to be put on the Rules of Procedure, according to which the composition of members of the Chamber following the oral proceedings would have to remain unchanged for the entire period of the deliberations until votes are cast on the judgment.

26. There is no need at this juncture to consider in more detail the question of whether 'entitlement to a lawful judge', in

9 — Cited in footnote 8.

the manner apparently understood by the appellant and relied upon as the reason for the need for the additional interpretation demanded by it, forms any part of Community law. [10]

27. The purpose of the Rules of Procedure is to uphold a proper system of legal protection. In any event, the purely hypothetical [11] possibility of influencing the composition of the Chamber during the final deliberations and the vote on the judgment by arranging the timing by reference to the end of the rotating terms of office of its individual members does not, in itself, support the interpretation of the Rules of Procedure to which the appellant aspires.

28. The inappropriate nature of the appellant's claims in relation to the Rules of Procedure is evident from their consequences. In order to ensure, where the terms of office of members of the Chamber come to a foreseeable end by rotation, that the only judges who take part in the deliberations are those who can also take part in the voting on the judgment, there are really only two possibilities: either (1) the deliberations and voting on the judgment — as the appellant apparently suggests — have to take place before the terms of office of the resigning judges come to an end by rotation, or (2) those judges who will be resigning in the foreseeable future will have to be excluded from the deliberations and voting on judgments even before their terms of office come to an end.

29. In the interests of proper legal protection, the length of judicial deliberations which precede a judgment cannot be cut short simply because the retirement of one or more judges by rotation is imminent. As far as excluding those judges from the deliberations and voting is concerned, suffice to say that the participation of judges in deliberations and voting on judgments forms the crux of their activities. To exclude judges whose terms of office are coming to an end by rotation would be tantamount to requiring their terms of office to be brought to a premature close.

30. It must therefore be established that a principle whereby 'whosoever is not able to participate in deciding the judgment cannot participate in the deliberations either' does not find support within the Rules of Procedure given the general concern for sound legal protection afforded by the Rules of Procedure.

31. Since the composition of the Chamber when the judgment was adopted otherwise conformed to the Rules of Procedure, there has been no error of procedure.

10 — Judgment of the Court of Justice in Case C-7/94 *Gaal* [1995] ECR I-1031.

11 — In the present case should the President of the Chamber have scheduled the timing of the deliberations and the voting on the judgment in such a way that, because of the foreseeability of his own resignation, any influence on the adoption of the judgment by *him* was precluded in any event?

32. The *first* ground of appeal, alleging wrongful composition of the Chamber, must therefore be dismissed as *unfounded*.

2. Failure to consider evidence (*second* ground of appeal)

Submissions of the parties

33. The *appellant* is alleging infringement of Article 24 of the ECSC Statute of the Court of Justice in conjunction with Article 65 of the Rules of Procedure because the Court of First Instance did not allow its application, quoted in paragraph 109 of the judgment under appeal, for evidence to be produced for inspection in the form of the original minutes of the Commission. It claims that it would have been possible to prove from the originals that the Commission did not have the necessary quorum when the Decision was adopted.

34. To prove the presence of the Commission Members, the Court of First Instance erred in confining itself to an interpretation of the excerpt from the minutes that had been produced, although that excerpt was contradictory in content. The appellant claims that page 40 of the minutes had established the presence of two Cabinet heads and one Cabinet member 'in the absence of the Commission Members', whereas the presence of the corresponding Commission Members themselves was established on page 2 of the minutes.

35. It submits that the principle of full clarification of the facts demands that the Court of First Instance should have made the full original minutes available and should also have examined them before a contradiction that had come to light in the wording of the excerpt of the minutes '[was] "remedied" by a reinterpretation'.

36. Furthermore, the appellant argues, the critical point XXV in the excerpt from the minutes (deliberations on the Decision) does not contain the proposal from one or more of the Members of the Commission which is required under the first sentence of Article 6 of the Commission's Rules of Procedure, nor does it mention the outcome of the vote.

