JUDGMENT OF THE COURT (Fifth Chamber)
2 October 2003 *

In Case C-182/99 P,

Salzgitter AG, formerly Preussag Stahl AG, established in Salzgitter (Germany), represented by H. Satzky and C. Frick, Rechtsanwälte, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 11 March 1999 in Case T-148/94 *Preussag* v *Commission* [1999] ECR II-613, seeking to have that judgment set aside in part,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: German.

THE COURT (Fifth Chamber),

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

Advocate General: C. Stix-Hackl,

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

having regard to the Report for the Hearing,

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

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

gives the following

Judgment

1 By application lodged at the Court Registry on 18 May 1999, Salzgitter AG, formerly Preussag Stahl AG, brought an appeal under Article 49 of the ECSC Statute of the Court of Justice against the judgment of the Court of First Instance of 11 March 1999 in Case T-148/94 *Preussag* v *Commission* [1999] ECR II-613

('the judgment under appeal'), by which the Court of First Instance dismissed in part its application for annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1) ('the contested decision'). By that decision, the Commission imposed a fine on the appellant under Article 65 of the ECSC Treaty.

Facts and the contested decision

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

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

4 Long before that date, the Commission had announced in various communications and decisions that the quota system was to be abandoned, pointing out that the end of that system would mean a return to a market characterised by free competition between undertakings. However, the sector continued to be affected by excess production capacity which, according to expert opinion, had to undergo a sufficient and rapid reduction to enable undertakings to meet world competition.

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

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

7 On 16 February 1994, the Commission adopted the contested decision, by which it found that 17 European steel undertakings and one of their trade associations had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) of the ECSC Treaty. By that decision, it imposed fines on 14 undertakings for infringements committed between 1 July 1988 and 31 December 1990.

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

8 On 11 April 1994, the present appellant brought an action before the Court of First Instance for annulment of the contested decision.

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

Forms of order sought by the parties

10 The appellant claims that the Court should:

— set aside the judgment under appeal, in so far as it dismissed its application for annulment of the contested decision;

— annul Articles 1, 3 and 4 of that decision, in so far as they were upheld by the judgment under appeal;

— order the Commission to pay the costs incurred at first instance and in the present appeal proceedings;

in the alternative:

— reduce the amount of the fine imposed on the appellant in Article 4 of the contested decision, which was fixed at EUR 8 600 000 in paragraph (2) of the operative part of the judgment under appeal;

in the further alternative:

— refer the case back to the Court of First Instance.

11 The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

The grounds of appeal

12 The appellant raises seven grounds of appeal:

1. infringement of the ECSC Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance as regards the composition of the Chamber which deliberated the case at the final stage and signed the judgment under appeal;

2. infringement of the ECSC Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance as a result of the refusal to order a measure of inquiry;

3. legally defective finding as regards the adoption and content of the contested decision;

4. infringement of the appellant's rights of defence;

5. infringement of Article 15 of the ECSC Treaty as regards the statement of reasons given for the calculation of the fines in the contested decision;

6. infringement of Article 65 of the ECSC Treaty as a result of the misinterpretation of the concept of normal competition;

7. infringement of Article 65 of the ECSC Treaty as regards the assessment of the exchange of information.

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

The appeal

The first ground of appeal

14 The first ground of appeal alleges infringement of Article 46 of the ECSC Statute of the Court of Justice in conjunction with Article 31 of that Statute and Articles 32(1) and (3), 33(3) and (5) and 82(2) of the Rules of Procedure of the Court of First Instance in that certain members of the Chamber of the Court of First Instance designated to give judgment in the case at issue did not take part in the final stage of the deliberations and did not sign the judgment under appeal.

15 Article 31 of the ECSC Statute of the Court of Justice is worded as follows:

'Judgments shall be signed by the President, the Judge acting as Rapporteur and the Registrar. They shall be read in open court.'

