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

In Case T-141/94,

Thyssen Stahl AG, a company incorporated under German law, established in Duisburg (Germany), represented, during the written procedure, by Jochim Sedemund and Frank Montag, and, during the oral procedure, by Frank Montag and Barbara Balke, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 32 Grand-Rue,

applicant,

v

Commission of the European Communities, represented initially by Julian Currall and Norbert Lorenz, of its Legal Service, and Géraud Sajust de Bergues, a national civil servant on secondment to the Commission, and subsequently by Jean-Louis Dewost, Director-General of its Legal Service, Julian Currall and Guy Charrier, a national civil servant on secondment to the Commission, acting as Agents, assisted by Hans-Joachim Freund, Rechtsanwalt, Frankfurt am Main,

* Language of the case: German.

with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

The facts giving rise to the action

A — *Preliminary observations*

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

2 The applicant is the largest steel-producing subsidiary of the Thyssen Group. In 1989/1990 it had a turnover of DM 8.241 billion. Its sales of beams within the Community in 1990 amounted to DM 187.5 million (ECU 91 million).

3 Ten other parties to which the Decision was addressed have also brought actions before the Court. They are: NMH Stahlwerke GmbH ('NMH'), in Case

T-134/94; Eurofer ASBL ('Eurofer'), in Case T-136/94; ARBED SA ('ARBED'), in Case T-137/94; Cockerill-Sambre SA ('Cockerill-Sambre'), in Case T-138/94; Unimétal — Société française des aciers longs SA ('Unimétal'), in Case T-145/94; Krupp Hoesch Stahl AG ('Krupp Hoesch'), in Case T-147/94; Preussag Stahl AG ('Preussag'), in Case T-148/94; British Steel plc ('British Steel'), in Case T-151/94; Siderúrgica Aristrain Madrid SL ('Aristrain'), in Case T-156/94; and Empresa Nacional Siderúrgica SA ('Ensidesa'), in Case T-157/94.

4 Since the eleven cases were joined for the purposes of measures of inquiry and the oral procedure by order of the Court of 10 December 1997, reference will be made in the present judgment to certain documents produced in the parallel cases. Likewise, since the applicants in these cases raised a number of arguments in joint submissions at the hearing, reference will be made to 'the applicants'.

B — *Relations between the steel industry and the Commission from 1970 to 1990*

The crisis in the 1970s and the creation of Eurofer

5 From 1974 onwards, a fall in demand, giving rise to problems of excess supply and capacity and low prices, severely affected the European steel industry.

6 On 1 January 1977, the Commission adopted, on the basis of Article 46 of the ECSC Treaty, the 'Simonet Plan', under which each undertaking was to give unilateral voluntary commitments to adjust its deliveries to the levels proposed in the forward programmes published each quarter, pursuant to point 2 of the third paragraph of Article 46 of the ECSC Treaty. This system failed to stabilise the market and was replaced in 1978 by the 'Davignon Plan', which supplemented, in

particular, the unilateral voluntary commitments with guide and minimum prices (the 'Eurofer I' agreement).

7 The unilateral voluntary commitments which the undertakings gave to the Commission were discussed beforehand by them within the Eurofer trade association, which was established in 1977 with the encouragement of the Commission. In reality, the Commission relied very extensively on Eurofer to manage the crisis in the steel industry, to the extent that a letter of 13 July 1978 from Mr Davignon, a Member of the Commission, to the chairman of Eurofer refers to 'joint management of the anti-crisis [measures] for which the Commission and the producers have opted' (application in Case T-151/94, appendix 3, document 2).

The quota system established from 1980 to 1988

8 In view of the continued deterioration of the situation on the steel market, the Commission adopted Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (OJ 1980 L 291, p. 1). In that decision, 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 most steel products, including beams.

9 That crisis regime may be described in the following terms. The Commission fixed a quarterly objective for Community production for different product categories and allocated to each undertaking a production quota and a quota for deliveries within the Community ('I' quotas). It was further agreed that each undertaking would be allocated a delivery quota for each of the national markets ('i' quotas). Eurofer was given the task of dividing up the 'I' quota of each undertaking into 'i' quotas within the framework of the Eurofer II to Eurofer V agreements. Where necessary, the Commission was to intervene in the event of disputes between undertakings (see the arbitration of 2 June 1982 by Mr Davignon in regard to the 'i' quotas of Italsider, appendix 3, document 11, to the application in Case T-151/94).

10 By a letter of 17 January 1983 (application in Case T-151/94, appendix 3, document 6), Messrs Davignon and Andriessen, Members of the Commission, issued a formal notice to Eurofer, the terms of which provide as follows:

'The Commission appreciates the cooperation which undertakings and their associations have brought to the success of the anti-crisis measures, including cooperation on pricing policy. It considers that this activity is an essential element in its policy for steel and would like to see it continue.

However, it wishes to draw the attention of the associations, and in particular Eurofer, to the fact that they must carry out their activities in strict compliance with the framework and limits specified by Article 48 of the ECSC Treaty.

The Commission stresses that it cannot accept that steel undertakings or their associations should anticipate or circumvent the decisions which the Commission takes in drawing up pricing policy, or that the measures which it takes and the recommendations which it drafts as part of its anti-crisis policy should be used as a pretext for concluding agreements or adopting decisions contrary to the Treaty. Such agreements or decisions fall under Article 65, are entirely without legal effect, and would have to be prosecuted by the Commission.

...'.

11 By letter of 8 February 1983, the chairman of Eurofer replied as follows to Messrs Davignon and Andriessen (application in Case T-151/94, appendix 3, document 7):

'... we would like to remind you that, in the field of quantities, the agreements on restriction of production and deliveries have been reached at the urgent request of the European Commission and of the Council. The Commission has been kept informed of how they operate in full detail and we have made up our minds to carry on acting in that way.

In the field of prices, the Commission and the Council have constantly insisted on the necessity of an increase designed to allow steel undertakings sufficient income ...

The Commission has been kept meticulously informed of all the efforts made with a view to reaching the goal which it has set for itself, and we are resolved to continue down this road in the future.

In these circumstances, if our activities should at any stage risk going beyond the Commission's interpretation of the provisions of the Treaty of Paris, we rely on you to inform us of that fact immediately.'

12 In view of the fact that the state of manifest crisis had established itself on a long-term basis, the quota measures adopted by the Commission were extended and supplemented on numerous occasions, in particular by the adoption, between 1984 and 1986, of a system of minimum prices for beams and other products (Commission Decision No 3715/83/ECSC of 23 December 1983 fixing minimum prices for certain steel products (OJ 1983 L 373, p. 1)). The Commission also adopted Decision No 3483/82/ECSC of 17 December 1982 concerning the requirement for Community undertakings to declare the quantities of certain steel

products delivered (OJ 1982 L 370, p. 1, hereinafter 'Decision No 3483/82'), establishing a 'monitoring system' under which each undertaking was required to inform the Commission of its deliveries for each country.

13 At the beginning of 1984, the Commission reinforced the quota system by adopting Decision No 234/84/ECSC of 31 January 1984 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1984 L 29, p. 1). The ninth recital in the preamble to that decision refers to a declaration of the Council of 22 December 1983 stating that 'the stability of traditional patterns of deliveries of steel products within the community is an essential factor which must be preserved if the restructuring of the steel industry is to be carried out within a competitive context compatible with the solidarity imposed by the production quota system'. Consequently, Article 15B of that decision provides that, where a Member State submits a complaint in this connection, the Commission shall, if it finds that such complaint is justified, request the undertakings which are alleged to have caused the confirmed disruptions to give a commitment in writing that, during the following quarter, they will correct the imbalance in their traditional deliveries. If an undertaking refuses to accede to this principle of solidarity, the Commission may reduce that part of its quota which may be delivered in the common market.

14 The policy of stabilising traditional flows and the efforts to maintain prices at an acceptable level were the subject of extensive contact between the Commission and Eurofer, as evidenced in particular by:

— a Eurofer note of 2 July 1984 setting out the explanations provided at a meeting between representatives of the Commission and of the industry held

in Brussels on 27 June 1984 (application in Case T-151/94, appendix 3, document 8), which states as follows in regard to the implementation of Article 15B of Decision No 234/84:

'The Commission established the Art. 15B system in answer to the concern of the national Governments. It cannot, by any means, replace the small "i" system of a Eurofer IV Agreement. On the contrary, the Commission needs Eurofer for market evaluations and for the settlement of all the details. Without Eurofer, the Commission would be in extreme difficulty.... Generally speaking, the Commission is interested only in a broad analysis of the situation, without going into minor details.... For the future, the Commission is prepared to consider a system based on quotas, but would then need full support from Eurofer';

— the minutes of a meeting between the Commission and Eurofer held on 16 December 1985 in the presence of Commission Member Narjes (application in Case T-151/94, appendix 3, document 10), which state as follows with regard to traditional flows:

'The Commission expressed its deep concern about recent market developments. It regretted that Eurofer V had not yet been concluded and underlined the responsibility of the producers as regards prices.... The Commission urged the participants to re-examine ways of cooperation between them, because it considered that Eurofer played an essential role in the implementation of Article 58. It intended to define the criteria for the application of Article 15b as soon as possible, in order to cope with the situation should Eurofer fail, or to facilitate a private arrangement';

— the minutes of a meeting of 10 March 1986 between Mr Narjes and Eurofer (application in Case T-151/94, appendix 3, document 13), which state as follows with regard to the Spanish market:

'Narjes recalled the Commission decision concerning the limitation of deliveries to Spain.... As far as the burden sharing was concerned, he was in favour of an internal agreement between Eurofer producers';

— the minutes of a meeting held on 16 May 1986 between Mr Narjes and Eurofer delegates (application in Case T-151/94, appendix 3, document 14), which state as follows:

'The Commission stressed the need to rapidly harmonise the published prices in the Community to the same level and to avoid differences between published prices and market prices. The sector rebates should correspond to the reality. Confirmation was given of the readiness of the French steel industry to raise the price but also of the necessity to be supported by the penetrants in this respect. Eurofer expressed the hope that the Eurofer V Agreement would bring the appropriate basis for a general price recovery'.

15 At the same period, the Commission concluded a series of international agreements with the Kingdom of Sweden, the Kingdom of Norway and the Republic of Finland designed to ensure stability of traditional flows between those countries and the Community (known as the 'arrangements' system): see the Commission's letters, lodged by the parties at the hearing, of 4 March 1986, 13 February 1987 and 21 January 1988 to the Swedish authorities, of 4 March 1986, 11 March 1987 and 10 February 1988 to the Norwegian authorities, and of 4 March 1986, 10 April 1987 and 12 February 1988 to the Finnish authorities, exchanged respectively within the framework of the Agreement of 22 July 1972 between the Member States of the European Coal and Steel Community and the European Coal and Steel Community, of the one part, and the Kingdom of Sweden, of the other part (OJ 1973 L 350, p. 76), the Agreement

of 14 May 1973 between the Member States of the European Coal and Steel Community and the European Coal and Steel Community, of the one part, and the Kingdom of Norway, of the other part (OJ 1974 L 348, p. 17), and the Agreement of 5 October 1973 between the Member States of the European Coal and Steel Community and the European Coal and Steel Community, of the one part, and the Republic of Finland, of the other part (OJ 1974 L 348, p. 1).

16 A similar arrangement was applied to the Kingdom of Spain, for a three-year transitional period, by Protocol No 10 to the Act of Accession. The Commission thus fixed, for each of the years 1986, 1987 and 1988, the level of deliveries to the Community markets, apart from Portugal, of steel products originating in Spain. The application of those specific transitional measures came to an end on 31 December 1988.

Events preceding the end of the manifest crisis regime on 30 June 1988

17 From 1985 onwards, the Commission began to prepare for the end of the crisis regime and a return to normal market conditions. A document drawn up by the Commission's Directorate-General for the Internal Market and Industrial Affairs ('DG III') during 1985 (Document III/534/85/FR) (application in Case T-151/94, appendix 3, document 5) states that 'the quota system was based largely on the voluntary system which had been operated by Eurofer' and stresses how important it was that 'some agreement on the future should be reached [before] the mid-point of the coming year because, if this is not done, there will be a battle for market position in the second half of the year which could well have disastrous effects on prices and on company revenue.' In conclusion, that document states that 'Eurofer must therefore be encouraged to accept its responsibilities and formulate its propositions on how the steel industry should emerge from a period of protection to the circumstances of a free market'.

18 In its communication to the Council on the introduction of a system of production quotas under Article 58 of the ECSC Treaty after 31 December 1985

(COM(85) 509, Annex 14 to the application in Case T-145/94), the Commission describes in detail a transitional period prior to the resumption of normal competition. Taking the view that the worst of the crisis was practically over, it concluded that:

'... restructuring in the Community steel industry is not complete.... A period of transition is thus necessary. Limited to a maximum of three years, it will allow the industry to move progressively from the extremely rigid controls currently applied to a fully competitive market in compliance with the objectives of the ECSC Treaty.... the quota system proposed from 1 January 1986 will... be the last before a return to a competitive market.... the Commission does not intend to include in the next Decision the provisions of Article 15B of Decision 234/84/ECSC in their present form.... On the other hand, it does intend to continue, during the first phase of the transition period, with the statistical monitoring of flows of steel products between Member States on the basis of the production certificates and accompanying documents. These documents will make it possible to check whether the traditional flows between the Member States are subject to serious disturbances. If the statistical monitoring shows that the flows are disturbed, the Commission would immediately examine whether the firms concerned have launched a drive to recruit new customers, contrary to the rules of the Treaty, in particular the rules on prices.'

19 In its Decision No 3485/85/ECSC of 27 November 1985 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1985 L 340, p. 5), the Commission indicated that, owing to an improvement in market conditions:

'... the quota system can be dismantled completely over a two-year, or at most three-year, transition period. At its meeting on 25 July 1985 the Council said that an orderly return to a market allowing free competition between Community steelmakers was needed as soon as possible.'

20 The minutes of the meeting of 16 May 1986 between the Commission and Eurofer (application in Case T-151/94, appendix 3, document 14), drafted by Eurofer, state, under the heading 'Implementation of Article 58 in 1987': 'As regards the future after 1987, the Commission representatives stated that they for their part did not yet have an opinion on the matter'. Those minutes also reveal that, in a meeting after the Commission representatives had left, the Eurofer delegates reviewed various possibilities from their perspective:

'An initial discussion showed that a choice was to be made between three possibilities:

— full liberty and, in such a case, how to cooperate in the best way;

— continuation of Article 58 and, in such a case, how to proceed with the Commission;

— no Article 58, but a private arrangement.

In such a case, what kind of arrangement (production, deliveries) and what coverage (crude steel, some products, etc.).

Each member agreed that anyhow the objective was to set up a price level which corresponded to profitability for a large number of companies.

Different kinds of opinions were expressed, one, based on the existence of over-capacities for some years to come, considered that quantity arrangements were unavoidable, another based on the experience of the past, doubted the ability of all companies to accept adaptations necessary for the conclusion of a private arrangement after a long period of artificial measures'.

21 In its Decision No 3746/86/ECSC of 5 December 1986 amending Decision No 3485/85 (OJ 1986 L 348, p. 1), the Commission explained: 'The inclusion of Article 15B became necessary at the height of the crisis in the steel industry. At the present time there is no justification for maintaining this provision. It should therefore be deleted'.

22 In its communication to the Council on steel policy, submitted on 18 September 1987 (COM(87) 388 final/2) (OJ 1987 C 272, p. 3), the Commission stated *inter alia* as follows:

'... the Commission is not prepared to prolong the quota system — which everyone recognises must be updated — unless it is accompanied by closure incentives and firm commitments from the firms and governments concerned.

...

Although crisis conditions persist for flat products and heavy sections, the Commission, aware that the quota system itself can be an impediment to the restructuring of the industry, will implement such a system only if it receives firm commitments from companies for a satisfactory level of closures carried out over a period not to exceed three years.

...

In particular:

...

— it will terminate the system in the course of 1988 if by 1 August 1988 the firms have not made an additional effort ...'

23 On 8 October 1987 the Commission commissioned a group of three 'Wise Men' (Messrs Colombo, Friderichs and Mayoux) to ascertain whether, in three categories of products (including beams), undertakings were prepared to enter into commitments for a sufficient and rapid reduction of the production capacity judged to be excessive.

24 The report of the 'Three Wise Men' (OJ C 9 of 14 January 1988, p. 6) stated that:

'It is obvious that, having been protected by a quota system for seven years, and having become accustomed to the system being extended, the companies are not prepared to give adequate undertakings regarding closures in order to justify extending the system ....

However, in view of the international economic situation, it may be foreseen that the current situation of comparatively high prices will not last long, and it is

certain that over-capacity will again weigh heavily on the market, forcing the steelmakers to restructure and close plants down.

The Commission must therefore act firmly, but with a sense of its responsibilities.

The current quota system cannot be maintained unless firm undertakings are given by the companies on capacity reductions. On the other hand, if market forces are suddenly allowed to operate freely, the fall in prices which would undoubtedly follow could affect all companies, and hence make the proposed restructuring more difficult.'

25 The Report concludes:

'As a final point, we must again emphasise the extreme gravity of the steel crisis, which is much worse than most in the industry admit.

This crisis demands a resolute and unequivocal stance from the Community authorities to make the industry face up to its responsibilities.

It is a matter of urgency that steel companies should be restructured to meet world competition and become fully competitive in a market which will be increasingly open.'

26 It was also during 1987 that the Commission abandoned its views regarding the maintenance of 'traditional flows'. In Annex I to its abovementioned communication to the Council of 18 September 1987, it thus expressed its view that 'the preservation of the traditional flows of trade in steel products between Member States is inconsistent with the Community objective of achieving an open internal market by 1992'.

27 The Community's new steel policy was set out in the Commission's communication on steel policy, submitted to the Council on 16 June 1988 (COM(88) 343 final) (OJ 1988 C 194, p. 23). Outlining the measures to be adopted, the Commission stated:

'The Treaty of Paris is based on the principle of free market competition as the normal situation, and Article 5 empowers the Commission to exert direct influence upon production only when circumstances so require ... The Treaty stipulates that competition is to take place under normal conditions.

Furthermore, it must be borne in mind that completion of the internal market in 1992 is also a crucial objective for the steel market. Preparing for the 1992 deadline requires a radical change of strategy on the part of entrepreneurs, whose thinking is still all too often dominated by national market considerations'.

28 The Commission concluded:

'The steel market has improved to such an extent that the quota system is no longer justified. Furthermore, the system has proved inadequate for inciting firms to complete the restructuring process ... the Commission believes that structural adjustment must continue under the influence of normal market forces'.

29 During its 1255th meeting on 24 June 1988, the Council noted that the Commission intended to bring the quota system to an end, in respect of all steel products, on 30 June 1988. Referring to the accompanying measures and market-monitoring measures envisaged by the Commission (monthly production and delivery statistics, forward programmes, consultation of interested parties), the Council stressed that 'no-one must use the monitoring system in order to circumvent Article 65 of the ECSC Treaty' (see the extract from the draft minutes of the 1255th meeting of the Council, Annex 3 to the statement of defence in Case T-151/94).

30 On 4 May 1988, the Commission also published a press release (IP/88/261) (see appendix 5, document 4, to the application in Case T-151/94) concerning the inspection which it had just completed as part of the Stainless Steel case (see paragraph 36 below). That press release states in particular that:

'This is the first cartel inspection in the steel sector which the Commission has conducted in thirteen years. At a time when the Commission's official quota system has already been terminated for some steel products and when proposals have been made to end the quota system by 30 June 1988, it is clear that the Commission cannot tolerate any substitution of the Community system by unofficial and illegal arrangements by the industry itself'.

31 The crisis regime officially came to an end, so far as beams were concerned, on 30 June 1988. The Eurofer V Agreement also came to an end on that date. However, the monitoring system for deliveries between Member States introduced by Decision No 3483/82 was retained until November 1988.

The monitoring system implemented with effect from 1 July 1988

32 Although the manifest crisis regime came to an end on 30 June 1988, it is apparent from an internal memorandum of DG III dated 24 October 1988, produced by the defendant in compliance with the order of the Court of 10 December 1997, that the Council and Commission had agreed on the need to facilitate undertakings in adapting to changes in demand. To that end, it had been agreed that the Commission would continue to monitor the market by means of three measures:

— the collection of monthly statistics on production and deliveries of certain products;

— monitoring of developments on the market for those products within the framework of quarterly forward programmes;

— regular consultation with undertakings on the situation and trends in the market.

33 The Commission implemented that policy in particular by its Decision No 2448/88/ECSC of 19 July 1988 introducing a surveillance system for certain products of undertakings in the steel industry (OJ 1988 L 212, p. 1), under which each undertaking was required to inform the Commission of its deliveries. That system expired on 30 June 1990 and was replaced by an individual and voluntary information scheme.

34 Undertakings thus continued to maintain regular and close contacts with DG III, in the course of which market parameters (such as production, deliveries, stocks, prices, imports and exports) were discussed. Those contacts took place in the following contexts:

(a) official quarterly meetings between representatives of producers, customers and traders, and those of the Commission, at which, in accordance with Article 46 of the ECSC Treaty, the forward programmes were discussed. Those meetings took place, in particular, on 4 May 1988, 1 September 1988, 3 November 1988, 1 February 1989, 28 April 1989, 1 September 1989, 7 November 1989, 7 February 1990, 3 May 1990, 4 September 1990 and 5 November 1990;

(b) consultation meetings, limited to a small number of representatives of the industry, whether or not belonging to Eurofer, and of the Commission, which took place, in particular, on 27 October 1988, 26 January 1989, 28 April 1989, 27 July 1989, 26 October 1989, 25 January 1990 and 27 July 1990;

(c) restricted meetings, limited to a very small number of representatives of the industry, whether or not belonging to Eurofer, and of the Commission, held on 8 December 1988, 21 March 1989, 15 June 1989 and 13 December 1989;

(d) 'steel lunches', which brought together representatives of Eurofer and of the Commission in an informal setting during consultation meetings and restricted meetings.

35 The main purpose served by these meetings was to provide the Commission with information from the industry which was necessary for the application of Article 46 of the Treaty and the surveillance system established by Decision

No 2448/88. They brought together officials from DG III (in particular, Messrs Ortún, Kutscher, Evans, Drees, Aarts and Vanderseypen), the chairman of the CDE, the chairmen of Eurofer's products committees, a number of representatives of other steel associations and members of Eurofer's staff. The industry representatives provided the Commission with general information concerning the economic situation of each product. The general and product-specific information exchanged on those occasions related to actual consumption, apparent consumption, prices, orders, deliveries, imports, exports and the state of stocks. A summary of the consultation meetings, better known as 'speaking notes', was, as a rule, submitted by Eurofer to DG III a few days after the meeting in question.

The 'Stainless Steel' decision of 18 July 1990

36 On 18 July 1990 the Commission adopted Decision 90/417/ECSC relating to a proceeding under Article 65 of the ECSC Treaty concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (OJ 1990 L 220, p. 28) ('the Stainless Steel decision'), by which it imposed fines ranging from ECU 25 000 to ECU 100 000 on a number of steel undertakings, including British Steel, Thyssen Edelstahlwerke AG (the applicant's sister company) and Ugine Aciers de Châtillon et Gueugnon, a subsidiary of Unimétal, for having infringed Article 65(1) of the Treaty by concluding a quota and price agreement on 15 April 1986.

The Commission's reflections on the future of the ECSC Treaty after 1990

37 The Commission began a process of reflection on the future of the ECSC Treaty during 1990, as is shown by a draft note of 23 October 1990 from Mr Bangemann, the Commission Member responsible for industrial policy, to

the Members of the Commission on this matter (Annex 10 to the application in Case T-156/94). In that document, the Commission favoured the option that the ECSC Treaty should expire as scheduled in 2002, 'while making use of all the flexibility which it offers in order to adapt, so far as possible, its application to the position of the two sectors and progressively organising their phasing-in by the EEC Treaty in 2002' (see also the communication from the Commission to the Council and the European Parliament of 15 March 1991 on the future of the ECSC Treaty (SEC(91) 407 final) (appendix 3, document 1, to the application in Case T-151/94)).

38 In its notice of September 1991 on ECSC competition policy (IV/832/91) (Annex 5 to the reply in Case T-151/94), the Commission proposed to 'ensure that ECSC and EEC competition practices are brought into line as far as possible in the future.' Likewise, in its *Twentieth Report on Competition Policy*, published in 1991, the Commission (in point 122) stated *inter alia* that 'the time has come to bring the ECSC competition rules as far into alignment as possible with those of the Rome Treaty'.

C — *The administrative procedure before the Commission*

39 On 16, 17 and 18 January 1991 the Commission, acting on the basis of individual decisions adopted pursuant to Article 47 of the Treaty, carried out inspections in the offices of seven undertakings and two associations of undertakings. Further inspections were carried out on 5 March, 7 March and 25 March 1991. Additional information was provided by some of the undertakings and associations concerned on the basis of requests made by the Commission pursuant to Article 47 of the ECSC Treaty.

40 On 6 May 1992 the Commission sent a written statement of objections to the undertakings and associations concerned, including the applicant. The applicant replied to that statement by letters of 18 August and 20 December 1992.

41 The parties were also given the opportunity to present their cases at a hearing held in Brussels between 11 and 14 January 1993, the minutes of which were circulated to them on 8 July and 8 September 1993. On that occasion, having regard to the numerous references made by the parties present to certain contacts allegedly maintained by DG III with the beams producers during the period covered by the statement of objections, the Hearing Officer requested them to produce to him all the evidence which they held in that connection. The applicant replied to that request by letter of 16 February 1993.

42 By letter of 22 April 1993 the Hearing Officer informed the parties concerned that he did not intend to hold a second hearing.

43 On 15 February 1994, that is to say, the day before the Decision was adopted, the negotiations then under way between the Commission and the representatives of the steel industry designed to restructure that industry through voluntary reductions in production capacity were broken off through lack of success.

44 According to the minutes of the 1189th meeting of the Commission (morning and afternoon) produced by the defendant at the Court's request, the Decision was definitively adopted during the afternoon session on 16 February 1994.

45 At midday on 16 February 1994, Mr Van Miert, the Commission Member responsible for competition matters, gave a press briefing at which he announced that the Commission had just adopted the Decision and indicated the level of the fines imposed on the applicants British Steel, Preussag and ARBED. Those amounts did not correspond to the amounts indicated in the Decision. He also set out in detail a number of criteria applied in determining the fines and replied to journalists' questions. In particular, he denied that there was any connection whatever between the adoption of the Decision and the failure, on the previous day, of the negotiations to secure voluntary reductions in production capacities.

46 During a debate in the European Parliament on 24 February 1994, a number of members questioned the reasons which had led the Commission to adopt the Decision on the day after the negotiations on restructuring the industry had collapsed. Mr Van Miert defended the Commission's position and stressed that the two matters were quite separate.

D — *The Decision*

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

'*Article 1*

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

...

(a) Exchange of confidential information through the Poutrelles Committee and the Walzstahl-Vereinigung (30)

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

(c) Price fixing in the German market (3)

(d) Price fixing in the Italian market (3)

(e) Price fixing in the Danish market (30)

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

(g) Market sharing, France (3)

(h) Market sharing, Italy (3)

(i) Harmonisation of extras (x)

...

Article 2

Eurofer has infringed Article 65 of the ECSC Treaty by organising an exchange of confidential information in connection with the infringements committed by its members and listed in Article 1.

Article 3

The undertakings and associations of undertakings mentioned in Articles 1 and 2 shall henceforth bring to an end the infringements referred to in Articles 1 and 2 to the extent that they have not already done so. To this end, the undertakings and associations of undertakings shall refrain from repeating or continuing any of the acts or behaviour specified in Article 1 or as the case may be Article 2 and shall refrain from adopting any measures having equivalent effect.

Article 4

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

...

1 — This is the date given in the French and Spanish versions of the Decision; the German and English versions give the date as 31 December 1988.

Thyssen Stahl AG ECU 6 500 000

...

Article 5

The fines imposed pursuant to Article 4 shall be paid within three months of the date of notification of this Decision...

On the expiry of that period interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3.5 percentage points, i.e. 9.75 %.

Fines in excess of ECU 20 000 may, however, be paid in five equal annual instalments:

— the first to be paid within three months of the date of notification of this Decision;

— the second, third, fourth and fifth instalments to be paid respectively one, two, three and four years after the date of notification of this Decision. Each instalment shall be increased by the interest, calculated on the total amount remaining to be paid by applying the interest rate used by the European

Monetary Cooperation Fund in its operations in ecu in the month preceding the due date of each annual payment. This facility is granted on condition that by the date provided for in the first indent, a bank guarantee acceptable to the Commission, covering the remaining principal and interest has been presented.

In the case of late payment this interest rate shall be increased by 3.5 percentage points.

...

Article 6

This Decision is addressed to:

...

— Thyssen Stahl AG

...'.

48 After reciting the provisions of Article 5 of the Decision, the Letter provides as follows:

'If you appeal to the courts of the European Communities, the Commission will not recover the debt as long as the case is before these courts, on condition that:

— you accept that your debt, between the moment of its exigibility and the moment of payment which should take place in the month following the delivery of the final verdict, will bear interest at the following rates:

  — in case you have chosen to pay in one time, at the rate of 7.75 %,

  — in case you have chosen to pay in annual instalments, the rate for the first instalment shall be 7.75 % and for the successive instalments, the rate mentioned in Article 5 for each instalment, increased by one and a half points;

— and you provide the Commission not later than the date of expiry mentioned in Article 5, first indent, of the Decision with a guarantee acceptable by the Commission covering the debt both as regards the principal and as regards the interest ...'

Procedure before the Court of First Instance, developments following the bringing of the action, and forms of order sought by the parties

49 The present action was brought by application lodged at the Court Registry on 8 April 1994.

50 By letter of 7 September 1994 addressed to the Registry, Aristrain, the applicant in Case T-156/94, asked whether the Commission had, in the case in point, complied with its obligations under Article 23 of the ECSC Statute of the Court of Justice ('Article 23') concerning the transmission of documents. Upon being requested to submit its observations on that request, the Commission replied in essence, by letter of 12 October 1994, that in its view it had complied with the requirements of Article 23.

51 By letter of 25 October 1994, the Court Registry requested the Commission to fulfil its obligations under Article 23. The Commission lodged with the Registry a total of approximately 11 000 documents relating to the Decision under cover of a letter dated 24 November 1994, in which it stated in particular that the undertakings in question should not be given access to the documents containing business secrets or to the Commission's own internal documents.

52 Following an informal meeting with the parties on 14 March 1995, the Court of First Instance (Third Chamber, Extended Composition) requested those parties, by a letter from the Registry of 30 March 1995, to define in writing their position regarding the issues of confidentiality thus raised, and also regarding possible joinder of the cases. In view of the incomplete replies given by the parties, the Court addressed a second series of questions to them, by letter from the Registry of 21 July 1995 (25 July 1995 in the case of British Steel). In addition, the Court requested the defendant to define its position regarding a fresh application by British Steel, dated 14 July 1995.

53 In their replies to the questions put by the Court, received between 6 and 15 September 1995, the applicants stated in particular that they wished to be given access to the Commission's internal documents, in the light of a list of those documents annexed to a letter which the defendant had produced before the Court on 25 June 1995.

54 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 order of 19 June 1996'), the Court of First Instance (Second Chamber, Extended Composition, to which the Judge-Rapporteur had in the interim been assigned) ruled on the applicants' right of access to the documents in the file sent by the defendant emanating, first, from the applicants themselves and, second, from third parties not involved in the present proceedings which the Commission had, in the interests of those parties, classified as confidential. However, the Court reserved its decision on the applicants' requests for access to the documents in that file which the defendant had classified as internal documents, and on their applications for the production of documents not appearing in that file; it ordered the defendant to explain in detail and specifically the reasons why it considered that certain documents classified by it as 'internal' among the documents contained in that file could not, in its view, be communicated to the applicants.

55 The defendant acceded to that request by the Court by letters dated 11, 12 and 13 September 1996. In those letters, the defendant proposed that the cases in point be referred to the Court sitting in plenary session pursuant to Article 14 of its Rules of Procedure. Upon being requested to submit their observations on that proposal, the applicants replied by letters addressed to the Court and dated 4 to 18 October 1996. The applicants in Cases T-134/94, T-137/94, T-138/94, T-148/94, T-151/94 and T-157/94 opposed such a reference.

56 By 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 ('the order of 10 December 1997'), the Court of First Instance (Second Chamber, Extended Composition) ruled on the applicants' applications for access to the documents classified by the Commission as 'internal', ordering that certain documents submitted to the Court under Article 23 concerning the contacts between DG III and the steel industry during the infringement period taken into account in the Decision for the purpose of fixing the amount of the fines and certain documents from the Directorate-General for External Relations (DG I) relating to the contacts established between the Commission and a number of national Scandinavian authorities be put on the case-files. The Court also adopted certain measures of inquiry, ordering the Commission to produce its own minutes or notes relating to the meetings held between DG III and the

representatives of the steel industry between July 1988 and November 1990. Finally, the Court ordered that the cases be joined for the purposes of the inquiry and the oral procedure, without referring them to the Court sitting in plenary session.

57 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and to put various written questions to the parties on the basis of Article 64 of the Rules of Procedure. In particular, it requested the defendant, by letter sent by the Registry on 26 November 1997, to produce the text of the definitive minutes of the Commission's meeting of 16 February 1994 (morning and afternoon) in so far as they related to the adoption of the contested Decision. In that letter, the Court also called on the Commission to indicate, for each applicant and for the undertakings Norsk Jernverk and Inexa Profil AB:

— the turnover figure it had taken into account in imposing the fine on each undertaking;

— the different rates which it had applied to turnover in order to calculate the fine for each undertaking concerned;

— the arguments or considerations, set out in detail for each undertaking, which it had taken into account in regard to the different circumstances, aggravating or mitigating, for the purpose of obtaining a final figure for the fine.

58 The defendant replied to those letters of the Court by letter of 19 January 1998, which was lodged at the Court Registry on 22 January 1998. Under cover of that letter, it forwarded to the Court two documents entitled 'Draft minutes of the 1189th meeting of the Commission held in Brussels (Breydel) on Wednesday

16 February 1994 (morning and afternoon)' and 'Special draft minutes of the 1189th meeting of the Commission held in Brussels (Breydel) on Wednesday 16 February 1994 (morning and afternoon)', but argued that these two documents were confidential and should not be divulged to the applicants.

59 By letter sent by the Registry on 27 November 1997, the Court also called on the applicant to specify to what extent it was maintaining its allegation that it did not have access to certain incriminating documents during the administrative procedure. The applicant replied to that request by letter of 19 January 1998.

60 On 14 January 1998 the Court held an informal meeting with the parties with a view to planning the smooth conduct of the hearing. In particular, it pointed out to the parties that they were entitled to access to the case-file sent to the Court pursuant to Article 23 to the extent indicated in the orders of 19 June 1996 and 10 December 1997 and in accordance with the arrangements to be determined by the Registry. The Court also requested the parties to inform it, after having had access to the file, to which specific additional documents they intended to refer at the hearing.

61 The applicants ARBED, Aristrain, Cockerill-Sambre, British Steel, Ensidesa, Preussag and Unimétal inspected that Court file and obtained a copy of the documents which they considered necessary for their defence. By letter of 9 February 1998, Ensidesa submitted observations on a number of the documents in question.

62 By letters sent by the Registry on 30 January 1998, the Court put a number of additional questions to the Commission and Eurofer concerning the system of monthly exchange of information on orders and deliveries established by Eurofer and described in the Decision as 'fast bookings'. Those parties replied by letters of 18 February and 23 February 1998 respectively.

63 By letter sent by the Registry on 6 February 1998, the Court also put a number of additional questions to the defendant concerning the method used in this case for calculating the fines. The Commission replied by letter of 20 February 1998, lodged at the Registry on 24 February 1998.

64 By order of 16 February 1998, the Court (Second Chamber, Extended Composition) ordered that only the document entitled 'Draft minutes of the 1189th meeting of the Commission held in Brussels (Breydel) on Wednesday 16 February 1994 (morning and afternoon)', which had been lodged with the Registry on 22 January 1998, should be placed on the file and communicated to the applicants.

65 By letters of 13 February and 19 February 1998, the applicants jointly requested that measures of inquiry be adopted concerning, in particular, the calculation of the fines and the production of documents linked to the adoption of the Decision. The Commission replied to those requests by letter of 2 March 1998.

66 By letter sent by the Registry on 11 March 1998, the Court requested the defendant, in the first place, to amplify its replies of 19 January and 20 February 1998 to the questions put by the Court by specifying, for each applicant, the precise arithmetical calculations making it possible to understand exactly how the amounts of the fines had been determined, and, second, to produce the definitive minutes of the Commission meeting (morning and afternoon) at which the Decision was adopted, in addition to its annexes in so far as they related to the Decision. The defendant replied to that request by letter of 19 March 1998 and lodged with the Registry the definitive minutes of the Commission meeting of 16 February 1994 together with the annexes thereto.

67 By order of 23 March 1998 the Court ordered that Messrs Ortún and Vanderseypen, officials with DG III, as well as Mr Kutscher, a former official of DG III, should be heard as witnesses concerning the contacts established between DG III and the steel industry during the period of infringement taken into account for the purpose of determining the fines, that is to say, from 1 July 1988 to the end of 1990.

68 During the hearing held from 23 to 27 March 1998, the parties submitted oral argument and replied to the questions put by the Court (Second Chamber, Extended Composition), composed of Judges Kalogeropoulos, President, Briët, Bellamy, Potocki and Pirrung. The applicants submitted joint pleadings on a number of issues. The Court heard, in an expert capacity, Professor Steindorff, former Secretary-General of the German delegation at the negotiations which preceded the signing of the ECSC Treaty. The Court also heard, as witnesses, Messrs Ortún, Vanderseypen and Kutscher, as well as, at the request of Preussag, that undertaking's representatives Messrs Mette and Kröll. The Court also viewed a video recording, made by Aristrain, of the press briefing held by Mr Van Miert on 16 February 1994.

69 A number of new documents were lodged during the hearing at the request of the Court or with its authorisation. The Court also called on the Commission to produce certain documents concerning its relations with the Scandinavian national authorities during 1989 and 1990. Those documents were lodged with the Registry under cover of a Commission letter dated 11 May 1998.

70 The oral procedure was closed at the end of the hearing on 27 March 1998. Since two members of the Chamber were prevented from taking part in the judicial deliberations following the expiry of their mandate on 17 September 1998, the Court's deliberations were continued by the three judges whose signatures the present judgment bears, in accordance with Article 32 of the Rules of Procedure.

71 The applicant claims that the Court should:

— annul Articles 1, 3 and 4 of the Decision in so far as they concern the applicant;

— in the alternative, reduce to an appropriate amount the fine imposed on it by Article 4 of the Decision;

— in the alternative, annul the Letter in so far as it fixes a rate of interest which differs from that indicated in Article 5 of the Decision;

— order the Commission to pay the costs.

72 The defendant submits that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The claim for annulment of Article 1 of the Decision

73 In support of its claim for annulment of Article 1 of the Decision, the applicant puts forward a number of arguments, which may be grouped as follows. It first raises a series of arguments alleging infringement of its procedural rights. Second, it raises a number of arguments alleging that the Commission breached substantive requirements during the administrative procedure. In a third series of arguments, the applicant submits that Article 65(1) of the Treaty has been infringed (see paragraphs 171 and 172 below).

A — *Infringement of the applicant's procedural rights*

Failure to forward all the documents to which the Decision refers

Summary of the applicant's arguments

74 The applicant submits that, in so far as the Decision relies on several documents which are also mentioned in the statement of objections, which were neither attached nor forwarded at a later stage in the administrative procedure, the Commission infringed the applicant's rights of defence. The applicant points out that, by letter of 20 December 1992 and during the administrative hearing, it objected to the failure to forward most of those documents.

75 In its reply, the applicant acknowledges that 'most of the documents covered by the [present] head of complaint ... were forwarded to it on 19 January 1993' and adds that it 'is abandoning this head of complaint inasmuch as it relates to the documents in question'.

76 Asked by the Court to specify to what extent and in respect of which documents it maintained this plea, the applicant indicated, by letter lodged with the Registry on 19 January 1998, that it was abandoning the plea in so far as it had submitted that the documents mentioned in paragraph 17 of the application had not been forwarded to it before the Decision was adopted. However, it was maintaining the plea in so far as it had criticised the Commission for failing to forward those documents to it with the statement of objections, thereby preventing it from using them during the administrative hearing.

Findings of the Court

77 The rights of the defence invoked by the applicant are, in this case, guaranteed by the first paragraph of Article 36 of the ECSC Treaty, according to which the Commission must, before imposing a pecuniary sanction provided for in that Treaty, give the party concerned an opportunity to submit its comments. Regarding compliance with that guarantee in the present case, a distinction must be drawn between the documents in respect of which the applicant had already raised the objection of non-submission in its letter of 20 December 1992 and those in respect of which that objection was expressed for the first time in the application.

— The documents in respect of which the applicant raised the issue of non-submission in its letter of 20 December 1992

78 It is clear from Annex 3 to the statement of objections that a copy of the documents relating to the applicant was sent to it with the Commission's letter of 6 May 1992. A number of documents relied on in the applicant's letter of 20 December 1992 are mentioned in Annex 3.

79 In Annex 2 to the statement of objections, the Commission also provided the applicant with a list of all the documents constituting the file for the present case, indicating those to which it was prepared to allow the applicant access. All of the documents relied on in the applicant's letter of 20 December 1992, with the exception of a set of documents dealing with the exchange of information through Eurofer, which were forwarded to the applicant by Commission letter of 14 July 1992, were classified, in Annex 2 to the statement of objections, as 'accessible' or, in the case of a number of internal British Steel documents, as 'partially accessible' to the applicant. Regarding this latter category, the applicant has not disputed that the objections are based exclusively on the accessible passages.

80 On 5 June 1992, the applicant was given access to the file in accordance with the arrangements indicated in the Commission's letter of 6 May 1992. It was thus able to obtain a copy of all the documents classified by the Commission as 'accessible' or 'partially accessible'.

81 In its reply of 18 August 1992 to the statement of objections, the applicant did not complain of any failure to forward documents, with the single exception of 'the document cited in paragraph 266' of that statement of objections (p. 5 of the letter of reply). It was only in its letter of 20 December 1992, that is to say more than seven months after the statement of objections, that the applicant provided the Commission with a list of the documents which it claimed had not been forwarded to it.

82 During the administrative hearing from 11 January to 14 January 1993, the Hearing Officer indicated that a copy of the documents mentioned in the applicant's letter of 20 December 1992 might (again) be forwarded to it, and he called on the applicant to ascertain whether, in the light of those documents, its reply to the statement of objections ought to be amended, adding that he would then consider whether the entire case ought to be re-examined (minutes of the hearing, p. 176).

83 On 19 January 1993, a representative of the applicant signed an acknowledgement of receipt, which reads as follows:

'Following your access to files June 5, 1992, your letter dated December 20, 1992, and your request at the hearing January 12, 1993, the documents, listed in the abovementioned letter, have been given to the undersigned as of this date. All of these documents were available either in the appendix 3 to the statement of objections or in the files you consulted on June the 5th, 1992.'

84 It appears, however, from the Commission's statement in defence that, contrary to what that acknowledgement of receipt would suggest, five documents mentioned in the applicant's letter of 20 December 1992 were not given to it on 19 January 1993. Those five documents were none the less classified as 'accessible' in the list joined as Annex 2 to the statement of objections, with the exception of one (a British Steel file note concerning a meeting held on 14 September 1988, cited in recital 172 of the Decision) which was not used against the applicant.

85 Although it wrote to the Hearing Officer on 16 February 1993 regarding the contacts established between DG III and the steel industry, and although it received the minutes of the meeting no later than 8 September 1993, the applicant did not return to the issue of file access.

86 The Court takes the view that, in those circumstances, the applicant has failed to establish that it was not enabled, during the administrative procedure, effectively to make its views known on the documents referred to in its letter of 20 December 1992.

87 It follows that the arguments which the applicant draws from an alleged failure to forward the documents referred to in the Decision must be rejected in so far as they concern the documents which the applicant mentions in its letter of 20 December 1992.

— The documents whose non-submission was first raised in the application instituting proceedings

88 This category covers only a limited number of documents, that is to say: the delivery tables, dated 3 December 1990, cited in Annex 1, point 26, to the

Decision; the Peine-Salzgitter hand-written note mentioned in recital 63 of the Decision; all of the documents mentioned in recital 115 of the Decision; and the fax of 3 December 1990 from the head of Eurofer's legal department to that association (recital 140 of the Decision).

89 With regard to the documents appended to the statement of objections according to Annex 3 thereto, that is to say all the abovementioned documents with the exception of the first, it must be pointed out that the applicant did not take issue with their non-submission in its letter of 20 December 1992. It must therefore be assumed that they were in fact appended to the statement of objections. In any event, those documents were also included in Annex 2 to that statement, as being documents which were accessible to the applicant in the Commission's files.

90 So far as the delivery tables dated 3 December 1990 are concerned, they were not used against the applicant and do not contain any evidence exonerating it. Moreover, the applicant did not contest those documents after obtaining access to them during the judicial proceedings, following the order of 19 June 1996.

91 It follows that the applicant's arguments alleging a failure to forward the documents referred to in the Decision must be rejected in their entirety.

Infringement of the 'principle of ex proprio motu *investigation' and of the right to procedural fairness*

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 Decision accuses them or the extent to which they took part in such practices. The assertion in recital 312 of the 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 the 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) annexed by the Commission to its statement in defence.

93 The applicant points out that at no time did the officials in DG IV responsible for the present case themselves inspect the files of DG III concerning meetings between the representatives of the undertakings and the Commission. In the applicants' joint pleadings at the hearing, more specific criticism was levelled at the defendant's failure, in the course of the administrative procedure, to examine the 26 internal DG III notes concerning the meetings held with steel producers between July 1988 and November 1989 and the documents concerning the contacts between the Commission and the Swedish authorities, which were later produced in compliance with the order of 10 December 1997, and at its failure to collect witness statements from Messrs Ortún, Kutscher and Vanderseypen.

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 Decision was adopted, whether by holding a second hearing or by providing the undertakings with an opportunity to submit written observations.

95 The Court notes at the outset that the heads of complaint alleging infringement of the principle of *ex proprio motu* investigation and of the applicant's procedural rights, in particular to the effect that the Commission refused to conduct fresh hearings, are formally distinct from the question whether the defendant was justified in forming the view that the documents which the applicants produced after the hearing did not corroborate their allegations. That question will be examined at a later stage (see Part D below, which deals with the Commission's involvement in the infringements of which the applicant is accused).

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 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.

98 It appears from the case-file that, by Note No 002793 of 22 July 1991 (Annex 2 to the statement in defence), thus before the statement of objections was sent, Mr Temple Lang, Director of Directorate D 'Cartels, Abuse of Dominant Positions, and Other Distortions of Competition III' of DG IV, wrote as follows to Mr Ortún, Director of Directorate E 'Internal Market and Industrial Affairs III' of DG III:

'I wish ... to clarify the extent to which information was exchanged between DG III and CDE Eurofer during the meetings for preparation of the steel forward programmes. Could you set out for me:

— the method used to calculate the Community figures for crude steel and product categories when they were published;

— statistics received by DG III during meetings with the CDE delegation, as well as the extent to which they were aggregated and their frequency.

Did you hear any reference, during your meetings, to a "Traverso method", which appears to have the purpose of adapting demand and deliveries by national markets for the various categories of products?'

99 In his reply Note No 10018 of 12 September 1991 (Annex 3 to the statement in defence), Mr Ortún stated *inter alia* as follows for Mr Temple Lang's attention:

'2. Regarding the information received from Eurofer, apart from a copy of the rapid Eurofer statistics concerning orders and deliveries of which you are aware, we received forecasts in the form annexed... The data were also aggregated at the EEC level.

I would also point out that DG III had also taken care (while the system of forecasts on a product basis was at an early stage) to publish only production (and not delivery) forecasts, to round them off and to change their definition... with a view to distancing itself from the definitions adopted by Eurofer.

3. The meetings with the CDE took place within the framework of the meetings of the group of surveillance experts, as a rule every three months, in order to comment on the market situation. These meetings have recently become more occasional in nature. The last meeting, at which the attached [speaking] note was handed to me, dates from 19 July 1991. I consider these meetings to be useful for ensuring a regular monitoring of the market ...

4. With regard to the so-called "Traverso" method, I must admit that none of my present colleagues had heard any reference [to this] ...'

100 The file which the Commission submitted to the Court pursuant to Article 23 also contains a note of 27 January 1993 from Mr Ehlermann, the Director-General of DG IV, to Mr Perissich, the Director-General of DG III (document No 9729, made accessible to the applicant under the order of 10 December 1997), which is worded as follows:

'In the case in question, my departments consulted your departments, in particular during the preparation of the statement of objections and in regard to the written replies of certain undertakings which refer to the action of DG III.

It follows from the hearing which took place between 11 January and 14 January 1993, which representatives of your departments attended, that the parties attach the utmost importance in their respective defences to the argument that the Commission, in this case DG III, was aware of the practices complained of, in particular through the "speaking notes" drafted by the industry.

The Hearing Officer refused the parties, and their representatives who so requested, access to the files of DG III, but suggested to them that they forward to DG IV, within two weeks of the conclusion of the hearing, any documents in their possession which might, at least in their opinion, exonerate them.

So far as this particular point is concerned, I should be very grateful if you could check once more whether you have in your archives any documents of this type (whether correspondence between the undertakings and the Commission or

documents originating with the undertakings and made available to the Commission's departments) and, if so, send me copies of them with your comments'.

101 Mr Perissich replied to Mr Ehlermann by Note No 001836 of 12 February 1993 (Annex 4 to the statement in defence). He attached to his note that of 12 September 1991 from Mr Ortún, along with the annexes thereto, and pointed out:

'As you can confirm in the annexes, the very general nature of the information in these "speaking notes" did not in any case give my departments grounds to suspect that they might be the result of practices contrary to the ECSC Treaty.

The purpose of those meetings with Eurofer was always confined to a continuous study of market trends, as provided for under Article 46.1 of the Treaty.

If you so wish, we could send you the speaking notes relating to other quarters. The archives of DG III do not contain any other document which could, in my opinion, have any bearing on this case'.

102 Mr Temple Lang also forwarded to Mr Ortún, by note of 18 February 1993 (document No 9763 on the file sent by the Commission to the Court under Article 23, made available to the applicant pursuant to the order of 10 December 1997), the documents (speaking notes) sent to DG IV by the applicants Preussag and Unimétal following the hearing, requesting Mr Ortún to examine them and to let him know his views 'on the significance to be attached to the information which they contain in regard to the practices of beam producers which are the subject of complaint'. Mr Temple Lang also sent to Mr Ortún, by note of 22 February 1993 (document No 9764 on the file sent by the Commission to the

Court under Article 23, made available to the applicant pursuant to the order of 10 December 1997), the documents sent by the applicants Cockerill-Sambre, TradeARBED and British Steel, with a request for comments.

103 Mr Ortún sent his comments to Mr Temple Lang by note of 5 May 1993 (document No 9769 on the file sent by the Commission to the Court under Article 23, made available to the applicant pursuant to the order of 10 December 1997), confirming, in substance, the earlier comments of DG III.

104 The Commission's file (see Annex 5 to the statement in defence) also contains a confidential note of 19 February 1993 from Mr Ortún to Mr Schaub (DG IV), which is set out as an 'argument in response to accusations' intended to 'reply to the producers' assertions that DG III knew of, or was even involved [in the] practices investigated by the Commission (DG IV)'.

105 With regard to the alleged involvement of DG III in exchanges of information concerning quantities and monitoring, that note states as follows:

'Meetings with commercial experts of Eurofer, extended to include non-Eurofer independent operators, were held within the context of Decision No 2448/88 on the market surveillance instituted at the end of the quota system and up to the end of June 1990.

The aggregated production and delivery results of the undertakings were submitted to the participants for their comments and for comparison with the forecasts made within the framework of the Steel Forward Programme (Programme Prévisionnel Acier — PPA). Trends in external trade in the same products were also analysed in order to complete the assessment of the market.

These meetings also made it possible to collect, for purposes of the PPA, information on future market trends (in particular exports) for those products which were the subject of surveillance. At no time during those meetings was any reference made to the possibility of organising the market on an individual product basis.

The "speaking notes" which the representative of the CDE (generally, Mr Traverso) used during those meetings were drafted previously within Eurofer without any officials from DG III being present. The fact that DG III received those speaking notes outside these "monitoring" meetings cannot in any event constitute approval of practices contrary to the ECSC Treaty.

...

It was only at the end of monitoring and for practical reasons that "steel lunches" replaced this type of meeting. The purpose served by these contacts with Eurofer was always confined to the "continuous study of market trends" as provided for under Article 46.1 of the Treaty. It should also be pointed out that, to that end, our departments have developed contacts with all interested parties: associations of independent producers, traders and consumers'.

106 Dealing with DG III's alleged knowledge of the concerted pricing practices, that note states that:

'(a) regarding prices, the speaking notes in question above were always confined to indicating a trend in very general indicators (for example, flat products over their entire range) relating to the past and an estimate of developments expected over the following quarter.

Here too, the very general nature of the information did not allow our departments in any case to suspect practices contrary to the ECSC Treaty.

(b) Harmonisation of extras

> Decision No 31/53/ECSC requires undertakings to inform the Commission of their price lists as well as of any change therein.... Being in possession of all price lists and in regular receipt of any changes to them, the departments of DG III were able to observe the parallel similarities in the structure, the price levels and occasionally the dates of publication of the price-list extras. Since this practice was not contrary to the rules of Article 60, it was never picked up by our departments or by the numerous Article 60 controls carried out by DG IV.'

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 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).

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

The textual similarities between the Decision and the statement of objections

117 According to the applicant, the Decision was adopted in breach of its rights of defence by reason of the fact that it consists almost entirely of a mere repetition of

the statement of objections. This almost verbatim similarity justifies the conclusion that the Commission clearly did not take into account the arguments which the applicant had set out during the administrative procedure. That similarity, it argues, also constitutes a breach of the obligation to state reasons laid down in Article 15 of the ECSC Treaty.

118 With regard to the applicant's rights of defence, the Court considers that reproduction of the text of certain passages in the statement of objections in itself indicates only that the Commission maintained its point of view. In the absence of any other relevant evidence, as is the case here, such similarity between texts does not establish that the Commission failed, when assessing the case, to afford proper consideration to the arguments which the party concerned set out in its defence.

119 With regard to the statement of reasons required by Article 15 of the ECSC Treaty, while it is true that the Commission is not required to reply to all the issues of fact and law raised during the administrative procedure (see, concerning the EC Treaty, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22, and Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 17), it must be remembered that the statement of reasons in any decision adversely affecting a party must enable the Community judicature to carry out its review and enable the Member States and the nationals concerned to ascertain the circumstances in which the Commission has applied the Treaty. Such an obligation may sometimes require the Commission to set out its position on the essential arguments adduced by the parties during the administrative procedure (Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraphs 39 to 49). However, it must be concluded here that the applicant has not identified, within the context of the present plea, any passage in the Decision which ought to have been amended *vis-à-vis* the corresponding passage in the statement of objections because of arguments which it set out during the administrative procedure.

120 It follows that the applicant's argument based on the textual similarities between the Decision and the statement of objections must be rejected.

B — *Breach of essential procedural requirements*

Summary of the applicant's arguments

121 At the hearing, the following heads of complaint, relating to breach of essential procedural requirements during the procedure for the adoption of the Decision, were presented during a joint submission made on behalf of all the applicants.

122 First, the applicants point out that, during the press briefing which he held at midday on 16 February 1994, Mr Van Miert stated that the Decision had been adopted, which was not the case, and that he also gave incorrect figures concerning certain fines (see appendix 1 to the application in Case T-151/94). The Commission's press releases, prepared before the Decision was adopted, also contained errors, in particular concerning the identity of the undertakings on which fines were imposed.

123 In those circumstances, the applicants, relying on the judgment of the Court of Justice in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ('the *PVC* judgment') and the judgments of the Court of First Instance in Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821, paragraph 50, and in Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729, paragraphs 114 and 119 ('the *LdPE* judgment'), put forward four main heads of complaint.

124 First, the quorum of nine members of the Commission required under Article 5 of the Commission's Rules of Procedure of 17 February 1993, which were in force at the time (93/492/Euratom, ECSC, EEC, OJ 1993 L 230, p. 15, hereinafter 'the 1993 Rules of Procedure') was, they argue, not achieved. According to the applicants, although it appears to follow from page 2 of the minutes of the

Commission's meeting of 16 February 1994 that nine members were present when the Decision was adopted during the afternoon session (point XXV, p. 43), it follows in fact from the list of persons mentioned as having 'attended the session in the absence of the Commission Members' on page 40 of those minutes that only six Commission Members were in fact present at that session. In the absence of a quorum, therefore, no vote on the adoption of the Decision could validly have been taken in accordance with Article 6 of the 1993 Rules of Procedure.

125 Second, the applicants submit that the Decision was not adopted by the Commission in the form notified to them. In any event, it was impossible to determine the precise content of the decision which the Commission intended to adopt on 16 February 1994.

126 According to the minutes of the meeting (p. 43), the Commission approved 'in all the languages having binding force, the decision set out in Document C(94)321/2 and 3', whereas the version of the Decision notified to the applicants is numbered 'C(94)321 final'. Furthermore, according to the list of internal documents submitted to the Court under Article 23 and annexed to the Commission's letter of 27 June 1995, there is another version of the Decision bearing the number C(94)321/4 and dated 25 February 1994.

127 Furthermore, they argue, there are justified doubts as to the various versions of the Decision lodged with the Registry of the Court following its request of 11 March 1998. Apart from the fact that only the Spanish and Italian versions bear the words 'authentic version' on their cover page, the documents C(94)321/2 and C(94)321/3 appear to consist of several documents prepared separately, drafted with different character fonts and having inconsistent pagination.

128 In view of the fact that the Commission decided, during the hearing, to lift confidentiality from the internal documents relating to the adoption of the Decision contained in document files 57, 58 and 61 of the case-file sent to the

Court pursuant to Article 23, counsel for the applicants state that their doubts have been reinforced by the discovery of a number of differences, summarised in a list lodged at the hearing, between the internal documents in those document files and the documents C(94)321/2 and C(94)321/3. Furthermore, there are significant differences between the document in the Commission's document file 61, which in the applicants' view constitutes document C(94)321/1 as examined by the Commission during its morning meeting on 16 February 1994, and documents C(94)321/2 and C(94)321/3. These differences too are summarised in a second list submitted at the hearing. Finally, the applicants claim that a number of changes were made by hand to the Italian version of document C(94)321/2 following receipt of a telex from the Commission's translation services between 17.09 hours and 17.14 hours on 16 February 1994, and thus after the closure of the meeting at 16.25 hours.

129 Third, the applicants submit that neither the version C(94)321 final nor the versions C(94)321/2 and C(94)321/3 of the Decision were authenticated in accordance with Article 16 of the 1993 Rules of Procedure. None of those versions was annexed to the minutes within the meaning of that provision, which requires that they be physically attached. The minutes, moreover, make no reference to the documents annexed thereto.

130 In any event, the minutes cannot be regarded as having been authenticated in accordance with Articles 9 and 16 of the 1993 Rules of Procedure in the absence of the original signatures of the President and the Secretary-General on the cover page.

131 Fourth, the applicants argue that the minutes do not bear the date on which they were signed by the President and Secretary-General of the Commission and consequently cannot be presumed to have been authenticated at the time when they were approved.

132 Finally, the applicants request the Court to adopt measures of inquiry designed to allow them to inspect the original version of the minutes in the Commission's

archives and to determine, for example on the basis of the Commission Members' engagement books and similar documents, which Commission Members were in fact present when the Decision was adopted during the afternoon session on 16 February 1994.

Findings of the Court

Admissibility

133 The applicant has not, in its application, raised any plea alleging irregularities in the procedure by which the Decision was adopted. However, the minutes of the Commission's meeting of 16 February 1994 and the annexes thereto must be treated as matters which have come to light in the course of the procedure following the measures of inquiry and organisation of procedure adopted by the Court. Article 48(2) of the Court's Rules of Procedure does not prohibit the introduction of new pleas based on such factors. It follows that the present plea is admissible.

Absence of a quorum

134 The first paragraph of Article 13 of the Treaty, as inserted by Article H(2) of the Treaty on European Union, provides that the Commission must act by a majority of the number of its Members, who at the time were 17 in number. Under the second paragraph of Article 13 of the Treaty, a meeting of the Commission is valid only if the number of Members laid down in its Rules of Procedure is present.

135 Article 5 of the 1993 Rules of Procedure provided that 'the number of Members present required to constitute a quorum shall be equal to a majority of the number of Members specified in the Treaty'. It follows that the quorum of those present required for the Commission to have been able validly to deliberate during its meeting of 16 February 1994 was nine Members.

136 Under Article 6 of the 1993 Rules of Procedure, 'The Commission takes decisions on a proposal from one or more of its Members. A vote shall be taken if any Member so requests. The vote may be on a proposal as originally made or as amended by the Member or Members responsible or by the President. Commission decisions shall be adopted if a majority of the number of Members specified in the Treaty vote in favour'. It also follows that Commission decisions were, at that period, adopted with the agreement of nine of its Members.

137 According to the minutes of the 1189th meeting of the Commission, held in Brussels on 16 February 1994 ('the minutes'), sent to the Court following its requests of 27 November 1997 and 11 March 1998, that meeting consisted of two sessions, one in the morning and one in the afternoon. Point XVII of the minutes, discussed during the morning session, reads as follows:

'XVII. CASE CONCERNING APPLICATION OF ARTICLE 65 OF THE ECSC TREATY (C(94) 321; SEC (94) 267)

MR RENAUDIERE, a Member of the Cabinet of MR VAN MIERT, took part in the discussions on this point.

MR VAN MIERT outlined to the Commission the various elements of the case submitted to him. He stressed the extreme seriousness of the infringements which had been confirmed. He presented to the Commission the fines which he proposed to impose on the undertakings in question.

The Commission approved the content of the decision proposed by MR VAN MIERT and went on to discuss in detail the amounts of the fines. It decided to state its views at a later stage of the present meeting on the final decision, the draft version of which will be submitted to it by MR VAN MIERT.

The other Commission discussions on this point are the subject of special minutes.'

138 Point XXV of the minutes, discussed during the afternoon session, reads as follows:

'XXV. CASE CONCERNING APPLICATION OF ARTICLE 65 OF THE ECSC TREATY (CONTINUATION OF POINT XVII) (C(94) 321/2 AND /3; SEC (94) 267)

The Commission continued the discussions which it had begun during the morning session. It fixed as follows the fines imposed on the undertakings in question:'

ARBED SA:	11 200 000 Ecus
British Steel plc:	32 000 000 Ecus
Unimétal SA:	12 300 000 Ecus

Saarstahl AG:	4 600 000 Ecus
Ferdofin SpA:	9 500 000 Ecus
Thyssen Stahl AG:	6 500 000 Ecus
Preussag AG:	9 500 000 Ecus
Empresa Nacional Siderúrgica SA:	4 000 000 Ecus
Siderúrgica Aristrain Madrid SL:	10 600 000 Ecus
SA Cockerill-Sambre:	4 000 000 Ecus
Krupp-Hoesch Stahl AG:	13 000 Ecus
NMH Stahlwerke GmbH:	150 000 Ecus
Norsk Jernverk AS:	750 Ecus

Inexa Profil AB: 600 Ecus

The Commission also decided that the fines exceeding ECU 20 000 may be paid by instalments. It accordingly approved, in the authentic languages, the decision contained in Document C(94) 321/2 and /3.

*

* *

The meeting ended at 16.25 hours.'

139 It follows from points XVII and XXV of the minutes, read together, that the Decision was not definitively adopted when point XVII was being discussed during the morning session, but that it was definitively adopted during the discussions on point XXV during the afternoon session.

140 It is also clear from the attendance list on page 2 of the minutes that nine Commission Members were present when the Commission discussed point XXV, that is to say: Mr Delors, Sir Leon Brittan, Mr Van Miert, Mr Ruberti, Mr Millan, Mr Van den Broek, Mr Flynn, Mr Steichen and Mr Paleokrassas. The quorum required by Article 5 of the 1993 Rules of Procedure was thus achieved. Likewise, the Decision was able to be adopted with the agreement of the nine Members present, in accordance with Article 6 of those Rules of Procedure.

141 The applicants' argument, however, is based on the attendance list set out on page 40 of the minutes, which indicates that Mr Budd and Mr Santopinto, the respective heads of the Cabinets of Sir Leon Brittan and Mr Ruberti, together with Mrs Evans, a member of Mr Flynn's Cabinet, 'attended the session in the absence of the Commission Members'. From this the applicants infer that, contrary to what is stated on page 2 of the minutes, Sir Leon Brittan, Mr Ruberti and Mr Flynn were not present when the Decision referred to in point XXV was adopted.

142 That argument cannot be accepted. It is clear from the actual wording of the list on page 2 of the minutes that the purpose of that list was to record precisely which Commission Members were absent or present during the meeting in question. That record relates both to the morning and to the afternoon session and is thus proof that the Commission Members concerned were present during those two sessions, unless it is expressly indicated therein that a Member was absent during the discussion on a specific point. In contrast, the list on page 40 of the minutes is not intended to record which Commission Members were present but relates solely to the other persons who may have been present, such as heads of Cabinet. In those circumstances, the indirect inferences which the applicants purport to draw from that list cannot carry greater weight than the express reference, on page 2 of the minutes, to the presence or absence of Commission Members.

143 In any event, the Court takes the view that the words 'attended the session in the absence of the Commission Members', which appear on page 40 of the minutes, must be construed as meaning the same as 'attended in the event that the Member should be absent for a specific point'.

144 Those words must be considered in conjunction with Article 8 of the 1993 Rules of Procedure, which provides *inter alia* that '... In the absence of a Member of the Commission, his chef de cabinet may attend the meeting and, at the invitation of the President, state the views of the absent Member ...' The list on page 40 of the minutes was thus not intended to replace that on page 2 but to identify the persons authorised to attend the meeting in accordance with Article 8 and, where appropriate, to state the views of the absent Member.

145 However, the fact that a head of Cabinet may state the views of the Commission Member whom he represents on a specific point, in the Member's absence, does not preclude the possibility that the Commission Member in question may have returned to the meeting during the discussion on another point, without his head of Cabinet having left the meeting room following his return. The reference, on page 40 of the minutes, to the fact that Mr Budd, Mr Santopinto and Mrs Evans were present during the afternoon session may therefore be explicable by the simple fact that, according to page 2 of the minutes, Sir Leon Brittan, Mr Ruberti and Mr Flynn were absent during the discussion on certain points of the afternoon agenda, namely points XXIII.B, XXIII.C and XXIV in part (Sir Leon Brittan), as well as points XXIII.B and XXIII.C in part (Mr Ruberti and Mr Flynn). It does not follow, however, that those three Commission Members were absent during the discussions on point XXV, contrary to the express wording of page 2 of the minutes.

146 This interpretation is corroborated by page 7 of the minutes, on which, for the morning session, there is a list of the persons who attended the meeting 'in the absence' of the Commission Members, equivalent to that on page 40 for the afternoon session. If the applicants' interpretation of the words 'attended the session in the absence of the Commission Members' were correct, it would follow from the indication, on that list, of the presence of Mr Kubosch and Mr Budd, respectively member of the Cabinet of Mr Bangemann and head of Cabinet of Sir Leon Brittan, during the entire morning, that those two Commission Members were absent during the entire morning session. That was clearly not the case since, according to page 2 of the minutes, Mr Bangemann was present during the morning session for points I to XVIII and Sir Leon Brittan for points XVII to XXII.

147 It follows that the required attendance quorum was achieved when the Decision was adopted during the afternoon of 16 February 1994.

148 It should be added that Article 6 of the 1993 Rules of Procedure provided for the Commission to take decisions on a proposal from one or more of its Members and that a vote should be taken only if a Member so requests. If no such request was made, it was not necessary for the Commission to proceed to a formal vote during the afternoon session. In any event, given that, according to Article 6,

Commission decisions are adopted if a majority of the number of Members specified in the Treaty, that is to say, nine Members at the period in question, vote in favour, there was nothing to prevent the nine Members present during the afternoon of 16 February 1994 from deciding unanimously to adopt the Decision.

149 It follows that the applicants' first head of complaint is unfounded.

No strict correspondence between the Decision adopted and that notified to the applicant

150 It follows from the case-law of the Court of Justice that the operative part and reasoning of the decision notified to the person or persons to whom that decision is addressed must correspond to those of the decision adopted by the college of Commissioners, exception being made for any corrections merely of spelling and grammar which may still be made to the text of an act after its formal adoption by that college (*PVC* judgment, paragraphs 62 to 70).

151 According to point XXV of the minutes, the Commission adopted 'in the authentic languages, the decision contained in Document C(94)321/2 and /3'.

152 It follows that the relevant comparison to be made is between the versions C(94)321/2 and C(94)321/3 of the Decision, read together, which were adopted by the Commission in the afternoon of 16 February 1994, and the various versions of the Decision notified to the applicants in the authentic languages.

153 The applicants have not pleaded, and the Court has not been able to identify, any substantive difference between the versions C(94)321/2 and C(94)321/3 of the Decision, read together, as lodged by the Commission at the Registry of the Court in the five authentic languages, and the versions of the Decision notified to the applicants. In those circumstances, the fact that the Decision was adopted in the form of two documents, that is to say C(94)321/2 and C(94)321/3, the second of which contained a number of amendments, some hand-written, to the first, is irrelevant, *a fortiori* since, in substance, those amendments relate only to the payment of the fines by instalments and the decision not to impose fines of less than ECU 100. Likewise, the fact that in some language versions the documents C(94)321/2 and C(94)321/3 have inconsistent page numbering or different character fonts is irrelevant, since the intellectual component and the formal component of those documents, read in conjunction, correspond to the version of the Decision notified to the applicants (*PVC* judgment, paragraph 70).

154 The Court considers, on the contrary, that the differences between the documents C(94)321/2 and C(94)321/3 are evidence of the efforts made by the Commission not to adopt the Decision formally until all of the amendments decided on by the college, in particular those concerning payment of the fines by instalments and the decision not to impose fines of less than ECU 100, had been incorporated in each of the language versions.

155 It also follows from the foregoing that the arguments based on a detailed comparison between a number of documents in document files 57, 58 and 61 of the Commission's file and documents C(94)321/2 and C(94)321/3 are misplaced. As the Court has just found, the relevant comparison must be that between documents C(94)321/2 and C(94)321/3, as produced by the Commission, and the version notified to the applicants, and not between documents C(94)321/2 and C(94)321/3, on the one hand, and certain drafts and other possibly earlier documents in the Commission's file, on the other. With regard, in particular, to document B contained in document file 61, the Court takes the view that it has not been established that this document, which appears to be a working document, constitutes document C(94)321 or corresponds to that which was examined by the Commission during its morning meeting on 16 February 1994.

At any rate, document C(94)321 is irrelevant, since the definitive version of the Decision adopted by the Commission consists of documents C(94)321/2 and C(94)321/3.

156 The fact that there may be some uncertainty as to the precise moment at which the translation of certain minor changes in the Italian version of the Decision was sent is equally irrelevant, particularly since the Italian version of the Decision was not addressed to the applicant.

157 Finally, it has been established that document C(94)321/4 was merely a non-confidential version of version C(94)321 final, in which certain figures representing confidential commercial information about those to whom it was addressed were deleted for the purpose of notifying the Decision to the other recipients.

158 It follows that the applicants' second head of complaint is unfounded.

Lack of authentication of the Decision

159 With regard to the applicants' third head of complaint, to the effect that versions C(94)321/2 and C(94)321/3 of the Decision were not properly authenticated in accordance with the first paragraph of Article 16 of the 1993 Rules of Procedure, that provision read as follows:

'Instruments adopted by the Commission in the course of a meeting or by written procedure shall be annexed, in the authentic language or languages, to the [minutes] of the meeting at which they were adopted or at which note was taken

of their adoption. They shall be authenticated by the signatures of the President and the Secretary-General on the first page of the minutes.'

160 Similarly, the second paragraph of Article 9 of the 1993 Rules of Procedure provided for the Commission's minutes to be 'authenticated by the signatures of the President and the Secretary-General'.

161 It must first be pointed out that the first paragraph of Article 16 of the 1993 Rules of Procedure did not define how instruments adopted in the course of a meeting were to be 'annexed' to the minutes, in contrast, for example, to Article 16 of the Commission's Rules of Procedure, as amended by Decision 95/148/EC, ECSC, Euratom of 8 March 1995 (OJ 1995 L 97, p. 82), which provides that the instruments in question must be attached to the minutes 'in such a way that they cannot be separated'.

162 In this case, the minutes were received by the Court accompanied by documents C(94)321/2 and C(94)321/3 in the authentic languages, in the same container which Commission officials state to have received as such from the Commission's Secretariat-General, following the Court's request of 11 March 1998. It can therefore be assumed that those documents were 'annexed' to the minutes in the sense that they were placed with those minutes, without being physically attached to them.

163 The purpose of the first paragraph of Article 16 of the 1993 Rules of Procedure is to ensure that the Commission has duly adopted the instrument in the form notified to the party to whom it is addressed. In this case, the applicant has failed to establish that there was any substantive difference between the version of the Decision which was notified to it and the version which, according to the Commission, was 'annexed' to the minutes.

164 In those circumstances, and regard being had to the presumption of validity which Community measures enjoy (Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, paragraph 31), the applicant has failed to establish that documents C(94)321/2 and C(94)321/3 were not 'annexed' to the minutes within the meaning of Article 16 of the 1993 Rules of Procedure. Those documents must therefore be regarded as having been authenticated by the signatures of the President and the Secretary-General on the first page of those minutes.

165 As regards the fact that the minutes produced before the Court were themselves a photocopy lacking the original signatures of the President and the Secretary-General, it must be pointed out that the first page of that document bears the stamp 'certified to be a true copy, Secretary-General Carlo Trojan' and that this stamp bears the original signature of Mr Trojan, the titular Secretary-General of the Commission. The Court takes the view that this certification of authenticity by the titular Secretary-General of the Commission provides sufficient proof for legal purposes that the original version of the minutes bears the original signatures of the President and Secretary-General of the Commission.

166 It follows that the third head of complaint is unfounded.

No indication as to the date on which the minutes were signed

167 With regard to the applicants' fourth head of complaint, to the effect that the minutes do not indicate the date on which they were signed by the President and Secretary-General of the Commission, suffice it to note that the first page of the minutes lodged with the Court bears the words 'Brussels, 23 February 1994' and 'the present minutes were adopted by the Commission at its 1190th meeting held in Brussels on 23 February 1994', followed by the signatures of the President and Secretary-General and the certification, by Mr Trojan, that the minutes are a true copy of the original. It must therefore be held that the minutes were properly signed by the President and Secretary-General on 23 February 1994, in accordance with the 1993 Rules of Procedure.

168 The applicants' fourth head of complaint is therefore equally unfounded.

169 Finally, as regards the inaccurate statements made by Mr Van Miert at his press briefing at noon on 16 February 1994, when he announced that the Commission had just adopted the Decision and mentioned certain fines which did not correspond to those imposed by the Decision, those inaccuracies do not in themselves affect the regularity of the adoption of the Decision by the college of Commissioners, since the judicial review by the Court can relate only to the decision adopted by the Commission (see Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136).

170 It follows that the various arguments alleging infringements by the Commission, during the administrative procedure, of essential procedural requirements must be rejected in their entirety, without its being necessary to order the measures of inquiry which the applicants have requested.

C — *Infringement of Article 65(1) of the Treaty*

171 The applicant raises three principal complaints in its arguments alleging infringement of Article 65(1) of the Treaty. First, the applicant challenges the facts on the basis of which the Commission found the infringements listed in Article 1 of the Decision, except with regard to the sharing of the Italian market referred to in the sixth indent of recital 275 of the Decision. Second, even if it is supposed that those facts are proved, the applicant challenges their legal characterisation, arguing, in particular, that the Commission wrongly applied legal concepts derived from Article 85(1) of the EC Treaty, thereby misconstruing what, in the applicant's view, is the very different legal framework of the ECSC Treaty. Third, the applicant argues that the conduct of which the undertakings are accused was known to DG III, and indeed was encouraged or at least tolerated by it, so that Article 65(1) of the Treaty was not infringed in this case. The applicant also alleges certain failures to provide a statement of reasons.

172 In view of the fact that the arguments raised by the applicant are interdependent, the Court considers that the various infringements of which the applicant is accused and which it challenges should be examined in turn, first ascertaining whether the correctness of the facts constituting those infringements has been proved to the required legal standard and then determining whether the legal characterisation of those facts by the Decision is sound in law. The question whether DG III's actions were such as to deprive the facts so characterised of their nature as infringements will be examined in Part D below.

Fixing of prices (target prices) within the Poutrelles Committee

1. The facts

173 Under Article 1 of the Decision, the Commission accused the applicant of having engaged in price-fixing within the Poutrelles Committee. The period taken into account for the purposes of the fine was 30 months, from 1 July 1988 to 31 December 1990 (see recitals 80 to 121, 223 to 243, 311 and 314 of the Decision).

174 While the applicant does not deny that it took part in the meetings of the Poutrelles Committee described in the Decision, it submits, in particular, that no 'agreements' were concluded there and that there were simply exchanges of information between members as to their price 'estimates' or 'forecasts'. It further submits that the agreements and concerted practices of which it stands accused have not been proved to the requisite legal standard, relying here on, *inter alia*, an expert economic report presented during the administrative hearing by the expert Mr Bishop. Finally, the applicant takes the view that the Decision fails to make sufficiently clear what the applicant's individual role was in the alleged infringements and argues that it contains no specific evidence of the conduct of which it is accused.

— Preliminary observations

175 Before examining individually the agreements and concerted practices detailed in recitals 80 to 121 and 223 to 237 of the Decision, it should be observed first of all that the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact (see the Opinion of Mr Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, II-869 — joint Opinion in the *Polypropylene* judgments (T-2/89 [1991] ECR II-1087, T-3/89 [1991] ECR II-1177, T-4/89 [1991] ECR II-1523, T-6/89 [1991] ECR II-1623, T-7/89 [1991] ECR II-1711, T-8/89 [1991] ECR II-1833, and T-9/89 to T-15/89 [1992] ECR II-499, II-629, II-757, II-907, II-1021, II-1155 and II-1275).

176 It is common ground in this regard, first, that the Poutrelles Committee, in the same way as the other 'products committees' of Eurofer, was set up by that association during the period of manifest crisis with a view to better coordinate the steel undertakings' conduct, particularly within the framework of the system of 'I' and 'i' quotas and the Eurofer Agreements I to V (see paragraph 9 et seq. above). Once the crisis period had ended, that committee, which brought together the main beam producers in the Community and had a permanent secretariat, continued to meet on a regular basis. In the present case, it is principally this system of regular meetings which constitutes the reference framework for assessing the relevant evidence (see recitals 30, 36, 37 and 212 of the Decision).

177 Second, it is common ground that the applicant attended the meetings of the Poutrelles Committee held on 25 November 1987, 3 May 1988, 19 July 1988, 18 October 1988, 15 November 1988, 13 December 1988, 10 January 1989, 7 February 1989, 19 April 1989, 6 June 1989, 11 July 1989, 3 August 1989, 21 September 1989, 12 December 1989, 14 February 1990, 21 March 1990, 16 May 1990, 10 July 1990, 11 September 1990, 9 October 1990 and 4 December 1990 (recital 38(f) of the Decision). Attendance by an undertaking at meetings involving anti-competitive activities suffices to establish its participa-

tion in those activities, in the absence of proof capable of establishing the contrary (see Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraphs 129 and 144).

178 Third, it is common ground that the decisions adopted during those meetings were notified to the Eurofer/Scandinavia group, which operated in the same way as the Poutrelles Committee and brought together the principal Community and Scandinavian producers (see, in particular, recitals 81, 84, 86 to 88, 93, 187, 189, 191 and 192 of the Decision). It is also not contested that the applicant took part, between 5 February 1986 and 31 October 1990, in the 20 meetings of the Eurofer/Scandinavia group mentioned in recital 178 of the Decision, with the exception of that held on 25 July 1988 (see recital 181 of the Decision).

179 Fourth, with more particular regard to the contention that this case involved, not 'agreements on prices', but rather 'exchanges of information on expected prices', while it is true that the minutes concerned frequently use expressions such as price 'estimates' or 'forecasts', account must be taken, when assessing the evidence as a whole, of the following matters:

(a) several price tables (for instance, those indicating the prices fixed at the meetings of 25 July 1988, 18 October 1988, 10 January 1989 and 19 April 1989) were drawn up relatively long before the quarter concerned and contain very detailed information relating, *inter alia*, to the different categories of products, the various countries, the exact amounts of envisaged price increases and discounts. Tables of this kind cannot be regarded as reflecting simply the 'estimates' of undertakings as to market price developments;

(b) in several cases, the wording of the minutes does not support the applicant's argument: see, for example, expressions such as 'the price increases result in the following level of prices' (meeting of 18 October 1988); 'the following price levels are anticipated for the second quarter of 1989. These prices represent *vis-à-vis* the first quarter of 1989 the following increases: [a very

detailed table follows]' (meeting of 10 January 1989); 'the forecasts for the second quarter of 1989 are carried over to the third quarter of 1989, that is to say, the following levels: [a very detailed table follows]' (meeting of 19 April 1989); 'the prices anticipated and obtained for the third quarter of 1989 are carried over in that context to the fourth quarter of 1989' (meeting of 11 July 1989);

(c) the minutes also contain numerous references to the fact that the prices 'envisaged' for the quarter in question had been 'obtained', or 'accepted' by customers (see recitals 94, 95, 97 to 99, 101, 102 and 118 of the Decision);

(d) the minutes of the meetings of the Poutrelles Committee must be read in conjunction with those of the meetings of the Eurofer/Scandinavia group, which served in particular to notify Scandinavian producers of the decisions taken during the previous meeting of the Poutrelles Committee (see recital 177 et seq. of the Decision). It is very clear from the minutes of the Eurofer/Scandinavia group meetings that pricing agreements were involved (see below);

(e) the evidence adduced by the Commission comprises not only the minutes of the Poutrelles Committee and the Eurofer/Scandinavia group but also other documents from the undertakings themselves, such as the telex of 22 September 1988 from TradeARBED to Thyssen, the internal Peine-Salzgitter memorandum of 13 January 1989, the TradeARBED note of 31 January 1990 for the meeting of the Eurofer/Scandinavia group, the letters of 6 November 1989 and 19 December 1989 from Peine-Salzgitter to Unimétal, the letter of 7 February 1990 from TradeARBED to Unimétal, and the British Steel documents referred to in the Decision, in particular at recitals 96, 100, 111, 112, 114, 115 and 117;

(f) the applicant has not denied that agreements to harmonise the prices of extras were concluded during the meetings of the Poutrelles Committee held on 15 November 1988, 19 April 1989, 6 June 1989, 16 May 1990 and

4 December 1990 (see below). Having regard to the close relationship between the basic prices and the extras, it is not plausible that the participants would have concluded agreements on the one and not on the other;

(g) the applicant has not challenged the Commission's allegation in recital 37 of the Decision that the final versions of the minutes of the Poutrelles Committee were drafted with some circumspection.

180 It is in the light of these general observations that each of the price-fixing agreements or concerted practices of which the applicant stands accused must be examined.

— The agreements allegedly concluded in 1986 and 1987

181 In recital 223 of the Decision, the Commission finds, referring to recitals 80 to 86, that 'agreements on prices were reached on several occasions in 1986 and 1987'.

182 Although the applicant has not expressly challenged the existence of those agreements, it is common ground that it did not attend the meetings of the Poutrelles Committee prior to 25 November 1987 (recital 38(f) of the Decision).

183 In those circumstances, the Court considers that recital 223 of the Decision is too imprecise to be construed as charging the applicant with being a party to those agreements.

— The agreement on prices in Germany and France allegedly concluded prior to 2 February 1988

184 In recital 224 of the Decision, the Commission found that, at a meeting on an unspecified date prior to 2 February 1988, an agreement was reached by the Poutrelles Committee to increase prices in Germany and France. The Commission based this finding on an extract from the minutes of the 2 February 1988 meeting of the Eurofer/Scandinavia group, which state as follows: 'It was decided to increase prices on 1 April as follows: on the German market by DM 20 for categories 1, 2a, 2b2 and 2b3, and by DM 10 for category 2b1; on the French market, by FF 50 for all categories except 2c.' (recital 87, documents 674 to 678).

185 The Court considers that it follows from their actual wording that the minutes of the 2 February 1988 meeting of the Eurofer/Scandinavia group record an agreement to increase prices on the German and French markets. The consensual nature of those price increases is evidenced, with regard to the term 'décision' (in French), by the use of the singular and by the uniform character of the increases on each of the markets in question. It is also common ground that the applicant attended that meeting. The existence of the facts alleged by the Commission has thus been established.

— The target prices allegedly fixed prior to 25 July 1988

186 In recital 224 of the Decision, the Commission also found that 'Further target prices (for the fourth quarter of 1988) were agreed prior to 25 July 1988'. It based its finding on a table attached to the minutes of the Eurofer/Scandinavia meeting on 25 July 1988 indicating the 'market prices for the fourth quarter of 1988', broken down according to category, for Germany, France and the Belgian-Luxembourg market (recital 88 of the Decision).

187 The Court observes first that it is the table (document no 2507) annexed, according to the Commission, to the minutes of the meeting of 25 July 1988 of the Eurofer/Scandinavia group which is the incriminating document and not the minutes themselves. The fact that the applicant did not have a representative in attendance at that meeting is consequently irrelevant.

188 The Court finds that the table in question, which was drawn up on 25 July 1988 or earlier, refers to the prices applicable during the final quarter of 1988. It was thus drawn up a relatively long time before the reference quarter and gives exact prices on a country-by-country basis and according to product category. From this the Court infers that the table in question relates to detailed prices which the parties jointly intended to apply and is not simply an account of actual or forecast market prices.

189 This document, understood in its factual context, must also be regarded as bringing information relating to such an agreement to the knowledge of the Eurofer/Scandinavia group. Similar information was regularly communicated to the members of that group, several times, at least, in the form of a table annexed to the minutes of the meeting in question.

190 The existence of the facts alleged by the Commission has therefore been proved.

— The target prices allegedly fixed on 18 October 1988

191 In recitals 225 and 226 of the Decision, the Commission finds that an agreement on the target prices to be achieved during the first quarter of 1989 was concluded during the meeting of the Poutrelles Committee held on 18 October 1988. The Commission based its finding in particular on the following evidence:

— the minutes of that meeting, which mention *inter alia* the price increases 'estimated' at between DM 25 and DM 40 for the Federal Republic of Germany, between FF 50 and FF 100 for France, and between BFR 200 and BFR 800 for Benelux. The prices in which those increases 'result' are set out in a table, broken down on a country-by-country basis and according to product categories and customers (recital 89 of the Decision);

— the table used to draw up the target prices for the fourth quarter of 1988 (document no 2507, annexed to the minutes of the meeting of the Eurofer/Scandinavia group of 25 July 1988, recital 90 of the Decision);

— a telex which the applicant sent to TradeARBED on 22 September 1988 (recital 91 of the Decision);

— the minutes of the meeting of the Eurofer/Scandinavia group held on 3 November 1988 (documents no 2488 to no 2493), according to which

'New price increases are envisaged for the first quarter of 1989; these increases are also expected by traders. They will lead to increases in the order of between DM 25 and DM 40 in Germany, FF 50 to FF 100 in France and BFR 200 to BFR 800 in Benelux';

— the fact that 'agreements were reached to increase prices by harmonising and increasing extras'.

192 The Court considers that the factors set out in recitals 225 and 226 of the Decision constitute a body of consistent evidence capable of proving the acts charged.

193 In particular, the minutes of the meeting of the Poutrelles Committee of 18 October 1988, which the applicant attended, contain detailed prices, broken down on a product-by-product and market-by-market basis, for the various categories of customers, and use the expression 'the price increases result in the following level of prices'. Likewise, the figures cited correspond to those indicated in the minutes of the Eurofer/Scandinavia group meeting of 3 November 1988 (recital 200 of the Decision), which the applicant also attended, which proves that the decision of the Poutrelles Committee of 18 October 1988 was also notified to the Eurofer/Scandinavia group.

194 Moreover, the applicant's telex of 22 September 1988 to TradeARBED constitutes further evidence of the consensual nature of the prices referred to in the minutes of the meeting of 18 October 1988. That telex reads as follows:

•

'Basically, the most helpful timing of the discussion would be after the Eurofer/Scandinavia meeting. However, since this is rather late, we should in my view

notify our friends of our broad intention for the EC and plead for parallel action, i.e. increases for the Scandinavian programme of:

Sweden	SKR	100
Norway	NKR	100
Finland	DM	40

The decision about category 2c can then be taken on 29 September.'

195 So far as the telex raises the matter of 'intention for the EC', this was an intention common to several undertakings. The person who sent the telex was recommending, in regard to the 'Scandinavian programme', 'parallel action' between the average increase envisaged for the Community and that which those attending the next meeting of the Eurofer/Scandinavia group had to decide by mutual agreement (this latter decision was in fact adopted on 3 November 1988). Furthermore, a forthcoming 'decision' was proposed to the recipient of the telex with regard to prices in the category 2c, which indicates that these were prices adopted by common agreement.

196 The Commission was equally entitled to form the view, at recital 225, seventh indent, of the Decision, that, since the undertakings meeting within the Poutrelles Committee were agreeing to harmonise extras, it would have been surprising if they had let the free play of competition decide on the amount of the basic prices (see below). It was precisely at the meeting of 18 October 1988 that a proposal

by Usinor Sacilor for the harmonisation of quality extras was examined, before being accepted in principle at the meeting of 15 November 1988 (recital 122 of the Decision).

197 Furthermore, in accordance with the reasoning set out in recital 226 of the Decision, the at least 'morally' binding nature of the agreements alleged by the Commission is proved by the fact that none of those who attended the meeting indicated its intention not to apply the proposed prices (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232) and by the undertakings' subsequent declarations that the prices in question had been accepted by customers (see recitals 94 and 95 of the Decision).

198 The Commission has thus proved the acts charged regarding the target-price agreement concluded on 18 October 1988.

— The target prices allegedly set at the meeting on 10 January 1989

199 According to recital 227 of the Decision, the Poutrelles Committee agreed, at its meeting on 10 January 1989, on target prices for deliveries to France, Germany, the Benelux countries and Italy for the second quarter of 1989.

200 The Commission relies on the minutes of that meeting (see recital 95 of the Decision), which set out in detail the increases for the reference quarter according to markets and categories. Those minutes then indicate the 'expected price levels' resulting from those increases. The Commission also relies on an undated British

Steel file note on the results of that meeting and on an internal Peine-Salzgitter memo of 13 January 1989 (recital 96 of the Decision).

201 The Court holds that the documents cited in recitals 95 and 96 of the Decision prove the facts alleged.

202 The parties again employed the technique already adopted at the meeting on 18 October 1988 in setting down precisely and in detail, in the minutes for 10 January 1989, the increases and the resulting new prices, for each market and each product and customer category. The Court considers that such indications presuppose an agreement on the prices in question. That conclusion is confirmed by the other two documents which the Commission cites in recital 96 of the Decision, that is to say, the undated British Steel note (documents no 2001 to no 2003) and the Peine-Salzgitter memo of 13 January 1989 (documents no 3051 and no 3052). The British Steel note gives prices for France, Germany and the Benelux countries which are identical to those in the minutes of the meeting held on 10 January 1989. It goes on to discuss 'price intentions', which, in view of the uniform nature of the increases and the new prices resulting therefrom, can only mean intentions common to the members of the Poutrelles Committee. According to the Peine-Salzgitter memo of 13 January 1989, the increases had already been 'envisaged' previously and had been 'fleshed out' during the meeting. After outlining the increases concerning Germany, that memo continues: 'Selective price increases were also decided on for the different categories in the other principal Community countries...'. That formulation also indicates that there was an agreement. Contrary to what the applicant asserts, it cannot, under the circumstances, have amounted to a mere exchange of information on prices.

203 That conclusion is not altered by the fact that the new prices for Italy indicated in the undated British Steel note exceeded by LIT 20 000 per tonne those set out in the minutes of the meeting in question. This divergence in the British Steel note, which refers only to the new prices for Italy, must be attributed to a simple error when the new prices in question were being written down.

— The target prices for the Italian and Spanish markets allegedly set at the meeting on 7 February 1989

204 According to recital 227 of the Decision, the Poutrelles Committee adopted target prices for the Italian and Spanish markets at its meeting on 7 February 1989.

205 The Commission relies on the minutes of that meeting (see recital 98 of the Decision), from which it appears that prices for two categories of beams in Italy and prices for Spain were fixed and supplemented the price information contained in the minutes of the meeting of 10 January 1989 (see recital 95 of the Decision).

206 The Court finds that, despite the wording of the minutes of the meeting of 7 February 1989 (documents no 97 to no 106), describing the indications in question as 'supplements to the price forecasts for the second quarter of 1989', several factors demonstrate that the prices in question were in fact agreed prices.

207 First, the prices which those indications were considered to supplement had already been fixed by joint agreement at the meeting of 10 January 1989 (see above). In the course of the meeting held on 7 February 1989, those attending also stated that the latter prices had been obtained or would be obtained without any difficulties (see recital 98 of the Decision).

208 Second, the minutes indicate that the new price level for category 2c in Italy 'preserves a "harmony" between the prices charged on all of the European markets and takes into account the competition from reconstituted welded metal frames (rwmf)'. With regard to the Spanish market, it is pointed out that the 'prices forecast' for that quarter would be 'carried forward' to the next quarter 'in order to consolidate the levels attained'. It is clear from that wording that a consensus existed among the undertakings to attain, through the application of these prices, a number of common objectives. Those undertakings were thus necessarily in agreement that those prices should be applied.

209 The facts alleged in the second paragraph of recital 227 of the Decision have thus been proved.

— The target prices allegedly agreed on at the meeting of 19 April 1989

210 According to recital 228 of the Decision, target prices to be applied in the third quarter of 1989 on the markets of Germany, France, Belgium, Luxembourg, Italy and Spain, which were practically identical to those of the previous quarter, were agreed at the meeting of the Poutrelles Committee held on 19 April 1989.

211 The Commission bases itself on the minutes of that meeting, which, after indicating that the forecast prices had been obtained in Germany, France and Italy, gave the prices for the coming quarter (recital 99 of the Decision).

212 The Court takes the view that the Commission has proved that the prices put in the minutes of 19 April 1989 (documents nos 125 to 145) were the subject of an agreement.

213 First, inasmuch as the relevant passage in those minutes indicates that the 'forecasts for the second quarter of 1989 are carried forward to the third quarter of 1989', these 'forecasts' were in fact the result of an agreement within the Poutrelles Committee which the undertakings in question had reached during the meetings held on 10 January 1989 and 7 February 1989 (see above). The 'carrying-forward' of those 'forecasts' was also in the nature of an agreement, aimed this time at maintaining the former price level. This conclusion is corroborated by the finding, contained in those minutes, that the 'prices forecast' for the second quarter or the 'forecasts' concerning that quarter had been 'accepted ... by customers' (document no 126). The reference to the German

market, which mentions that the corresponding 'forecasts' had been 'achieved', must be interpreted to the same effect.

214 Second, the prices for the forthcoming quarter were set out, in the minutes of the meeting of 19 April 1989, in the same precise and detailed manner as the prices for the fourth quarter of 1988 and those for the first two quarters of 1989 in the previous minutes. Such detailed presentations cannot be construed as reflecting merely forecasts or estimates.

— The fixing of the prices applicable in the United Kingdom from June 1989

215 In recitals 229 and 230 of the Decision, the Commission finds that there was a concerted practice of fixing the prices applicable in the United Kingdom from June 1989, which was initiated by British Steel and accepted by its competitors.

216 In support of this argument, the Commission cites an internal British Steel note of 24 April 1989 (see recital 100 of the Decision) and the information, contained in the minutes of the Poutrelles Committee meetings of 6 June 1989 and 11 July 1989, that, according to British Steel, the price increase had been accepted by customers (see recitals 101 and 102 of the Decision).

217 The Court finds that the Commission's allegation that British Steel announced to the other undertakings on 19 April 1989 that it would be increasing its prices in the United Kingdom and called on them to follow that increase (recital 229 of the Decision) is proved by the memo of 24 April 1989 (documents nos 1969 and 1970) cited in recital 100 of the Decision. It is also established that the applicant, which attended the meeting of 19 April 1989, received both the British Steel announcement and its call to apply the new prices in the United Kingdom.

218 The Court also finds that the Commission has proved its allegation that British Steel and its competitors had acted in concert in regard to prices (recital 230 of the Decision). The Commission rightly explained, in recital 229 of the Decision, that the cooperation within the context of which the disputed conduct took place had already resulted in a number of price-fixing agreements for continental ECSC markets to which British Steel had been a party. In those circumstances, British Steel's action could not be regarded as unilateral conduct *vis-à-vis* a competitor with which it did not have any cooperative links.

219 Once British Steel had accepted, at numerous previous meetings of the Poutrelles Committee, to bind itself, at least 'morally', to the continental prices, it could reasonably expect its competitors to comply with its call that they respect its new prices in the United Kingdom when determining their own conduct on that market. This finding also applies to the applicant, whose attendance at the meetings in question has not been contested.

220 Finally, the Court finds that the Commission has proved that the undertakings did in fact comply with British Steel's demand (recitals 229 and 230 of the Decision). The applicant has not, in this regard, contested either British Steel's statements that its price increases had been accepted by the British market or the Commission's assertion that, at the time, prices in the United Kingdom were considerably higher than on the continental markets of the ECSC (recital 229 of the Decision). Given that, in those circumstances, offers at prices corresponding to the continental level would have prevented local customers from accepting British Steel's new prices, the fact that its price increases were accepted 'without difficulties' suffices to establish, in the absence of evidence to the contrary, that the applicant did not stand in the way of British Steel's obtaining the price increases in question.

221 It must therefore be held that the facts underlying the reasoning in recitals 229 and 230 of the Decision have been proved.

— The agreement allegedly reached at the meeting of 11 July 1989 to carry forward to the fourth quarter of 1989, on the German market, the target prices for the third quarter of that year

222 In recital 231 of the Decision, the Commission infers from the minutes of the meeting of the Poutrelles Committee of 11 July 1989 (see recital 102 of the Decision) that it was agreed at that time that the same target prices as in the third quarter of 1989 should be applied in the fourth quarter of 1989 in Germany.

223 The Court finds that the minutes of the meeting of 11 July 1989 (documents nos 182 to 188) sufficiently establish the Commission's contentions concerning an agreement to maintain prices on the German market during the fourth quarter of 1989.

224 The relevant passage in those minutes, under the heading 'Price trend forecasts for the fourth quarter of 1989', provides as follows:

'On the German side, it is envisaged, in so far as an increase of dimension and quality extras in the region of DM 20 to DM 25 per tonne is scheduled for 1 October 1989, not to increase basic prices. The prices forecast and obtained for the third quarter of 1989 are in that context carried over to the fourth quarter of 1989. An exchange of information on the other Community markets will be made during the Poutrelles Committee's next meeting.'

225 It follows from the structure of that paragraph that only the prices of the other markets were to be the subject of a subsequent 'exchange of information', while the prices on the German market were 'carried over' by common agreement at the meeting in question.

226 In particular, the announcement by the German producers must be considered in the context of the regular meetings of the Poutrelles Committee and the other agreements the existence of which the Court has already confirmed above. Thus, the prices 'carried over' had themselves been the subject of an agreement within the Poutrelles Committee on 19 April 1989 (see paragraph 210 et seq. above). It thus appears that the measures adopted in regard to the German market were in line with the practice of previous meetings in fixing the successive quarterly prices for the principal Community markets.

227 Moreover, the Court holds that an agreement not to increase prices may constitute a price-fixing agreement within the meaning of Article 65(1) of the Treaty.

228 Finally, it should be pointed out that the Commission is not charging the undertakings with having concluded an agreement to fix target prices at the meeting of 3 August 1989. In so far as they seek to rebut that hypothesis, the applicant's arguments are therefore redundant.

— The decision allegedly adopted at the meeting of 12 December 1989 concerning the target prices to be achieved in the first quarter of 1990

229 According to recital 232 of the Decision, the Poutrelles Committee decided, at its meeting on 12 December 1989, to apply in the first quarter of 1990 the same target prices as those applied in the fourth quarter of 1989.

230 In this connection, the Commission relies on a TradeARBED representative's speaking note for the Eurofer/Scandinavia group meeting on 31 January 1990 (documents nos 2414 to 2416, see recital 107 of the Decision).

231 The Court finds that this TradeARBED note (document no 2414) proves the existence of the alleged agreement concerning the first quarter of 1990. It is not denied that this document served as the basis for a TradeARBED representative's address at the Eurofer/Scandinavia group meeting on 31 January 1990. It follows that the information which it contains, to the effect that 'prices for the fourth quarter of 1989 have in principle been maintained', must be construed as referring, as usual, to the agreements resulting from cooperation within the Poutrelles Committee.

232 The applicant's argument that the note in question referred simply to an appeal for moderation made to producers during the meeting of 12 December 1989 is gainsaid not only by the manner in which the maintenance of prices is alluded to there ('Prices ... have in principle been maintained ...') but also by the fact that the 'maintained' prices are described there as 'programmed prices' and that the practice by which some undertakings 'undercut' those prices is regarded as 'regrettable'.

233 So far as concerns the divergences which surfaced during that meeting, on which the applicant also relies, these did not relate to the level of the prices for the forthcoming quarter but solely to the quantities delivered by British Steel and a proposal to share markets, apparently submitted by Unimétal. Finally, the fact that existing prices were simply maintained and not increased does not argue against the existence of an agreement, no more than does the fact that the new prices may not have been fully respected (see recital 108 of the Decision).

— The fixing of prices for category 2c on the French market, as revealed by the announcement of Unimétal during the meeting on 14 February 1990

234 In recital 233 of the Decision, the Commission refers to the announcement by Unimétal, at the meeting of 14 February 1990, of its intention to increase the price of category 2c beams on the French market. According to the Commission,

which refers to the facts set out in recitals 109 and 110 of the Decision, this was not a unilateral decision on the part of Unimétal but rather an agreement between the undertakings concerned.

235 The Court finds that the facts alleged against the applicant are proved by the evidence set out in recitals 233, 109 and 110 of the Decision, considered in the context of the meetings of the Poutrelles Committee.

236 It appears from that evidence that Unimétal had been requested by two of its competitors, Peine-Salzgitter and TradeARBED, to raise its prices. Given a difference between prices in France and those in Germany, it was necessary, according to those undertakings, to 'prevent distortions in the flux of trade' (see the letter of 6 November 1989 sent by the chairman of the Poutrelles Committee to Unimétal, recital 109 of the Decision, documents nos 3009 to 3011) or to prevent 'distortion' of 'the price structure in Germany' (fax of 7 February 1990 from TradeARBED to Unimétal, recital 110 of the Decision, document no 2413).

237 Since that request was accepted by Unimétal, at least up to a certain amount, the resultant price increase was consensual in nature.

238 Moreover, the price increase in the category under consideration was announced during the meeting of 14 February 1990, in the presence not only of TradeARBED and Peine-Salzgitter but also of the other undertakings cooperating within the Poutrelles Committee.

239 In addition, the increase in question could not be explained on economic grounds since, in the aforementioned fax, TradeARBED had acknowledged that 'conditions do not favour a price increase'. In those circumstances, maintenance of the price announced required that all the other undertakings concerned would apply it.

240 That detailed evidence, put in its context, proves that, by its announcement, Unimétal intended to ensure that it would have the support of all the undertakings which attended the meeting of 14 February 1990, including the applicant, in order to prevent the charging of lower prices from jeopardising the success of the envisaged 'harmonisation'. The fact that similar agreements had been concluded at earlier meetings, for the principal Community markets, allowed Unimétal, and more generally all the undertakings which regarded this increase as being in their interest, to assume that this call would be followed.

241 The applicant's argument that some of the evidence to which the Commission refers in the present context shows that there was no agreement in respect of the first quarter of 1990 has already been rejected by the Court. Moreover, that argument cannot affect the finding that prices were fixed for the following quarter, which is in issue here.

— The fixing of the prices applicable in the United Kingdom in the second quarter of 1990

242 It follows from the reasoning set out in recitals 220 and 234 to 236 of the Decision that the Commission charges the undertakings in question, including the applicant, with having acted in concert, for the second quarter of 1990, in regard to the prices to be applied in the United Kingdom and having applied the prices which were the subject of that concerted action.

243 In support of its reasoning, the Commission first of all argues that British Steel informed the recipients of its fax of 14 February 1990 of the prices which it did not consider to be 'disruptive' for the United Kingdom market (recital 234 of the Decision) and which it was therefore prepared to tolerate (recital 112, *in fine*, of the Decision). The Court finds that this claim is proved by a combined reading of the handwritten comments on the original of that fax of 14 February 1990 (document no 1887) and the internal British Steel memo of 20 February 1990 (document no 1908). Those comments must be understood as revealing the

telephone information promised to the recipients of the fax. They refer to 'interpenetration allowances', that is to say prices which would not result in a flow of imports considered to be excessive. In that memo, the author expressly states that he had informed the Unimétal representative of the prices 'which are not judged by us to be disruptive'.

244 The Commission alleges, second, that British Steel's announcement corresponded to a 'concerted practice' (recital 235 of the Decision; see also recital 220), which, in its view, means that it was made in a context allowing British Steel to assume that the other undertakings would respect the prices announced. The Court finds that this allegation is proved by the Commission's findings. The announcement formed part of 'the constant dialogue between this company and its competitors in other Member States' (recital 235 of the Decision). As has already been found (paragraph 219 above), British Steel's participation in the earlier agreements concluded within the Poutrelles Committee allowed it to expect that its competitors would demonstrate a certain amount of solidarity in return. That conclusion is corroborated, at least so far as concerns the German undertakings involved, namely Peine-Salzgitter, Thyssen and Saarstahl, by the table (document no 1864) referred to in recitals 235 and 55 of the Decision, which confirms that those undertakings and British Steel were making efforts to maintain certain relations between the trade flows between the two countries in question and that each of the parties had thus accepted, in light of the circumstances, to demonstrate solidarity in the interests of the other party. The applicant's argument that British Steel was engaged merely in unilaterally menacing the other undertakings with retaliatory measures if they engaged in disruptive conduct must therefore be rejected.

245 The Commission alleges, third, that the undertakings concerned did in fact increase their prices as suggested by British Steel (recital 236 of the Decision). The Commission argues that this is proved by the fact that, although British Steel initially criticised offers below its price list, it raised its prices a few months later following the meeting of 16 May 1990 (see recital 115 of the Decision). In the absence of evidence to the contrary, the Court finds that this fact, which is not contested, proves that British Steel largely succeeded in ensuring that its competitors respected its prices. In view of the difference in the price levels

between the continent and the United Kingdom, British Steel could not, in May 1990, seriously have envisaged any increase without being confident that continental producers would show solidarity.

246 The observations contained in the British Steel memos of 17 and 30 July 1990 (recital 117 of the Decision), on which the applicant relies, do not concern the implementation of the guidance given by British Steel shortly after the meeting of 14 February 1990, for the second quarter of that year. The memo of 17 July 1990 refers to the price guidelines given following the meeting of 16 May 1990 and concerns the next quarter (see below). That of 30 July 1990 deals with the breach of an agreement between British Steel and TradeARBED and makes no reference to the applicant's conduct.

247 It follows that the factual contentions underlying the reasoning set out in recitals 234 to 236 of the Decision have been proved.

— The fixing of the prices applicable in the United Kingdom in the third quarter of 1990

248 It follows from the reasoning set out in recital 237 of the Decision, read in the light of recital 220 (first and third paragraphs), that the Commission charges the undertakings with having colluded on the prices to be charged in the United Kingdom for the third quarter of 1990 and having applied the prices which were the subject of that collusion.

249 Inasmuch as the Commission alleges, first, that British Steel notified its competitors of its new prices and asked them to respect them, the Court takes the view that these two matters are evidenced by British Steel's fax of 7 June 1990 (see recital 115 of the Decision, document no 1798). British Steel, moreover,

repeated that request during the Poutrelles Committee meeting of 10 July 1990 (see recital 117 of the Decision, documents nos 1964 to 1966). In regard to these points of fact, the Commission's allegation is thus proved.

250 In so far as the Commission concludes, second, that there was concerted action, the Court has already found that, in view of the previous activities of the Poutrelles Committee, British Steel could reasonably expect that its competitors would show solidarity on the British market with regard to prices, and in particular that its request that they comply with its new prices, made during a meeting with its competitors, would be taken into account by those undertakings when they were deciding how they would conduct themselves on that market. The Commission has thus proved the concerted action which it alleges.

251 With regard, third, to compliance by the other undertakings with the prices announced by British Steel, such compliance is adequately proved by the reference in the minutes of the meeting of 11 September 1990 (recital 118 of the Decision, documents nos 1666 to 1679) to the fact that the increase in the British Steel price list had been accepted by British customers. If the other undertakings had not respected, in large measure, the new prices announced by British Steel, it is scarcely conceivable that such an increase would have been accepted by customers. This conclusion is not shaken by the fact that, before deciding to follow British Steel's guidance, its competitors had initially applied lower prices (see recital 117 of the Decision). The fact that, during this period, the conduct of TradeARBED (and not the applicant) was presented by British Steel as being in breach of an agreement between those two companies likewise does not affect the Court's findings.

252 It follows that the factual contentions underlying the reasoning in recital 237 of the Decision have been proved.

253 It follows from all of the foregoing that the facts alleged in support of the arguments in recitals 224 to 237 of the Decision concerning the conclusion of

agreements on prices and conduct which the Commission there characterises as 'concerted practices' have been proved by the documents on which it relies.

— The expert economic report submitted by the applicant

254 The Court finds that this conclusion is not invalidated by the argument which the applicant bases on the analysis of price trends presented at the administrative hearing by the expert Mr Bishop (pp. 113 to 127 of the minutes of the hearing). According to that analysis, the Commission's view that the undertakings concluded agreements on pricing is contradicted by the fact that the market prices were no higher than those which could be expected under normal conditions of competition. Thus, between 1987 and 1991, real prices for beams within the Community were at a historically low level, with the exception of 1989, in which year, however, they were not higher than those applied in 1985, when demand had reached its lowest level. This price trend, it is argued, cannot be explained solely by the increases in productivity achieved at that period.

255 In so far as the applicant seeks, by that argument, to challenge the existence of the agreements alleged in recitals 224 to 237 of the Decision, the Court has already found that the facts on the basis of which the Commission found that the agreements and concerted practices in question had been entered into are proved by the documents in question, read in the light of the general context of cooperation which existed at that time within the Poutrelles Committee.

256 The applicant's argument based on general price trends in the Community cannot, by its nature, call in question the validity of those findings of fact. Moreover, the expert himself acknowledged, during the hearing, that the purpose of his analysis was not to comment on the statement of objections but simply to reply to the question whether the steps taken by the undertakings had proved successful (see p. 127 of the minutes of the hearing).

— Conclusions

257 It follows from the foregoing considerations that the applicant's arguments must be rejected in so far as they challenge the findings of fact set out in recitals 224 to 237 of the Decision. It also follows that the Commission has provided adequate reasons showing both the existence of the agreements and concerted practices with which the applicant is charged and the applicant's individual involvement in those agreements and concerted practices and that the Commission has provided a sufficient description of the infringements in question.

2. Legal analysis of the facts

258 At this stage in the reasoning, it is appropriate to consider the Commission's legal analysis of the conduct alleged in recitals 224 to 237 of the Decision in relation to: (a) the categories of agreements covered by Article 65(1) of the Treaty; (b) the purpose or effect of such conduct; and (c) the concept of normal competition, within the meaning of that provision.

(a) Analysis of the incriminated conduct in relation to the categories of agreements covered by Article 65(1) of the Treaty

259 The applicant considers that, contrary to the assessment in recitals 217 to 220 of the Decision, proof of a concerted practice within the meaning of Article 65(1) of the Treaty requires the Commission to demonstrate not only that the undertakings acted in concertation but also that they engaged in the practices which were the subject of that concertation, in particular by increasing their prices in a uniform manner (see Article 65(5) of the Treaty, and, in the domain of the EC Treaty, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraphs 64 and 126 et seq.). The Commission, it claims, has

provided no evidence of any such conduct. Moreover, the documents cited in paragraphs 223 to 237 of the Decision do not establish that the prices allegedly fixed were complied with.

260 The Court observes that Article 4(d) of the Treaty provides as follows:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in the Treaty:

...

(d) restrictive practices which tend towards the sharing or exploiting of markets'.

261 Article 65(1) of the Treaty prohibits 'All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market ..., and in particular those tending:

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply.'

262 In the present case, the conduct objected to in recitals 224 to 228 and 231 to 233 of the Decision is characterised by the Commission as 'agreements' to fix prices within the meaning of that provision. It is clear from the facts now found by the Court that, on each of the occasions referred to by those recitals of the Decision, the undertakings in question, including the applicant, did not confine themselves to merely exchanging information on their price 'forecasts' or 'estimates' but expressed their common desire to conduct themselves on the market in a particular manner in regard to prices, that is to say, to act in such a way as to ensure that the prices agreed at the meetings in question would be achieved or, in some cases, maintained. The Court finds that such a common intention constitutes an 'agreement' within the meaning of Article 65(1) of the Treaty. Moreover, the Court sees no reason here to interpret the concept of 'agreement' in Article 65(1) of the Treaty differently from the concept of 'agreement' in Article 85(1) of the EC Treaty (see *Rhône-Poulenc* v *Commission*, cited above, paragraph 120).

263 As regards the applicant's conduct in relation to the three price increases on the British market, characterised in the Decision as 'concerted practices' (see recitals 220 and 230, *in fine*), the Court holds that this concept must be construed having regard to the purpose of Article 65(1) and the legal framework of the Treaty.

264 In Opinion 1/61 of 13 December 1961 [1961] ECR 243 the Court of Justice stressed that the purpose of Article 4(d) of the Treaty was to prevent undertakings from acquiring, by means of restrictive practices, a position allowing them to share or exploit markets. According to the Court of Justice, that prohibition, to which effect is given by Article 65(1) of the Treaty, is of strict application and distinguishes the system established by the Treaty (p. 262). The Court of Justice has also stressed, in regard to the system of publication of prices under Article 60 of the Treaty (see below), that 'The Treaty is based on the assumption that the freedom given to undertakings to fix their own prices and to publish new price-lists whenever they wish to amend them will ensure that prices find their own level. If current market trends change, producers will have to amend their lists accordingly, and in this way "the market makes the price"' (Case 1/54 *France* v *High Authority* [1954-1956] ECR 1, at p. 14). It also follows from the case-law

of the Court of Justice that, even though the steel market is an oligopolistic market, characterised by the system of Article 60 of the Treaty which ensures, through the compulsory publication of scales of prices and transportation charges, publicity for the prices charged by the various undertakings, the resulting immobility or parallelism of prices are not, in themselves, contrary to the Treaty if they result not from an agreement, even tacit, between the parties concerned, 'but from the interplay of the strengths and strategies of independent and opposed economic units on the market' (Case 66/63 *Netherlands* v *High Authority* [1964] ECR 533, at pp. 548 and 549).

265 It follows from that case-law that the idea that every undertaking must determine independently the market policy which it intends to pursue, without collusion with its competitors, is inherent to the ECSC Treaty and in particular Articles 4(d) and 65(1) thereof.

266 In those circumstances, the Court holds that the prohibition by Article 65(1) of the ECSC Treaty of 'concerted practices' in principle has the same purpose as the parallel prohibition of 'concerted practices' in Article 85(1) of the EC Treaty. More particularly, it seeks to ensure the effectiveness of the prohibition under Article 4(d) of the Treaty by bringing within that prohibition a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of normal competition under the Treaty (see Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 64).

267 As regards more specifically the three cases of price increases on the British market which the Commission found to be 'concerted practices', it should be borne in mind that: (a) these three cases arose in a context of regular collusion through numerous meetings and written correspondence between the undertakings belonging to the Poutrelles Committee designed, in particular, to coordinate their conduct with regard to prices on the various national markets; (b) on each of the three occasions involving prices on the British market, British Steel revealed to its competitors, during a meeting which most of them attended, what its future market conduct would be in regard to prices, calling on them to

adopt the same conduct, and thus acted with the express intention of influencing their future competitive activities; (c) the framework of regular coordination within the Poutrelles Committee was such that British Steel was reasonably able to count on its competitors complying in large measure with its call or, at least, on their bearing it in mind when deciding on their own commercial policy; (d) the factors relied on by the Commission establish that the undertakings in question did comply, in large measure, with British Steel's proposals. In particular, the applicant has failed to adduce any evidence to show that it opposed British Steel's requests or that it did not follow British Steel in the price initiatives notified at the meetings in question.

268 It follows from all of these considerations that, in these three cases, the undertakings in question substituted practical cooperation between them for the risks of normal competition under the Treaty, which the Commission rightly characterised as 'concerted practices' within the meaning of Article 65(1) of the Treaty.

269 As regards the applicant's argument that the concept of a 'concerted practice' in Article 65(1) of the Treaty presupposes that the undertakings have engaged in the practices which were the subject of their concertation, in particular by uniformly increasing their prices, it follows from the Court's case-law concerning the EC Treaty that, in order to be able to conclude that a concerted practice existed, it is not necessary for the concertation to have had an effect, in the sense understood by the applicant, on the conduct of competitors on the market. It suffices to find that each undertaking was bound to take into account, directly or indirectly, the information obtained during its contacts with its competitors (*Rhône-Poulenc* v *Commission*, cited above, paragraph 123). That case-law is not brought into question by paragraphs 64 and 126 et seq. of the judgment in *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, relied on by the applicant, which deal with different issues.

270 That case-law can be transposed to the sphere of application of Article 65 of the ECSC Treaty, since the concept of a concerted practice fulfils the same role there as the equivalent concept in the EC Treaty.

271 This conclusion is not invalidated by the wording of Article 65(5) of the Treaty, which provides that the Commission may impose fines by reason of 'concerted practices' only where the parties concerned have 'engaged' in practices contrary to Article 65(1). Undertakings engage in a concerted practice within the meaning of that provision where they actually take part in a scheme designed to eliminate the uncertainty about their future market conduct and necessarily implying that each of them takes into account the information obtained from its competitors (see *Rhône-Poulenc*, cited above, paragraph 123). It is therefore not necessary for the Commission to demonstrate that the exchanges of information in question led to a specific result or were put into effect on the market in question.

272 This interpretation is reinforced by the wording of Article 65(1) of the Treaty, which prohibits 'All... concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market'. The Court considers that this prohibition applies to any concerted practice which 'tends' or 'is likely' to adversely affect normal competition, without its being necessary to prove, for the purpose of finding that an infringement has been committed, that there has been an actual and specific effect on competition. In its judgment in Case 2/56 *Geitling and Others* v *High Authority* [1957 and 1958] ECR 3 ('*Geitling I*'), the Court of Justice (at p. 17) indicated, moreover, that, in order to reach the finding that an agreement distorts or restricts competition, it is not necessary to examine its practical effects, since that finding emerges *in abstracto* from Article 65(1).

273 In any event, even assuming that the applicant's interpretation should be accepted, to the effect that the concept of a concerted practice presupposes market conduct in conformity with the result of the concertation, that condition is satisfied in the present case with regard to the three price movements on the United Kingdom market. It has been established that, in each of those cases, the undertakings complied in large measure with the calls made by British Steel, which made it possible effectively to impose the new prices.

274 It follows from all of the foregoing that the applicant has not established that there was an error of law in the analysis of the conduct in question in relation to

the concepts of 'agreements' or 'concerted practices' covered by Article 65(1) of the Treaty.

(b) The purpose and effect of the agreements and concerted practices in question

275 According to recital 238 of the Decision, the agreements and concerted practices in question in recitals 223 to 237 'tended to' restrict competition within the meaning of Article 65(1) of the Treaty. In recital 221 of the Decision, the Commission identifies the 'purpose' of the conduct in question as being, *inter alia*, 'to increase and harmonise prices'. In recital 222, after stating that the analysis of that purpose makes it unnecessary to demonstrate that there was an adverse effect on competition, the Commission none the less forms the view that this effect was far from negligible.

276 The applicant argues that the agreements and concerted practices in question were not contrary to Article 65(1) of the Treaty since there is nothing to support the conclusion that agreements in restraint of competition were given effect to during the period covered by the fine. It relies, in particular, on the analysis of the market situation submitted by the expert Mr Bishop and on the fact that, between June 1988 and December 1991, annual Community production of beams rose from 3.7 million to 5.6 million tonnes, with variations between the market shares of undertakings in excess of 50% between July 1988 and the beginning of 1992. Moreover, during that period Community trade underwent considerable development, resulting in a decrease in the market shares of the various producers on their respective domestic markets. The applicant also criticises the Commission for not having set out its views on this economic analysis, a failure which, it claims, represents a defect in its statement of reasons.

277 In so far as Article 65(1) of the Treaty refers to agreements 'tending' to distort normal competition, the Court holds that this expression includes the formula 'have as their object' found in Article 85(1) of the EC Treaty. The Commission was therefore correct in holding, in recital 222 of the Decision, that it was not

obliged, in order to establish an infringement of Article 65(1) of the Treaty, to demonstrate that there was an adverse effect on competition.

278 In any event, given the abundant evidence that the price increases agreed on in this case were achieved, it must be concluded that the conduct in question, involving the main Community producers of beams, necessarily had on the market an effect which was far from negligible, as the Commission found in recital 222 of the Decision.

279 The Court finds, finally, that recital 222 is adequately reasoned as regards the purpose and effect of the infringement.

(c) Analysis of the conduct in question in relation to the criterion of 'normal competition'

Summary of the applicant's arguments

280 The applicant submits that the conclusions which the Commission reaches in recitals 239 to 241 of the Decision are legally defective inasmuch as the Commission interpreted Article 65(1) of the ECSC Treaty in the same way as Article 85(1) of the EC Treaty, particularly with regard to the concept of 'normal' competition, construed in the light of Articles 46 to 48 and 60 of the ECSC Treaty. Furthermore, it claims that the argument developed in recitals 239 to 241 of the Decision does not satisfy the requirements of adequate reasoning.

281 The Commission was, in the applicant's view, wrong to treat what was merely a reciprocal notification by the undertakings of their prices as constituting an infringement of Article 65(1) of the Treaty, even though the undertakings in question did not act in concert and did not jointly fix prices. An exchange of information within the context of the rules of the ECSC Treaty, which, in Articles 46 to 48 and 60, envisages only regulated and limited competition, does not constitute an infringement of Article 65. The same applies in regard to an agreement between undertakings designed to bring an end to or to prevent infringements of Article 60.

282 Referring to Article 232 of the EC Treaty, the applicant points out that, in its judgment in Case 13/60 *Geitling and Others* v *High Authority* [1962] ECR 83 ('*Geitling II*'), the Court of Justice merely envisaged the possibility of interpreting Article 65 of the ECSC Treaty in the light of Article 85 of the EC Treaty. In actual fact, however, the Court based its reasoning on Articles 2 to 5 of the ECSC Treaty. Similarly, in its judgment in Case C-128/92 *Banks* v *British Coal* [1994] ECR I-1209, the Court of Justice expressly declined to recognise Article 65 of the ECSC Treaty as having a direct effect in the same way as Article 85 of the EC Treaty. The Commission's administrative practice of bringing the competition rules of the ECSC and EC Treaties into alignment (see the *Twentieth Report on Competition Policy*) has not yet obtained the approval of the Community judicature.

283 Furthermore, the economic regime of the ECSC Treaty, which is the framework for interpreting the concept of 'normal' competition, is orientated towards planning. It is thus clearly distinguishable from the economic framework of the EC Treaty, which seeks to ensure that competition in the common market is not distorted (Article 3(g) of the EC Treaty).

284 The applicant argues that, during the negotiations on the ECSC Treaty, Articles 65 and 66 were included in order to prevent, in the context of a system replacing the rights of occupation, the industry of the Ruhr from acquiring a dominant position, and in order to ensure that industrial policy would be guided by the High Authority and not, as in the past, by agreements between undertakings. Article 65(1) thus prohibits only those restrictions on competition which run counter to the objectives of industrial policy laid down in Articles 2 to

5 of the ECSC Treaty. At the same time, the intention of those who drafted the ECSC Treaty was to ensure that buyers would have equal access to the sources of production, which made it necessary to include Article 60. All those industrial-policy objectives are alien to the EC Treaty. Furthermore, those who drafted the ECSC Treaty proceeded on the basis of the principle that information for undertakings on markets and prices, provided through the High Authority, was necessary for their action and that, consequently, the information received from the High Authority on the basis of Article 46 and following an exchange for that purpose between undertakings was not contrary to Article 65. The oligopolistic nature of the market in question, relied on by the Commission, confirms that it was scarcely envisaged that there should be a system of perfect competition.

285 The Commission itself noted, in its Sixth General Report (Vol. II, Chapter II, paragraph 1, No 41), that competition on the common market of the ECSC 'is... not *free and uncontrolled competition*, such as would result from the mere removal of restrictions on trade, but *regulated competition* which is the result of carefully evaluated measures and decisions which are constantly renewed' (italics in original).

286 The applicant also relies on Articles 2, 3, 4 and 5 of the ECSC Treaty. In Opinion 1/61, already cited, the Court of Justice, it argues, held that Article 65 is a provision applying Article 4(d) of the Treaty. The latter provision requires only a minimum of competition, so that determination by undertakings of their prices will be incompatible with that provision only if they exceed the limits provided for under heading (c) of the first subparagraph of Article 65(2) of the Treaty (*Geitling II*, pp. 102 and 106 et seq.).

287 The Court of Justice, it continues, inferred from Articles 2 and 5 of the Treaty that the fact that an undertaking has the power to determine prices can be criticised only where all competition has been eliminated (*Geitling II*, p. 102). Article 5, which forms the basis of Article 46 in so far as it requires the Community to provide guidance and assistance for the parties concerned, shows that the Treaty presupposes that 'normal' conditions of competition are those of a 'guided' and informed market. Without this market transparency, it would not be possible to ensure that all comparably placed consumers in the common market have equal access to the sources of production, in accordance with Article 3(b) of the Treaty.

288 Despite its general and rigid nature, Article 4(d) of the Treaty does not preclude restrictions on competition accepted by specific provisions. Those specific provisions include not only Article 65(2), as acknowledged by the case-law, but also Articles 46 to 48 and 60.

289 So far as Article 60 of the Treaty is concerned, the applicant contends that Article 60(2) prevents effective price competition. On a market of like products and in a situation of overcapacity, that provision prevents undertakings having any interest in lowering their prices because such a reduction, necessarily applicable to all customers of the undertaking in question, would lead to immediate parallel movements by its competitors and consequently to a reduction in the general price level, without resulting in any lasting increase in sales volumes. In those circumstances, the applicant submits, the economic scheme of the Treaty neither provides for nor permits the existence of competition which can be restricted.

290 In any event, the applicant continues, Article 60 limits competition in two ways: in the first place, by combating hidden competition, through the obligation in Article 60(2) to publish price lists and, second, by the prohibition on supplying products at prices which differ from the applicable price list. Given this obligation, which is imposed on undertakings both for the benefit of their customers (Article 3(b) of the Treaty) and for the benefit of their competitors (*France* v *High Authority*, cited above, p. 9), exchanges of information between them in regard to their future prices do not restrict 'normal' competition within the meaning of Article 65.

291 This interpretation of Article 60(2) of the Treaty is, the applicant argues, corroborated by Article 60(1). Since the latter provision requires undertakings to comply with Articles 2, 3 and 4 of the Treaty, the fact that they exclude use of competition parameters at variance with the objectives laid down therein does not constitute a restriction of normal competition. More particularly, the applicant argues that if undertakings were able to engage in covert competition, this would jeopardise the orderly supply to the common market intended under Article 3(a) of the Treaty.

292 As regards the Commission's responsibility to ensure compliance with Article 60 of the Treaty (see recital 241 of the Decision), the applicant submits that this provision is directly effective and that undertakings may legitimately commit themselves to complying with it without infringing Article 65 of the Treaty.

293 Moreover, Article 46 of the Treaty provides for close cooperation between the Commission and undertakings, involving reciprocal provision of information and the definition by the Commission of objectives for economic action. In this context, Article 48 of the Treaty attaches a special role to associations. In the present case, those provisions required undertakings to confer together on all points which, being capable of being taken into account by the Commission in drawing up forward programmes or defining general objectives, could be the subject of observations on their part. The applicant argues that, in order to be able to submit such observations to the Commission, undertakings must first confer together on their content, within the framework of their associations. Such consultation is covered by Article 46 of the Treaty in so far as the Commission participates actively or passively in it without raising any objections. On the one hand, it corresponds to Article 5 of the Treaty in so far as it requires the Commission to provide guidance for the parties concerned. On the other, undertakings cannot be expected to find out for themselves how to comply at the same time with Article 46 et seq. and with Article 65 of the Treaty.

294 In the present case, the applicant continues, the Commission did indeed take part in the exchange of information in question because it encouraged the undertakings to act as they did and, in any event, was informed of this exchange and benefited from it. So, the undertakings did not restrict 'normal' competition.

295 Moreover, the independent nature of the system of competition under the ECSC Treaty is explicable on the same grounds as those which led the Court of Justice to recognise that a special system of competition exists in the agricultural sector of the EC Treaty (see Case 71/74 *Frubo* v *Commission* [1975] ECR 563, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 59 to 61, and Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and

114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 65 to 70).

296 In their joint pleadings at the hearing, the applicants stressed that the principle of the market economy inherent in the EC Treaty must be contrasted with the principle of the managed economy under the ECSC Treaty. They cited, in this connection, the work by Professor Paul Reuter entitled '*La Communauté européenne du charbon et de l'acier*' (Paris, LGDJ, 1953), in which it is stated that 'the competition established by the Treaty is not and cannot be free competition but merely fair and regulated competition' (p. 143), according to rules 'which draw an analogy between the conditions in which [undertakings] operate and those in which public services operate' (p. 205). 'Normal' competition under the ECSC Treaty is merely subordinate in character, as is demonstrated by the provisions relating to publication of price lists on the basis of specified parity points (Article 60(2)), the requirement of transparency (Articles 46 to 48) and the possibility of suspending competition (Articles 61, 53 and 58). Under the ECSC Treaty, competition is merely one instrument among others (see *Banks*, cited above). In so far as the Commission has the task of reconciling the objectives of the Treaty and thus determining the application and content of the competition rules (see the *Twentieth Report on Competition Policy*, point 120), it is supposed to work in close collaboration with undertakings.

297 This submission was supplemented at the hearing by a statement by Professor Steindorff. He submitted that Article 65 had to be construed narrowly, in the light of the ECSC Treaty as a whole, characterised as it was by certain political objectives related to the specific features of the sector. Discussions between undertakings under the system provided for in Articles 46 to 48 of the Treaty had never been regarded as infringing Article 65 (see the report of the French Delegation on the ECSC Treaty and the 1951 Convention on the Transitional Provisions, as well as the above work of Professor Paul Reuter). Those discussions form part of normal competition, provided that the Commission directs them or, in the case where the undertakings themselves take the initiative, that they act in good faith and for the purpose of preparing their discussions with the Commission. Article 60 of the Treaty was conceived in such a manner as to limit undercutting and to protect existing relations between producers and customers. Put in the context of the EC Treaty, such a system is incompatible with Article 85 thereof. Given the difficulties in implementing Article 60 of the Treaty,

difficulties recognised by the Commission, an exchange of information on prices, which in any event are supposed to be published, is not contrary to Article 65(1) of the Treaty.

Findings of the Court

298 The applicant's argument rests on three principal aspects: the legislative context of Article 65(1); Article 60 of the Treaty; and Articles 46 to 48 of the Treaty.

— The context of Article 65(1) of the Treaty

299 In this case, the undertakings concluded a number of agreements on the prices to be charged during a particular quarter or, at least, which were to be considered as the objective which they endeavoured to achieve by common agreement (see the second paragraph of recital 225 of the Decision). As regards the three instances of concerted practices concerning prices on the United Kingdom market, these made it possible to ensure that the level of the continental producers' prices would not compromise the increases announced by British Steel. They were not therefore mere exchanges of information on future price 'forecasts' or 'estimates', as the applicant contends.

300 As regards the aim of Article 65(1) of the Treaty, which is to safeguard the requirement that undertakings should have market autonomy in order to ensure compliance with the prohibition in Article 4(d) of 'restrictive practices which tend towards the sharing or exploiting of markets', such coordination of conduct, achieved by means of an agreement or a concerted practice designed to achieve specific price objectives, must be treated as tending 'to fix... prices' within the meaning of Article 65(1) and thus as being contrary to that provision.

301 Likewise, the historical reasons which resulted in Article 65 being included in the Treaty, assuming that the applicant's account of those reasons is correct, cannot justify a reading of that provision which is at variance with its objective purpose as indicated by its wording and legislative context. Moreover, in the French Government Declaration of 9 May 1950, which preceded the drafting of the Treaty, it was stated that: '... unlike an international cartel designed to share and exploit national markets through restrictive practices and maintenance of high profits, the planned organisation will ensure the merger of markets and the expansion of production'.

302 As regards the oligopolistic character of the markets covered by the Treaty, while it is true that this may, to some extent, weaken the effects of competition (*Geitling II*, p. 110), that consideration cannot justify an interpretation of Article 65 authorising undertakings to behave in such a way as, in this case, reduces competition even further, particularly through price-fixing. In view of the consequences which the oligopolistic structure of the market may have, it is all the more necessary to protect residual competition (see, in the context of the application of Article 65(2) of the Treaty, *Geitling II*, p. 110).

303 As for the planning aspects of the Treaty, the Court has already pointed out that Article 4(d) of the Treaty, to which effect is given in particular by Article 65(1) thereof, contains a prohibition of strict application which distinguishes the system established by the Treaty (Opinion 1/61, cited above, p. 262; *Banks*, cited above, paragraphs 11, 12 and 16). The objective of free competition thus has, within the Treaty, an independent character and the same binding force as the other Treaty objectives laid down in Articles 2 to 4 (see the judgments in *France* v *High Authority*, cited above, p. 9, and in Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245, at p. 253).

304 Similarly, the applicant's argument that Article 65(1) prohibits only those restrictions on competition which run counter to the industrial-policy objectives laid down in the Treaty cannot be accepted. No such criterion appears in that provision, which, on the contrary, lays down a general prohibition of agreements

which tend to distort normal competition (see Joined Cases 36/59, 37/59, 38/59 and 40/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft and Others* v *High Authority* [1960] ECR 423, at p. 439).

305 Finally, the argument which the applicant derives from a comparison with the agricultural sector governed by the EC Treaty is irrelevant in the context of the present case.

— Article 60 of the Treaty

306 As regards the applicant's arguments based on Article 60 of the Treaty, that provision, which gives effect to Article 4(b) of the Treaty, prohibits, in paragraph (1),

'— unfair competitive practices, especially purely temporary or purely local price reductions tending towards the acquisition of a monopoly position within the common market;

— discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer.'

307 Article 60(2)(a) of the Treaty makes compulsory, for the purposes set out above, the publication of the price lists and conditions of sale applied on the common market. Under Article 60(2)(b), the methods of quotation used must not have the effect that prices charged by an undertaking in the common market, when

reduced to their equivalent at the point chosen for its price lists, result in increases over the price shown in the price list in question for a comparable transaction, or in reductions below that price the amount of which exceeds, *inter alia*, the extent enabling the quotation to be aligned on the price list, based on another point which secures the buyer the most advantageous delivered terms.

308 According to settled case-law, the purpose of the compulsory publication of prices under Article 60(2) of the Treaty is, first, as far as possible to prevent prohibited practices; second, to enable purchasers to learn exactly what prices will be charged and be able themselves to check whether any discrimination has taken place, and; third, to enable undertakings to have an accurate knowledge of the prices of their competitors so as to enable them to align their prices (see *France* v *High Authority*, cited above, p. 9, and Case 149/78 *Rumi* v *Commission* [1979] ECR 2523, paragraph 10).

309 It must be acknowledged that the system laid down by Article 60 of the Treaty, and in particular the prohibition on departing from the price list, even temporarily, constitutes a significant restriction on competition.

310 However, in the present case, Article 60 of the Treaty is irrelevant for the purpose of assessing, in light of Article 65(1), the conduct of which the applicant stands accused.

311 First, in so far as the applicant's arguments are based on the idea that this case involves mere exchanges of information on future price 'estimates' or 'forecasts', they are to no avail since, as the Court has just found, the applicant participated in agreements and concerted practices designed to fix prices.

312 Second, it is settled case-law that the prices which appear in the price lists must be fixed by each undertaking independently, without any agreement, even a tacit agreement, between them (see *France* v *High Authority*, cited above, p. 14, and *Netherlands* v *High Authority*, cited above, p. 549). In particular, the fact that the provisions of Article 60 tend to restrict competition does not prevent application of the prohibition of agreements under Article 65(1) of the Treaty (*Netherlands* v *High Authority*, cited above).

313 Third, Article 60 of the Treaty does not provide for any contact between undertakings, prior to publication of the price lists, for the purpose of exchanging information on their future prices. In so far as such contacts prevent those price lists being fixed independently, they are liable to distort normal competition within the meaning of Article 65(1) of the Treaty.

314 Finally, as regards the argument that the applicant was entitled to enter into a commitment to comply with the provisions of Article 60 of the Treaty, by excluding covert competition incompatible with that article, suffice it to recall that the present case involves agreements and concerted practices designed to coordinate prices, generally upwards, and not exchanges of information for ensuring compliance with Article 60 of the Treaty.

315 Furthermore, even assuming that at that time the system of Article 60 of the Treaty was not functioning in the manner envisaged by the Treaty (see the Commission's working document attached as appendix 5, document 2, to the application in Case T-151/94), it is clear from the objectives of Articles 4, 60 and 65 that the Treaty protects both the interest in having non-discriminatory and public prices applied and the interest in ensuring that competition is not distorted by collusive arrangements. The Court cannot therefore accept that the non-observance by the undertakings in question of the rules protecting the former interest can render inapplicable the rules protecting the latter interest. The onus, in any event, was on the undertakings themselves to comply with Article 60 of the Treaty, rather than establishing private price coordination between themselves, ostensibly in place of that provision, the implementation of which is the responsibility of the Commission.

316 In any event, agreements between producers cannot be treated as falling under the system of Article 60 of the Treaty, if only because they do not enable purchasers to learn exactly what prices will be charged or to check whether discrimination has taken place (see *France* v *High Authority*, cited above, p. 9, and *Rumi* v *Commission*, cited above, paragraph 10).

— Articles 46 to 48 of the Treaty

317 As regards the arguments based on Articles 5 and 46 to 48 of the Treaty, it should be borne in mind that, under the first indent of the second paragraph of Article 5 of the Treaty, the Community must provide guidance and assistance for the parties concerned, by obtaining information, organising consultations and laying down general objectives. Under the third indent of the second paragraph of Article 5 of the Treaty, the Community must ensure the establishment, maintenance and observance of normal competitive conditions and exert direct influence on production or on the market only when circumstances so require. Article 46 of the Treaty provides, *inter alia*, that the Commission must, when consulting undertakings, conduct a continuous study of market and price trends and periodically draw up programmes indicating foreseeable developments in production, consumption, exports and imports. Article 47 of the Treaty provides that the Commission may obtain the information which it requires to carry out its tasks, while complying with the obligation of professional secrecy. Under Article 48 of the Treaty, associations of undertakings, *inter alia*, may engage in any activity which is not contrary to the provisions of the Treaty, have the right to submit to the Commission the comments of their members in cases where the Treaty provides for consultation with the Consultative Committee established under Article 18 of the Treaty, and are required to provide the Commission with any information which the latter considers that it requires in regard to their activities.

318 None of the above provisions allows undertakings to infringe the prohibition laid down in Article 65(1) of the Treaty by concluding agreements or engaging in concerted price-fixing practices of the kind here in question.

319 The applicant's arguments concerning the alleged need for undertakings to exchange information with each other within the framework of their cooperation with DG III after 1 July 1988 will be examined in detail in Part D below.

320 Subject to that reservation, it follows from the foregoing that the Commission did not misconstrue the scope of Article 65(1) of the Treaty or wrongly apply the provisions of Article 85(1) of the EC Treaty to the facts of the present case. Similarly, the explanations which the Commission gave in recitals 239 to 241 of the Decision constitute an adequate statement of reasons for that aspect of the Decision.

321 It follows that, subject to that same reservation, the arguments against characterising the conduct of which the applicant is accused as agreements or concerted practices to fix target prices, as the Commission does in recitals 224 to 237 of the Decision, must be rejected in their entirety.

The agreements to harmonise extras

322 In Article 1 of the Decision, the Commission found that the applicant had participated in a practice described as 'harmonisation of extras'. According to recitals 122 to 142 (regarding the facts) and recitals 244 to 252 (regarding the legal assessment) of the Decision, the undertakings in question adopted, at the Poutrelles Committee meetings of 15 November 1988, 19 April 1989, 6 June 1989, 16 May 1990 and 4 December 1990, five successive agreements to harmonise extras.

323 While not denying that those agreements did indeed relate to harmonisation of the prices of extras, the applicant contends that the Commission was not entitled to accuse it of infringing Article 65 of the Treaty. In 1976, the Commission requested undertakings to provide it with information on the harmonisation of

extras, on the basis of a mandate derived from Article 65 of the Treaty. Since the Commission did not react to the information received on that occasion, the undertakings were, according to the applicant, entitled to assume that their conduct was not objectionable under that provision. Furthermore, in order to make it possible, at the end of 1977, to fix basic import prices (see the communication published in OJ 1977 L 353, p. 1), the sector carried out, at the Commission's request and in concert with it, a short-term harmonisation of all areas of extras for the entire range of products. The Commission was subsequently kept informed of the results of this harmonisation through the notification of price lists, which it never challenged. The Commission thus participated in the conduct of the undertakings. From this the applicant infers that their conduct remained within the parameters set by Article 60 of the Treaty and cannot be treated as constituting a restriction on normal competition within the meaning of Article 65(1) of the Treaty.

324 The applicant is not challenging any of the findings or inferences of fact set out in recitals 122 to 142 and 244 to 252 of the Decision concerning the conclusion of the agreements objected to therein and the identification of their purpose, which was not only to harmonise but also to increase the prices of extras. The applicant merely asserts that the Commission was aware of that conduct and even took part in it.

325 To the extent to which the applicant makes reference to the fact that in 1976 the Commission inquired into the harmonisation of extras and did not react to the information which it received at that time from the undertakings, its argument cannot be accepted. The applicant has provided no details as to the nature of the declarations or information which formed the subject-matter of this alleged exchange between the Commission and the undertakings, or as to the context of those events or the connection which they might have had with a course of conduct adopted more than 11 years later.

326 If the applicant's argument refers to the Commission's investigation into the Groupement Belge de la Sidérurgie, mentioned in a memorandum of 24 February 1976 (Annex 5 to the applications in Cases T-137/94 and T-138/94), that document is not such as to substantiate those allegations. It appears from that document that the Groupement's representative had described the meetings which

formed the subject-matter of the investigation as 'vital for introducing a certain transparency into the market and qualitative homogeneity'. None of those objectives presupposed harmonisation of the amounts of extras, even less an increase in those amounts. Furthermore, that document also refers, in regard to international contacts between undertakings, to a statement by that representative that those contacts did not result in 'price agreements'.

327 The argument that the Commission took part in the conduct in question by demanding harmonisation of extras in order to be able to fix, at the end of 1977, the basic import prices in the context of antidumping measures cannot be accepted either. There is no evidence to justify the conclusion that the harmonisation agreements at issue in this case, which were concluded more than ten years after that step was taken, bear any relationship whatever to it.

328 Likewise, the fact that the Commission found similarities in undertakings' price lists is not in itself sufficient to establish that it knew about the agreements in question and even less that it approved of such agreements.

329 Even if it is assumed that harmonisation of the structure of extras (dimensions, qualities, etc.) might be of some use for publishing price lists under Article 60 of the Treaty, the unavoidable conclusion is that this case involved agreements relating not only to the structure but also to the prices of extras, and in particular to the increase in those prices on five occasions between 15 November 1988 and 4 December 1990. Given that Article 60 of the Treaty does not under any circumstances authorise agreements on pricing, the applicant's arguments based on that provision are to no avail.

330 Consequently, and subject to the reservation regarding the argument examined in Part D below, the applicant's heads of complaint directed at the Commission's finding, in recitals 122 to 142 and 244 to 252 of the Decision, that agreements on harmonisation of extras had been concluded, contrary to Article 65(1) of the Treaty, must be dismissed in their entirety.

Market sharing under the 'Traverso methodology'

331 In Article 1 of the Decision, the Commission found that the applicant had taken part in market sharing which it calls the 'Traverso system'. The period taken into account for the purposes of the fine imposed by reason of that participation was two periods of three months. The grounds on which that charge is based are set out in recitals 72 to 79 (as regards the facts) and 254 to 259 (as regards the legal assessment) of the Decision.

332 In recitals 254 to 259 of the Decision, the Commission points out, *inter alia*, that the system in question 'was set up shortly before 19 July 1988' and that it 'was in operation for the fourth quarter of 1988 and the first quarter of 1990'. With the help of that system, the participating undertakings, that is to say, Peine-Salzgitter, Thyssen, Klöckner, Saarstahl, Unimétal, Ferdofin, Cockerill-Sambre, TradeARBED and British Steel, 'strove to match supply and demand' (recital 254).

333 According to the Commission, the undertakings notified their delivery plans to Mr Traverso, who at the time was chairman of the CDE (see recital 31 of the Decision). He was in a position to approach any of those undertakings and suggest modifications if he thought fit to do so (recital 256). Distributed subsequently to the participating undertakings, those figures took the form of 'delivery plans' for each company and for each of the markets concerned (recitals 256 and 257). The Commission also confirms that the chairman of the CDE and Eurofer approached companies which disregarded those figures and requested them to respect the traditional pattern of trade. Participating undertakings thus engaged in a concerted practice prohibited by Article 65(1) of the Treaty '[by] disclosing their delivery plans to each other and by putting into effect the recommendations of the chairman of the CDE' (recital 258 of the Decision).

334 The applicant denies that it ever participated in such a system. The fax referred to in recital 74 of the Decision, it argues, merely contains Eurofer delivery forecasts.

Furthermore, the exchange of correspondence between Unimétal and British Steel referred to in recital 77 of the Decision does not allow any conclusions to be drawn as to the importance which the applicant attached to that system. In addition, it follows from the Decision (recital 75, second paragraph) that the applicant, along with other undertakings, largely exceeded the figure envisaged. Moreover, the Commission, it claims, has also failed to show that the Traverso methodology was resumed at the beginning of 1990 (see recitals 78 and 79 of the Decision).

Findings of the Court

— The first phase of the Traverso system (fourth quarter of 1988)

335 The Commission's finding that the applicant took part, during the fourth quarter of 1988, in a concerted practice known as the 'Traverso system' is based on the following evidence:

— an extract from the minutes of the Poutrelles Committee meeting of 19 July 1988 (see recital 72 of the Decision, document no 2207);

— a fax from Eurofer to ARBED/TradeARBED, British Steel, Cockerill-Sambre, Usinor Sacilor, Ferdofin, Klöckner, Saarstahl, Thyssen and Peine-Salzgitter, received by the latter on 4 August 1988 and referring to a 'table showing the final delivery intentions collected at the end of the last CDE meeting of 27 and 28 July 1988 in Paris' (recital 74 of the Decision, document no 3380);

— an (undated) internal Peine-Salzgitter memo comparing the delivery intentions of Peine-Salzgitter, Thyssen, Klöckner, Saarstahl, Unimétal, Ferdofin, Cockerill-Sambre, TradeARBED and British Steel for the fourth quarter of 1988 as compared with actual deliveries (recital 75 of the Decision);

— a telex of 28 November 1988 from Unimétal to British Steel and British Steel's reply of 6 December 1988 (recital 77 of the Decision, documents nos 1989 and 1986).

336 The Court finds that the abovementioned pieces of evidence prove that the undertakings in question engaged in a concerted practice during the fourth quarter of 1988 by revealing to each other their delivery plans with the intention of giving effect to the recommendations of the chairman of the CDE in such a way as to adjust supply to demand. The communication of the 'sales intentions' to Eurofer was expressly provided for in the scheme set out in the minutes of the meeting of 19 July 1988, in the same way as the examination of those figures in regard to the market estimates and subsequent amendments, to be proposed by Mr Traverso, in the event that the intentions as communicated should 'diverge significantly from past figures' (recital 72, document no 2207). In accordance with this idea, 'final delivery intentions' were 'collected' during the CDE meeting of 27 and 28 July 1988 in Paris (fax of 4 August 1988, recital 74 of the Decision, document no 3380). Furthermore, in the table mentioned in that fax (see recital 75 of the Decision, documents nos 3383 and 3384), the sum of the 'delivery intentions' for each market corresponds to the figure indicated as a 'new market estimate'. In the fax itself it is explained that 'in addition to the figures considered in Paris, some minor adjustments have been brought in for the English and Danish markets'.

337 The Court further notes that, during the meeting on 19 July 1988, reference was made to 'the necessary equilibrium' (see recital 72 of the Decision). Along the same lines, the fax of 4 August 1988 refers to the CDE chairman's expectation that the companies in question would not exceed the limit of the 'intentions' communicated at that time and which, as stated therein, 'are related to the price stability'. Those indications show that the undertakings concerned accepted those intentions and that the objective of the system was indeed to ensure that there

would be a coincidence between 'delivery intentions' and 'market estimates' (see recital 72 and the table cited in recital 75 of the Decision).

338 That objective could scarcely have been achieved if the undertakings, unaware of the definitive figures for their competitors, had been unable to monitor whether it was being followed. Such monitoring, moreover, was carried out, once the table in question had been distributed, by Peine-Salzgitter (see its internal memo cited in recital 75 of the Decision) and by British Steel and Unimétal (see the telexes cited in recital 77 of the Decision). In addition, there is nothing to suggest that those undertakings treated this distribution of individual data among competitors as abnormal.

339 It follows that, contrary to what the applicant asserts, the fax referred to in recital 74 of the Decision does not contain solely Eurofer's delivery forecasts. Likewise, the fact that the applicant was not a party to the exchange of correspondence between Unimétal and British Steel (recital 77 of the Decision) does not preclude that correspondence from being treated as solid evidence of the objective of the Traverso system. That correspondence shows that the figures distributed were meant to be complied with.

340 So far as the applicant is concerned, it is to be noted that it took part in the Poutrelles Committee meeting of 19 July 1988 (recital 38(f) of the Decision), that the fax of 4 August 1988 was addressed to it, and that its own delivery intentions were set out in the table annexed thereto. Its participation in the concerted practice in question has thus been proved.

341 The fact that the applicant exceeded the figures agreed under that system (see recital 76 of the Decision) did not prevent the Commission from finding that an infringement had occurred.

— The second phase of the Traverso system (first quarter of 1990)

342 The Court finds that the resumption of the system in the first quarter of 1990 is proved by the two documents referred to in recital 78 of the Decision, that is to say the letter of 31 January 1990 from Peine-Salzgitter to the chairman of the CDE (documents nos 3422 and 3423) and British Steel's briefing note of 20 July 1990 (documents nos 1964 to 1966).

343 The content of the letter of 31 January 1990 from Peine-Salzgitter coincides with the characteristics of the Traverso methodology. Addressed to the chairman of the CDE, it contains 'delivery intentions' for the first two quarters of 1990, justified, in principle, by the figures for earlier periods, that is to say, by 'past figures' within the meaning of the terminology used in the minutes of the meeting of 19 July 1988 (see recital 72 of the Decision). Specific justification is provided for the first quarter of 1990, in the sense of a rescheduling of deliveries which could not be made previously.

344 British Steel's internal memo of 20 July 1990 concerning the Poutrelles Committee meeting of 10 July 1990 refers to attacks led by other producers by reason of the way in which British Steel's continental sales had developed. In its defence, British Steel states that its sales for the previous quarter had remained 'within the Traverso guidelines'.

345 That conclusion is not invalidated by the fact, which the applicant stresses, that British Steel had been criticised even though it had claimed to have complied with the 'Traverso guidelines'. Criticism of that kind cannot be construed as denying the existence or application of the system in question.

346 Likewise, the fact, stressed by the applicant, that an alternative to this methodology, which had proved to be rather ineffective, was proposed in December 1989 (see point 108 of the statement of objections) did not affect at all

the resumption of the system at the beginning of 1990, as evidenced by the abovementioned letter from Peine-Salzgitter and British Steel's internal memo.

347 As for British Steel's file note on the meeting of 21 March 1990, according to which a Unimétal representative had revealed that the system had broken down (see recital 79 of the Decision), that document demonstrates at most that, towards the end of the first quarter of 1990, to which the Commission's charge is confined, it could no longer be expected that the undertakings would comply with the figures which had been distributed. That, however, does not prevent the conclusion being drawn that the method had functioned well until that 'breakdown'.

348 It follows from all of the foregoing that the establishment and operation of the contested system for the fourth quarter of 1988 and the first quarter of 1990, as described in the Decision, have been proved for the purposes of these proceedings. The same applies with regard to the applicant's participation in that system during those two periods.

349 Subject to the considerations examined in Part D below, all of the applicant's arguments relating to the Traverso system must therefore be rejected.

Agreement to share the French market during the fourth quarter of 1989

350 Article 1 of the Decision charges the applicant with engaging in sharing of the French market and lays down, as a reference period for purposes of the fine, a period of three months.

351 In support of its charge, the Commission refers, in recitals 63 to 71 (facts) and 260 to 262 (law) of the Decision, to an agreement to share deliveries on the French market in respect of the fourth quarter of 1989. That agreement, it claims, was concluded during the meeting of the Poutrelles Committee held on or about 21 September 1989 between Peine-Salzgitter, Thyssen, Saarstahl, Ferdofin, Cockerill-Sambre, TradeARBED, British Steel, Ensidesa and Unimétal. According to the Commission, Ensidesa did not play an active role in drawing up the system but did comply with it.

352 The applicant denies that it took part in the meeting of 21 September 1989. The note drafted by the Walzstahl-Vereinigung (recital 66 of the Decision) setting down the conclusions of that meeting does not therefore incriminate it. Nor does that note prove that it took part in the preparatory work on that alleged agreement. Furthermore, the minutes of that meeting refer only to deliveries by Unimétal (point 207 of the statement of objections). In addition, the fact that it was represented at the meeting on 13 September 1989 does not, the applicant argues, suffice to establish that it took part in the alleged agreement of 21 September 1989. It argues further that the documents cited in recitals 67 and 68 of the Decision fail to provide any basis for the claim that it took part in a market-sharing agreement. Finally, a number of undertakings, including the applicant, substantially exceeded the quantities envisaged (recital 69 of the Decision).

353 The Court notes that the Commission relies, in support of its findings, on the following:

(a) a meeting of 13 September 1989 between the representatives of Peine-Salzgitter, Thyssen, Saarstahl, British Steel, Unimétal, TradeARBED and Cockerill-Sambre/Steelinter dealing with the question of deliveries of beams to the French market in the fourth quarter of 1989 (recital 63 of the Decision);

(b) a document drafted by the Walzstahl-Vereinigung and discovered in the offices of Peine-Salzgitter (recital 63 of the Decision, documents nos 3140 and 3141), and a manuscript note (document no 3138) attached to that document by Peine-Salzgitter;

(c) an internal memo dated 19 September 1989 prepared by Peine-Salzgitter (recital 64 of the Decision, document no 3139);

(d) the minutes of the Poutrelles Committee meeting of 21 September 1989 (recital 65 of the Decision, documents nos 211 to 217);

(e) a note dated 25 September 1989 prepared by the Walzstahl-Vereinigung and recording the conclusions of the meeting of 21 September 1989 (recital 66 of the Decision, documents nos 207 to 210);

(f) a telex of 26 September 1989 sent by the Walzstahl-Vereinigung to Peine-Salzgitter, Thyssen, Saarstahl, Ferdofin, TradeARBED, British Steel, Ensidesa and Unimétal (recitals 67 and 261 of the Decision, document no 3136);

(g) the summary of the conclusions reached at the Poutrelles Committee meeting of 7 November 1989, referring to a 'desire that the "system of deliveries for the French market in the fourth quarter of 1989" should be extended to the first quarter of 1990 and to all ECSC markets' (recitals 68 and 261, final indent, of the Decision, documents nos 224 to 229), and the minutes of that meeting (recital 71 of the Decision, documents nos 230 to 235).

354 The Commission also found, on the basis of the data resulting from the monitoring of the deliveries made during the fourth quarter of 1989, that most of the participating companies either complied with the delivery plan drawn up or delivered quantities below those envisaged. Only three undertakings (Thyssen, Ferdofin and British Steel) substantially exceeded those quantities (recitals 262 and 69 of the Decision).

355 The Court holds that the findings set out in recitals 261 and 262 of the Decision, on the basis of the evidence listed in recitals 63 to 71, support the Commission's conclusion that an agreement to share the French market was concluded, by reference to the quantities set out in the telex of 26 September 1989 cited in recital 67, for the fourth quarter of 1989.

356 First, it is clear from the evidence discussed in recitals 63 and 64 of the Decision that, following the Poutrelles Committee meeting of 13 September 1989 dealing, in particular, with deliveries on the French market, and prior to the meeting of 21 September 1989, the undertakings concerned were endeavouring to reach such an agreement.

357 The internal Peine-Salzgitter memo of 19 September 1989 (recital 64, document no 3139) reveals that those undertakings had started negotiations to find an allocation formula, on the basis of two proposals. The document prepared by the Walzstahl-Vereinigung (document no 3141), to which the author of that memo refers, sets out the previous deliveries of the undertakings concerned and, on that basis, two separate allocation formulas. The first comes under the heading 'French market — Beams — Fourth quarter of 1989', the second under the heading 'Gaillard alternative'. According to the Peine-Salzgitter memo, Peine-Salzgitter 'agreed' that the percentage corresponding to previous delivery figures should be applied to it, on the basis of the 'document drawn up by the [Walzstahl-Vereinigung]', which it recognised as a 'basis for the allocation to Eurofer suppliers'. Taking the view that 'the basis must, however, be 33 000 tonnes', it stated that it was in favour of the first allocation formula, to the exclusion of the second (that is to say, the 'Gaillard alternative'), proposed by a Unimétal representative. This point of view is also expressed in Peine-Salzgitter's manuscript note cited in the final paragraph of recital 63 of the Decision (document no 3138). It appears from those two documents that the other companies concerned also rejected the 'Gaillard alternative'.

358 With regard, second, to the documents concerning the meeting held on 21 September 1989, that is to say two days after the date of the Peine-Salzgitter memo of 19 September 1989, while it is true that the minutes of that meeting

refer only to the deliveries to be made by Unimétal, it appears nevertheless that all of the plants concerned, whether or not belonging to Eurofer, had 'notified plans to reduce deliveries' (see the Walzstahl-Vereinigung note, recital 66 of the Decision, documents nos 207 to 210). The Court takes the view that this latter reference can only be reasonably construed as evidence of the completion of efforts made only a few days previously to reach an agreement on the quantities to be delivered on the French market. Having regard to the context of those preliminary discussions, it can be excluded with sufficient certainty that the announcements made by the undertakings concerned about their deliveries reflected decisions which they had taken independently.

359 The Court finds, third, that the Walzstahl-Vereinigung telex of 26 September 1989 (recital 67 of the Decision, document no 3136) informed the parties of the details of the agreement thus reached. The undertakings for which a delivery quantity is indicated are those for which such a quantity had been envisaged in the preparatory documents drawn up by the Walzstahl-Vereinigung, with the single exception of Klöckner, which (with an insignificant quantity) features only in these preparatory documents (recital 63 of the Decision). Close examination of those figures also suggests that the two previous percentage figures used in the latter documents for seven of the undertakings concerned (Peine-Salzgitter, Thyssen, Saarstahl, Ferdofin, Cockerill-Sambre, ARBED and British Steel) served as a basis for determining the definitive share for each of them in the total quantity allocated to them. In this way, the previous percentage figures amounted, in the applicant's case, to 2.0% and 2.1%, and its definitive share, notified by telex of 26 September 1989, to 2.1%.

360 The fact that the quantities indicated in the telex in question were described there as 'approximate' does not alter the conclusion that those quantities were the subject of an agreement between the undertakings concerned.

361 It also appears that, during the meeting of 7 November 1989, the undertakings took the view that the figures for delivery orders during the material quarter were at a 'reasonable' level (see the short account cited in recital 68 of the Decision, and the minutes cited in recital 71, documents nos 230 to 235), and expressed the 'desire that the "system of deliveries for the French market in the fourth quarter

of 1989" should be extended to the first quarter of 1990 and to all ECSC markets'. Read in its context, this reference implies that such a system for the allocation of deliveries for the market and quarter in question had indeed been put into place.

362 The existence of the agreement to which the Commission objects has thus been proved.

363 For the reasons given in the judgment being delivered today in Case T-148/94 *Preussag* v *Commission*, this conclusion is not affected by the testimony given at the hearing by Mr Mette and Mr Kröll of Preussag.

364 So far as the applicant's participation in that agreement is concerned, it must be noted that it attended the meeting of 13 September 1989 (recital 63 of the Decision) and that delivery figures relating to it were contained in the preparatory documents drawn up by the Walzstahl-Vereinigung. Contrary to its assertions, the applicant also took part in the meeting of 21 September 1989. In its reply of 10 September 1991 to the Commission's request for information, it confirmed that it had attended all meetings of the Poutrelles Committee in the period from 25 November 1987, apart from that on 7 November 1989 (see also recital 38(f) of the Decision). The table sent by the Walzstahl-Vereinigung on 26 September 1989 (recital 67 of the Decision) was addressed to the applicant, among others, and its name is included there with a delivery figure. In view of all that corroborative evidence, the Court concludes that the applicant was a party to the disputed agreement. Finally, even though the applicant's deliveries during the relevant quarter may have exceeded the quantities allocated to it, that cannot prove that it did not conclude the agreement, but only that it did not observe it.

365 It follows from all of the foregoing that it has been proved for the purposes of these proceedings that the applicant entered into and participated in the agreement in question. That agreement was intended to share markets within

the meaning of Article 65(1)(c) of the Treaty and was thus prohibited under that provision, subject to the considerations which will be examined in Part D below.

Exchanges of information within the Poutrelles Committee (monitoring of orders and deliveries) and through the Walzstahl-Vereinigung

366 According to Article 1 of the Decision, the applicant took part, during a 30-month period, in an 'exchange of confidential information through the Poutrelles Committee and the Walzstahl-Vereinigung'. The Commission sets out the details of those systems in recitals 39 to 60 of the Decision, as regards the facts, and in recitals 263 to 272 in regard to the issues of law.

367 The exchange of information through the Poutrelles Committee, commonly known as 'monitoring', involved two stages relating to orders and deliveries of the participating undertakings (recital 263). It was organised by the secretariat of the Poutrelles Committee (recital 47), at that time provided by Usinor Sacilor (recital 33), which collected the figures and redistributed them in the form of statistics (recital 40).

368 The monitoring of orders, established in 1984, allowed participating undertakings to be informed by each other on a regular basis as to the orders they had received for delivery in a specific quarter (recital 39) in the following countries: France, Germany, Belgium/Luxembourg, Netherlands, the United Kingdom, Italy, Spain, Portugal, and Greece/Ireland/Denmark. Since the beginning of 1989 at least, those statistics were collected and distributed each week by the secretariat of the Poutrelles Committee (recital 40).

369 The monitoring of deliveries, which operated from the beginning of 1989 for the statistics relating to the fourth quarter of 1988, related to the quarterly deliveries

of participants on the markets of the ECSC (recital 41). Statistics broken down for each undertaking were exchanged for the following markets: the ECSC as a whole, Germany, France, the United Kingdom, the Benelux area, Italy, Greece/ Ireland/Denmark, Portugal and Spain. Those statistics were distributed a month or two after the end of the relevant quarter (recital 42).

370 According to the Decision, these monitoring systems were suspended at the end of July 1990 (recitals 43 to 46) following the adoption of the Stainless Steel decision, but were subsequently resumed (recital 45). Thus, individual data on orders for delivery during the fourth quarter of 1990 and the first quarter of 1991 by the applicant and other participating undertakings were sent to the secretariat of the Poutrelles Committee and circulated by the Walzstahl-Vereinigung in December 1990 and January 1991 (recital 46 and Annex I, No 28, to the Decision).

371 This exchange of information within the Poutrelles Committee was supplemented by an exchange of information through the Walzstahl-Vereinigung. The Commission refers in this regard to two sets of tables dated 1 October 1990 and 23 November 1990 setting out the deliveries completed and the orders recorded by the applicant and other companies on the various Community markets. The first set of tables, prepared for the 9 October 1990 meeting of the Poutrelles Committee, presented the quantities delivered from January 1990 to July 1990, expressed on a monthly basis. It also contained several weekly figures, between 2 June and 22 September 1990, relating to orders to be delivered during the third and fourth quarters of 1990. The tables of 23 November 1990, prepared for the 4 December 1990 meeting of the Poutrelles Committee, contained figures set out in the same way but more up-to-date, relating to the quantities delivered between January 1990 and September 1990 and the orders to be delivered in the fourth quarter of 1990 (recitals 47 and 48 of the Decision).

372 In recitals 49 to 60 and 268 of the Decision, the Commission alleges that these exchanges of information were frequently accompanied by discussions within the Poutrelles Committee, during which the undertakings complained about the

conduct of their competitors in relation to orders or exports, as well as about discrepancies between the orders announced and deliveries actually made.

1. The facts

373 The applicant argues, in the first place, that German producers exchanged only aggregate figures, which did not allow their competitors to identify individual market shares, pricing strategies or present and future market trends. Second, the applicant denies that it resumed, through the Walzstahl-Vereinigung and with effect from December 1990, the exchange of information on orders for delivery (recitals 46 and 263 of the Decision). In its view, that charge does not square with the fact that the tables mentioned in point 75 of the statement of objections contained only overall figures. Third, it argues that the charge in recital 48 of the Decision that the statistics broken down by undertaking were distributed through the Walzstahl-Vereinigung is entirely unsupported.

374 With regard, first, to the monitoring of orders and deliveries between July 1988 and July 1990, the Court finds that it is abundantly clear from the documents cited in Annex I to the Decision that there was an exchange of figures broken down for each undertaking and each country, and that the applicant took part in that exchange.

375 As regards the resumption of monitoring in December 1990 (final sentence of recital 46 of the Decision), the Court finds that the tables compiled on that occasion were in fact broken down by undertaking (see documents nos 293 to 295). The aggregate tables mentioned in point 75 of the statement of objections,

to which the applicant refers, pre-date this by several months and thus do not relate to the resumption of the monitoring in December 1990.

376 Finally, contrary to the applicant's assertions, examination of the tables prepared by the Walzstahl-Vereinigung, dated 1 October 1990 (documents nos 1409 to 1414) and 23 November 1990 (documents nos 1447 to 1452), referred to in recital 48 of the Decision, makes it clear that they were broken down by undertaking. The tables referred to in points 79 and 82 of the statement of objections, to which the applicant refers, are different tables.

377 The Court considers that distribution of those two tables is proved by the lists set out at the beginning of the files found on the premises of the Walzstahl-Vereinigung (document no 1394 concerning the meeting of 9 October 1990; document no 1433 concerning the meeting of 4 December 1990). According to the memo sent by Mr Vygen to Mr Everard on 4 October 1990 (recitals 48 and 33 of the Decision, documents nos 1337 to 1339), the Walzstahl-Vereinigung supplied 'up-to-date statistics' to its members prior to each meeting of the Poutrelles Committee. The contents of the tables in question, which include figures for orders and deliveries on various markets over the immediately preceding period, fully meet that definition. In the abovementioned lists of the Walzstahl-Vereinigung (documents nos 1394 and 1433), those tables are set out under the heading 'trends' or 'monitoring' of the 'deliveries and orders of the German/Luxembourg plants'. In addition, as regards the meeting of 9 October 1990, it is clear from the memo of Mr Vygen, as pointed out in recital 48, *in fine*, of the Decision, that the file relating to that meeting had already been sent to TradeARBED on 2 October 1990. It is, furthermore, not credible that this file would have been sent solely to TradeARBED. Nor is it plausible that the Walzstahl-Vereinigung would have acted differently in regard to the meeting of 4 December 1990.

378 Consequently, the applicant's objections to the findings of fact made by the Commission in the Decision are unfounded and must be rejected in their entirety.

2. Legal analysis of the facts

Summary of the parties' arguments

379 The applicant challenges the argument, in recitals 266, 267, 269 and 271 of the Decision, that exchange of individualised information on orders and deliveries is contrary to Article 65(1) of the Treaty. It submits that the hypothesis of a well-informed trader having information on production, deliveries and prices of its competitors is the norm under the ECSC Treaty. The exchange in question was thus designed to achieve what Article 65 of the Treaty considers to be 'normal' competition, a concept which presupposes the existence of a transparent market. In this connection, the applicant restates its views on how Articles 46, 48 and 60 of the Treaty bear upon the interpretation of Article 65. In so far as the Commission, in order to reach the conclusion that the exchanges in question were prohibited, relied on decisions which it had adopted under the EC Treaty (Decision 87/1/EEC of 2 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.128 — Fatty Acids), OJ 1987 L 3, p. 17 ('the Fatty Acids Decision') and Decision 92/157/EEC of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange), OJ 1992 L 68, p. 19 ('the United Kingdom Agricultural Tractor Registration Exchange Decision'), it failed to take account of the fundamental differences between those two Treaties.

380 The applicant further claims that it did not exceed the limits within which the Commission accepts systems of information exchange, according to its communication on agreements, decisions and concerted practices relating to cooperation between undertakings, published on 29 July 1968 (OJ 1968 C 75, p. 3) ('the 1968 communication'). In any event, the Commission did not examine the difficulties which may arise from the distinction between information which is neutral from the point of view of competition and anti-competitive conduct, which it recognised in point II.1 of the 1968 communication.

381 In reply to the Commission's argument that the anti-competitive effects of the contested exchange were compounded, *inter alia*, by the fact that the information exchanged was up-to-date, the applicant claims that the Commission itself encouraged the undertakings to ensure that the statistics were up-to-date. Furthermore, the anti-competitive intention which the Commission purports to infer from the oligopolistic structure of the market is in any event inherent in the system of the ECSC Treaty.

382 In any event, the exchange of information of which the applicant is accused is compatible with Article 65 of the Treaty since the Commission was informed of it and took part in it within the context of Article 46 of the Treaty by putting into place and applying the system of market surveillance provided for by Decision No 2448/88, as well as by requiring the undertakings to provide information on orders and deliveries.

383 The Commission takes the view that the exchange by the undertakings of information in this case was incompatible with Article 65 of the Treaty for the reasons set out in recitals 263 to 272 of the Decision.

384 However, in its reply of 19 January 1998 to a written question put by the Court, the Commission stated that the disputed information systems did not constitute a separate infringement of Article 65(1) of the Treaty but formed part of wider infringements consisting, in particular, in price-fixing and market-sharing agreements. Those agreements, the Commission argues, thus infringed Article 65(1) of the Treaty in so far as they made it easier for those other infringements to be committed. During the hearing the Commission, while doubtful as to whether the judgments of the Community Courts in the '*Tractor*' cases (Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraphs 88 to 90, and Case T-35/92 *John Deere* v *Commission*, cited above, paragraph 51) are directly transposable to the ECSC Treaty, stressed that this case involved not only an exchange of information but also the use of that information for collusive purposes, as is evident from recitals 49 to 60 of the Decision.

Findings of the Court

— The nature of the infringement of which the applicant is accused

385 Regard being had to the arguments set out by the Commission in its written reply of 19 January 1998 and during the hearing, it is necessary first of all to determine whether the infringement of which the applicant is accused in recitals 263 to 272 of the Decision constitutes a separate infringement of Article 65(1) of the Treaty or whether, on the contrary, the illegality of the information exchange systems in question lies in the fact that they made it easier to commit the other infringements confirmed in the Decision. This question is important not only for the legal analysis of the conduct at issue but also for determining whether the imposition of a separate fine for that conduct was justified (see below).

386 In recital 267 of the Decision, the Commission took the view that the undertakings in question went beyond what was admissible in the exchange of information inasmuch as, first, the information exchanged concerning the deliveries and orders received by each individual company for delivery to the respective markets is normally regarded as strictly confidential, and, second, the figures on orders were updated every week and circulated rapidly among the participants, while the delivery figures were circulated shortly after the end of the quarter concerned. From this the Commission inferred that 'Each of the participating companies had thus a comprehensive and detailed knowledge about the deliveries which their competitors intended to carry out and their actual deliveries. These companies were consequently in a position to ascertain the behaviour which their competitors proposed to adopt or had adopted on the market and act accordingly.'

387 Next, the Commission states, in recitals 267 and 268 of the Decision, that this was the very reason for the exchange, since the information exchanged formed the basis for the discussions on trade flows described in recitals 49 to 60 of the Decision. According to the Commission, the undertakings closely followed those figures and checked whether deliveries matched the orders announced. During

those discussions, the parties managed to bring about a 'remarkable degree of transparency as between themselves'. The Commission adds that, had the exchange been limited to figures of a merely historical value with no possible impact on competition, such discussions would have been inexplicable.

388 The Commission concludes, at recital 269 of the Decision, that the parties thus established a 'system of solidarity and cooperation designed to coordinate [their] business activities' and that they thereby 'replaced the normal risks of competition by practical cooperation, resulting in conditions of competition differing from those obtaining in a normal market situation'.

389 In recitals 270 and 271 of the Decision, the Commission points out that the exchange of individual information capable of influencing the conduct of undertakings on the market is not covered by its 1968 communication. Invoking the Fatty Acids and United Kingdom Agricultural Tractor Registration Exchange Decisions, previously cited, adopted under the EC Treaty, it takes the view that the exchange of information in the present case, which included accurate and up-to-date information on manufacturers' orders and deliveries making it possible to determine the conduct of different undertakings in a narrow oligopoly, was contrary to Article 65(1) of the Treaty.

390 It follows from the foregoing that the Commission based its legal assessment, in recitals 263 to 271 of the Decision, on the specific characteristics of the monitoring and exchange of information through the Walzstahl-Vereinigung, including the discussions on trade flows which took place on the basis of the information received, set out in recitals 49 to 60 of the Decision.

391 Even if it is also clear from the Decision that the monitoring did facilitate certain other infringements which the undertakings in question were found to have committed, in particular the 'Traverso methodology' and the agreement relating to the French market for the fourth quarter of 1989, there is nothing in the

Decision to indicate that this fact was taken into account in the legal assessment of the system of information exchange in question in the light of Article 65(1) of the Treaty.

392 It must therefore be concluded that, in recitals 263 to 272 of the 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.

— Anti-competitive nature of the monitoring

393 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.

394 The Court finds, in this case, that the information distributed, relating to participants' orders and deliveries on the main Community markets, was broken down by undertaking and Member State. The distribution of that information thus made it possible to identify the position occupied by each undertaking in relation to the total sales by the participants on all of the geographical markets in question.

395 Since the information distributed was updated and sent out frequently, undertakings were in a position to follow closely each change in market share held by the participants on the markets in question.

396 Thus, the figures relating to orders to be met during a particular quarter (monitoring of orders) were collected and distributed each week by the Poutrelles Committee secretariat (recital 40 of the Decision). It is also clear from the documents identified in Annex I to the Decision that the time elapsing between the reference date of a table and that on which it was drawn up or made available to the undertakings was normally less than three weeks. Likewise, the orders tables listed in Annex I to the Decision were, with one single exception (namely the table cited in point 26 of that Annex, the date of which is approximately two months after the reference quarter), distributed either before the end of the reference quarter, sometimes even several weeks before, or a few days after the end.

397 As for the delivery figures, they were distributed in any event less than three months after the end of the relevant quarter.

398 All of the cooperation thus described was limited exclusively to those manufacturers which were parties to the arrangement, to the exclusion of consumers and other competitors.

399 Nor is it disputed that the exchange related to homogenous products (see recital 269 of the Decision), so that competition based on product characteristics played only a limited role.

400 As regards the structure of the market, the Court finds that, in 1989, ten of the undertakings engaged in the Poutrelles Committee monitoring accounted for two-thirds of apparent consumption (recital 19 of the Decision). Given such an oligopolistic market structure, which can reduce competition *ipso facto*, it is all the more necessary to protect the decision-making independence of undertakings as well as residual competition.

401 The matters set out in recitals 49 to 60 of the 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.

402 In general, the information distributed was the subject of regular discussions within the Poutrelles Committee. It appears, particularly from the evidence summarised in recital 268 of the Decision, that criticism was expressed in regard to levels of orders considered to be too high (recital 51) and the deliveries of parties concerned, in particular to other Member States (recitals 51, 53 and 60), on the basis that, in certain cases, deliveries between two countries or two areas were analysed (recitals 53, 55 and 57). In that context, the undertakings referred regularly to past figures (recitals 51, 53, 57 and 58), employing in that connection the term 'traditional delivery flows' (recital 57). During those discussions, threats were voiced in regard to what was regarded as excessive conduct (recital 58) and, on several occasions, the undertakings criticised attempted to explain their conduct (recitals 52 and 56). Finally, it appears that the distribution of the delivery figures also served to detect possible discrepancies in relation to the orders announced (recital 54). In this way, the monitoring of deliveries reinforced the effectiveness of the monitoring of orders (see recital 268 of the Decision).

403 It follows that the information which the undertakings received under the arrangements in question was capable of appreciably influencing their conduct, by reason of the fact that each undertaking knew that it was being kept under close surveillance by its competitors and that it could, if necessary, react to the conduct of its competitors, on the basis of considerably more recent and accurate data than those available by other means (see Peine-Salzgitter's briefing note of 10 September 1990 quoted in recital 59 of the Decision, stating that: 'An exchange of only aggregated figures is (almost) useless for our purposes (opinion expressed by the German-Luxembourg group on 30 August 1990) because the market behaviour of individual suppliers can no longer be traced'). It is also for that reason that, in recital 267 of the Decision, the Commission was able to take the view that such information is normally regarded as strictly confidential. Contrary to what the applicant submits, the Court finds that such data, indicating

the very recent market shares of participants and not publicly available, are by their very nature confidential data, as confirmed by the fact that interested undertakings could receive the data distributed by the secretariat only on a reciprocal basis (see recital 45 of the Decision).

404 The Court also finds that this mutual control operated, at least implicitly, by reference to past figures, in a context in which, until January 1987, the Commission's policy tended towards the maintenance of 'traditional flows' of trade, a term expressly used by the participants. The exchange thus tended to partition markets by reference to those traditional flows of trade.

405 The information distributed under the system organised by the Walzstahl-Vereinigung, which also related to orders to be delivered and deliveries completed, was comparable to that which has just been analysed, both with regard to the way in which it was broken down and the way in which it was updated (see recital 48 of the Decision). This system functioned during the third and fourth quarters of 1990 and allowed the members of the Walzstahl-Vereinigung to have tables broken down according to undertakings at a time when they were receiving from the secretariat of the Poutrelles Committee no more than aggregate figures (see recital 48 of the Decision).

406 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.

407 It also follows that the conduct of which the applicant stands accused is not covered by point II.1 of the 1968 communication, which, according to its actual wording, does not apply to exchanges of information which reduce the decision-making independence of participants or is liable to facilitate coordinated conduct on the market. Furthermore, the present case involves an exchange of individualised data, in the context of an oligopolistic market of homogenous products, which tended to compartmentalise markets by reference to traditional flows.

408 In so far as the applicant refers to Article 60 of the Treaty in order to justify the systems in question and its participation in them, its arguments cannot be accepted. In the first place, that provision is limited to the area of prices and does not concern information on quantities placed on the market. Second, the publication of the prices, as provided for under Article 60(2) of the Treaty, is supposed to benefit consumers, among others (see, *inter alia*, *France* v *High Authority*, cited above, at p. 9), whereas the benefit of the systems in question was confined to the participating producers alone. Likewise, Article 47 of the Treaty does not in any circumstances authorise the Commission to divulge information on the competitive conduct of undertakings in the area of quantities solely for the benefit of producers. For those same reasons, the applicant cannot plead any general principle of transparency inherent to the ECSC Treaty, *a fortiori* since the information involved in this case was confidential information which, by its very nature, constitutes business secrets.

409 With regard to the arguments on the need to exchange information within the context of cooperation with the Commission, based on Articles 5 and 46 to 48 of the ECSC Treaty and on Decision No 2448/88, there is nothing in those provisions which expressly allows an exchange of information between undertakings such as that in question in this case. The question whether such an exchange was implicitly authorised by the conduct of DG III will be examined in Part D below.

410 Subject to that reservation, and regard being had in particular to the fundamental principle of the Treaty that the competition to which it refers consists in the interplay on the market of the strengths and strategies of independent and opposed economic units (*Netherlands* v *High Authority*, cited above), the Court finds that the Commission did not err in law in referring, at recital 271 of the Decision, to certain decisions it had adopted under the EC Treaty in cases involving oligopolistic markets. With particular regard to the United Kingdom Agricultural Tractor Registration Exchange Decision, cited above, it must be pointed out that both this Court and the Court of Justice have ruled that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders (T-35/92 *John Deere* v *Commission*, cited above, paragraph 51, and C-7/95 P *John Deere* v *Commission*, cited above, paragraphs 88 to 90). The Court considers that the same applies *a fortiori* where, as here, the information

exchanged was the subject of regular discussions between the participating undertakings.

411 The Court observes, finally, that, having regard to the nature of the discussions conducted within the Poutrelles Committee and the information exchanged there, as well as to the wording of the 1968 communication, the undertakings in question could not have had any reasonable doubt that the exchanges in question prevented, restricted or distorted normal competition and that they were consequently prohibited under Article 65(1) of the Treaty. The same conclusion follows from the considerations set out by the Court in Part D below. In any event, the alleged difficulties which might exist in assessing the prohibited nature of a course of conduct cannot affect the prohibition itself, which is objective in nature. The Court also takes the view that, in recitals 266 to 271 of the Decision, the Commission has provided adequate legal grounds to support its view that the arrangements in question were contrary to the normal operation of competition.

412 It follows from all of the foregoing that the applicant's arguments relating to the exchange of information within the Poutrelles Committee and through the Walzstahl-Vereinigung must be rejected in their entirety, subject to the Court's findings in Part D below.

The practices relating to the various markets

1. Price-fixing on the German market

413 In Article 1 of the Decision the Commission charges the applicant with being a party to an agreement to fix prices on the German market. The period taken into

account for the purposes of the fine was three months. At recital 273 of the Decision, the Commission sets out various types of conduct characterised as restrictive practices on the German market. It states as follows in the first and third indents of that recital:

'— Peine-Salzgitter, Thyssen and TradeARBED entered in various price-fixing agreements, beginning in December 1986 (see recitals 147 and 148),

...

— at a meeting in January 1988, Peine-Salzgitter, TradeARBED, Hoesch, Saarstahl and Thyssen adopted common recommendations as to prices and agreed on major aspects of their future price policy (see recital 150)'.

In the fifth indent, the Commission states as follows:

'— on at least two occasions in 1989 several producers agreed to restrict their deliveries to the German market with a view to stabilising this market. Of these undertakings only Peine-Salzgitter can be identified as taking part in the first of these agreements (see recital 153)...'.

414 The applicant denies that it took part in a price-fixing agreement on the German market. In particular, it criticises the Commission for having failed to identify, in recitals 147 to 154 and 273 of the Decision, the three-month period taken into account for the purposes of the fine. The text of the Decision does not call for the interpretation which the Commission expounds in its statement of defence, according to which the period in question was the second quarter of 1989, but suggests that the relevant period was, for instance, in the first quarter of 1987.

415 In its documents, the Commission expresses the view that the conclusion of an agreement relating to the second quarter of 1989 is confirmed by the Peine-Salzgitter note of 20 April 1989, mentioned in recital 153 of the Decision, according to which participating producers had agreed, for that quarter, not to exert pressure on the German market. According to the Commission, this can be understood only as indicating that extras were not to be increased. The argument put forward by the applicant that the relevant period could be the first quarter of 1987, which is not covered by the fine (recital 314 of the Decision), finds no support in recitals 314, 273 or 147 to 153 of the Decision.

416 At the hearing, however, the Commission argued that the agreement objected to is that indicated in the third indent of recital 273 of the Decision, namely the agreement on the conduct to be adopted in regard to 'future price policy' concluded on 20 January 1988. That agreement clearly lasted until at least 18 April 1989 (see recital 152 of the Decision).

417 The Court observes that the price-fixing on the German market of which the applicant is accused is presented, in Article 1 of the Decision, as postdating 30 June 1988 (see the precise reference to an infringement period of three months). Yet all the restrictive practices on that market in which the applicant is supposed to have taken part, according to recital 273 of the Decision, pre-date 30 June 1988.

418 This consideration applies also to the conduct to which the Commission referred at the hearing and which is alleged in the third indent of recital 273. It follows from Article 1 of the Decision, and in particular from the passages dealing with TradeARBED and Hoesch, that this conduct, prior to 30 June 1988, was not taken into account for purposes of the fine. Moreover, no explanation is given in the Decision as to the period for which the agreement concluded on 20 January 1988 remained in force. Further, the explanation given at the hearing is incompatible with the indication, in Article 1 of the Decision, of a period of one quarter being taken into account for purposes of the fine imposed on the applicant, since that explanation ought to have resulted in a period of at least nine months being taken into account (from 30 June 1988 to 18 April 1989).

419 So far as concerns the reference, in the Commission's defence documents, to the conduct revealed by the briefing note mentioned in recital 153 of the Decision (documents nos 3150 to 3152), it should be noted that recital 153 reads as follows:

'A briefing note dated 20 April 1989 which was drawn up by Peine-Salzgitter with a view to a forthcoming meeting with traders on 21 April 1989 records that on the occasion of the last meeting of this forum on 16 February 1989 it had been agreed that the participating producers would not exert pressure on the market in the second quarter of 1989. The author notes that this appears to have been the case'.

420 From this the Commission itself infers, in the fifth indent of recital 273 of the Decision, that 'only Peine-Salzgitter can be identified as taking part' in that conduct. Given that this document does not in fact give the names of the other undertakings which, on 16 February 1989, agreed not to exert pressure on the German market, it cannot be used against the applicant.

421 In so far as the Commission refers to the fact, which the same document reveals, that the undertakings had agreed not to increase the prices of size extras, its argument also cannot be accepted. Whereas this alleged agreement on the prices of extras was, according to that document, concluded during the final Poutrelles Committee meeting prior to 20 April 1989, that is to say the meeting of 19 April 1989, the meeting in question in recitals 153 and 273, fifth indent, of the Decision was concluded on 16 February 1989 during a meeting with traders. In addition, the agreement reached within the Poutrelles Committee during the meeting of 19 April 1989 is objected to separately in recitals 245 and 125 and in Article 1 of the Decision, within the context of a course of conduct described as 'harmonisation of extras'.

422 It follows that the charge set out in Article 1 of the Decision, concerning participation by the applicant in price-fixing on the German market after 30 June

1988, has no support in the grounds of the Decision. Article 1 of the Decision must consequently be annulled in so far as that charge is concerned.

2. Price-fixing on the Italian market

423 In Article 1 of the Decision, the Commission accuses the applicant of having participated in price-fixing on the Italian market. The period taken into account for the purposes of imposing the fine was three months. In recital 275 of the Decision, the Commission refers to a number of restrictive practices on the Italian market. In the second and eighth indents of that recital, it states as follows:

'— further price agreements were concluded at an unspecified date some time after this meeting [of 7 April 1987] (see recitals 157 to 159). The evidence shows that at least Peine-Salzgitter and Ferdofin must have been a party to these agreements,

...

— prices were fixed between TradeARBED, Peine-Salzgitter, Saarstahl, Unimétal, Thyssen and Ferdofin at a meeting on 15 May 1990 (see recitals 170 and 171)'.

424 According to the applicant, the Commission did not specify, within the period from the beginning of 1987 to mid-1990, which was the three-month period covered by the agreement in which it had allegedly participated (recitals 275 and 155 to 171 of the Decision). In reply to the argument which the Commission sets out in its statement of defence, the applicant takes the view that there is nothing

to establish that the prices for the third quarter of 1990 were fixed during a meeting on 15 May 1990. Moreover, the documents cited in recitals 157 and 158 of the Decision do not allow the conclusion to be drawn that the applicant participated in any concerted action on prices.

425 The Court finds, first, that only the infringement mentioned in the eighth indent of recital 275 corresponds to that condemned in Article 1 with regard to price-fixing on the Italian market. In particular, the infringement detailed in recitals 157 and 158 of the Decision, to which the applicant refers, does not correspond to this and is earlier than 30 June 1988.

426 Second, the Court finds that the existence of the agreement alleged by the Commission, concluded during a meeting on 15 May 1990 which the applicant attended (recital 171 of the Decision), is proved by the content of the internal note of 18 May 1990 drafted by the secretariat of the Poutrelles Committee (recital 170 of the Decision, documents nos 2266 to 2268). The prices envisaged therein are not presented as those provided for by Ferdofin, but as the prices of the Italian market in general. Moreover, they were not the subject of a simple forecast but, in the words of that note, a 'confirmation' in certain cases and a 'slight increase' in others. Finally, they were described as the 'result' of the meeting of 15 May 1990, a description which excludes the hypothesis that Ferdofin fixed them independently.

427 The deposition made at the hearing by Mr Mette does not affect this assessment for the reasons set out in the judgment delivered today in Case T-148/94 *Preussag* v *Commission*.

428 It follows that the applicant's argument relating to the charge of price-fixing on the Italian market must be rejected in its entirety.

Price-fixing on the Danish market, within the framework of the activities of the Eurofer/Scandinavia group

429 Article 1 of the Decision condemns participation by the applicant in an infringement involving price-fixing on the Danish market. A 30-month period was taken into account for the purpose of imposing the fine.

430 The grounds on which this charge is based are set out in recitals 177 to 209 (in regard to the facts) and recitals 284 to 296 (in regard to the law) of the Decision. Basing its charge primarily on the minutes of meetings, the Commission describes a course of conduct which it characterises as agreements to fix target prices for the Scandinavian markets, allegedly concluded from one quarter to the next during meetings of the Eurofer/Scandinavia group, on the basis of a single continuing framework agreement (recitals 288, 289, 291 and 294). In so far as those agreements concern the Danish market, the Commission takes the view that they come within Article 65(1) of the Treaty (recitals 286, 287, 292 and 293).

431 The applicant denies having taken part in agreements to fix prices on the Danish market during the period in question. It argues, in particular, that the meetings of the Eurofer/Scandinavia group were not designed to fix prices for the Danish market according to an 'overall plan' (recital 287 of the Decision), but to discuss the situation on the Community markets and the Scandinavian markets, to discuss price estimates and to extend to the Scandinavian producers the exchange lawfully engaged in within the Eurofer framework. The meetings, it claims, involved, among other things, the provision of information on the price lists applicable to the Danish market. Increases in the German prices, in particular, were communicated by reference to the parity point of Oberhausen, which determined, by means of Article 60 of the Treaty, export prices to Denmark. Since the levels of the price lists of Norwegian and Swedish producers were, in general, higher than those of the Community producers, the lowest price list within the latter category was necessarily determinant for the competition. The general application of this price list did not therefore constitute an agreement on prices. The applicant adds that the Commission was aware of the price increases in question and knew that the estimates discussed within the Eurofer/Scandinavia group were regularly below the applicable price lists.

432 Furthermore, in a joint submission at the hearing, the applicants argued, referring to a number of documents concerning the contacts established between the Commission's DG I and the Scandinavian authorities, forwarded to the Court under Article 23 and placed on the case-file following the order of 10 December 1997, as well as to the documents lodged at the hearing relating to the 'arrangements' between the Community, on the one hand, and Norway, Sweden and Finland, on the other (paragraph 15 above), that both the Commission and the Scandinavian authorities were aware of the activities of the Eurofer/ Scandinavia group and even encouraged them, since those activities were essential for implementation of those 'arrangements'. In those circumstances, according to the applicant, there cannot have been any infringement of Article 65(1) of the Treaty in that regard.

433 The Court finds, in the first place, that the applicant has not challenged in detail the Commission's analysis that the documents described in recitals 184 to 209 of the Decision prove that there was a system of meetings at which agreements on the target prices applicable in Denmark between 5 February 1986 and 31 October 1990 were concluded.

434 After examining those documents, that is to say, the minutes and other documents relating to the meetings of 5 February 1986, 22 April 1986, 30 July 1986, 28 October 1986, 3 February 1987, 28 April 1987, 4 August 1987, 4 November 1987, 2 February 1988, 25 July 1988, 3 November 1988, 1 February 1989, 25 April 1989, 31 July 1989, 30 October 1989, 31 January 1990, 24 April 1990, 31 July 1990 and 31 October 1990, cited in recitals 184 to 209 of the Decision, the Court takes the view that these confirm the Commission's analysis.

435 In particular, the Court observes that there are several documents which refer to the 'programmation' of prices (recitals 184, 192, 193 and 195), to the 'fixing' of prices or to prices which have been 'fixed', 'decided' or 'agreed' (recitals 184, 186, 187, 189, 190, 191, 192, 200, 201 and 204). The Court also observes that there are several documents which refer to the prices which were to 'remain the same' or 'remain unchanged' (recitals 204, 205, 207 and 208), proposals to be discussed during a forthcoming meeting (recital 199), requests made to undertakings to refrain from quoting prices to customers prior to a forthcoming

meeting (recitals 198 and 201), information on pricing decisions taken during certain meetings (recitals 187, 188, 189, 190, 191, 197 and 205), and information on the attainment of the prices decided on during an earlier meeting (recitals 184, 193, 195, 200, 202, 203 and 204 of the Decision).

436 By way of illustration, the Court takes the view that the tenor of the meetings held by the Eurofer/Scandinavian group is amply confirmed by the note of 1 February 1990 from the chairman of that group, quoted in recital 206 of the Decision:

'(...) To date, we have had positive reactions to our meetings and a number of representatives for other products are even envious of our club's results and understanding.

I am not saying this for nothing, for during the first quarter not everyone played the game, especially in the merchant bar sector. In view of this I am asking you, as representatives of the Eurofer/Scandinavia club, and for the good of our companies, to do your utmost so that we can leave this room with the firm resolve to stabilise the market and thereby save the honour of our club.'

437 Since the existence of agreements on the target prices for Denmark has been proved, the applicant's argument that the undertakings confined themselves to discussing the market situation and price estimates and, more generally, exchanging information, cannot be accepted.

438 This assessment is all the more appropriate in view of the applicant's argument that the price lists established by reference to the Oberhausen parity point were conclusive for competition on the Danish market and that it was therefore normal to notify members of the Eurofer/Scandinavia group of amendments to those price lists.

439 The applicant's argument is contradicted, in general, by the very existence of agreements relating to the Danish market, concluded within the Eurofer/ Scandinavia group in the context of activities reserved for the Scandinavian markets, and which are distinct from those concluded within the Poutrelles Committee for the German and other Community markets. At least one of those agreements, concluded at the meeting of 30 July 1986 (recital 188 of the Decision), expressly provides for German prices to be applied to the Danish market. These agreements would not have been necessary if it had simply been a matter of following the application of the German prices, having regard to competition and the applicable provisions.

440 The Court considers that the applicant's participation in the agreements concluded within the Eurofer/Scandinavia group is sufficiently established in recitals 285, 180 and 181 of the Decision. It is clear from those recitals that the applicant took part in all the meetings of that group, except for that held on 25 July 1988. According to the grounds of the Decision, all of the participating undertakings stand accused of the activities of that group (recitals 287 and 289 of the Decision). The only distinction relates to the degree to which the undertakings affiliated to Eurofer and the Scandinavian producers were respectively responsible (recitals 294 and 295 of the Decision).

441 The agreements in question were intended to fix prices, within the meaning of Article 65(1)(a) of the Treaty, and were thus prohibited under that provision.

442 This assessment is not affected by the contention made by the applicant, but which has in no way been established before the Court, that the agreed prices were lower than those of the applicable price lists, or by the fact that the Commission was aware of the price increases as such.

443 As for the heads of complaint put forward at the hearing and based on the knowledge which DG I had, or ought to have had, of the activities of the Eurofer/ Scandinavia group within the context of the 'arrangements' then in force between the Community and Norway, Sweden and Finland, the Court notes, at the outset,

that documents nos 9773 to 9787, which were placed on the case-file pursuant to the order of 10 December 1997, are matters which came to light in the course of the procedure, with the result that Article 48(2) of the Court's Rules of Procedure does not prevent the applicant from introducing new pleas in law based on those documents.

444 With regard first, in this connection, to the period from 1986 to 1988, it follows from the letters and memoranda between the Community and the Norwegian, Swedish and Finnish authorities that, during that period, certain 'arrangements' designed to maintain traditional trade flows were in force between the parties concerned (see point (c) of the letters exchanged with Norway on 4 March 1986, 11 March 1987 and 10 February 1988; point (c) of the letters exchanged with Finland on 4 March 1986, 10 April 1987 and 12 February 1988; points 13 to 15 of the letter of 4 March 1986 and points 8 to 10 of the letters of 13 February 1987 and 5 February 1988 exchanged with Sweden). According to recital V.10 of the Stainless Steel decision, this meant in practice that exports from the Scandinavian steel producers to the Community had to be maintained at previous levels and that no variations were allowed in regional distribution, product-mix or timing ('triple clause').

445 The Court has more particularly examined the following: the Commission's communication to the Council of 13 November 1986 on external commercial policy in the steel sector (COM(86) 585 final, lodged by the applicants at the hearing); a file note of 30 May 1985 (document no 9774) detailing a meeting of 29 May 1985 with the Swedish authorities concerning certain Swedish deliveries of iron and steel bars to Denmark, and indicating that a representative of DG I had used the occasion to draw the Swedish authorities' attention to the Community's interest in maintaining the 'gentlemen's agreement' between Eurofer and the Swedish forge association in order to guarantee the smooth development of trade in steel products between the Community and Sweden; the memorandum of 30 May 1985 produced during the administrative procedure by the Swedish undertakings Ovako Profiler AB and SSAB Svenskt Stål AB, contained in the file submitted to the Court under Article 23 and to which the parties were granted access by the order of 10 June 1996; the manuscript note of a meeting between DG I and the Swedish authorities which apparently took place on 4 December 1985 or 1986; the note of a consultation meeting between the Community and Swedish authorities held on 20 November 1986 (documents nos 9777 to 9784); and the note of a meeting of the 'Contact Group ECSC-Sweden' held on 11 and 12 June 1987.

446 In view of what is revealed by those documents, the Court concludes, first, that it cannot be excluded that the Eurofer/Scandinavia group's activities had their origin in the preoccupation shared by the Community and Scandinavian authorities to limit exports of steel products to their traditional level, within the context of the abovementioned 'arrangements'. It is clear from the file that this objective could not have been achieved without the cooperation of the undertakings concerned, particularly within the context of the 'gentlemen's agreements' concluded between the undertakings belonging to Eurofer and the Scandinavian steel undertakings.

447 Second, it is also evident from the file that both the Community authorities and the Scandinavian authorities encouraged the conclusion of such 'gentlemen's agreements' or, at the very least, direct contacts between the undertakings concerned, with a view to resolving the problems arising under those arrangements. Moreover, in recital X.12(a) of the Stainless Steel decision, the Commission expressly admitted that those arrangements had limited the freedom of the undertakings in question to sell the desired tonnages and that DG I had, through an exchange of correspondence, indirectly encouraged the Scandinavian undertakings to conclude a number of bilateral agreements with the Community undertakings.

448 The arrangements in question admittedly did not constitute pricing agreements but simply limited tonnages. However, in view of the fact that, in the first place, the Danish market was at the time regarded as traditionally forming part of the Scandinavian steel market and, second, that undercutting of prices had the effect of increasing the tonnages sold, the possibility cannot be discounted that the price agreements for the Danish market concluded within the Eurofer/Scandinavia group were conceived, at least in part, as an appropriate support for the arrangements concluded between the Commission and the Scandinavian countries in question for the years 1986, 1987 and 1988, for the purpose of maintaining traditional trade flows.

449 It must, however, be borne in mind that there is no provision in the Treaty which authorises such pricing agreements and that neither the Council, the Commission nor the undertakings may ignore the provisions of Article 65(1) of the Treaty or exempt themselves from their obligation to comply with them.

450 It follows that, even on the assumption that the price agreements concluded within the Eurofer/Scandinavia group during 1986, 1987 and 1988 were concluded under the arrangements limiting trade between the Community and the Scandinavian countries and that the Commission and/or the Scandinavian authorities encouraged or tolerated them, at least indirectly, those agreements none the less infringed Article 65(1) of the Treaty in so far as they fixed prices on the Danish market.

451 However, since the arrangements in question between the Community and the Scandinavian countries were maintained in force up to 31 December 1988, the misunderstandings which, according to the Decision (recital 311), may have existed prior to 30 June 1988, could have lasted, so far as the Eurofer/Scandinavia agreements are concerned, up to at least 31 December 1988. This matter will be taken into consideration by the Court when fixing the fine (see below, on the alternative claim for annulment of Article 4 of the Decision or, at least, reduction of the amount of the fine).

452 So far as concerns the period after 31 December 1988, it appears from the Commission's letters of 5 April 1989 to the Norwegian authorities and of 4 April 1989 and 28 May 1990 to the Swedish authorities, which were produced by the defendant, at the Court's request, under cover of a letter of 11 May 1998, that after 1 January 1989 there was no longer any measure designed to maintain traditional trade flows between the Community and the countries concerned. It follows that, in any event, there was no justification, from 1 January 1989, for the undertakings in question to conclude between themselves private agreements to fix prices on the Danish market.

453 Finally, with regard to document no 9323 of 17 June 1989, relied on by the applicants at the hearing, the Court finds that this relates to a complaint by the Belgian authorities in regard to an alleged infringement by certain Norwegian undertakings of Article 60 of the Treaty, applicable to the products in question by virtue of Article 20 of the free trade agreement between Norway and the Community, and that it therefore has nothing to do with the infringement of which the applicant stands accused within the context of the Eurofer/Scandinavia agreements.

454 In those circumstances, the applicant's arguments concerning the finding, in the Decision, that there were agreements to fix prices on the Danish market must be rejected.

Conclusions

455 Subject to the Court's findings set out in paragraphs 422 and 451 above, and the argument examined in Part D below, examination of the arguments alleging infringement of Article 65(1) of the Treaty has failed to show that the Commission committed any error of fact or law in finding that the infringements of that article set out in the Decision and disputed by the applicant had been committed. Likewise, the Court's examination has not revealed any deficient statement of reasons, in particular with regard to the role which the applicant played in the infringements.

456 It follows that those arguments must be rejected in their entirety.

D — *The Commission's involvement in the infringements of which the applicant is accused*

Summary of the applicant's arguments

457 The applicant submits in its application that, during the whole of the period covered by the Decision, DG III had requested and obtained from the undertakings information which those undertakings could collate only through exchanging information within the Poutrelles Committee and their associations. The Commission, it claims, was aware of these activities, which, ultimately, were

attributable to its own initiative. The applicant accordingly takes the view that those activities cannot constitute infringements of Article 65(1) of the Treaty.

458 In view of the fact that similar pleas were raised by other applicants, the role played by DG III in the present context was the subject of joint submissions at the hearing. The applicant thus adopted the argument on this point set out on behalf of the applicants concerned. It is for that reason necessary to regroup those pleas and arguments in order to examine them together for the purposes of the present judgment.

459 After going through the Commission's involvement in managing the crisis in the steel industry since the 1970s and its interventions after the end of the crisis period, the applicants advance an argument that the Commission itself initiated and then encouraged, or at least had knowledge of and tolerated, the conduct impugned in the Decision.

460 The applicants plead, in varying degrees, that the Decision breaches the principles of legal certainty and the protection of legitimate expectations, the doctrine of estoppel or the maxim *nemo auditur turpitudinem suam allegans*, and submit that, in those circumstances, the Commission was not entitled to penalise the conduct of the undertakings referred to in the Decision.

461 As regards the crisis period, the applicants first refer to the various measures adopted by the Commission from 1974 pursuant to Articles 46, 47 and 58 et seq. of the Treaty for coping with the crisis in the European steel industry. They refer in particular to the 1977 Simonet Plan, the 1978 Davignon Plan, and later Decision No 2794/80 imposing a mandatory system of production quotas, as well as its various accompanying measures (see paragraph 5 et seq. above).

462 More particularly, they argue that the quota system introduced by Decision No 2794/80 was conceived from the outset as part of a much larger whole, based on horizontal collaboration between undertakings, particularly with regard to the introduction of national 'i' quotas which the Commission wished to see applied by the producers in order to implement its own 'I' quota system envisaged at Community level.

463 The Eurofer association was, on that occasion, the main interface between the Commission and the producers, particularly within the context of the Eurofer II to Eurofer V agreements, which, during the entire manifest crisis regime and until July 1988, consisted essentially in establishing and managing the system of 'i' delivery quotas on the national markets, as well as in the provision of production and delivery data. The Eurofer agreements also provided for the participants to undertake to comply with the price objectives fixed in coordination with the Commission.

464 The applicants also point out that exchanges of information were current throughout the steel sector since the onset of the crisis, and they refer to the circumstances underlying Case 27/84 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1985] ECR 2385, in which the Commission acknowledged that some transparency was already current among the major steel undertakings belonging to Eurofer, with the result that some of the information deriving from the latter was not covered by professional secrecy within the meaning of Article 47 of the Treaty.

465 So far as the crisis period is concerned, the applicants base their case more specifically on extracts from the following documents, some of which are cited in paragraph 5 et seq. above: the Commission request for the Council's assent to the establishment of a system of production quotas for the steel industry (COM(80) 586 final, application in Case T-151/94, appendix 3, document 3); the Council resolution of 3 March 1981 on the steel recovery policy (see the Council's press release of 26 and 27 March 1981, application in Case T-151/94, appendix 3, document 4); annex IV to Commission Document III/534/85/FR approving the Eurofer agreements (application in Case T-151/94, appendix 3, document 5); the

letter sent to Eurofer on 17 January 1983 by Mr Andriessen and Mr Davignon (application in Case T-151/94, appendix 3, document 6); the reply of 8 February 1983 from Mr Etchegaray, the chairman of Eurofer, to Mr Andriessen and Mr Davignon (application in Case T-151/94, appendix 3, document 7); above Decision No 3483/82; point 302 of the *XIXth General Report on Community Activities*; above Decision No 234/84; the minutes of a meeting held in Brussels on 27 June 1984 between the Commission and Eurofer experts (application in Case T-151/94, appendix 3, document 8); a note drafted by Eurofer following a meeting between Commission Member Narjes and the chairmen of Eurofer held in Düsseldorf on 26 September 1985 (application in Case T-151/94, appendix 3, document 9); the minutes of a meeting held on 16 December 1985 between Mr Narjes and Eurofer (application in Case T-151/94, appendix 3, document 10); various letters highlighting the Commission's involvement in resolving disputes between producers concerning the system of 'i' quotas (application in Case T-151/94, appendix 3, documents 11 and 12); the minutes of the meeting of 10 March 1986 between Mr Narjes and Eurofer (application in Case T-151/94, appendix 3, document 13); the report of the 'Three Wise Men', cited above; the minutes of the meeting held on 16 May 1986 between Mr Narjes and Eurofer management (application in Case T-151/94, appendix 3, document 14); and the Commission's abovementioned communication of 16 June 1988 to the Council on steel policy.

466 Although the manifest crisis regime came to an end on 30 June 1988, the *XXIst General Report on the Activities of the Communities* indicates, at point 278, that the Commission was prepared to envisage, for three years as from 1 January 1988, an extension of the quota system and the implementation of a concerted plan to reduce capacities, suggested by Eurofer at the end of 1986. However, since the Commission did not receive the minimum commitments on closures laid down in December 1987 as a precondition for any extension of the system, it did not propose to the Council that it be extended. From this the applicants infer that the quota system was terminated in July 1988 not because the Commission considered that there was no longer any manifest crisis but in order to penalise the undertakings for their lack of collaboration. Those facts also show that in mid-1988 the Commission took the view that it was not contrary to Article 65 of the Treaty to request undertakings to conclude an agreement relating to a concerted reduction in their capacities, which was as much prohibited as measures relating to prices, if the rigid interpretation of that article advocated in the Decision were followed. The Commission thus accepted that Article 65(1) of the Treaty could be flexibly applied.

467 So far as the period after 30 June 1988 is concerned, the Commission maintained, up to November 1988, the system for monitoring deliveries established by Decision No 3483/82. It also adopted the surveillance system established by Decision No 2448/88, by which undertakings were required to make a monthly declaration of the production and delivery of certain of their products. The validity of that decision expired in June 1990, but the situation in real terms was not amended, as demonstrated by two letters of 10 and 12 September 1990 sent to Eurofer by two Commission officials (annexes 7 and 8 to the application in Case T-137/94). All of those measures had the objective of increasing market transparency in order to make it easier for undertakings to adapt to possible alterations in demand, and this transparency was not perceived as being contrary to Article 65 of the Treaty.

468 In that context, particularly that of Articles 46 to 48 of the Treaty and the surveillance system established by Decision No 2448/88, cited above, the contacts between DG III and beam producers even intensified during the period after the manifest crisis regime, with 'restricted' and 'consultation' meetings, as well as 'steel lunches', supplementing the official quarterly meetings during which forward programmes were discussed in accordance with Articles 46 to 48 of the Treaty.

469 Relying on various extracts from the 'speaking notes' and other minutes of meetings held after the end of the crisis regime (see appendix 3 to the application in Case T-151/94), and on the internal notes of DG III produced by the Commission following the order of 10 December 1997, the applicants argue that the Commission knew and even encouraged the collection and exchange of information on orders, deliveries, actual price levels and estimated future price levels, led by Eurofer and the Poutrelles Committee, as well as the harmonisation of extras and the other practices which the Decision found that the undertakings had engaged in.

470 In this context, the applicants argue, the various agreements and practices of which they are accused, assuming that they have been established, ought to be considered as lawful activities, particularly in light of Articles 46 to 48 of the Treaty and the surveillance system established by Decision No 2448/88.

471 It appears from those documents that the Commission, and in particular DG III, attached considerable value to its discussions with the producers and the information provided to it at that time; under cover of fairly general exchanges, the Commission encouraged or, at least, approved the frequent initiatives of producers aimed at stabilising prices and production; in the same way as the practice followed during the manifest crisis period for the allocation of 'I' quotas, on a quarterly basis, among the national markets ('i' quotas), the Commission informed producers of its views on how it wished to see the market develop and left it to Eurofer to regulate the practical details of the market action which it was advocating; the Commission itself, within the framework of its market rationalisation, played a determinant role in the attempts to control price and production fluctuations effected by producers; nothing could be attempted by those producers without the assistance or, at the very least, the approval of the Commission. While acknowledging that the 'speaking notes' do not reveal the detailed information exchanged within the Poutrelles Committee and used for the purpose of establishing price tendencies and quantity forecasts, the applicants submit that the Commission knew, or ought to have known, that such exchanges of information between producers were vital for preparing the discussions with it, as had been the case in the recent past, and that it ought therefore to have advised producers to amend the method by which they prepared their forecasts. The 'speaking notes' also contain many very clear references to the discussions on prices and to the wish to maintain their level shared by the Commission and the producers. The Commission even attempted directly to reinforce price discipline, for instance by considering the introduction, in 1989, of a system requiring producers to notify each other of discounts being applied (see the application in Case T-151/94, appendix 5).

472 Although a full set of the minutes and notes relating to the many meetings between the Commission and the steel undertakings during this period was forwarded to the Hearing Officer, it is clear from recital 312 of the Decision that the Commission avoided carrying out any detailed examination of those documents, the relevance of which it denies *en bloc*.

473 The applicants do not deny that the Commission periodically referred to Article 65 of the Treaty, in particular for the purpose of pointing out that it

remained applicable in full during the crisis period. However, in the absence of practical guidelines from it, those simple references were meaningless.

474 Thus, for instance, the declaration that the Commission could not accept concerted action on prices or quantities contrary to Article 65 of the Treaty, included at Mr Kutscher's request in the minutes of the 'consultation meeting' of 26 January 1989 (application in Case T-151/94, appendix 3, document 16), did not provide producers with any guidelines as to how they were to draw up the market forecasts which the Commission required, while refraining from carrying out 'surveillance' of orders and deliveries or exchanging information on price changes.

475 The Decision itself recognises, in recital 311, that there may have been 'misunderstandings' as to the operation of Article 65 during the crisis period. According to the applicants, the confusion was not allayed after 30 June 1988. On the contrary, it increased as a result of the Commission's interventions in the sector, in conjunction with the latter's declarations affirming, without further explanation, that the provisions of Article 65 of the Treaty were applicable.

476 In those circumstances, the Commission's press release of 4 May 1988 at the opening of the 'Stainless Steel' procedure, indicating that it 'would not tolerate illegal arrangements' (see recital 305 of the Decision), had no practical use. Commission Member Van Miert, moreover, conceded, during the press briefing of 16 February 1994, that there may have been some ambiguity during the period which followed the period of manifest crisis. Clear guidelines should therefore have been published to dispel any misunderstanding (see, for an example within the context of the EC Treaty, the Guidelines on the application of EEC competition rules in the telecommunications sector, OJ 1991 C 233, p. 2).

477 It was only in its Stainless Steel decision, adopted on 18 July 1990, that the Commission demonstrated, for the first time, its disapproval of the conduct of the undertakings during the period in question, by condemning practices similar to those which it had accepted and even encouraged. That condemnation was thus at variance with the Commission's previous attitude, which had induced the undertakings to believe that their practices were consistent with Article 65 of the Treaty.

478 The applicants submit that the Commission amended its interpretation of the ECSC Treaty competition rules at the end of 1990 (see paragraphs 37 and 38 above). They take the view, however, that the Commission cannot, without infringing the principle of the protection of legitimate expectations, retroactively apply Article 65 of the Treaty to the undertakings, whereas, during the period in question, it had accepted that it would not apply it to the practices in question and had, on the contrary, encouraged such practices or at least developed similar practices with the undertakings.

479 In reply to the Commission's argument that administrative tolerance can never legitimise or justify an infringement, the applicants rely on the judgments in Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435 and Case 223/85 *RSV* v *Commission* [1987] ECR 4617.

480 The applicants criticise, however, the application to the present context of the line of decisions resulting from Case 1252/79 *Lucchini* v *Commission* [1980] ECR 3753, paragraph 9, and Case 8/83 *Bertoli* v *Commission* [1984] ECR 1649, paragraph 21, according to which laxity by the Commission in prosecuting cases cannot justify an infringement. In the present context, the Commission did not simply demonstrate laxity in regard to the beam producers but actually tolerated, if not encouraged, the conduct impugned in the Decision, in full knowledge of the circumstances.

481 At the hearing, the applicants also presented a detailed analysis of the 'speaking notes' and the documents from DG III produced at the Court's request. They also relied on the evidence taken by the Court, in particular that of Mr Kutscher.

Summary of the hearing of witnesses

482 By order of 23 March 1998, the Court ordered that Mr Pedro Ortún, Mr Guido Vanderseypen and Mr Hans Kutscher, officials and a former official of DG III respectively, be heard as witnesses in regard to the contacts established between DG III and the iron and steel industry during the infringement period taken into account in the Decision for the purpose of fixing the amounts of the fines, that is to say, from July 1988 to the end of 1990. The witnesses presented their evidence to the Court at the hearing on 23 March 1998 and took the oath provided for under Article 68(5) of the Rules of Procedure.

483 In his deposition and replies to the Court's questions, Mr Ortún, who at the time was the director of Directorate E 'Steel' (subsequently called 'Internal market and industrial affairs III') of DG III, stated that the consultation meetings with the entire iron and steel industry, arranged after 30 June 1988, in accordance with the mandate which the Council gave to the Commission on 24 June 1988, as well as the meetings confined to Eurofer members, were designed to give the Commission as clear a picture as possible of the market situation and trends for various products in order to make surveillance of them possible under Decision No 2448/88 and to facilitate preparation of forward programmes, and supplemented the information received from other sources, such as producers not belonging to Eurofer, consumers, traders and independent experts instructed by the Commission. During those meetings, a representative of the industry normally intervened as sectoral spokesperson for each group of products and provided information on trends in demand, production, deliveries, stocks, prices, exports, imports and other market parameters for the months to come. According to Mr Ortún, these permanent exchanges of views with the industry on the main market parameters implied that the producers convened prior to their meetings

with DG III for an exchange of views and opinions on future market tendencies of various products, including prices, but DG III, which did not receive any minutes of these internal meetings, was unaware of what information was exchanged on those occasions, just as it was unaware of the use to which producers put that information, and was, moreover, not especially worried about it. In reply to the Court's questions, Mr Ortún stated that, after June 1988, the Commission pursued neither a policy of stability of traditional trade flows between Member States nor an objective of increasing or maintaining prices, but sought only to prevent market fluctuations resulting in sudden and significant price variations without any direct link to trends in demand. He also stressed that DG III, while not having the objective or main responsibility of verifying or ensuring that the practices linked to the exchanges of information between producers prior to their meetings with it should comply with the Treaty rules on competition, pointed out to them on various occasions that they were required to comply with Article 65 and consequently assumed that they were doing so.

484 In his deposition and answers to the questions put by the Court, Mr Kutscher, who at the time was principal adviser in Directorate E of DG III, stated *inter alia* that it was at the request of Mr Narjes, at the time Commission Member responsible for industrial affairs, that he included in the minutes of the consultation meeting of 26 January 1989 (application in Case T-151/94, appendix 3, document 16) the warning that 'the Commission could not accept concertations on prices or on tonnages which would be in conflict with Art. 65 of the Treaty. If such concertations existed, the Commission would have to intervene'. That warning, which Mr Kutscher confirmed that he had already phrased in more or less identical terms before the ECSC Consultative Committee on 1 June and 20 June 1988 and in October 1988, was intended to show clearly to the industry that free competition had to be fully applied at the end of the quota system, in strict compliance with Article 65 of the Treaty, and to avoid repetition of an agreement such as that which the Stainless Steel decision found had existed.

485 Mr Kutscher also acknowledged that DG III knew that the undertakings which belonged to Eurofer convened prior to their meetings with the Commission and that on these occasions they discussed developments in various market

parameters until they reached some form of consensus on future market tendencies, the content of which was then the subject of their discussions with DG III. According to his evidence, it would have been practically impossible for the Commission or a trade association such as Eurofer to question each producer individually. In order to provide the Commission with the information which it required, the producers thus had to meet to exchange their opinions and their forecasts on how prices, stocks, imports and so on would develop. It was then a matter for the chairman of the meeting concerned to collate the information exchanged and to forward it to the Commission during the consultation meetings.

486 Mr Kutscher expressly accepted in particular that, during their meetings, the undertakings exchanged their forecasts as to the future prices of various products or their individual intentions in that regard. In his opinion, an exchange of views between producers as to their individual future intentions in regard to prices does not fall within the prohibition of concerted practices under Article 65(1) of the Treaty, even if it is in fact followed by a general movement in prices consistent with the forecasts exchanged, provided that this exchange of views remains within the limits of market-related findings and does not result in any agreement, concertation or collusion as to that movement. Mr Kutscher stressed in that regard that, on a market such as that of steel, when market trends are positive, as was the case in 1988-1989, a price increase decided on independently by one producer will very quickly become known and followed almost automatically and independently by most of his competitors, without there being any need for an agreement between them if that increase is consistent with the market trends, since each undertaking will wish to profit from the favourable situation.

487 Mr Kutscher did, however, stress that DG III had no knowledge of agreements or concerted practices going beyond such an exchange of information between undertakings, and that any personal misgivings which he may from time to time have had in that regard were dispelled by the persons with whom he spoke. On this point, Mr Kutscher referred more specifically to the consultation meeting held on 27 July 1989 (see the summarised minutes of that meeting, dated 3 August 1989, produced by the defendant pursuant to the order of 10 December 1997), during which, in a reaction to an announcement by Mr Meyer, the chairman of the Poutrelles Committee, according to whom the market was

'balanced and would even still allow slight price increases from 1 October 1989', he 'pointed out that the Commission was concerned to ensure full compliance with the price rules in Article 65 of the Treaty.' Mr Kutscher confirmed that he had been reassured by the reply of the industry representative, to the effect that 'in this particular case, the undertakings concerned confined themselves to informing trade circles and customers of their respective intentions to increase prices'. It was also current practice at the time for steel producers to inform their major customers in advance of individual future intentions in regard to prices. Mr Kutscher also stressed that, in this case, the modest price increases announced by producers during meetings in 1988 and 1989 were in line with the favourable market trends and that they did not therefore allow DG III to suspect that they resulted from concerted action. He also added that, during his numerous discussions with representatives of the iron and steel industry, with the exception of the abovementioned incident with Mr Meyer, those representatives had never given the slightest indication to suggest that the industry was acting in concert on prices or quantities, whether in regard to beams or in regard to other iron and steel products.

488 In his deposition and replies to the questions put by the Court, Mr Vanderseypen, who at the time was on secondment to Directorate E of DG III, stated *inter alia* that DG III had knowledge, as shown by its file note of 7 April 1989, produced by the defendant pursuant to the order of 10 December 1997, of the collection by Eurofer from its members of rapid statistics consisting of aggregate monthly data on orders and deliveries available 10 to 20 days after month's end, but did not have knowledge of the system for monitoring individual orders and deliveries of participating undertakings which had been established within Eurofer at approximately the same time. He confirmed that the rapid statistics in question, aggregated at company level, were broken down according to product and national market of destination, with the result that no declaring undertaking could calculate its competitors' market shares. He pointed out that the Commission never received from Eurofer statistics broken down according to individual undertakings, that the Commission did not know whether such figures were circulated within Eurofer and that, in reply to the question whether Eurofer carried out such exchanges, his interlocutors were still replying in the negative in July 1990.

489 With regard to the figures indicating price tendencies given during the meetings in question, Mr Vanderseypen stated that, in general, orders for iron and steel goods

are met within three months. Those indications may thus often have been based on the first orders returned for the following quarter. The references to prices contained in the 'speaking notes' did not therefore necessarily reflect intentions, but perhaps an initial realistic picture, that is to say, the prices applying to the first orders which were beginning to come in.

Findings of the Court

Preliminary observations

490 By their very nature, the applicants' arguments can relate only to the infringements of which they are accused within the context of the Poutrelles Committee's activities. In this regard, their line of argument consists in substance of four main limbs:

(a) during the manifest crisis period, the Commission encouraged close horizontal cooperation between undertakings, particularly under the management of the system of 'i' quotas on national markets, pricing agreements and efforts to achieve voluntary agreements on capacity reduction. It thus gave the impression either that such conduct is not contrary to Article 65(1) of the Treaty or that Article 65(1) is flexible in content depending on the Commission's policy at any given time. At the very least, the Commission placed the undertakings in a state of uncertainty as to which types of conduct were prohibited under Article 65(1) of the Treaty;

(b) at the end of the crisis period, the Commission failed to give any practical advice or guidelines to dispel the misunderstandings in question, with the result that the undertakings could not know the precise scope of Article 65(1) of the Treaty. In addition, the Commission did not adopt transitional

measures but, on the contrary, retroactively aligned the competition rules of the ECSC Treaty with those of the EC Treaty without any prior warning;

(c) in any event, after the end of the crisis period, the Commission knew about, and even encouraged, the collection and exchange of information, particularly with regard to orders, deliveries, actual price levels and future price-level estimates, within the framework of the numerous meetings held between the undertakings and DG III to ensure implementation of Articles 46 to 48 of the Treaty and the surveillance system established by Decision No 2448/88. The Commission thus knew about, and even tolerated, the practices of which the undertakings stand accused in the Decision;

(d) it follows that the practices in question were lawful in view, in particular, of Articles 46 to 48 of the Treaty.

The Commission's conduct during the crisis period

491 As it is clear from paragraph 6 et seq. above, since the beginning of the crisis in the iron and steel industry in the mid-1970s the Commission actively pursued a policy of adjusting supply to demand, maintaining the stability of traditional trade flows, both within and outside the Community, and of supporting prices in order to make possible the necessary restructuring, in terms of capacity reduction, while ensuring that as many undertakings as possible remained in being. Since supply far outstripped demand, the Commission was constrained to deal with the shortage of orders by imposing quotas on the basis of the principles of 'burden-sharing' and 'equality of sacrifice', reflecting a degree of solidarity among undertakings in the face of the crisis, which was supposed to encourage structural adaptations in an orderly manner.

492 This policy was implemented in close collaboration with the industry, in particular through Eurofer, whether by way of voluntary commitments which the undertakings gave to the Commission, which were characteristic of the period 1977 to 1980, or through the system of 'I' and 'i' quotas and the Eurofer agreements from 1980 to 1988.

493 On that occasion, the undertakings developed, with the support and in any event with the knowledge of DG III, practices which were similar, in several respects, to some of those to which objection is taken in the Decision. In particular, they engaged in surveillance of traditional trade flows, the maintenance of which, involving the division of markets along national lines, was moreover expressly authorised, until 1986, by Article 15B of Decision No 234/84. They also established arrangements for detecting and preventing disruptive conduct by surveillance of orders and deliveries, as well as systems for adjusting supply to demand and supporting prices.

494 The Commission was thus led to authorise, guarantee or encourage conduct apparently contrary to the normal rules governing the working of the common market, which are based on the principle of the market economy (Joined Cases 154/78, 205/78, 206/78, 226/78, 227/78, 228/78, 263/78 and 264/78, 31/79, 39/79, 83/79 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 80), and therefore liable to come within the prohibition of agreements under Article 65 of the Treaty. Thus, at a time when the Commission wanted harmonisation and a general price increase in the Community, it did not voice any objection to the call by representatives of the French iron and steel industry for the conclusion of an agreement to fix prices on the French market (see the minutes of the abovementioned meeting of 16 May 1986 between Commission Member Narjes and Eurofer representatives). It is also clear from a number of official documents (see, for example, Commission Decision No 1831/81/ECSC of 24 June 1981 establishing for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products (OJ 1981 L 180, p. 1) and the minutes of the abovementioned meeting of 10 March 1986 between Mr Narjes and Eurofer) that the Commission was openly in favour of certain 'private arrangements', 'concertations', 'internal agreements' and 'voluntary systems' drawn up by the undertakings.

495 During this period, the Commission apparently took the view that those agreements, practices and private systems did not come within the prohibition of Article 65 of the Treaty in so far as they merely constituted implementing or accompanying measures adopted by the undertakings in accordance with its general policy. The Commission's thinking in this connection had already been set out in the letter sent by Mr Davignon and Mr Andriessen on 17 January 1983 to the chairman of Eurofer (see paragraph 10 above). The system of supplementary 'I' and 'i' quotas under the Eurofer agreements is the most obvious example of this.

496 Recital VIII.13 of the Stainless Steel decision confirms that, in the Commission's opinion, there is 'a fundamental difference between agreements between companies made after consultation with the Commission and designed essentially to make measures taken by the Commission more effective and easier to supervise, on the one hand, and agreements made on the companies' own initiative, without consultation with the Commission (which was merely informed informally about them) and which were designed not to support existing restrictions but to create new restrictions with additional economic effects, on the other.'

497 Likewise, the Commission indicates in recital 309 of the Decision that 'the fact that competition has been limited in certain respects by the action of the Community does not permit undertakings to impose additional restrictions or restrict competition in other respects. It is essential, in such circumstances, that the undertakings and their associations do nothing further to reduce competition.'

498 It is, however, necessary to point out that the only infringement connected with the activities of the Poutrelles Committee of which the applicant is accused with sufficient precision, for the period before 1 July 1988, is the agreement concluded at a meeting held on an undetermined date before 2 February 1988, to which recital 224 of the Decision refers. It is clear from the Decision that the other agreements reached within the Poutrelles Committee on price-fixing, the harmonisation of extras, the Traverso methodology and the French market were made after 30 June 1988. Likewise, it appears from the Decision that the infringements linked to the monitoring of orders and deliveries and to the

exchange of information through the Walzstahl-Vereinigung relate to the period after 30 June 1988, particularly in view of the fact that the monitoring of deliveries did not begin until after 18 October 1988 (recital 41 of the Decision) and that all the evidence relied on by the Commission to demonstrate the purpose and effect of the exchanges of information dates from after 30 June 1988 (see recitals 49 to 60 of and appendix I to the Decision).

499 With sole regard, therefore, to the price-fixing agreement concluded some time before 2 February 1988, referred to in recital 224 of the Decision, the Court has already referred to the case-law of the Court of Justice according to which the prohibition laid down in Article 65(1) of the Treaty is rigid and characterises the system established by the Treaty (Opinion 1/61, cited above, p. 262). Whatever the scope of Articles 46 to 48, 58 or 61 of the Treaty, those provisions do not authorise undertakings to conclude price-fixing agreements prohibited by Article 65(1), nor do they authorise the Commission to encourage or tolerate such agreements.

500 In any event, the applicant has not provided the Court with evidence to establish a direct connection between the agreement in question and the measures which the Commission adopted during the crisis period in accordance with the provisions of the Treaty.

501 It follows that the Commission's conduct during the period of manifest crisis was not such as to prevent the price-fixing agreement made before 2 February 1988, and referred to in recital 224 of the Decision, from being characterised as an infringement of Article 65(1) of the Treaty.

502 It ought, however, to be added that, despite the abovementioned letter of 17 January 1983 from Mr Davignon and Mr Andriessen to Eurofer, the Commission's practice during the period of manifest crisis was such that it was not easy to ascertain what it considered at the time to be the exact scope of Article 65 of the Treaty. The Commission was therefore right to state, in recital 311 of the Decision, that 'in view of the possible misunderstandings about the

operation of Article 65 during the period of manifest crisis and the operation of the quota system', it had 'decided not to impose fines on companies for their behaviour up to 30 June 1988'.

Continued misunderstandings, after the period of manifest crisis, as to the interpretation or operation of Article 65(1) of the Treaty

503 Even assuming that, after the end of the period of manifest crisis, some doubt could have remained as to the actual scope of Article 65(1) of the Treaty or as to the Commission's position in that regard, given its ambiguous attitude up to 30 June 1988, this circumstance cannot prevent the actions of the applicant after that date from being characterised as infringements.

504 In any event, the Court finds that, after the end of the period of manifest crisis, the applicant could not have entertained any serious doubts as to the Commission's attitude about the operation of Article 65(1) of the Treaty or as to the scope of that provision in relation to the infringements of which it is accused.

505 It should be pointed out in this regard that the Commission realised, around the mid-1980s, that, far from promoting the structural adaptations considered vital for lasting rationalisation of the sector, the quota system and its accompanying measures had brought the undertakings into what might be described as a protected position (on these issues, see the report of the 'Three Wise Men', paragraph 24 above). The Commission concluded at that time that the quota system, as operated since 1980, had been a failure and it decided to plan, over a two- or three-year period, a return to a system of normal competition according to the Treaty rules. Its hope was that market forces would make it possible to achieve what interventionist measures had been unable to achieve, the re-

establishment of normal competition necessarily leading, in a sector experiencing structural overcapacity, to the disappearance of less efficient units in the short or long term (paragraphs 27 and 28 above).

506 The Commission was authorised to bring the manifest crisis regime to an end once the formal conditions laid down in Article 58(3) of the Treaty had been met. Consequently, the normal rules for the functioning of the common market in coal and steel, 'based on the principle of the market economy' (*Valsabbia* v *Commission*, cited above, paragraph 80), automatically re-applied once that regime had come to an end.

507 The Court finds further that this change in Commission policy was brought clearly to the attention of the parties concerned and was accompanied by appropriate transitional measures.

508 The discontinuance of the quota regime was announced publicly in 1985, that is to say several years before it became effective. It is clearly set out in numerous official documents dating from 1985 to 1988 and it was, moreover, specifically brought to the attention of the sectors concerned, in particular through meetings between the Commission and Eurofer (see paragraph 17 et seq. above).

509 In particular, the parties were aware from September 1985, if not earlier, that they had entered a transitional regime. The Commission thus agreed to extend the quota regime for several years to enable the industry to adapt progressively to a return to conditions of normal competition. It commissioned a report by a group of three experts, which confirmed its views and also the lack of awareness on the part of industrialists as to the gravity of the crisis and the need for them to adapt to worldwide competition. The Commission was still prepared in 1988 to extend the regime to the end of 1990, on condition that the steel undertakings gave commitments that they would shut down at least 75% of what the Commission had calculated as excess plant. Finally, even after the return to a regime of normal competition, the Commission adopted a variety of measures designed to

accompany the transition, in particular the surveillance regime introduced between 1 July 1988 and 30 June 1990 by Decision No 2448/88. It cannot therefore be argued, as some of the applicants contend, that the Commission culpably placed the undertakings in an impossible situation by abandoning them abruptly, without preparation, to the free market.

510 The Court finds that Eurofer itself examined how it might cope with the Commission's new policy, as is clear from the minutes of the meeting of 16 May 1986, extracts of which are cited in paragraph 20 above.

511 Furthermore, the attention of the undertakings was drawn on several occasions to the need to comply with the Treaty rules on competition, in particular the mandatory requirement in Article 65. Very clear signals were sent to them, *inter alia* at the time of the press briefing of 4 May 1988 and during the administrative procedure in the Stainless Steel case. In addition, formal statements or warnings were officially mentioned in the minutes of certain meetings between Commission representatives and representatives of the industry, at the express request of the Commission officials (see paragraphs 531 and 532 below).

512 Moreover, as the Court has just found, the present case concerns agreements or concerted practices relating to price-fixing, market allocation and exchanges of information on the orders and deliveries of the participating undertakings, broken down according to country and undertaking, designed to coordinate their commercial activities and to influence trade flows after the end of the crisis period. The Court considers that the undertakings could not have had serious doubts as to whether such conduct was contrary to Article 65(1) of the Treaty.

513 As regards clear infringements of Article 65(1) of the Treaty, the Court also finds that it was in no way necessary for the Commission to 'align' the competition rules of the ECSC Treaty with those of the EC Treaty in order to be able to decide that such infringements had taken place, so that the applicants' arguments based

on the reflections which the Commission began to have on the future of the ECSC Treaty from 1990 are irrelevant.

514 It follows that the applicants are not justified in relying on alleged misunderstandings as to the application or scope of Article 65(1) of the Treaty after the end of the manifest crisis regime.

Involvement of DG III in the infringements found after the end of the manifest crisis regime

515 In order to examine more carefully this aspect of the action, the Court, by order of 10 December 1997, ordered production of the notes, memos or minutes drafted by DG III officials in relation to their meetings with the representatives of the steel industry during the period in which the surveillance system established by Decision No 2448/88 applied. The Court also heard evidence from Mr Ortún, Mr Vanderseypen and Mr Kutscher on the contacts established between DG III and the steel industry during the infringement period taken into account in the Decision for the purpose of fixing the amount of the fine.

516 Neither 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.

517 In particular, there is nothing to show that the Commission was aware of the agreements and concerted practices concerning the fixing of target prices and the sharing of markets objected to in the Decision, or of information-exchange systems going beyond those which it itself organised within the context of the

meetings to prepare forward programmes and, more specifically, the system for monitoring orders and deliveries described in recitals 39 to 60 and 263 to 272 of the Decision, or the system for the exchange of individual statistics organised through Eurofer, described in recitals 143 and 144 of the Decision.

518 It should be recalled in this regard that, at its 1255th meeting, held in Luxembourg on 24 June 1988 (see annex 3 to the statement in defence in Case T-151/94), the Council:

— noted that the Commission intended to bring the quota system to an end, in respect of all steel products, on 30 June 1988;

— advocated certain measures to enable undertakings to adapt more easily to changes in demand, namely: the collection of monthly statistics relating to production and deliveries on the basis of Article 47 of the Treaty; regular monitoring, as part of the forward programmes referred to in Article 46 of the Treaty, of market developments; and regular consultation of interested parties on the situation and tendencies of the market;

— stressed, at the same time, that no-one should use the monitoring system in order to circumvent Article 65 of the ECSC Treaty.

519 The Commission accordingly established a system for monitoring the market, in association with Eurofer, pursuant to Decision No 2448/88.

520 It is true that, within that context, the Commission was pursuing a general objective of preserving a balance between supply and demand, and consequently

of stability in the general level of prices, intended to allow steel undertakings to become profitable again (see, for instance, the internal DG III note of 24 October 1988 concerning the meeting with the industry on 27 October 1988, DG III's summary of 10 May 1989 of the consultation meeting of 27 April 1989, DG III's summary of 28 October 1989 of the consultation meeting of 26 October 1989, and the internal DG III note of 8 November 1989 concerning a meeting with producers on 7 November 1989).

521 The Commission thus supported consultation of producers on the market, with a view to obtaining direct information on market trends and thus creating improved transparency of the available information (see the internal DG III note of 24 October 1988), in such a way as to make it easier for undertakings to adapt to any changes in demand.

522 These extensive and detailed exchanges of information, involving those with responsibility for sales within the undertakings, who were considered to be more in touch with commercial reality (see the internal note of 24 October 1988), related *inter alia* to the parameters of supply and demand, as well as to the level and past and future development of the prices of various steel products on the different national markets. The Commission also made regular appeals to producers' sense of moderation and self-control, for instance by encouraging them to limit supply where market trends were unfavourable.

523 However, as the following analysis makes clear, there is no evidence before the Court to suggest that the Commission encouraged or tolerated, on these occasions, the various forms of collusion of which the applicant is accused in the Decision.

— Price-fixing agreements

524 With regard, first, to the price-fixing agreements of which the applicant is accused, the Court has already found that what was involved in this case was not, as the applicant claims, mere exchanges of information on price 'forecasts' but agreements to fix prices. Nothing in the evidence before the Court justifies the conclusion that the Commission was aware of such agreements.

525 It is true that many of the documents relating to the meetings between the industry and DG III refer to price forecasts.

526 Equally, it is clear, *a posteriori*, from all of the documents produced before the Court that some of the information given to DG III concerning future prices of beams was derived from the agreements reached within the Poutrelles Committee (see, in particular, the minutes of the Poutrelles Committee meetings of 18 October 1988, 10 January 1989, 19 April 1989, 6 June 1989 and 11 July 1989 in conjunction with the minutes and speaking notes relating to the consultation meetings of 27 October 1988, 26 January 1989, 27 April 1989 and 27 July 1989).

527 However, the Court finds that, at that time, the officials of DG III were not in a position to tell that, among the extensive information which Eurofer provided to them concerning, in particular, the general market situation, stocks, imports and exports and demand trends, the information on prices came from agreements between undertakings.

528 It must be pointed out in this regard that, notwithstanding the very large number of meetings and contacts between the undertakings and DG III, none of the applicants has claimed that it had informed DG III, even unofficially, of its participation in the actions found by the Decision to constitute infringements. Likewise, no minutes of the Poutrelles Committee meetings were notified to

DG III, even though the undertakings must have known that DG III would have been greatly appreciative of the detailed information contained in those minutes.

529 At most, it emerges from the documentary evidence before the Court and in particular from the 'speaking notes' relating to the meetings between the Commission and the industry, as well as from the measures of inquiry and organisation of procedure ordered by the Court, that DG III was aware that the undertakings belonging to Eurofer were holding meetings, prior to their meetings with the Commission, at which they discussed developments in a variety of market parameters until some form of consensus was reached as to future market tendencies, the content of which was then the subject-matter of the discussions with DG III.

530 While it is true that DG III was aware that, in those meetings, the undertakings exchanged their respective forecasts on future prices and even their individual intentions in that regard, as Mr Kutscher expressly acknowledged when giving his testimony, the latter also expressed the opinion that such an exchange of views between producers did not fall foul of Article 65(1) of the Treaty, even if it was in fact followed by a general price movement in line with the forecasts exchanged, provided that this exchange of views was confined to determining the economic situation and did not result in any agreement or collusion as to that movement.

531 Moreover, the minutes of the consultation meeting of 26 January 1989 (application in Case T-151/94, appendix 3, document 16) include an express warning by Mr Kutscher to the effect that if the Commission were to discover that there was an agreement within the industry concerning quantities and prices, contrary to Article 65 of the Treaty, it would not hesitate to take appropriate measures. While giving his testimony, Mr Kutscher explained that he had his statement entered in the minutes at the express request of Commission Member Narjes in order to indicate clearly to the industry that free competition had to apply in full at the end of the quota regime, in strict compliance with Article 65 of the Treaty, and in order to avoid repetition of an agreement such as the Stainless Steel agreement.

532 Mr Kutscher also stated, without being challenged by the applicants on this point, that he had made three similar statements before the ECSC Consultative Committee on 1 June and 20 June 1988 and in October 1988.

533 It also appears from the DG III summary of the consultation meeting of 27 July 1989 that, in reference to an announcement of a price increase which appeared to him suspect, Mr Kutscher had 'reiterated the importance which the Commission attaches to full compliance with the rules in Article 65 of the Treaty'. The reply by the representative of the Poutrelles Committee that the undertakings concerned by that increase had 'confined themselves to informing trade circles and customers of their respective intentions to raise prices' gave the appearance that this was an independent course of action.

534 It follows that the applicants have not established that the DG III officials were aware of the agreements and concerted practices in relation to price-fixing of which the applicants are accused in the Decision, or, *a fortiori*, that those officials tolerated or encouraged such agreements and practices.

— Agreements on harmonisation of the prices of extras

535 It has already been established, in paragraph 324 et seq. above, that the Commission was unaware of the practices engaged in by the undertakings for harmonising the prices of extras. That finding cannot be affected by the fact that Eurofer's speaking note concerning the consultation meeting of 27 July 1989 (application in Case T-151/94, appendix 3, document 18) indicates that 'extras for size and quality will, probably, increase' and that this prognosis apparently served as a basis for the Commission's observation, in the forward programme for steel for the third quarter of 1989 (OJ 1989 C 178, pp. 2 to 8), that 'there is no sign of any further major upward movement [in prices for heavy sections] in the next few months, except on price extras, which are generally being harmonised Europe-wide'.

— Market-sharing agreements

536 The evidence before the Court does not establish that the undertakings were encouraged by the Commission to act in concert for the purpose of regulating or stabilising the market, in particular through the conclusion of agreements deriving from the Traverso methodology or relating to the French market in the fourth quarter of 1989.

537 As regards the Traverso methodology, there is no evidence to suggest that the Commission had knowledge of that system, which was first brought into effect in July 1988 and thus before the first consultation meetings in October 1988.

538 As regards the agreement on the French market for the fourth quarter of 1989, the applicants have referred in particular to the minutes of the consultation meeting of 1 September 1989 (application in Case T-151/94, appendix 3, document 32), which indicate, in regard to the discussion of the situation on the French market, that 'an appeal has been made to national producers to show moderation so as not to destabilise the other Community markets'. However, it must be stressed that, unlike the speaking notes forwarded to the Commission for information purposes, the minutes in question are a document unilaterally drafted by Eurofer of which the Commission was not aware before these proceedings, and that the internal DG III note concerning that meeting makes no reference whatever to such an appeal for moderation. The Court accordingly takes the view that the document in question has no probative value. In any event, the appeal for moderation to which it refers is expressed in general terms which do not give reason to believe that it was underpinned by an agreement to share the French market.

539 In so far as the applicants referred, in their joint pleading, to the statement in those minutes that 'the chairman [of the meeting] agreed that the forward programme ought to be considered as a guideline for reasonable conduct on the market', the Court observes that the same document also states, immediately before the remark in question, that 'in the absence of a quota system, it is possible

only to make a call for reasonable behaviour, without any guarantee as to results'. This comment demonstrates that, to the Commission's thinking, the reasonable behaviour or self-discipline which it expected from the industry was to be shown by each player considered individually, and was not to be the result of any concerted action between producers.

540 It is true that the speaking note relating to the consultation meeting of 27 April 1989 (application in Case T-151/94, appendix 3, document 17) indicates, in regard to the market situation of reinforcing bars (p. 8), that: 'some changes of traditional trade flows that are currently taking place further to offers made by Italian producers on the German and French markets, are strongly threatening the price stability in this sector given the immediate effect of these offers on the price level. This could easily result in severe damage to wire rod and so must be watched carefully'. Similarly, the speaking note relating to the consultation meeting of 27 July 1989 (application in Case T-151/94, appendix 3, document 18) also cites, among a number of 'negative factors' influencing pricing on the market for long products, the 'increase of interpenetrations'.

541 Those indications, however, are not sufficient to establish that the Commission was at that time pursuing its former policy of maintaining traditional trade flows or that it approved, even implicitly, a similar policy being pursued by the producers themselves. In the first place, these references in the speaking notes and minutes of a great number of meetings at that time are isolated references, and consequently atypical. Second, they are essentially descriptive in nature, are confined to reflecting the industry's assessment of the market situation and result, at most, in a simple exhortation to 'careful monitoring', without any action whatever on the market being contemplated in response to the 'threat' in question.

— Exchanges of information on orders and deliveries

542 It is clear from the evidence not only that the Commission was unaware of the exchange of information on orders and deliveries carried out by the Poutrelles Committee but also that Eurofer deliberately failed to disclose to DG III and DG IV the existence of systems for exchanging information on individualised data.

543 It should be pointed out in this regard that, during the restricted meeting of 21 March 1989 between representatives of DG III and representatives of the industry (see the minutes of this meeting, application in Case T-151/94, appendix 3, document 24), Mr von Hülsen, Director-General of Eurofer, informed DG III of the implementation, within that association, of a system of accelerated statistical inquiries concerning aggregate monthly data on orders and deliveries, but did not inform it of the establishment of monitoring of orders and deliveries, the first results of which had, however, been discussed among the participating undertakings for the first time at the Poutrelles Committee meeting of 9 February 1989.

544 Mr Vanderseypen, who testified at the hearing, confirmed that the rapid statistics in question, aggregated at the level of the undertakings, were broken down for each product and national market of destination, with the result that no undertaking could calculate the market share of its competitors. He stated that the Commission had never received from Eurofer figures broken down for each undertaking and that the Commission was unaware that such figures were circulated within Eurofer.

545 It is apparent from the documents listed in Annexes I and II to the Decision that, both in the context of the monitoring described in recitals 39 to 60 of the Decision and in that of the exchange of information through Eurofer described in recitals 143 to 146 of the Decision, individual statistics for each undertaking and each national market were exchanged for the orders and deliveries of, *inter alia*, Peine-Salzgitter, Thyssen, Usinor Sacilor, Cockerill-Sambre, ARBED, British Steel and Ensidesa.

546 By letter of 22 June 1990 (application in Case T-151/94, appendix 4, document 1), Mr Temple Lang, Director in DG IV, also raised the general problem of collection and exchange of information and statistical data within Eurofer. He pointed out that, during a meeting of the Steel Statistics Committee of 11 June 1990, 'the Commission had considered it necessary, in light of the unusual solution of collecting information, to warn the members of the Committee and in particular the Eurofer representative that Article 65 of the Treaty was applicable'. He also referred to 'the Commission's position on the question of the joint preparation of statistics and the exchange of information between undertakings or through the offices of a third body', stressing the difference 'between an agreement to collect statistical information which is generalised and not up-to-date, on the one hand, and, on the other, the collection of statistics which are up-to-date and detailed and which would not otherwise be accessible to competitors'. He added that the members of the Committee had already been informed at the meeting of 7 July 1989 by the sending of a copy of the 1968 communication. He accordingly called on the Director-General of Eurofer to provide a number of items of information, 'in order to be able to ascertain whether [its] activities in the area of joint preparation of statistics [might] have a bearing on effective competition', and in particular the 'description of the method for collecting and distributing statistics within [his] association'.

547 However, it appears from the reply of 24 July 1990 by the Director-General of Eurofer (application in Case T-151/94, appendix 4, document 1) that, its express request notwithstanding, DG IV was not informed of the nature and precise scope of the exchanges of information — namely, that these involved individual data on orders and deliveries broken down according to undertaking and country — which took place within Eurofer, as well as between the members of its Poutrelles Committee.

548 At the same time, on 30 July 1990, or less than one week after Eurofer had replied to DG IV's request for information, the administration of Eurofer sent to,

inter alios, the chairman and secretariat of the Poutrelles Committee a letter headed 'Statistics exchange and circulation' (document no 1681 of the Commission's file), cited as follows in recital 44 of the Decision:

'The decision recently made by the Commission in the matter of stainless flat products and some contacts taken by DG IV with the general management of Eurofer, have drawn attention to the statistics exchange or circulation made by our office or by the committee secretariats and to their compatibility with Article 65 of the ECSC Treaty.

While waiting for a thorough examination from the legal point of view, we decided to suspend any circulation which discloses individual figures for production, delivery or orders and we ask you to kindly abstain from any similar exchange or circulation in the framework of your Committee.

Of course, this request does not affect the collection of individual figures by one neutral centre, namely the Eurofer office, and the circulation of aggregate results, without mention of individual elements, as we usually do. Such statistics are perfectly legal because they obviously aim at giving a global information on the economic and market development. They will be maintained as before by us and you may proceed in the same way.'

549 It must therefore be concluded that Eurofer, even while it was the subject of an express request by DG IV for information, deliberately kept the Commission in the dark about the exchange or distribution of individual statistics which it knew was taking place within its product committees, in particular the Poutrelles Committee, while requesting those committees to refrain subsequently from so doing.

550 It is also established that, after initially acceding to Eurofer's request of 30 July 1990, the undertakings belonging to the Poutrelles Committee, in agreement with the Eurofer authorities, rapidly resumed the exchange of information on individual undertakings, with the exception of British Steel, which refused to provide such information (see recitals 44 to 46 of the Decision).

— Other agreements

551 The applicant has not claimed, let alone demonstrated, that DG III had knowledge of the other agreements of which the applicant is accused in the Decision, subject to a proviso with regard to the Eurofer/Scandinavia agreements, which have been the subject of separate examination by the Court.

— Conclusions

552 The Court concludes from all of the foregoing that, from 1988 on, the steel undertakings and their trade association Eurofer submitted to the Commission relatively general and imprecise information, whilst engaging, in support of their agreements in restraint of competition, in very precise and detailed discussions, individualised at the level of the undertakings, the existence and content of which they hid from both DG III and DG IV. The undertakings were fully aware of the substantive difference between those two categories of information, and they deliberately made sure that only one category, and not the other, was brought to the Commission's knowledge.

553 The Court accordingly finds that the undertakings infringed the Treaty rules on competition, while putting up a screen to protect them from the scrutiny of the DG III officials responsible for monitoring the market. They cannot, consequently, plead that those officials knew, or ought to have known, of their

practices in order to escape their obligation to comply with Article 65(1) of the Treaty.

554 In any event, the provisions of Article 65(4) of the Treaty, to the effect that agreements or decisions prohibited under Article 65(1) are 'automatically void', have an objective content and are binding on both undertakings and the Commission, which cannot exempt those undertakings (see Opinion 1/61 of the Court of Justice, cited above). In those circumstances, toleration or administrative laxity cannot alter the fact that a breach of Article 65(1) is an infringement of the Treaty (judgments in *Lucchini* v *Commission* and *Bertoli* v *Commission*, cited above).

555 That is particularly so when the toleration in question, even if assumed to have been established, is shown by the Directorate-General of the Commission responsible for industrial affairs, and not that responsible for competition matters. Had the undertakings had the slightest doubt as to whether their conduct was lawful, they should have contacted DG IV in order to clarify the situation.

556 The letter of 8 February 1983 from the chairman of Eurofer to Mr Davignon (paragraph 11 above) clearly cannot free them from their responsibility for conduct dating from a different period and subject to a fundamentally different regime. Nor can that letter impose on the Commission an implicit obligation to react immediately to the slightest suspicion of anti-competitive conduct. In any event, that letter rests on the premiss that the Commission was 'meticulously informed' of Eurofer's practices 'in full detail', which was not the case here.

Legality of the activities of which the applicant is accused with regard, in particular, to Articles 46 to 48 of the Treaty

557 The Court has already found that the provisions of Articles 46 to 48 of the Treaty did not authorise the conclusion of the agreements and concerted practices at issue in this case (paragraphs 317 to 321 above).

558 Moreover, the applicants have themselves acknowledged, in particular in their joint pleadings, referring to the opinion of Professor Reuter, that, if the measures adopted by the Commission pursuant to those articles, in 'collaboration' with the interested parties and with their agreement, 'patently constitute concerted practices', it is only in so far as 'the High Authority is involved in the concerted action and even directs it' that those measures do not come under Article 65 of the Treaty.

559 Likewise, in his oral submissions on behalf of the applicants at the hearing, Professor Steindorff indicated, with regard to the exchanges of information between undertakings preparatory to the meetings with the Commission, that such prior exchanges would escape from the prohibition of Article 65(1) of the Treaty only if they were conducted by the Commission. According to Professor Steindorff, undertakings must act in good faith and bear in mind that, in those exchanges, they are merely preparing the discussions with the Commission, which, for its part, operates within the context of Article 46 of the Treaty.

560 The Court finds that this was not the case here. On the contrary, it is clear from the documents before it that, when they realised that the Commission no longer intended taking any action to maintain the stability of traditional trade flows, the undertakings covered by the Decision chose to substitute themselves for the Commission and began to act in the manner of a private cartel. Thus, following the expiry of the quota system on 30 June 1988, the undertakings in question endeavoured to replace the public mechanisms established during the crisis regime by private measures adopted jointly, particularly within the Poutrelles Committee.

561 This reaction was in no way required, and was in no way provoked or occasioned, by the monitoring and consultation regime introduced by DG III after July 1988.

562 In addition, the Court finds that the infringements, and in particular the exchanges of information objected to in the Decision, were secret and that there is nothing to suggest that purchasers, other producers or the Commission were informed of them. On the contrary, the documents on the case-file which have already been analysed indicate that the undertakings took care to hide their activities from the Commission, to the point, *inter alia*, of organising a special meeting of Eurofer committees on the subject of drafting the minutes of the meetings.

563 It must therefore be concluded that, at the end of the manifest crisis regime, the beam producers in question in the Decision, acting in concert and against the express wishes of the Commission, as set out in particular in the press release of 4 May 1988 relating to the Stainless Steel case, secretly substituted their own system of collective organisation of the market for the public management of the sector, with the objective of forestalling or weakening the effects of normal competition. Such conduct is prohibited by Article 65(1) of the Treaty.

564 Furthermore, the question whether the undertakings engaged in a concerted practice prohibited by Article 65(1) of the Treaty by confining themselves to a general discussion and a reciprocal exchange of intentions in regard to prices, of the kind described by Mr Kutscher, for the purpose of informing the Commission of market trends, is irrelevant for the purposes of the present judgment. First, that was not the purpose of the agreements and concerted practices here in question. Second, the Commission did not put in issue that type of conduct in the Decision. Third, in this case, the contacts between producers prior to the exchanges of views with the Commission on the main parameters and market trends in no way required commission of the infringements which the Decision found to have taken place. Finally, in so far as the applicants did not honestly and fully reveal their activities to the Commission, they cannot claim that they are exempt from the prohibition of Article 65(1) of the Treaty.

565 The pleas and arguments put forward by the applicants on the basis of DG III's actions, on which they rely in support of the claims for annulment of Article 1 of the Decision, must therefore be rejected in their entirety.

E — *Misuse of powers*

566 In its application, the applicant referred to the debates of the industrial committee of the European Parliament of 24 February 1994, during which a number of members expressed their suspicions that the Commission had chosen the amount of the fines and the date of adoption of the Decision with the intention of influencing the conduct of the undertakings in the negotiations, then under way, on measures to reduce capacity in the iron and steel industry. It adds that, if that suspicion were to prove correct, it would be established that the amount of the fine was fixed for other than objective reasons.

567 This argument is similar to the plea of misuse of powers specifically put forward by a number of applicants alleging that, instead of carrying out its responsibilities under the Treaty, in particular Article 58 thereof, the Commission sought to 'force' producers to carry out the restructuring which the Commission regarded as vital and 'penalised' their refusal by imposing heavy fines in the Decision, adopted the day after the negotiations in question had been broken off.

568 The Court points out that, in parallel to the administrative procedure conducted by DG IV in this case, DG III conducted negotiations with the steel industry to bring about a thorough restructuring of the industry, partially financed through Community funds. Those negotiations were broken off, in the absence of any agreement between the parties, on 15 February 1994, the day before the Decision was adopted, during a meeting attended by representatives of the industry and Commission Members Bangemann and Van Miert.

569 According to settled case-law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68, and Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraph 327).

570 The prosecution and punishment of infringements in competition matters are a legitimate objective of Community action, in accordance with the fundamental provisions of Articles 3 and 4 of the Treaty. If the commission of such infringements has actually been proved and it has been established that the fines have been calculated in an objective and proportionate way, the decision imposing such fines, in accordance with Article 65(5) of the Treaty, cannot be regarded as being vitiated by misuse of powers except in exceptional circumstances.

571 In this case, neither the co-existence of parallel negotiations between the Commission and the industry on restructuring the European steel industry, dating back to the 1980s, or even the 1970s, nor the 'coincidence' between the failure of those negotiations and the adoption of the Decision, and the questions which this raised among some members of the European Parliament or journalists, constitutes *per se* evidence of misuse of powers.

572 Nor has the Court found, in the file submitted to it under Article 23, any evidence to establish that the procedure followed here for applying Article 65 of the Treaty was used for the purpose of forcing the steel industry to restructure itself or to penalise its lack of cooperation in that regard. There is indeed no reason to suspect that the procedure did not follow a normal course, from the first inspections in January 1991 to the adoption of the Decision on 16 February 1994, and including the statement of objections notified to the undertakings concerned on 6 May 1992, the analysis of their replies sent around August 1992, their hearing in January 1993, the internal investigation carried out at the request of the interested parties in January/February 1993, the sending of the minutes of

the hearing in two parts, on 8 July 1993 and 8 September 1993, and the preparation of the draft decision, with translations into the various languages and consultation of the various services concerned. Furthermore, the applicant has not challenged the Commission's statement that the hearing was postponed from September 1992 to January 1993, a period of approximately four months, at the actual request of some of the undertakings, in order to enable their lawyers to concentrate on their defence in the antidumping proceedings instituted against them, at that time, by the American authorities.

573 Finally, the argument that the Decision would not have been adopted in its final form if the negotiations with the steel industry had not been broken off the previous day is unsupported by any evidence.

574 The applicant's argument alleging misuse of powers must therefore be rejected as unfounded.

The alternative claim for annulment of Article 4 of the Decision or, at least, reduction of the fine

A — *Preliminary observations*

575 By Article 4 of the Decision a fine of ECU 6 500 000 was imposed on the applicant for the infringements described in Article 1. The criteria taken into consideration in determining the general level of the fines and the amounts of the individual fines are set out in recitals 298 to 317 and 319 to 324 of the Decision respectively.

576 In reply to the Court's questions, the Commission provided explanations as to the method used for calculating the fines and produced a number of tables explaining that calculation for each of the undertakings concerned (see annex 6 to its reply of 19 January 1998, its reply of 20 February 1998 and the tables produced on 19 March 1998).

577 It follows from that information that the Commission determined the fine according to a 'base rate' representing 7.5% of Community sales during 1990 of beams manufactured by the undertaking concerned. That percentage was apportioned among the three types of infringement referred to in recital 300 of the Decision, in accordance with the following formula: price-fixing: 3%, of which 2.5% was for the agreements on base prices and 0.5% for the agreements harmonising extras; market sharing: 3%; exchanges of information: 1.5%.

578 The Commission weighted those percentages on the basis, in particular, of the duration and geographic extent of each infringement.

579 Thus, in order to adjust the fines in light of the duration of each infringement, the Commission applied a coefficient obtained by dividing the number of months actually taken as the duration of the infringement by the maximum number of 30 months, except with regard to the agreements on the harmonisation of the prices of extras. Likewise, in order to adjust the fines in light of the geographical scope of each infringement, in so far as certain infringements related solely to one or more national markets, the Commission applied a percentage corresponding to the share of apparent total Community consumption represented by the relevant market(s) (Germany: 21%; France: 17%; United Kingdom: 17%; Spain: 15%; Italy: 14%; Netherlands: 7%; Belgo-Luxembourg Economic Union: 6%; Denmark: 2%).

580 Where appropriate, certain increasing or decreasing coefficients were applied to each infringement in order to take account of aggravating or extenuating circumstances.

581 Finally, the total amount resulting from the calculation set out above was increased by one third in the case of the applicant, British Steel and Unimétal on grounds of re-offending.

582 According to the Commission's reply of 19 March 1998, the fine imposed on the applicant was calculated as follows, on the basis of a relevant turnover of ECU 91 million:

				Millions ecus
(a) Price-fixing agreements				
Poutrelles Committee	91 x 2.5 %	x	30/30	2.2750
German market	91 x 2.5 % x 21 %	x	3/30	0.0478
Italian market	91 x 2.5 % x 14 %	x	3/30	0.0319
Danish market	91 x 2.5 % x 2 %	x	30/30	0.0455
Harmonisation of extras	91 x 0.5 %			0.4550
			Total	**2.8552**
(b) Market-sharing agreements				
Traverso methodology	91 x 3 %	x	6/30	0.5460
French market	91 x 3 % x 17 %	x	3/30	0.0464
Italian market	91 x 3 % x 14 %	x	3/30	0.0382
			Total	**0.6306**
(c) Exchange of information	91 x 1.5 %	x	30/30	1.3650
Total (a)+(b)+(c)				**4.8508**
Increase of 33 % for re-offending				1.6010
			Total	**6.4518**
Final amount of the fine				6.5000

B — *Absence of fault on the applicant's part, infringement of the principle of the protection of legitimate expectations, and failure to adopt transitional measures following the end of the manifest crisis regime*

583 In a first group of arguments, the applicant contends that Article 4 of the Decision must be annulled because there was no fault on its part, because the principle of the protection of legitimate expectation was infringed, and because no transitional measures were adopted following the end of the manifest crisis regime. In this regard, it relies essentially on the arguments already put forward concerning the Commission's alleged participation in the infringements in question. In particular, it argues that the Commission failed, in recitals 298 to 317 of the Decision, to examine the consequences of its own involvement in the exchange of information organised within the Poutrelles Committee.

584 The applicant claims that it acted in good faith and that it was unaware of the illegality (which it contests) of the exchanges of information carried out within the Poutrelles Committee and the Eurofer/Scandinavia group. It was only following discussions with the Commission begun in mid-1990 that the undertakings and their associations had doubts as to whether those exchanges were compatible with Article 65(1) of the Treaty.

585 The documents to which recital 307 of the Decision refers, that is to say, the internal memorandum of Usinor Sacilor cited in recital 105, the fax from Eurofer's Head of Legal Affairs cited in recital 140, and the internal Peine-Salzgitter note cited in recital 59, cannot be used against the applicant, and in any case do not establish that the applicant acted in the knowledge that its conduct was illegal.

586 The applicant adds that it was not until 1991 that the Commission revised its assessment of the systems of information exchange under the ECSC Treaty by aligning its practice with that followed under the EC Treaty (see paragraph 38 above). Until that time, the undertakings were entitled to take the view that such systems were compatible with Article 65(1) of the ECSC Treaty.

587 Finally, the applicant claims that the Commission failed to take account of the need for undertakings and their collaborators to adapt, on expiry of the quota regime, to a situation of free competition. The Commission ought, in its view, to have provided for transitional measures, as proposed by the group of 'Three Wise Men' which it had appointed (see the *XXIst General Report on the Activities of the European Communities*, point 278).

588 The Court has already found that the Commission's alleged participation in the infringements of which the applicant is accused has in no way been established in this case (see Part D below). The Court has also found that the applicant could not have been unaware that the conduct in question was unlawful, at least since 30 June 1988, and that the Commission did not unlawfully 'align' the ECSC Treaty with the EC Treaty. It follows that the arguments questioning its good faith and based on infringement of the principle of the protection of legitimate expectations must be rejected.

589 Even assuming that the three documents drafted by Usinor Sacilor, Peine-Salzgitter and Eurofer and referred to in recital 307 of the Decision could not be used as incriminating evidence against the applicant, it must once again be pointed out that the infringements constituted by the agreements on price-fixing and market-sharing, such as those in which it has been duly established that the applicant took part, are expressly covered by Article 65(1) of the Treaty and are thus manifest.

590 So far as concerns the exchanges of confidential information, it follows from the Court's assessment (see paragraph 407 above) that their purpose was similar to an allocation of markets by reference to traditional flows. The applicant could not reasonably imagine that such exchanges were not caught by Article 65(1) of the Treaty. On the contrary, the fact that the members of the Poutrelles Committee were aware that they were illegal can be inferred from the dual system of monitoring implemented within Eurofer, one of which, relating to aggregate data, was voluntarily brought to the knowledge of DG III and DG IV, whereas the other, relating to individual data, was reserved exclusively for the participating undertakings, including the applicant (see paragraph 542 et seq. above).

591 It also follows from the Court's findings (see paragraph 509 above) that the Commission was not under any obligation to provide for specific transitional measures following the expiry of the manifest crisis regime on 30 June 1988.

592 It follows that the arguments based on the applicant's good faith, infringement of the principle of the protection of legitimate expectations and failure to adopt transitional measures after 30 June 1988 must be dismissed.

C — *The disproportionate nature of the fine*

Summary of the parties' arguments

593 In support of its plea alleging that the fine was disproportionate, the applicant contends that the statement of reasons in the Decision is deficient and that it contains errors of assessment.

594 The applicant first argues that the explanations in recitals 301 to 316 of the Decision are too vague to ascertain how the Commission came to fix the amounts of the individual fines. Likewise, it continues, it is impossible to understand why the fine imposed on the applicant was greater than that imposed on undertakings such as Saarstahl, Cockerill-Sambre or Ensidesa, which, during the period 1988/1989, made larger deliveries within the ECSC than the applicant itself (see table 11 in recital 19 of the Decision).

595 Furthermore, recital 316 of the Decision does not indicate how account was taken of the duration and seriousness of the infringement. With more particular regard to the duration of the infringement, the applicant submits that the

Decision does not identify the last infringement of which it is accused for each category of infringement.

596 The applicant also criticises the Commission for having failed to meet its obligation to state reasons by omitting, in the grounds of the Decision, to indicate the factors which it took into account for fixing the fine and which were referred to by Mr Van Miert at his press briefing of 16 February 1994. In particular, the Commission did not indicate at any point in the Decision that a supplementary fine had been imposed on the applicant on the ground that it was to be regarded as a recidivist, a description which the applicant considers to be entirely without foundation.

597 So far as the errors of assessment are concerned, the applicant argues, in the first place, that the Commission misjudged its financial position. Its share capital amounted to DM 875 million, not DM 2 000 million as erroneously suggested by recital 11(b) of the Decision. Since capital is a determinant factor in assessing the size and economic power of an undertaking (see Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 120, hereinafter 'the *Pioneer* judgment'), the Commission's calculation is thus based on erroneous data.

598 Further, in its assessment of the economic situation of the steel industry (see recital 301 of the Decision), the Commission did not take the applicant's financial situation into account. Since the financial year 1987/1988 (during which it made a loss of DM 7.9 million on its sales of beams), leaving aside the financial years 1988/1989 and 1989/1990 (which generated only minimal profits of DM 4 million and DM 4.6 million respectively), the applicant's beam production was loss-making. Moreover, the recorded losses, which continued to increase since the 1990/1991 financial year, led to the applicant's decision to close its laminated beam chain on 1 April 1993. In its reply, the applicant adds that this analysis must lead to a reduction of the fine, in line with the case-law of the Court of Justice (*Pioneer* judgment, cited above, paragraph 129) and the Commission's practice (see in particular Commission Decision 83/667/EEC of 5 December 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.671 —

IPTC Belgium), OJ 1983 L 376, p. 7). It is not sufficient to take account of that situation solely for the purpose of fixing a period for payment (see Article 5 of the Decision).

599 Second, the applicant submits that the Commission exaggerated the alleged economic consequences of the infringements (see recitals 302 to 304 of the Decision). Given the applicant's economic situation, those infringements could not possibly have brought any benefit to it, as the Bishop report also points out.

600 Third, the documents mentioned in recital 307 of the Decision for the purpose of establishing, as an aggravating circumstance, that some undertakings 'were aware that their behaviour was or could have been contrary to Article 65 of the ECSC Treaty' do not prove that this was the case with regard to the applicant, since the documents in question are internal to the undertakings and the association from which they derive. Nor does it follow from the Stainless Steel decision (see recital 305 of the Decision) that the applicant was aware that its conduct was illegal.

601 In their joint pleading at the hearing, the applicants also submitted that:

(a) the Commission did not adequately indicate the extent to which the conduct in issue had an anti-competitive effect, whereas Article 65 of the Treaty requires evidence of such an effect. In particular, the explanations given in recitals 302 and 303 of the Decision, concerning the additional benefits allegedly obtained as a result of the agreed price increases, are gainsaid by those proffered by Mr Kutscher in his testimony. According to Mr Kutscher, such increases could have resulted from the market situation obtaining at the time;

(b) the Commission ought to have taken account, in extenuation, first, of the fact that the conduct at issue was not intended to restrict production, technical development or investment, within the meaning of Article 65(5) of the Treaty, and, second, of the differences between the ECSC Treaty and the EC Treaty;

(c) the Commission was wrong to impose a separate fine for the information-exchange systems, since, before the Court, these had been classified as ancillary to other infringements;

(d) the Commission unjustifiably imposed fines which were generally heavier than those imposed in its Stainless Steel decision and Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Case IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1) (hereinafter 'the Cement decision' or 'the Cement case');

(e) the Commission applied twice, first at the Community level and then at the level of the different national markets, the partial rates attributed to the various aspects of infringement relating to the price-fixing agreements and the market-sharing agreements, with the result that the actual base rate of the fine was 13% and not, as the Commission submits, 7.5%.

602 As regards the increase in the fine imposed on the applicant, Unimétal and British Steel for re-offending, the Commission alleged, in reply to the questions put by the Court (see point 33 of its reply of 19 January 1998) and at the hearing, that the Stainless Steel decision did not constitute a conclusive factor. According to the Commission, the fact that the undertakings concerned were the subject of the inspection referred to in recital 305 of the Decision and that they received, at the end of 1988, a statement of objections in those proceedings ought to have served as a specific warning and distinguishes their situation from that of the other undertakings on which fines were imposed in that case.

Findings of the Court

603 Article 65(5) of the Treaty provides that:

'On any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce... an agreement or decision which is automatically void... or has engaged in practices prohibited by paragraph 1 of this Article, the Commission may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the agreement, decision or practice prohibited by this Article; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10% of the annual turnover of the undertakings in question in the case of fines, and 20% of the daily turnover in the case of periodic penalty payments.'

The applicant's arguments

— The statement of reasons in the Decision explaining the fine

604 As the Court has previously held, the statement of reasons required under Article 15 of the Treaty must enable the person concerned to ascertain the matters relied upon to justify the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded, and, secondly, must enable the Community judicature to review the legality of the decision. The requirement for a statement of reasons must be considered in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons relied on and the context in which the measure was adopted (*NALOO* v *Commission*, cited above, paragraphs 298 and 300).

605 So far as a decision imposing fines on several undertakings for a breach of Community competition rules is concerned, the scope of the obligation to provide reasons must, in particular, be assessed in light of the fact that the gravity of the infringements must be determined by reference to a variety of factors such as the particular circumstances of the case, its context and the dissuasive element of fines, there being no binding or exhaustive list of criteria which must be applied (order of the Court of Justice in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54). Furthermore, the Commission enjoys a margin of discretion when fixing the amount of each fine and cannot be regarded as being obliged to apply a precise mathematical formula for that purpose (judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

606 In the present case, the Court finds that the Decision contains, in recitals 300 to 312, 314 and 315, 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. Those indications are, moreover, supplemented, with regard to the exchange of information referred to in recital 300, by the detailed explanations in recitals 49 to 60 and 266 to 272 of the Decision.

607 The Commission, furthermore, concluded in recital 314 of the Decision that there had been an infringement of long duration, a characterisation which the applicant has not disputed. Article 1 of the Decision details the period taken into account for each infringement and thus expresses the principle that partial fines corresponding to the different infringements are to be broken down on the basis of their duration. The Court finds this reasoning adequate.

608 In its judgment in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 142, the Court stressed that it was desirable for undertakings — in order to be able to define their position in full knowledge of the facts — to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them by a decision for infringement of the rules on competition, without being obliged, in order to do so, to bring court proceedings against the Commission decision.

609 That applies *a fortiori* where, as here, the Commission has used detailed arithmetical formulas to calculate the fines. It is desirable in such a case that the undertakings concerned and, if need be, the Court should be in a position to check that the method employed and the steps followed by the Commission are free of error and compatible with the provisions and principles applicable in regard to fines, and in particular with the principle of non-discrimination.

610 It must, however, be pointed out that such figures, provided at the request of one party or of the Court pursuant to Articles 64 and 65 of the Rules of Procedure, do not constitute an additional *a posteriori* statement of reasons for the Decision, but are rather the translation into figures of the criteria set out in the Decision where they are themselves capable of being quantified.

611 In this case, although the Decision does not contain any indications as to how the fine was calculated, the Commission provided, during the present proceedings, at the request of the Court, figures relating, in particular, to the breakdown of the fine according to the various infringements with which the undertakings were charged.

612 As regards the applicant's objection to the lack of any reference to the last infringement taken into account for each of the infringement categories, 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 Decision, by referring either to the actions of the parties involved or to the reference periods concerned by those actions.

613 It follows that, subject to examination of the increase of the fine on account of re-offending, which is considered separately below (paragraphs 614 to 625), the applicant's arguments alleging that the statement of reasons in the Decision is deficient must be rejected.

— The increase in the fine on account of re-offending

614 Recitals 305 and 306 of the Decision read as follows:

'(305) The Commission press release of 2 May 1988 made at the time of the inspection in the Stainless Steel case leading to Decision 90/417/ECSC gave a clear warning that the Commission would not tolerate illegal arrangements organised by the industry.

(306) In addition, some of the undertakings involved (British Steel, Thyssen and Usinor Sacilor) were fined for their participation in the Stainless Steel flat products cartel in that Decision which was published in the *Official Journal of the European Communities* in August 1990 and was widely discussed in both the specialised and general press. The attitude of the Commission towards illegal agreements and concerted practices had therefore been clear from at least May 1988.'

615 It appears from the answers given by the Commission during these proceedings that, in the case of the three undertakings mentioned in recital 306 (British Steel, Unimétal and the applicant), the total amount of the basic fine, obtained by adding the sub-amounts for the various infringements listed in Article 1, was increased by one third by reason of the recidivist nature of those three undertakings' conduct, regard being had to the Stainless Steel case closed by decision of 18 July 1990.

616 The Court finds that recitals 305 and 306 of the Decision do not contain a sufficient statement of reasons to enable the undertakings in question to ascertain that their fine was thus increased on account of re-offending, to comprehend the size of that increase, or to ascertain the reasons for which the Commission considered that such an increase was justified.

617 Recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements. In this case, the only example of this kind was a sister company of the applicant being penalised by the Stainless Steel decision of 18 July 1990. Yet the greater part of the infringement period, from 30 June 1988 to the end of 1990, taken into account in the present case against the applicant, pre-dates the Stainless Steel decision.

618 It follows that, in so far as the increase in the fine imposed on the applicant, in particular, was based on the consideration that the Commission had already penalised it for similar infringements in the Stainless Steel decision, the Decision is vitiated by an error of law, since that fact cannot be taken into account as an aggravating circumstance in relation to infringements committed before the Stainless Steel decision was adopted.

619 Next, the Court finds that, in so far as the Commission relies on the fact that it had 'warned' the undertakings through the press release published in the Stainless Steel case (recital 305 of the Decision), this consideration does not make it possible to distinguish the position of the three undertakings on whom the increase was imposed from that of the other addressees of the Decision.

620 The Commission explained, however, before the Court that the fact that they had been the subject of an inspection in the Stainless Steel case and that they had received a statement of objections in those proceedings at the end of 1988 ought to have been a particularly clear warning to the three undertakings concerned.

621 The Court finds, first, that the inspection carried out in May 1988 did not, in itself, constitute a sufficiently clear warning, equivalent to a substantiated finding, in order to be treated, in the present context, as the same as a decision upon which a finding of recidivism could be based. The checks provided for by

the first paragraph of Article 47 of the Treaty do not declare facts found to be incompatible with the Treaty, but are solely to enable the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 21).

622 Secondly, although recital 305 of the Decision refers to the inspection carried out at that time, there is no mention in the Decision of explanations specifically given to the three undertakings concerned, in connection with that inspection, or, in particular, of the reasons stated in the warrants or investigation decisions. There is therefore nothing to explain how the position of the three undertakings concerned is different from that of the other producers.

623 Furthermore, the Decision makes no reference to the statement of objections in the Stainless Steel case. The reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see, most recently, Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 350).

624 In any event, a statement of objections is, by its very nature, merely a preparatory act not in the nature of a decision and does not require the undertaking concerned to alter or reconsider its commercial practices (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraphs 17 to 19; see also 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, paragraph 34). Furthermore, the Commission has indicated before the Court neither the date nor the content of the statement of objections on which it relies.

625 It follows that Article 4 of the Decision must be annulled to the extent to which it imposed on the applicant an increase in the fine for the recidivist nature of its conduct.

— The economic situation of the applicant and in the steel industry

626 The Court finds that the argument based on the low level of the applicant's share capital is irrelevant, since the fine imposed on it was calculated on the basis of its turnover, as prescribed by Article 65(5) of the Treaty.

627 As for the argument that the fine imposed on the applicant should be reduced on the ground that, with the exception of the period from 1988 to 1990, its beam production was loss-making, the Court points out that, in recital 301 of the Decision, the Commission referred to the situation of undertakings at the time when the Decision was adopted, expressing the view that 'steel producers are not generally making profits at the present time'. It is also common ground that the difficult economic situation of steel undertakings at the time when the Decision was adopted was taken into account by means of, *inter alia*, the periods for payment detailed in Article 5.

628 The Court considers that the Commission is in principle entitled to adopt such a solution, which takes account of the present situation of undertakings while maintaining fines at a level which appears appropriate (see Case 8/56 *ALMA* v *High Authority* [1957 and 1958] ECR 95, at p. 100).

629 Likewise, the fact that the applicant achieved only profits which it describes as 'minimal' between 1988 and 1990 and that, apart from that period, its beam production was primarily loss-making is not in itself sufficient to establish that the Commission committed an error of assessment. The figures indicated by the

applicant confirm that the period taken into account for purposes of the fine was characterised by a clear improvement as compared with previous years and allowed it to achieve a profit despite the structural over-capacity of the market.

630 In any event, recognition of an obligation requiring the Commission to take account, when determining the fine, of an undertaking's loss-making financial situation would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 55; Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 76).

631 The arguments derived from the applicant's economic situation and that of the steel industry must therefore be rejected.

— The economic impact of the infringements

632 The applicant's argument that the Commission exaggerated, in recitals 302 to 304 of the Decision, the economic impact of the infringements must be considered in conjunction with the argument of other applicants in the parallel cases, which also criticise the Commission essentially for not having seriously studied the economic effects of the cartel on the market and of having based its findings on mere conjectures, whereas the Commission is under an obligation to examine the economic implications of the infringements in order to assess their seriousness and to take into account, if appropriate, the limited nature of those implications (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 51 et seq., and *Suiker Unie and Others* v *Commission*, cited above, paragraph 614 et seq.), particularly within the context of a regulated market such as that of the ECSC. According to the applicant, the study made by Professor Bishop shows that the practices at issue in this case did not have any appreciable bearing on the level of competition.

633 In their joint pleading on this aspect of the case, the applicants combined this argument with the contention that Article 65(5) of the Treaty covers only conduct which has an anti-competitive effect, and not conduct which merely has that objective.

634 The applicants also referred to the testimony of Mr Kutscher, according to which, during a favourable economic period, as was the case between 1988 and 1990, it is normal to see undertakings' prices increase, and that this occurs almost automatically, since each will seek to profit from the rises decided on by its competitors, so that it could not be inferred from the profits achieved at the time by the undertakings that they were acting in concert on prices. According to the applicants, that testimony controverts the scenario depicted in recitals 302 to 304 of the Decision.

635 As the Court has already indicated (paragraphs 272 and 277 above), it is not necessary, in order to find that there has been an infringement of Article 65(1) of the Treaty, for it to be established that the conduct in question actually had an anti-competitive effect. The same applies with regard to the imposition of a fine under Article 65(5) of the Treaty.

636 It follows that the effect which an agreement or concerted practice may have had on normal competition is not a conclusive criterion in assessing the proper amount of the fine. As the Commission has correctly pointed out, factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects (see the Opinion of Judge Vesterdorf, acting as Advocate General in the *Polypropylene* cases, cited above, at [1991] ECR II-1022 et seq.), particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing. The Court takes the view that those factors are present here.

637 The defendant, however, acknowledges that the assessment of the effects of an infringement may be relevant, in regard to fines, where the Commission bases its

decision expressly on an effect and is unable to prove it or to provide good reasons why it should be taken into account (see, also in this regard, the Opinion of Judge Vesterdorf, acting as Advocate General in the *Polypropylene* cases, cited above, at [1991] ECR II-1023).

638 On this point the Commission explained, at recitals 222 and 293 of the Decision, that the undertakings in question represented a large part of the Community beam market, all the major producers being involved, and that the effect of the infringements was far from negligible. The Commission also referred, in particular in recital 222, to the producers' own documents, reflecting their opinion that the price increases in question had been accepted by customers. In recital 303 of the Decision, the Commission calculated the total increase in revenue thus obtained at not less than ECU 20 million for the first two quarters of 1989.

639 In those circumstances, the Court takes the view that the Commission was quite entitled, when calculating the fine, to take account of the appreciable economic impact which the infringements had on the market.

640 It must, however, be pointed out that, in his testimony at the hearing, Mr Kutscher, who acquired considerable experience in the steel sector while an official with DG III, expressed the view that price increases on the scale of those seen on the market in this case, at the material time, were normally to be expected, given the favourable economic trend at the time. Mr Kutscher indicated that this situation of fact was one of the reasons why he had not suspected that a cartel had been organised by producers.

641 Also, the working method adopted by the Commission when preparing forward programmes and in the context of the monitoring system under Decision No 2448/88/ECSC meant that the undertakings had to convene prior to their meetings with DG III and exchange their views on the economic situation of the market and future tendencies, particularly in regard to prices, in order to be able

to present a synthesis of those views to DG III. Preparatory meetings of this kind, involving the senior commercial managers of the undertakings concerned, were, moreover, necessary to the success of that monitoring system, since the Commission was not itself in a position to collect the individual data provided by the undertakings and have it analysed in time, as Mr Kutscher confirmed at the hearing. It is also common ground that the data provided by the undertakings during those meetings were useful to DG III, particularly in preparing the forward programmes.

642 It is also clear from Mr Kutscher's testimony that, at the time, DG III was reasonably well disposed to seeing the steel industry — still fragile after a long period of losses — once again making profits, thus reducing the risk of a return to the manifest crisis regime.

643 The Court finds that, by behaving in this way within the context of the system of monitoring, between mid-1988 and the end of 1990, DG III introduced a degree of ambiguity into the meaning of the concept of 'normal competition' as used in the ECSC Treaty. Although it is unnecessary, for the purposes of the present judgment, 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, since that was not the objective of the meetings of the Poutrelles Committee, it none the less remains a fact that the effects of the infringements committed in this case cannot be determined 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. In this case, it is more relevant to compare the situation resulting from the anti-competitive agreements with that which was 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.

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.

645 The Court accordingly finds that, in recital 303 of the Decision, the Commission exaggerated the economic impact of the price-fixing agreements found here, as compared with the competition which would have existed had it not been for such infringements, having regard to the favourable economic climate and the latitude given to undertakings to conduct general discussions on price forecasts, between themselves and with DG III, in the context of meetings organised by DG III on a regular basis.

646 Taking those matters into account, the Court holds, in the exercise of its unlimited jurisdiction, that the fine imposed on the applicant for the various price-fixing agreements and concerted practices should be reduced by 15%. On the other hand, it finds that there are no grounds for granting such a reduction in relation to either the market-sharing agreements or the exchanges of information on orders and deliveries, to which the same considerations do not apply.

— The aggravating circumstance that the applicant must have known that the actions in issue were unlawful

647 The Court finds that the three items of evidence specifically mentioned in recital 307 of the Decision, that is to say the internal notes prepared by Usinor Sacilor, Peine-Salzgitter and Eurofer, are not relied on as a specific aggravating circumstance against those three parties, but tend rather to show, in conjunction

with recitals 305 and 306, that all of the undertakings to which the Decision was addressed were aware that they were infringing the prohibition set out in Article 65(1) of the Treaty. For the reasons already indicated (see paragraph 588 and Part D above), the Court finds that the applicant could not have been unaware that its conduct was unlawful.

648 In those circumstances, the Court finds that, in the exercise of its unlimited jurisdiction, there is no reason to set aside the aggravating circumstance taken into account in this regard against the applicant in recital 307 of the Decision, and it is not necessary to determine whether the three documents mentioned in that recital may be used against it.

— The fine imposed on the applicant for its participation in the information-exchange systems

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 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.

— Double application of the base rate used to fix the fine

650 At the hearing the applicants submitted that the use of the base rate of 7.5% of turnover resulted in application of an actual base rate of 13%, consisting of 2.5% for the pricing agreements within the Poutrelles Committee, plus 0.5% for harmonisation of extras, plus 2.5% for the pricing agreements on the various individual national markets, plus 3% for the market-sharing agreements

concluded within the Poutrelles Committee, plus 3% for the agreements to share the various national markets, plus 1.5% for information exchange.

651 It is indeed apparent from the information provided by the Commission during these proceedings that, as the applicants have pointed out, the fine could in theory have amounted to 13% of turnover, as a result of adding the various rates mentioned in paragraph 650 above. However, in its calculations, the Commission also varied the amounts of the fines according to the duration and geographical extent of each infringement, so that in practice the fines imposed on the undertakings are far from the base rate of 7.5% and still further from a rate of 13%. Consequently, the applicants' argument has no bearing on the amount of the fines actually imposed on them. This is particularly so in the case of the applicant, whose fine for participation in the various market-sharing infringements is much lower than the base rate of 3% applied by the Commission for this category of infringement. Although it is true that, according to the Commission's calculations, the fraction of the fine imposed on the applicant for the price-fixing agreements was slightly in excess of the base rate of 3%, it suffices to state that this is no longer the case following the assessment made by the Court.

652 In those circumstances, even assuming that some of the infringements overlap in part (for example, the agreements on prices within the Poutrelles Committee and some of the agreements on prices on the various national markets) and that there was a relationship between certain infringements (for instance, between the monitoring of orders and deliveries and certain market-sharing agreements), the Court finds, in the exercise of its unlimited jurisdiction, that there are no grounds here for reducing the fine imposed on the applicant, since, in the Court's opinion, the overall amount of the fine, as fixed below, represents an appropriate sanction for all of the infringements in question.

653 Likewise, the Court considers that there are no grounds for adjusting the fine imposed on the applicant in respect of the various price-fixing agreements and concerted actions within the Poutrelles Committee according to the precise duration or the geographical extent of the various infringements which it was found to have committed in 1990.

654 It is true that the matters set out in recitals 232 to 237 of the Decision do not in themselves contain evidence to establish that the participants in the meetings of the Poutrelles Committee concluded an agreement or engaged in a concerted practice of price-fixing during the fourth quarter of 1990.

655 Furthermore, the specific infringements taken into account by the Commission for 1990, in recitals 232 to 237 of the Decision, relate only to the application of an agreement on target prices concerning the first quarter of 1990 (recital 232), an agreement relating to the French market (recital 233), and two instances of concerted practices involving the British market (recitals 234 to 237), and thus appear to have had a more limited geographical scope than those taken into account for 1988 and 1989.

656 However, it is clear from recitals 118 to 121 of the Decision and from the documents cited there that, after broaching, at the meeting on 11 September 1990, the principle of and arrangements for a moderate price increase to be 'probably applied on 1 January' 1991, the members of the Poutrelles Committee continued their discussions at the meeting on 9 October 1990 until they arrived at a consensus on a price increase in the region of DM 20 to 30 on the continental markets during the first quarter of 1991 (see the minutes of that meeting, documents nos 346 to 354 of the file). In addition, the minutes of the meeting indicate that 'in regard to prices, despite some difficulties in certain countries, the levels for the third quarter of 1990 have been continued for the fourth quarter with full application of the new changes'.

657 For those reasons, the Court finds that the argument thus put forward by the applicants at the hearing must be rejected.

— The general level of the fines imposed in the Decision in comparison with other ECSC decisions of the Commission and with the provisions of Article 65(5) of the Treaty

658 In their joint pleading at the hearing, the applicants referred to the Stainless Steel decision in challenging the general level of the fines. That line of argument cannot be upheld.

659 In the first place, all of the infringements taken into account for the fine imposed in the Stainless Steel decision had been committed during the period of manifest crisis. Second, the undertakings have not established in this case that the DG III officials were aware of the practices objected to in the Decision, so that the corresponding extenuating circumstance, recognised in the Stainless Steel decision, cannot be taken into account in the present case. Third, if account is taken of the warning represented, in particular, by the press release mentioned in recital 305 of the Decision, there can be no question, as there was at the time of the Stainless Steel decision, of any possible misunderstanding as to the scope of Article 65(1) of the Treaty.

660 As regards the argument that the combined effect of the Stainless Steel decision and certain other Commission decisions in the 1970s and 1980s suggested that its policy was not to impose heavy fines when applying Article 65(1) of the Treaty, it suffices to point out that the fact that the Commission penalised certain types of infringement in the past with fines of a particular level cannot prevent it from raising that level within the limits indicated in Article 65(5) of the Treaty if that is necessary to ensure the effectiveness of Community competition policy (see, by analogy, the *Pioneer* judgment, cited above, paragraph 109).

661 Nor can the Court accept the argument, advanced at the hearing, to the effect that the general level of the fines is excessive having regard to the differences between the EC Treaty and the ECSC Treaty. Although certain provisions of the

ECSC Treaty, in particular Article 60, in themselves restrict the free operation of competition, the maximum ceiling of 10% of annual turnover of the undertaking in question, provided for by Article 65(5) of that Treaty for more serious restraints of competition, is identical to the maximum ceiling provided for by Article 15(2) of Council Regulation No 17 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The Court also points out that, in this case, Article 65(5) of the ECSC Treaty allows fines up to twice the turnover in the product in question to be imposed.

662 While the applicants, in their joint pleadings, stressed that the infringements were not intended to restrict production, technical development or investment, within the meaning of Article 65(5) of the Treaty, the Court finds that the Commission rightly did not take this into account as an extenuating circumstance. Under the scheme of Article 65(5) of the Treaty, such restrictions are aggravating circumstances allowing the normal ceiling of double the turnover in the product concerned to be exceeded. In the present case, the fine is well below that ceiling.

— The comparison between the fines imposed by the Decision and those imposed by the Cement decision

663 It was also argued in the joint pleadings that, in the Cement decision, the Commission imposed fines of the order of 4% of turnover for infringements regarded as serious and lasting ten years. From this the applicants conclude, on the basis of a recent Commission communication (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 of 14 January 1998, p. 3) ('the Guidelines'), that in the Cement case the Commission applied a basic fine of 2% before applying increases linked to the duration of the infringements. On the basis of the same calculation, the basic rate in the present case would, they argue, come to 6%. The amount of the fines must therefore, according to the applicants, be divided by three.

664 The Court considers that no direct comparison can be made between the general level of the fines applied in the Decision and the level applied in the Cement decision.

665 In the first place, the calculation made in the Decision, which pre-dates the Guidelines, was not carried out by having recourse to the method which is provided for in that communication, involving a basic fine and increases in line with duration.

666 Second, the Cement decision also pre-dates the Guidelines and does not indicate that it would have followed the method which they lay down.

667 Third, the Court considers that the factual and legal framework of the present case is too far removed from that of the Cement case for a detailed comparison of the two decisions to serve any useful purpose in assessing the fine to be imposed on the applicant in the present case.

668 It follows that, subject to what is to be said below, the applicant's arguments relating to the amount of the fines must be rejected in their entirety.

The Court's exercise of its unlimited jurisdiction

669 The Court has already annulled Article 1 of the Decision in so far as it finds that the applicant participated in an agreement to fix prices on the German market (see paragraph 422 above). The fine imposed by the Commission for that infringement was set at ECU 47 800.

670 For the reasons set out in paragraph 451 above, the period from 1 July 1988 to 31 December 1988 must also be excluded in calculating the fine relating to the infringement of price-fixing on the Danish market, which, in the case of the applicant, means a reduction of the fine by ECU 9 100, following the method used by the Commission.

671 The Court has also annulled the increase in the fine imposed on the applicant on account of the allegedly recidivist nature of its conduct, which the Commission calculated at ECU 1 601 000, for the reasons set out in paragraph 614 et seq. above.

672 Finally, for the reasons explained in paragraph 640 et seq. above, the Court considers that the total amount of the fine imposed for the price-fixing agreements and concerted practices should be reduced by 15% in view of the fact that the Commission exaggerated to some extent the anti-competitive effects of the infringements which it found to have occurred. If account is taken of the reductions already mentioned concerning the pricing agreements on the German and Danish markets, that reduction comes to ECU 419 745, following the method of calculation used by the Commission.

673 Applying the Commission's method, the fine imposed on the applicant should therefore be reduced by ECU 2 077 645.

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

675 The Court considers that the Commission's general approach in determining the level of the fines (paragraph 577 above) is justified by the circumstances of the

case. The infringements involving price-fixing and market-sharing, which are expressly prohibited by Article 65(1) of the Treaty, must be treated as particularly serious since they involve direct interference with the essential parameters of competition on the market in question. Likewise, the systems for the exchange of confidential information, in which the applicant is accused of having been involved, had a purpose similar to market-sharing according to traditional flows. All of the infringements taken into account for the purpose of the fine were committed, following the end of the crisis regime, after the undertakings had received appropriate warnings. As the Court has found, the general objective of the agreements and practices in question was precisely to prevent or distort the return to normal competition entailed by the ending of the manifest crisis regime. The undertakings, moreover, were aware of their unlawful nature and deliberately concealed them from the Commission.

676 Having regard to all of the foregoing and the entry into effect, on 1 January 1999, of Council Regulation (EC) No 1103/97 of 17 June 1997 laying down certain provisions concerning the introduction of the euro, the amount of the fine must be fixed at EUR 4 400 000.

The claim for annulment of Article 3 of the Decision

677 The applicant contends that the obligation which Article 3 of the Decision imposes on it to refrain from repeating or continuing any of the acts or behaviour specified in Article 1 and from adopting any measures having equivalent effect must be declared void in consequence of the annulment of Article 1 of the Decision. Article 3, it further claims, is meaningless in its case, since it ceased production of beams in 1993, a fact of which the Commission was informed.

678 The Court finds that the Commission was justified in including, in the operative part of the Decision, the injunction contained in Article 3, given, in particular, that the applicant has contested the infringements concerned and not given an

undertaking not to repeat its anti-competitive conduct. The fact that the applicant stopped producing beams does not prevent the Commission from issuing an injunction in terms whereby the obligation to 'henceforth bring to an end the infringements' applies to the undertakings and associations concerned only 'to the extent that they have not already done so'.

679 The claim for annulment of Article 3 of the operative part of the Decision must therefore be dismissed.

The alternative claim for annulment of the Letter

680 The applicant argues that the Letter provides, in the event of legal proceedings, for an increase in the rate of interest set out in Article 5 of the Decision by 1.5 percentage points if payment is made by instalment (the latter rate being that used by the European Monetary Cooperation Fund in its ecu operations in the month preceding the due date of each annual payment; hereinafter the 'EMCF rate'). This difference, for which adequate reasons were not given, obliges the applicant to bear a financial burden significantly greater than that which it would have had to bear if it had not challenged the Decision. It also amounts to a misuse of powers, since, not being justified on economic grounds, it was intended to prevent the undertakings from exercising their right to judicial protection guaranteed by Articles 33 and 36 of the Treaty or to penalise them should their action fail. Finally, the applicant claims, it is contrary to the principle of equal treatment since it creates discrimination between the undertakings depending on whether or not they contest the Decision before the Court. In this regard the applicant argues that the position of the undertakings which have brought proceedings and applied for recovery of the fine to be suspended for the duration of the proceedings must be compared to the position of undertakings which accept the Decision and pay the fine within the time prescribed. On the other hand, the applicant considers that it cannot be compared to undertakings which, without having challenged the Decision, do not pay their fines within the time prescribed. There is nothing to justify the assumption that the undertakings which have brought proceedings will not comply with the judgment of the Court or, should the proceedings go so far, the judgment of the Court of Justice

dismissing their action. In the applicant's view, it is only in the opposite case that an increase in the rate of interest would be justified.

681 It follows from the wording of Article 5 of the Decision and from the Letter, as well as from the explanations which the defendant has provided during these proceedings, that an undertaking which has chosen to pay the fine by instalments and to bring an action is subject to the EMCF rate until the latest date for payment of each instalment, after which it has the choice of either paying the instalment due or going on, for that instalment, to the EMCF rate increased by 1.5% until the date on which judgment is delivered. Consequently, the application of a rate of interest increased by 1.5 percentage points does not depend on whether an action has been brought before the Court, but solely on whether there has been a delay in payment of the fine attributable to the fact that the party concerned did not pay by the due date but preferred to accept the offer which the Commission made in the Letter to suspend collection of the fine until judgment has been delivered.

682 It must be stressed in this regard that, under Article 39 of the Treaty, actions brought before the Court do not have suspensory effect. It follows that the Commission cannot be required to treat in the same way an undertaking which, whether it has or has not brought an action, pays the fine on its normal due date, where appropriate by making use of the arrangements to pay by instalments at the preferential interest rate which, as here, may have been offered to it by the Commission, and an undertaking which wishes to postpone that payment until a definitive judgment has been delivered. Exceptional circumstances apart, application of default interest at the normal rate must be regarded as justified in this latter case (see Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 141, and the orders of the President in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549 and Case 392/85 R *Finsider* v *Commission* [1986] ECR 959).

683 It must also be pointed out that the possibility offered to the undertakings concerned to pay their fines in the form of five annual instalments subject, until

their due date, to the basic EMCF rate, in conjunction with the possibility of obtaining a suspension of recovery measures in the event of an action being brought, represents an advantage *vis-à-vis* the formula traditionally used by the Commission where an action has been brought before the Community judicature. It follows from the general practice adopted by the Commission that the rate of interest which it demands if payment of the fine is suspended is equal to the rate applied by the EMCF to its ecu transactions in the month prior to adoption of the decision in question, increased by 1.5 percentage points. Choosing to pay by instalments, by delaying the due date for payment of four fifths of the fine, has the effect of postponing application of that rate.

684 The claim for annulment of the Letter must therefore be dismissed as unfounded, without it being necessary to rule on whether that Letter constitutes a separate decision which may be challenged in an action for annulment.

Costs

685 Under Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared or order each party to bear its own costs. Since the action has been only partially successful, the Court considers it fair in the circumstances of the case to order the applicant to bear its own costs and to pay one half of the Commission's costs.

On those grounds,

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

hereby:

1. Annuls Article 1 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as it finds that the applicant participated in a price-fixing agreement on the German market which lasted three months;

2. Fixes the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at EUR 4 400 000;

3. Dismisses the remainder of the action;

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

Bellamy Potocki Pirrung

Delivered in open court in Luxembourg on 11 March 1999.

H. Jung

Registrar

C.W. Bellamy

President

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