JUDGMENT OF THE COURT (Fifth Chamber)

2 October 2003 *

In Case C-194/99 P,

Thyssen Stahl AG, established in Duisburg (Germany), represented by F. Montag, Rechtsanwalt, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 11 March 1999 in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, seeking to have that judgment set aside in part,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall and W. Wils, acting as Agents, assisted by H.-J. Freund, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and S. von Bahr, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 May 1999, Thyssen Stahl AG brought an appeal under Article 49 of the ECSC Statute of the Court of Justice against the judgment of the Court of First Instance of 11 March 1999 in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347 ('the judgment under

appeal'), by which the Court of First Instance dismissed in part its application for partial 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 contested decision'). By that decision, the Commission imposed a fine on the appellant under Article 65 of the ECSC Treaty.

Facts and the contested decision

2 According to the judgment under appeal, the European steel industry underwent, from 1974 onwards, a crisis characterised by a fall in demand giving rise to problems of excess supply and capacity and low prices.

3 In 1980, after having attempted to manage the crisis by way of unilateral voluntary commitments given by undertakings as regards the amount of steel put on the market and minimum prices ('the Simonet Plan') or by fixing guide and minimum prices ('the Davignon Plan', the 'Eurofer I' agreement), the Commission declared that there was a manifest crisis within the meaning of Article 58 of the ECSC Treaty and imposed mandatory production quotas for, inter alia, beams. That Community system came to an end on 30 June 1988.

4 Long before that date, the Commission had announced in various communications and decisions that the quota system was to be abandoned, pointing out that the end of that system would mean a return to a market characterised by free competition between undertakings. However, the sector continued to be affected

by excess production capacity which, according to expert opinion, had to undergo a sufficient and rapid reduction to enable undertakings to meet world competition.

5 From the end of the quota system, the Commission set up a surveillance system involving the collection of statistics on production and deliveries, monitoring of market developments and regular consultation with undertakings on the market situation and trends. The undertakings in the sector, some of which were members of the Eurofer trade association, thus maintained regular contact with DG III (Directorate-General for the 'Internal Market and Industrial Affairs') of the Commission ('DG III') by way of consultation meetings. The surveillance system came to an end on 30 June 1990 and was replaced by an individual and voluntary information scheme.

6 At the beginning of 1991, the Commission carried out a series of inspections in the offices of a number of steel undertakings and associations of undertakings in the sector. A statement of objections was sent to them on 6 May 1992. Hearings were held at the beginning of 1993.

7 On 16 February 1994, the Commission adopted the contested decision, by which it found that 17 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. By that decision, it imposed fines on 14 undertakings for infringements committed between 1 July 1988 and 31 December 1990.

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

8 On 8 April 1994, the present appellant brought an action before the Court of First Instance for, inter alia, partial annulment of the contested decision.

9 By the judgment under appeal, the Court of First Instance granted the present appellant's application in part and reduced the fine imposed on it.

Forms of order sought by the parties

10 The appellant claims that the Court should:

— set aside the judgment under appeal, in so far as it imposed on the appellant a fine of EUR 4 400 000 in paragraph (2) of the operative part, dismissed the appellant's action in paragraph (3) of the operative part and ordered the appellant to bear its own costs and to pay half of the Commission's costs in paragraph (4) of the operative part;

— annul Articles 1, 3 and 4 of the contested decision, in so far as those articles have not already been annulled by the judgment under appeal;

— order the Commission to pay the costs of the proceedings at first instance and those of the present appeal.

11 The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

The grounds of appeal

12 The appellant raises eight grounds of appeal:

1. infringement of procedural principles applicable to the administrative procedure;

2. infringement of the Commission's Rules of Procedure as laid down in Commission Decision 93/492/Euratom, ECSC, EEC of 17 February 1993 (OJ 1993 L 230, p. 15) ('the 1993 Rules of Procedure');

3. infringement of Article 33 of the ECSC Treaty;

4. infringement of Article 65(1) of the ECSC Treaty as regards the exchange of information and the interpretation of the concept of 'normal competition';

5. infringement of Article 65(5) of the ECSC Treaty as regards the assessment of fault on the part of the appellant;

6. infringement of Article 65(5) of the ECSC Treaty as regards the exchange of information;

7. infringement of the obligation to state reasons under Article 15 of the ECSC Treaty;

8. infringement of the principle that judicial decisions must be given within a reasonable time in proceedings before the Court of First Instance.

13 The paragraphs of the judgment under appeal challenged by each of the grounds of appeal will be indicated as those grounds are examined.

The appeal

The first ground of appeal

14 By its first ground of appeal, which can be divided into two limbs, the appellant claims that, in several respects, the judgment under appeal infringes procedural principles. By the first limb, it submits that the Court of First Instance failed to take account of the scope of what it calls the principle of *ex proprio motu* investigation. By the second limb, it alleges that the Court of First Instance infringed the principles relating to the rights of the defence in the administrative procedure by refusing to acknowledge that the appellant should have had an opportunity to set out its views on the results of the internal investigation carried out by the Commission. In addition, in respect of both of those complaints, the appellant submits that the Court of First Instance was wrong to hold that errors committed during the administrative procedure may be remedied in the judicial proceedings.

15 This ground of appeal is directed against paragraphs 92 to 116 of the judgment under appeal. Paragraphs 92 to 97 of that judgment state:

> '92 In its first head of complaint, the applicant criticises the defendant for not having verified in detail, despite the requests made during the administrative procedure, the extent to which officials in DG III had encouraged the undertakings to implement the practices of which the [contested] decision accuses them or the extent to which they took part in such practices. The assertion in recital 312 of the [contested] decision that the Commission carried out a thorough investigation in this regard is, the applicant argues, questionable in view of the terse reply given, in recitals 312 and 315 of [that]

decision, to the detailed presentation made by the applicant in its requests. Moreover, that assertion is gainsaid by the exchange of internal correspondence between DG III and the Directorate-General for Competition (DG IV) ["DG IV"] annexed by the Commission to its statement in defence.

...

94 Under a second head of complaint, the applicant criticises the Commission for not having made the results of its investigation available to the undertakings and for having failed to give them an opportunity, guaranteed by the rights of the defence, to set out their views in this regard before the [contested] decision was adopted, whether by holding a second hearing or by providing the undertakings with an opportunity to submit written observations.

...

96 With regard, first, to the complaint of infringement of the principle of *ex proprio motu* investigation, the Court notes that the Commission found itself facing allegations of importance for the defence of the undertakings in question, as, moreover, it recognised in recital 312 of the [contested] decision, and that, with regard to the conduct of its own departments, it was in a privileged position, compared with those undertakings, to establish whether those allegations were true or false.

97 In those circumstances, the Court holds that it follows from the principles of sound administration and equality of arms that the Commission was under an obligation to examine seriously this aspect of the case-file in order to

determine the extent to which the allegations in question were or were not well founded. However, it was for the Commission, and not for the applicants, to decide how to conduct such an examination.'

