OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 26 September 2002 [1]

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1 — Original language: German.

I — Introduction

1. The present case is an appeal brought against the judgment delivered by the Court of First Instance on 11 March 1999 in Case T-137/94 ('the judgment under appeal'). [2]

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

3. On 16 February 1994 the Commission adopted against 17 European steel undertakings and one of their trade associations 'Commission Decision 94/215/ECSC... relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams' [5] (hereinafter 'the Decision'). The parties to which the Decision was addressed had, in the Commission's view, breached the competition law of the European Coal and Steel Community by establishing, in an anti-competitive manner, systems for the exchange of information and engaging in price-fixing and market-sharing. The Commission imposed fines on 14 of the undertakings. In the case of ARBED SA (hereinafter 'the appellant') the Commission imposed a fine of ECU 11 200 000.

4. Several of the undertakings concerned, including the appellant, together with the trade association, challenged the Decision before the Court of First Instance. The Court of First Instance ultimately reduced the fine to EUR 10 000 000 and dismissed the remainder of the action.

5. On 11 May 1999 the appellant lodged with the Court Registry an appeal against that judgment.

II — Forms of order sought and grounds of appeal

6. In its appeal, the appellant claims that the Court should set aside the judgment of the Court of First Instance and

— if the matter is ready for decision, annul the Commission Decision and

2 — Case T-137/94 *ARBED* v *Commission* [1999] ECR II-303.

3 — OJ 1988 L 212, p. 1.

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

5 — OJ 1994 L 116, p. 1.

order the Commission to bear the costs of the proceedings at both instances;

or

— in the alternative, refer the case back to the Court of First Instance and reserve judgment on costs.

The Commission contends that the Court should:

(1) dismiss the appeal;

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

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

First ground of appeal:

'[It] consists of a number of component parts and is based on the rejection by the Court of First Instance of the objection that the Decision was addressed to ARBED instead of TradeARBED and that the fine was imposed on ARBED.'

Second ground of appeal:

'[It] is based on the grounds that the Court of First Instance gave for finding that the necessary quorum was present when the Decision was adopted.'

Third ground of appeal:

'[It] is based on the argument that, in assuming that the Decision was properly authenticated, the Court of First Instance infringed ARBED's right of observance of essential formal provisions.'

Fourth ground of appeal:

'[It] is based on the use by the Court of First Instance of information received as a result of measures of organisation of procedure.'

Fifth ground of appeal:

'[It] is based on the infringement of Article 65 of the ECSC Treaty by the Court of First Instance.'

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

8. The submissions relating to the individual grounds of appeal and their component parts indicate that the appellant is alleging several breaches of the ECSC Treaty. Summarised according to the essential issues of law involved, the appellant is arguing that in the judgment under appeal the Court of First Instance breached Community law in that it:

— erred in law in accepting the *formal legality* of the Decision, even though

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

  — the Decision was not properly adopted (*second* and *third* grounds of appeal);

— erred in law in accepting the *substantive legality* of the Decision,

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

  — the adoption of the Decision against the appellant was unlawful (*first* ground of appeal).

9. The examination which follows will base itself around this summary. The grounds of appeal put forward by the appellant and the subdivisions and arguments contained therein, together with the Commission's arguments, will be set out under these individual points.

10. The grounds of appeal in the present proceedings substantively correspond in part to the grounds of appeal and their subdivisions submitted in Case C-194/99 P *Thyssen Stahl* v *Commission*.[6] My Opinion in that case is also being delivered today. Where the content of the submissions is the same I will refer in this Opinion to the appraisal that I have undertaken in my Opinion on Case C-194/99 P.

6 — [2003] ECR I-10821.

III — Examination of the case

A — *The ground of appeal taking issue with the formal legality of the Decision*

1. Infringement of the rights of the defence by the Commission and the possibility of its regularisation (*fourth* ground of appeal)

Submissions of the parties

11. The *appellant* argues that the Court of First Instance should have annulled the Decision for infringement of the rights of the defence in accordance with the case-law of the Court of Justice [7] as it was not given access during the administrative procedure to a number of documents that were of vital importance to the assessment of the role of DG III.

12. In paragraph 78 of the judgment in the *ICI* case [8] the Court of First Instance itself stated that failure to provide information constitutes an infringement of the rights of the defence where the information 'might have influenced the course of the procedure and the content of the decision to the applicant's detriment'. The Court of First Instance found implicitly, but unequivocally, that this was the case here. In paragraph 629 et seq. of the judgment under appeal the Court of First Instance stated in the light of the testimony of the witness Mr Kutscher that, through the conduct of DG III in connection with the system of monitoring between mid-1988 and the end of 1990, 'a degree of ambiguity arose with regard to the scope of the concept of "normal competition" as used in the ECSC Treaty'.

13. It did not obtain access to those documents until the Court of First Instance pronounced orders relating to evidence at the final stage of the judicial proceedings. According to the case-law cited, however, an infringement of the rights of the defence that occurs during the administrative procedure cannot be remedied during the proceedings before the Court of First Instance.

14. The *Commission* considers that the appellant is not taking into account the fact that the documents mentioned by it were documents internal to the Commission and points out that, according to the case-law of the Court of Justice, [9] those documents did not have to be disclosed during the administrative procedure. The case-law cited by the appellant, however, relates to documents that come from other undertakings involved in the investigation.

7 — Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307.

8 — Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847.

9 — Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711.

15. The Commission observes, with reference to the arguments raised by the then applicants summarised by the Court of First Instance in the order of 19 June 1996, [10] that the appellant has itself conceded that the principle of confidentiality of internal documents of the Commission applies in the administrative procedure.

Appraisal

16. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the *fourth* ground of appeal should be dismissed as unfounded, to paragraph 40 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

17. It should additionally be stated that even the reference to paragraph 632 of the judgment under appeal, in particular, does not alter that appraisal. I refer, in relation to the meaning of 'a degree of ambiguity' in the said paragraph, to paragraph 173 et seq. of my Opinion in Case C-194/99 P. Those grounds apply *mutatis mutandis*.

18. There is no need to go any further into the question raised by the appellant as to whether Community law allows the alleged procedural error by the Commission to be remedied during the judicial proceedings in the Court of First Instance [11] because — as indicated — the Commission did not commit any procedural error.

19. The *fourth* ground of appeal, alleging an infringement of the rights of the defence in the procedure before the Commission, must therefore be dismissed as being *unfounded*.

2. The Commission's adoption of the Decision

(a) The quorum when the Decision was adopted by the Commission (*second* ground of appeal)

Submissions of the parties

20. The *appellant* takes issue with paragraph 122 et seq. of the judgment

10 — Order of 19 June 1996 in Cases T-134/94, T-136/94, T-137/94, T-138/94 T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537, paragraphs 53 and 54.

11 — The Court of Justice has now stated in connection with the right of access to the file that 'the infringement committed is not remedied by the mere fact that access was made possible... during the judicial proceedings'. Judgment in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, at paragraph 78.

under appeal. It submits that the Court of First Instance clearly misconstrued the minutes of the Commission session on 16 February 1994 at which the Decision was adopted in relation to the question of whether the necessary quorum was present when the Decision was adopted.

21. There is no reason to give precedence over the attendance list on page 40 of the minutes to the list of Commission Members who were present on page 2. As the Court of First Instance itself states in paragraph 125 of the judgment under appeal, the first list mentioned above states that 'in the absence of the Commission Members [certain Commissioners' Cabinet members]... attended the session'.

22. Citing the case-law of the Court, [12] the appellant stresses the importance of compliance with the principle of collegiate responsibility, which requires such compliance to be 'ensured'.

23. The *Commission* contends, firstly, that the ground of appeal is inadmissible as it is for the Court of First Instance alone to assess the facts and the value that is to be attributed to the evidence put before it.

12 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

24. If the Court should find the ground of appeal admissible, the Commission takes the view that it is unfounded. The Court of First Instance properly took into account the list on page 2 of the minutes of the session, the purpose of which was to provide an exact record of the Commission Members who were present at or absent from the meeting concerned. To cast doubt on the accuracy of that list on the basis of another excerpt from the minutes that did not have that purpose would be tantamount to allowing the indirect consequences of a document the content of which has nothing at all to do with the issue under examination to take priority over evidence that does directly concern that issue. This is contrary to the principle that Community measures enjoy a presumption of validity.

25. The Commission is finally of the opinion that the appellant is misinterpreting page 40 of the minutes. As the Court of First Instance stated, the presence of Commissioners' Heads of Cabinet at a session of the Commission does not necessarily signify that the Commissioners were absent from the whole of the session.

Appraisal

26. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the *second* ground of appeal should

be dismissed as being inadmissible, to paragraph 52 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

27. The *second* ground of appeal, challenging the failure to rule that the necessary quorum was not present when the Decision was adopted by the Commission, must therefore be dismissed as *inadmissible*.

(b) The question of the proper authentication of the Decision by the Commission (*third* ground of appeal)

Submissions of the parties

28. The *appellant* takes issue with paragraph 143 et seq. of the judgment under appeal in which the Court of First Instance erred in its assumption that the Commission authenticated the Decision properly — that is to say, in accordance with Article 12(1) of the Commission's 1993 Rules of Procedure.

29. However, this would only be the case if the wording of the Decision were firmly attached to the minutes and the minutes bore the signatures of the President and Secretary-General of the Commission, which has not been proven.

30. In paragraph 144 of the judgment under appeal the Court of First Instance erred in law in proceeding on the basis that compliance with that essential formal provision could be assumed.

31. The appellant considers that the judgment should therefore be set aside. As the matter is ready for decision the Commission should be charged with now finally adducing evidence to show that the Decision adopted at the session of the Commission on 16 February 1994 was firmly 'annexed' to the original minutes of that session.

32. The *Commission* refers to the statements made by the Court of First Instance in paragraph 141 et seq. of the judgment under appeal. The Court of First Instance properly referred to the presumption of validity applying to Community actions and to the fact that the Rules of Procedure of the Commission did not stipulate the manner in which documents had to be annexed to each other; it also found that the appellant had not proven that the documents were not annexed.

33. Finally, the Court of First Instance observed that the appellant had not demonstrated that there was any material difference between the notified version of the

Decision and the version that was annexed to the minutes.

Appraisal

34. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the *third* ground of appeal should be dismissed as inadmissible to paragraph 68 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

35. The *third* ground of appeal, which challenges the alleged failure to take account of the improper authentication of the Decision by the Commission, must therefore be dismissed as being *inadmissible*.

B — *The ground of appeal alleging that the assessment of the substantive legality of the Decision was defective in law (fifth ground of appeal)*

Submissions of the parties

36. The *appellant* takes issue with paragraph 295 et seq. of the judgment under appeal. It considers that in paragraph 297 et seq. of the judgment under appeal the Court of First Instance construed Article 65 of the ECSC Treaty and, in particular, the concept of 'normal competition' contrary to the case-law of the Community courts [13] without taking into account the position of that provision in the ECSC Treaty and other aims pursued by the ECSC Treaty. The scope of Article 65 of the ECSC Treaty should, however, be interpreted in the light of the overall economical situation and the policy pursued by the Commission.

37. The manner in which the Commission proceeded can only be explained by an interpretation of Article 65 of the ECSC Treaty that takes the whole of the ECSC Treaty into account. In paragraphs 551 and 631 of the judgment under appeal the Court of First Instance stated with regard to the significance of the Commission's conduct, referring to the testimony of the witness Mr Kutscher, an official at the Commission, that the Commission itself had assumed that the meetings between the undertakings at which information was exchanged on prices and individual plans were practices that were not contrary to Article 65 of the ECSC Treaty and that the Commission had (at least impliedly) tolerated them.

38. The Court of First Instance did nevertheless state in paragraph 632 of the judgment under appeal that 'there is no need to

13 — The judgments of the Court of Justice in Case 13/60 *Geitling and Others* v *High Authority* [1962] ECR 83 and of the Court of First Instance in Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839.

clarify the extent to which the undertakings were entitled to exchange individual data in order to prepare for the consultation meetings with the Commission without being in breach of Article 65 (1) of the Treaty'. The Court of First Instance therefore declined to interpret Article 65 of the ECSC Treaty in the light of an overall appreciation of the ECSC Treaty even though — as demonstrated in paragraph 272 et seq. of the judgment under appeal — the appellant had put forward that argument in the proceedings before the Court of First Instance.

39. The *Commission* contends, with reference to paragraph 293 et seq. of the judgment under appeal and paragraph 297 et seq. in particular, that the Court of First Instance properly ruled that, even in the context of the ECSC Treaty, Article 65 could not be interpreted as meaning that practices that are incompatible with the objective and wording of that provision should be permitted.

40. The Court of First Instance exhaustively investigated the conduct of the Commission during the course of the measures covered by the investigation and took the view that the Commission had never supported the various undertakings' restrictive practices and that, even if it were proven that the Commission had tolerated them, this would not have had the effect of discharging the appellant from its liability. The Court of First Instance did take the Commission's conduct into account, however, in reducing the size of the fine on the grounds that, because of that conduct, a degree of ambiguity had arisen with regard to the concept of 'normal competition'.

41. Paragraph 632 of the judgment under appeal, as cited by the appellant, has therefore been abbreviated and taken out of context. The full wording of that paragraph shows that the Court of First Instance dismissed the question raised by the appellant as irrelevant because it related to measures that were not the subject of examination by the Court of First Instance ('this [was] not the subject of the meetings of the Poutrelles Committee...').

Appraisal

42. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl AG* in Case C-194/99 P, I refer, in relation to the grounds on which the *fifth* ground of appeal should be dismissed as unfounded, to paragraph 135 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

43. It must also be stated with regard to paragraph 632 of the judgment under appeal that the allegation that the Court of First Instance did not consider the arguments of the then applicant is incorrect. That issue is dealt with in paragraph 293 et seq. of the judgment under appeal. The substance of the passage

with which the appellant takes issue comes within a quite different context — that is to say, examination of the level of the fine by way of a comparison between the economic effects of the restraints of competition and the economic situation that might possibly have resulted from the absence of the practices complained of. It was only in the context of paragraph 632 of the judgment under appeal — and not in general — that the Court of First Instance deemed it unnecessary to examine what practices would still have been covered by Article 65(1) of the ECSC Treaty.

44. The *fifth* ground of appeal must therefore also be dismissed as unfounded in that respect.

45. The *fifth* ground of appeal, alleging that the assessment of the substantive legality of the Decision was defective in law, must therefore be dismissed in its entirety as *unfounded.*

C — *The ground of appeal taking issue with the adoption of the Decision against the appellant (first ground of appeal)*

Submissions of the parties

46. The *appellant* takes the view that the Court of First Instance erred in law in failing to rule that the Decision was void. That should have been found, however. The Commission sent the statement of objections to TradeARBED and not to the appellant. The appellant itself was not subsequently involved in the procedure but the Decision was nevertheless adopted against it alone. The individual objections raised by the appellant are as follows:

47. *Firstly*, the appellant takes issue with paragraph 92 et seq. of the judgment under appeal. It considers that the Court of First Instance infringed its rights of defence; in the paragraphs cited it justified the adoption of the Decision against the appellant on grounds that were not those given to TradeARBED by the Commission in the statement of objections. Hence, neither TradeARBED nor the appellant itself were able to safeguard their rights of defence; during the administrative procedure TradeARBED was unable to submit its observations on a reason that had not been given in that form in the statement of objections and it itself had not been able to submit its observations on the reasoning of the Court of First Instance since it is not reflected in the Decision in that way.

48. The *Commission* considers that the problem of the appellant not having been formally and expressly informed that the Commission intended to impute liability to it for the conduct of TradeARBED was widely discussed in the proceedings before the Court of First Instance so that the

appellant was in a position to exercise its rights of defence within that framework. Citing the case-law of the Court of Justice [14] the Commission contends that the Court of First Instance could also have considered this issue of its own motion.

49. The *appellant* takes issue, *secondly*, with the statements by the Court of First Instance in paragraph 92 of the judgment under appeal according to which, in relation to the question of whether both undertakings are considered in law to be one and the same 'undertaking' for the purposes of Article 65(1) of the ECSC Treaty, '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 (ARBED)'. The Court of First Instance based that appraisal on an assertion that it did not justify in any way, so that it was in breach of the duty to provide reasons.

50. The *Commission* contends that adequate reasons were given for paragraph 92 of the judgment under appeal and that it justifies the conclusion that the case-law of the Court of Justice cited in paragraphs 90 and 91 of the judgment under appeal can be transposed to ARBED.

51. The *appellant* takes issue, *thirdly*, with paragraph 98 et seq. and accuses the Court of First Instance of having based the judgment under appeal on inconsistent reasoning tantamount to an absence of reasoning. On the basis of one and the same fact it simultaneously concluded that, on the one hand, there was uncertainty as to the individual roles and responsibilities of the appellant and its subsidiary TradeARBED whilst, on the other, the appellant had assumed right from the start that the Commission was imputing liability to it for the conduct of its subsidiary TradeARBED.

52. In the opinion of the *Commission* the appellant has misconstrued the judgment under appeal. In concluding in paragraph 98 of the judgment under appeal, from the findings in paragraph 97, that there was uncertainty as to the particular roles and responsibilities of the two companies, the Court of First Instance did not decide that this uncertainty had an effect on the appellant. Its findings showed that there was no uncertainty as to the roles and responsibilities of the two companies on the appellant's part as it was apparently never in any doubt that the administrative procedure was directed against it. The observation by the Court of First Instance in paragraph 99 of the judgment under appeal, that the appellant took it for granted from the outset that the Commission was holding it liable for the conduct of its subsidiary TradeARBED, was a logical consequence of the fact that during the administrative procedure the appellant had always acted as if it were the subject of investigation by the Commission at the same time as its subsidiary. This follows from the matters described in paragraph 96 of the judgment under appeal.

14 — Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421 and Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697.

53. The *appellant* alleges, *fourthly*, that the Court of First Instance misconstrued the scope of the statement of objections by relying on matters not contained in that statement. It refers, in particular, to the matters described in paragraph 96 of the judgment under appeal which the Court of First Instance took into account when determining the scope of the statement of objections.

54. The *Commission* considers that the appellant is distorting the appraisal by the Court of First Instance, which never questioned the fact that TradeARBED was the addressee of the statement of objections. The Court of First Instance simply examined various aspects of fact in order to establish whether the appellant was aware of the objections that the Commission had raised in the statement to its subsidiary. Furthermore, it examined whether the appellant had also been in a position to submit its observations on it and whether the adoption of the Decision against the appellant because of the conduct of its subsidiary did therefore infringe the appellant's rights of defence.

55. The *appellant* alleges, *fifthly*, that the Court of First Instance had made an obvious error of fact that was tantamount to defective reasoning. As proof that the appellant was aware that it was being held liable for the alleged infringements from the outset, it relied on the fact that a number of requests for information made to TradeARBED by the Commission were answered by the appellant's legal department and that the statement of objections, which was also communicated to TradeARBED, was answered by the appellant's counsel.

56. In the opinion of the *Commission* errors by the Court of First Instance 'relating to the facts' are not open to review by the Court. Furthermore, the Court of First Instance did not take that evidence as the basis for an assumption that the applicant was the addressee of the statement of objections. The Court of First Instance simply used the evidence to support the conclusion that ARBED had been aware of that statement.

57. Finally and *sixthly*, the *appellant* complains that the Court of First Instance clearly erred in law in preventing the observance of its rights of defence, which is a fundamental right, by putting simple requests for information by the Commission on a par with the statement of objections. The appellant refers to paragraph 100 of the judgment under appeal in which the Court of First Instance states that it had an opportunity to submit its observations on the imputation of liability contemplated by the Commission when it was requested to provide information concerning its own turnover.

58. This mere request for information does not contain any of the characteristic features of a statement of objections. Even if it were to be deemed such a statement, it did

not include those considerations of the Commission on the basis of which it intended to hold the appellant liable for the conduct of TradeARBED; the appellant was therefore not able to defend itself.

59. The *Commission* disputes the assertion that the Court of First Instance equated that request for information with a statement of objections. It merely established that the appellant had been able to submit its observations with regard to the imputation of the conduct of TradeARBED. There could not be any doubt as to the purpose of a request for information on turnover that is made during investigation procedure in competition matters.

Appraisal

1. The question of the term 'undertaking' within the meaning of Article 65(1) of the ECSC Treaty

60. In the second argument on the *first* ground of appeal the appellant takes issue in law with the assumption by the Court of First Instance that the Commission properly proceeded on the basis that TradeARBED and it itself together constituted one 'undertaking' within the meaning of Article 65(1) of the ECSC Treaty.

61. In paragraph 92 of the judgment under appeal the Court of First Instance based that view on a number of facts (TradeARBED is a wholly-owned subsidiary; a mere sales company; relevant products only sold on behalf of the appellant; income from commission alone).

62. This was an appraisal of facts the objective of which was to prove that TradeARBED had to follow instructions — one of the core elements establishing the existence of a single 'undertaking' within the meaning of Community law on cartels. [15] Appraisals of facts are not, however, save with regard to examination of potential distortion, amenable as such to review on appeal. [16]

63. The *first* ground of appeal, in so far as it alleges misinterpretation of the term 'undertaking' within the meaning of Article 65(1) of the ECSC Treaty, must consequently be dismissed as being *inadmissible*.

15 — The Court of First Instance refers to the relevant case-law in paragraph 90 of the judgment under appeal.

16 — For the established case-law see, for example, the order of the Court in Case C-479/00 P(R) *Commission* v *Gerot* [2001] ECR I-3121.

2. The addressee of the statement of objections

64. In the other arguments on the *first* ground of appeal the appellant takes issue, all in all, with what it considers to have been its lack of proper involvement in the procedure before the Decision was adopted. This is based on the following:

65. In the first, fourth and sixth arguments on the *first* ground of appeal the appellant takes issue with the alleged error of law in failing to rule that its rights of defence had been infringed as a result of the fact that it was not a formal addressee of the statement of objections and was therefore not formally a party to the procedure before the Commission.

66. In the third and fifth arguments on the *first* ground of appeal the appellant takes issue with the assessment by the Court of First Instance of the question of the extent to which it was nevertheless informed, or should have been informed, that this relationship formed the subject of the Decision and would ultimately also be the reason for the Decision being adopted against it.

67. The latter arguments only require legal appraisal if it is established that the *first* ground of appeal is justified in relation to the first arguments mentioned above. It would be unnecessary in principle to answer the question of whether the Court of First Instance erred in law in its assessment of the problem of whether the appellant knew or should have known of the risk of it being held liable for the conduct of its subsidiary if the Decision were to prove invalid simply because it was directed at an addressee that was not a formal addressee of the statement of objections.

68. It is therefore necessary to start with the basic question as to whether the Court of First Instance erred in law, in the paragraphs of the judgment under appeal the subject of complaint, in its assessment of the question of the appellant's involvement in the procedure before the Commission.

69. The findings of fact made by the Court of First Instance [17] show that the statement of objections was not formally addressed to the appellant. Furthermore, 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'. [18]

70. The Court has already emphasised on a number of occasions the significance of the

17 — See paragraph 96 of the judgment under appeal.
18 — See paragraph 95 of the judgment under appeal.

statement of objections in relation to observance of the rights of the defence. In its *CMB* judgment [19] the Court stated:

'It is settled case-law that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. The essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 10 and 14).

It follows that the Commission is required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed.

It is clear that a statement of objections which merely identifies as the perpetrator of an infringement a collective entity,... does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually if the infringement is made out...

Similarly, a statement of objections in those terms is not sufficient to warn the companies concerned that the amount of the fines imposed will be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement.'

71. What then is the significance of that case-law in relation to the observance of the rights of the defence in a case such as this one in which — in contrast to the *CMB* case — the issue is not so much the content of the statement of objections but the fact that the statement of objections was not addressed to the subsequent addressee of the Decision? The starting point for these reflections must be the question of observance of the rights of the defence — something that was also given pre-eminence in the *CMB* judgment.

72. The statement of objections should not only make the addressee of the statement aware of how and by whom the relevant elements of an offence under competition law are deemed by the Commission to have taken place. As established in the *CMB* judgment, it must also state quite unequivocally who might have to pay the fine. According to the findings of the Court of First Instance there are indications that it must have been clear to the appellant, at least in general, that as the parent company it could be held liable under competition law for the practices of its subsidiary.

19 — See the judgment of the Court in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365.

However, that does not mean to say that it must also have been clear to it that the Commission intended to make use of that legal possibility in this specific case.

73. This distinction is vital because only the certainty that the Commission was actually considering holding the appellant liable for the practices of TradeARBED would have produced a separate need for a defence.

74. In group situations such as in this case there can indeed be differences in the interests of potential addressees of a Decision in putting forward a defence. With regard to the question 'how is an infringement committed' the lines of defence taken by a marketing subsidiary and the group parent company must overlap to a great extent (both have the same aim, which is to question the illegality of the subsidiary's practices). However, this is not always necessarily the case with the question of 'by whom was the infringement committed' or, in particular, with the question of liability for the conduct of the other party. From the point of view of a group parent company with potential liability it might, for example, be advisable to emphasise the independence of the subsidiary from the parent company or to dispute any benefit to itself from the subsidiary's infringements so as to avoid liability.

75. If, therefore, in a group situation there is a possible conflict of interests with regard to a defence the fact that the statement of objections is addressed to undertakings with potential liability serves as a clear *warning* that the Commission is specifically contemplating liability and that there might therefore be a *particular need for individual defences to be put forward*. However, a statement of objections will not meet that specific objective of giving a warning if the parties potentially liable are merely aware of its contents; the statement of objections must also be formally addressed to them.

76. In this case it is not disputed that the statement of objections was not addressed to the appellant. Consequently, its rights of defence were affected in so far as it might possibly not have been made sufficiently clear to it that an individual defence argument might be required with regard to its influence on the conduct of TradeARBED. The Decision should therefore be considered invalid in principle in so far as it is directed at the appellant. For the reasons stated (particularly the 'warning function' of the statement) de facto knowledge of the content of the statement of objections is irrelevant.

77. Consequently, the Court of First Instance might have erred in law in ruling that the Commission had properly adopted

the Decision against the appellant even though the statement of objections had only been sent to TradeARBED.

3. The possibility of an error of form being remedied by the appellant's own conduct

78. As established by the Court of First Instance in paragraph 99 of the judgment under appeal, the statement of objections did, however, 'come within the control' of the later addressee and the appellant was fully aware of its content. In paragraph 96 the Court of First Instance established that in the run-up to the Decision the appellant had corresponded with the Commission on vital issues in connection with the proposed Decision (e.g. participation in various meetings of beam producers, access to the Commission's files, provision of turnover data) and had sent members of its own legal department to meetings with the Commission to act on behalf of TradeARBED.

79. The question is whether the failure to formally address the statement of objections to the appellant might possibly mean, by way of exception, that the rights of the defence were not infringed.

80. In paragraph 101 of the judgment under appeal the Court of First Instance states:

'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...'

81. Without saying so in so many words, therefore, the Court of First Instance apparently proceeded on the basis that a procedural error by the Commission does not make a decision void if the rights of defence of the party concerned are safeguarded as a result of other circumstances. Hence, the Court of First Instance seems to be assuming some kind of 'remedying' of procedural errors.

82. The question is whether it is permissible under the competition law of the Community for procedural errors by the Commission to be remedied in this way. I do not consider that this possibility should be immediately ruled out in principle. Nevertheless, the circumstances in which they can be so remedied would have to be very strictly defined and would, in any event, need to be covered by the particular protective aim of the procedural rights concerned.

83. In this case therefore it would only be at all conceivable for that failure to address the statement of objections to be remedied if it were to be irrefutably established from indisputable facts that in the appellant's case there was no (further) need for that particular warning function (the need for an individual defence argument). This would only be the case if it were to be proven that the appellant was fully aware of the need for an individual defence and did nothing to satisfy that requirement due only to reasons that lay solely within its domain.

84. Contrary to the assumption made by the Court of First Instance in paragraph 101 of the judgment under appeal, however, this cannot be assumed to be the case here because the Commission specifically indicated in the letter of 30 June 1992 mentioned there that the appellant was *not* the addressee of the statement of objections, [20] so that the appellant might in any event have been prevented from securing the observance of its individual defence interests that differed from those of TradeARBED.

85. It cannot therefore be assumed in this case that the formal error of not addressing the statement of objections to the appellant could have had no adverse effect at all on the rights of the defence. Nor can any remedying of that formal error therefore be the subject of consideration.

20 — Paragraphs 96 and 101 of the judgment under appeal.

86. It must therefore ultimately be determined on the whole, with regard to the *first* ground of appeal, that in paragraph 92 et seq. of the judgment under appeal the Court of First Instance simply undertook an appraisal of evidence with regard to the question of whether the content of the statement of objections was known to the appellant and whether the conditions for such liability (single 'undertaking') were satisfied.

87. However, the Court of First Instance failed to take proper account of the fact that, by failing to address the statement of objections to the appellant itself, it could have been deprived of the opportunity of realising with sufficient clarity that it needed to safeguard its individual defence interests.

88. The *first* ground of appeal, in so far as it alleges failure to take proper account of the significance of the failure to address the statement of objections to the appellant, is therefore *well founded*.

89. The *first* ground of appeal, challenging the adoption of the Decision against the appellant, is therefore partly *inadmissible* and otherwise admissible and *well founded*.

90. Under the first paragraph of Article 54 of the ECSC Statute where an appeal is well founded the Court of Justice must quash the decision of the Court of First Instance.

It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

91. In this case the files are sufficiently complete for the Court of Justice to decide the matter itself; the case does not therefore have to be referred back to the Court of First Instance.

92. As only one of the grounds of appeal is well founded the judgment should only be set aside to that extent and the Decision amended accordingly. Consequently, the judgment should only be set aside to the extent that it upholds the legality of the adoption of the Decision against the appellant. Articles 4 and 6 of the Decision should be annulled with regard to the appellant.

IV — Costs

93. Under Article 32 of the ECSC Statue and Article 122(1) of its Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(3) of its Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the Court may order costs to be shared or order each party to bear its own costs where each party succeeds on some and fails on other heads or if there are exceptional circumstances. Since only the ground of appeal relating to the fine is well founded — and then only in part — it would appear reasonable for the appellant to bear its own costs and three-quarters of the Commission's costs.

V — Conclusion

94. In the light of the foregoing, I accordingly propose that the Court:

— set aside the judgment of the Court of First Instance of 11 March 1999 in Case T-137/94 *ARBED SA* v *Commission* in so far as it rules that the adoption of the Decision against ARBED SA was valid;

— declare void in respect of ARBED SA Articles 4 and 6 of the Commission Decision No 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;

— dismiss the rest of the appeal;

— order ARBED SA to bear its own costs and three-quarters of the costs of the Commission of the European Communities.