37. All in all, production of the complete original minutes was necessary to enable the appellant to check whether the minutes provided evidence of compliance with the conditions governing the validity of the Decision at issue.

38. The *Commission* submits, first, that this ground of appeal is inadmissible as the Court of First Instance alone has jurisdic-

tion to determine the facts and assess the evidence submitted to the Court of First Instance.

39. The criticism levelled by the appellant at the interpretation put on the minutes by the Court of First Instance is also unfounded. The naming of Mr K. as a Cabinet member who attended the session 'in the absence' of a Commission Member does not mean that the Commission Member did not attend the session. It is stated on page 34 of the minutes that the Commission Member did attend the session.

40. The appellant does not state what additional knowledge could have been gained by producing a complete original rather than the copy excerpt that was in fact produced. If, however, there should not be serious reason to believe that the copy might not be a proper copy excerpt, the presumption of validity applying to Community actions would arise. There was no doubt about the interpretation that would have necessitated the production of further evidence.

Appraisal

41. The complaint of an error in law in failing to consider evidence would appear, at first sight, to be a complaint as to breach of procedure by the Court of First Instance (Article 51 of the ECSC Statute) so that such a ground of appeal would immediately be admissible if it were to be assumed that there is a principle of procedural law that obliges the Court of First Instance to allow applications for the production of evidence where certain conditions are satisfied.

42. The appellant would seem to be inferring such a principle from the 'principle of full clarification of the facts' put forward by it. However, Article 24 of the ECSC Statute, on which the appellant relies in support of its assumption, merely states that the Court (here, the Court of First Instance) 'may' require the parties to produce all documents 'which the Court considers desirable'. It certainly cannot therefore be construed from relevant Community law in general that there was any fundamental obligation on the Court of First Instance to comply with the applications for production of evidence made by one of the parties. This is therefore clearly not a complaint of breach of procedure, so that this ground of appeal must be dismissed as inadmissible.

43. In my opinion, it would appear very doubtful whether a ground of appeal termed 'failure to consider evidence' should be deemed at all admissible in principle.

44. The situation, for the most part, is that a ground of appeal termed 'failure to consider evidence' simply means that one party is complaining that the Court of First

Instance misconstrued other evidence produced in the proceedings by, for example, considering its substance to be absolute proof of certain facts even though other conflicting ('unconsidered') evidence was tendered. However, such criticism of the appraisal of evidence by the Court of First Instance — subject to any allegation of distortion — renders a ground of appeal inadmissible. [12]

45. I therefore consider a ground of appeal entitled 'failure to consider evidence' to be inadmissible in any event if it really means *in substance* that an appellant is challenging the appraisal of other evidence by the Court of First Instance. [13]

46. The present case is one such example: the appellant is evidently questioning the assumption made by the Court of First Instance that the copies of the excerpts from the minutes answered the question of whether or not the necessary quorum was present at the time that the Decision was adopted by the Commission. In doing so, therefore, the appellant is actually, in the *second* ground of appeal, challenging an appraisal of evidence by the Court of First Instance, [14] without saying it in so many words. [15]

47. The *second* ground of appeal, alleging 'failure to consider evidence' in general, must therefore be dismissed as *inadmissible*.

In the alternative: examination of the merits of the ground of appeal

48. It would appear that the Court has not yet had occasion to pronounce judgment in principle on the issue of admissibility in relation to similar grounds of appeal. [16] However, it has examined the merits of comparable arguments. [17] In case the Court should not follow the reasoning for inadmissibility suggested here, I should now like to deal briefly with the question of the merits of the second ground of appeal.

12 — If 'failure to consider evidence' were to be recognised in such cases as an admissible ground of appeal — assuming that specific evidence was tendered in the proceedings before the Court of First Instance — practically any appraisal of fact by the Court of First Instance could be amenable to appeal if it were not heeded.

13 — It would be conceivable, although not relevant here, if the complaint of 'failure to consider evidence' were to address a breach of substantive law in which the allegation is made that, by not taking certain evidence, the Court of First Instance revealed that it had overlooked or failed to properly examine an issue of law. This would be the case, for instance, if it were alleged that the Court of First Instance had not allowed evidence of facts that might have proven a legal defence. The allegation of failure to apply substantive law or of an error of law in its application does *per se* constitute an admissible ground of appeal, so that no special ground of appeal, namely 'failure to consider evidence', would normally be required in such cases.

14 — See below, paragraph 64.

15 — See, on the other hand, the argument put forward by the appellant in Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, and in this respect paragraph 23 of the Opinion that I am delivering today in the aforementioned case.

16 — Admissibility of the ground of appeal challenging a procedural defect: Opinion of Advocate General Léger delivered on 3 February 1998 in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

17 — Apparently their admissibility was either not in issue or else the arguments were implicitly declared admissible.

49. In its *Baustahlgewebe* judgment the Court had 'regard to the circumstances' in relation to the allegation of failure to consider evidence and ruled that 'the determination made by the Court of First Instance of the relevance of hearing evidence... [can]not be called in question'. [18]

50. In its *Connolly* judgment the Court stated, on an allegation of a supposed error in law in failing to consider evidence, that 'it must be pointed out that, as a general rule, in order to satisfy the Court as to a party's claims or, at the very least, as to the need for the Court itself to take evidence, it is not sufficient merely to refer to certain facts in support of the claim. There must also be adduced sufficiently precise, objective and consistent indicia of their truth or probability.' [19]

51. With regard to the question of the taking of evidence in proceedings before the Court of First Instance, therefore, the Court must bear the following division of responsibilities in mind: a party who wants to have evidence produced in the proceedings must substantiate which facts, in its opinion, have to be proven and that their existence is, at the very least, probable. It is for the Court of First Instance to examine the relevance of taking evidence.

18 — Judgment of 17 December 1998 (Opinion cited in footnote 16), at paragraph 68.

19 — Judgment in Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, at paragraph 113.

52. In the present case no substantiated argument was presented by the applicant in the proceedings before the Court of First Instance. By its own admission, the appellant only required the Court of First Instance to take evidence (produce the original minutes) in order to be able to check *whether* the minutes could have provided evidence of the existence of the necessary quorum when the Commission adopted the Decision. It did not therefore plead any indicia of concrete facts the proof of which could only have been provided by the complete original minutes.

53. If the Court should consider the *second* ground of appeal alleging failure to consider evidence to be admissible, it must nevertheless be dismissed as *unfounded*.

B — *The grounds of appeal alleging a legally defective assessment of the formal validity of the Decision*

1. Infringement of procedural rights by the Commission (*fourth* ground of appeal)

Submissions of the parties

54. The *appellant* takes issue with paragraph 88 of the judgment under appeal and

argues that the Court of First Instance found that the appellant's rights of defence had not been infringed by the Commission's inadequate clarification of the facts with regard to its own role. It based its conclusion primarily on the argument that DG IV was entitled to rely on DG III's written documentation without itself examining it. This, the appellant claims, was an error in law.

55. The *Commission* considers this ground of appeal to be inadmissible as the finding by the Court of First Instance, in paragraph 88 of the judgment, that the statements were detailed and precise so that DG IV had no reason to check them itself, was a finding of fact which the Court has no jurisdiction to review.

Appraisal

56. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the *fourth* ground of appeal should be dismissed as inadmissible, to paragraph 21 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

57. The *fourth* ground of appeal, challenging failure to acknowledge infringement of procedural rights by the Commission, must therefore be dismissed on the ground that it is *inadmissible*.

2. The question of the proper adoption by the Commission of the Decision and the substantive correspondence between the versions of the Decision as notified and as adopted (*third* ground of appeal)

Submissions of the parties

58. The *appellant* submits that the Court of First Instance erred in law in its findings as to the proper adoption and substance of the Decision by the Commission. The Decision itself was not established from the minutes that were produced to the Court of First Instance. In paragraph 139 of the judgment under appeal the Court of First Instance drew the conclusion, from unchecked statements by the Commission's agents, that the substance of the adopted Decision was apparent merely from a document that was kept in geographic proximity to the minutes.

59. This does not constitute a sufficient basis for the 'presumption of validity applying to Community actions' referred to by the Court of First Instance because, in the absence of proper minutes, the substance of the Community action was in doubt.

60. Nor was it established from the copy minutes produced whether the necessary quorum was present when the Decision was adopted by the College of Commissioners.

61. The *Commission* considers this ground of appeal to be inadmissible since the appellant is challenging the determination of facts and assessment of evidence which come within the purview of the Court of First Instance alone.

62. In the alternative, it is argued against the appellant that Article 16(1) of the 1993 Rules of Procedure does not require the Decision to be established from the minutes; it must be 'annexed' to them.

63. The allegation that the copy minutes do not establish whether the necessary quorum was achieved is similarly inadmissible. This was determined by the Court of First Instance when dealing with such allegations in paragraphs 111 to 124 of the judgment under appeal following detailed appraisal of the evidence required by it.

Appraisal

64. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the *third* ground of appeal should be dismissed as inadmissible, to paragraphs 52 and 63 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

65. The *third* ground of appeal, challenging the failure to recognise that the necessary quorum was not present and that the Decision was not properly adopted by the Commission, must therefore be dismissed on the ground that it is *inadmissible*.

C — *The ground of appeal alleging that the assessment of the substantive legality of the Decision was defective in law*

1. The separate nature of the infringement of competition law as a result of participation in the information exchange system (*seventh* ground of appeal)

Submissions of the parties

66. The *appellant* is alleging that paragraph 373 of the judgment under appeal shows that the Commission had established

during the course of the oral procedure that the information exchange system at issue did not constitute a separate breach of Article 65(1) of the ECSC Treaty, a view of the law with which the appellant entirely concurred in the proceedings before the Court of First Instance. The Court of First Instance therefore pronounced judgment upon the separate nature of the information exchange system even though this was not an issue for it to decide. The Court therefore decided *ultra petita* and was in breach of procedural provisions.

67. The appellant also takes the view that, in considering the information exchange system to be a separate act in restraint of competition within the meaning of Article 65 of the ECSC Treaty, that provision has also been misconstrued. The Court of First Instance erred in law in finding that it was sufficient for the information exchange system to have been *liable* to affect the conduct of the undertakings concerned when, under Article 65 of the ECSC Treaty, the information exchange system should have *tended* to do so.

68. The appellant argues, with regard to the Commission's contention that the issue of whether the information exchange system had independent significance was a challenge to appraisals of fact not amenable to review on appeal, that independence can be decided on the basis of legal criteria without any review of the facts.

69. The Court of First Instance found in paragraph 691 et seq. that the Commission had exaggerated the effects of the information exchange system on fixing prices and therefore reduced the fine accordingly. For the same reasons, however, it should also have set aside, or at least considerably reduced, the separate fine of ECU 2 580 000 referred to in paragraph 634 of the judgment under appeal, which had been imposed for participation in the information exchange system.

70. By not doing so, the Court of First Instance was in breach of the principle of *ne bis in idem*. Infringement of this principle could not be alleged until the appeal stage because it was only in response to the written question put by the Court of First Instance that the Commission withdrew its argument that participation in the information exchange system constituted a separate breach of Article 65 of the ECSC Treaty.

71. The *Commission* considers this ground of appeal to be inadmissible in so far as it is based on the statement made by the Commission in the proceedings before the Court of First Instance dealt with in paragraph 373 of the judgment under appeal (regarding the separate nature of the restraint of competition by participating in the information exchange system). The Court of First Instance had to review the Commission's Decision and it was not bound by the statements made by the Commission in the judicial proceedings.

72. As can be seen from a reading of paragraphs 374 to 380 of the judgment under appeal, when categorising the information exchange system as a separate infringement the Court of First Instance was conducting an appraisal of fact, so that the ground of appeal is also inadmissible in that context.

73. The Commission also considers the ground of appeal to be inadmissible in as much as the appellant is basing its argument on the principle of *ne bis in idem*. It is evident from paragraph 708 et seq. of the judgment under appeal that this argument had already been raised in the Court of First Instance, although in a different context. In its rejoinder the Commission contends, moreover, that the appellant could have raised the *ne bis in idem* plea in the proceedings before the Court of First Instance, so that the ground of appeal is inadmissible for that reason.

74. The ground of appeal is also unfounded to the extent that it relates to the effects of the information exchange system. In paragraph 691 et seq. the Court of First Instance is discussing, not the information exchange system, but the general, without-obligation exchange of opinions that DG III considered permissible in relation to prices anticipated by the undertakings. However, the undertakings' regular exchange of up-to-date, individualised figures and breakdowns of orders and deliveries, which was concealed from the Commission, went far beyond the mere exchange of opinions on price forecasts. The fact that the commercial effects of the price-fixing agreements would have been diminished if the undertakings had confined themselves to an exchange of opinions such as that considered permissible by DG III is quite irrelevant to the determination and assessment of the fine for the appellant's participation in the information exchange system.

75. The Commission contends that participation in the information exchange system also constituted a separate infringement, so that the imposition of a separate fine was also permissible.

Appraisal

76. In the first part of the *seventh* ground of appeal the appellant alleges an excess of jurisdiction on the part of the Court of First Instance by claiming that, in finding that participation in the information exchange system was a separate infringement of Article 65(1) of the ECSC Treaty, it went beyond the substance of the Decision acknowledged by the Commission itself in the proceedings before the Court of First Instance.

77. Hence, the appellant is not taking issue with the error of law in misconstruing Article 65(1) of the ECSC Treaty, but is alleging an infringement of Article 33 of the ECSC Treaty.

78. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the first part of the *seventh* ground of appeal should be dismissed as unfounded, to paragraph 89 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

79. The first part of the *seventh* ground of appeal, alleging that the Court of First Instance exceeded its jurisdiction, must therefore be dismissed as *unfounded*.

80. In the second part of the *seventh* ground of appeal the appellant challenges the failure to take cognisance of the fact that infringement of competition in the form of participation in an information exchange system was not a separate issue. The allegation of infringement of the *ne bis in idem* principle is also based on the assumption that participation in the information exchange system does not constitute a separate infringement of competition.

81. Contrary to the view expressed by the Commission, I am of the opinion that this ground of appeal is admissible in so far as it addresses the fundamental question of whether certain conduct constitutes an offence with regard to Article 65(1) of the ECSC Treaty, so that it is a legal issue. Regarding the inadmissibility claim based on the alleged repetition of pleas that have already been raised in the proceedings before the Court of First Instance (whilst simultaneously relying on the prohibition on production of new evidence) it should just be noted that, in its reasoning on this second part of the seventh ground of appeal, the appellant is expressly referring to the argument on which the Court of First Instance, for the very first time, based its assumption that there was a separate infringement of Article 65(1) of the ECSC Treaty, so that this cannot constitute a repetition of arguments raised in the proceedings before the Court of First Instance.

82. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the second part of the *seventh* ground of appeal should be dismissed as unfounded, to paragraph 109 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

83. Consequently, the assumption by the Court of First Instance that participation in the information exchange system constituted a separate infringement of competition is not open to any objection in law.

The allegation of infringement of the *ne bis in idem* principle based on the contrary viewpoint therefore requires no further examination.

84. The second part of the *seventh* ground of appeal, criticising the failure to take cognisance of the fact that the infringement of competition was not a separate issue and alleging infringement of the *ne bis in idem* principle, must therefore also be dismissed as *unfounded*.

85. In the third part of the *seventh* ground of appeal the appellant submits that the Court of First Instance was wrong not to reduce the part of the fine for participation in the information exchange system even though the grounds for reducing the fine for price-fixing also applied to the information exchange system. However, it is here alleging misconstruction, not of Article 65(1) of the ECSC Treaty, but of Article 65(5) of the ECSC Treaty (assessment of the amount of the fine).

86. Since, in this context, the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the third part of the *seventh* ground of appeal should be dismissed as inadmissible, to paragraph 205 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

87. The third part of the *seventh* ground of appeal, alleging misconstruction of Article 65(5) of the ECSC Treaty when assessing the amount of the fine, must therefore be dismissed as *inadmissible*.

88. The *seventh* ground of appeal must therefore be dismissed in part as *inadmissible* and otherwise as *unfounded*.

2. The adverse effect which the information exchange system had on 'normal competition' within the meaning of Article 65 of the ECSC Treaty (*sixth* ground of appeal)

Submissions of the parties

89. The *appellant* submits that the Court of First Instance erred in law in dismissing any influence on the interpretation of Article 65(1) of the ECSC Treaty by the

general connection between that paragraph and other provisions in the ECSC Treaty, such as Article 60 and Articles 46 to 48 of the ECSC Treaty, for example. 'Normal competition' within the meaning of Article 65(1) of the ECSC Treaty should not be established without regard for the view that was shared by the Commission and the undertakings concerned at the critical time. From the fact that, even in the opinion of DG III, a certain amount of exchange of information was necessary between undertakings in the steel industry to enable the Commission to fulfil its obligations under the ECSC Treaty, the Court of First Instance should have concluded that the 'normal competition' given protection under Article 65(1) of the ECSC Treaty could not be the same competition as that protected under Article 85(1) of the EC Treaty.

90. The Court of First Instance found that even an exchange of opinion by the undertakings as to their price forecasts, which was considered permissible by DG III, could have led to price increases of the size established in the market at the relevant date, and it therefore reduced the fine by 15%. However, the appellant continues, the Court of First Instance erred in law in considering that it was not necessary to establish to what extent the undertakings could have exchanged individual data to prepare for consultations with the Commission without infringing Article 65(1). The furtherance of transparency by DG III should be taken into account when interpreting the concept of normal competition — not just when considering the effects of an infringement.

91. The *Commission* considers this allegation unfounded. It is not for the Commission to define the term 'normal competition'. The conduct of DG III might have led to a 'degree of ambiguity' with regard to the scope of that concept but that conduct could not have altered the concept itself, which could only be construed from the Treaty itself. This is precisely what the Court of First Instance did in paragraphs 268 to 289 of the judgment under appeal having regard, on the one hand, to Article 60 of the ECSC Treaty and, on the other, to Articles 46 to 48 of the ECSC Treaty.

92. There is also a huge difference between the exchange of information that was considered necessary by DG III and the information exchange system which the Court of First Instance, in paragraph 382 et seq. of the judgment under appeal, regarded as a breach of the competition rules. By regularly exchanging up-to-date, individualised figures and breakdowns of orders and deliveries the undertakings were doing much more than just exchanging opinions.

Appraisal

93. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the *sixth* ground of appeal should be dismissed as unfounded, to paragraphs 135 et seq. and 157 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

94. The *sixth* ground of appeal, challenging confirmation of the assumption that the information exchange system had an adverse effect on 'normal competition' within the meaning of Article 65 of the ECSC Treaty, must therefore be dismissed as *unfounded*.

D — *The ground of appeal relating to inadequate grounds for the fine (fifth ground of appeal)*

Submissions of the parties

95. The *appellant* submits that the Court of First Instance considered the Commission's statement of reasons for the amount of the fine to be sufficient even though the statement of reasons did not include the mathematical formula that, according to the finding by the Court of First Instance, the Commission had used to calculate the fines.

96. The *Commission* considers this submission to be unfounded. Although inclusion of mathematical formulae is 'desirable', it is not mandatory.

Appraisal

97. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the *fifth* ground of appeal should be dismissed as unfounded, to paragraph 217 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

98. The *fifth* ground of appeal, challenging the failure to take cognisance of the inadequate grounds for the fine, must therefore be dismissed as *unfounded*.

IV — Conclusion

99. In the light of the foregoing, I propose that the Court:

— dismiss the appeal;

— order the appellant to bear the costs of the proceedings.