JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
11 March 1999 *

In Case T-145/94,

Unimétal — Société Française des Aciers Longs SA, established in Rombas (France), represented by Antoine Winckler, of the Paris Bar, and Caroline Levi, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented initially by Julian Currall and Norbert Lorenz, of its Legal Service, and Géraud de Bergues, a national civil servant on secondment to the Commission, and subsequently by Jean-Louis Dewost, Director-General of its Legal Service, Julian Currall and Guy Charrier, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION, principally, for the annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: C.W. Bellamy, acting as President, A. Potocki and J. Pirrung, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 23, 24, 25, 26 and 27 March 1998

gives the following

Judgment [1]

The facts giving rise to the action

A — *Preliminary observations*

1 The present action seeks the annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1, hereinafter 'the Decision'), by which the Commission found that seventeen European steel undertakings and one of their trade associations had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) of the ECSC Treaty, and imposed fines on fourteen undertakings operating within that sector for infringements committed between 1 July 1988 and 31 December 1990.

2 According to the Decision, Unimétal — Société Française des Aciers Longs SA (hereinafter 'Unimétal') is the most important producer of long products of the Usinor Sacilor group, of which it is a wholly-owned subsidiary. In 1990 its

1 — Only the grounds of the judgment which the Court considers it appropriate to publish are reproduced here. The remaining paragraphs are broadly identical to or similar to those in the judgment of 11 March 1999 in Case T-141/94 *Thyssen* v *Commission* [1999] ECR II-347, with the exception of paragraphs 413 to 422, which have no equivalent in the present judgment. Likewise, the infringements of Article 65(1) of the Treaty which the applicant is alleged to have committed on certain national markets are not the same as those which the applicant in *Thyssen* v *Commission* is alleged to have committed. In the present case the partial annulment of Article 1 of the Decision is based essentially on the fact that there is no evidence that the applicant participated in the infringement referred to in paragraph 1 of the operative part of the present judgment.

turnover amounted to FRF 6 896 million of which FRF 1 164 million, or ECU 168 million, came from sales of beams in the Community. Usinor Sacilor SA (hereinafter 'Usinor Sacilor') is a State-owned holding company which unites the majority of France's steel-producing companies and is the second-largest producer of steel in the world. In 1990 it had a consolidated turnover of FRF 96 053 million.

...

D — *The Decision*

47 The Decision, which the applicant received on 3 March 1994 under cover of a letter of 28 February 1994 from Mr Van Miert ('the Letter'), contains the following operative part:

'*Article 1*

The following undertakings have participated, to the extent described in this Decision, in the anti-competitive practices listed under their names which prevented, restricted and distorted normal competition in the common market. Where fines are imposed, the duration of the infringement is given in months except in the case of the harmonisation of extras where participation in the infringement is indicated by "x".

...

Unimétal

(a) Exchange of confidential information through the Poutrelles Committee (30)

(b) Price fixing in the Poutrelles Committee (30)

(c) Price fixing in the Italian market (6)

(d) Price fixing in the Danish market (16)

(e) Market sharing, "Traverso system" (3 + 3)

(f) Market sharing, France (3)

(g) Market sharing, Italy (3)

(h) Harmonisation of extras (x)

(i) Price fixing on the French market

...

Article 4

For the infringements described in Article 1 which took place after 30 June 1988 (31 December 1989 [2] in the case of Aristrain and Ensidesa) the following fines are imposed:

...

Unimétal SA	ECU 12 300 000

...

2 — The date mentioned in the French and Spanish versions of the Decisions. The German and English versions give the date as 31 December 1988.

Article 6

This Decision is addressed to:

...

— Unimétal

...'.

...

Principal claim, for annulment of the Decision

...

A — *The breach of the applicant's rights of defence*

Limitation of access to the Commission's file

...

Findings of the Court

...

86 As regards the allegation that the Commission refused to provide the applicant with a non-confidential summary of certain documents classified as not accessible, after having initially offered to do so, it should be pointed out that the applicant's request related to virtually all the documents thus classified (in fact several hundred, not twenty or so, as the applicant maintains in its written submissions), and referred by way of justification solely to its 'desire to show that it did not participate in certain offending practices'. The Court considers that the Commission was entitled to refuse to grant such a request, the reasons for which are drafted in such general terms as to amount to an absence of reasons.

87 Furthermore, those documents were not used against the applicant and contain no evidence in its favour, as the applicant accepted after having access to them in the context of the judicial procedure following the order made on 19 June 1996.

88 The Court takes the view that, in those circumstances, the applicant has failed to establish that it was not enabled, during the administrative procedure, effectively to make its views known on the documents relied on against it in the statement of objections.

...

The alternative claim for annulment of the fine or, at least, reduction of the amount thereof

...

The increase in the fine for the purpose of penalising Usinor Sacilor's conduct

593 It follows from the detailed explanations provided by the Commission at the hearing that the fine imposed on the applicant in respect of the harmonisation of extras was increased by 10% to take account of the fact that its parent company, Usinor Sacilor, had suggested that harmonisation.

594 That aggravating circumstance is not mentioned anywhere in the Decision, but was first invoked in the defendant's reply of 19 January 1998 to the written questions put by the Court. The Decision is therefore vitiated by a complete failure to state reasons on that point.

595 It follows that Article 4 of the Decision must be annulled to the extent to which it imposed on the applicant an increase in the fine for the role as instigator played by Usinor Sacilor in the harmonisation of extras.

596 It also follows from the detailed explanations provided by the defendant at the hearing that the fine imposed on the applicant in respect of the exchange of confidential information was increased by 10% on the ground that Usinor Sacilor organised the secretariat of the Poutrelles Committee, a fact, moreover, that the applicant does not dispute.

597 Having regard to the reasons set out at recital 321 of the Decision, where the Commission states that '[t]he fines imposed on Unimétal take into account the behaviour of its parent company in providing administrative support to the Poutrelles Committee', the Decision cannot be considered to be vitiated for lack of reasoning on this point. The reasons there stated enabled the applicant to understand that the Commission was imputing to it the behaviour adopted by its parent company, which consisted in facilitating, through provision of the secretariat, the commission of the infringements which occurred within the Poutrelles Committee, and that its fine was increased for that reason. Moreover, the applicant disputed that imputation and the increase in the fine in its application and relied on a number of substantive arguments (see paragraphs 561 and 562 above).

598 In that regard, there is no inconsistency between recitals 321 and 285 of the Decision. At no point in recital 285 of the Decision does the Commission state that Usinor Sacilor's contribution to the activities of the Eurofer/Scandinavia group, for which it provided the secretariat, did not constitute participation in an infringement of Article 65(1) of the Treaty. At the very most it states that its contribution was not sufficiently 'substantial and individual' to justify adopting a decision separate from that addressed to its subsidiary Unimétal. Furthermore, recital 321 of the Decision must be read in the light of recital 319, which states that, where more than one company in a group has been involved in the infringements, the Decision is addressed to the production company as it is the production companies that have most to gain from advance knowledge of prices and volumes. Recital 321 of the Decision applies that principle to the particular

case of Unimétal, which is identified as the Usinor Sacilor subsidiary that produces beams, and also states that the fines imposed on Unimétal take into account the behaviour of its parent company to the extent to which it provided administrative support to the Poutrelles Committee.

599 In any event, recital 285 of the Decision concerns only the activities of the Eurofer/Scandinavia group, and is therefore directed only at the infringement of price-fixing on the Danish market, whereas recital 321 of the Decision is directed at the activities of the Poutrelles Committee. It follows from the explanations provided by the Commission at the hearing that the 10% increase imposed on Unimétal in respect of an aggravating circumstance, to take account of Usinor Sacilor's behaviour, concerns only the part of the fine imposed in respect of the exchange of confidential information within the Poutrelles Committee.

600 As regards the correctness of that imputation, the Court notes at the outset that, like the prohibition in Article 85(1) of the EC Treaty, the prohibition in Article 65(1) of the ECSC Treaty is aimed, *inter alia*, at 'undertakings'. It follows from the case-law of the Court of First Instance (see Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311) that the concept of an undertaking within the meaning of Article 85 of the EC Treaty must be understood as referring to an economic unit consisting of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see also Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50, upheld on appeal in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 15 to 18). The Court considers that the same applies to Article 65 of the ECSC Treaty.

601 In the present case Usinor Sacilor and its wholly-owned subsidiary Unimétal must be regarded as constituting one and the same undertaking for the purposes of that provision.

602 Furthermore, according to the case-law of the Court of Justice, in consideration of the unity of the economic group formed by a parent company and its subsidiaries, the acts of the subsidiaries may in certain circumstances be imputed to the parent company, especially where the subsidiary, although having separate legal personality, does not determine its market conduct independently but in all material respects carries out the instructions given to it by the parent company (see Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 to 135). The Court of First Instance has likewise held that the company responsible for coordinating the action of a group of companies may be held answerable for the infringements committed by the companies in the group, even where they are not subsidiaries in the legal sense of the word (see *Shell* v *Commission*, cited above, paragraphs 312 to 315).

603 Having regard to the fundamental concept of economic unity which underlies that case-law, the Court considers that it may be applied to the opposite situation, such as that of the present case.

604 In so far as, by its administrative activity in providing the secretariat, Usinor Sacilor facilitated the commission of the infringements which occurred within the Poutrelles Committee, the Commission was justified in taking that assistance into account in determining the precise involvement and role of the undertaking in question in the practices in issue.

605 The Commission was also justified in imputing Usinor Sacilor's behaviour to its subsidiary Unimétal rather than taking the opposite course, since it is apparent that in the particular circumstances of the case the applicant, as the subsidiary responsible for beam production within the Usinor Sacilor group, is the principal author and beneficiary of the infringements which occurred, whereas the parent company confined itself to an accessory role of providing administrative assistance. In that regard, the applicant stated in its written submissions that Usinor Sacilor had no decision-making power or freedom of initiative when it provided the administrative secretariat to the Poutrelles Committee.

606 It follows from the foregoing that the applicant's arguments in respect of the increase in the fine on the ground of the administrative assistance provided by Usinor Sacilor to the functioning of the Poutrelles committee must be rejected as unfounded.

...

The Court's exercise of its unlimited jurisdiction

655 The Court has already annulled Article 1 of the Decision in so far as it finds that the applicant participated in an agreement to share the Italian market (see paragraph 403 above). The fine imposed by the Commission for that infringement was set at ECU 70 600.

656 For the reasons set out in paragraph 422 [3] above, the period from 1 July 1988 to 31 December 1988 must also be excluded in calculating the fine relating to the infringement of price-fixing on the Danish market, which, in the case of the applicant, means a reduction of the fine by ECU 16 800, following the method used by the Commission.

657 The Court has also annulled the increase in the fine imposed on the applicant on account of the allegedly recidivist nature of its conduct, which the Commission calculated at ECU 3 074 200, for the reasons set out above (see paragraph 581 et seq.). [4]

3 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraph 451.

4 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraph 614 et seq.

658 The Court has likewise annulled the increase in the fine imposed on the applicant in respect of the role as promoter played by Usinor Sacilor in the harmonisation of extras (paragraph 595 above). That increase was calculated by the Commission at ECU 84 000.

659 Finally, for the reasons explained above (paragraphs 615 to 621),[5] the Court considers that the total amount of the fine imposed for the price-fixing agreements and concerted practices should be reduced by 15% in view of the fact that the Commission exaggerated to some extent the anti-competitive effects of the infringements which it found to have occurred. If account is taken of the reductions already mentioned concerning the pricing agreements on the Danish market, that reduction comes to ECU 777 800, following the method of calculation used by the Commission.

660 Applying the Commission's method, the fine imposed on the applicant should therefore be reduced by ECU 4 023 400.

661 By its nature, the fixing of a fine by the Court, in the exercise of its unlimited jurisdiction, is not an arithmetically precise exercise. Moreover, the Court is not bound by the Commission's calculations, but must carry out its own assessment, taking all the circumstances of the case into account.

662 The Court considers that the Commission's general approach in determining the level of the fines (paragraph 548 et seq. above)[6] is justified by the circumstances of the case. The infringements involving price-fixing and market-sharing, which are expressly prohibited by Article 65(1) of the Treaty, must be treated as particularly serious since they involve direct interference with the essential parameters of competition on the market in question. Likewise, the systems for the exchange of confidential information, in which the applicant is accused of

5 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraph 640 et seq.
6 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraph 577 et seq.

having been involved, had a purpose similar to market-sharing according to traditional flows. All of the infringements taken into account for the purpose of the fine were committed, following the end of the crisis regime, after the undertakings had received appropriate warnings. As the Court has found, the general objective of the agreements and practices in question was precisely to prevent or distort the return to normal competition entailed by the ending of the manifest crisis regime. The undertakings, moreover, were aware of their unlawful nature and deliberately concealed them from the Commission.

663 Having regard to all of the foregoing and the entry into effect, on 1 January 1999, of Council Regulation (EC) No 1103/97 of 17 June 1997 laying down certain provisions concerning the introduction of the euro (OJ 1997 L 162, p. 1), the amount of the fine must be fixed at EUR 8 300 000.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition),

hereby:

1. **Annuls Article 1 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European**

producers of beams in so far as it finds that the applicant participated in an agreement to share the Italian market for a period of three months;

2. Fixes the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at EUR 8 300 000;

3. Dismisses the remainder of the action;

4. Orders the applicant to bear it own costs and to pay half of the defendant's costs. The defendant shall bear half of its own costs.

Bellamy Potocki Pirrung

Delivered in open court in Luxembourg on 11 March 1999.

H. Jung C.W. Bellamy

Registrar President