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

In Case T-151/94,

British Steel plc, a company incorporated under English law, established in London, represented by Philip G.H. Collins and John E. Pheasant, Solicitors, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

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 James Flynn, Barrister, of the English and Welsh Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment [1]

The facts giving rise to the action

A — *Preliminary observations*

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

2 The applicant, British Steel plc ('British Steel'), is the largest crude steel producer in the United Kingdom. In the business year ending on 31 March 1990, it had a consolidated turnover of UK £5 113 million and its sales of beams in 1990

1 — The grounds of the present judgment are largely identical or similar to those of the Court's judgment of 11 March 1999 in Case T-141/94 *Thyssen* v *Commission* [1999] ECR II-347, with the exception, in particular, of paragraphs 74 to 91, 373 to 378 and 413 to 428 of that judgment, which have no equivalent in the present judgment. Likewise, the infringements of Article 65(1) of the Treaty which the applicant was alleged to have committed on certain national markets are not identical to those which the applicant in *Thyssen* v *Commission* was alleged to have committed. In the present case, the essential reason for the partial annulment of Article 1 of the decision lies in the absence of evidence that the applicant took part in the infringement referred to in paragraph (1) of the operative part of the present judgment.

totalled UK £286.5 million. It was the largest Community producer of beams in 1989.

...

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".

...

British Steel

(a) Exchange of confidential information through the Poutrelles Committee (25)

(b) Price fixing in the Poutrelles Committee (27)

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

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

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

(f) Market sharing, France (3)

(g) Market sharing, Italy (3)

(h) Market sharing British Steel, Ensidesa and Aristrain (8)

(i) Market sharing British Steel and Ferdofin (30)

(j) Harmonisation of extras (x)

...

Article 4

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

...

British Steel plc ECU 32 000 000

...

2 — 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.

Article 6

This Decision is addressed to:

...

— British Steel plc

...'.

...

The alternative claim for annulment of Article 4 of the Decision or, at least, reduction of the fine

...

— The criterion of turnover used in calculating the fine

643 As regards the applicant's argument that, in using the criterion of turnover for the purpose of calculating the fine, the Commission did not take account of a number of factors which might have exaggerated the scale of its turnover in relation to that of its competitors, it must be remembered that under Article 65(5) of the Treaty the Commission is required to take into account the turnover of the undertaking concerned as the basic criterion for calculating the fine. The Treaty is based on the principle that the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition.

644 In the present case, the applicant has failed to establish that the Commission's use of the same percentage figure for turnover in calculating the fine for undertakings involved in the same infringement resulted in any discrimination whatever to its detriment. On the contrary, in the absence of extenuating or aggravating circumstances, or other duly established exceptional circumstances, the Commission is required, by virtue of the principle of equal treatment, to apply, for the purpose of calculating the fine, the same reference rate to undertakings which took part in the same infringement.

645 As regards the applicant's argument that the relevant turnover is the turnover in products actually sold pursuant to the agreements in question and not the turnover in all products of the same type sold by the undertaking, whether or not pursuant to unlawful practices, Article 65(5) of the Treaty provides that the Commission may impose fines equal to 200% of the turnover in the products which were the subject of the agreement, except where the purpose of the agreement is to restrict production, technical development or investment, in which case the fine may be increased to up to 10% of the annual turnover of the undertaking in question.

646 Since the applicant fully participated in agreements and concerted practices which affected the entire ECSC market, the Commission was entitled to take account of all of its beams sales within the Community, adjusting the fines according to the geographic extent of each particular infringement.

...

— The duration of the infringement

669 The Court considers that unlawful conduct manifested by participation in a series of agreements and restrictive practices relating to price-fixing, market-sharing and the exchange of confidential information, within the institutionalised framework of numerous meetings between producers, for a duration of 25 to 30 months, may properly be regarded as being of long duration. Furthermore, contrary to what the applicant claims, it does not appear from the documents before the Court that the Commission took the period prior to 30 January 1988 into account for the purpose of calculating the fine.

...

The Court's exercise of its unlimited jurisdiction

686 The Court has already annulled Article 1 of the Decision in so far as it finds that the applicant participated in an agreement to share the Italian market (see paragraph 419 above). The fine imposed by the Commission for that infringement was set at ECU 252 600.

687 It is necessary to point out that the market-sharing agreement between the applicant and Ferdofin (see paragraph 434 et seq. above) concerned the United Kingdom market alone, not the Italian market. Contrary to the Commission's calculations, it is thus necessary to exclude the Italian market from the factors to be taken into account in the calculation of the fine. This involves a reduction of ECU 1 684 200, following the method used by the Commission.

688 For the reasons set out in paragraph 477 [3] above, the period from 1 July 1988 to 31 December 1988 must also be excluded in calculating the fine relating to the infringement of price-fixing on the Danish market, which, in the case of the applicant, means a reduction of the fine by ECU 40 100, following the method used by the Commission.

689 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 8 040 100, for the reasons set out above (see paragraph 633 et seq.). [4]

690 It must also be pointed out that neither Article 1 of the Decision nor the first table setting out the various price-fixing agreements, contained in recital 314 of the Decision, mentions the applicant as having participated in an agreement to fix prices on the Spanish market. It is clear from the detailed explanations given by the Commission during the proceedings that a fine amounting to ECU 320 800 was imposed on the applicant for that infringement. According to the Commission, which refers to recitals 174 and 276 of the Decision, it was apparently as the result of a mistake that this factor was not included in recital 314 and Article 1 of the Decision.

691 Since the operative part of the Decision does not state that the applicant participated in that infringement, it cannot be taken into account in the

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

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

calculation of the fine. The fine must therefore be reduced by ECU 320 800, following the method of calculation used by the Commission.

692 Finally, for the reasons explained above (paragraph 652[5] et seq.), 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 reduction already mentioned concerning the pricing agreements on the Spanish and Danish markets, that reduction comes to ECU 1 669 200, following the method of calculation used by the Commission.

693 Applying the Commission's method, the fine imposed on the applicant should therefore be reduced by ECU 12 007 000.

694 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.

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

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

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.

696 Having regard to all of the foregoing and the entry into effect, on 1 January 1999, of Council Regulation (EC) No 1103/97 of 17 June 1997 laying down certain provisions concerning the introduction of the euro (OJ 1997 L 162, p. 1), the amount of the fine must be fixed at EUR 20 000 000.

The alternative claim for repayment of the fine, plus default interest

697 As regards the claim for repayment of the fine, plus default interest, in the event of its being annulled or reduced, suffice it to state that it is for the Commission to take the necessary steps to comply with the present judgment, in accordance with Article 34 of the Treaty.

...

On those grounds,

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

hereby:

1. Annuls Article 1 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as it finds that the applicant participated in an agreement to share the Italian market which lasted three months;

2. Sets the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at EUR 20 000 000;

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