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

In Case T-137/94,

ARBED SA, a company incorporated under Luxembourg law, established in Luxembourg, represented by Alexandre Vandencasteele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Paul Ehmann, 19 Avenue de la Liberté,

applicant,

v

Commission of the European Communities, represented initially by Julian Currall, of its Legal Service, and Géraud 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 Jean-Yves Art, of the Brussels 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: French.

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 According to the Decision (recital 12(a)), ARBED SA (hereinafter 'ARBED') owns, directly or indirectly, all the shares in TradeARBED SA (hereinafter 'TradeARBED'), which carries on the business of distributing ARBED's steel

1 — Only the grounds of the judgment which the Court considers it appropriate to publish are reproduced here. The remaining paragraphs are broadly identical or similar to those in the judgment of 11 March 1999 in Case T-141/94 *Thyssen* v *Commission* [1999] ECR II-347, with the exception of, in particular, paragraphs 74 to 120, 413 to 422, 566 to 574 and 614 to 625 of that judgment, which have no equivalent in the present judgment. Likewise, the infringements of Article 65(1) of the Treaty which the applicant is alleged to have committed in certain national markets are not the same as those which the applicant in *Thyssen* v *Commission* is alleged to have committed. In the present case, the partial annulment of Article 1 of the Decision is based essentially on the fact that there is no evidence that the applicant participated in the infringement referred to in paragraph 1 of the operative part of the present judgment.

products. In 1990 ARBED had a consolidated turnover of LUF 208 760 million, of which LUF 8 541 million, or ECU 201 million, were for sales of steel beams in the Community.

...

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".

TradeARBED

(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 (6)

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

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

(g) Market-sharing, France (3)

(h) Market-sharing, Germany (6)

(i) Market-sharing, Italy (3)

(j) Harmonisation of extras (x)

(k) Price-fixing on the French market

...

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:

...

ARBED SA	ECU 11 200 000

...

2 — The date mentioned 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:

...

— ARBED SA

...'.

Principal claim: annulment of the Decision

...

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

Summary of the parties' arguments

73 The applicant observes that in the present case it is being ordered to pay a fine for having committed the 'infringements described in Article 1 [of the Decision]

which took place after 30 June 1988', whereas, according to the same article, it did not participate in any of the infringements in question, which were committed by TradeARBED, its subsidiary. The question, therefore, does not concern the circumstances in which a subsidiary's conduct may be imputed to the parent company, but whether the Commission may address to the parent company a decision imposing on it a fine calculated on the basis of its turnover without ever having imputed to it, in the administrative proceedings or even in the Decision, the conduct which it condemns.

74 In the present case the Commission never attributed to ARBED the line of conduct adopted by its subsidiary TradeARBED between 1988 and 1990, and it is apparent from the Decision as a whole that only TradeARBED was implicated by the Commission. The statement of objections was sent only to TradeARBED, without any indication that the Commission also intended to institute proceedings against ARBED. Furthermore, it is apparent from the actual content of the statement of objections that the objections were directed solely at TradeARBED. It was TradeARBED, to the exclusion of the applicant, that replied to the objections, without giving rise to any protest from the Commission. Nor did ARBED take part in the hearing of the undertakings to which the statement of objections was addressed, which took place on 11, 12, 13 and 14 January 1993. The fact that TradeARBED was assisted at the hearing by two of ARBED's lawyers merely reflects the fact that the group's legal department is structurally attached to the parent company and provides services for all the companies in the group, which is the normal practice in a number of large industrial groups. The applicant, however, never instructed a lawyer in order to protect its interests. Finally, the Decision does not accuse ARBED of any infringement of Article 65(1) of the Treaty.

75 Thus by even accepting that TradeARBED's conduct can be attributed to ARBED and justifies the fine imposed on ARBED, which it does not accept, the applicant is condemned by a Commission decision without ever having been given the opportunity properly to put forward its argument in its defence. Such an omission ignores the obligation placed on the Commission to hear the persons concerned before adopting a decision capable of having a serious effect on their interests (see judgments of the Court of Justice in Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, 1080, and Case 85/76 *Hoffmann-*

La Roche v *Commission* [1979] ECR 461, at 511, and judgment of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667).

76 The applicant refers, in particular, to the judgment in Joined Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires 'CB' and Europay* v *Commission* [1994] ECR II-49, where the Court of First Instance held that the Commission cannot replace, with respect to one of the parties to an agreement, a direct statement of objections by the dispatch, in the form of a copy, and solely for the purposes of information, of the statement of objections sent to another party. That authority provides even stronger grounds for the argument that the contested Decision is void in the present case, where not only was the statement of objections not formally addressed to the applicant, but the applicant was never provided with that statement of objections in any form whatsoever.

77 In its reply the applicant further maintains that the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, cited by the Commission, cannot be relied upon against that authority. A breach of the rights of the defence at the stage of the preliminary investigation carried out by the Commission pursuant to Article 11 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17'), which was in issue in *Orkem*, cannot be compared with a breach of the rights of the defence owing to failure to observe the procedural rules in the context of infringement proceedings resulting in fines. In that case, moreover, the Court expressly refrained from deciding whether it is permissible to address a request for information under Article 11(1) of Regulation No 17 to a subsidiary and the decision subsequently adopted pursuant to Article 11(5) of that regulation to the parent company. The Court merely established that both undertakings had replied to the questions put to them without raising the slightest objection to the Commission's practice. That is not so here, where the applicant had no reason to believe that its subsidiary's conduct might be imputed to it and cannot therefore have assented to an alleged imputation by the Commission. The applicant concedes that it could not have failed to be aware of the proceedings instituted against its subsidiary and that it was aware of the statement of objections sent to the latter; since the administrative procedure initiated owing to the subsidiary's conduct was never

directed against the applicant, however, the applicant never had any reason to submit its views on the objections, and more particularly on the possibility that the subsidiary's conduct might be imputed to it.

78 The applicant also observes that in Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, on which the Commission relies, the Court of First Instance showed the importance which it places on the reasons stated for imputing the infringements. Furthermore, the fact that specific reasons are given in the Decision cannot in itself ensure the protection of the rights of the defence.

79 At the hearing the applicant also referred to a letter to its lawyer from Mr Temple Lang (document No 2540 on the file), from which it is apparent that the applicant was denied access to the file.

80 The Commission denies that in the present case it failed to respect the rights of the defence within the meaning ascribed to that principle in *Hoffmann-La Roche*, *Cimenteries CBR and Others* and *CB and Europay*, cited above.

81 The Commission refers to recital 12 of the Decision, where it is stated that TradeARBED 'is a public limited company all of whose shares [are] owned (directly or indirectly) by ARBED...' and that it 'carries on the business of distributing ARBED's steel products', and refers to the judgment of the Court of Justice in Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 49, and to the judgments of the Court of First Instance in Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraphs 311 and 312, and Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50.

82 In the present case it is common ground that ARBED and TradeARBED, despite having separate legal personality, constitute a single undertaking within the

meaning of the case-law referred to above, and this fact is relevant, notwithstanding that the applicant, which does not state why TradeARBED's conduct should not be attributed to it, maintains otherwise. On the basis of the findings in recital 12 of the Decision, it must be presumed that TradeARBED acted within the framework of the agreements and practices in question only on behalf of its parent company. The Commission observes that ARBED's registered office is at the same address as TradeARBED's; that both companies have the same telephone switchboard and the same telex number; that ARBED does not claim at any point in its application that it was kept in ignorance by its subsidiary of the proceedings initiated against it; that representatives of its legal department participated in the hearing on 11, 12, 13 and 14 January 1993; and that ARBED does not appear to experience any difficulty in refuting, paragraph by paragraph, the Commission's allegations against TradeARBED or in justifying its subsidiary's approach at the material time.

83 In its rejoinder the Commission further points out that ARBED could not seriously have felt that it was not concerned by a statement of objections in which it is mentioned on a great many occasions, whether instead of TradeARBED (see points 35, 37, 42, 67, 72, 77, 78, 82, 89, 98, 100, 114, 199, 210, 252, 254, 275, 276, 279, 281, 282, 283, 296, 297, 300 and 344) or as well as its subsidiary (see points 44, 49, 97, 203, 287, 291 and 295). On the other hand, although a large number of documents on which the Commission relied in establishing the infringements committed by TradeARBED refer only to ARBED, its subsidiary did not challenge that attribution at any point in the proceedings. TradeARBED thus accepted by implication that it had acted with ARBED as a single undertaking, and defended the entire group during the administrative proceedings. This conclusion is supported by the fact that, according to the Commission, ARBED frequently replied to requests for information which the Commission addressed to TradeARBED, and by the fact that representatives of its legal service participated in the hearing on 11, 12, 13 and 14 January 1993.

84 The Commission considers that in these circumstances the applicant cannot claim that it was not given a proper opportunity to make known usefully its views concerning the reality and relevance of the objections alleged against it.

85 The judgment in *CB and Europay* is irrelevant in that regard, in so far as it is not denied that the statement of objections was duly notified to TradeARBED. The Commission considers that the statement of objections thus properly came within the applicant's 'control' within the meaning of the judgment in Case 8/56 *ALMA* v *High Authority* [1957] ECR 95, at p. 99.

86 The Commission refers, on the other hand, to the facts of *Orkem* v *Commission*, where the Court, without adjudicating on whether, by virtue of the concept of unity of undertakings, it may be regarded as proper to address a request for information under Article 11(1) of Regulation No 17 to the subsidiary and a decision under Article 11(5) to the parent company, merely observed, first, that the contested decision had been notified to the applicant and, secondly, that the latter in fact had full knowledge of the prior request for information. The Commission points out that the applicant in that case had employed arguments similar to those invoked by ARBED in the present case and further states that ARBED acknowledges in point 7 of its reply that it 'could not fail to be aware of the proceedings initiated against its subsidiary and was able to consult the statement of objections which the Commission sent to its subsidiary'.

87 The Commission considers, moreover, that it clearly stated in recital 322 of the Decision the reasons why the fine should be imposed on ARBED rather than on TradeARBED. The reasons stated comply with the obligation to provide 'adequate reasons' for decisions addressed to several addressees and giving rise to a problem of imputability of the infringement, within the meaning of the judgment in *AWS Benelux* v *Commission*. That reasoning is also confirmed by paragraph 26 of the judgment in *CB and Europay*, where it was accepted that the Commission should take account of the turnover of the members of an association of undertakings rather than that of the association itself when fixing the amount of the fines. In the present case the Commission claims that the influence that TradeARBED was able to exercise on the market in steal beams, in particular by participating in the agreements and practices in issue, was the direct consequence of the scale of output of its parent company and the associated turnover, whereas that influence was not reflected in TradeARBED's turnover, owing to the method whereby it was remunerated for the distribution services which it supplied to ARBED.

Findings of the Court

88 According to recital 322 of the Decision:

'Only TradeARBED took part in the various arrangements and agreements. However, TradeARBED is a sales company that sells, *inter alia*, beams on a commission basis for its parent company ARBED SA. TradeARBED receives a small percentage of the sales price for its services. To ensure equality of treatment, this Decision is addressed to ARBED SA, the beams-producing company in the ARBED group, and the turnover in the relevant products is the turnover of ARBED and not of TradeARBED'.

89 It follows from that recital that, in order to take account of TradeARBED's special position and to ensure equality of treatment between the undertakings concerned, the Commission intended to impute to the applicant liability for the infringements committed by its subsidiary TradeARBED by making it an addressee of the Decision and requiring it to pay the fine, which was calculated on the basis of its own turnover.

90 As regards, first, the conditions which in substance justify such an imputation of liability, it should be observed at the outset that, like the prohibition in Article 85(1) of the EC Treaty, that in Article 65(1) of the ECSC Treaty is addressed to, *inter alia*, 'undertakings'. It follows from the case-law of the Court of First Instance (see judgment in *Shell* v *Commission*, cited above, paragraph 312), that the concept of undertaking, within the meaning of Article 85 of the EC Treaty, may be defined as an economic unit consisting of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis, a unit which may assist in the commission of an infringement referred to in that provision (see also judgment of the Court of Justice in Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and judgment of the Court of First Instance in *Viho* v *Commission*, cited above, paragraph 50, upheld by the Court of Justice in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 15 to 18). The Court considers that the same applies to Article 65 of the ECSC Treaty.

91 Furthermore, the Court of Justice has consistently held (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 to 135, and *AEG-Telefunken* v *Commission*, cited above, paragraph 49), that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, especially where the subsidiary does not determine its market conduct independently but in all material respects carries out the instructions given to it by the parent company.

92 In the present case TradeARBED is a wholly-owned subsidiary of ARBED. At the hearing, counsel for the applicant stated that TradeARBED is a sales company which distributes ARBED's steel products, in particular steel beams. TradeARBED acts either as an agent, in which case the sale is invoiced directly to the customer by ARBED, or as a commission agent, in which case the sale is invoiced to the customer by TradeARBED on behalf of ARBED. In both cases TradeARBED receives commission on the product sold. Furthermore, it is established that TradeARBED does not determine its conduct on the Community market in beams independently, but in all material aspects carries out the instructions given to it by the applicant.

93 It follows that ARBED and its subsidiary TradeARBED must be regarded as constituting one and the same undertaking for the purposes of Article 65(1) of the Treaty and that the Commission was correct in law to impute liability to ARBED for TradeARBED's conduct.

94 As regards, second, the question whether the Commission breached the applicant's rights of defence by addressing to it a Decision imposing on it a fine calculated on the basis of its turnover, without first having formally sent it a statement of objections or even indicated its intention of imputing to it liability for the infringements committed by its subsidiary, the Court observes that the procedural rights on which the applicant relies are, in the present case, guaranteed by the first paragraph of Article 36 of the ECSC Treaty, which provides that before imposing a pecuniary sanction as provided for in the Treaty the Commission must give the party concerned the opportunity to submit its comments.

95 As to whether, in the present case, ARBED was given the opportunity to submit its comments before the Decision was adopted, the Court finds that the Commission did not at any point in the administrative proceedings formally advise the applicant of its intention to impute to it liability for the conduct of TradeARBED called in question in the statement of objections and, accordingly, to impose on it a penalty calculated on the basis of its own turnover. The Court considers that such an omission could constitute a procedural irregularity capable of adversely affecting the applicant's rights of defence.

96 In the present case, however, it should be pointed out that:

— following the inspection carried out at TradeARBED's premises on 16 and 17 January 1991, the Commission sent that company, first, on 9 July 1991, a letter requesting it to indicate the confidential nature of certain documents seized on that occasion (documents nos 5482 and 5483) and, second, on 24 July 1991, a request for information pursuant to Article 47 of the Treaty (documents nos 5484 to 5490), requesting it, in particular, to indicate the meetings of producers of steel beams which it had attended between 1984 and 1990 and to provide a list of the participants in each of those meetings and a copy of the agenda and minutes;

— by letter of 5 August 1991 (document no 5492) ARBED acknowledged receipt of the request for information dated 24 July 1991, in the following terms: 'We have received your formal request for information dated 24 July addressed to our sales organisation TradeARBED, which we received on 30 July 1991'; it requested further time to reply to the request, on the ground that the reply to the request for information made it necessary to carry out detailed searches and that, because of the holiday period, its staff who were to investigate the matter were not at work;

— by letter of 9 August 1991 (document no 5494), TradeARBED replied to the Commission's letter of 9 July 1991;

— by letters of 16 September 1991 (document no 5495) and 26 September 1991 (documents nos 5499 and 5500), ARBED provided a comprehensive reply to the request for information dated 24 July 1991; in those letters ARBED refers to TradeARBED as either its 'sales organisation TradeARBED' or as its 'sales organisation';

— ARBED likewise replied, by letter of 26 September 1991 (document no 5499), to a letter from the Commission to TradeARBED dated 23 September 1991 (document no 5498);

— the Commission's objections were communicated to TradeARBED, with a request for information concerning its turnover (total sales of ECSC products and total sales of beams in the Community for the years 1986 to 1990), by letter dated 6 May 1992 (documents nos 8086 to 8088); TradeARBED acknowledged receipt of this letter on 8 May 1992 (document no 8083);

— on 3 June 1992 counsel for the applicant sent Mr Ehlermann, Director General of the Directorate-General for Competition (DG IV), a letter in the following terms (documents nos 8089 to 8090):

'I am writing to you in my capacity as counsel for ARBED, which is one of the addressees of the statement of objections in the case cited above.

...

Will you please confirm that [the documents referred to in the statement of objections] must be regarded as accessible to our client'.

— by letter of 15 June 1992 to Mr Ehlermann, counsel for the applicant, acting 'on behalf of TradeARBED', requested further time to reply to the statement of objections (document no 8091); the Commission replied by letter of 26 June 1992 (document no 8092):

— by letter of 30 June 1992 (document no 8093), Mr Temple Lang, a director in DG IV, replied as follows to the letter of 3 June 1992 from counsel for the applicant:

'Mr Ehlermann has asked me to express his thanks for your letter of 3 June and to answer on his behalf.

I confirm that the documents to which you refer in the annex to your letter may be regarded as accessible to TradeARBED. In that regard, I feel that I should point out that it was to TradeARBED (and not to the parent company, ARBED) that the statement of objections was addressed'.

— TradeARBED replied to the statement of objections in a letter from the applicant's lawyer dated 3 August 1992 and requested to be heard at a hearing;

— by letter of 6 August 1992 (documents nos 8203 and 8204) the applicant's lawyer sent the Commission the information concerning TradeARBED's

turnover which Mr Ehlermann had requested in his letter of 6 May 1992;

— only TradeARBED was invited to attend the administrative hearing on 11, 12, 13 and 14 January 1993; it was assisted at that hearing by, *inter alios*, two representatives from ARBED's legal department;

— by letter of 23 September 1993 (document no 8341) the Commission requested the applicant's lawyer to forward certain information concerning the turnover of the 'ARBED group' (total sales of ECSC products and total sales of beams in the Community for each year between 1986 and 1990);

— on 29 September 1993 the applicant's lawyer, acting in his capacity as counsel for ARBED, sent to the Commission a fax in the following terms (document no 8342):

'I refer to your letter of 23 September in the case referred to above, concerning the turnover of the ARBED group.

It is presumed that your request relates to the years 1986 to 1990, like the request previously sent to us concerning the turnover of TradeARBED.

I should be grateful, however, if you would kindly confirm that this is so';

— by fax of 30 September 1990 (document no 8343) the Commission confirmed to the applicant's lawyer that its request did indeed relate to the ARBED group's turnover for the years 1986 to 1990;

— the information concerning ARBED's turnover was sent to the Commission by letter from the applicant's lawyer dated 5 October 1993;

— the Commission wrote to ARBED's legal department on 26 November 1993 requesting it to confirm the information referred to above and also to send it details of ARBED's figures for sales in the ECSC between January and September 1993 and its estimated sales in the ECSC in 1993 (document no 8348); this letter was answered by letter of 7 December 1993 (document no 8349).

97 It follows from all the foregoing that, in particular: (a) either ARBED or TradeARBED, as applicable, replied without distinction to the requests for information which the Commission addressed to TradeARBED; (b) ARBED regarded TradeARBED as merely its sales 'agency' or 'organisation'; (c) ARBED spontaneously regarded itself as the addressee of the statement of objections formally notified to TradeARBED, of which it was fully aware, and instructed a lawyer to defend its interests; (d) the applicant's lawyer presented himself without distinction as either counsel for ARBED or counsel for TradeARBED; and (e) ARBED was requested to provide the Commission with certain information concerning its turnover for the products and the period of infringement referred to in the statement of objections.

98 The Court concludes that throughout the administrative procedure there was some uncertainty as to the respective roles and liability of the two companies ARBED and TradeARBED, as regards both the substantive issues (see also the numerous documents in the Commission's file which refer sometimes to ARBED and sometimes to TradeARBED) and the procedural aspects. This confusion

persisted up to the stage of the written procedure before the Court, since in point 1 of the application (p. 3) the applicant stated that it (and not TradeARBED) had replied to the statement of objections on 3 August 1992 (this assertion, which was described as a 'clerical error', was rectified by the applicant's lawyer in a corrigendum of 8 April 1994).

99 In the light of that confusion, the Court also considers that the statement of objections necessarily came within ARBED's control, that ARBED took it for granted from the outset that the Commission was holding it liable for the conduct of its subsidiary TradeARBED and that, accordingly, it could not seriously imagine that the amount of the fine which it might eventually be required to pay, as an undertaking subject to the prohibition in Article 65 of the Treaty, would be calculated by reference only to TradeARBED's turnover (see also point 12 of the statement of objections, which refers to the turnover of the ARBED group).

100 Furthermore, ARBED was given the opportunity to submit its observations on the objections which the Commission proposed to uphold against TradeARBED, both through its subsidiary and by the participation in the administrative hearing of two members of its legal department, assisted by a lawyer who, according to the information in the file referred to above, represented both companies. ARBED also had the opportunity to submit its observations on the imputation of liability contemplated by the Commission when it was requested to provide information concerning its turnover. In that regard, the Court has already found that the applicant could not take that request to mean anything other than that the Commission intended to hold it liable for TradeARBED's conduct.

101 Having regard to all the facts of the case, moreover, the Court considers that Mr Temple Lang's letter of 30 June 1992, in which he stated that ARBED was not the addressee of the statement of objections and apparently denied it the right of access to the file for that reason, regrettable though it might be, did not in fact adversely affect the applicant's rights of defence; nor did the applicant put forward any plea based specifically on such a refusal.

102 Having regard to all the specific circumstances of the present case, the Court therefore considers that such an irregularity is not such as to entail the annulment of the Decision in so far as it concerns the applicant.

...

Alternative claim: annulment of Article 4 of the Decision or, at least, reduction in the amount of the fine

...

The increase in the fine imposed on the applicant in respect of the harmonisation of extras

618 It follows from the detailed explanation provided by the Commission during the proceedings that the fine imposed on the applicant in respect of the harmonisation of extras was increased by 10% to take account of the fact that its subsidiary TradeARBED had suggested that harmonisation.

619 The Court finds that this aggravating circumstance is not mentioned anywhere in the Decision, but was first referred to in the Commission's reply of 19 January 1998 to the written questions put by the Court. The Decision is therefore vitiated by a complete absence of reasoning on this point.

620 It follows that Article 4 of the Decision must be annulled in so far as it increases the fine imposed on the applicant in order to penalise the role played by TradeARBED as instigator of the harmonisation of extras.

...

TradeARBED's alleged cooperation with the Commission during the administrative procedure

664 As regards the 'complete cooperation' allegedly given by TradeARBED during the Commission's investigation, it should first of all be pointed out that, in its reply of 26 September 1991 to a request for information sent to TradeARBED pursuant to Article 47 of the Treaty, the applicant stated on behalf of its subsidiary that it had no list of the participants in the meetings of the Poutrelles Committee and the Eurofer/Scandinavia group, or any of the records, minutes or reports relating to a number of those meetings referred to in the Commission's request, whereas it is clear from the evidence before the Court that TradeARBED regularly received such documents.

665 Furthermore, apart from the fact that it participated in the meetings in question, in its reply to the statement of objections TradeARBED did not accept that any of the allegations of fact made against it had any foundation.

666 The Commission correctly considered that the applicant, by replying in that way, did not conduct itself in a manner which justified a reduction in the fine on grounds of cooperation during the administrative procedure. A reduction on that

ground is justified only if the conduct enabled the Commission to establish an infringement more easily and, where relevant, to bring it to an end (see Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 255 et seq.).

...

The Court's exercise of its unlimited jurisdiction

668 The Court has already annulled Article 1 of the Decision in so far as it finds that TradeARBED participated in an agreement to share the Italian market (see paragraph 448 above). The fine imposed by the Commission for that infringement was set at ECU 84 400.

669 For the reasons set out in paragraph 472 [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 20 100, following the method used by the Commission.

670 The Court has also annulled the increase in the fine imposed on the applicant on account of the role as instigator allegedly played by TradeARBED in the harmonisation of extras (see paragraph 621 above). This increase was calculated by the Commission at ECU 100 500.

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

671 Finally, for the reasons explained above (paragraph 629 et seq. [4]), 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 Danish market, that reduction comes to ECU 953 500, following the method of calculation used by the Commission.

672 Applying the Commission's method, the fine imposed on the applicant should therefore be reduced by ECU 1 158 500.

673 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.

674 The Court considers that the Commission's general approach in determining the level of the fines (paragraph 591 et seq. above [5]) 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 TradeARBED 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.

4 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraph 640 et seq.

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

675 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 10 000 000.

...

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 the applicant liable for the participation of its subsidiary TradeARBED in an agreement to share the Italian market lasting for three months;**

2. **Sets the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at EUR 10 000 000;**

3. **Dismisses the remainder of the action;**

4. **Orders the applicant to bear its own costs and to pay four fifths of the defendant's costs. The defendant shall bear one fifth of its own costs.**

Bellamy Potocki Pirrung

Delivered in open court in Luxembourg on 11 March 1999.

H. Jung C.W. Bellamy

Registrar President