16 In paragraphs 98 to 106 of the judgment under appeal, the Court of First Instance examined certain documents in the file relating to the investigation carried out by DG IV with respect to the attitude allegedly adopted by DG III. Paragraphs 107 to 116 of that judgment state:

'107 The Court takes the view that it follows from all these documents that the Commission properly took into account the comments and documents submitted by the undertakings at the hearing, which comments and documents were forwarded to DG III for commentary and explanations. Furthermore, DG III was requested by DG IV, at the latter's initiative, to explain its alleged "involvement" in the practices in question, on a first occasion during the administrative investigation and on a second occasion after the hearing.

108 Admittedly, the DG IV officials responsible for the investigation in the "beams" cases did not apparently have any direct discussions with the DG III officials who had attended the meetings with the producers and also did not ask to examine the minutes of those meetings and other internal notes in the DG III archives produced at the Court's request. However, the Court considers that a Commission directorate cannot be criticised for attaching credence, without seeking to verify them by other means, to the precise and detailed explanations provided at its request by another directorate, which, moreover, it is not its function to check.

109 It follows that the applicant has failed to establish that no sufficiently serious internal investigation was carried out in this case. Its arguments alleging infringement of the "principle of *ex proprio motu* investigation" must therefore be rejected as unfounded.

110 With regard, second, to the complaint of breach of the applicant's procedural rights, particularly as regards the contention that the Commission was obliged to reopen the oral procedure on conclusion of its internal investigation, the guarantee of the rights of the defence afforded by the first paragraph of Article 36 of the Treaty does not require the Commission to reply to all the arguments of the party concerned, to carry out further investigations or to hear witnesses put forward by the party concerned, where it considers that the preliminary investigation of the case has been sufficient (Case 9/83 *Eisen und Metall Aktiengesellschaft* v *Commission* [1984] ECR 2071, paragraph 32, and Case 183/83 *Krupp Stahl* v *Commission* [1985] ECR 3609, paragraph 7).

111 In this case, the undertakings concerned were in a position to consider the alleged exonerating documents in their possession in their reply to the statement of objections. In any event, the hearing on 11, 12, 13 and 14 January 1993 provided them with an opportunity to set out their position in detail, and the Commission also gave them an additional opportunity to state their views in writing (see the judgment in *Krupp Stahl* v *Commission*, cited above, paragraph 8).

112 In those circumstances, the mere fact that the applicants produced certain documents after the hearing and that the Commission, following that hearing, decided to open an internal investigation was not, in itself, such as to oblige it to reopen the oral procedure after that investigation had been concluded.

113 The Court also finds that the defendant adequately respected the rights of defence of the undertakings concerned by informing them of the results of that investigation by letter of 22 April 1993 from the Hearing Officer indicating that the documents which they had provided following the hearing did not support the conclusion that the Commission was aware of their practices, and that they did not justify a second hearing.

114 In particular, the Court considers that the Commission was not under any obligation to pass on to the undertakings concerned, during the administrative procedure, the internal notes relating to its investigation or to give them an opportunity to set out their views thereon during the administrative procedure, since those documents, which were confidential by nature, clearly did not contain any exonerating material.

115 In a situation like that in the present case, the procedural rights of the undertakings concerned must be regarded as being sufficiently guaranteed by their right to bring an action before the Court and to challenge, in that action, the soundness of the conclusion reached by the Commission in recital 312 of the [contested] decision, while requesting the Court, if necessary, to adopt the measures necessary for inquiring into that aspect of the case (see the order of 10 December 1997 [in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293]).

116 The arguments alleging breach of the applicant's procedural rights must accordingly be rejected as unfounded.'

The first limb of the first ground of appeal

17 The appellant submits that, by stating in paragraph 108 of the judgment under appeal that DG IV was not obliged to verify the explanations provided by DG III, the Court of First Instance failed to take proper account of the scope of the principle of *ex proprio motu* investigation, which it defined in paragraph 97 of that judgment. According to the appellant, since the written information received by DG IV could not have provided sufficient clarity as to the extent to which the

unlawful conduct of the undertakings to which the contested decision was addressed had been known to the DG III officials or was objectively caused by them, the Commission ought to have heard the officials actually handling the file. Indeed, the Court of First Instance held such a hearing.

18 The Commission contends that that complaint is inadmissible as it does not relate to any infringement of Community law by the Court of First Instance but rather to the findings of fact made by that Court in paragraphs 108 and 109 of the judgment under appeal. According to the Commission, the scope of the duty of *ex proprio motu* investigation was laid down by the Court of First Instance in paragraphs 96 and 97 of that judgment, which are not, however, as such the object of criticism.

19 In the alternative, the Commission claims that the complaint is unfounded. The appellant exaggerates the scope of the duty of *ex proprio motu* investigation. Since, as the Court of First Instance found in paragraph 108 of the judgment under appeal, the explanations from DG III were accurate and detailed, there were no grounds for further checks.

Findings of the Court

20 First of all, it should be pointed out that, as is clear from Article 32d(1) CS and Article 51 of the ECSC Statute of the Court of Justice, an appeal lies on a point of law only. Therefore, the Court of First Instance has sole jurisdiction to find and appraise the relevant facts and to assess the evidence, except where those facts and that evidence have been distorted (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 49 and 66; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 194; and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 69).

21 In paragraphs 96 and 97 of the judgment under appeal, the Court of First Instance observed that, in accordance with the principles of sound administration and equality of arms, the Commission is under an obligation to examine seriously a competition file incriminating undertakings in order to determine the extent to which allegations of importance for the defence of the undertakings in question and relating to the conduct of its own departments are well founded.

22 The Court of First Instance examined the relevant documents on the case-file in paragraphs 98 to 106 of the judgment under appeal. In paragraph 107 of that judgment, it held that it followed from all those documents that the Commission had properly taken into account the comments and documents submitted by the undertakings concerned at their hearing and observed that those comments and documents had been forwarded to DG III for commentary and explanations and that, on two occasions, DG III had been asked to explain its alleged 'involvement' in the practices in question.

23 It is clear that, in paragraphs 98 to 107 of the judgment under appeal, the Court of First Instance assessed facts and evidence.

24 The statement in paragraph 108 of the judgment under appeal, which the appellant challenges, that a Commission directorate is not obliged to verify by other means the precise and detailed explanations provided by another directorate does not cast doubt on the Court of First Instance's findings as to the seriousness of the investigation carried out.

25 As the first limb of the first ground of appeal is in part inadmissible and in part unfounded, it is unnecessary to consider the argument that an error allegedly committed during the administrative procedure may be remedied in the judicial proceedings.

The second limb of the first ground of appeal

26 The appellant submits that the refusal to communicate to it the documents relating to the Commission's internal investigation of the role of DG III and to hear the appellant's views in that regard during the administrative procedure constituted an infringement of its rights of defence. More specifically, it challenges paragraphs 113 and 114 of the judgment under appeal.

27 The Commission notes that the appellant does not challenge the Court of First Instance's finding, in paragraph 110 of the judgment under appeal, that the Commission was not required to carry out further investigations as it considered that the investigation of the case had been sufficient. That finding alone, it submits, justifies rejection of the complaint.

28 The Commission also submits that, as the Court of First Instance observed in paragraphs 113 to 115 of the judgment under appeal, the obligation to communicate documents to the undertakings in question does not extend to the Commission's internal documents or to other confidential information.

29 In its reply, the appellant disputes the finding that DG III's conduct was sufficiently established by the Commission's internal investigation. The order in *NMH Stahlwerke*, cited above, by which the Court of First Instance ruled on requests for access to the documents classified by the Commission as 'internal', confirmed that there are indeed points which remain unclear in that connection. As those points concern factual aspects which may include evidence exonerating the undertakings in question, it necessarily follows that the appellant should have been heard on the results of the investigation.

Findings of the Court

30 In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9).

31 The rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission may have been different as a result of an error committed by it (Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26). An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see, to that effect, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 81, and *Limburgse Vinyl Maatschappij*, paragraph 318).

32 In the present case, the appellant's line of argument is rebutted by the Court of First Instance's finding, in paragraph 114 of the judgment under appeal, that the Commission's internal notes on its investigation 'clearly did not contain any exonerating material' in respect of the undertakings concerned. The appellant challenges that finding by the Court of Instance in its entirety but makes no effort to demonstrate how it is erroneous.

33 Moreover, the appellant cannot properly claim that its being heard in relation to the results of the investigation could have clarified certain unclear points. That argument is tantamount to casting doubt on the finding by the Court of First

Instance, in paragraph 108 of the judgment under appeal, that DG III had provided DG IV with 'precise and detailed explanations'. However, as it follows from an assessment of facts and evidence, that finding is not, in principle, subject to review by the Court of Justice in appeal proceedings.

34 The Court of First Instance properly took the view, in paragraph 116 of the judgment under appeal, on the basis of those considerations, that the arguments alleging infringement of procedural rights during the administrative procedure were unfounded.

35 It follows that the second limb of the first ground of appeal, alleging infringement of the appellant's rights of defence during the administrative procedure, must be rejected.

36 Accordingly, it is likewise unnecessary to consider, in the context of that limb, the argument that an error allegedly committed during the administrative procedure may be remedied in the judicial proceedings.

37 In the light of the above findings, the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

The second ground of appeal

38 The second ground of appeal can be divided into two limbs. The first limb alleges infringement of Articles 5 and 6 of the 1993 Rules of Procedure and the second alleges infringement of Article 16 of those rules.

The first limb of the second ground of appeal

39 The appellant claims that the Court of First Instance infringed Articles 5 and 6 of the 1993 Rules of Procedure, which lay down respectively the quorum and the number of votes necessary for a decision to be validly adopted by the Commission. In paragraph 142 of the judgment under appeal, it misinterpreted the minutes of the Commission session during which the contested decision was adopted ('the minutes') and, as a result, wrongly concluded that that decision had been adopted in compliance with those articles.

40 The Commission contends that the appellant is calling into question findings of fact and the assessment of evidence and that this head of complaint therefore is inadmissible.

Findings of the Court

41 The appellant is not alleging distortion by the Court of First Instance of the content of the minutes but is merely challenging its assessment of those minutes in paragraph 142 of the judgment under appeal.

42 It must therefore be held that the first limb of the second ground of appeal is inadmissible.

The second limb of the second ground of appeal

43 The appellant submits that the Court of First Instance misapplied Article 16 of the 1993 Rules of Procedure on the authentication and form of Commission decisions. It erred in concluding that the contested decision notified by the Commission to the appellant had been authenticated on 23 February 1994. First, the Court of First Instance established neither that the version of the contested decision notified to the appellant was identical to the versions C(94)321/2 and C(94)321/3 of that decision, which the appellant, moreover, disputes were annexed to the minutes in the due and proper manner, nor that the notified version itself was annexed to the minutes in such a manner. Second, the Commission was unable to produce the minutes with the original signatures of its President and Secretary-General, and the date on which they were signed is missing from the minutes. In addition, the Court of First Instance misconstrued the scope of the presumption that Community measures are valid.

44 The Commission contends that the complaint that the versions of the contested decision were not identical is inadmissible on the grounds that the appellant provides no reasons for its criticism of the Court of First Instance's line of argument in that regard and that this ground of appeal relates to the determination of facts for which the Court of First Instance has sole jurisdiction. Similarly, with respect to proof that the contested decision was authenticated, the Commission takes the view that this head of complaint is inadmissible because, save where the evidence has been distorted, such an issue falls within the exclusive jurisdiction of the Court of First Instance.

Findings of the Court

45 By this limb of the second ground of appeal, the appellant again challenges the assessments of the facts and evidence by the Court of First Instance in the judgment under appeal, specifically those in:

— paragraph 162, in which the Court of First Instance assumed that documents C(94)321/2 and C(94)321/3 were annexed to the minutes;

— paragraph 163, in which the Court of First Instance took the view that it had not been established that there was any substantive difference between the notified version of the contested decision and that annexed to the minutes;

— paragraph 164, in which the Court of First Instance ruled that documents C(94)321/2 and C(94)321/3 had to be regarded as having been authenticated by the signatures of the President and the Secretary-General of the Commission on the first page of the minutes;

— paragraph 165, in which the Court of First Instance decided that the certification of authenticity by the titular Secretary-General of the Commission provided sufficient proof for legal purposes that the original version of the minutes bore the original signatures of the President and the Secretary-General of the Commission; and

— paragraph 167, in which the Court of First Instance held that the minutes had been properly signed by the President and the Secretary-General of the Commission on 23 February 1994.

46 With respect to the reference in paragraph 164 of the judgment under appeal to the presumption of validity enjoyed by the measures of Community institutions (see, inter alia, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48), suffice it to state that the Court of First Instance did not draw from that presumption any factual or legal conclusion but relied solely on its own assessment of the facts and evidence to conclude that the contested decision had been properly authenticated.

47 It follows that, in so far as the second limb of the second ground of appeal is directed against that reference, it is irrelevant and therefore unfounded.

48 Accordingly, it must be held that this limb is in part inadmissible and in part unfounded.

49 The second ground of appeal is therefore in part inadmissible and in part unfounded.

The third ground of appeal

50 The third ground of appeal alleges infringement by the Court of First Instance of Article 33 of the ECSC Treaty in so far as it exceeded its jurisdiction to review the contested decision.

51 The first and second paragraphs of Article 33 of the ECSC Treaty are worded as follows:

'The Court of Justice shall have jurisdiction in actions brought by a Member State or by the Council to have decisions or recommendations of the Commission declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court of Justice may not, however, examine the evaluation of the situation, resulting from economic facts or

circumstances, in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

Undertakings or associations referred to in Article 48 may, under the same conditions, institute proceedings against decisions or recommendations concerning them which are individual in character or against general decisions or recommendations which they consider to involve a misuse of powers affecting them.'

52 The ground of appeal is directed against paragraph 392 of the judgment under appeal, which states:

'It must therefore be concluded that, in recitals 263 to 272 of the [contested] decision, the information exchange systems in question were regarded as being separate infringements of Article 65(1) of the Treaty. In so far as they seek to alter this legal assessment, the arguments submitted by the Commission in its reply of 19 January 1998 and at the hearing must therefore be rejected.'

53 The appellant submits that the Court of First Instance exceeded the jurisdiction conferred on it by Article 33 of the ECSC Treaty in so far as, in paragraph 392 of the judgment under appeal, it rectified the contested decision by interpreting it in a way which, if reference is made to the express explanations of the Commission and to the wording of the decision, does not correspond to its content. The Court of First Instance found that the Commission had regarded the exchange of information as a separate infringement, even though the Commission itself stated, in response to a question posed by the Court of First Instance, that it had acted on the basis that the exchange of information had formed part of wider infringements consisting, inter alia, in price-fixing and market-sharing agreements, since that exchange had facilitated the implementation of those agreements.

54 In the opinion of the Commission, this ground of appeal is inadmissible because the classification of the information exchange system by the Commission is not a question of law but one of fact, which the Court has no jurisdiction to review. It submits, in the alternative, that the ground of appeal is unfounded. The appeal is directed against the contested decision and not against the explanations given by the Commission's representatives during the procedure, which, moreover, the Court of First Instance is not required to take into account.

Findings of the Court

55 The appellant does not establish, and, moreover, does not seek to establish, how the Court of First Instance infringed Article 33 of the ECSC Treaty and exceeded its jurisdiction by interpreting itself the contested decision rather than relying on the explanations provided by the Commission's representatives in the reply of 19 January 1998 and at the hearing.

56 It is sufficient to point out in that connection that, where the Court of First Instance rules on an application for annulment of a Community measure, it must interpret that measure itself.

57 It follows that, in interpreting the contested decision, the Court of First Instance did not exceed its jurisdiction and that the third ground of appeal is unfounded.

The fourth ground of appeal

58 The fourth ground of appeal alleges infringement by the Court of First Instance of Article 65(1) of the ECSC Treaty. By the first limb of this ground of appeal, the

appellant complains that the Court of First Instance wrongly treated the exchange of information as constituting a separate infringement and, by the second limb, that it misinterpreted the concept of 'normal competition'.

The first limb of the fourth ground of appeal

59 The first limb of the fourth ground of appeal alleges infringement by the Court of First Instance of Article 65(1) of the ECSC Treaty in so far as — even if it were to be taken as established that the exchange of information was a separate infringement, which was disputed in the third ground of appeal — the Court of First Instance neither explained nor demonstrated the alleged effect of that exchange of information on competition.

60 This limb of the ground of appeal is directed against paragraphs 393 to 412 of the judgment under appeal and, more specifically, paragraphs 401 and 406.

61 In paragraph 393 of the judgment under appeal, the Court of First Instance observed that 'Article 65(1) of the Treaty is based on the principle that every trader must determine independently the policy which he intends to follow on the common market'.

62 In the following paragraphs of the judgment under appeal, the Court of First Instance found that the information distributed was detailed (paragraph 394) and had been updated and sent out frequently (paragraphs 395 to 397), that the information had been sent only to a certain number of manufacturers, to the exclusion of consumers and other competitors (paragraph 398), that the products in question were homogenous (paragraph 399) and that the structure of the market was oligopolistic, which could itself reduce competition (paragraph 400).

63 The Court of First Instance thus held in paragraph 401 of the judgment under appeal:

'The matters set out in recitals 49 to 60 of the [contested] decision confirm that, having regard to all the circumstances of the case, in particular the fact that the information distributed was up-to-date, broken down and intended only for producers, the product characteristics, and the degree of market concentration, the arrangements in question clearly affected the participants' decision-making independence.'

64 Next, the Court of First Instance observed, in paragraph 402 of the judgment under appeal, that the information distributed had been the subject of regular discussions within the Eurofer Committee, called the 'Poutrelles Committee' ('the Poutrelles Committee'), during which some undertakings had been criticised. In paragraph 403 of the judgment under appeal, it concluded that the information received under the arrangements in question was capable of appreciably influencing the conduct of the undertakings.

65 In paragraph 404 of the judgment under appeal, the Court of First Instance held that the mutual control inherent in the exchange of information operated by reference to previous policy of the Commission, which tended towards the maintenance of 'traditional flows' of trade.

66 In paragraph 406 of the judgment under appeal, the Court of First Instance concluded that:

'It follows that the information exchange systems in question appreciably reduced the decision-making independence of the participating producers by substituting practical cooperation between them for the normal risks of competition.'

67 The appellant maintains that, in the present case, the exchange of information did not relate to prices but was intended to gather statistics on the quantities ordered and delivered. In principle, such an exchange has the effect of stimulating competition.

68 The appellant submits that the Court of First Instance failed to draw a clear distinction between, on the one hand, the infringements of Article 65(1) of the ECSC Treaty consisting of the agreements and, on the other, of a separate information exchange system. According to the appellant, where an information exchange system implements or monitors an illegal agreement, that system is not a separate infringement of Article 65(1) and does not require a separate legal assessment. For an information exchange system to be regarded as a separate infringement, as the Court of First Instance did in paragraph 392 of the judgment under appeal, that system's restrictive effect on competition must follow from the system itself and, if relevant, from the general market structure but not from the combination of that information exchange system with an alleged agreement on prices.

69 The appellant takes the view that the Court of First Instance was wrong to invoke the case-law relating to the tractor market (Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, and Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, and Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175) when assuming that, as had been the case with that market, the structure of the beams market was likewise characterised by a narrow oligopoly and thus justifying its finding that the information exchange systems, even considered in isolation, amounted to a breach of competition law. As the Court of First Instance itself found, in paragraph 400 of the judgment under appeal, the 10 largest undertakings participating in that system accounted for only two thirds of the beams market, which indicates strong competition between several undertakings. In any event, this precludes any assumption of a simple oligopolistic structure and *a fortiori* any assumption of a highly concentrated market.

70 The Commission contends that the criticism of paragraph 401 et seq. of the judgment under appeal is unfounded because, contrary to what the appellant claims, the Court of First Instance did establish in those paragraphs that the information exchange systems, as such, were anti-competitive.

71 According to the Commission, the appellant's criticism of the findings of the Court of First Instance regarding the structure of the beams market is inadmissible since it is directed against assessments of fact. It submits further that the appellant itself described the beams market as an oligopolistic market in paragraph 80 of its application of 8 April 1994, by which it brought the proceedings at first instance.

72 The Commission also disputes the appellant's criticism of the references to the cases concerning the tractor market. In the judgments delivered in those cases, which are cited in paragraph 69 of this judgment, the Court of First Instance expressly stated that a positive effect on competition of transparency between traders is dependent on an atomisation of supply on the market, which was not the case with regard to the beams market.

73 In addition, the Commission notes that the appellant criticises only one factor, whereas the Court of First Instance based its finding that the exchange of information was anti-competitive on several circumstances. The Commission submits that the beams market can be distinguished from the tractor market since the products on the former market are more homogenous, which limits competition on the basis of product characteristics.

74 The Commission further claims that examination of the effects of an agreement on competition involves a complex economic assessment and that judicial review by the Community judicature must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers. The appellant has in no way

established that the Court of First Instance failed to observe those standards when reviewing the Commission's examination of the exchange of information in question.

75 In its reply, the appellant submits that its criticism relates to the legal conclusions drawn from the structure of the market as established by the Court of First Instance. It therefore concerns a question of law subject to review by the Court of Justice.

76 It claims that there are no grounds for comparing the beams market with that for tractors and that the criterion of homogeneity of the products is irrelevant in the present case. In the decision giving rise to the judgments cited in paragraph 69 of this judgment, the Commission viewed tractors as homogenous products on the ground that they fulfil the same functions and are compatible with all other agricultural machines to be attached to a tractor. The structure of the market which was the subject of those judgments was exceptional, which cannot be said of the market at issue in the present case.

Findings of the Court

77 First of all, the first limb of the fourth ground of appeal cannot call into question, even indirectly, the Court of First Instance's finding, examined in connection with the third ground of appeal, that the exchange of information was treated as a separate infringement in the contested decision.

78 Moreover, it should be borne in mind that, although as a general rule the Community judicature undertakes a comprehensive review of the question

whether or not the conditions for applying the competition provisions of the EC and ECSC Treaties are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (see, to that effect, with respect to Article 85 of the EC Treaty (now Article 81 EC), Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62).

79 Such a rule is laid down in the first paragraph of Article 33 of the ECSC Treaty, which provides that '[t]he Court of Justice may not... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application'.

80 The present limb of the ground of appeal must be considered in the light of those factors.

81 According to the case-law relating to the tractor market, referred to in paragraph 69 of this judgment, in which the Court of First Instance and the Court of Justice first examined an agreement on the exchange of information in the context of the EC Treaty and the general findings of which can be applied to the ECSC Treaty, such an agreement is incompatible with the rules on competition if it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (see, in particular, Case C-7/95 P *John Deere*, cited above, paragraph 90).

82 The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual 'plan' to have been worked out, are to be understood in the light of the concept inherent in the provisions of the EC and ECSC Treaties on competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers (see Case C-7/95 P *John Deere*, paragraph 86, and the case-law cited therein).

83 While it is true that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (Case C-7/95 P *John Deere*, paragraph 87, and the case-law cited therein).

84 In paragraphs 88 to 90 of that *John Deere* judgment, the Court confirmed the general premiss on which the Court of First Instance based its reasoning, namely that:

— in principle, where there is a truly competitive market, transparency between traders is likely to lead to intensification of competition between suppliers, since the fact that in such a situation a trader takes into account information on the operation of the market, made available to him under the information exchange system, in order to adjust his conduct on the market, is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders all uncertainty about the foreseeable nature of his competitors' conduct;

— however, on a highly concentrated oligopolistic market, the exchange of market information is liable to enable undertakings to be aware of the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

85 In paragraph 89 of its *John Deere* judgment, the Court also noted that the Court of First Instance had taken account of the detailed and confidential nature of the information exchanged, of the frequency of its exchange and of the fact that it was intended only for the undertakings participating in the exchange, to the exclusion of their competitors and of consumers.

86 Contrary to what the appellant claims, an information exchange system may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market. It is true that, in its judgment in Case T-35/92 *John Deere*, cited above, which was upheld in this regard by the Court's judgment in *John Deere*, the Court of First Instance concluded that the tractors market was such a market. However, those judgments take into consideration a number of criteria in that regard, the only general principle applied in relation to the market structure being that supply must not be atomised.

87 It follows that, in choosing the oligopolistic structure of the relevant market as one of the criteria of assessment, without seeking to establish whether the market was highly concentrated, the Court of First Instance did not infringe Article 65(1) of the ECSC Treaty as it must be interpreted in the light of the Court's case-law relating to exchanges of information.

88 The finding that, in the present case, the beams market was oligopolistic in structure is an assessment of fact which is not subject to review by the Court in appeal proceedings. That is true also of the finding that the products were homogenous.

89 In light of the case-law referred to in paragraphs 81 to 85 of this judgment and given the various findings made by the Court of First Instance in paragraphs 394 to 400 of the judgment under appeal, from which it is clear that the information exchange systems in question reduced the degree of uncertainty as to the operation of the market, the Court of First Instance was right to conclude, in paragraph 401 of that judgment, that those systems clearly affected the participants' decision-making independence. Similarly, having regard to the findings made in paragraphs 402 to 404 of the judgment under appeal, the Court of First Instance was entitled to hold, in paragraph 406 of that judgment, that the decision-making independence of the undertakings participating in those systems had been appreciably reduced.

90 It follows from the above findings that the first limb of the fourth ground of appeal is unfounded.

The second limb of the fourth ground of appeal

91 By the second limb of the fourth ground of appeal, the appellant claims that the Court of First Instance infringed Article 65(1) of the ECSC Treaty by misinterpreting the concept of 'normal competition'. As a result, it wrongly took the view that that article had been infringed by the exchange of information and the conduct complained of, relating to price fixing and harmonisation of extras.

92 According to the appellant, normal competition within the meaning of the ECSC Treaty must be understood as the competitive situation resulting, in an individual case, from all the general and special conditions existing under that Treaty.

93 The appellant takes the view that, from July 1988 to June 1990, normal competition within the meaning of Article 65(1) of the ECSC Treaty was determined by a surveillance system set up by the Commission, which involved the exchange among the participating undertakings of individual data relating to quantities. Consequently, by treating the exchange of information on orders and deliveries as an infringement of competition law, the Court of First Instance erred in law.

94 As regards the price-fixing activity complained of, the Court of First Instance failed to take account of the fact that a situation accepted and encouraged by the Commission must be regarded as forming part of 'normal competition'. It should therefore have reached the conclusion that, within the framework of normal competition, undertakings are granted a degree of latitude which also covers the conduct in question.

95 The appellant also criticises paragraph 262 of the judgment under appeal, in which the Court of First Instance concluded that there was an agreement, within the meaning of Article 65(1) of the ECSC Treaty, on prices, even though the common intention of which the undertakings were accused did not go beyond the conduct which the Court of First Instance ultimately considered to be lawful and the aim of which was to reach consensus on future market trends.

96 In addition, the appellant complains that the Court of First Instance contradicted itself. On the one hand, it held, in paragraph 318 of the judgment under appeal, that none of the provisions of the ECSC Treaty permitted the concerted practices relating to price-fixing. On the other hand, in paragraph 645 of that judgment, it treated the exchange of views on price forecasts — regarded as lawful by Mr Kutscher, a former official of DG III heard as a witness by the Court of First Instance — as a concerted practice, yet found, in particular in paragraph 534 of the judgment, that the Commission had not been aware of the infringements of Article 65(1) of the ECSC Treaty.

97 Those submissions, the appellant argues, also apply to the agreements on extras. The Court of First Instance similarly infringed Article 65(1) of the ECSC Treaty by finding, in paragraph 330 of the judgment under appeal, that those agreements were in breach of that article.

98 The Commission points out that it does not determine the scope of the concept of 'normal competition', which is defined by the ECSC Treaty. It is therefore irrelevant whether the exchange of individual information was necessary to cooperation with the Commission, as defined in this case by DG III.

99 The Commission submits in this connection that it is not inconsistent to take account of the situation accepted by DG III in order to assess the economic impact of the infringement, without, however, calling into question the concept of 'normal competition' within the meaning of the ECSC Treaty.

100 The same argument applies in relation to the agreements and concerted practices concerning price-fixing. Moreover, in so far as the appellant criticises the finding in paragraph 262 of the judgment under appeal that the undertakings concluded agreements on prices, this limb of the ground of appeal is inadmissible as it is directed against findings of fact and the assessment of evidence by the Court of First Instance.

Findings of the Court

101 First of all, as follows from Article 32d CS, the first paragraph of Article 51 of the ECSC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must indicate precisely the contested

elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, to that effect, Case C-248/99 P *France* v *Monsanto* [2002] ECR I-1, paragraph 68).

102 In the present case, there is a problem in interpreting the appeal because the appellant claims to contest the interpretation by the Court of First Instance of the concept of 'normal competition' as used in Article 65(1) of the ECSC Treaty, even though its ground of appeal does not challenge paragraphs 300 to 320 of the judgment under appeal, in which the Court of First Instance found that, for the purposes of that article, that concept had to be interpreted in the same way as the corresponding concept in Article 85 of the EC Treaty and concluded that the Commission did not misconstrue the scope of Article 65(1) of the ECSC Treaty or wrongly apply the provisions of Article 85(1) of the EC Treaty to the present case.

103 However, in so far as this limb of the ground of appeal must be understood as referring to the involvement of DG III in the infringements of which the appellant is accused, it is appropriate to observe that the appellant invokes no argument calling into question the assessment made by the Court of First Instance in paragraphs 490 to 556 of the judgment under appeal. In those paragraphs, the Court of First Instance demonstrated that the undertakings concerned had concealed from the Commission the existence and the content of the discussions adversely affecting competition which they had held and of the agreements which they had concluded. In paragraph 554 of the judgment under appeal, it stated that, in any event, the provisions of Article 65(4) of the ECSC Treaty have an objective content and are binding on both undertakings and the Commission, which cannot exempt those undertakings.

104 It follows that the appellant cannot validly claim that the Court of First Instance erred in law when interpreting the concept of 'normal competition' within the meaning of Article 65(1) of the ECSC Treaty by not taking account of the competitive situation accepted and encouraged by the Commission.

105 Moreover, the present limb of the ground of appeal challenges a number of different findings made by the Court of First Instance throughout the judgment under appeal but does not set out coherent legal arguments specifically contesting that Court's assessment of the concept of 'normal competition' within the meaning of Article 65(1) of the ECSC Treaty as regards either the interpretation of the legal rule or its application in the present case in the light of the conduct of DG III.

106 As the second limb of the fourth ground of appeal is too vague to be answered, it must be declared inadmissible.

107 In light of the above findings, the fourth ground of appeal must be rejected as being unfounded in part and as being inadmissible in part.

The fifth ground of appeal

108 By the fifth ground of appeal, the appellant claims that the Court of First Instance infringed Article 65(5) of the ECSC Treaty, which authorises the Commission to impose fines on undertakings, and the fault principle in that it exaggerated the degree of fault on the part of the appellant. In particular, it argues that the Court of First Instance failed to take account of the consequences of the lack of clarity found to exist in relation to the concept of 'normal competition' within the meaning of Article 65(1) and wrongly supposed that the appellant had been entirely aware that its conduct was illegal.

109 In the appellant's opinion, when the Court of First Instance took the view, in paragraphs 411, 504, 514, 589 and 590 of the judgment under appeal, that the infringements were manifest, it contradicted its finding in paragraph 643 that the

conduct of DG III in connection with the system of surveillance implemented by the Commission from mid-1988 to the end of 1990 introduced a 'degree of ambiguity' into the meaning of the concept of 'normal competition' as used in the ECSC Treaty.

110 The appellant further points out that, in view of the legal uncertainty which existed at the time of the facts at issue, the general calls made by DG III to the undertakings encouraging them to comply with the competition rules could not have made it aware that it was acting illegally.

111 The appellant also takes issue with the 'intention to conceal' attributed to it by the Court of First Instance in paragraph 552 et seq. of the judgment under appeal. In the context of the surveillance system introduced by the Commission, it was essential that undertakings collect and prepare the information required by the Commission. The information exchanged among undertakings was not identical to that supplied to DG III because, since the latter information was in summary form, it was, by its nature, more general and less accurate.

112 The Commission submits that the ground of appeal is inadmissible in so far as, in challenging the findings of the Court of First Instance that the infringements were clear and manifest, that there were actual agreements on price-fixing, that information on deliveries was exchanged or that there was an intention to conceal, the appellant is challenging the determination and assessment of facts, which fall within the exclusive competence of the Court of First Instance. The ground of appeal is in any event unfounded as the appellant was penalised not for practices of uncertain legality but for serious infringements of the rule prohibiting cartels, as to which that undertaking could not have been in error.

Findings of the Court

113 When the Court of First Instance found, in paragraph 553 of the judgment under appeal, that the undertakings concerned had infringed the rules on competition, 'while putting up a screen to protect them from the scrutiny of the DG III officials responsible for monitoring the market', it did so only after a detailed examination of a body of facts and evidence in paragraphs 491 to 551 of that judgment.

114 In paragraph 516 of the judgment under appeal, the Court of First Instance stated, in particular, that '[n]either the documentary evidence which the parties have submitted to the Court nor the measures of inquiry and organisation of procedure which it ordered have made it possible to establish that DG III was aware of the infringements of Article 65 of the Treaty of which the applicant is accused, or, *a fortiori*, that DG III initiated, encouraged or tolerated such infringements'.

115 Similarly, it pointed out, in paragraph 552 of the judgment under appeal, that the steel undertakings and their trade association Eurofer had concealed from Commission officials the existence and content of certain of their discussions.

116 In light of all those facts and items of evidence, the Court of First Instance was entitled to conclude, in paragraph 553 of the judgment under appeal, that the undertakings could not escape their obligation to comply with Article 65(1) of the ECSC Treaty by pleading that the DG III officials knew, or ought to have known, of their practices.

117 Paragraph 643 of the judgment under appeal, in which the Court of First Instance stated that, by its conduct, 'DG III introduced a degree of ambiguity into the meaning of the concept of "normal competition" as used in the ECSC Treaty', is contained in the part of that judgment in which the Court examines the economic impact of the infringements with a view to determining whether the fine was fixed at a disproportionate amount (paragraphs 632 to 646 of the judgment under appeal).

118 Thus, in that part of the judgment under appeal, the Court of First Instance examined one of the criteria normally applied in assessing the seriousness of an infringement, while stating, in paragraph 635, that an infringement of Article 65(1) of the ECSC Treaty may be found and a fine imposed under Article 65(5) even in the absence of anti-competitive effects. As it stated in paragraph 636 of the judgment under appeal, the effect which an anti-competitive practice has is therefore not a conclusive criterion for assessing the proper amount of a fine. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing, factors which are present in this case.

119 The sentence quoted by the appellant which appears in paragraph 643 of the judgment under appeal cannot be read in isolation but must be placed in the context of the argument developed by the Court of First Instance. That line of argument led to the conclusion, in the same paragraph, that, in light of the Commission's conduct, it was unnecessary to determine the effects of the infringements committed in this case by simply comparing the situation resulting from the anti-competitive agreements with that which would have existed had there been no contact whatever between the undertakings. The Court of First Instance took the view that it was more relevant to compare the situation resulting from those agreements with the situation envisaged and accepted by DG III, in which the undertakings were supposed to meet and engage in general discussions, particularly in regard to their forecasts on future prices.

120 The Court of First Instance therefore did not contradict itself by taking into consideration the Commission's conduct in order to assess the economic effects of

the infringements while stating that that conduct had no bearing on the fact that the undertakings concerned had been fully aware that the practices complained of were anti-competitive.

121 It follows that the fifth ground of appeal is unfounded.

The sixth ground of appeal

122 The sixth ground of appeal, which also alleges infringement of Article 65(5) of the ECSC Treaty, relates to the assessment of fault with regard to the exchange of information. It is directed against paragraphs 644 and 649 of the judgment under appeal, which are worded as follows:

'644 Even in the absence of agreements such as those concluded in the present case within the Poutrelles Committee, it cannot be excluded that exchanges of views between undertakings on their price "forecasts", of the kind regarded as legitimate by DG III, would have made it easier for the undertakings concerned to adopt a concerted course of conduct on the market. Thus, were it to be supposed that the undertakings had confined themselves to an exchange of views which was general and not binding in regard to their expectations in regard to prices, solely for the purpose of preparing for the consultation meetings with the Commission, and that they had revealed to the Commission the precise nature of those preparatory meetings, it could not be ruled out that such contacts between undertakings, accepted by DG III, could have reinforced some parallel conduct on the market, particularly with regard to the price increases occasioned, at least in part, by the favourable economic trends in 1989.

...

649 For the reasons set out in paragraph 385 et seq. above, the Court has already found that the applicant's participation in the information-exchange systems described in recitals 263 to 272 of the [contested] decision must be regarded as a separate infringement of Article 65(1) of the Treaty. It follows that the Commission was entitled to take that separate infringement into account when calculating the fine imposed on the applicant.'

123 The appellant submits, in a first limb, that, when assessing the amount of the fine imposed, the Court of First Instance was wrong to confine to the agreements on price-fixing alone the scope of its findings as to the impact on normal competition of the surveillance system set up by the Commission. Those findings should also have been applied to the exchange of information.

124 In a second limb, it claims that the Court of First Instance infringed Article 65(5) of the ECSC Treaty in so far as, in paragraph 649 of the judgment under appeal, it treated the exchange of information as constituting a separate infringement and allowed that separate infringement to be taken into account when calculating the fine, even though the exchange of information had been merely ancillary to the other infringements.

125 The Commission submits that the reasons given by the Court of First Instance for the reduction of the fine relating to the price-fixing agreements did not apply to the exchange of information at issue. It does not follow from any passage in the judgment under appeal that the exchange of individual data was necessary within the framework of the surveillance system. The undertakings could simply have made their individual data available to a central service subject to a duty of confidentiality, which would have communicated the information in summary form only.

Findings of the Court

126 By the first limb of this ground of appeal, the appellant is also challenging assessments made by the Court of First Instance in that part of the judgment under appeal which examines the economic impact of the infringements with a view to determining whether the fine was fixed at a disproportionate amount. It complains that the Court of First Instance failed, with regard to the exchange of information, to take account of the fact that the economic effects of the infringement and those of conduct envisaged and accepted by the Commission were identical, as it did with regard to the price-fixing agreements.

127 In paragraph 644 of the judgment under appeal, the Court of First Instance found that there may be economic justification for taking account, for the purpose of assessing the effects of a price-fixing agreement, of the exchanges of views between undertakings on price forecasts, regarded as legitimate by DG III, as such exchanges of views may lead to parallel conduct which, though having the same economic effect as such an agreement, does not constitute an anti-competitive practice contrary to the ECSC Treaty.

128 It must, however, be stated that the appellant has not shown that there was an exchange of information regarded as legitimate by the Commission or that such an exchange could have resulted in parallel conduct having the same economic effect as the information exchange systems at issue.

129 On the contrary, as is clear from paragraph 544 of the judgment under appeal, the only exchange of information with regard to orders and deliveries of which the Commission was aware related to rapid statistics, 'aggregated at the level of the undertakings,... broken down for each product and national market of destination, with the result that no undertaking could calculate the market share of its competitors'.

130 If the Court of First Instance took the view, in paragraph 407 of the judgment under appeal, that the information exchange systems in question were not covered by that which the Commission regarded as permissible in relation to the exchange of information, this was precisely because they had a different economic effect from that of information such as rapid statistics, in so far as 'the arrangements in question clearly affected the participants' decision-making independence' (paragraph 401 of the judgment under appeal), which necessarily precludes any possibility of independent individual decisions of the same content.

131 It follows that the first limb of the sixth ground of appeal is unfounded.

132 With respect to the second limb of that ground of appeal, relating to the taking into consideration of the appellant's participation in the information exchange systems for the purpose of determining the penalty, it should be noted that, in paragraph 392 of the judgment under appeal, the Court of First Instance concluded that, in the contested decision, those systems had been regarded as being separate infringements. In paragraphs 393 to 412 of that judgment, it examined whether they had indeed been, as such, anti-competitive.

133 The Court of First Instance was therefore correct to approve, in paragraph 649 of the judgment under appeal, the Commission's action in taking account of that separate infringement when calculating the fine.

134 It follows that the second limb of the sixth ground of appeal is likewise unfounded.

135 Accordingly, the sixth ground of appeal must be rejected as unfounded.

The seventh ground of appeal

136 The seventh ground of appeal alleges infringement of Article 15 of the ECSC Treaty in so far as the Court of First Instance failed to penalise the inadequate statement of reasons given in the contested decision with regard to the calculation of the fines. By this ground of appeal, the appellant challenges the Court of First Instance's conclusion, in paragraph 606 of the judgment under appeal, that that decision contained an adequate and relevant statement of the factors taken into account in assessing the general gravity of the various infringements found to have been committed.

137 The appellant claims that the reasons for the calculation of the fines in a Commission decision must of itself enable the parties to identify the criteria actually chosen in their case to calculate the fine and the way in which those criteria were used. That, it claims, is not the case here.

138 In particular, the contested decision does not allow for identification of the manner in which the duration of the infringement was determined. In that connection, the appellant refers to paragraph 612 of the judgment under appeal, which states that 'it is clear from the Court's analysis of the facts that the Commission has duly given reasons for the duration of the infringing actions taken into account in Article 1 of the [contested] decision, by referring either to the actions of the parties involved or to the reference periods concerned by those actions'. According to the appellant, even a detailed study of that decision enables the appellant only to conjecture as to, but in no way to identify with certainty, the precise period within which the Commission placed the infringements that were the subject of complaint.

139 As regards the figures relating to the calculation of the fine, the appellant alleges that there is a contradiction between paragraphs 608 and 609 of the judgment under appeal, in which the Court of First Instance referred to the relevant

case-law, and paragraphs 610 and 611, in which it held that the figures provided by the Commission during the proceedings were sufficient. The statement of reasons must be included in the decision imposing the fine. In the absence of such a statement, the undertaking can ascertain the method used for calculating the fine only by bringing an action.

140 The Commission argues that the Court of First Instance properly reviewed the application to each undertaking of the various criteria for calculating the fine. It thus examined, in paragraphs 607, 614 and 626 of the judgment under appeal, the duration of each infringement, recidivism and the appellant's share capital respectively. The ground of appeal is therefore unfounded in that regard.

141 It contends that the challenge to the Court of First Instance's assessment of the duration of the infringement is inadmissible as it is directed against the evaluation of facts, which falls within that Court's exclusive jurisdiction.

142 As regards the calculation of the fine, the Commission submits that the Court of First Instance stated that it would have been desirable for the mathematic calculation of the fine to be included in the decision imposing that fine but did not demand its inclusion. It also took the view that the criteria used in calculating the fine had been included in the contested decision. The Commission contends that this limb of the ground of appeal is unfounded.

Findings of the Court

143 The first paragraph of Article 15 of the ECSC Treaty provides that '[d]ecisions, recommendations and opinions of the Commission shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained.'

144 It is settled case-law that the purpose of the obligation to state the reasons on which an individual decision is based is to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested (Case 32/86 *Sisma* v *Commission* [1987] ECR 1645, paragraph 8).

145 In the present case, the Court of First Instance was correct in law to take the view, in paragraph 606 of the judgment under appeal, that the contested decision contains, in recitals 300 to 312, 314 and 315 of its grounds, an adequate and relevant statement of the factors taken into account in assessing the general gravity of the various infringements alleged and to find, in paragraph 607 of that judgment, that Article 1 of the contested decision detailed the period taken into account for each infringement.

146 The grounds of the contested decision refer, in recital 300, to the gravity of the infringements and state the factors taken into consideration in fixing the fine. Account was thus taken, in recital 301, of the economic situation of the steel industry, in recitals 302 to 304, of the economic impact of the infringements, in recitals 305 to 307, of the fact that at least some of the undertakings and their associations were aware that their conduct was or could have been contrary to Article 65 of the ECSC Treaty, in recitals 308 to 312, of misunderstandings which might have arisen during the period of the crisis regime and, in recital 316, of the duration of the infringements. The contested decision also sets out in detail the participation of each undertaking in each infringement.

147 As regards the fact that, in Article 1 of the contested decision, the period during which each infringement was committed was not specifically stated by reference to the dates of its commencement and conclusion but rather was simply assessed in terms of months, the Court of First Instance was correct to take the view that such a presentation constituted adequate reasoning in view of the criteria which had to be taken into account in calculating the fine. Moreover, the account of the facts in that decision contains numerous dates which make it possible to identify

the periods of infringement and, in any event, the appellant provides no evidence showing that the assessment in months of the duration of the infringements was inaccurate in so far as it is concerned.

148 It must be concluded that the information contained in the contested decision enabled the undertaking concerned to ascertain the reasons for the adopted measure in order to assert its rights and allows the Community judicature to review the legality of that decision. It follows that the Court of First Instance did not infringe Article 15 of the ECSC Treaty in finding that adequate reasons had been given in the contested decision with regard to the calculation of the level of the fines.

149 With regard to statements of figures relating to the calculation of fines, it is appropriate to point out that, however useful and desirable such figures may be, they are not essential to compliance with the duty to state reasons for a decision imposing fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own power of assessment (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 75 to 77, and *Limburgse Vinyl Maatschappij*, paragraph 464).

150 The Court of First Instance was therefore correct and did not contradict itself in stating, in paragraphs 608 and 609 of the judgment under appeal, that it is desirable for figures relating to the calculation of fines to be provided while at the same time finding, in paragraph 607 of that judgment, that the reasons given for the contested decision were adequate as regards the level of the fines.

151 It follows from these findings that the seventh ground of appeal is unfounded.

The eighth ground of appeal

152 In its eighth ground of appeal, the appellant submits that, by reason of the excessive duration of the proceedings, lasting almost five years, the Court of First Instance infringed its right to legal protection within a reasonable period.

153 The Commission argues that this ground of appeal is unfounded because the proceedings before the Court of First Instance were not excessively lengthy given the specific circumstances of the case. Significant financial interests were at stake in these proceedings. The proceedings were complex, involved 11 applications submitted in four languages and required the Court of First Instance to examine in detail copious documentation. Moreover, the proceedings were delayed by the need to deal with questions relating to the production of documents.

Findings of the Court

154 The general principle of Community law that everyone is entitled to a fair hearing, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21, and *Limburgse Vinyl Maatschappij*, paragraph 179).

155 The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (*Baustahlgewebe*, cited above, paragraph 29, and *Limburgse Vinyl Maatschappij*, paragraph 187).

156 The Court has held in that regard that that list of criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. The purpose of those criteria is to determine whether the time taken in the handling of a case is justified. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is prima facie too long. Conversely, the time taken may be regarded as longer than is reasonable in the light of just one criterion, in particular where its duration is the result of the conduct of the competent authorities. Where appropriate, the duration of a procedural stage may be regarded as reasonable from the outset if it appears to be consistent with the average time taken in handling a case of its type (*Limburgse Vinyl Maatschappij*, paragraph 188).

157 In the present case, the proceedings before the Court of First Instance commenced with the lodging on 8 April 1994 of the application bringing the present appellant's action for annulment of the contested decision and were concluded on 11 March 1999, the date of delivery of the judgment under appeal. They thus lasted almost five years.

158 Such a duration is, prima facie, considerable. However, it should be noted that 11 undertakings brought actions for annulment of the same decision, in four different languages of procedure.

159 As pointed out in paragraphs 50 to 56 of the judgment under appeal, the Court of First Instance had to rule on various claims regarding access to the documents relating to the administrative procedure. The Commission having lodged, on 24 November 1994, a file containing 11 000 documents relating to the contested decision, submitting that the undertakings in question should not be given access to the documents containing business secrets or to the Commission's own internal documents, the Court of First Instance had to hear the parties on that issue, examine all the documents and decide which documents each of the applicants might have access to.

160 By order of 19 June 1996 in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537, the Court of First Instance ruled on the applicants' right of access to the documents in the Commission's file emanating, first, from the applicants themselves and, second, from third parties not involved in the proceedings which the Commission had, in the interests of those parties, classified as confidential.

161 By order of 10 December 1997 in *NMH Stahlwerke*, cited above, the Court of First Instance ruled on the applicants' requests for access to the documents classified by the Commission as 'internal'.

162 The various actions brought by the undertakings affected by the contested decision were joined for the purposes of measures of inquiry and the oral procedure. As is explained in paragraphs 57 to 67 of the judgment under appeal, a number of measures of inquiry were ordered by the Court of First Instance in order to prepare that procedure. In that connection, the Court of First Instance addressed various written questions to the parties and ordered the production of documents and the hearing of witnesses.

163 The oral procedure was closed at the end of the hearing on 27 March 1998.

164 The judgment under appeal was delivered on 11 March 1999, that is to say, on the same day as the other 10 judgments ruling on the actions brought against the contested decision.

165 It follows from the above findings that the duration of the proceedings leading to the judgment under appeal can be explained, inter alia, by the number of undertakings which participated in the concerted practice at issue and brought

actions against the contested decision, which made it necessary to examine those different actions simultaneously, by the legal issues relating to access to the Commission's voluminous file, by the in-depth examination of the file by the Court of First Instance and by the linguistic constraints imposed by that Court's Rules of Procedure.

166 It follows that the duration of the proceedings before the Court of First Instance is justified in the light of the particular complexity of the case.

167 The eighth ground of appeal is for that reason unfounded.

168 It follows from all of the above findings that the appeal must be dismissed.

Costs

169 Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the appellant and since that party has been unsuccessful in all of its grounds of appeal, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Thyssen Stahl AG to pay the costs.**

Wathelet Edward La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber