OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 26 September 2002 [1]

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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-141/94 ('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 [3] ('Decision No 2448/88'). The surveillance system established pursuant to Decision No 2448/88 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

2 — Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347.

3 — OJ 1988 L 212, p. 1.

4 — See paragraph 33 of the judgment under appeal.

'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 Thyssen Stahl (hereinafter 'the appellant') the Commission imposed a fine of ECU 6 500 000.

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 upheld in part the appellant's action and reduced the fine to EUR 4 400 000.

5. On 25 May 1999 the appellant lodged with the Court Registry an appeal against that judgment.

5 — OJ 1994 L 116, p. 1.

II — Forms of order sought and grounds of appeal

6. In its appeal, the appellant claims that the Court should:

(1) set aside the judgment delivered on 11 March 1999 by the Court of First Instance in Case T-141/94 in so far as that judgment fixes the fine imposed on the appellant at EUR 4 400 000 (paragraph (2) of the operative part), dismisses the appellant's action (paragraph (3) of the operative part) and orders the appellant to bear its own costs and to pay half of the Commission's costs (paragraph (4) of the operative part);

(2) annul Articles 1, 3 and 4 of Commission Decision C(94)321 final of 16 February 1994 in so far as those articles have not already been annulled by the judgment of the Court of First Instance of 11 March 1999 in Case T-141/94;

(3) order the Commission to pay the costs of the proceedings at first instance and those of the present appeal.

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:

'The judgment breaches in several respects the principles of proper procedure. In particular, there has been a failure to take proper account of the scope of the appellant's procedural rights, the principle of *audi alteram partem*, procedural equity, and of the duty also to establish facts favourable to undertakings arising from the principle of *ex proprio motu* investigation.

Further, the Court of First Instance erred in law in assuming that such procedural defects in the administrative procedure had been remedied during the judicial proceedings.'

Second ground of appeal:

'The judgment misconstrues the formal provisions of the Commission's 1993 Rules of Procedure governing authentication of the Commission Decision and therefore unjustifiably proceeds on the assumption that there was a validly adopted decision.'

Third ground of appeal:

'The judgment is contrary to Article 33 of the ECSC Treaty inasmuch as the Court of First Instance exceeded its jurisdiction to review the contested Decision.'

Fourth ground of appeal:

'The judgment breaches in several respects Article 65(1) of the ECSC Treaty:

It errs in law in finding that the monitoring of orders and deliveries constituted a separate breach of Article 65(1) of the ECSC Treaty, without being able to explain why the exchange of information was anti-competitive in its effect. Further, the judgment errs in law in assuming, on the basis of a misconstruction of the term "normal competition", that the monitoring of orders and deliveries had an adverse effect on normal competition.

The judgment errs in law in finding that the appellant's conduct, which was the subject of complaint in relation to the fixing of prices, amounted to a breach of Article 65(1) of the ECSC Treaty. In this it also bases itself on a misconstruction of

the term "normal competition" within the meaning of Article 65(1) of the ECSC Treaty.'

Fifth ground of appeal:

'Finally, the judgment infringes Article 65(5) of the ECSC Treaty and the fault principle by over-estimating the degree of fault on the appellant's part. In particular, the judgment fails to take account of the effects of the confirmed lack of clarity concerning the term "normal competition" within the meaning of Article 65(1) of the ECSC Treaty and erroneously assumes that the appellant was fully aware that its conduct was unlawful. The Court of First Instance thus wrongly failed, when assessing the fine, to consider leniently what was in fact no more than a limited awareness on the appellant's part that it was acting unlawfully.'

Sixth ground of appeal:

'With regard to the monitoring of orders and deliveries, the Court of First Instance also breached Article 65(5) of the ECSC Treaty by its inadequate assessment and consequent over-valuation of the economic effects of the information exchange when it was determining the fine. Moreover, in the absence of any distinct breach, the imposition of a separate fine in respect of the exchange of information was inadmissible.'

Seventh ground of appeal:

'The Court of First Instance failed to take proper account of the requirement that adequate reasons be given for the determination of the fine and thus breached Article 15 of the ECSC Treaty. It failed to take account of the fact that a lack of adequate reasons cannot be remedied during the judicial proceedings.'

Eighth ground of appeal:

'Through the excessive length of the proceedings of almost five years, the Court of First Instance infringed the appellant's entitlement to vindication of its legal rights within a reasonable period.'

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 fundamental issues of law raised, the appellant is in essence 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

  procedural rights had been infringed during the course of the procedure before the Commission (*first* ground of appeal) and

  the Decision had not been adopted in the proper manner (*second* ground of appeal);

— exceeded its *jurisdiction to carry out a review* under the first paragraph of Article 33 of the ECSC Treaty (*third* ground of appeal);

— erred in law in accepting the *substantive legality* of the Decision, even though no breach of Article 65(1) of the ECSC Treaty had been committed (*fourth* ground of appeal), because

  participation in the information exchange system [6] did not constitute a separate infringement of competition and

  the system for the exchange of information and the fixing of prices could not have had any detrimental effect on 'normal competition';

— erred in law in its assessment of the *fine and the grounds given for it* (*fifth, sixth and seventh* grounds of appeal);

— contrary to *Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR')*, failed to vindicate the appellant's legal rights within a reasonable period (*eighth* 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 argu-

6 — The appellant speaks of 'the monitoring of orders and deliveries' (in the singular) but is obviously referring to both the monitoring of orders and deliveries within the Poutrelles Committee and the exchange of information within the Walzstahl-Vereinigung. As the existence of two systems of information exchange which supplemented each other (see paragraph 371 of the judgment under appeal) does not, in the appellant's case, appear to have had any bearing on the Decision, the judgment under appeal or on the appellant's submissions, references in what follows shall uniformly be to 'the' information exchange system in the singular.

ments 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 large measure to the grounds of appeal and their subdivisions submitted in the parallel proceedings. In the corresponding Opinions [7] these will therefore be broken down into similar summary form and reference will be made to the present Opinion so as to avoid repetition.

III — Examination of the case

A — *The grounds of appeal alleging a legally defective assessment of the formal legality of the Decision*

11. The appellant challenges this infringement of the Treaty in its *first* and *second* grounds of appeal.

7 — Cases C-176/99 P *Arbed* v *Commission*, C-179/99 P *Eurofer* v *Commission*, C-182/99 P *Salzgitter* v *Commission*, C-195/99 P *Krupp Hoesch* v *Commission*, C-196/99 P *Aristrain* v *Commission*, C-198/99 P *Ensidesa* v *Commission* and C-199/99 P *Corus* v *Commission*.

1. Infringement of procedural rights by the Commission (*first* ground of appeal)

12. The *first* ground of appeal consists in principle of two parts. In the first, the appellant challenges the alleged failure by the Court of First Instance to appreciate the true extent of the Commission's duty to conduct an *ex proprio motu* investigation. In the second, the appellant criticises the alleged failure to take account of the Commission's infringement of the rights of the defence. In both parts the appellant takes issue with the alleged error in law consisting in the acceptance of the possibility that these failures by the Commission could be remedied in the proceedings before the Court of First Instance.

(a) Infringement of the principle of *ex proprio motu* investigation by the Commission and the possibility of rectification

Submissions of the parties

13. The *appellant* takes the view that, in paragraphs 92 to 116 of the judgment under appeal, the Court of First Instance failed to take proper account of the scope of the Commission's duty to carry out an *ex proprio motu* investigation. As the written information received from DG IV could not have provided sufficient clarification of the extent to which the unlawful conduct of the undertakings had been known to the DG III officials or had been objectively caused by

them, the Commission ought to have questioned the officials who were actually involved. The Court of First Instance had itself regarded this questioning as being necessary and carried it out during the proceedings. That notwithstanding, it denied that the Commission was under any such duty. The evidence collected by DG IV regarding the role of DG III was overall not appropriate to clarify fully and comprehensively the facts in this regard, and other evidence had been available during the administrative procedure.

14. The *Commission* submits that this part of the first ground of appeal does not concern any infringement of a legal provision by the Court of First Instance but rather challenges the facts established in paragraphs 108 and 109 and the assessment of those facts by the Court of First Instance, for which reason this ground of appeal is inadmissible to that extent. The appellant confirms this inadmissibility when it claims that the 'evidence' adduced by the Commission was insufficient. The Court of First Instance laid down the scope of the duty of *ex proprio motu* investigation in paragraphs 96 and 97 of the judgment under appeal and applied a stringent criterion. However, those paragraphs were not as such the object of criticism.

15. In the alternative, the Commission considers the ground of appeal to be to that extent unfounded. The appellant, it argues, is exaggerating the scope of the duty to conduct an *ex proprio motu* investigation. If the explanations from DG III were accurate and detailed, as the Court of First Instance found them to be, there was no need for further checks.

16. The *appellant* takes issue with the Commission's allegation of inadmissibility. In the appellant's view, the distinction, which the Commission advocates, between the criterion of the duty to investigate (question of law) and the application of that duty (determination of fact) is incorrect. The appellant's submission relates to the interpretation of a rule of Community law (principle of *ex proprio motu* investigation) and the subsumption of the confirmed facts under that principle. Both elements relate to the evaluation of questions of law by the Court of First Instance and are thus reviewable in appeal proceedings.

17. The *appellant* further avers that, as stated in paragraph 115 of the judgment under appeal, the Court of First Instance proceeded on the assumption that this infringement of the principle of *ex proprio motu* investigation had been corrected during the judicial proceedings. That view stands at variance with the established case-law. [8]

18. The Commission argues that it cannot be concluded, on the basis of the fact that

8 — Case T-30/91 *Solvay* v *Commission* ('*Soda-ash*') [1995] ECR II-1775, paragraphs 98 and 103, and Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* ('*PVC*') [1999] ECR II-931, paragraph 1022.

the Court of First Instance adopted measures of organisation of procedure and made inquiries, that the Commission must have breached its duty to examine the facts. Even if one were to assume that the Court of First Instance had, through the measures of inquiry in the judicial proceedings, recognised that the Commission had made mistakes in investigating certain facts, that could still not justify the conclusion that the Commission had infringed the principle of *ex proprio motu* investigation in its entirety.

19. The *appellant* disputes this assertion. A declaration that the Decision is void does not depend on whether the duties of investigation as a whole were infringed but rather whether the procedural mistakes committed by the Commission could have had a bearing on the Decision. The decision regarding the fine was a discretionary decision taken after consideration of all the circumstances of the individual case. The possible bearing on the Decision of a procedural error limited to only one aspect of the facts can therefore not be precisely demarcated, with the result that annulment of the Decision cannot in principle be ruled out even in the case of procedural errors confined to a portion of the facts.

20. With regard to the complaint alleging that the Commission's procedural errors were impermissibly corrected in the proceedings before the Court of First Instance, the *Commission* submits that these possibilities of correction were expressly mentioned in paragraph 115 of the judgment under appeal. This question does not, however, require to be examined in any greater detail as the findings of fact made by the Court of First Instance did not corroborate the appellant's allegation that the Commission had breached its duty to clarify the issues of fact.

Appraisal

21. The appellant is challenging the alleged failure by the Court of First Instance to take proper account of the scope of the Commission's duty to conduct an *ex proprio motu* investigation. This submission provides an opportunity to address the question whether and to what extent 'compliance by the Commission with the principle of *ex proprio motu* investigation' is a question of law amenable to examination in appeal proceedings.

22. In order to reply to this question it is necessary to examine more closely what is to be understood by the 'scope' of the duty of *ex proprio motu* investigation. In the first instance, the scope may relate to the *evidentiary issues*, that is to say, the question whether investigations were conducted into all constituent facts and exculpatory grounds touching on competition law of relevance to the case in point. Second, the scope may relate to the *evidence*, that is to say, to the question of which and how much evidence the Commission sought in order to establish the constituent facts or exonerating grounds.

23. The question of the evidentiary issues is a question of law for the reason that it is inseparable from the question of the legal evaluation of conduct. If the Commission did not conduct serious investigations in regard to *all* the issues of fact germane to the particular case, it would be difficult for legal purposes to confirm that there was an infringement. This, however, does not apply with regard to the question of the scope of the evidence used. [9]

24. In the present case, the Court of First Instance held in the judgment under appeal that the competent service of the Commission did examine the knowledge and conduct of other services as potentially exonerating elements of fact. [10] The Court stated in this connection that the Commission recognised the evidentiary issue and conducted itself accordingly. Nor has this been challenged by the appellant in its submissions on the principle of *ex proprio motu* investigation.

25. The Court of First Instance also made findings on the evidence in examining, in paragraphs 108 and 109 of the judgment under appeal, the relevant exchange of correspondence between the directors of DG III and DG IV and in assessing the background to that correspondence and the evaluation of its content as appropriate investigative efforts. The appellant challenges this in the present part of the first ground of appeal.

26. This assessment of the above correspondence by the Court of First Instance is, however, not a question of law but an appraisal of facts inasmuch as the Court of First Instance assessed the evidence actually used with a view to determining its appropriateness and seriousness. Appraisals of facts are not, however, save with regard to examination of potential distortion, amenable as such to review on appeal. [11]

27. The first part of the first ground of appeal, alleging failure to take proper account of the Commission's duty to conduct an *ex proprio motu* investigation, must consequently be dismissed as being *inadmissible*.

28. There is no need to examine further the appellant's allegation that the Court of First Instance wrongly proceeded on the basis that the Commission's procedural error could be remedied in the proceedings before it, the reason being that — as

9 — An exception might, at most, appear appropriate in those cases in which the conduct of *ex proprio motu* investigations gives rise, in the light of the choice or the number of items of evidence used by the Commission, to doubts regarding the seriousness of the particular investigation.

10 — See, for example, paragraph 108 of the judgment under appeal.

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

already stated — no procedural error on the Commission's part has been demonstrated.

(b) Infringement of the rights of the defence and the possibility of rectification

Submissions of the parties

29. The *appellant* first invokes the infringement of its rights of defence in connection with its complaint that the principle of *ex proprio motu* investigation was infringed. The Court of First Instance, it argues, failed properly to appreciate the scope of the Commission's actual duties to conduct an *ex proprio motu* investigation and thereby also infringed the appellant's rights of defence, that is to say, the *audi alteram partem* principle, because the appellant was unable to use the role of DG III for purposes of its defence.

30. Against this, the *Commission* argues that the appellant derives the alleged infringement of its rights of defence from an alleged infringement of the principle of *ex proprio motu* investigation, which was not, however, committed. There is, the Commission submits, no need to carry out any separate examination of the issue of the rights of the defence.

31. The *appellant* sees a further infringement of its rights of defence in the administrative procedure in the non-compliance with the *audi alteram partem* principle by reason of the refusal to allow it access to the results of the investigation into the role of DG III, which was not conducted until after the first hearing. In this connection it takes issue with, in particular, paragraphs 113 and 114 of the judgment under appeal, invoking the Court's judgment in *Technische Universität München.* [12]

32. The right to be heard before the Community Courts encompasses the duty on the Commission to give parties the opportunity to state their views on both inculpatory and exonerating material. By its order of 10 December 1997 the Court of First Instance confirmed the appellant's right of access in regard to certain internal documents to be submitted by the Commission, as those documents appeared prima facie to contain evidence which appeared likely to reinforce views that were relevant to the Decision and had been submitted in all seriousness. In contrast to this, however, the Court of First Instance held in the judgment under appeal that the Commission was under no obligation to enable the undertakings to address at the stage prior to the proceedings factual material which might exonerate them. Had the undertakings been in a position to adduce earlier in their defence the documents which came to light only during the proceedings, the Commission might possibly have reached a different decision.

12 — Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469.

33. The results of the internal Commission investigation, the appellant continues, could also not be treated as internal documents exempted from the duty of publication. This exemption applies only to documents which do not constitute evidence because the Commission cannot rely on them when assessing facts (for example, internal drafts, statements of position or comments) or because they serve to protect the confidentiality of discussions which allows services to express, in complete freedom, their views on pending cases. None of this concerns the documents here in issue, as these documents related to the role of the Commission's services in regard to the practices of which the undertakings concerned were accused.

34. The *Commission* stresses that the appellant is not challenging the finding of the Court of First Instance in paragraph 110 of the judgment under appeal, according to which the Commission is not obliged to carry out further investigations or to hear witnesses put forward by the party concerned where it considers that the facts have been adequately clarified.

35. The rejection by the Court of First Instance of the appellant's submission is further supported by paragraphs 113 to 115 of the judgment under appeal, which state that the duty to make documents accessible to the undertakings concerned did not extend to internal Commission notes and other confidential documents. Further, a distinction must be drawn between, on the one hand, internal notes on the investigation conducted by the Commission subsequent to the hearing and, on the other, documents relating to the contacts between DG III and the steel industry. By its order of 10 December 1997 the Court of First Instance placed only the latter documents on the case-file as they alone related directly to an actual circumstance of the case. The results of the internal investigation consisted in expressions of position and comments by DG IV, to which access did not have to be granted.

36. The appellant, so the Commission continues, is impermissibly confusing access to internal documents in the administrative procedure and in the judicial proceedings. In the latter, a balance must be struck between the principle of effective administration and the guarantee of legal protection against acts of the administration. It is the Court of First Instance which is required, on the basis of Article 23 of the ECSC Statute of the Court of Justice, to balance those interests with regard to a decision, not the Commission in the administrative procedure.

Appraisal

37. In the first place, it is here unnecessary to examine further the submission that the Court of First Instance failed to take proper

account of the fact that infringement of the principle of *ex proprio motu* investigation may also involve an infringement of the rights of the defence, since the appellant — as stated above —[13] has made no submission capable of sustaining the claim that the Court of First Instance erred in law in assessing the Commission's duty to conduct an *ex proprio motu* investigation.

38. Instead, the appellant's submission relates to the right to view documents and the right to a fresh hearing, this time concerning the content of documents which were drawn up only after the first hearing. Further in issue here is the question whether an infringement of such rights of the defence can be remedied in the proceedings before the Court of First Instance.

39. It must first be held that, if there was no right to view documents, there can be no presumption of a right to a hearing in regard to their content. In what follows, therefore, the emphasis will initially be on the right to *view documents*.

40. According to the case-law of the Court, there is an infringement of the right to view documents[14] only if the knowledge of the information contained therein could have influenced the course of the proceedings and consequently the content of the decision. A conclusive determination as to whether the decision would in fact have been different is thus not required.[15]

41. It is therefore necessary to examine whether, in the judgment under appeal, the Court of First Instance took account of this examination criterion and applied it correctly.[16]

42. The Court of First Instance ruled in paragraph 114 of the judgment under appeal that the documents relating to the investigations conducted into DG III after the first hearing before the Commission 'clearly did not contain any exonerating material'. In so doing, the Court of First Instance unequivocally expressed its view that knowledge of those documents was not likely to influence the course of the subsequent procedure and thus also the content of the Decision.

13 — See paragraph 21 et seq. above.

14 — The basic judgment is that 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.

15 — Judgments in Case T-30/91 *Solvay* (cited above in footnote 8) and in Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847; judgment in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235 (one of the *Polypropylene* cases). See also the Opinion delivered on 25 October 2001 by Advocate General Mischo in Case C-244/99 P *DSM and DSM Kunststoffen* v *Commission* (the *PVC II* cases).

16 — Paragraph 25 of the judgment in Case C-269/90 (cited in footnote 12), which the appellant invokes, states only in general terms that 'the right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution'. The Court of First Instance did not, in the judgment under appeal, place in question this general principle.

43. The content of the documents is set out in paragraphs 100 to 106 of the judgment under appeal. These documents do not appear to provide even the slightest indication that they could have contained any exonerating material in favour of the appellant. Nor has the appellant made any substantive submission capable of placing in question the evidentiary value which the Court of First Instance derived from these documents in connection with the grounds of exoneration pleaded ('Role of DG III').

44. The Court of First Instance was thus correct in ruling that there was no right of more extensive access to the Commission's documents.

45. If the Court of First Instance thus properly held that there was no right of more extensive document access, it must, on the basis of the statements made at the outset, be concluded at the same time that the Court of First Instance could also not have committed an error of judgment in finding that the rights of the defence had not been infringed through the refusal of a further hearing (into the content of those documents).

46. The second part of the *first* ground of appeal, challenging the failure to find that there was an infringement of the rights of the defence (access to documents and right to be heard), must accordingly be dismissed as being *unfounded*.

47. With regard to the appellant's claim that the Court of First Instance incorrectly proceeded on the basis that the Commission's alleged procedural error could be remedied in the proceedings before the Court of First Instance, this need not be examined any further here, [17] given that — as already stated — no procedural error on the Commission's part has been demonstrated.

2. The Commission's adoption of the Decision (*second* ground of appeal)

48. The *second* ground of appeal also consists of two parts. In the first, the appellant challenges the assumption made by the Court of First Instance that, at the time of adoption by the Commission, the necessary quorum for voting purposes was present. In the second part, the appellant takes issue with the alleged failure by the Court of First Instance to hold that there was an infringement of the formal provisions governing authentication, and the alleged substantive discrepancy between the notified and adopted versions of the Decision.

17 — In the interim, the Court has stated, in connection with the right of access to documents, that 'the infringement committed is not remedied by the mere fact that access was made possible... during the judicial proceedings' (Case C-51/92 P, cited in footnote 15, at paragraph 78).

(a) The quorum when the Decision was adopted by the Commission

Submissions of the parties

49. The *appellant* submits that the Court of First Instance erred in law in finding, in paragraph 142, that there was no formal error in regard to the adoption of the Commission Decision, inasmuch as it misconstrued the minutes of the Commission session ('the minutes') and consequently concluded — incorrectly — that the requisite quorum of Commission Members had been present when the Decision was adopted. In so doing, the Court of First Instance breached Articles 5 and 6 of the Commission's 1993 Rules of Procedure. [18]

50. Against this, the *Commission* contends that the appellant is here challenging the determination of facts and the assessment of evidence, for which reasons the ground of appeal is to that extent inadmissible.

51. The ground of appeal is also unfounded, the Commission continues, as the names of the persons who took part in the discussions on the Decision were evident from the attendance list on page 2 of the minutes. The documentary function and evidentiary force of the attendance list are not placed in question by the fact that the minutes state elsewhere that certain Cabinet members attended the session 'in the absence of the Commission Members'.

Appraisal

52. In order to reply to the question whether the number of Members required for the adoption of the Decision under Articles 5 and 6 of the Rules of Procedure in force in 1993 was present, the Court of First Instance, in the judgment under appeal, relied on the attendance list, set out on page 2 of the minutes of the session. [19] The Court of First Instance took the view that the comment on page 40 of the minutes stating that certain members of Cabinets attended the session 'in the absence of the Commission Members' [20] was not at variance with the attendance list on page 2 of the minutes. [21]

53. The Commission has raised the question whether this part of the second ground of appeal is inadmissible on the ground that it may be challenging a non-appealable assessment of a factual matter by the Court of First Instance.

18 — OJ 1993 L 230, p. 15.

19 — Paragraph 140.

20 — Paragraph 141.

21 — Paragraph 142 et seq.

54. The Court has already dealt on a number of occasions in its case-law with the question whether the appraisal of a document is a question of fact or of law.[22] In the appraisal of a document by the Court of First Instance the following three stages may be distinguished:

55. First, it may be a question of determining the purely textual content of a document (for instance, which words were actually used). Next, the issue may be one of determining, on that basis, the objective (i.e. not the legal) content of the text (what do these words generally mean). Finally, an appraisal of the document's legal meaning may be carried out on the basis of its objective content as thus determined (whether the document thereby satisfies the substantive legal requirements).

56. Determination of the textual content and of the objective content of what the document states constitutes merely a preliminary stage to that of the legal assessment. There is a determination and evaluation of facts which — subject to examination of potential distortion — cannot be reviewed in appeal proceedings. The actual legal assessment takes place only at the third stage and is reviewable in appeal proceedings.

57. The present case features a classic example of the threefold division just illustrated: the text of pages 2, 7 and 40 of the minutes is set out in paragraphs 140, 141 and 146 of the judgment under appeal. In paragraph 142 et seq. under challenge the Court of First Instance determines the objective textual content regarding the issue of those in attendance, which it ascertains by considering page 40 in conjunction with pages 2 and 7 of the minutes. The legal appraisal of the objective textual content (existence of capacity on the Commission's part to adopt a decision in accordance with Article 5 of the 1993 Rules of Procedure) is not carried out until paragraph 147.

58. In its submission that the necessary quorum was not achieved, the appellant is thus taking issue with the second stage in the appraisal of a document, that is to say, the determination by the Court of First Instance as to what the text of the minutes actually means. In this it is directing its criticism at that Court's assessment of the facts and not at any legal appraisal.

59. The first part of the *second* ground of appeal, challenging the alleged failure by the Court of First Instance to take account

22 — The judgment in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681 concerned the question whether a Commission letter closing the file on a complaint was to be regarded as being a 'preparatory statement of position' and thus as a challengeable legal measure; the judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339 centred on the issue of whether a document was of a 'medical nature', on which depended the right of access under specified legal bases; that in Case C-346/90 P *F.* v *Commission* [1992] ECR I-2691 turned on the question whether a letter contained a clarification or a 'complaint' triggering a set period within which action had to be taken.

of the fact that there was no quorum when the Commission adopted the Decision, must therefore be dismissed on the ground that it is *inadmissible*.

(b) The question of the proper adoption by the Commission of the Decision and the substantive correspondence between the versions of the Decision as notified and as adopted

Submissions of the parties

60. The *appellant* submits that, in paragraph 158 of its judgment, the Court of First Instance rejected as unfounded its head of complaint that version C(94)321 final of the Commission Decision notified to it had not been authenticated in accordance with Article 16 of the 1993 Rules of Procedure. The Court of First Instance, in particular, thereby misapplied the formal provisions governing Commission decisions and misconstrued the meaning of the presumption of validity applying to Community actions.

61. In its judgment, the appellant continues, the Court of First Instance did not hold that the version notified to it was identical to the versions C(94)321/2 and C(94)321/3, nor did it hold that it had been annexed to the minutes in the due and proper manner. Further, the Commission was not in a position to produce the minutes with the original signatures of its President and Secretary-General, and the minutes did not indicate the date on which they were signed. For those reasons the Court erred in concluding that the notified Decision had been properly authenticated on 23 February 1994, as the evidence available did not justify that conclusion.

62. The *Commission* takes the view that the argument alleging lack of correspondence between the versions of the Decision renders this ground of appeal inadmissible in so far as the appellant has adduced nothing to substantiate its criticism of the comments of the Court of First Instance on this point and its submission relates to the determination of facts for which the Court of First Instance alone is competent.

Appraisal

63. Paragraph 158 of the judgment under appeal, with which the appellant takes issue, relates to the alleged *discrepancy* between the version of the Decision before the Commission at the time of adoption and the version notified to the appellant.

64. The purely substantive correspondence between the version of the Decision notified to the appellant and that before the

Commission at the time of adoption is a determination of fact and is not a question of law.

65. The second part of the *second* ground of appeal must therefore be dismissed as *inadmissible* in so far as it alleges that there was a discrepancy between the versions of the Decision as adopted and as notified.

66. It is evident, however, from the arguments set out in support of this part of the second ground of appeal that the appellant is here principally challenging the rejection of the doubts which it raised during the proceedings before the Court of First Instance concerning the *proper authentication* of the Commission's Decision. In this connection, however, it is directing its criticism not at paragraph 158 of the judgment under appeal, which it cites, but rather at paragraph 166 thereof.

67. The questions of the substantive concordance of the textual versions of the Decision and that of the proper authentication of the Decision are, however — as will now be shown — inseparably connected. What is merely an incomplete citation of the contested paragraphs should not therefore lead to rejection of the appellant's submissions regarding the alleged failure to take account of the lack of proper authentication.

68. The appellant's submission appears to question whether the factors of comparison selected by the Court of First Instance to prove substantive concordance were correctly chosen. The Court did not compare the version notified to the appellant with the original Decision but rather with a copy of that original. This implies an allegation that the Court of First Instance, absent submission of the original Decision as authenticated, relied on inappropriate evidence in its examination of substantive concordance.

69. This idea cannot be dismissed out of hand if one considers the requirements governing, and the purpose served by, the authentication of Commission decisions. Articles 9 and 16 of the Commission's 1993 Rules of Procedure provide that a decision is authenticated when the minutes of the session in question are approved by the Commission and the minutes, as approved, are signed on their front page by the President and the Secretary-General (Article 9). It is by virtue of *these* signatures on the minutes that a decision is deemed to have been authenticated (Article 16, first paragraph, second sentence). The first sentence of Article 16 of the Rules of Procedure states that the text which has been the subject of adoption must be 'annexed' to the relevant minutes. Only in this way

can the fact that the unsigned decision and the signed minutes belong together be externally verifiable, and the version of the text of this — annexed — decision is distinguishable from a non-authenticated version of the text. [23]

70. These requirements imposed by the Rules of Procedure are thus not an end in themselves but serve rather precisely the purpose of providing evidence in judicial proceedings, in the event of doubt, as to whether any, and if so which, text version was adopted by the Commission as a collegiate body. [24] More precisely, the text version of a decision adopted by the Commission becomes, for legal purposes, an original decision only once it has been authenticated in the due and proper form. As the notified version and the 'original' must be compared, it is in principle the production of the authenticated decision alone that can make possible a comparison free from any doubt.

71. This gives rise to the following questions: how was the Court of First Instance actually able, on the basis of a copy, to determine whether there was an original satisfying the requirements of authentication, and what was the content of that original?

72. It will in this connection be necessary to distinguish between the signatures on the front page of the minutes and the requirement that the decision be 'annexed' to the minutes.

73. The Court of First Instance based itself, in paragraph 165, on the certification of the copy in the form of the stamp and signature of the Secretary-General of the Commission in office at the time of the judicial proceedings, and stated clearly that it was construing the stamp 'certified to be a true copy' as meaning that the Secretary-General was thereby confirming, in view of the signatures, that the copy of the *minutes* corresponded to the original thereof. This substantively involves an appraisal of evidence that is not amenable to review in appeal proceedings.

74. More problematic, however, appears to be the question how the Court of First Instance considered that it could formally establish, on the strength of a copy, that that text of the *Decision* before the Commission at the time of adoption had been '*annexed*' to the original minutes when the copy was made.

75. The Court of First Instance first invokes in this regard, in paragraph 162, the fact that it received the minutes and the

23 — Since the Commission's 1999 Rules of Procedure (OJ 1999 L 252, p. 41), Article 16, first paragraph, states in considerably clearer terms that 'instruments adopted by the Commission in the course of a meeting shall be attached, in the authentic language or languages, *in such a way that they cannot be separated*, to a summary note prepared at the end of the meeting at which they were adopted' (no emphasis in the original). The Commission's 2001 Rules of Procedure, in force since 1 January 2001 (OJ 2000 L 308, p. 26) have left this provision (now Article 18, first paragraph) unchanged.

24 — A point expressly stated in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ('*PVC I*'), paragraph 75, and in Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, paragraph 47.

text of the Decision (both as copies) 'in the same container', and, second, refers to the indications furnished by the Commission's agents to the effect that they had received those two texts 'as such' from the Commission's Secretariat-General. [25]

76. While this should not be assumed in the present case, it is none the less still quite possible to copy separately the signed minutes and a text claimed to be that which was formally adopted, and to forward those copies 'in the same container'. That, however, is precisely — as indicated above — what compliance with the authentication requirement that the decision be 'annexed' seeks to prevent. The purely physical fact of 'being annexed', and concomitantly the existence and content of the Commission decision, can in principle really be established beyond doubt only through visual inspection of the two original texts (minutes and text of the decision) placed at the same time before the Court of First Instance.

77. However, neither of the two original texts was placed before the Court of First Instance, the Court placing particular reliance instead on the statement by the Commission's agents (to the effect that they had received those two texts 'as such' from the Commission's Secretariat-General). The Court of First Instance thereby obviously construed the statement made by the Commission's agents as meaning that they had received the two copies attached to each other 'as such' as the texts had also been 'annexed' in the original. The Court of First Instance obviously inferred from this, and from the fact that the copies were directly forwarded to those agents by the Secretariat-General, that is to say, by the only possible holder of an original, that an original of the two texts, having the same content and in 'annexed' form, was also held by the Secretariat-General.

78. The Court of First Instance thus bases its conclusions on this point substantially on the statements made by the Commission's agents, to which it attaches credence, and interprets those statements in a particular way. This is an appraisal of evidence which in appeal proceedings, subject to any allegation that the Court of First Instance distorted the evidence, is not open to review and to that extent renders a ground of appeal *inadmissible*.

79. The appellant also challenges paragraph 164 of the judgment under appeal, in which the Court of First Instance, for the purpose of finding that the Commission Decision was properly authenticated, invokes additionally its own case-law dealing with the principle that Community

25 — Paragraph 162 of the judgment under appeal.

measures enjoy a presumption of validity. [26]

80. In my view, the Court of First Instance is here misconstruing the substance of the presumption of validity of Community instruments as recognised in the case-law. This holds good, in the first instance, where it was already possible to prove that a legal measure of the Communities was defective. [27] In the present case, however, what is primarily at issue is the assessment as to whether the legal instrument is at all (formally) defective, or, more precisely, the proof of the facts necessary for that purpose. In paragraph 164, the Court of First Instance evidently erred in its reasoning in treating the presumption of validity as constituting evidence of validity (in the sense of 'being free of defects'). In this it confuses the subject-matter of the adduction of evidence with that actual adduction itself.

81. This substantive deficiency in the reasoning does not, however, mean that the Court's statements in regard to the proper authentication of the Decision are entirely defective in law. The case-law on the presumption of validity was cited in the judgment under appeal only for complementary purposes in an ascertainable connection with that reasoning which the Court of First Instance — as just indicated — gave in its assessment of the statement of the Commission's agents, [28] with the result that no independent conclusive significance can be attached to it.

82. As for the appellant's submission that the Court of First Instance failed to take account of the fact that the signatures of the Secretary-General and the President on the minutes were undated, all that need be stated is that this submission corresponds in full to its submission made as applicant in the proceedings before the Court of First Instance. No new arguments have been adduced in the present proceedings as to why the findings by the Court of First Instance in paragraph 167 of the judgment under appeal might have been defective in law.

83. A ground of appeal based solely on a repeated submission must, according to the settled case-law of the Court, be dismissed as *inadmissible*. [29]

84. The second part of the *second* ground of appeal, which challenges the failure to take account of the improper authentication of the Commission's Decision, must therefore similarly be dismissed as being *inadmissible*.

26 — Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957.

27 — See paragraph 48 of the judgment in Case C-137/92 P, cited in footnote 24.

28 — Directly following the probative evaluation of the statements of the Commission's agents, paragraph 164 begins as follows: '*In those circumstances*, and regard being had to the presumption of validity which Community measures enjoy... the applicant has failed to establish that...' (no emphasis in the original).

29 — See, for example, the Court's order in Case C-244/92 P *Kupka-Floridi* v *ESC* [1993] ECR I-2041.

B — *The ground of appeal alleging that the Court of First Instance exceeded its jurisdiction* (*third* ground of appeal)

Submissions of the parties

85. The *appellant's* submission is directed against paragraph 392 of the judgment under appeal, in which the Court of First Instance held that the Commission had, in the Decision, regarded participation in the information exchange system as constituting a separate infringement, even though — as emerges from paragraph 384 of the judgment under appeal — the Commission's agents themselves had stated in the proceedings before the Court of First Instance, in response to the latter's question, that the Commission had proceeded on the basis that, by serving to facilitate price-fixing and market-sharing agreements, participation in the information exchange system had merely formed part of wider infringements.

86. The Court of First Instance, at least in the appellant's view, thereby exceeded its jurisdiction under Article 33 of the ECSC Treaty inasmuch as it did not confine itself to examining the Commission's Decision but actually altered it.

87. In the opinion of the *Commission*, this ground of appeal is inadmissible because the classification of the information exchange system by the Commission is not a question of law but one of fact which the Court has no jurisdiction to review.

88. The Commission submits in the alternative that the ground of appeal is unfounded. The action was directed against the Decision. It could not be directed against the explanations given by the Commission's agents in the judicial proceedings, as the Court of First Instance was not bound by those explanations. In the Decision, however, participation in the information exchange system is mentioned in Article 1 and recital 314 in the listing of the individual infringements other than price-fixing and market-sharing.

Appraisal

89. It is first necessary to state that, in its submissions in the *third* ground of appeal, the appellant is expressing the fact that it shares the Commission's view of the law which is favourable to it, as expressed by the Commission in the proceedings before the Court of First Instance (participation in the information exchange system is *not* a separate infringement of competition). In contrast, it does not share the Commission's view of the law which on this point is unfavourable to it and which is expressed in the Decision (separate infringement of competition). For that reason it also does

not share the view of the law expressed by the Court of First Instance confirming the Commission's interpretation as set out in the Decision.

90. The appellant does not, however, allege in this ground of appeal that there was a legally defective application of competition law (Article 65(1) of the ECSC Treaty) by the Court of First Instance: this assertion is made in the *fourth* ground of appeal, which will be dealt with below. [30]

91. In its *third* ground of appeal the appellant expressly takes issue with what it alleges to be an excess of jurisdiction on the part of the Court of First Instance, and thus a breach of Article 33, first paragraph, second sentence, of the ECSC Treaty in conjunction with Article 34 thereof. In what follows, I shall therefore examine this submission on the basis of those rules:

92. The rules contained in those provisions authorise the Court of First Instance only to review a Commission decision and thus at the same time prohibit, subject to the unlimited power of review under Article 36 of the ECSC Treaty, constructive interference to the detriment of a complainant.

93. The appellant is now claiming that the Court of First Instance interfered constructively with the substantive content of the Decision in a manner adversely affecting it. It accordingly claims a breach of the Treaty, that is to say, a breach of Article 33, first paragraph, of the ECSC Treaty. The ground of appeal is thus *admissible*.

94. It is, however, questionable in the present case whether there was in fact any such constructive interference by the Court of First Instance. That would be so only if the judgment under appeal conferred on the Decision a substantive content other than what it had actually had. In its result, however, the judgment under appeal confirms the legal view expressed by the Commission in the Decision that the information exchange system in itself constituted a breach of Article 65(1) of the ECSC Treaty. An alteration in the substantive content of the Decision could therefore be attributed to the Court of First Instance only if the substantive content of the original Decision had been altered on this point during the proceedings.

95. In the appellant's view, such alterations were clearly made through the reply to the written question put by the Court of First Instance and through the related statements made by the Commission's agents during the oral procedure.

96. The Commission's agents could not, however — even had this been their true intention — have altered the substantive content of the Decision in a legally effective manner precisely because in that case the formal Commission instrument necessary for that purpose would have been lacking.

30 — See paragraph 99 et seq. below.

97. As the content of the Decision was therefore not altered during the proceedings before the Court of First Instance, the latter proceeded in the judgment under appeal on the basis of the content which the Decision had when adopted by the Commission. The Court of First Instance thus confined itself to its review jurisdiction under Article 33, first paragraph, of the ECSC Treaty and did not alter the content of that Decision in a manner adversely affecting the present appellant.

98. The *third* ground of appeal, alleging that the Court of First Instance exceeded its jurisdiction, contrary to Article 33, first paragraph, of the ECSC Treaty, is for those reasons *unfounded*.

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

99. The *fourth* ground of appeal consists of two parts. In the first part the appellant takes issue with the assumption by the Court of First Instance that the Commission correctly presumed that participation in the information exchange system constituted a separate infringement of competition law. In the second part, the appellant challenges the alleged failure by the Court of First Instance to rule that the information exchange system did not have an adverse effect on 'normal competition' within the meaning of Article 65(1) of the ECSC Treaty.

1. Whether participation in the information exchange system constituted a separate infringement of competition

Submissions of the parties

100. The *appellant* here takes issue with paragraph 393 et seq. of the judgment under appeal. In its opinion, the Court of First Instance erred in categorising the monitoring of orders and deliveries as a breach of Article 65(1) of the ECSC Treaty, even though the information exchange system here in question could not by itself have had any restrictive effect on competition.

101. The exchange of information in the present case related not to price information but to statistics recording orders and quantities delivered. Such an exchange, the appellant submits, has in principle the effect of stimulating competition.

102. The appellant goes on to criticise the Court of First Instance for providing contradictory reasons as to why the information exchange system in itself was in restraint of competition. In paragraph 403 the Court proceeded on the basis of an anti-competitive effect resulting from the information exchange system, whereas in paragraph 401 et seq. it puts forward at the same time the 'maintenance of traditional flows of trade' resulting from the information exchange system as an argument pointing to this anti-competitive effect. In an information exchange system which is deemed to constitute in itself a separate breach of Article 65(1) of the ECSC Treaty, the restrictive effect on competition must follow from that system itself and, if relevant, from the general market structure.

103. In concluding that participation in the information exchange system was anti-competitive, the Court of First Instance was wrong to invoke the 'UK Tractor Registration Exchange' case-law[31] ('the *Tractor* judgments') and to assume that the structure of the market in beams was also characterised, as had been the case with the tractor market, by a narrow oligopoly, in order thereby to justify its assessment that participation in the information exchange system amounted to a breach of competition law. As the Court of First Instance itself held in paragraph 400 of the judgment under appeal, the 10 largest undertakings within the steel-beams market held only two thirds of the market share, a fact indicating strong competition among the many competitors. Given such a market structure, there can in any event be no assumption of a simple oligopolistic structure, and *a fortiori* no assumption of a highly concentrated market.

104. The *Commission* submits that these heads of complaint are inadmissible as the appellant has failed precisely to indicate which grounds of the contested judgment it is challenging and has failed to indicate precisely the legal arguments intended to support its application to have those grounds of the judgment set aside. The criticism levelled at paragraph 401 et seq. of the judgment under appeal is unfounded as the Court of First Instance, contrary to what the appellant claims, did give reasons for the anti-competitive nature of the information exchange system which were derived from that system itself.

105. The appellant's arguments challenging the Court's views on the oligopolistic structure of the market in beams must also, the Commission argues, be rejected on the ground that they question the appraisal of facts. Further, the appellant had itself, in its application of 8 April 1994 (paragraph 80), already described the beams market as an oligopolistic market.

31 — Judgments in Cases T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 and T-35/92 *John Deere* v *Commission* [1994] ECR II-957 and the respective appeals in Cases C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175 and C-7/95 P [1998] ECR I-3111.

106. Equally, the appellant's criticism of the reference made by the Court of First Instance to the *Tractor* judgments must be rejected. The Court of First Instance expressly stated in those judgments that information exchange systems, as a means of ensuring transparency among traders, could have a stimulating effect on competition only if there was an atomisation of supply on the market, which was not the case with regard to the beams market.

107. In addition, the appellant picks out only one factor, whereas the Court of First Instance provided several elements to demonstrate that the information exchange system was anti-competitive in nature. While the steel-beams market is in fact less oligopolistic than the relevant market in the *Tractor* judgments, steel beams are more homogenous products than tractors, with the result that competition in the present case based on product characteristics was from the outset limited.

108. Examination of the effects which an agreement has on competition involves the assessment of complex economic issues, judicial review of which must necessarily confine itself to verifying whether the procedural rules were followed, whether the reasons given are adequate, whether the facts were properly determined, and whether or not there was any obvious misconstruction of the facts or abuse of discretionary power. The appellant, however, has in no respect demonstrated that the Court of First Instance infringed those standards with regard to the Commission's examination of the information exchange system.

Appraisal

109. The question which the appellant here posits is essentially whether the Court of First Instance applied to the information exchange system here in issue, in a legally correct manner, the conditions required under Community law for a finding that certain information exchange systems are anti-competitive, as derived from the *Tractor* case-law. [32]

110. I would first like to set out, with the necessary brevity, the essential features of that case-law.

111. It must first of all be stated that the Court has not yet had an opportunity to set out its views on the separate anti-competitive nature of information exchange systems under the ECSC Treaty (Article 65 of the ECSC Treaty). All of the cases to date have been examined within the scope of application of the EC Treaty (Article 85 of

32 — Cases C-8/95 P (cited in footnote 31) and C-7/95 P (cited in footnote 31).

the EC Treaty, now Article 81 EC). As the question here, however, is in the first instance merely whether and to what extent information exchange systems *in se* may *generally* be liable to affect competition, possible differences *vis-à-vis* the ECSC Treaty need not for the moment be addressed. The question whether the results are transposable to 'normal competition' within the European Coal and Steel Community (Article 65(1) of the ECSC Treaty) will then be dealt with separately below. [33]

112. Information exchange systems will be anti-competitive *in se* if their anti-competitive nature results from the systems themselves, and thus independently of whether the information obtained through them was used for other 'classic' breaches of competition, such as price-fixing agreements and market-sharing. This separate anti-competitive nature of information exchange systems has in principle been recognised by the Court in the *Wood Pulp* [34] and *Tractor* judgments. [35] In its grounds the Court bases itself on a fundamental idea, which is referred to as a 'requirement of independence': [36] '[E]ach trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers'. [37] This requirement of independence will be adversely affected by an information exchange system if the latter is liable 'to create conditions of competition which do not correspond to the normal conditions of the market in question'. [38] That will in particular be the case where the systematic exchange of information takes place on a 'highly concentrated oligopolistic market'. On such a market the systematic increase in information provides an indication of the market positions and strategies of competitors. [39]

113. The Court has, however, also held that information exchange systems are, under certain circumstances, compatible with competition. Thus, an information exchange system extending beyond traders and also accessible to, for example, customers is more likely to strengthen competition than weaken it. [40] A market truly characterised by competition and with atomised supply can also have the result that competition is strengthened through the information so obtained. [41] It is only by means of the transparency thus achieved that traders are placed in a position to adjust their individual conduct to that market.

33 — See paragraph 135 et seq. below.

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

35 — Cited in footnotes 26 and 31.

36 — Judgments delivered on 14 July 1972, for example in Case 48/69 *ICI* v *Commission* [1972] ECR 619 ('*Dyestuffs*').

37 — Cited in footnote 26 (paragraph 86).

38 — Cited in footnote 26 (paragraph 87).

39 — Cited in footnote 26 (paragraph 88).

40 — Cited in footnote 26 (paragraph 88).

41 — Cited in footnote 26 (paragraph 88).

114. In the present case, the Court of First Instance examined the information exchange system against this background.

115. First of all, with regard to the issue whether this is an oligopolistic market, I share the Commission's view that, in so far as it invokes an alleged misappraisal of the market in steel beams (oligopolistically structured), the ground of appeal is *inadmissible*. That is an assessment of facts and — subject to review of potential distortion — is not amenable to challenge in appeal proceedings.

116. Proceeding further on this basis, the Court of First Instance identifies the anti-competitive nature of the information exchange system in the fact that undertakings' 'decision-making independence' is thereby adversely affected. In paragraph 402 et seq., it explains this adverse affect as being attributable to the pressure on traders resulting from the discussions subsequent to the exchange of information (analysis, evaluation, criticism of orders announced and deliveries etc.).

117. In putting forward such grounds, however, the Court of First Instance has, in my opinion, in fact logically placed in question the basis on which participation in the information exchange system becomes a *separate* breach of competition.

118. The anti-competitive nature of certain information exchange systems does not arise *ab initio* from the fact that the information restricts *decision-making independence*. That rather is typical for the normal type of agreements and concerted practices. The anti-competitive nature of an information exchange system presumably lies in the fact that it dispenses with another attribute fundamental to commercial activity, namely the *risk of uncertainty*. Decision-making independence and the risk of uncertainty are, however, two *separate* attributes of competition in its ideal form. These two attributes may, it is true, have an effect on one another. The removal of uncertainty may, in certain economic situations, also significantly affect decision-making independence by, for instance, exerting pressure to adopt a specific line of conduct on the market. This is, however, not a necessary result and the Court took the view, in the *Tractor* judgments,[42] that competition was adversely affected by certain information exchange systems simply on the ground that the risk of uncertainty inherent in the ideal form of competition is reduced.

119. With reference to the line of argument followed by the Court of First Instance, it must therefore be concluded that it misconstrued this distinction by introducing, as a ground for the separate anti-competitive nature of the information exchange

42 — Cited in footnotes 26 and 31.

system, the influence on decision-making independence, which was not absolutely necessary for that purpose.

120. The Court of Justice, however, has repeatedly ruled that a ground of appeal must also be dismissed if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other grounds. [43]

121. It must be borne in mind in this regard that the Court of First Instance expressly referred, in paragraph 410 of the judgment under appeal, to the relevant jurisprudence in the *Tractor* judgment. On the basis of the facts, which can no longer be placed in question, there cannot be any reasonable doubt that, even on the basis of what I consider to be a proper construction of the earlier case-law, the Court of First Instance would have concluded that the information exchange system did satisfy the conditions for a finding of anti-competitive conduct. As the Court of First Instance ruled in paragraph 394 et seq., the system enabled its participants — to the exclusion of those competitors and consumers not participating in the system — to have knowledge of the order and delivery levels [44] of each participant, information which would otherwise be subject to commercial confidentiality, and thereby to obtain up-to-date information on the market position of each individual participant in relation to total turnover on all the markets concerned. This resulted in precisely what makes an information exchange system *inherently* anti-competitive: a reduced risk, exclusively for participants, with regard to the uncertainties typical of competition.

122. As it may thus, on the whole, be accepted that the Court of First Instance did set out reasons as to why the information exchange system was anti-competitive and correctly based those reasons on the previous case-law, and that its decision was therefore correct in law, the defect contained in the reasoning just indicated cannot be regarded as being sufficiently serious to render the ground of appeal well-founded to that extent.

123. The first part of the *fourth* ground of appeal, criticising the failure to rule that the information exchange system did not constitute a separate issue under competition law, must for those reasons be dismissed as

43 — See, for example, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28.

44 — The appellant's submission that the system related 'only' to order and delivery levels, and not to price information, is evidently linked to the fact that the *Wood Pulp* judgment (cited in footnote 34) involved a system for the exchange of information on prices. According to the Court's case-law, however, the determinant factor is not the subject-matter of the information, but rather its function. The system must relate to information that is normally subject to commercial confidentiality inasmuch as knowledge of it would enable competitors individually to tailor their own market conduct accordingly. That is the case with regard to information on current order and delivery levels.

being in part *inadmissible* and as being otherwise *unfounded*.

2. The adverse effect which the information exchange system and price-fixing had on 'normal competition' within the meaning of Article 65 of the ECSC Treaty

Submissions of the parties

124. The *appellant* submits that the Court of First Instance was wrong to hold that the practices complained of constituted a breach of Article 65(1) of the ECSC Treaty inasmuch as it based itself on a misconstruction of the term 'normal competition' as used in Article 65(1) of the ECSC Treaty.

125. 'Normal' competition within the meaning of the ECSC Treaty should be construed as covering not only restrictions on the ideal form of competition through the general legal possibilities offered by Articles 5, 46, 47 and 48 of the ECSC Treaty or Decision No 2448/88. That term must also be understood as covering the competitive situation resulting in this particular case from the totality of the special framework conditions arising against the background of the ECSC Treaty. The Court of First Instance failed in this regard to take proper account of the influence which the conduct of DG III had on the structure of competition in the case in point.

126. More specifically, the appellant takes issue with the appraisal of the information exchange system and the price-fixing from the point of view of competition law and, in support of its contentions, submits essentially as follows:

127. The Court of First Instance, it claims, failed to take cognisance of the fact that, within the framework of normal competition within the ECSC, undertakings are allowed a scope of action which also extends to cover the conduct here in issue. The attempt by the Court of First Instance to draw a distinction in the legal assessment, to the effect that there were, on the one hand, general, non-binding discussions authorised within the context of cooperation with DG III, and, on the other, prohibited agreements and concerted practices, is unconvincing.

128. The appellant invokes essentially the witness statements of Mr Kutscher, who worked at that time in DG III, which are reproduced in paragraph 484 et seq. of the judgment under appeal. Mr Kutscher referred expressly to 'consensus'. Achievement of such consensus, however, involves not merely the exchange of forecasts, in particular relating to individual prices and quantity data, but also a corresponding

agreement between undertakings. An internal agreement of this kind was thus regarded by DG III as being not only permissible but also even as unavoidable in view of the information which it required.

129. The judgment under appeal is in any event contradictory inasmuch as the Court of First Instance held, in paragraph 318, with regard to price-fixing, that none of the provisions of the ECSC Treaty permits concerted price-fixing practices. On the other hand, in paragraph 269, it defined 'concerted practices' in such wide terms that even the exchange among undertakings of pricing forecasts, considered permissible by Mr Kutscher, would have to be classified as a concerted practice. That notwithstanding, the Court of First Instance still found, for instance in paragraph 534, that the Commission knew nothing of the breaches of Article 65(1) of the ECSC Treaty.

130. The judgment under appeal is, according to the appellant, also contradictory in so far as the Court of First Instance took no account of the Commission's influence in its examination of the breach of Article 65(1) of the ECSC Treaty but did take it into account when assessing the fines. In paragraph 644 of the judgment under appeal, the Court of First Instance held, with regard to the level of the fine, that even an exchange of views by the undertakings concerning pricing forecasts in the form approved by DG III might in itself have led to 'some parallel conduct' on the market. This is tantamount to a finding that the undertakings were given in this connection an extended scope with regard to agreements on pricing policy which also covered conduct which would otherwise — under Article 85 of the EC Treaty (now Article 81 EC) — have been treated as in breach of competition. In so doing, however, the Court of First Instance acted at variance with the reasons which it had given for the breach of Article 65(1) of the ECSC Treaty and set out in paragraphs 318, 330 and 411 with regard to the individual infringements.

131. The *Commission* points out that the scope of the term 'normal competition' within the European Coal and Steel Community cannot be determined by the Commission itself but is defined by the Treaty.

132. Nor, it continues, is it contradictory if, in connection with the level of the fine, the economic repercussions of the infringement are examined and at the same time some account is also taken of the 'situation accepted by DG III', because the concept of normal competition, as defined by the ECSC Treaty, is not thereby as such brought into question.

133. The appellant's argument could be accepted only if the 'situation envisaged and accepted by DG III' had had the result of removing from the conduct complained of any tendency adversely to affect competition within the ECSC. The Court of First Instance, however, did not make any such finding. Rather, it simply refrained in paragraphs 643 and 644 from comparing the economic repercussions of the conduct in question with the position which would have arisen had no contact been established among the undertakings, and instead compared those repercussions only with the position envisaged and accepted by DG III.

— The Court of First Instance inconsistently used the term 'concerted practices' as meaning a restriction of normal competition;

— In assessing the fine under Article 65(5) of the ECSC Treaty, the Court of First Instance applied a different construction of normal competition to that applied in connection with the issue of the breach of Article 65(1) of the ECSC Treaty.

Appraisal

134. The claim that there was a misconstruction in law of the term 'normal competition' within the meaning of Article 65(1) of the ECSC Treaty (hereinafter 'normal competition') is based on the underlying assumption that this notion of competition is distinct, by virtue of the additional word 'normal', from the notion of competition contained in Article 85 of the EC Treaty (now Article 81 EC). On this basis the appellant sets out three main lines of argument:

— The Court of First Instance failed to take any, or any proper, account of the lawful disruption of the ideal form of competition which forms part of normal competition;

(a) The question whether and to what extent lawful disruptions of the ideal form of competition fall within the concept of normal competition

135. The distinction between normal competition and competition within the meaning of Article 85 of the EC Treaty (now Article 81 EC) is addressed in the judgment under appeal [45] in connection with the question whether it can be assumed that the ECSC Treaty is posited on the basis of inherently disrupted competition on the markets concerned. The Court of First Instance followed this argument of the appellant only in so far as it recognised in principle that normal competition on the ECSC markets may, by virtue of the

45 — Paragraph 299 et seq.

oligopolistic nature of those markets and specified industrial policy objectives, in conjunction with the use of corresponding instruments, [46] diverge from the ideal concept of competition. [47] The Court of First Instance, however, stated its express opposition to drawing from this legal situation any consequences in general regarding the competition law of the ECSC.

136. The appellant is not challenging the general appraisal by the Court of First Instance that the oligopolistic nature of the relevant markets and the application of industrial-policy rules distinguish normal competition from competition in its ideal form. In my view, this raises rather the more extensive question whether the Court of First Instance erred in law in limiting the scope of the disruptions to the ideal form of competition covered by the ECSC Treaty ('system-inherent' disruptions) to the oligopolistic nature of the relevant markets and to the correct application of the industrial-policy rules under the ECSC Treaty. The appellant's reproach is that the Court of First Instance ought to have examined whether the 'special framework conditions of the individual case' produced through the conduct of a Community institution might not also have been a disruption to the ideal form of competition covered by the ECSC Treaty. Were that the case, normal competition would then also probably as a result fall below the threshold of ideal competition. In turn, the Court of First Instance ought, in the appellant's view, to have drawn the appropriate conclusions in applying Article 65(1) of the ECSC Treaty.

46 — The system under Articles 46, 47, 48 and 60 of the ECSC Treaty was examined in relation to Article 65(1) of the ECSC Treaty.

47 — 'Competition' within the meaning of Article 81 EC.

137. In my view, the Court of First Instance set out, in paragraph 302, the correct basis for answering that question. With regard to the assessment of the oligopolistic character of the ECSC markets in terms of competition law, the Court of First Instance stated in paragraph 302 that:

'while it is true that this may, to some extent, weaken the effects of competition... , that consideration cannot justify an interpretation of Article 65 authorising undertakings to behave in such a way as... reduces competition *even further* [emphasis added]... In view of the consequences which the oligopolistic structure of the market may have, it is all the more necessary to protect residual competition'.

138. This statement of principle by the Court of First Instance may well retain validity beyond the oligopolistic structure of the ECSC markets. The reason for this is that neither the disruptions in the form of the special features of the European Coal and Steel Community, which were examined by the Court of First Instance, nor the 'special framework conditions of the individual case' (occasioned by a Community institution), which in the appellant's view are covered by the ECSC Treaty through the use of the concept of normal competition, result in partial or temporary 'destruction' of competition. In fact what is in issue is rather — as the Court of First Instance correctly held — at most a 'weakening' (of the effects) of competition. The difference presumably lies in the fact that, where competition has been 'destroyed', the question may well arise as to whether there can still be any anti-competitive conduct at all. In the case of

'weakened' competition, in contrast, it is clear that the ideal form of competition continues (subliminally) to exist [48] and for that reason merits protection.

139. It necessarily follows from this need for protection that, in addition to the system-inherent disruptions already mentioned, the 'special framework conditions of the individual case' invoked by the appellant in the present case can in any event be established only on the basis of the objectives and instruments provided for in the ECSC Treaty.

140. These 'special framework conditions of the individual case' are, according to the appellant, the meetings of the undertakings, which it is not contested were at least in part brought about by DG III. The Court of First Instance dealt with this group of issues under the heading 'Involvement of DG III in the infringements found after the end of the manifest crisis regime' at paragraph 515 et seq. of the judgment under appeal.

141. Citing the witness statement of the DG III official Mr Kutscher, the appellant concentrates its argument on the contention that the Commission, according to its own statements, expected that the undertakings concerned would reach among themselves, at the internal preparatory meetings, a 'consensus' [49] concerning specified market parameters (production, delivery, prices and their future tendencies). This was intended to enable the Commission to secure the requisite information on the market situation and future market developments in a prepared and collated form.

142. The Court of First Instance examined in paragraph 318 of the contested judgment the legality of the Commission's desire for 'consensus'. It concluded that 'consensus' in the form of *price-fixing* is not covered by Articles 46 to 48 of the ECSC Treaty. [50] In view of the purely technical-information-related nature of Article 47 of the ECSC Treaty in particular, and in the light of the fact, as outlined above, that competition, in any event weakened, merited protection, this appraisal cannot be criticised from the legal point of view.

143. With regard to the *information exchange system*, the Court of First Instance found, in paragraphs 542 and 549 of the judgment under appeal, that the Commission had been deliberately kept

48 — As the Court of First Instance correctly states in paragraph 303, citing the case-law of the Court of Justice (Opinion 1/61 [1961] ECR 243; judgments in Case C-128/92 *Banks* v *British Coal* [1994] ECR I-1209, Case 1/54 *France* v *High Authority* [1954-1956] ECR 1, Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245, at p. 253): 'The objective of free competition... has, within the [ECSC] Treaty, an independent character and the same binding force as the other Treaty objectives laid down in Articles 2 to 4'.

49 — Paragraph 485.

50 — The Court of First Instance thereby overlooked the fact that the pricing agreements resulting from the meetings arranged by DG III on the basis of Decision No 2448/88 even fell outside the legal scope of Decision No 2448/88 until that decision expired in mid-1990. According to Article 2 thereof, discussions up to mid-1990 could deal exclusively with production and delivery quantities. On the other hand, those discussions could not involve forecasts or even development trends, as under Article 2 the information system of Commission Decision No 2448/88 was intended only to provide the Commission monthly on a retrospective basis with data on established production and delivery quantities.

in the dark with regard to the true content of the discussions in question. Moreover, the individual data there exchanged were patently also not required by the Commission as such. [51] These also therefore could not be preparatory meetings, the purpose and content of which were directed at acquiring 'the information [which the Commission] requires to carry out its tasks' within the meaning of the first paragraph of Article 47 of the ECSC Treaty.

144. The second part of the *fourth* ground of appeal must therefore be dismissed as *unfounded* in so far as the interpretation and application of the term 'normal' competition within the meaning of Article 65(1) of the ECSC Treaty is challenged with regard to the extent of the (lawfully authorised) weaknesses contained therein.

(b) Contradictory use of the term 'concerted practices' as meaning a restriction on normal competition

145. This part of the ground of appeal takes issue with the alleged misconstruction of the concept of 'normal' competition within the ECSC based on the assumption of the existence of 'concerted practices'. In order better to appreciate the question of law thus raised, the following explanation might first be given:

146. In paragraph 263 et seq. the judgment under appeal examines whether three price increases on the United Kingdom market amounted to prohibited 'concerted practices' within the meaning of Article 65(1) of the ECSC Treaty, before finding in the affirmative in that regard.

147. Citing its judgment in *Rhône-Poulenc*, [52] the Court of First Instance stressed the following in particular:

'it follows from the Court's case-law concerning the EC Treaty that, in order to be able to conclude that a concerted practice existed, it is not necessary for the concertation to have had an effect... on the conduct of competitors on the market.' [53]

148. In the appellant's view, this suggests such a broad definition of the term 'concerted practices' that even the conduct of undertakings which do not have any intention whatever of influencing their competitors' market conduct might constitute an infringement of competition law. However,

51 — The Court of First Instance might well also, through an appraisal of the evidence contained in the witness statement of Mr Kutscher (an appraisal which was not carried out), have concluded that the pricing agreements of the present kind clearly did not constitute that 'consensus' which DG III required and expected. This may be illustrated in particular by the Commission's evident interest in data *prepared* for purposes of technical information but not data '*standardised*' in an anti-competitive manner.

52 — Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, one of the *Polypropylene* cases. For the judgments of the Court of Justice on the appeals in those cases, see Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125 (hereinafter 'the *Polypropylene* cases').

53 — Paragraph 269.

if such an intention were not necessary — so the thinking clearly goes — an exchange of information required by the Commission to prepare the requisite market parameters would be a 'concerted practice' and likewise illegal. Such an assumption, however, is expressly rejected by the Court at another point in the judgment under appeal. [54] In the view of the appellant, this ostensible contradiction could be resolved only through a correspondingly restrictive interpretation of the concept of 'normal' competition within the meaning of Article 65(1) of the ECSC Treaty, something, however, which the Court of First Instance did not do in the judgment under appeal.

149. The appellant's submission is thus based essentially on the contention that, in its view, the Court of First Instance ruled that conduct must be intended to result in parallel market conduct before it can be anti-competitive as constituting a 'concerted practice'.

150. The appellant is thus clearly proceeding on the basis of a specific construction of 'concerted practices' (and of 'concerted practices' within the meaning of Article 81 EC). This provides a reason for outlining briefly this type of breach of competition on the basis of the existing case-law of the two Community Courts:

151. Concerted practices can exist only if there have been *practices* amounting at least to a making of contact between undertakings. [55] There must subsequently be evidence of actual *parallel market conduct* on the part of undertakings [56] (apart from the case of information exchange systems) [57] and there must be a *causal nexus* between the making of contact and the parallel market conduct. [58] Evidence of *market effect* is not absolutely necessary. [59] The strength or weakness of the market effect may, however, be taken into account

54 — Paragraph 564.

55 — See, for instance, Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663 and Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021.

56 — Judgments in the *Polypropylene* appeals, as in Case C-49/92 P (cited above in footnote 52). In paragraph 118 of the latter judgment the Court stated: 'It follows that, as is clear from the very terms of Article 85(1) of the [EC] Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.' In its judgment in Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991 — one of the *Cartonboard* cases — the Court held that there may be a breach of competition even if an involved undertaking participated passively in the agreements but did not itself take part in the resulting parallel conduct on the market.

57 — See Case C-7/95 P (cited in footnote 26). Considered in this light, the Court, in its judgments in the *Polypropylene* cases (cited in footnote 52), delivered only a short time later, perhaps chose an excessively broad formulation, which might also lead to misunderstandings inasmuch as those cases also involved, *inter alia*, information exchange systems. The exceptional nature of the treatment accorded to certain information exchange systems may be entirely justified on the ground that the peculiar nature of these breaches of competition — as illustrated above — results from the reduction of the *risk of uncertainty* inherent in the ideal form of competition. As the objective of competition law is directed in these cases at maintaining a risk meriting protection, the issue of proven parallel conduct cannot be relevant. In the case of classic breaches of competition, the objective of which for purposes of competition law is directed at maintaining *the decision-making independence of undertakings*, the case presents itself differently in that regard. Evidence must be provided of parallel market conduct because serious doubts might otherwise be raised on a regular basis as to whether the practices complained of in an individual case are at all of such a kind as to adversely affect decision-making independence.

58 — See the case-law cited in footnote 52.

59 — Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and Case C-49/92 P (cited in footnote 52). The market effect will be relevant only if there is no objective in restraint of competition or where no such objective can be demonstrated. However, no general economic market effects are examined, but only market effects in the form of restrictions of competition. In this regard it is sufficient if the restrictions of competition are inherent to the agreement or conduct, although they need not actually have come into force. See also the *Tractor* cases, Cases C-7/95 P (cited in footnote 31) and C-8/95 P (cited in footnote 31).

when the fine is being set, in the context of the seriousness of the act. [60]

152. The appellant's invocation of the citation, in the judgment under appeal, of the *Rhône-Poulenc* judgment [61] is, in my view, misleading for the following reasons. The assumption by the appellant that, in the paragraph of the judgment under appeal which it cites, the Court of First Instance is proceeding on the basis that the agreement need not have 'had as its object' the subsequent parallel market conduct of the participants, would certainly appear to be based on a misunderstanding of the German term 'erstrecken' used in the judgment under appeal:

153. The wording chosen in German, the language of the case, which states that the existence of a concerted practice 'nicht davon abhängt, dass sich die Abrede ... auf das Marktverhalten der Konkurrenten *erstreckte*' (emphasis not in the original) may, it is true, also be construed in German as meaning that the agreement must *not have as its purpose* the influencing of market conduct. However, it is also possible to construe the sentence as meaning that the agreement must *not bring about* [62] the parallel market conduct.

154. As the latter indeed reflected the Court of First Instance's view of the law [63] at the time of the judgment under appeal, and the Court of First Instance expressly invokes its judgment in *Rhône-Poulenc*, it must be assumed that, in the paragraph under challenge, the Court of First Instance was dealing solely with the question of the need for *verifiable* parallel market conduct. Even considered in this light, however, the fact remains that it cannot be inferred from this paragraph that the Court of First Instance intended to state a view on the question of the purpose of specific practices.

155. It cannot therefore be inferred from the contested passages of the judgment that the Court of First Instance was proceeding on the basis that there might also be concerted practices within the meaning of Article 65(1) of the ECSC Treaty where specific practices have a purpose other than that of influencing the conduct of participants on the market. Consequently, it also

60 — See, for example, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359.

61 — Cited in footnote 52.

62 — The wording of the French original of this paragraph is in this regard unequivocal: '... il n'est pas nécessaire que la concertation se soit *répercutée*... sur le comportement des concurrents sur le marché' (emphasis added).

63 — The Court did not go along with the view expressed by the Court of First Instance. In the judgments on the appeals in the *Polypropylene* cases (cited in footnote 52), the Court did not confirm the assumption made by the Court of First Instance in *Rhône-Poulenc* (cited in footnote 52) that the mere suspicion that the undertakings' conduct must necessarily have resulted in corresponding parallel conduct on the market suffices for the presumption of a concerted practice (Article 81(1) EC). Those judgments, however, had not yet been delivered at the time of the proceedings in the present case.

cannot be inferred from the judgment under appeal that an exchange of information remaining solely within the parameters of what the Commission required for the performance of its duties within the lawful boundaries of the ECSC Treaty could constitute an infringement of competition.

156. Consequently, it is to that extent not possible to identify any contradiction to other passages in the judgment.

157. The second part of the *fourth* ground of appeal must therefore be dismissed as *unfounded* in so far as it alleges a contradictory use of the concept of 'concerted practices' as meaning a restriction of normal competition within the meaning of Article 65(1) of the ECSC Treaty.

(c) Contradictory use of the concept of 'normal competition' in Article 65(1) and (5) of the ECSC Treaty

158. In paragraph 632 et seq. the judgment under appeal addressed the question whether, in fixing the fine, the Commission took sufficient account of the 'economic impact' of the various anti-competitive practices. That judgment correctly stated — as indicated above [64] — that evidence of economic impact is in principle not necessary for a finding that Article 65(1) of the ECSC Treaty has been infringed. From this the Court of First Instance concluded that the economic impact of an infringement also could not in principle [65] be taken into account for the purpose of determining the amount of the fine.

159. However, in view of the pricing agreements, the Court of First Instance took into account, in paragraph 644, the fact that, even if participants' conduct were irreproachable under competition law, 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'.

160. In my opinion, all that can be inferred from paragraph 644 is that, at this point, the Court of First Instance incorporated in its examination of the question of 'economic impact' a hypothetical causal sequence (lawful conduct — parallel market conduct through external effects — intensification of this parallel conduct occasioned through the lawful conduct).

64 — See paragraph 151 above.

65 — Paragraph 636 of the judgment under appeal.

161. By its submissions the appellant is now raising the question whether the Court of First Instance erred in law in the judgment under appeal because it considered the hypothetical causal sequence only in its examination of the legal consequences and not earlier in its examination of the facts.

162. In my view, the appellant, in its arguments on this branch of the ground of appeal, fails to appreciate that what is here in issue is not at all the factual aspect of specific practices but rather a question of evidence in regard to the causal connection between the practices and the resultant parallel market conduct: if there is proof of certain practices, parallel conduct on the market and a causal connection between the two, that will constitute proof of a breach of Article 65(1) of the ECSC Treaty. However, should the Court of First Instance conclude that lawful conduct would have resulted in the same or similar parallel market conduct, that will give rise to serious doubts as to the causal connection between the practices and the market conduct and the evidence of facts constituting the infringement can no longer be regarded as having been adduced.

163. In the present case, however, the Court of First Instance simply states with great caution in paragraph 644 that it 'could not be ruled out' that even lawful conduct 'could have [not even "produced" but simply] reinforced some parallel conduct on the market'. It cannot therefore be assumed that the Court of First Instance intended thereby to cast serious doubt on the causal connection between practices which it had previously labelled unlawful and the market conduct (here: price-fixing). [66]

164. It cannot therefore be assumed that the Court of First Instance thereby placed itself in contradiction with those paragraphs of the judgment in which it set out the reasons why price-fixing constituted an offence.

165. The second part of the *fourth* ground of appeal must therefore be dismissed as *unfounded* in so far as it alleges a contradictory use of the term 'normal competition' in Article 65(1) and (5) of the ECSC Treaty.

166. The *fourth* ground of appeal alleging a legally defective assessment of the substantive legality of the Decision (Article 65(1) of the ECSC Treaty) is therefore in part *inadmissible* and in the main *unfounded*.

66 — That said, however, the hypothetical assumption set out in this paragraph of the judgment under appeal also does not appear to me to be entirely comprehensible in regard to the grounds for reducing the relevant portion of the fine.

D — *The grounds of appeal relating to the fine*

167. In its *fifth*, *sixth* and *seventh* grounds of appeal, the appellant alleges a number of Treaty infringements relating to the fine.

1. Inadequate consideration of the fault principle (*fifth* ground of appeal)

Submissions of the parties

168. The *appellant* takes the view that the findings of fact by the Court of First Instance would allow only a — much reduced — degree of fault to be attached to it. While, according to paragraphs 504, 514, 589 and 590 of the judgment under appeal, the Court of First Instance considers the various infringements to be manifest, this stands in contradiction to its own finding in paragraph 643 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. As is clear from paragraph 643, the Court of First Instance even considered it possible, in view of the involvement of DG III, that the exchange of individual data in the present case need not necessarily have constituted a breach of Article 65(1) of the ECSC Treaty. In view of these uncertainties, the appellant claims that it could not have been aware that its conduct was illegal under the ECSC Treaty rules. Further, the general exhortations made by DG III for compliance with the competition rules could not, in view of the uncertainty just indicated, have contributed to awakening the appellant's awareness of wrongdoing.

169. Finally, the appellant takes issue with the 'intention to conceal' assumed in this connection by the Court of First Instance in paragraphs 522 and 523 of the judgment under appeal. In the context of the Commission's monitoring system it was necessary for the undertakings to collate and prepare the information supplied to DG III. The information exchanged and that supplied to DG III was thus not identical as the information supplied to DG III must have been in summary form and thus more general than the discussions actually conducted by the undertakings.

170. The *Commission* submits that this ground of appeal is inadmissible in so far as, in challenging the finding of the Court of First Instance that the infringements were clear and manifest, that there were actual agreements on price-fixing, that information on deliveries was exchanged and that there was an intention to conceal, the appellant is challenging the deter-

mination and assessment of facts, which are matters within the purview of the Court of First Instance alone.

171. The ground of appeal, the Commission continues, is, however, in any event unfounded. The appellant was not being accused of practices classifiable in some grey zone but was being charged with gross infringements of the prohibition of cartels as to which it could not have been in error.

Appraisal

172. The appellant invokes what it claims to be a mistake in law on its part and claims that, in its view, this constitutes the basis for the defective assessment of its fault.

173. In this connection, the appellant relies in large measure on paragraph 643 of the judgment under appeal, in which the Court of First Instance found that 'DG III introduced a degree of ambiguity into the meaning of the concept of "normal competition" as used in the ECSC Treaty'.

174. It cannot indeed be denied that these lines express a degree of doubt as to the identifiability of unlawful conduct. It must also be acknowledged, in favour of the appellant, that this might involve a contradiction to the statements made by the Court of First Instance in paragraphs 504, 514, 589 and 590.

175. However, it must also be borne in mind that these respective statements by the Court of First Instance were made within quite separate contexts:

176. The Court of First Instance first states that the practices in issue may be recognised as unlawful in its comments on the substantive legality of the Decision in the context of the investigations into the continuance of 'misunderstandings as to the application or scope of Article 65(1) of the Treaty after the end of the manifest crisis regime'. [67]

177. Similar comments are also to be found in the statements of the Court of First Instance on the application for a reduction of the fine, there in connection with the investigations into 'the applicant's good faith, infringement of the principle of the protection of legitimate expectations and failure to adopt transitional measures' [68] after the end of the manifest crisis regime.

67 — Paragraphs 504 and 514 of the judgment under appeal.
68 — Paragraph 592 of the judgment under appeal.

178. The passage in contradiction to this [69] also features in the remarks on the application for a reduction of the fine, but occurs there in connection with the 'proportionality' of the fine. In addition to several other grounds adduced before the Court of First Instance to demonstrate that the fine was disproportionate, that passage also deals with the aspect of the 'economic impact' of the practices complained of. In this the Court of First Instance compares the position which arose as a result of the disputed practices with the position that would have arisen had the undertakings met solely in the interests of DG III.

179. In the comparison of two descriptions of economic conditions, however, it strikes me as unnecessary, if indeed not redundant, to mention subjective aspects such as supposed or actual uncertainties concerning specific legal concepts. [70] Considered thus, it would also appear that no conclusions can be drawn from paragraph 643 for the purpose here sought by the appellant.

180. The *fifth* ground of appeal, alleging that inadequate attention was paid to the fault principle, must therefore be dismissed as being *unfounded*.

69 — Paragraph 643 of the judgment under appeal.

70 — The statement to which objection is taken might therefore be more likely to generate doubt as to its conclusiveness for providing grounds for a reduction of the fine. That, however, is not the subject of the ground of appeal being examined here.

2. Calculation of the portion of the fine relating to participation in the information exchange system (*sixth* ground of appeal)

Submissions of the parties

181. The *appellant* argues that, in paragraph 649 of the judgment under appeal, the Court of First Instance deemed participation in the information exchange system to constitute a separate infringement of Article 65(1) of the ECSC Treaty justifying an increase in the fine, even though the information exchange system was of merely ancillary significance in relation to the other infringements.

182. The *Commission* refers to its other submissions concerning the separate nature of the infringement consisting in participation in the information exchange system.

183. The *appellant* refers further to paragraph 644 of the judgment under appeal, in which the Court of First Instance gave reasons for reducing the fine in respect of price-fixing by reference to the alteration in 'normal competition' resulting from the monitoring system of DG III. It takes the view that the Court of First Instance erred in limiting its examination to price-fixing, arguing that the views expressed by the Court of First Instance are equally valid in

regard to participation in the information exchange system and ought, for the sake of consistency, also to have been applied by the Court of First Instance to such participation, with the result that the fine should also have been reduced with regard to participation in the information exchange system.

184. In *the Commission's* view, the grounds on which the Court of First Instance reduced the fine in respect of price-fixing are not applicable in respect of participation in the information exchange system.

Appraisal

185. The *sixth* ground of appeal consists of two parts. First, it is necessary to examine in general whether the Court of First Instance was correct in confirming that participation in the information exchange system could constitute a separate element in the calculation of the fine. If so, it will then be necessary to address the second part, by which the appellant argues that the Court of First Instance should also have applied the grounds for reduction by which it lowered the portion of the fine corresponding to price-fixing to that portion of the fine relating to participation in the information exchange system.

186. Unlike the Commission, I take the view that the first part of this ground of appeal concerns a question which must be distinguished from the assessment of the discrete nature of the information exchange system already carried out above. [71] While it was first considered whether there was at all an infringement (whether the facts constituting the offence occurred), it will now be examined whether separateness in regard to the facts should, or even must, lead to separate consideration in regard to the legal consequences.

187. This part of the sixth ground of appeal can also be distinguished from the question discussed above [72] as to whether the Court of First Instance erred in law in failing also to take into account in its assessment of the information exchange system hypothetical assumptions which it applied in assessing the level of the fine. The issue there for determination was whether the line of argument of the Court of First Instance in the examination of the legal consequences ought to have influenced its examination into whether the facts constituting the offence had been established. Here — in contrast — the question is whether the establishment of the facts constituting the offence ought to have any, and if so, what, bearing on the legal consequences.

188. The Court of First Instance confirmed — correctly so [73] — the Commis-

71 — See paragraph 109 et seq. above.
72 — See paragraph 158 et seq. above.
73 — See paragraph 109 et seq. above.

sion's assumption that participation in the information exchange system constituted a separate infringement of competition. As it is common ground that the information which participants acquired through the system was used for the subsequent pricing agreements and market-sharing, the question now arises: was the Court of First Instance correct in assuming that the distinct nature, in factual terms, of this breach of competition ought to be reflected in a distinct (additional) component of the fine if the advantages obtained unlawfully from this breach were used up — 'consumed', so to speak — in the commission of further breaches? This situation will typically arise where there is a combination of information exchange systems, on the one hand, and 'classic' infringements of competition, such as market-sharing and price-fixing, on the other.

189. The grounds on which the Court, in the *Tractor* cases, [74] established the distinct nature of the facts constituting the offence cannot, in my view, be transposed unrestrictedly to the question of the distinct nature with regard to the legal consequences. This is, not lastly, because the facts underlying those cases gave no cause to address that question.

190. The Commission had examined the information exchange system in the *Tractor* cases within the framework of Article 85 of the EC Treaty (now Article 81 EC) as a notified agreement, but had been previously informed that similar prior agreements had been in existence without notification and had also been applied for several years. In the *Tractor* decision [75] the Commission had confirmed the anti-competitive nature of the information exchange system, refused individual exemption and ordered discontinuance, but had not imposed a fine. The Commission thus had to examine the separate anti-competitiveness of the tractor information exchange system with regard to the facts constituting the offence, as this was the subject of an application for negative clearance, but not the separate nature, for purposes of competition law, in regard to the consequences in law, because utilisation in the form of price-fixing, market-sharing and so forth was not the subject-matter of the proceedings.

191. In the judgments in *Mo och Domsjö and Others* (the *Cartonboard* cases) [76] the situation was also different as the Commission had already proceeded, in regard to

74 — Cited in footnotes 26 and 31.

75 — Commission Decision of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange) (OJ 1992 L 68, p. 19).

76 — See, for example, the judgment in Case C-283/98 P *Mo och Domsjo* v *Commission* [2000] ECR I-9855, one of the judgments relating to the Commission Decision of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1); see also the similar situation in the *PVC* cases, as illustrated by the judgment in Joined Cases T-79/89 *et al. BASF and Others* v *Commission* [1992] ECR II-315 concerning the Commission Decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC) (OJ 1989 L 74, p. 1).

the facts, on the basis that there had been a single act, in view of the fact that the participation in the information exchange system and the practices by which the information was exploited had been assessed from the outset as constituting a single breach of Community competition law which had accordingly attracted only a uniform fine.

192. The facts of the present case, however, contain both elements: the Commission had, in its Decision, proceeded on the basis of separateness in regard to the facts and had taken account of this participation in the information exchange system by adding on a separate portion to the fine. Considered in this light, the question arises here for the first time as to whether several separate infringements of competition law can also be considered separately in regard to their legal consequences.

193. Article 65(5) of the ECSC Treaty does not itself indicate how several courses of action are to be dealt with, nor does it resolve the question whether and under what prior conditions several courses of action that are dubious from the point of view of competition law may perhaps together constitute facts giving rise to only one offence. Likewise, Article 65(5) of the ECSC Treaty does not indicate whether and how the existence of facts giving rise to several offences are to be reflected with regard to the legal consequences. From this it may be concluded that Community law in principle confers on the Commission a degree of discretion in this regard.

194. It is, however, necessary to examine whether a uniform manner of dealing with this problem can be derived from the common juridical traditions of the Member States.

195. In the determination of the level of penalties in competition proceedings the Member States confer — subject to judicial review — a relatively broad degree of discretion on national competition monitoring authorities. Although the 'gravity' of the breach/breaches is often expressly mentioned as an assessment criterion in this connection, [77] it is in most instances not specified in such cases whether the aspect of dealing with several interrelated breaches can, or even must, also be covered. Denmark, Germany, Italy, Luxembourg, Austria and Portugal have codified rules on the consideration of multiple infringements of the competition legislation of those respective Member States. Such a situation is in part dealt with according to the 'Aspirationsprinzip', that is to say, an overall penalty is imposed which in most cases will be based on the level fixed for the most serious infringement. [78]

77 — Belgium, Finland, France, Greece, Ireland, the Netherlands, Sweden, Spain and the United Kingdom.

78 — In part this level represents an upper limit, while in part it forms the basis for a corresponding increase in the penalty. In some Member States there are specified upper limits even in the case of increases.

196. As the treatment accorded to several interrelated breaches and the form of the resulting legal consequences are subject to different rules under the national competition laws of the Member States, it cannot be assumed that the Member States share a common legal tradition in this regard. [79]

197. Consequently, it cannot be assumed that Community law (Article 65(5) of the ECSC Treaty) obliges the Commission to take account, when fixing a fine, of several interrelated breaches as a factor for increasing that fine, or that it prevents the Commission from so doing.

198. The scope which the relevant provisions thus confer on the Commission does, however, have its limits where such action appears arbitrary or inappropriate.

199. In order to assess this it is probably necessary to address the basis for any form of penalties, that is to say, the 'demerits' of an action. The steps taken by the Commission would thus be arbitrary or inappropriate if it were to take into account one of several breaches of competition law for the purpose of increasing the fine, even though the demerits of the first breach ought to have been regarded as 'consumed' through the use made of it in connection with the other breaches.

200. In the case of an information exchange system constituting a separate infringement, the demerits of the act, according to the Court's case-law, [80] lie in the fact that the risk of uncertainty intrinsic to free competition is partially or wholly removed. However, the demerits of 'classic' infringements of competition, such as price-fixing or market-sharing, lie in a separate disruption of free competition, namely the restriction placed on the decision-making independence of participating undertakings. Consequently, one can proceed on the premiss that there has been a 'consumption' of the demerits of the first action (removal of the risk attached to lack of knowledge) when the second action is committed (restriction of operational freedom) only if, in the particular case, nothing more remains of the demerits of the first action such as to justify a separate penalty.

201. Admittedly, it cannot be ruled out that there may be cases in which the separate demerits of the information acquired in an information exchange sys-

79 — See the Opinion of Advocate General Léger in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

80 — See the judgments cited in footnotes 26, 31 and 34.

tem disappear entirely through the use made of that information in price-fixing and market-sharing. However, no submissions were made on this point in the proceedings before the Court of First Instance or in the present proceedings.

202. One must rather proceed generally on the basis that the 'risk of uncertainty typical of competition', regarded by the Court as being worthy of protection, is reduced in such a way by the receipt of systematically channelled information on the commercial secrets of competitors that the restoration of free competition for 'uninformed undertakings' appears scarcely conceivable.

203. Applied to the case in hand, this means that the systematically and regularly supplied information on delivery levels and prices of competitors does not lose its (legally disapproved) value for participants if price-fixing is operated for a set period and market-sharing carried out for specified geographical areas. Indeed, one can assume rather a certain persistence on the part of the information which might have arisen in subsequent further price-fixing or market-sharing, or which also only lies in the fact that participants secured an overview of the market and its structure which is precisely what the ideal type of trader operating in accordance with Community competition law does not have.

204. In the present case the Commission evidently based the increase in the fine on such — at least — 'residual demerits' of the participation in the information exchange system. It cannot therefore be supposed that the Commission acted arbitrarily in fixing the level of the fine. Consequently, the Court of First Instance also cannot be accused of erring in not challenging that action.

205. The first part of the *sixth* ground of appeal, disputing the fact that participation in the information exchange system constituted a separate component in the determination of the fine, must therefore be dismissed as *unfounded*.

206. In regard to the second part of the *sixth* ground of appeal, which alleges that the Court of First Instance reduced only the portion of the fine relating to price-fixing but did not object to that portion of the fine which related to participation in the information exchange system, the following should be noted:

207. The grounds accepted by the Court of First Instance in paragraph 644 of the judgment under appeal for reducing that portion of the fine relating to price-fixing apply — as it expressly states in paragraph 646 of its judgment — only in relation to those breaches of competition, but not in

relation to the information exchange system.

208. Substantively, those grounds relate to an economic effect provoked by external factors and assumed by the Court of First Instance to be theoretically possible, which might, in its view, cause the economic repercussions of the price-fixing to appear in a different light. The Court of First Instance evidently proceeded on the basis — as is clear from paragraph 646 of the judgment under appeal — that these hypothetical economic effects would have to be assessed differently in the case of different breaches of competition.

209. In this, however, the appellant is challenging a finding of fact by the Court of First Instance which cannot be reviewed in appeal proceedings.

210. The second part of the *sixth* ground of appeal, alleging that the Court of First Instance failed also to apply to participation in the information exchange system the grounds applied in reducing the portion of the fine relating to price-fixing, must accordingly be dismissed as *inadmissible*.

211. The *sixth* ground of appeal, which takes issue with the calculation of the portion of the fine relating to participation in the information exchange system, is in part *inadmissible* and, for the rest, *unfounded*.

3. The absence of grounds in the Decision explaining the level of the fine (*seventh* ground of appeal)

Submissions of the parties

212. The appellant takes issue with the finding made by the Court of First Instance in paragraph 606 of the judgment under appeal that the Decision contains an adequate and relevant statement of the factors taken into account in assessing the gravity of the various infringements which determined the level of the fine.

213. The Decision, the appellant continues, also does not indicate how the duration of the infringements was taken into account. In this connection the appellant cites paragraph 612 of the judgment under appeal, according to which 'it is clear from the Court's analysis of the facts that the Commission has duly given reasons for the duration of the infringing actions taken into account in Article 1 of the Decision, by referring either to the actions of the parties involved or to the reference periods concerned by those actions.' The appellant submits that even a detailed study of the Commission's Decision allows of no more than conjectures as to the precise period within which the Commission placed the infringements. It is, in particular, unclear whether and to what extent account was taken of an interruption to the information exchange system.

214. With regard to the conditions governing the fixing of the fine, the judgment, so the appellant claims, contains a contradiction. In paragraphs 608 and 609 the Court of First Instance refers to the relevant case-law which states that the method by which a fine is calculated must be ascertainable even without judicial proceedings. In paragraphs 610 and 611, however, the Court of First Instance relies on the fact that the Commission provided the necessary facts and figures in the course of the judicial proceedings. Such a statement of reasons, however, the appellant argues, must, under Article 15 of the ECSC Treaty, already be contained in the Decision itself.

215. The *Commission* cites paragraphs 607, 614 and 626 of the judgment under appeal and argues that the Court of First Instance properly examined the various criteria for the assessment of the fine imposed on each individual undertaking and consequently provided adequate reasons for its judgment. To that extent the ground of appeal is therefore unfounded.

216. The arguments submitted against the assessment of the duration of the infringement would, the Commission contends, suggest that this ground of appeal is inadmissible in so far as it is directed against the evaluation of facts, a task for which the Court of First Instance alone is responsible.

217. So far as the calculation of the fine is concerned, the Court of First Instance stated that a disclosure in the Decision of the mathematical calculation of the fine would have been desirable, but did not demand such disclosure. The Court of First Instance took the view that the criteria underlying the calculation of the fine could be identified in the Decision. This part of the ground of appeal is also, the Commission argues, unfounded.

Appraisal

218. The Court has already on several occasions in the past addressed the question whether and to what extent the Commission is obligated to apply a method of calculation when setting a fine and, if need be, also to disclose that method.

219. According to settled case-law, [81] which the Court of First Instance expressly cites in paragraph 605 of the judgment under appeal, 'the scope of the obligation to provide reasons must, in particular, be assessed in light of the fact that the gravity of the infringements must be determined by reference to a variety of factors such as the particular circumstances of the case, its context and the dissuasive element of fines, there being no binding or exhaustive list of

81 — Order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611; judgment in Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809; judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165.

criteria which must be applied... Furthermore, the Commission enjoys a margin of discretion when fixing the amount of each fine and cannot be regarded as being obliged to apply a precise mathematical formula for that purpose'.

220. In its judgments in the *Cartonboard* cases [82] the Court sought to clarify the issue of the requirements to be imposed on the Commission's duty to provide reasons in its decisions, stating in this regard as follows:

'... the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.' [83]

221. In the present case the Commission provided in the Decision an 'adequate and relevant statement' — as the Court of First Instance found in paragraphs 606 and 607 of the judgment under appeal — of the factors used by it to determine the gravity of the various infringements. The Commission also found that the infringements in question were of 'long duration' and even demonstrated this with the help of tabular lists, divided up according to the individual undertakings involved, 'and thus expresses the principle that partial fines corresponding to the different infringements are to be broken down on the basis of their duration.' [84]

222. Concerning the alleged failure to take proper account of the scope of the duty to provide reasons with regard to the alleged interruption in the duration of the information exchange system, it must be pointed out that, in its judgments in the *Cartonboard* cases, the Court clearly expressed once again its opposition to any presumption that there is an obligation to carry out a mechanical calculation of fines and to provide corresponding reasons. The Court emphasised at the same time that, although the Commission is not obliged to do so, it is perfectly entitled to, on condition that it does not 'by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment.' [85]

223. If the Commission was therefore not obligated to calculate the fine in an entirely formal manner, it also cannot be assumed that it was required to act in such a manner when determining the duration of the infringements. Community law cannot therefore be construed as meaning that

82 — See footnote 76.

83 — Judgment cited in footnote 76 (paragraph 44).

84 — Paragraph 607 of the judgment under appeal.

85 — Judgment cited in footnote 76 (paragraph 47).

any interruption whatever must *necessarily* be considered to the corresponding degree. [86]

224. In the present case, therefore, the Commission would even have satisfied its duty to provide reasons if it had not — as was done in the Decision — set out in concrete terms, by preparing individual tables, the connection between the duration of each individual infringement and the individual level of the fine. It cannot therefore also be required of the Commission that it provide even more detailed information in regard to the duration in time of each individual infringement committed by each individual participant. It must suffice if the overall duration of the infringements in question, which the Commission used as the basis for setting the fine, can be ascertained.

225. The *seventh* ground of appeal, alleging failure to take account of the insufficiency of the grounds in the Decision explaining the level of the fine, must for those reasons be dismissed as being *unfounded*.

86 — This does not, however, also mean that the Commission *may* not take interruptions into account. As a general rule, however, it must be borne in mind that the law on cartels typically involves a long-term series of events, with the result that, even where there is evidence of periods being interrupted or of individual instances of non-participation in specific actions, the Commission can proceed on the assumption that there is one single continuing offence or several offences linked sequentially. See, for instance, the facts underlying Case 48/69 (cited in footnote 36) and Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223.

E — *The ground of appeal alleging that the duration of the proceedings amounted to a breach of the ECHR* (*eighth* ground of appeal)

226. In its final ground of appeal the appellant submits that, by reason of the excessive duration of the proceedings, the Court of First Instance infringed its right to a decision within a reasonable period of time enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).

Submissions of the parties

227. The *appellant* points to the length of the administrative and judicial proceedings and invokes in this connection the Court's judgment in the *Baustahlgewebe* case. [87] A duration of almost five years for the proceedings before the Court of First Instance could not, it argues, be justified on grounds of the complexity of the facts or of the measures of inquiry taken by the Court of First Instance. Further, the proceedings must be considered in their entirety: the Court is being called on in the present case to adjudge events which already date back more than 10 years, and indeed will date back almost 15 years by the time that final judgment is delivered. After the elapse of

87 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

such a period of time, a decision will affect an undertaking that has changed in terms of its economic performance and staff in comparison with the period when it was involved in the infringements. For those actually involved this resembles rather a denial of justice.

228. The *Commission* considers this ground of appeal to be unfounded. In the first place, the appellant may, by its invocation of Article 6(1) of the ECHR, take issue only with the duration of the proceedings before the Court of First Instance, but not with that of the administrative procedure. However, regard being had to the circumstances of the case, the proceedings before the Court of First Instance were not excessively lengthy.

229. Considerable financial interests were in issue for the appellant. The legal proceedings were complex, involving eleven applicants in four different languages and calling for an extensive examination of copious documentation. Like the other applicants in the proceedings subsequently joined for the purpose of a joint oral procedure, the appellant also continually submitted requests, dealing with and ruling on which took time. The appellant cannot therefore complain about the duration of the proceedings.

230. In the Commission's view, a comparison with corresponding stages of the proceedings in the *Baustahlgewebe* case in itself demonstrates that the Court of First Instance cannot be accused in the present case of undue tardiness in the proceedings. In the three years between the conclusion of the written procedure and the decision to open the oral procedure, numerous measures of procedural organisation were taken. Further, the period of one year between the conclusion of the oral procedure and delivery of the judgment was, having regard to the scope of the case, exceedingly short.

Appraisal

231. Article 6(1) of the ECHR provides that, in the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

232. According to the Court's settled case-law, [88] 'fundamental rights form an integral part of the general principles of law whose

88 — See Case C-7/98 *Krombach* v *Bamberski* [2000] ECR I-1935, paragraphs 25 and 26.

observance the Court ensures [89]... For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") has particular significance'. [90]

233. The Court thus held in the *Baustahlgewebe* case that the general principle of Community law, developed from the fundamental rights under the ECHR, that everyone is entitled to fair legal process, and in particular to legal process within a reasonable period, also applies to proceedings brought by an undertaking against a Commission decision imposing fines on that undertaking for infringement of competition law. [91]

234. In order to determine whether there was an infringement of the right of the appellant in the present case to have its action dealt with in a reasonable time, within the meaning of Article 6(1) of the ECHR, it is first necessary to determine the relevant duration.

235. According to the case-law of the European Court of Human Rights ('the Court of Human Rights') on the 'reasonable duration of proceedings', periods of pre-judicial procedure are in principle also to be taken into consideration. [92]

236. Under the first paragraph of Article 51 of the EC Statute of the Court of Justice, the Court has jurisdiction in appeal proceedings, *inter alia*, to verify whether a breach of procedure adversely affecting an appellant's interests was committed before the Court of First Instance. [93] The effectiveness of the fundamental right to have a case disposed of within a reasonable period

89 — See, for example, Opinion 2/94 [1996] ECR I-1759, paragraph 33.

90 — See, for example, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18. These principles, furthermore, have been incorporated in Article 6(2) EU. Article 46(d) EU requires the Court of Justice to supervise the application of that provision with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and the Treaty on European Union. See also Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 38.

91 — *Baustahlgewebe* (cited in footnote 87), paragraph 21; see also Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 17.

92 — Thus, according to the case-law of the Court of Human Rights, the relevant period under Article 6(1) ECHR in 'criminal offences' within the meaning of that article does not begin to run only when the action is brought before a judicial body but already when the person concerned is informed of a criminal charge or suspicion, and is thus exposed to a specific accusation (see, for example, the judgment of 24 November 1993 in *Imbrioscia*, Series A, No 275, paragraph 36). However, even in civil disputes the determinant procedural period begins with the institution of the preliminary administrative proceedings if a binding decision can be taken in such proceedings and appeal to a judicial body is subject to implementation of that decision (see the *Erkner and Hofauer* judgment of 23 April 1987, Series A, No 117, paragraph 64, and that of 18 July 1986 in *Lithgow and Others*, Series A, No 102, paragraph 199).

93 — *Baustahlgewebe* judgment (cited in footnote 87), paragraphs 19 (and the case-law there cited) and 28.

is, with regard to the duration of the procedure before the Commission, not restricted in so far as it is possible to challenge any corresponding procedural error on the Commission's part before the Court of First Instance. [94]

237. It is, however, unnecessary to reply to the question whether the duration of the procedure before the Commission can also be addressed in the examination, in the present appeal proceedings, of the issue whether protection of rights was provided within a reasonable period in so far as it was only in its statement of appeal — and even then only incidentally — that the appellant raised an argument based on the duration of the procedure before the Commission. At no point in the proceedings before the Court of First Instance did it argue that it felt adversely affected by the duration of the procedure before the Commission. The ground of appeal must therefore be dismissed as inadmissible in so far as this aspect was first raised in the appeal proceedings before the Court. [95]

238. In order to determine whether the appellant was refused vindication of its rights within a reasonable period of time, account may therefore be taken in the present case only of the total duration of the proceedings before the Court of First Instance, which amounted to approximately four years and eleven months from the lodging of the application to the date of delivery of the judgment under appeal.

239. It follows from the Court's case-law as well as from that of the Court of Human Rights that the reasonableness of the length of proceedings must be determined in the light of the circumstances specific to each case and, in particular, the importance of the case for the persons concerned, its complexity and the conduct of the parties involved and of the competent authorities. [96] However, as the reasonableness of the length of proceedings must be determined according to the circumstances of the individual case on the basis of a series of factors, a comparison with other proceedings — such as those in the *Baustahlgewebe* case — can provide at most indications for such a determination. [97]

240. First, there can be no doubt in the present case that *real interests* of the appellant were in issue in the proceedings

94 — See, *inter alia*, Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraphs 14 and 15, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 56, together with the Court's case-law there cited; further, with regard to disciplinary proceedings, see Case C-270/99 P *Z* v *Parliament* [2001] ECR I-9197, paragraph 24; see also the comments of Advocate General Mischo in his Opinion in Case C-244/99 P (cited in footnote 15), at paragraph 95 et seq. The particularities inherent in the Community's judicial structures cannot, moreover, justify as such any infringement of the fundamental right to have a case disposed of within a reasonable period of time conferred by Article 6 ECHR: see (concerning a separate fundamental right) the Court's order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18.

95 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981.

96 — See *Z* v *Parliament* (cited in footnote 94), paragraph 24, *Baustahlgewebe* (cited in footnote 87), paragraph 29, and the judgments of the Court of Human Rights in the cases of *Erkner and Hofauer* (cited in footnote 92), paragraph 66; *Kemmache* of 27 November 1991, Series A, No 218, paragraph 60; *X* v *France* of 31 March 1992, Series A, No 234-C, paragraph 32; *Phocas* v *France* of 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 546, paragraph 71; and *Garyfallou AEBE* v *Greece* of 24 September 1997, Reports of Judgments and Decisions 1997-V, p. 1821, paragraph 39).

97 — See also along these lines the Opinion of Advocate General Mischo in *PVC II* (cited in footnote 15), at paragraphs 158 and 159.

before the Court of First Instance. [98] The Commission had imposed on the appellant what was without doubt a comparatively heavy fine of ECU 6 500 000, payable within three months of the date of notification of the Decision, plus default interest at 9.75% *per annum* on expiry of that period. [99] On the other hand, the appellant has not claimed that its economic survival was directly jeopardised by the legal dispute, with the result that there is nothing to suggest that there was a special need for expedition in the proceedings before the Court of First Instance. [100]

241. So far as the *complexity* of the case is concerned, the Commission found in its Decision that infringements of competition had been committed by 17 European steel undertakings and one of their trade associations, and imposed fines on 14 of those undertakings on account of the corresponding offences.

242. It is clear from the judgment under appeal and from the case-file that the Court of First Instance was required to examine particularly copious documentation [101] and address a large number of issues of fact and law, both with regard to the applicants as a whole and to the individual case of the present appellant. In addition to the appellant, 10 other parties to which the Decision was addressed brought proceedings before the Court of First Instance. The 11 cases, lodged in a variety of languages of procedure, were joined by the Court of First Instance for the purposes of joint measures of inquiry and the oral procedure. [102]

243. For reasons of procedural economy, *inter alia*, it may be permitted and, in certain circumstances, even required to join different sets of proceedings so that they may be disposed of together, or to coordinate them for purposes of disposal. [103] Consequently, in order to determine what is reasonable, the present proceedings cannot be considered in isolation, it being necessary, rather, to focus on the totality of the cases dealt with by the Court of First Instance in parallel and in part jointly.

244. That being so, it must be stated that the Court of First Instance was called on to resolve a dispute that was complex in terms of both the factual and legal issues involved.

245. It thus remains to consider the duration of the proceedings in the light of the *conduct of the undertakings, the Commis-*

98 — See also in this connection the Court's views (which to this extent are transposable) in paragraphs 30 and 31 the *Baustahlgewebe* judgment (cited in footnote 87).

99 — See Articles 4 and 5 of the Decision.

100 — Compare in this regard the case-law of the Court of Human Rights (see, for example, the judgment of 8 February 1996 in *A. and Others* v *Denmark*, Reports of Judgments and Decisions 1996-I, paragraph 78), according to which in special cases, where there is a threat of irreversible damage, increased urgency of the decision is presumed.

101 — The material submitted by the Commission to the Court of First Instance on 24 November 1994 alone comprised some 11 000 documents (paragraph 51 of the judgment under appeal).

102 — See paragraphs 4 and 56 of the judgment under appeal.

103 — See the judgment of the Court of Human Rights of 16 September 1996 in *Süßmann* v *Germany*, Reports of Judgments and Decisions 1996-IV, paragraphs 56 and 59.

sion and the Court of First Instance. For this purpose, it seems appropriate to consider separately individual stages of the proceedings, as the Court has already done in the *Baustahlgewebe* case. The separation in that case into stages up to the oral procedure and from the oral procedure up to the delivery of the judgment [104] therefore makes sense because in the first stage the duration of the proceedings may be influenced by both the undertakings and the Commission, while in the second stage the Court of First Instance alone is responsible for the further duration of the proceedings.

246. As is clear from paragraph 49 et seq. of the judgment under appeal, the first period relevant in determining the duration of the proceedings in the present case, that is to say, the period from the bringing of the action to the oral procedure, lasted almost four years. The deliberation phase up to the date of delivery of judgment amounted to almost exactly one year.

247. Regarding this latter period, this is clearly unobjectionable. A period of just under one year for deliberation of the case by the Court of First Instance prior to delivery of the judgment under appeal is reasonable when one considers the complexity of the case and procedural law factors such as the linguistic rules. [105] The duration also lies, in comparative terms, significantly below that of 22 months for the same procedural stage in the *Baustahlgewebe* case, which the Court criticised as being unreasonable.

248. In contrast, the first period, amounting to almost four years, does indeed at first sight appear relatively lengthy, even when one considers that it includes the period of time taken up by the written procedure, and should for that reason be examined more closely, particularly on the basis of the conduct of the undertakings, the Commission and the Court of First Instance.

249. In regard to the Court of First Instance, it is necessary first of all to state that — unlike the position in the proceedings in the *Baustahlgewebe* case — it cannot, in the light of the description of its activities in paragraph 49 et seq. of the judgment under appeal, be shown to be guilty of any lengthy periods of patent inactivity justifiable only by exceptional circumstances. [106]

104 — See, more specifically, paragraph 45 of the *Baustahlgewebe* judgment (cited in footnote 87).

105 — See the *Baustahlgewebe* judgment (cited in footnote 87), paragraph 43. The present proceedings — for all of the applicants before the Court of First Instance together — involved the translation of more than 2 500 pages of judgments from French into the languages of the respective cases and the translation of extracts into the other official Community languages before the judgments could be delivered.

106 — See the judgments of the Court of Human Rights in *Zimmermann and Steiner* of 13 July 1983, Series A, No 66, paragraph 27, and in *Guincho* of 10 July 1984, Series A, No 81, paragraph 36.

250. Rather, the situation was clearly that, during the period up to the oral procedure, the Court of First Instance was substantially occupied with the issue of the right of access to the Commission's procedural documents. [107] In this it had to determine, first, whether the documents concerned were 'confidential' and, second, whether they were 'internal' documents which had, or could have had, no significance in regard to the legal appraisal of the Decision. The right of access to Commission documents and production of the documents were dealt with by the Court of First Instance in its orders of 19 June 1996 [108] and 10 December 1997. [109]

251. While it is thus evident that no periods of manifest inactivity are identifiable, this in no way signifies that extensive activity on the part of the Court of First Instance rules out any possibility that entitlement to protection of rights within a reasonable period might have been infringed.

252. In order to determine whether there was a breach of the fundamental entitlement to vindication of rights within a reasonable period, it may in principle rather be entirely appropriate to examine in greater detail the nature and duration of the activities, paying particular attention to their respective causes (whether attributable to the undertakings, the Commission or the Court of First Instance itself).

253. At the same time, however, account has to be taken of the interests of the parties and of the Court of First Instance that are in issue. Thus, it must be held in regard to the appellant that it is entitled in principle to exhaust all procedural avenues that may be of use to it. [110] This certainly also includes the request for access to the Commission's documents. There is also therefore, contrary to what the Commission submits, no contradiction — obvious abuse apart — in first making such requests and subsequently complaining about the duration of the proceedings.

254. It cannot, however, be ruled out that dealing with applications by the undertakings or the Commission took up a disproportionately large part of the time of the Court of First Instance. Any resulting delay would be attributable to the Court of First Instance in regard to the granting of protection for rights within an appropriate period. The same would apply in regard to

107 — Subsequently, and up to the time of the oral procedure, the Court of First Instance was involved for a few more months with a variety of other measures of organisation of procedure. See paragraph 57 et seq. of the judgment under appeal.

108 — Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537 ('the order of 19 June 1996').

109 — Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293 ('the order of 10 December 1997').

110 — See the judgment in *Baustahlgewebe* (cited in footnote 87), paragraph 39, and the judgment of the Court of Human Rights of 23 April 1987 in *Poiss*, Series A, No 117, paragraph 57.

patently delaying conduct on the Commission's part if the Court of First Instance could be criticised for not reacting appropriately to such delays.

255. The appellant, however, has failed to adduce any firm evidence of such instances as would enable the Court to rule accordingly.

256. The appellant's complaint that the issue of document access ought to have been resolved at the stage of the procedure before the Commission, with the result that 'catching up' in the proceedings before the Court of First Instance gave rise to delay, is invalid inasmuch as document access in the procedure before the Commission would then have led to delay in that procedure, and because the Commission cannot, as a matter of principle, be accused of seeking to protect the interests of third parties ('confidentiality') or its own interests independent of the proceedings ('internal documents').

257. Nor is it clear from the information contained in the judgment under appeal — which the appellant does not challenge or criticise as being incomplete — why the examination allegedly lasted for an unreasonably long time. Assessment of the 'confidentiality' of the Commission's documents necessitated a wide-ranging examination by the Court of First Instance for the purpose of balancing the interests represented by the potential rights of third parties, and the rights of the Commission and the undertakings, including those of the appellant. Finally, the examination of the documents as 'internal' documents demanded a preliminary substantive assessment in order to determine whether their content might be relevant. [111]

258. There is nothing in the judgment under appeal to suggest that the Commission conducted itself with unnecessary delay. As is clear from paragraph 52 of that judgment — a point not challenged in this regard — it was rather the undertakings by themselves which contributed to certain delays inasmuch as they failed to comply correctly and promptly with a measure of procedural organisation ordered by the Court of First Instance. [112]

259. To summarise, therefore, regard being had to the requirements of adversarial proceedings and its reasonable degree of discretion in investigating the necessary reasoning of the Decision, and, not lastly, bearing in mind the fact that the interests of the parties must be guaranteed equally and the linguistic rules complied with, [113] the Court of First Instance was not remiss in expediting the proceedings and the dur-

111 — This relates to the submissions of various parties to the proceedings before the Court of First Instance in regard to the role of other Directorates-General, particularly DG III. On this point see also paragraph 40 et seq. above.

112 — The replies to the first questions put by the Court of First Instance had been incomplete.

113 — *Baustahlgewebe* judgment (cited in footnote 87), paragraph 43.

ation of the proceedings cannot therefore be regarded on the whole as having been unreasonable.

260. The *eighth* ground of appeal, based on Article 6(1) of the ECHR, must for those reasons be dismissed as *unfounded*.

IV — Conclusion

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

— dismiss the appeal;

— order the appellant to bear the costs of the proceedings.