16 The first and second paragraphs of Article 46 of the ECSC Statute of the Court of Justice provide:

'The procedure before the Court of First Instance shall be governed by Title III of this Statute, with the exception of Articles 41 and 42.

Such further and more detailed provisions as may be necessary shall be laid down in the Rules of Procedure established in accordance with Article 32d(4) of the Treaty.'

17 Article 32(1) and (3) of the Rules of Procedure of the Court of First Instance are worded as follows:

'1. Where, by reason of a Judge being absent or prevented from attending, there is an even number of Judges, the most junior Judge within the meaning of Article 6 shall abstain from taking part in the deliberations unless he is the Judge-Rapporteur. In this case, the Judge immediately senior to him shall abstain from taking part in the deliberations.

...

...

3. If in any Chamber the quorum of three Judges has not been attained, the President of that Chamber shall so inform the President of the Court of First Instance who shall designate another Judge to complete the Chamber.'

18 Article 33(1) to (5) of those Rules provides:

'1. The Court of First Instance shall deliberate in closed session.

2. Only those Judges who were present at the oral proceedings may take part in the deliberations.

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

...

5. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court of First Instance. Votes shall be cast in reverse order to the order of precedence laid down in Article 6.'

19 According to Article 82(2) of those Rules:

'The original of the judgment, signed by the President, by the Judges who took part in the deliberations and by the Registrar, shall be sealed and deposited at the Registry; the parties shall be served with certified copies of the judgment.'

20 The appellant submits that the judgment under appeal is vitiated by an infringement of the ECSC Statute of the Court of Justice and of the Rules of Procedure of the Court of First Instance because the President A. Kalogeropoulos and the Judge C.P. Briët, who had both taken part in the oral procedure and the initial stage of the deliberations, did not sign the judgment under appeal.

21 Paragraph 69 of the judgment under appeal states in this connection:

'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 mandates 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.'

22 The appellant submits that, given the volume of the case-file, the expiry of the mandates of Mr Kalogeropoulos and of Mr Briët constituted neither a case of absence nor a case of prevention from attending justifying the fact that they did not sign the judgment under appeal. It claims that, otherwise, the composition of a Chamber may be influenced by the timing of the conclusion of deliberations.

23 The appellant also points out that the guarantee of a lawfully constituted court, which is a corollary of the principle of the rule of law, applies to the composition of the Chambers of the Court of First Instance.

24 The Commission refers to Article 33(5) of the Rules of Procedure of the Court of First Instance, according to which the judges who have taken part in the deliberations, within the meaning of Article 82(2) of those Rules, are those who took part in the final discussion and casting of votes. The participation of judges in the initial stage of the deliberations is therefore not conclusive in this connection.

25 The Commission takes the view that the criticism of the reference, in paragraph 69 of the judgment under appeal, to Article 32 of the Rules of Procedure of the Court of First Instance is unfounded. It is not always possible to determine from the outset whether the final discussion and the vote on the various questions to be dealt with will take place before or after expiry of the mandates of members of a Chamber.

26 The Commission contends that the principle of the guarantee of a lawfully constituted court was not infringed since the judges who were to give the final ruling on the case were determined at the outset in the clearest and most precise manner possible by the composition of the Chamber. The fact that the deliberations had not yet been concluded when two judges' mandates expired in September 1998 does not cast doubt on that conclusion.

27 The appellant challenges the Commission's reference to Article 33(5) of the Rules of Procedure of the Court of First Instance, which governs only the final stage of the deliberations. In contrast, Article 82(2) of those Rules relates to the deliberations as a whole and requires that the judges taking part in the deliberations sign the judgment.

Findings of the Court

28 Under Article 10(1) of its Rules of Procedure, the Court of First Instance is required to set up Chambers composed of three or five Judges and to decide which Judges shall be attached to them. Article 10(2) of those Rules states that the composition of the Chambers is to be published in the *Official Journal of the European Communities*.

29 Under Article 12 of its Rules of Procedure, the Court of First Instance is required to lay down criteria by which cases are to be allocated among the Chambers. Following an amendment made to those Rules on 15 September 1994 (OJ 1994 L 249, p. 17), that article now states that this decision is to be published in the *Official Journal of the European Communities*.

30 When the action in Case T-148/94 was brought, the case was assigned to the Third Chamber, Extended Composition, as composed at that time (see notice of 30 July 1993, OJ 1993 C 206, p. 7), in accordance with the criteria laid down by the Court of First Instance on 1 July 1993.

31 Following the triennial partial replacement of the judges of the Court of First Instance in 1995 and the change in the composition of the Chambers decided on as a result by the Court of First Instance at the Plenary Meeting of 19 September 1995 (see notice of 19 October 1995, OJ 1995 C 274, p. 11), the case was reassigned to the Second Chamber, Extended Composition, of the Court of First Instance with effect from 1 October 1995. That information was communicated to the parties by letter of the Registrar of the Court of First Instance of 10 October 1995.

32 The case subsequently remained pending before that Chamber as composed in accordance with the decisions of the Court of First Instance (see notices of 5 October 1996, OJ 1996 C 294, p. 10; of 12 July 1997, OJ 1997 C 212, p. 25; and of 6 September 1997, OJ 1997 C 271, p. 14) until the opening of the oral procedure. It was the Judges attached to that Chamber in the composition laid down in the most recent of those decisions at the time of the opening of the oral procedure who actually constituted the bench.

33 In accordance with the second paragraph of Article 18 of the ECSC Statute of the Court of Justice, which also applies to the Court of First Instance pursuant to Article 44 of that Statute, decisions of the Court of First Instance are valid only if an uneven number of its members is sitting in the deliberations, and decisions of Chambers composed of three or five judges are valid only if they are taken by three judges. Article 32 of the Rules of Procedure of the Court of First Instance sets out how those rules are to be applied.

34 Contrary to what the appellant claims, the volume of the case-file cannot justify excluding application of the provisions referred to in the preceding paragraph where, after deliberation of a case has begun, two of the judges of whom a Chamber is initially composed are definitively prevented from exercising their functions as a result of the expiry of their mandates.

35 According to Article 33(5) of the Rules of Procedure of the Court of First Instance, the relevant time in determining whether the provisions of those Rules relating to deliberations have been complied with is that of adoption, following final discussion, of the conclusions determining the Court's decision.

36 In the present case, the Second Chamber, Extended Composition, of the Court of First Instance therefore reached a valid decision in a composition reduced to three members following the expiry, after the oral procedure and the initial stage of the deliberations, of the mandates of two of the five members of whom that Chamber was initially composed. The reduction in the number of judges taking part in the deliberations, which was made in compliance with the second paragraph of Article 18 of the ECSC Statute of the Court of Justice, is not inconsistent with Article 10 of the Rules of Procedure of the Court of First Instance, which relates to the composition of Chambers and the publication thereof.

37 It follows that the first ground of appeal is unfounded.

The second ground of appeal

38 The second ground of appeal alleges infringement of Article 24 of the ECSC Statute of the Court of Justice in conjunction with Article 65 of the Rules of Procedure of the Court of First Instance in that that Court did not allow the

appellant's application, referred to in paragraph 109 of the judgment under appeal, for production, for consultation purposes, of the original minutes of the Commission meeting during which the contested decision was adopted ('the minutes').

39 The Court of First Instance, the appellant argues, was wrong to limit itself to interpreting extracts from the minutes even though those extracts were contradictory and the minutes make no reference, in point XXV, to a proposal by one or more members of the Commission, even though such a proposal is required under the first sentence of Article 6 of the Commission's Rules of Procedure as laid down in Commission Decision 93/492/Euratom, ECSC, EEC of 17 February 1993 (OJ 1993 L 230, p. 15) ('the 1993 Rules of Procedure'), or to the result of the vote.

40 The Commission contends that this ground of appeal is inadmissible since it is for the Court of First Instance alone to determine the facts and to assess what value is to be attributed to the evidence submitted to it.

Findings of the Court

41 It is for the Community judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced. As regards the Court of First Instance, it follows from Article 49 read in conjunction with Article 65(b) of its Rules of Procedure that a request for production of documents is a measure of inquiry which the Court may order at any stage of the proceedings (Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, paragraphs 49 and 50).

42 In paragraph 142 of the judgment under appeal, the Court of First Instance examined the photocopy of the minutes which had been submitted to it and concluded that the fact that the first page of that document bore the stamp 'certified to be a true copy, Secretary-General Carlo Trojan' and that this stamp bore the original signature of Mr Trojan, the titular Secretary-General of the Commission, was sufficient to establish that the photocopy was a true copy of the original.

43 In principle, the assessment by the Court of First Instance of the probative value of a document may not be subjected to review by the Court in appeal proceedings. As is clear from Article 32d(1) CS and Article 51 of the ECSC Statute of the Court of Justice, an appeal lies on a point of law only. The Court of First Instance therefore has sole jurisdiction to find and appraise the relevant facts and to assess the evidence, except where those facts and that evidence have been distorted (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 49 and 66; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 194; and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 69).

44 Given that this copy of the minutes was available to the Court of First Instance, which it accepted as being a certified true copy of the original, it was under no obligation whatsoever to adopt a further measure for taking evidence in order to obtain the original if it formed the view that such a measure was unnecessary to establish the truth (see, to that effect, *Limburgse Vinyl Maatschappij*, cited above, paragraph 404).

45 The interpretation of the content of the minutes involved an interpretation of facts which is not subject to review by the Court in an appeal.

46 It follows that the second ground of appeal is in part inadmissible and in part unfounded.

The third ground of appeal

47 By its third ground of appeal, the appellant submits that the Court of First Instance's finding that the contested decision had been adopted properly and its findings with regard to the content of that decision are not free from errors in law.

48 The contested decision did not itself, the appellant argues, result from the minutes submitted to the Court of First Instance. However, on the basis of unchecked statements of the Commission, the Court of First Instance concluded, in paragraph 139 of the judgment under appeal, that the content of that decision was evident from a document kept in physical proximity to the minutes. That is not a sufficient basis for applying the 'presumption of validity which Community measures enjoy', referred to by the Court of First Instance, since, in the absence of properly authenticated minutes, the content of the Community measure is uncertain. Nor is it clear from the photocopies of the minutes submitted that the requisite quorum was achieved when the College of Commissioners adopted the contested decision.

49 The Commission contends that this ground of appeal is inadmissible since the appellant is calling into question the determination of facts and the assessment of evidence, for which the Court of First Instance has sole jurisdiction.

50 In the alternative, the Commission states that the first paragraph of Article 16 of the 1993 Rules of Procedure does not require that acts adopted by the Commission form part of the minutes but that they be 'annexed' to them.

51 The Commission takes the view that the argument that it cannot be ascertained from the photocopies of the minutes whether the requisite quorum was achieved is likewise inadmissible. The Court of First Instance established that this had been achieved following a detailed examination, in paragraphs 111 to 124 of the judgment under appeal, of the evidence which it had requested in order to assess the present appellant's heads of complaint in that connection.

Findings of the Court

52 In order to establish whether the contested decision was properly authenticated, the Court of First Instance, in paragraphs 138 to 142 of the judgment under appeal, carried out various assessments of the facts and the evidence which are not subject to review by the Court in appeal proceedings.

53 Thus, in paragraph 139 of the judgement under appeal, the Court of First Instance assumed that documents C(94)321/2 and C(94)321/3 were annexed to the minutes. In paragraph 140, it found that it had not been established that there was any substantive difference between the notified version of the contested decision and that annexed to the minutes. In paragraph 141, the Court of First Instance ruled that documents C(94)321/2 and C(94)321/3 had to be regarded as having been authenticated by the signatures of the President and the Secretary-General on the first page of the minutes. In paragraph 142, it decided that the certification of authenticity by the titular Secretary-General of the Commission provided sufficient proof for legal purposes that the original version of the minutes bears the original signatures of the President and the Secretary-General of the Commission.

54 With respect to the reference, in paragraph 141 of the judgment under appeal, to the presumption of validity enjoyed by the measures of Community institutions (see, inter alia, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48), suffice it to state that the Court of First Instance did not

draw from that presumption any factual or legal conclusion but relied solely on its own assessment of the facts and evidence to conclude that the contested decision had been properly authenticated.

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

56 Consequently, it must be held that the third ground of appeal is in part inadmissible and in part unfounded.

The fourth ground of appeal

57 The fourth ground of appeal alleges infringement of the appellant's rights of defence.

58 This ground is directed against paragraph 88 of the judgment under appeal, which is worded as follows:

'Admittedly, the DG IV [Directorate-General for "Competition" of the Commission ("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 takes the view 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.'

59 According to the appellant, the Court of First Instance refused to accept that the inadequacy of the Commission's investigation into the conduct of its own services constituted an infringement of the rights of the defence. In that regard, the Court of First Instance based its conclusion, in paragraph 88 of the judgment under appeal, essentially on the finding that DG IV was entitled to rely on the documents of DG III without verifying them itself and thus erred in law.

60 The Commission contends that this ground of appeal is inadmissible and claims that the Court of First Instance's finding, in paragraph 88 of the judgment under appeal, that the explanations provided by DG III were precise and detailed and that DG IV had no reason to verify them itself is a finding of fact which is not subject to review by the Court.

Findings of the Court

61 In paragraphs 76 and 77 of the judgment under appeal, the Court of First Instance observed that, in accordance with the principles of sound administration and equality of arms, the Commission is under an obligation to examine seriously a competition file incriminating undertakings in order to determine the extent to which allegations of importance for the defence of the undertakings in question and relating to the conduct of its own departments are well founded.

62 The Court of First Instance examined the relevant documents on the case-file in paragraphs 78 to 86 of the judgment under appeal. In paragraph 87 of that judgment, it held that it followed from all those documents that the Commission had taken proper account of the comments and documents submitted by the undertakings concerned at their hearing and observed that those comments and documents had been forwarded to DG III for commentary and explanations and that, on two occasions, DG III had been asked to explain its alleged 'involvement' in the practices in question.

63 It is clear that, in paragraphs 78 to 87 of the judgment under appeal, the Court of First Instance assessed facts and evidence.

64 The statement in paragraph 88 of the judgment under appeal, which the appellant challenges, that a Commission directorate is not obliged to verify by other means the precise and detailed explanations provided by another directorate does not cast doubt on the Court of First Instance's findings as to the seriousness of the investigation carried out.

65 It follows that the fourth ground of appeal must be rejected.

The fifth ground of appeal

66 The fifth ground of appeal alleges infringement of Article 15 of the ECSC Treaty in that the Court of First Instance did not censure the inadequate statement of reasons given in the contested decision with regard to the calculation of the fines.

67 This ground of appeal is, in particular, directed against paragraph 666 of the judgment under appeal, which is worded as follows:

'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 [contested] decision, but are rather the translation into figures of the criteria set out in [that] decision where they are themselves capable of being quantified.'

68 The appellant takes the view that the Court of First Instance infringed Article 15 of the ECSC Treaty in holding that the Commission had given sufficient reasons to explain the level of the fine, even though the contested decision did not contain the arithmetical formulas which, according to the findings of the Court of First Instance, had been used to calculate that level.

69 The Commission contends that this ground of appeal is unfounded. Whilst it would have been desirable for the arithmetical formulas used to calculate the level of the fine to be set out in the contested decision, there was no obligation to do so.

Findings of the Court

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

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

72 In the present case, the Court of First Instance was correct in law to take the view, in paragraph 662 of the judgment under appeal, that the contested decision contains, in recitals 300 to 312, 314 and 315 of its grounds, an adequate and relevant statement of the factors taken into account in assessing the general gravity of the various infringements alleged.

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

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

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

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

The sixth ground of appeal

77 The sixth ground of appeal alleges infringement of Article 65 of the ECSC Treaty in that the Court of First Instance misinterpreted the concept of normal competition.

78 According to the appellant, the Court of First Instance erred in law in refusing to find that the interpretation of Article 65(1) of the ECSC Treaty must take into account the normative relationship between that provision and other rules in that Treaty, such as Articles 60 and 46 to 48. Since it knew that DG III itself took the view that some exchange of information between the undertakings in the steel industry was necessary to enable the Commission to fulfil the tasks assigned to it by the ECSC Treaty, the Court of First Instance ought to have concluded that the normal competition protected by Article 65(1) of that Treaty cannot be treated in the same way as the competition which Article 85(1) of the EC Treaty (now Article 81(1) EC) seeks to guarantee.

79 The Court of First Instance, the appellant submits, found that an exchange of views between the undertakings on their price forecasts, which was regarded as legitimate by DG III, could have led to increases in price of the same scale as those found on the market at the time of the relevant facts. It reduced the fine by 15% in order to take account of that factor. However, the Court of First Instance erred in law in holding that it was unnecessary to establish to what extent the undertakings were able to exchange individual data in order to prepare for the consultation meetings with the Commission, without infringing Article 65(1) of the ECSC Treaty. The fact that DG III encouraged the undertakings in the sector to implement a degree of transparency ought to have been taken into account when interpreting the concept of normal competition and not only when assessing the impact of the infringement complained of.

80 The Commission contends that this ground of appeal is unfounded. First of all, it points out that it cannot define the concept of normal competition provided for in the ECSC Treaty as it pleases. The conduct of DG III, which may have created a certain ambiguity as regards the scope of that concept, could by no means have altered the content of that concept. The Court of First Instance was therefore right to assess, in paragraphs 268 to 289 of the judgment under appeal, the concept of normal competition solely on the basis of the ECSC Treaty, taking due account of Articles 60 and 46 to 48 of that Treaty.

81 The Commission further submits that there is a big difference between the exchange of information which DG III recognised as being necessary and the regular distribution of up-to-date, broken-down individual figures relating to orders and deliveries within the Eurofer Committee, called the 'Poutrelles Committee' ('the Poutrelles Committee'), and within the association of manufacturers of laminated products, the Walzstahl-Vereinigung, which distribution the Court of First Instance classed as an infringement of the competition rules in paragraphs 382 to 403 of the judgment under appeal.

Findings of the Court

82 In paragraphs 268 to 275 of the judgment under appeal, the Court of First Instance examined the context of Article 65(1) of the ECSC Treaty. In paragraphs 276 to 285, it also examined whether Article 60 of that Treaty was relevant to the assessment, in the light of Article 65(1), of the conduct alleged against the appellant. In paragraph 286 of the judgment under appeal, it examined Articles 46 to 48 of the ECSC Treaty and concluded, in the following paragraph, that none of the articles referred to in this paragraph allowed the undertakings to breach the prohibition in Article 65(1) by concluding agreements or participating in concerted practices relating to price-fixing such as those at issue in the present case.

83 The Court finds that all of the reasons set out by the Court of First Instance in that regard were correct in law.

84 However, in so far as this ground of appeal must be understood as referring to the involvement of DG III in the infringements of which the appellant is accused, it is appropriate to observe that the appellant invokes no argument calling into question the assessment made by the Court of First Instance in paragraphs 548 to 615 of the judgment under appeal. In those paragraphs, the Court of First Instance demonstrated that the undertakings concerned had concealed from the Commission the existence and content of the discussions adversely affecting competition which they had held and of the agreements which they had concluded. In paragraph 613 of the judgment under appeal, it stated that, in any event, the provisions of Article 65(4) of the ECSC Treaty have an objective content and are binding on both undertakings and the Commission, which cannot exempt those undertakings.

85 It follows from those findings that the sixth ground of appeal is unfounded.

The seventh ground of appeal

86 The seventh ground of appeal alleges infringement of Article 65 of the ECSC Treaty as regards the assessment of the exchange of information.

87 This ground is directed, in particular, against paragraphs 373 and 690 to 693 of the judgment under appeal, which are worded as follows:

> '373 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 systems, 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 principles laid down by 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* [[1994] ECR II-957], 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 [contested] decision.
>
> ...

690 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.

691 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.

692 The Court accordingly finds that, in recital 303 of the [contested] 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.

693 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.'

88 The appellant submits that the Court of First Instance infringed Article 65 of the ECSC Treaty in finding that the exchange of information complained of was in itself a practice restricting competition within the meaning of that article. Moreover, the Commission itself acknowledged that it was not a separate infringement, as is shown by paragraph 373 of the judgment under appeal. The Court of First Instance having found, in paragraphs 691 and 692 of that judgment, that the Commission had exaggerated the impact on price-fixing of the exchange of information relating to prices, it should have set aside, or at least considerably reduced, the fine of ECU 2.58 million imposed in respect of the exchange of information relating to orders and deliveries. By failing to do so, the Court of First Instance also infringed the principle of *non bis in idem*.

89 The Commission contends that this ground of appeal is inadmissible inasmuch as it is directed against the statements of the Commission summarised in paragraph 373 of the judgment under appeal. The role of the Court of First Instance in connection with the action brought before it by the appellant was to review the contested decision and it was not bound by the statements made by the Commission during the procedure.

90 The ground of appeal is also unfounded in so far as it concerns the effects of the exchange of information. In the Commission's view, paragraphs 691 and 692 of the judgment under appeal are not concerned with the exchange of up-to-date, broken-down individual figures relating to orders and deliveries which was penalised by the contested fine but with a merely general and non-binding exchange of views on the undertakings' price expectations of the kind regarded as legitimate by DG III. The fact that the price-fixing agreements would have had less of an economic impact if the undertakings had confined themselves to such an exchange of views is irrelevant to the fixing and the calculation of the fine imposed as a result of the appellant's participation in the exchange of confidential information within the Poutrelles Committee and the Walzstahl-Vereinigung.

91 The Commission takes the view, moreover, that the ground of appeal based on the principle of *non bis in idem* is a new plea and that, as such, it is inadmissible. It claims, alternatively, that the ground of appeal is unfounded on the basis that, since the exchange of information constituted a separate infringement, it was, in its view, entitled to impose a separate fine.

92 In its reply, the appellant submits that the head of complaint based on the principle of *non bis in idem* can be raised only at the appeal stage. It was only following a written question put by the Court of First Instance that the Commission returned to its position that the exchange of information constituted a separate infringement of Article 65 of the ECSC Treaty.

93 The appellant also submits that, by ruling on the question whether the exchange of information constituted a separate infringement even though that question had not been submitted to it for examination, the Court of First Instance ruled *ultra petita* and thus infringed the Rules of Procedure.

94 With respect to the taking into account, for the purpose of assessing the fine, of the effect of the exchange of information relating to orders and deliveries, the appellant submits that, in paragraph 691 of the judgment under appeal, the Court of First Instance held that it could not be excluded that even a legitimate exchange of information on prices could have led to parallel price increases. Thus, not only was the impact of the price-fixing agreements exaggerated but also that of the exchange of information. As a result, the fine relating to the exchange of information ought to have been reduced also.

95 In its rejoinder, the Commission submits that, since the appellant challenged the contested decision in its entirety, the issue of the exchange of information was likewise raised before the Court of First Instance and that Court did not rule *ultra petita* in adopting a position on that issue.

Findings of the Court

96 It must be examined, first of all, whether the Court of First Instance ruled *ultra petita* in determining whether the exchange of information had been treated as a separate infringement in the contested decision, next, whether it erred in law in holding that the exchange was a separate infringement and, finally, whether it was right not to take account of the effect of that exchange when assessing the penalty.

97 As the Court of First Instance pointed out in paragraph 363 of the judgment under appeal, the appellant claimed before it that it had not acted in breach of Article 65 of the ECSC Treaty by participating in the information exchange systems operated within the Poutrelles Committee.

98 It was in connection with the examination into whether those systems were anti-competitive and, therefore, without ruling *ultra petita* that the Court of First Instance determined whether the contested decision treated the exchange of information as a separate infringement.

99 That review was intended to enable the Court of First Instance to decide whether the penalty imposed by the Commission on the appellant was appropriate in view of the various infringements which it was found to have committed. It follows that, by claiming that the Court of First Instance infringed the principle of *non bis in idem* as regards participation in the information exchange, the appellant is merely criticising the judgment under appeal and not extending the scope of the action on the substance at the appeal stage. That limb of the ground of appeal is therefore admissible.

100 In order to determine whether the information exchange system in which the appellant participated had the effect of restricting competition, the Court of First Instance examined various factors. It thus found in the judgment under appeal that the information distributed was detailed (paragraph 383) and had been updated and sent out frequently (paragraph 384), that the information had been sent only to a certain number of manufacturers, to the exclusion of consumers and other competitors (paragraph 387), that the products in question were homogenous (paragraph 388), that the structure of the market was oligopolistic (paragraph 389) and that the information had given rise to discussions and criticism (paragraph 391).

101 In paragraph 392 of the judgment under appeal, the Court of First Instance concluded that the information received under the arrangements in question was capable of having a significant influence on the conduct of the undertakings.

102 The findings made in paragraphs 383 to 391 of the judgment under appeal and the conclusion drawn in paragraph 392 are assessments of facts, which are not subject to review by the Court in appeal proceedings.

103 In the light of those assessments of fact, the Court of First Instance did not err in law in concluding, in paragraphs 396 and 397 of the judgment under appeal, that the information exchange systems in question tended to prevent, restrict or distort normal competition within the meaning of Article 65(1) of the ECSC Treaty by enabling the participating manufacturers to substitute practical cooperation between them for the normal risks of competition.

104 Having accepted that that infringement was separate, the Court of First Instance was correct and did not infringe the principle of *non bis in idem* in ruling that it could be taken into account for the purpose of calculating the fine.

105 The appellant complains, moreover, that the Court of First Instance failed, with regard to the exchange of information, to take account of the fact that the economic effects of the infringement and those of conduct envisaged and accepted by the Commission were identical, as it did with regard to the price-fixing agreements. In paragraph 691 of the judgment under appeal, the Court of First Instance found that there may be economic justification for taking account, for the purpose of assessing the effects of a price-fixing agreement, of the exchanges of views between undertakings on price forecasts, regarded as legitimate by DG III, as such exchanges of views may lead to parallel conduct which, though having the same economic effect as such an agreement, does not constitute an anti-competitive practice contrary to the ECSC Treaty.

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

107 On the contrary, as is clear from paragraph 603 of the judgment under appeal, the only exchange of information with regard to orders and deliveries of which the Commission was aware related to rapid statistics, 'aggregated at the level of

the undertakings,... broken down for each product and national market of destination, with the result that no undertaking could calculate the market share of its competitors'.

108 If the Court of First Instance took the view, in paragraph 397 of the judgment under appeal, that the information exchange systems in question were not covered by that which the Commission regarded as permissible in relation to the exchange of information, this was precisely because they had a different economic effect from that of information such as rapid statistics, in so far as 'the arrangements in question clearly affected the participants' decision-making independence' (paragraph 390 of the judgment under appeal), which necessarily precludes any possibility of independent individual decisions having the same content.

109 It follows that the seventh ground of appeal is unfounded.

110 It follows from all of the foregoing that the appeal must be dismissed.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Salzgitter AG to pay the costs.**

Wathelet **Edward** **La Pergola**

Jann von Bahr

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber