# OPINION OF ADVOCATE GENERAL STIX-HACKL

## delivered on 26 September 2002 [1]

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## I — Introduction

1. The present case is an appeal brought against the judgment of the Court of First Instance of 11 March 1999 in Case T-151/94 [2] ('the judgment under appeal').

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

3. On 16 February 1994 the Commission adopted 'Commission Decision 94/215/ECSC... relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams' [5] ('the Decision') against 17 European steel undertakings and one of their trade associations. In the Commission's view, the parties to whom the Decision was addressed had infringed the competition rules of the European Coal and Steel Community by establishing systems for the exchange of information, by fixing prices and by sharing markets in an anti-competitive manner. The Commission imposed fines on 14 of the undertakings. In the case of British Steel plc, which changed its name to British Steel Ltd on 8 October 1999 and to Corus UK Ltd on 17 April 2000 (hereinafter 'the appellant'), the Commission imposed a fine of ECU 32 000 000.

4. Several of the undertakings concerned, including the appellant and the trade association, challenged the Decision before

2 — *British Steel* v *Commission* [1999] ECR II-629.

3 — OJ 1988 L 212, p. 1.

4 — See Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 33.

5 — OJ 1994 L 116, p. 1.

the Court of First Instance. The Court of First Instance ultimately reduced the fine to EUR 20 .000 000 and dismissed the remainder of the application.

5. The appellant lodged an appeal against that judgment with the Registry of the Court of Justice on 25 May 1999.

## II — Forms of order sought and grounds of appeal

6. In its appeal the appellant asks the Court to:

(1) set aside the judgment of the Court of First Instance in Case T-151/94 *British Steel* v *Commission of the European Communities* of 11 March 1999;

(2) in so far as the circumstances permit, annul 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 (allegedly) engaged in by European producers of beams;

(3) alternatively, reduce or cancel the fine set by the Court of First Instance imposed on the appellant by Article 4 of Commission Decision 94/215/ECSC;

(4) order interest to be paid by the Commission on such part of the fine as is repaid under (2) or (3) above, in respect of the period since payment of the fine by the appellant on 2 June 1994 until repayment by the Commission and at such rate as is considered by the Court to be fair and just;

(5) order the Commission to pay the costs.

The Commission asks the Court to:

(1) dismiss the appeal;

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

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

*First* ground of appeal:

'The Court of First Instance erred in law in denying British Steel a fair hearing within a

reasonable period, contrary to Article 6 of the European Convention for the Protection of Human Rights (ECHR)'.

*Second* ground of appeal:

'The Court of First Instance erred in law in finding that the Decision had been adopted and authenticated in conformity with the requisite rules and procedures'.

*Third* ground of appeal:

'The Court of First Instance erred in law in characterising the facts as agreements or concerted practices prohibited by Article 65(1) of the ECSC Treaty, in disregard of its own findings as to the nature and purpose of the contacts taking place between the undertakings within the framework of the Commission's monitoring system and contrary to the meaning and purpose of Article 65(1)'.

*Fourth* ground of appeal:

'The Court of First Instance erred in law in finding, contrary to the rights of defence, that, during the administrative procedure, the Commission had provided the appellant with sufficient information concerning its own role and had carried out an adequate investigation into its own role'.

*Fifth* ground of appeal:

'The Court of First Instance erred in law in finding that the Decision contained an adequate statement of reasons for the fine imposed on the appellant'.

*Sixth* ground of appeal:

'The Court of First Instance erred in law in failing, contrary to Article 33 of the Treaty, to annul the Decision to the extent to which it had found that the appellant had committed infringements of Article 65(1) prior to 1 July 1988.'

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

8. The arguments submitted on the individual grounds of appeal and their component parts indicate that the appellant is

alleging various infringements of the ECSC Treaty. Regarding the essential issues of law, the appellant is in essence arguing that the Court of First Instance was in breach of *Community law* in the judgment under appeal in that it:

— erred in law in assuming that the Decision was *formally valid*, even though

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

  the Decision had not been properly adopted (*second* ground of appeal);

— erred in law in assuming that the Decision was *substantially valid*, even though

  the practices complained of in the Decision could not have had a detrimental effect on 'normal competition' within the meaning of Article 65 of the ECSC Treaty (*third* ground of appeal) and

  there was no breach of Article 65(1) of the ECSC Treaty inasmuch as participation in the information exchange system did not constitute a separate breach of the competition rules (*third* ground of appeal) and

  Article 1 of the Decision included two infringements for the period prior to 1 July 1988 which, according to the findings of the Court of First Instance itself, the appellant had not committed (*sixth* ground of appeal);

— erred in law in its assessment of the *fine* and of the grounds on which it was based (*fifth* ground of appeal);

— did not provide protection under the law within a reasonable period, contrary to *Article 6 of the ECHR* (*first* ground of appeal).

9. The examination which follows is arranged according to this summary. The grounds of appeal put forward by the appellant, their component parts and arguments and the Commission's contentions shall be examined under these individual points.

10. The grounds of appeal in these proceedings correspond, in part, to the sub-

stance of the grounds of appeal or parts of the grounds of appeal put forward in Case C-194/99 P *Thyssen Stahl* v *Commission of the European Communities*.[6] I am also delivering my Opinion in that case today. Where there is a substantive correspondence of arguments, I shall refer in the present Opinion to the analyses set out in my Opinion in Case C-194/99 P.

## III — Examination of the case

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

#### 1. The infringement of procedural rights by the Commission (*fourth* ground of appeal)

##### Material arguments of the parties

11. The *appellant* considers that the Court of First Instance erred in law in failing to recognise that, as a result of its not having been fully provided with the information on the role of DG III needed for its defence, particularly with regard to its awareness of practices to which objection was subsequently raised and with regard to the connection with measures put in place under Article 47 et seq. of the ECSC Treaty, the appellant's procedural rights had been infringed.

12. It is clear from the case-law of the Court of First Instance[7] that the Commission must provide access to information in its possession in so far as the undertakings involved require it to defend themselves against allegations made by the Commission. The principle of equality of arms requires that the undertakings in question must, in principle, have access to the same information as the Commission. The right of access to the Commission's information therefore depends on the nature of the allegations made by that institution. It is also clear from the case-law cited that it is not for the undertakings concerned to prove that certain Commission documents may contain exonerating material and that it is therefore sufficient if there is a possibility that such documents exist.

13. The appellant categorises as general information required by it for its defence several of the documents produced by the Commission in the proceedings before the Court of First Instance relating to the contacts between DG III and the undertak-

6 — [2003] ECR I-10821.

7 — Cases T-30/91, T-31/91 and T-32/91 *Solvay* v *Commission* [1995] ECR II-1775, II-1821 and II-1825, and Cases T-36/91 and T-37/91 *ICI* v *Commission* [1995] ECR II-1847 and II-1901.

ings concerned, plus statements made by a member of the Commission's staff, excerpts from which are quoted by the appellant from the English transcript of the oral proceedings before the Court of First Instance.

14. The appellant considers that, had it been informed in good time of this information, to which it was not given access until the proceedings had reached the Court of First Instance, it would have been in a position to influence the course of the procedure before the Commission in such a way as to affect the substance of the Decision, in relation to the following issues:

— the proper construction to be placed on the internal discussions between the producers;

— the meaning of the concept of 'normal competition' during the period in question;

— the Commission's knowledge of the internal discussions between the producers and the subsequent exchange of opinions and forecasts;

— the meaning and relevance of Article 46 et seq. of the ECSC Treaty to the application of Article 65 of the ECSC Treaty, as meetings between the Commission and the undertakings concerned, considered by DG III to be lawful, could also have affected the market conduct of producers;

— the impact of the arrangements agreed between the Commission and the Scandinavian authorities on the allegation of price-fixing on the Danish market;

— the culpability of the alleged practices in relation to the appropriateness and level of the fine.

15. The appellant submits that the observations by the Court of First Instance at paragraphs 96 et seq., 101 and 102 of the judgment under appeal are concerned not with material collected by the Commission in general but only with the Commission's notes relating to its internal investigation. The Court of First Instance, it argues, did not consider the significance for the rights of defence of the non-production of those documents during the procedure before the Commission or of the fact that the testimony of witnesses concerning the role of the Commission was not provided until the judicial proceedings.

16. The appellant also categorises the documents relating to the Commission's internal investigations into the appellant's own role as information that ought to have been disclosed to it as it was necessary in order to safeguard its rights of defence. According to the *Solvay* and *ICI* judgments cited by it, the Commission's duties in regard to disclosure of documents are not limited to inculpatory material but extend to all information relevant to the defence.

17. The appellant particularly criticises paragraph 96 of the judgment under appeal, according to which '... 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'. In this case too the Commission had an obligation to disclose all documents in its possession, as they were necessary for the appellant's defence.

18. The appellant also takes issue with paragraph 98 of the judgment under appeal, according to which '... the fact that the Commission decided to open an internal investigation was not, in itself, such as to oblige it to make the material collected during that investigation available to the applicants'. The Court of First Instance here contradicted itself by stating that the documents were not relevant to British Steel's defence during the administrative procedure, even though it had ordered production of those documents during the judicial proceedings and even relied on them at various points in the judgment under appeal.

19. The appellant further criticises paragraph 92 of the judgment under appeal. The Court of First Instance here noted that there were deficiencies in DG IV's investigation regarding the conduct of DG III but found at the same time that it was not DG IV's function to check the explanations provided by DG III. This finding is incorrect because DG IV was responsible for the conduct of the investigation and ought for that reason to have satisfied itself as to the accuracy of the explanations provided by DG III. The duty to comply with Article 36 of the ECSC Treaty is a duty imposed on the Commission as a collegiate body, so that DG IV's failure to obtain and forward the necessary information cannot be excused by the fact that that information was available within DG III rather than DG IV.

20. The appellant also challenges paragraphs 81, 99 and 102 of the judgment under appeal, which state that it is for the Commission to rule on the relevance to the defence of documentation in its possession. Not even considerations of confidentiality can justify the Commission in determining by itself the relevance of documentation to

the defence. The principles and obligations which give rise to the Commission's duty to investigate also require it to carry out an investigation guaranteeing proper protection for procedural rights.

21. The appellant also refers to the judgment in Case T-42/96, [8] in which the Court of First Instance held that, where the Commission is alleged to have committed serious breaches of its obligations, in order for the right to be heard to be exercised effectively the Commission must provide access to all non-confidential administrative documents relating to the decision, if requested to do so. Indeed, documents which the Commission does not consider to be relevant may well be of interest to the undertakings concerned. If the Commission could unilaterally exclude from the administrative procedure those documents which might be detrimental to it, that could infringe the procedural rights of the parties. In the judgment under appeal, the Court of First Instance failed to follow the rules that it had itself established.

22. The appellant submits finally that, contrary to the findings of the Court of First Instance at paragraph 101 of the judgment under appeal, the procedural rights of the undertakings were not sufficiently guaranteed by their right to bring an action before the Court of First Instance. If an infringement of the right to a fair hearing could be remedied during annulment proceedings, the Commission would be absolved of the duty to comply with such essential procedural requirements during the administrative procedure and the Court of First Instance's duty to declare void decisions which have infringed such requirements would be rendered nugatory.

23. In conclusion, the appellant refers by way of example to paragraphs 320 and 558 of the judgment under appeal. The Court of First Instance dismissed the appellant's argument that the Commission was aware of and even encouraged the conduct of the undertakings that was subsequently complained of, basing this conclusion simply on records originating with the appellant and one of the other applicants in the proceedings before the Court of First Instance, the trade association Eurofer. However, the Court of First Instance erred in law in its failure to order the Commission to produce other documents in this connection. Knowledge of these documents during the procedure before the Commission would have enabled the appellant to put forward an appropriate defence.

24. The *Commission* argues that the case-law cited by the appellant does not relate to internal Commission documents, that is to say, documents which it is under no obligation to forward to undertakings under investigation, but merely to documents that are in the possession of the Commission for other reasons.

8 — Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401.

25. It argues that, even if there had been documents in its possession which demonstrated that DG III knew the full extent of the conduct of the undertakings subsequently complained of, a situation which it describes as extremely hypothetical, that could have been relevant only to the level of the fine, not to the question whether breaches of competition law had at all been committed.

26. The Commission takes the view that the Court of First Instance was otherwise correct in law in its answer to the question of disclosure to the appellant of documents concerning the internal investigations at paragraph 96 et seq. of the judgment under appeal. It found, at paragraph 100, that the Commission's notes concerning its internal investigation were by their very nature confidential and clearly did not contain any exonerating material. The other documents identified concerned meetings between the producers and the Commission and, by definition, the producers were aware of those meetings.

27. Furthermore, although all of the documents were disclosed to the appellant, it was unable to point to any exonerating evidence that the Commission ought to have disclosed during the administrative procedure. The Court of First Instance for that reason stated, at paragraph 102, that 'there is nothing to suggest that the applicant was not enabled to express its views during the administrative procedure, particularly in view of its voluminous replies to the statement of objections'.

28. The appellant does not state in what way it disagrees with that conclusion. Nor does it demonstrate how the arguments which it adduced during the administrative procedure might have been reinforced had it had access to the documents in question. More particularly, it fails to indicate which documents could have helped it in putting its views across.

29. Nor is there any inconsistency between the Court of First Instance's finding that the documents were not disclosed during the administrative procedure and the fact that it ordered their production during the judicial proceedings. Those documents were not evidence on which the Commission intended to rely against any of the undertakings. The case-law cited by the appellant cannot be transposed without qualification to a case in which the gravamen of the allegation in respect of procedural rights is the very different one that the Commission encouraged or tolerated the infringement of competition law.

30. As regards the harmonisation of extras, the Commission considers that this is an attempt by the appellant to have the Court review the appraisal of the facts. Furthermore, in the light of the Court of First

Instance's careful analysis of the evidence and consideration of the legal arguments presented, the fact that it did not order further measures of enquiry cannot be treated as constituting an infringement of procedural rights.

Analysis

31. Inasmuch as the appellant criticises paragraphs 96 and 98 of the judgment under appeal, its objection is, *in the first place*, directed in general at the Court of First Instance's assessment of the right of access to documents.

32. It is at the same time objecting, *secondly*, to the fact that the Court of First Instance examined the issue of disclosure of the Commission's information only in regard to the documentation relating to the internal investigations but not in regard to the general information in its possession.

33. In its criticism of paragraphs 81, 99 and 102 of the judgment under appeal the appellant is, *thirdly*, addressing the problem of whether it is for the Commission alone to decide whether or not knowledge of certain information is necessary to safeguard the rights of defence of the undertakings concerned.

34. The appellant's objections to paragraph 92 of the judgment under appeal relate to information about the internal investigations. This paragraph must therefore be considered in conjunction with paragraph 81 as that is where the specific reasoning for the conclusion in dispute reached by the Court of First Instance is to be found. The Court of First Instance stated there that it is for the Commission 'to decide how to conduct such an examination'. The appellant is therefore criticising, *fourthly*, the assessment undertaken by the Court of First Instance as to the Commission's compliance with its duties relating to official investigations.

35. Finally, in criticising paragraph 101 of the judgment under appeal, the appellant is, *fifthly*, addressing the question whether it is possible to remedy the infringement of procedural rights by the Commission by making good the disclosure of information in proceedings before the Court of First Instance.

(a) The question of the right of access to documents in general

36. The appellant's arguments relate to two categories of information: first, general information held by the Commission relating to contacts between DG III and the undertakings concerned and, second, documentation relating to internal investigations into the role of DG III.

37. In so far as the appellant's arguments relate to access to information on the internal investigations, those complaints correspond essentially to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P. I accordingly refer to the grounds set out in paragraph 40 et seq. of the Opinion which I am delivering today in that case, in which I conclude that this ground of appeal should be dismissed to this extent as being *unfounded*. Those grounds apply *mutatis mutandis* to the present case.

(b) The question of incomplete appraisal of the argument in relation to access to general information

38. As is clear from paragraph 74 of the judgment under appeal, the appellant was objecting in the proceedings before the Court of First Instance not only to the non-disclosure of information relating to the internal investigations, but also to the non-disclosure of general documents. Paragraph 77 et seq. of the judgment under appeal, however, specifically relate only to the documents concerning the internal investigations. The appellant's argument that, in paragraph 77 et seq. of the judgment under appeal, the Court of First Instance failed to give full consideration to the complaint of lack of access to documents must therefore be upheld.

39. The correctness of an appraisal is not, in principle, an issue open to examination on appeal in such a case. However, the Court has repeatedly stated that a ground of appeal must also be dismissed 'if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds'. [9]

40. According to the Court's case-law, there will be an infringement of the right of access to documents [10] only if knowledge of the information contained in them might have influenced the course of the procedure and hence the content of the decision. A conclusive appraisal as to whether a different decision would actually have been reached is not required. [11]

41. The appellant has submitted a list of matters which, in its opinion, had they been dealt with and the desired information provided timeously during the procedure before the Commission, might have influenced the further course of that procedure and hence the Decision itself.

9 — See, for example, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28.

10 — The basic judgment is that of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667.

11 — Judgments in Cases T-30/91 (cited in footnote 8) and T-36/91 (cited in footnote 7); judgment in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235 (one of the *Polypropylene* cases). See also Advocate General Mischo's Opinion of 25 October 2001 in Case C-244/99 P *DSM and DSM Kunststoffen* v *Commission* (the *PVC II* cases).

42. The present case, however, involves a quite special set of circumstances. The appellant and the other undertakings concerned might have required access to the general information on DG III's role to establish facts that might have been of assistance in a quite specific line of defence common to all those involved in the procedure before the Commission (the Commission's toleration or encouragement of the conduct complained of). Furthermore, the general information mentioned by the appellant essentially consisted, by its own admission, of documents ostensibly detailing the substance of the contacts between DG III and the undertakings concerned, principally in the form of their joint meetings and correspondence.

43. This specific information, however, is almost certainly not something that the appellant could have ascertained solely from the Commission's documentation. Rather, it may well be information that the appellant could also have obtained from an analysis of its own documentation, from questioning its own staff or from sources within other undertakings that would probably have been prepared to cooperate in view of their identical interests.

44. Nor has the appellant claimed that information from such sources would not have had sufficient value as evidence, with the result that it had to rely on obtaining the information from the Commission itself.

45. In my opinion, in a special case such as the present, where the information required for a line of defence could also almost certainly have been obtained without significant extra effort from sources other than the Commission itself, it is not sufficient for the purposes of an argument relating to the need for access to documents simply to state in general terms which issues of law (for example, the concept of 'normal competition' and the significance of Article 46 et seq. of the ECSC Treaty) might have been appraised differently, or what facts (for example, the Commission's 'awareness' of the substance of the internal meetings between producers) might have been established if the documents which were not produced had indeed been disclosed. In order for there to be a proper appraisal of the need for document access, the argument submitted in such a special case should contain substantiated details of what other facts might possibly have been brought to light had the desired information been provided by the Commission rather than from other sources.

46. In my view, the appellant's submission has not satisfied those requirements, with the result that it must be held overall that the appellant has failed to provide sufficient information to make it possible to determine whether or not the judgment under appeal was correct in dismissing the complaint of lack of access to the Commission's information.

47. The appellant's argument in this connection must therefore be dismissed as *unfounded*.

(c) The question of the power to decide on the need to grant access to documents in order to safeguard the rights of the defence

48. In my opinion, it cannot be inferred from paragraph 81 of the judgment under appeal, to which objection is raised, that the Court of First Instance was here asserting a principle that it is for the Commission alone to decide on the need to provide information. The only point to be inferred from that paragraph is that it is for the Commission 'to decide how to conduct such an [internal] examination'.

49. Paragraphs 99 and 102 of the judgment under appeal must be read in conjunction with the statement by the Court of First Instance at paragraph 100 that the documents relating to the internal investigations 'clearly did not contain any exonerating material'. As already mentioned above, [12] this constituted an appraisal of the requested documents with regard to their information value. The Court of First Instance therefore specifically did not find that the Commission could decide this matter on its own but rather evaluated the information not disclosed by the Commission in regard to the issue of whether knowledge of its content was necessary to safeguard the interests of the defence.

12 — See above, paragraph 37; see also paragraphs 42 and 43 of the Opinion in Case C-194/99 P (cited in footnote 6).

50. The appellant's submission in this respect must therefore also be dismissed as *unfounded*.

(d) The issue of the Commission's duties in relation to official investigations

51. As these objections essentially correspond to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P, I refer, with regard to the grounds on which this argument falls to be dismissed as *inadmissible*, to paragraph 21 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis* to the present case.

(e) The possibility of remedying the Commission's procedural errors

52. There is no need to address any further the appellant's argument that the Court of First Instance erred in its assumption that it was possible to remedy alleged procedural errors by the Commission in the proceed-

ings before the Court of First Instance [13] because — as has been shown — no procedural error by the Commission has been demonstrated.

53. In conclusion, therefore, the *fourth* ground of appeal, by which the appellant alleges infringement of procedural rights, must be dismissed as being in part *inadmissible* and as being otherwise *unfounded*.

2. The Commission's adoption of the Decision (*second* ground of appeal)

54. The *second* ground of appeal consists of two parts. In the first part the appellant criticises the alleged lack of correspondence between the adopted and notified versions of the Decision. In the second part it takes issue with what it considers to be the defective authentication of the Decision.

(a) The issue of correspondence between the adopted and notified versions of the Decision

*Arguments of the parties*

55. The *appellant* takes issue with paragraph 137 of the judgment under appeal. It considers that the Court of First Instance erred in law in finding that there were no material differences between the versions C(94)321/2 and C(94)321/3 of the Decision and the versions of the Decision notified to the undertakings concerned.

56. An analysis of the documents submitted by the Commission to the Court of First Instance, it argues, reveals a number of formal defects in the adoption of the contested Decision. [14]

57. It is also apparent from paragraph 137 et seq. of the judgment under appeal that there were differences in the wording of the various versions but that the Court of First Instance did not consider these discrepancies to be 'substantive'.

58. The *Commission* takes the view that this plea is inadmissible because the appellant did not raise it in the proceedings before the Court of First Instance. It argues that it is also inadmissible because on this point the Court of First Instance simply established the facts, stating that it had not found any substantive differences between the different versions of the Decision. However, the appellant does not allege any patent substantive inaccuracy in that finding or any distortion of evidence.

13 — The Court has since stated in connection with the law on disclosure that 'the infringement committed is not remedied by the mere fact that access was made possible... during the judicial proceedings'. See Case C-51/92 P (cited in footnote 11), paragraph 78.

14 — For example, difficulty in the identification of documents, versions that did not state that they were authentic language versions, undated deletions, inconsistencies in the documents produced.

59. The appellant is also challenging what are merely alleged discrepancies between versions C(94)321/2 and C(94)321/3 of the Decision. However, it could at most have criticised a comparison between the version notified and documents C(94)321/2 and C(94)321/3. The only relevant issue is which version was actually adopted, but this is the subject of the second part of the second ground of appeal.

60. Finally, the appellant has failed to explain to what extent the differences between the versions of the Decision were substantive.

Analysis

61. The purely substantive concordance between the version of the Decision notified to the appellant and the version which was before the Commission at the time of adoption is a finding of fact and not an issue of law.

62. The material nature of differences in the wording of those versions is a question of appraisal of evidence which, unless distortion of evidence by the Court of First Instance is alleged, cannot be examined on appeal and is therefore an issue which renders a ground of appeal inadmissible in that respect.

63. The first part of the *second* ground of appeal, in so far as it alleges a lack of concordance between the adopted and notified versions of the Decision, must therefore be dismissed as *inadmissible*.

(b) The issue of proper authentication of the Commission's adoption of the Decision

Arguments of the parties

64. The *appellant* considers that the Decision was not formally authenticated. The minutes relate to versions C(94)321/2 and C(94)321/3 of the Decision and not to a version with the number C(94)321 Final or C(94)321/4, which was the version notified to the appellant. There was no proof that the President and the Secretary-General of the Commission had authenticated the Decision in accordance with the requirements of Article 16 of the Commission's 1993 Rules of Procedure,[15] the minutes do not refer to the annex and the minutes themselves state that they comprise 43 pages, which is the number of pages of the minutes themselves and does not therefore include the text of the Decision.

15 — OJ 1993 L 230, p. 15.

65. The fact that the photocopy of the minutes was produced to the Commission's agent, and by him to the Court of First Instance, in the same cardboard box as the copies of documents C(94)321/2 and C(94)321/3, could not provide any basis whatever for the assumption by the Court of First Instance that those documents had been 'annexed' to the original version of the minutes in accordance with the requirements of Article 16 of the 1993 Rules of Procedure.

66. Citing two judgments of the Court of First Instance, [16] the appellant submits that it must be possible to identify 'the precise and certain content of the measures adopted'. It is essential, for this purpose, that the version adopted be attached to the definitive version of the minutes and that the minutes be dated.

67. The Court of First Instance erred when, in paragraph 149 of the judgment under appeal, it accepted certification of the photocopy by the Secretary-General of the Commission as proof that the minutes had been signed. Only production of the original version of the minutes, it contends, could have established that the minutes satisfied the requirements of the Rules of Procedure.

16 — Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 and Case T-32/91 *Solvay* (cited in footnote 7).

68. The appellant submits that the Court of First Instance abdicated its function of judicial review in assuming, as it did, that all of the procedural requirements governing the adoption of a decision in 1994 had been fulfilled simply because the photocopies had been certified by the then Secretary-General and forwarded to the Court of First Instance in the same cardboard box as a series of other language versions of the Decision purportedly adopted.

69. The appellant argues that the Court of First Instance was wrong, in paragraph 151 of the judgment under appeal, to infer that the date of authentication was 23 February 1994 merely because that was the date which appeared on the minutes and because the minutes bore the words 'the present minutes were adopted by the Commission at its 1 190th meeting held in Brussels on 23 February 1994', followed by the signatures of the President and the Secretary-General of the Commission and certification of authenticity.

70. The Rules of Procedure do not require the date of authentication to be stated. However, the date of authentication is as crucial as the date on which the Decision was adopted.

71. The *Commission* argues that the appellant is citing case-law concerning an earlier version of the Rules of Procedure than that in force when the Decision was adopted. The relevant provisions were Articles 16

and 9 of the 1993 Rules of Procedure, cited by the Court of First Instance in paragraphs 143 and 144 of its judgment.

72. The 1993 Rules of Procedure do not define how a document is to be 'annexed' and, in the light of the presumption of legality of Community measures, the certification of the copy also cannot be described as inadequate. Furthermore, the minutes of the meeting expressly referred to documents C(94)321/2 and C(94)321/3.

73. The appellant has in particular failed to demonstrate that the minutes were not adopted at the Commission meeting which preceded in time the notification of the Decision. Nor does it explain what principle underlies its assertion that an authentication not dated by the President and Secretary-General cannot be considered valid.

Analysis

74. As these objections correspond essentially to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P, I refer, with regard to the grounds on which the second part of the *second* ground of appeal must be dismissed as inadmissible, to paragraph 68 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis* to the present case.

75. The second part of the *second* ground of appeal, alleging lack of authentication of the Commission's adoption of the Decision, must therefore also be dismissed as *inadmissible*.

B — *The grounds of appeal alleging errors of law in the appraisal of the substantive legality of the Decision*

76. The appellant argues in its *third* and *sixth* grounds of appeal that the Court of First Instance erred in law in its appraisal of the substantive legality of the Decision.

1. Interpretation of Article 65 of the ECSC Treaty (*third* ground of appeal)

Arguments of the parties

77. The *appellant* submits that the legal appraisal of the evidence on the basis of which the Court of First Instance found

that it had engaged in agreements and concerted practices relating to prices and in the information exchange system, contrary to Article 65(1) of the ECSC Treaty, conflicts with that Court's own findings regarding the purpose, context and subject-matter of the discussions that the Commission conducted with the undertakings in connection with the monitoring of the steel sector introduced after the end of the period of manifest crisis.

78. For this purpose it analyses the practices of the undertakings to which objection was raised in the Decision as being in breach of competition and which were examined in the judgment under appeal, and itemises how it considers that those practices were brought about by the Commission under its monitoring system or were necessary for the functioning of that system.

79. It also states that the Court of First Instance itself found, at paragraph 656 of the judgment under appeal, that, when preparing meetings with the Commission, the undertakings had to convene in order to exchange their views on the economic situation of the market and future tendencies, particularly in regard to prices.

80. Furthermore, it appears from Mr Kutscher's testimony that, in a favourable economic situation, parallel increases in prices could come about without any agreement being necessary. The Court of First Instance failed to have regard to those factors and concluded that price-fixing agreements had been adopted. It also concluded that market-sharing agreements existed, without taking account, in assessing the evidence, of the fact that the discussions had taken place under the Commission's surveillance system. The same applies to participation in the Poutrelles Committee system for the exchange of information, which was treated as constituting a separate infringement of competition rules.

81. The Court of First Instance, the appellant goes on to argue, misconstrued the concept of 'normal competition'. It cites the Court's judgment in *Valsabbia and Others* v *Commission*, [17] which illustrates the need permanently to reconcile the different objectives of Article 3 of the ECSC Treaty. The Court thus expressly acknowledged that exercise of the various forms of intervention provided for in the ECSC Treaty will result in a system which differs from the free market economy of the EC Treaty and the normal 'mechanisms of competition'. The appraisal at paragraph 291 et seq. of the judgment under appeal is misconceived in that it takes no account of the effects that pursuit of the different objectives of the Treaty may have on the substance of the concept of 'normal competition'.

17 — Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78, 39/79, 31/79, 83/79 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907.

82. The appellant also takes issue with paragraph 311 of the judgment under appeal. The Court of First Instance's finding that Article 46 et seq. of the ECSC Treaty are irrelevant to the application of Article 65 is based on contradictory reasoning and a misinterpretation of the ECSC Treaty inasmuch as Article 46 et seq. of the ECSC Treaty provide for a surveillance system having a significant effect on the construction and application of Article 65(1) of the ECSC Treaty.

83. The grounds of the judgment are also contradictory inasmuch as the Court of First Instance took account of the ambiguity introduced by the Commission into the scope of the concept of 'normal competition' at paragraph 658 of the judgment under appeal as regards fixing the amount of the fine but did not take it into account as regards the interpretation of Article 65(1) of the ECSC Treaty.

84. The reasoning of the Court of First Instance at paragraph 658 of the judgment under appeal is also tautological. From its finding that infringements of Article 65(1) of the ECSC Treaty had been committed, the Court of First Instance concluded that the appellant's arguments that that article should be construed in the light of Article 46 et seq. of the ECSC Treaty were irrelevant.

85. At paragraph 358 et seq. of the judgment under appeal the Court of First Instance also erred in law in finding that the appellant had engaged in a separate breach of Article 65(1) of the ECSC Treaty by participating in the information exchange system. It considers that the Court of First Instance failed to demonstrate that participation in the information exchange system constituted a separate breach of Article 65(1) inasmuch as it neglected to draw a coherent distinction between the allegedly anti-competitive effects of the price-fixing and market-sharing agreements, on the one hand, and the information exchange system, on the other.

86. The Court of First Instance stated in this respect, at paragraph 390 of the judgment under appeal, that the relevant market was oligopolistic, without carrying out an economic evaluation of its structure. That structure is very different from that which is considered to be an oligopoly in the practice of the Commission under the EC Merger Regulation, in the Commission's '*Tractor*' decision or in Germany's *Gesetz gegen Wettbewerbsbeschränkungen* (Law prohibiting restraints of competition).

87. As regards the information exchange system, the Court of First Instance failed to establish that this in itself reduced the undertakings' decision-making independence above and beyond the other established anti-competitive practices such as price-fixing or market-sharing.

88. The *Commission* disputes the view that the fact that meetings were held with the Commission rules out any conclusion that the appellant was involved in anti-competitive activities.

89. First, that argument can relate only to the infringements of which the appellant was accused within the context of the Poutrelles Committee. Furthermore, the Commission refers to paragraphs 539 and 575 et seq. of the judgment under appeal, which make it clear that the activities of which the undertakings were accused are to be considered completely separate from the information meetings with the Commission.

90. With regard to Article 46 et seq. of the ECSC Treaty, the Commission observes that the Court of First Instance found, in paragraph 587 of the judgment under appeal, that the purpose of the undertakings' discussions that were the subject of complaint was not to prepare the information to be given to the Commission and that the Commission would not have objected to genuine preparatory discussions because preparatory discussions on market trends would not involve commission of the infringements confirmed in the Decision. The Court of First Instance was therefore correct in its conclusion that the producers' activities should be treated as infringements of Article 65(1) of the ECSC Treaty and that they were not covered by the concept of 'normal competition'.

91. The Commission further submits that the Court of First Instance did take account of the monitoring system as it held that the economic impact of the infringements had to be assessed by reference to the situation which would have resulted had the producers confined the scope of their discussions to that expected of them by the Commission. The Commission's conduct, however, could not in any event relieve the undertakings from their obligation to comply with the ECSC Treaty. The Commission's role could, at best, provide grounds for mitigation.

92. The Commission argues, with regard to the alleged contradictions in the judgment under appeal, that the appellant is distorting the clear sense of paragraph 658 et seq. of the judgment under appeal. The Court of First Instance did not, in that part of the judgment, conclude that the concept of 'normal competition' had to be adjusted. It merely held, in paragraph 660, that the Commission had exaggerated the economic impact of the price-fixing agreements confirmed in the Decision.

93. Regarding the legal appraisal of the information exchange system, the Commission states that the Court of First Instance demonstrated, at paragraph 391 et seq. of the judgment under appeal, that competition in the form of independent decision-making by the participants had been restricted and that it had tended to partition markets by reference to traditional

flows of trade. It is therefore incorrect to claim that the Court of First Instance failed adequately to show why this constituted a separate infringement.

94. The appellant's argument concerning the oligopolistic structure of the market is, the Commission contends, inadmissible as it was raised for the first time in the appeal. Furthermore, the Court of First Instance referred to the judgment in the *Geitling* case,[18] in which the Court stated that, given the oligopolistic structure of that market, it was all the more important that residual competition be protected.

95. The ground of appeal is also inadmissible in this respect because it challenges a finding of fact, even though the appellant simply dresses it up as a point in the legal reasoning.

Analysis

96. The first part of the *third* ground of appeal alleges that the Court of First Instance erred in law in its appraisal of the degree of legalised disruption to the ideal form of competition that is included in the concept of 'normal competition' within the meaning of Article 65(1) of the ECSC Treaty by misinterpreting the connection with other objectives of the ECSC Treaty, particularly the application of Article 46 et seq. and Article 60 of the ECSC Treaty.

97. As these objections correspond essentially to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P, I refer, with regard to the grounds on which the first part of the *third* ground of appeal must be dismissed as unfounded, to paragraph 135 et seq. of the Opinion that I am delivering today in that case. Those grounds apply *mutatis mutandis* to the present case.

98. It must be added that the appellant's reference to paragraphs 656 and 658 of the judgment under appeal cannot lead to any different conclusion.

99. Those paragraphs are certainly not inconsistent with the other findings in the judgment under appeal, particularly paragraph 289 et seq. The appellant fails to appreciate that paragraph 647 et seq. of the judgment under appeal relate to the assessment of the fine and, therefore, to the application of Article 65(5) of the ECSC Treaty.

18 — Case 13/60 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others* v *High Authority* [1962] ECR 83.

100. It cannot be inferred from those paragraphs that the Court of First Instance was there applying different considerations to evaluation of the scope of the limits inherent in the system than to its appraisal of the evidence of the practices under complaint. The Court of First Instance was there dealing only with the potential economic effects of proper conduct on the part of undertakings, which was precisely not the position here. It was only in this context that the Court of First Instance referred to a 'degree of ambiguity' (among the undertakings concerned) as to interpretation of the concept of 'normal competition'. The Court of First Instance also found, but only in this context, that it was unnecessary 'to rule on the extent to which undertakings could exchange individual data for the purpose of preparing for consultation meetings with the Commission without thereby acting contrary to Article 65(1) of the Treaty...'.

101. The first part of the *third* ground of appeal must therefore be dismissed as being *unfounded* in its entirety.

102. The second part of the *third* ground of appeal takes issue with the finding that participation in the information exchange system constituted a separate infringement of Article 65(1) of the ECSC Treaty.

103. As these objections correspond essentially to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P, I refer, with regard to the grounds on which the second part of the *third* ground of appeal must also be dismissed as being in part inadmissible and as being otherwise unfounded, to paragraph 109 et seq. of the Opinion that I am delivering today in that case. Those grounds apply *mutatis mutandis* to the present case.

104. The *third* ground of appeal, alleging a variety of errors of law in the interpretation of Article 65 of the ECSC Treaty, must therefore be dismissed as being in part *inadmissible* and as being predominantly *unfounded*.

2. The confirmation in the Decision of infringements prior to 1 July 1988 (*sixth* ground of appeal)

Arguments of the parties

105. The *appellant* submits that the Court of First Instance failed properly to exercise its jurisdiction to review and declare void the Decision under Article 33 of the ECSC Treaty.

106. It failed to annul Article 1 of the Decision, according to which the appellant had also infringed Article 65(1) of the ECSC Treaty during the period prior to 1 July 1988. This conflicts with paragraph 524 of the judgment under appeal, in which the Court of First Instance found that 'the Commission has failed to establish that the applicant is guilty of any infringement connected with the activities of the Poutrelles Committee prior to 1 July 1988'.

107. Against this, the *Commission* observes that the Court of First Instance found, in paragraph 166 of the judgment under appeal, that none of the undertakings could be charged with the first of the two infringements of Article 65(1) of the ECSC Treaty referred to in recitals 223 and 224 of the Decision, which took place prior to 1 July 1988, because the details were too imprecise. So far as the appellant is concerned, therefore, it is only the second infringement, mentioned in recital 224 of the Decision, in the form of a price-fixing agreement for Germany and France allegedly reached at an unspecified date prior to 2 February 1988, that could have been covered by its application for an amendment to Article 1 of the Decision. The Court of First Instance found, in paragraph 170 of the judgment under appeal, that the appellant's participation had not been proved in this connection.

108. It is common ground that no fine was imposed for that price-fixing agreement. The Commission considers that there was therefore no obligation on the Court of First Instance to specify in the operative part of the judgment that the Commission had not established the appellant's participation in a meeting which was proved to have taken place and at which price-fixing agreements were shown to have been entered into.

109. In the light of the serious infringements which had to be regarded as established, the one remaining unproven allegation was so insignificant that, even had it extended the scope of its partial annulment of the Decision, the Court of First Instance would still have awarded costs against the appellant in that respect.

110. Should the Court none the less be minded to uphold this ground of appeal and annul Article 1 of the Decision only on the ground that it is alleged in that article that the appellant participated in a price-fixing meeting prior to 1 July 1988, it should not order the Commission to pay any portion of the costs of the present appeal.

Analysis

111. I do not at all regard as cogent the interpretation that the appellant places on Article 1 of the Decision, to the effect that the two anti-competitive activities that

took place prior to 1 July 1988 are also covered by the operative part of the Decision.

112. Article 1 of the Decision states: 'The following undertakings have participated, to the extent described in this Decision, in the anti-competitive practices listed under their names... '. There then follows a list of infringements of competition rules, itemised under the names of the undertakings concerned and giving details of the duration of each infringement in months.

113. Article 1 of the Decision thus does not simply relate to infringements 'to the extent described in this Decision', which could be construed as a reference to the *grounds* of the Decision (and therefore to the price-fixing agreements prior to 1 July 1988 that were unproven in this respect). Article 1 also refers to the list setting out the infringements and giving details of their duration, as stated under the appellant's name. This list therefore forms an equal integral part of Article 1 of the Decision and thus of the *operative part* of the Decision.

114. The duration of the price-fixing within the Poutrelles Committee, of which the two price-fixing agreements not proven against the appellant also in principle form a part, is put at 27 months. Calculating back from the end of the period of the entirety of the practices complained of (31 December 1990), this means that the unproven price-fixing agreements prior to 1 July 1988 are clearly not included in Article 1 of the Decision.

115. As there is therefore an error, with regard to the appellant, only in recitals 223 and 224 of the *grounds* of the Decision and not in its operative part, the appellant cannot be entitled to have the *operative part* of the Decision amended in that respect.

116. This finding is also not gainsaid by the fact that, where the operative part of a decision remains unchanged, the erroneous grounds of that decision remain in law unchanged as such. This would, however, be questionable only if it were to be assumed that those sections of the grounds of the decision were capable of producing a binding legal effect; [19] adverse effects of a factual nature are irrelevant. [20]

117. The (incorrect) finding in the grounds of the Decision that the appellant had been involved in price-fixing agreements in two specific cases could probably have an

19 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

20 — Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, in which the issue was whether the grounds of the decision could produce binding legal effects if the operative part of the decision did not, as such, run counter to the interests of the parties concerned.

adverse effect on it in law only if, in the context of other potential competition-law proceedings against the appellant, the Commission were to consider the issue of recidivism [21] in determining the amount of the fine.

118. The Decision in point would not, however, produce any binding legal effects in such a case as the Commission is not *obliged* to take adverse account of offences established in earlier decisions. Furthermore, in establishing recidivism, it would have to proceed on the basis of the operative part of the Decision (particularly Articles 1 and 4) and could not consider the grounds of the Decision in isolation; not least of all, the Commission would be bound to take into consideration the inaccuracies in recitals 223 and 224 of the grounds of the Decision, confirmed by the Court of First Instance in paragraph 524 of the judgment under appeal.

119. As it must therefore be assumed that Article 1 of the Decision is not to be construed, in regard to the appellant, as covering the two infringements of competition law prior to 1 July 1988, the Court of First Instance did not err in law in not annulling that article.

120. The *sixth* ground of appeal must therefore be dismissed as *unfounded*.

C — *The ground of appeal alleging that inadequate reasons were given for the fine (fifth ground of appeal)*

Arguments of the parties

121. The *appellant* takes issue with paragraphs 629 and 630 of the judgment under appeal and submits that the Court of First Instance misapplied Article 15 of the ECSC Treaty in finding that the absence in the Decision of specific information relating to the calculation of the fine did not constitute a breach of the duty to state reasons such as to justify the annulment, in whole or in part, of the fine imposed. It refers in this connection to the case-law [22] cited by the Court of First Instance itself, according to which the Commission is obliged to set out in a decision the grounds on which the imposition of a fine is based in order to enable the addressees of the decision to verify that the level of the fine is fair. The Court of First Instance, it argues, failed to take that case-law into consideration in the judgment under appeal.

21 — 'Paragraph 2. Aggravating circumstances' of the 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3) refers *inter alia* to 'repeated infringement of the same type by the same undertaking(s)'.

22 — Judgment in Case T-148/89 *Trefilunion* v *Commission* [1995] ECR II-1063, paragraph 142; order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611; judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165.

122. The Court of First Instance erred in finding, in paragraph 628 of the judgment under appeal, that the arithmetical formulas on which the calculations were based, which were disclosed only during the judicial proceedings, were the mere 'translation into figures of the criteria set out in the Decision'.

123. The appellant also refers to paragraphs 627, 690 and 691 of the judgment under appeal. As a result of the extra information provided by the Commission only in the judicial proceedings before the Court of First Instance, it was able to identify the mistakes in the calculation of the fine imposed upon it. The Court of First Instance thus erred in law in holding that there had been no breach of the duty to state reasons.

124. The appellant further takes issue with what it considers to be an inconsistency between paragraph 676 of the judgment under appeal, in which the Court of First Instance stated that '... there can be no question... of any possible misunderstanding as to the scope of Article 65(1) of the Treaty' and paragraphs 658 and 659, in which it acknowledged that DG III introduced a degree of ambiguity into the meaning of the concept of 'normal competition' as used in the ECSC Treaty. The Court of First Instance ought to have made a further reduction in the light of that finding.

125. The *Commission* notes that the appellant is not challenging paragraphs 624 and 625 of the judgment under appeal, which contain the essential reasoning relating to the fine. The other paragraphs of the judgment under appeal are to be considered supererogatory. This means that the Court could not overturn that judgment even if it disagreed with the other paragraphs, because those paragraphs are not essential stages in the reasoning leading to the conclusion.

126. The Court of First Instance considered it desirable, but not legally necessary, that details be provided on the calculation of the fine in the Decision. Since the Court of First Instance made those comments in an earlier case, the Commission has adopted guidelines in that regard which it now follows.

127. The Commission considers that, in view of the Court of First Instance's findings that the undertakings were careful to keep the true nature and extent of their discussions hidden from the Commission, and in view of the fact that the undertakings could have approached DG IV had they had the slightest doubts as to the legality of those discussions, there is no contradiction in applying Article 65(1) of

the ECSC Treaty to the appellant's conduct. There was accordingly no conceivable basis for a further reduction in the fine on that account.

Analysis

128. As these objections correspond essentially to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P, I refer, with regard to the grounds on which the fifth ground of appeal must be dismissed as unfounded, to paragraphs 172 et seq. and 218 et seq. of the Opinion that I am delivering today in that case. Those grounds apply *mutatis mutandis* to the present case.

129. The *fifth* ground of appeal, alleging failure to acknowledge the defects in the Decision's reasoning with regard to the level of the fine, must therefore be dismissed as *unfounded*.

D — *The ground of appeal alleging infringements of the ECHR (first ground of appeal)*

130. In its *first* ground of appeal the appellant alleges infringements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), essentially in relation to two procedural rights guaranteed by that provision. First, in the proceedings before the Court of First Instance its right to equality of arms and its right of access to information and relevant evidence were infringed, with the result that it did not receive a fair hearing pursuant to Article 6(1) in conjunction with Article 6(3)(d) ECHR. Second, as a result of the excessive length of the proceedings, the Court of First Instance infringed the appellant's right to a determination within a reasonable time, which is afforded to everyone under Article 6(1) ECHR.

131. Article 6(1) and (3) ECHR provides as follows:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...'

132. In its legal arguments on these provisions preceding its submissions in relation to the case in point, the appellant cites several judgments of the European Court of Human Rights ('the Court of Human Rights') and submits that proceedings relating to infringements of the competition law of the ECSC are 'criminal' proceedings for the purposes of Article 6 ECHR.

Material arguments of the parties

133. With regard to the principle of a fair hearing, the *appellant* submits that the judgment of the Court of First Instance should be set aside in its entirety as being contrary to Article 6(1) in conjunction with Article 6(3)(d) ECHR.

134. It submits, first, that crucial information and evidence was disclosed to it during the judicial proceedings at such a time and in such a way as to prevent it from exercising its rights of defence in accordance with the principle of equality of arms.

135. It contends that the documents which the Court of First Instance had ordered to be produced in its order of 10 December 1997 were not made available until 14 January 1998, that the definitive description of the methodology used to calculate the fine was produced on 19 March 1998 and that a copy of the definitive minutes of the Commission meeting at which the Decision was adopted was not made available to the applicants before the Court of First Instance until 20 March 1998, even though the hearing commenced on 23 March 1998. As a result of those delays in the provision of documentation, for which there was no justification, the appellant was denied an adequate opportunity to examine evidence relevant to its submissions and was placed at a significant disadvantage *vis-à-vis* the Commission.

136. The appellant also complains that there was not a fair balance between it (or the other applicants) and the Commission before the Court of First Instance because they had no opportunity to question the officials of the Commission whose

testimony was heard by that Court (Messrs Ortun, Kutscher and Vanderseypen) in advance of the hearing and were given no prior notice of the statements to be made by them. Although they were given an opportunity to comment on the evidence presented by the witnesses, the time available between the end of the hearing on 23 March 1998 and its reopening on the following morning was inadequate.

137. The *Commission* fails to understand how the appellant had insufficient opportunity to prepare for the hearing or how it was placed at any disadvantage. As for the information that had to be produced in response to the Court's order of 10 December 1997, the appellant had more than two months in which to prepare for the hearing. The documents setting out the methodology used to calculate the fines were provided simply in amplification of details already submitted in January and February (paragraph 66 of the judgment under appeal). As far as the minutes of the Commission meeting are concerned, a draft version of those minutes had already been available to the appellant several weeks prior to the hearing (paragraph 64 of the judgment under appeal). The Commission finally observes that the appellant made no application for the hearing to be postponed on account of the date of production of any of the documents in question.

138. The *appellant* argues, second, that it was denied a right to put questions to the three Commission witnesses (Messrs Ortun, Kutscher and Vanderseypen) or otherwise to challenge adequately the evidence given by them. The then applicants had only a limited period of time during the hearing to comment on the evidence given by the witnesses and were provided with no opportunity whatever to test those witnesses as to the accuracy or completeness of their testimony or to elicit other information from them, whether exculpatory or inculpatory. The appellant ought to have been given an opportunity to put questions to the witnesses, particularly in view of the reliance which the judgment under appeal ultimately placed on the witness statements (paragraphs 538 to 546 of the judgment under appeal); the Commission had access to the witnesses at any time prior to the proceedings, as did the Court of First Instance during the proceedings, whereas the appellant was given no opportunity to put questions to them.

139. The *Commission* argues in this connection that there is nothing in the Rules of Procedure of the Court of First Instance that provides for witnesses to be questioned in advance of the hearing or for prior notice to be given of the statements to be made by them. In the Community legal system, witnesses are witnesses of the Court of First Instance, not of the parties; the questions posed are entirely a matter for the Court of First Instance and it is in that Court's discretion as to whether parties should be given the opportunity to question witnesses. The Commission notes that the appellant did not make an application at the hearing to examine any of the wit-

nesses. In any event, the witnesses were examined on the first day of the hearing, with the result that the appellant had a further four days in which to comment on their evidence.

140. On the issue of reasonable time, the *appellant* submits that the duration of the proceedings before the Court of First Instance — 59 months from the lodging of the application for annulment on 13 April 1994 to pronouncement of judgment on 11 March 1999 — was manifestly unreasonable, as was the length of time taken at individual stages of the proceedings, such as the period from the date of the Commission's rejoinder until the opening of the oral procedure (40 months). The complexity of the proceedings was not such as to justify the delays experienced in this case. Three of the eleven applicants (NMH Stahlwerke GmbH, Krupp and Eurofer) gave rise only to a limited number of issues.

141. The proceedings at first instance were characterised by long periods of apparent inaction, largely relating to the issues arising under Article 23 of the Protocol on the Statute of the Court of Justice of the ECSC. The appellant particularly criticises, in this respect, the period of nine months that elapsed between its application for access to the Commission's internal documentation transmitted to the Court of First Instance (15 September 1995) and the adoption of an order by the Court of First Instance on that issue (19 June 1996); the Court of First Instance took a further 15 months to adopt a definitive order granting the then applicants access to the documents lodged with the Court of First Instance pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the ECSC, following the Commission's response in relation to the documents classified as 'internal'. Those delays could not be warranted by the circumstances of the case.

142. Throughout the entire proceedings, the Commission sought to delay them and the Court of First Instance on several occasions extended the time given to the Commission in its measures of organisation of procedure. The appellant, in contrast, was keen to ensure a speedy resolution to the proceedings at first instance, particularly in view of the amount of the contested fine; throughout the proceedings it urged the Court of First Instance to resist the Commission's delaying efforts.

143. As a result of the various delays, the identity of the President of the Chamber changed and two of the five judges who were present at the hearing did not participate in the deliberations. This prevented continuity in the conduct of the case and a thorough consideration of the issues.

144. Against this, the *Commission* argues that, if the proceedings in the case in question are compared with those before

the Court in the *Baustahlgewebe* case,[23] the duration of the proceedings in issue here will be found to have been shorter (four years and eleven months, compared with five years and six months in the *Baustahlgewebe* case). Contrary to the view expressed by the appellant, its case raised many complex and novel issues, including *inter alia* the extent of parallelism between the ECSC and EC competition provisions, the connection between various Articles of the ECSC Treaty and factual questions relating to the role played by DG III.

145. The issues raised in connection with Article 23 of the Protocol on the Statute of the Court of Justice of the ECSC constituted 'exceptional circumstances' within the meaning of the *Baustahlgewebe* judgment. The Court of First Instance had to consider some 11 000 documents in this connection in the light of the parties' submissions and issued two reasoned orders of major importance. Furthermore, the Court of First Instance showed great willingness to entertain the various requests for production of documents. The period between the conclusion of the hearing and delivery of the judgment was again shorter than in *Baustahlgewebe*. The expiry of the mandates of two of the judges during the proceedings, the subject of criticism by the appellant, ought also to be regarded as an 'exceptional circumstance'.

146. In conclusion, the Commission submits that, in the light of the *Baustahlgewebe* judgment, a finding that the length of the proceedings was excessive could not of itself be a ground for setting aside the judgment in its entirety, but could at most justify only a reduction of the fine.

Analysis

147. The appellant is relying in the present case on procedural guarantees contained in Article 6(1) and Article 6(3)(d) of the ECHR.

148. According to the Court's established case-law,[24] 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures.[25]... For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR") has particular significance'.[26]

23 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

24 — See Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 25 and 26.

25 — See, for example, Opinion 2/94 [1996] ECR I-1759, paragraph 33.

26 — See, *inter alia*, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18. Those principles have, moreover, been incorporated in Article 6(2) EU. According to Article 46(d) EU, the Court is to ensure that this provision is applied with regard to action of the institutions, in so far as it has jurisdiction under the Treaties establishing the European Communities and under the Treaty on European Union. See also Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 38.

149. The Court has therefore held that the general principle of Community law that everyone is entitled to fair legal process, which is inspired by the fundamental rights enshrined in the ECHR, and in particular the right to legal process within a reasonable period, is also applicable in the context of proceedings brought by an undertaking against a Commission decision imposing fines on the undertaking for infringement of competition law. [27]

150. As regards the appellant's submission that such proceedings are classified as being 'criminal' in nature for the purposes of Article 6 ECHR, suffice it to hold that both the right to a hearing within a reasonable time pursuant to Article 6(1) ECHR and the right to call witnesses and to examine witnesses called by the Court, which is expressly afforded, in principle, under Article 6(3)(d) ECHR, only to a person charged with a criminal offence, applies to both criminal and civil proceedings. According to the case-law of the Court of Human Rights, this right constitutes another form of the principle of 'equality of arms' applicable to civil rights and obligations under Article 6(1) ECHR and can therefore also be examined under that article. [28] It does not therefore appear necessary, for the purposes of the present case, to categorise the proceedings as either 'civil' or 'criminal' within the meaning of Article 6 ECHR.

151. It follows in turn from the Court's case-law that 'equality of arms' constitutes a principle applicable to proceedings before the Court of First Instance. [29]

1. Fair hearing (equality of arms, examination of witnesses)

152. The appellant complains of a violation of its right to a fair hearing as provided for in Article 6(1) in conjunction with Article 6(3)(d) ECHR, specifically in relation to two aspects of the proceedings before the Court of First Instance: first, the production of various documents by the Commission and, second, the examination of the witnesses Messrs Ortun, Kutscher and Vanderseypen.

27 — *Baustahlgewebe* (cited in footnote 23), paragraph 21; see also Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 17.

28 — See, for example, the judgments of the Court of Human Rights in *Feldbrugge* v *Netherlands*, 29 May 1986, Series A, No 99, paragraph 44, *Albert and Le Compte* v *Belgium*, 10 February 1983, Series A, No 58, paragraph 39, and *Kostovski* v *Netherlands*, 20 November 1989, Series A, No 166, paragraph 39.

29 — See the judgment in Case C-13/99 P *Team* v *Commission* [2000] ECR I-4671, paragraph 45, and the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665.

153. It must first be pointed out that the Court has jurisdiction in appeal proceedings to verify whether a breach of procedure adversely affecting an appellant's interests was committed before the Court of First Instance and must satisfy itself that the general principles of Community law and the procedural rules applicable to the burden of proof and the taking of evidence have been complied with. [30]

154. Second, according to the case-law of the Court of Human Rights, the concept of a fair hearing for the purposes of Article 6 ECHR demands observance of the rights of the defence and of equality of arms and the conduct of adversarial proceedings. [31] That means that the parties to a criminal or civil trial must be given the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the Court's decision. [32] According to the principle of equality of arms, no party to proceedings may be placed at a disadvantage by the manner in which those proceedings are conducted and each party must be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. [33] It should also be noted that the proceedings as a whole are to be taken into account and that any procedural defects may be counterbalanced by later opportunities being given to safeguard the rights of the defence. [34]

155. In the light of the foregoing, therefore, consideration must first be given to the claim that the appellant was denied a reasonable opportunity before the Court of First Instance to examine specified documentation produced by the Commission.

156. As far as the documents which the Court of First Instance ordered to be produced in its order of 10 December 1997 are concerned, these were made available to the appellant on 14 January 1998, thus more than two months before the oral procedure. In so far as the appellant criticises the late production, on 19 March 1998, of the definitive methodology used to calculate the fines, the length of time available to the appellant in which to examine that methodology and to comment on it before the hearing came to a close does not appear to have been unreasonably

30 — Case C-13/99 P (cited in footnote 29), paragraph 36.

31 — See, for example, the judgments of the Court of Human Rights in *Borgers* v *Belgium*, 30 October 1991, Series A, No 214-B, paragraph 25, *Lobo Machado* v *Portugal*, 20 February 1996, Reports of Judgments and Decisions 1996-I, paragraph 31, and *Morel* v *France*, 6 June 2000, Reports of Judgments and Decisions 2000-VI, paragraph 27.

32 — See the judgments of the Court of Human Rights in *Vermeulen* v *Belgium*, 20 February 1996, Reports of Judgments and Decisions 1996-I, paragraph 33, and the order in the *Emesa Sugar* case (cited in footnote 29), paragraph 6, and the case-law of the Court of Human Rights there cited.

33 — See, for example, the judgments of the Court of Human Rights in *Niderost-Huber* v *Switzerland*, 18 February 1997, Reports of Judgments and Decisions 1997-I, paragraph 23, and *Morel* v *France* (cited in footnote 31), paragraph 27.

34 — See the judgments of the Court of Human Rights in *Feldbrugge* (cited in footnote 28), paragraph 44, and *Doorson* v *Netherlands*, 26 March 1996, Reports of Judgments and Decisions 1996-II, paragraphs 67 and 72.

short. As is clear from the judgment under appeal, [35] and as the Commission has also stated, the appellant had already, in January and February, submitted written observations on, *inter alia*, the issue of the calculation of the fines, with the result that it must already have been aware of at least the main features of the Commission's mode of procedure in that respect prior to 19 March 1998. Nor did the production, on 20 March 1998, of a copy of the definitive minutes of the Commission meeting — the subject of the appellant's final criticism — unreasonably prevent the appellant from exercising its rights of defence before the Court of First Instance prior to the conclusion of the hearing, because the draft minutes had already been communicated to the then applicants on 16 February 1998 [36] and the period from 20 to 27 March was sufficient at least to enable it to check that the minutes had been properly approved and authenticated — which the appellant had given as the reason for requiring production of the definitive minutes.

157. Given those circumstances, the appellant was afforded a reasonable opportunity to examine and comment on those documents.

158. It should also be mentioned that, in accordance with Article 62 of its Rules of Procedure, the Court of First Instance may of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties. [37] It does not appear from the case-files or from the appellant's submissions that the latter attempted to make any such application. [38]

159. For the above reasons, therefore, the proceedings before the Court of First Instance constituted a fair hearing within the meaning of Article 6 ECHR, as far as access to the documentation is concerned. The appellant's criticism on this point is for that reason unfounded.

160. It is now necessary to address the question of the calling and examination of witnesses before the Court of First Instance.

161. According to the case-law of the Court of Human Rights, Article 6(1) in conjunction with Article 6(3)(d) ECHR

35 — See paragraphs 57 and 58 of the judgment under appeal.

36 — See paragraph 64 of the judgment under appeal.

37 — See in this sense, with regard to the Court's procedure, the order in *Emesa Sugar* (cited in footnote 29), paragraph 18.

38 — See on this point the case-law of the Court of Human Rights, which states that it is for the parties to proceedings to exercise their procedural rights; see, for example, the judgments in *Albert and Le Compte* (cited in footnote 28), paragraph 41, *Olsson* v *Sweden*, 24 March 1988, Series A, No 130, paragraph 81, and *Kostovski* (cited in footnote 28), paragraph 42.

requires that a party to proceedings be given an adequate opportunity to challenge and question a witness, either at the time that the witness makes his statement or at some later stage of the proceedings. [39] An applicant does not therefore have the right to question witnesses prior to the hearing, as claimed by the appellant.

162. Moreover, the fact that the Commission might have been able to put questions to the witnesses from its own ranks at an earlier date than the applicants was, as the Commission correctly states, in the nature of things and was not in breach of the principle of 'equality of arms', provided that the applicant did, all in all, have an adequate opportunity during the course of the judicial proceedings to challenge the witness statements concerned. [40]

163. Furthermore, under Article 68(2) of the Rules of Procedure of the Court of First Instance, witnesses are summoned by an order of the Court of First Instance specifying *inter alia* the facts about which they are to be examined. That order — which the Court of First Instance made with regard to Messrs Kutscher, Ortun and Vanderseypen on 23 March 1998 [41] — has to be served on the parties under that provision, with the result that they are substantially aware, before the hearing takes place, of the matters on which the witnesses are to be examined.

164. The parties' representatives may also put questions to witnesses with the President's permission, pursuant to Article 68(4) of the Rules of Procedure of the Court of First Instance. This opportunity is afforded in equal measure to all parties to the proceedings.

165. The appellant has not submitted that it made any such application or that the Court of First Instance denied it the opportunity to put questions to the witnesses or allowed it to do so on terms less favourable than those afforded to the Commission. However, it is possible to claim that procedural rights have been infringed as regards the examination of witnesses only if the party to the proceedings has attempted to exercise those rights but has been denied the opportunity to do so by the Court of First Instance. [42]

166. In so far as the appellant submits that, although it did, in principle, have an

39 — See, for example, the *Kostovski* judgment of the Court of Human Rights (cited in footnote 28), paragraph 41.

40 — See paragraph 154 above.

41 — See paragraph 67 of the judgment under appeal.

42 — See the case-law of the Court of Human Rights cited in footnote 38.

opportunity to comment on the witnesses' statements, that opportunity was not a reasonable one, I also refer to what I have stated in paragraph 158 above.

167. In those circumstances, therefore, the complaint that the proceedings before the Court of First Instance infringed the right to a fair hearing within the meaning of Article 6 ECHR is also unfounded as regards the issue of examination of the witnesses. The whole of this part of the *first* ground of appeal, by which the appellant alleges that in the proceedings before the Court of First Instance it was denied a fair hearing in accordance with the principles laid down in Article 6 ECHR, must therefore be dismissed as *unfounded*.

2. The duration of the proceedings

168. As the appellant's objections regarding the duration of the proceedings before the Court of First Instance correspond essentially to the argument put forward by Thyssen Stahl, the appellant in Case C-194/99 P, I refer, with regard to the grounds on which this ground of appeal must be dismissed as unfounded in that regard, to paragraph 238 et seq. of the Opinion that I am delivering today in that case. Those grounds apply *mutatis mutandis* to the present case.

169. With regard to the appellant's criticism concerning the departure of the two judges during the course of the proceedings before the Court of First Instance, it must be stated, as the Court of Human Rights held in its judgment in the *Deumeland* case, that 'the changes of presiding judge represent a natural part of the life of a court', with the result that no blame can be attached to the Court of First Instance in this respect. [43]

170. The part of the *first* ground of appeal which alleges an inordinate delay in the conduct of the proceedings must therefore also be dismissed as *unfounded*.

171. The *first* ground of appeal, based on Article 6(1) and Article 6(3)(d) ECHR, must therefore be dismissed as *unfounded* in its entirety.

43 — Judgment of the Court of Human Rights in *Deumeland* v *Germany*, 29 May 1986, Series A, No 100, paragraph 81 et seq. On the compatibility of the composition of a chamber with Community law, see paragraph 23 et seq. of the Opinion in Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, which I am also delivering today.

## IV — Conclusion

172. For the above reasons, I propose that the Court:

— dismiss the appeal;

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