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-156/94 ('the judgment under appeal'). [2]

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

3. On 16 February 1994 the Commission adopted against 17 European steel undertakings and one of their trade associations 'Commission Decision 94/215/ECSC... relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams' (hereinafter 'the Decision'). [5] 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 Siderúrgica Aristrain Madrid SL (hereinafter the 'appellant') the Commission imposed a fine of ECU 10 600 000.

4. Several of the undertakings concerned, including the appellant, together with the trade association, challenged the Decision before the Court of First Instance. The Court of First Instance ultimately reduced the fine to EUR 7 100 000 and dismissed the remainder of the action.

2 — Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645.

3 — OJ 1988 L 212, p. 1.

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

5 — OJ 1994 L 116, p. 1.

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

II — Forms of order sought and grounds of appeal

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

(1) set aside the judgment delivered on 11 March 1999 by the Court of First Instance in Case T-156/94 having regard to all or any of the errors claimed and, both by way of an express ruling on substantive law and by referring the case back to the Court of First Instance, determine all of the legal consequences resulting from the setting aside of that judgment, and that it should, in particular:

— set aside the judgment under appeal in so far as it found that the Decision was not in breach of Community law for misapplication and misinterpretation of Article 65 of the ECSC Treaty, and consequently annul the Decision on that ground;

— decide the case in so far as the judgment stage has been reached or, alternatively, refer the case back to the Court of First Instance so that it can decide it on the basis of the grounds set out below and consequently annul the Decision in so far as it is based on those grounds or, in the alternative, reduce the fine imposed on the applicant:

— joint and several liability;

— errors of reasoning;

— inconsistency;

— infringement of the principles of equality and proportionality by expressing the fines in ecus;

— failure to order the Commission at first instance to pay all of the applicant's costs and interest resulting from the guarantee for the whole or part of the fine or from any payment thereof, so that the Court of First Instance should rule that the fine does not bear interest until its judgment becomes enforceable and

therefore order the Commission to pay the costs and interest incurred in respect of the guarantee for the fine or in respect of payment thereof;

— similarly, in relation to the eighth and ninth grounds claimed in the proceedings;

— dismiss the case in so far as the judgment stage has not yet been reached, that is to say

— in relation to the abuse of discretionary power;

(2) in the event of this appeal being allowed in whole or in part, order the respondent to pay the costs, including those of the proceedings at first instance.

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

'Infringement of Community law by the misapplication and misinterpretation of Article 65 of the Treaty establishing the European Coal and Steel Community ("ECSC Treaty") in appraising the infringements allegedly committed within the scope of the ECSC Treaty and the ECSC market in as much as the reasoning on this point of the judgment under appeal was inconsistent.'

Second ground of appeal

'Infringement of Community law due to the judgment of the Court of First Instance being legally defective in the application of the concept of abuse of discretionary power since it did not give reasonable consideration to the argument put forward by the applicant in this respect and the evidence adduced.'

Third ground of appeal

'Infringement of Community law by the misapplication and misinterpretation of Article 15 of the ECSC Treaty with regard to the absence of reasoning in the Decision explaining the fine.'

Fourth ground of appeal

'Infringement of Community law due to the judgment of the Court of First Instance not containing adequate reasoning in the following respects:

(a) In a material point of the applicant's claim concerning lack of capacity to adopt the Decision challenged.

(b) In the size of the fine imposed not being compared with that imposed in other cases under the law on cartels in the context of the EC Treaty, without any reason being given for that omission.'

Fifth ground of appeal

'Infringement of Community law due to the judgment of the Court of First Instance displaying a number of inconsistencies in its examination and appraisal of various arguments:

(a) firstly, with regard to joint and several liability because, since the fine was imposed only on Siderúrgica Aristrain Madrid, it also had to accept responsibility for the practices of its sister company;

(b) secondly, in relation to the aggravating factor — that is to say, knowledge of the unlawful nature of the practices the subject of complaint — and finally

(c) in relation to the date stipulated in the operative part of the Commission Decision from which the alleged infringements are imputed to Siderúrgica Aristrain Madrid.'

Sixth ground of appeal

'Infringement of Community law by the misapplication and misinterpretation of the principles of equality and proportionality as the judgment of the Court of First Instance did not take proper account of

the devaluations of the Spanish peseta. This meant that the fine payable by Siderúrgica Aristrain Madrid was greater in comparison with the fines paid by other undertakings with currencies that had not been devalued or that had even risen in value.'

Seventh ground of appeal

'Infringement of Community law and of fundamental rights with regard to inconsistencies in the reasoning of the judgment of the Court of First Instance in not ordering the Commission to pay costs and interest arising from the guarantee for the fine or from payment of the fine.'

Eighth ground of appeal

'Infringement of Community law resulting from a breach of Article 33 of the Rules of Procedure of the Court of First Instance and the guarantees under procedural law due to the fact that only three of the five judges of which the Chamber was composed at the hearing took part in the deliberations of the Court of First Instance.'

Ninth ground of appeal

'Infringement of Community law due to disregard for the applicant's entitlement to a fair decision within a reasonable period in breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").'

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 a number of breaches of the ECSC Treaty. Summarised according to the essential issues of law involved, the appellant is of the opinion that

the Court of First Instance committed *procedural errors* in the judgment under appeal in that

— the judgment under appeal was pronounced by a *Chamber with the wrong composition* (*eighth* ground of appeal) and

the Court of First Instance breached *Community law* in the judgment under appeal in that it:

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

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

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

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

no breach of Article 65(1) of the ECSC Treaty had been committed because participation in the information exchange system did not constitute a separate infringement of competition (*first* ground of appeal) and

the Commission had abused its discretionary power (*second* ground of appeal);

— erred in law in its assessment of the *fine*, the grounds given for it and the parties to which it was addressed (*third, fourth, fifth* and *sixth* grounds of appeal);

— omitted in the *decision on costs* to order the Commission to pay costs and interest arising from the lodgement of security or from any payment of the fine (*seventh* ground of appeal);

— contrary to *Article 6 of the ECHR*, failed to vindicate the appellant's rights within a reasonable period (*ninth* ground of appeal).

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

10. The grounds of appeal in the present proceedings substantively correspond in part to the grounds of appeal and their subdivisions submitted in Case C-194/99 P *Thyssen Stahl* v *Commission* or in Case C-182/99 P *Salzgitter* v *Commission*.[6] My Opinion in those cases is also being delivered today. Where the content of the submissions is the same I will refer in this Opinion to the appraisals that I have undertaken in my Opinions on Case C-194/99 P or Case C-182/99 P.

6 — *Thyssen Stahl* [2003] ECR I-10821, and *Salzgitter* [2003] ECR I-10761.

III — Examination of the case

A — *The wrongful composition of the Chamber* (eighth *ground of appeal)*

Submissions of the parties

11. The *appellant* takes issue with paragraph 77 of the judgment under appeal.

12. It is alleging that the judgment under appeal was signed by only three judges. It does not bear the signature of the judge who had, in any event, been President of the Chamber until the oral proceedings came to a close, nor does it bear the signature of another judge who was also present during the oral proceedings.

13. In so far as the Court of First Instance in the judgment under appeal based its procedure on Article 32(1) of the Rules of Procedure of the Court of First Instance (hereinafter, the 'Rules of Procedure'), it disregarded the fact that the ending of a term of office of a judge on a rotational basis is not one of the instances stipulated in Article 32(1) of the Rules of Procedure. The Court of First Instance could have foreseen that certain judges would not be able to participate in the deliberations because their terms of office had expired; it should therefore have changed the composition of the Chamber.

14. Since two judges present during the oral proceedings did not participate in the final deliberations, the appellant continues, the judgment was not only in breach of Article 33(5) of the Rules of Procedure but also in breach of the fundamental procedural guarantees enshrined in Community law and in Article 6(1) of the European Convention on Human Rights (hereinafter, the 'ECHR') as the deliberations form an essential part of the collegiate court process the purpose of which is to avoid subjective appraisal.

15. The *Commission* takes the view that Article 32 of the Rules of Procedure, referred to in paragraph 77 of the judgment, is significant in as much as Chambers must consist of the number of judges required, namely three, and this was in fact the case.

16. It contends that the appellant is misinterpreting Article 33 of the Rules of Procedure. This provision is not infringed if not all of the judges who were present at the oral proceedings are able to take part in the deliberations; it is only infringed if judges who were not present at the oral proceedings take part in the deliberations.

17. Finally, the Commission notes, if it had been foreseeable that two judges would not be able to be present during the deliberations, objection should have been raised during the oral proceedings or at the hearing in January 1998.

18. The Commission also refers to paragraph 323 of the judgment of the Court of First Instance in the *PVC II* case, [7] in which the Court of First Instance dismissed a similar claim.

Appraisal

19. Since the arguments put forward in relation to the composition of the Chamber essentially correspond to those presented by the appellant *Salzgitter AG* in Case C-182/99 P, I refer, in relation to the grounds on which the *eighth* ground of appeal should be dismissed as unfounded, to paragraph 21 et seq. of the Opinion that I am also delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

20. It should just be stated, with regard to reliance on Article 6(1) of the ECHR, that the appellant has not substantiated this aspect of its argument and that the case-law of the European Court of Human Rights does not show that this issue falls within the scope of application of that provision. [8]

7 — Case T-305/94 to T-307/94, T-313/94 to 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* [1999] ECR II-931.

8 — This question was left open in the judgment in *Piersack* v *Belgium* (1 October 1982, Series A. No 53, p. 16, paragraph 33) and in the *Pfeifer and Plankl* v *Austria* judgment (25 February 1992, Series A No 227, paragraph 35 et seq.) the European Court of Human Rights ruled only that the composition of the court must satisfy statutory requirements. It was held in the *Deumeland* v *Germany* judgment (29 May 1986, Series A No 100, paragraph 81 et seq.) that 'the change of judges represents a natural part of the life of a court'.

21. The *eighth* ground of appeal taking issue with the wrongful composition of the Chamber must therefore be dismissed as *unfounded*.

B — *The legally defective assessment of the question of the quorum when the Decision was adopted by the Commission* (fourth *ground of appeal)*

22. In its *fourth* ground of appeal the appellant takes issue with what it considers to be defective reasoning in the judgment under appeal in two respects. In the first part of the *fourth* ground of appeal it takes issue with the assumption made by the Court of First Instance that the necessary quorum was present when the Decision was adopted. The second point relates to the reason for the size of the fine and will be dealt with later. [9]

Submissions of the parties

23. The *appellant* takes issue with paragraph 186 et seq. of the judgment under appeal. It submits that the Court of First Instance misconstrued the minutes of Commission session 1189 on 16 February 1994 and consequently concluded — incorrectly — that the requisite quorum

9 — Paragraph 84 et seq.

of Commission Members had been present when the Decision was adopted. In doing so, the Court of First Instance breached Article 13 of the ECSC Treaty and Articles 5 and 8 of the Commission's Rules of Procedure.

24. Since the minutes were not unambiguous with regard to the presence of certain Commissioners when the Decision was adopted, the Court of First Instance should have undertaken a further examination *sua sponte* or at least have given its reasons for refusing the appellant's application for further evidence to be taken.

25. The *Commission* considers the first part of the *fourth* ground of appeal to be inadmissible since it refers to a determination of fact made by the Court of First Instance.

26. It is also unfounded, in any event, as the findings by the Court of First Instance in the paragraph of the judgment under appeal with which issue is taken do conform to the law. It is the appellant that is misinterpreting the minutes of the session.

Appraisal

27. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the first part of the *fourth* ground of appeal should be dismissed as being inadmissible, to paragraph 52 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

28. Since, according to the interpretation by the Court of First Instance (that is not amenable to review on appeal), the minutes were therefore not 'ambiguous' there is no further need to go into the question of whether it was unlawful for the Court of First Instance to refuse to order that further evidence should be taken in order to prove the necessary quorum.

29. The first part of the *fourth* ground of appeal, challenging the determination of the question of the quorum when the Decision was adopted by the Commission, must therefore be dismissed on the ground that it is *inadmissible*.

C — *The grounds of appeal alleging that the assessment of the substantive legality of the Decision was defective in law* (first *and* second *grounds of appeal)*

30. In the *first* and *second* grounds of appeal the appellant takes issue with the alleged failure by the Court of First Instance to take proper account of the substantive legality of the Decision.

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

32. In the *second* ground of appeal the appellant challenges the alleged failure to rule that the Commission committed an abuse of its discretionary power with regard to the question of whether a fine should be imposed for infringements of the competition rules (Article 65(5) of the ECSC Treaty).

1. The adverse effect of the conduct complained of in the Decision on 'normal competition' within the meaning of Article 65 of the ECSC Treaty (*first* ground of appeal)

Submissions of the parties

33. In the first part of the first ground of appeal the *appellant* takes issue with the fact that, in its opinion, the Court of First Instance failed to appreciate that the provisions of Article 85 of the EC Treaty (now Article 81 EC) and the provisions of Article 65(1) of the ECSC Treaty are different. It does not deny that the prohibition on 'agreements... and concerted practices' in the EC Treaty and on 'agreements... and... concerted practices' in the ECSC Treaty generally have the same meaning and that the aim pursued is ultimately the same.

34. However, the economic and normative contexts of the two treaties are not the same. An adverse effect on 'normal competition' is necessary for there to be an infringement of Article 65(1) of the ECSC Treaty. This is distinguishable, however, from the competition afforded protection under Article 85 of the EC Treaty (now Article 81 EC) so that the interpretation of the EC Treaty does not apply as it stands to the ECSC Treaty.

35. The problem that manifests itself here is that the meetings within the framework of the Poutrelles Committee, which were taken in the reasoning of the Decision as the basis for various infringements of the competition rules, took place at the instigation of the Commission and were also supervised by it.

36. As can be seen, in particular, from the witness statements made by the staff of DG III, the Commission had been informed that the people attending those meetings would be exchanging views and opinions on price trends and future tendencies in the product markets concerned and they had even made known their individual intentions in that respect. What was being fostered, the appellant continues, corresponds to what the Commission understood to be a 'cartel' — that is to say, a permanent arrangement between the parties the principal aim of which was to achieve equilibrium between supply and demand and harmonisation of prices.

37. The Court of First Instance also misapplied and misinterpreted Article 65 of the ECSC Treaty, the appellant continues, in wrongly using the criteria applicable to Article 85 of the EC Treaty even though the steel market that was relevant here displayed special characteristics. Because of the abundance of information accessible to all, the outstanding feature of that market was its great transparency; in a favourable economy there was a natural parallelism between prices on that market. This was also confirmed by the testimony of witnesses.

38. The assumption made by the Court of First Instance, that parallel prices necessarily signified the existence of an agreement in restraint of competition or concerted practices, is mistaken in the context of the ECSC Treaty. Even the Court of First Instance itself accepted this view of the law in finding, in paragraphs 606 to 623, that the fine imposed on the appellant for the various agreements and concerted practices should be reduced by 15% for that very reason.

39. In the opinion of the *Commission* the argument that an infringement of Article 65 of the ECSC Treaty (safeguarding 'normal competition') should be distinguished from a breach of Article 85 of the EC Treaty (now Article 81 EC) because of measures by the Commission for which provision was made in the ECSC Treaty, is quite without foundation. The Commission refers to the statements made by the Court of First Instance in paragraphs 316 to 320 and 323 to 331.

It takes the view that the Court of First Instance gave sufficient reasons for the prohibition on price-fixing within the meaning of Article 65 of the ECSC Treaty and for the fact that Article 60 of the ECSC Treaty did not preclude the application of Article 65 of the ECSC Treaty.

40. The Commission contends that, with regard to knowledge of the practices in restraint of competition of which the appellant was accused and the backing given to them by DG III, this allegation is false and it refers to paragraphs 510 and 511 of the judgment under appeal in that respect. These are also findings of fact that are not amenable to review by the Court of Justice.

41. As far as attendance at meetings of the Poutrelles Committee is concerned, the appellant is confusing the 'lawful' meetings referred to in paragraph 232 of the judgment under appeal with the secret meetings that had an unlawful purpose (described in paragraphs 510 and 511 of the judgment under appeal). The appellant stands accused of participating in the latter meetings.

42. The Commission stresses that the general aim of the special measures in the ECSC Treaty — that is to say, the maintenance of equilibrium between supply and demand thereby ensuring stability in general price levels — has nothing to do with the practices in restraint of competition of which the appellant is accused in the Decision, namely: price-fixing, harmonisation of extras, market sharing and a system for the exchange of information on orders and deliveries.

Appraisal

43. Since the arguments put forward by the appellant essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the first part of the *first* ground of appeal should be dismissed as unfounded, to paragraph 135 et seq. and paragraph 158 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

44. The first part of the *first* ground of appeal, challenging the interpretation and application of the term 'normal competition' within the meaning of Article 65(1) of the ECSC Treaty, must therefore be dismissed as *unfounded*.

2. Whether participation in the information exchange system constituted a separate infringement of competition (*first* ground of appeal)

Submissions of the parties

45. The *appellant* takes the view that the Court of First Instance wrongly assumed that the Decision was lawful in as much as the assumption was made there that participation in the information exchange system constituted a separate breach of competition law that was independent of the other infringements.

46. It concedes that it is particularly difficult to draw a dividing line between information exchange systems that are in restraint of competition and those that are not when one considers that under Articles 47, 60, 64 and 70 of the ECSC Treaty there is a wide obligation on undertakings to publish their prices and other conditions.

47. However, the appellant takes issue with the fact that, in paragraph 420 of the judgment under appeal, the Court of First Instance rejected the view taken by the Commission in the proceedings before the Court of First Instance, that the exchange of information was not considered in the Decision to be a separate infringement. In doing so the Court of First Instance has superimposed its views on those of the Commission and has therefore exceeded the limits of its powers.

48. The *Commission* takes the view that this plea is inadmissible as it is raised for the first time in the appeal proceedings before the Court of Justice.

49. It argues that the plea is also without foundation because the Court of First Instance was interpreting the Decision of the Commission and not the statements made by its representatives at the hearing.

Appraisal

50. The appellant has hardly provided any reasons to show why the view of the law taken by the Court of First Instance, namely that participation in the information exchange system constituted a separate breach of Article 65(1) of the ECSC Treaty, should have been defective in law. It merely directs its criticism at the fact that the Court of First Instance failed to take account of the opposite view of the law (*no* separate infringement) taken by the Commission's agents in the proceedings before the Court of First Instance and endorsed the opinion reflected in the Decision of the Commission (that there *was* a separate breach).

51. The appellant is therefore clearly criticising the Court of First Instance for having exceeded its jurisdiction, which would constitute a breach of Article 33 of the ECSC Treaty, rather than for any misjudgement of the substantive-law content of Article 65(1) of the ECSC Treaty in relation to its legal appraisal of the information exchange system.

52. Since, when considered in this light, the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the second part of the *first* ground of appeal should be dismissed as unfounded, to paragraph 89 et seq. of the Opinion that I

am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

53. The second part of the *first* ground of appeal, in so far as it alleges that the Court of First Instance exceeded its jurisdiction, must therefore be dismissed as unfounded.

54. If the Court should also be able to infer from the appellant's arguments a criticism of the substantive-law appraisal of participation in the information exchange system, the arguments put forward by the appellant, considered in that light, also essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P.

55. I therefore refer, in relation to the grounds on which the second part of the *first* ground of appeal should also be dismissed as unfounded in this respect, to paragraph 109 et seq. [10] of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

56. The second part of the *first* ground of appeal must therefore also be dismissed as *unfounded* in so far as it criticises in general, that is to say even irrespective of the statements made by the Commission's agents in the proceedings before the Court of First Instance, the alleged failure to rule that the information exchange system did not constitute a separate issue under competition law.

3. The issue of alleged abuse of discretionary power by the Commission (*second* ground of appeal)

Submissions of the parties

57. The appellant refers to paragraph 526 et seq. of the judgment under appeal and criticises the Court of First Instance for not successfully extinguishing the doubts that have arisen from the clear signs in this case of an abuse of discretionary power on the part of the European Commission.

58. In the judgment under appeal the Court of First Instance did not take account of the investigation into restraints of competition in connection with the wide strip steel markets that had been carried out by the Commission in parallel with the procedure that led to the Decision. That investigation was significant, however, in the light of the allegation of abuse of discretionary power because the latter investigation was sus-

10 — With the exception of paragraph 115 of the Opinion in Case C-194/99 P.

pended whereas the procedure in relation to the markets for steel beams was continued even though the markets for wide strip steel were of considerably more importance to most of the steel producers affected by the Decision.

59. In the statement made by the Member of the Commission, Mr Van Miert, at the press conference on 16 February 1994 he categorised the fine imposed as 'exemplary', thereby mentioning the possibility of account not just having been taken, when setting the fines, of circumstances that were closely connected with the procedure concerning the markets for steel beams. This was an indication that the fines might possibly have proved higher because of the suspended investigations into the markets for wide strip steel.

60. As the Court of First Instance itself established in paragraph 4 of the judgment under appeal, this had a particular effect on the appellant because it only produces steel beams.

61. Finally, the breakdown of negotiations between the Commission and the undertakings in the Community steel sector with regard to settling their differences on the economic restructuring of the steel markets on the day before the disputed Decision was adopted was a factor that was dismissed in the judgment under appeal as inadequate without compelling grounds being stated.

62. In reliance upon the judgment of the Court in the case of *UFEX* v *Commission* [11] the appellant levels criticism at the Court of First Instance for erring in law in limiting its examination of the reasons for the charge of abuse of discretionary power to the documentation contained in the files — which were submitted to the Court of First Instance by the Commission — in view of the aforementioned abundance of indications, and in not considering it necessary to carry out any further investigation to substantiate those indications even though the files contained documentation that could, at least, have given rise to reasonable doubts.

63. The *Commission* considers this ground of appeal to be inadmissible because the appellant is just repeating the same allegations that were made at first instance.

64. Nor is this ground of appeal well founded as the Court of First Instance set out its detailed reasoning for its decision in paragraph 529 et seq. of the judgment under appeal.

11 — Case C-119/97 P [1999] ECR I-1341.

65. The appellant is wrong to rely on the judgment of the Court in the *UFEX* case. The facts examined by the Court of First Instance in that case were not comparable with the facts here as in that case the Court of First Instance refused to examine other documents even though the appellant there — unlike the appellant in this case — had specified what the evidence was and had stated what other facts, in its view, could have been established from it.

Appraisal

66. With regard, firstly, to the appellant's general criticism that in view of the abundance of indications the Court of First Instance should not have confined its investigation to the files submitted by the Commission, I share the view of the Commission that reliance upon the judgment in the *UFEX* case [12] is mistaken. The problem in that case was somewhat different: the Court of First Instance there had dismissed the claim of abuse of discretionary power on the grounds that the applicant in that case had not adduced evidence of an abuse of discretionary power even though it had applied for a letter to be produced for that purpose, had stated the author, the addressee and date of that letter and the Court of First Instance had not granted that application.

12 — Cited in footnote 11 (paragraph 111).

67. In the present case, however, the Court of First Instance had the evidence before it and, according to paragraph 530, also appraised it. The appellant is therefore really taking issue with the appraisal of evidence by the Court of First Instance. However, this is not amenable to review in appeal proceedings, subject to the allegation of distortion of evidence by the Court of First Instance, and the *second* ground of appeal must therefore be dismissed in that respect as *inadmissible*.

68. The arguments of the Commission must also be accepted in as much as the appellant has already complained in substance of abuse of discretionary power in the proceedings in the Court of First Instance, setting out in its reasoning the same arguments as in the present proceedings.

69. The remark by the Member of the Commission, Mr Van Miert, as to the 'exemplary' significance of the fines, the close connection time-wise with the breakdown of negotiations on the restructuring of Community steel markets and the connection with suspension of the investigation into restraints of competition in relation to the markets for wide strip steel have already been mentioned in the proceedings in the Court of First Instance as indications of an abuse of discretionary power. The appellant has not put forward any other arguments in this respect as justification for its second ground of appeal.

70. The *second* ground of appeal must therefore also be dismissed as *inadmissible* in as much as its aim is merely to reinvestigate the grounds already stated in the Court of First Instance without adding any other reasoning. [13]

71. The appellant's criticism must be accepted, however, in as much as the Court of First Instance did not, in paragraph 526 et seq. of the judgment under appeal, examine all of the arguments put forward. The grounds of the judgment here are confined to the aspect of the close connection in time with the breakdown of the negotiations on the restructuring of the Community steel markets. This aspect concerned all of the undertakings affected by the Decision.

72. The alleged connection between the amount of the fines in the Decision and the suspended investigations into restraints of competition in relation to the markets for wide strip steel was an aspect of major concern to the appellant, however, as it only produces steel beams and does not produce any wide strip steel products. The appellant is therefore correct in its complaint that the grounds of the judgment do not deal with its individual allegation of alleged abuse of discretionary power.

73. The Court of Justice has established on a number of occasions, however, that an appeal must 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 legal grounds'. [14]

74. In the present case the grounds that the Court of First Instance gave for dismissing the allegation of abuse of discretionary power similarly apply to the specific allegation made by the appellant.

75. The fact that the Member of the Commission responsible called the amount of the fine in the Decision 'exemplary' at a press conference is not in itself grounds, even in the light of the simultaneous suspension of other competition-law investigations, for suspecting an abuse of discretionary power by the Commission since the term 'exemplary' can be interpreted in several ways and does not just mean that it is intended to penalise restraints of competition on other steel markets.

76. The *second* ground of appeal must therefore be dismissed as *unfounded* in this respect.

77. The *second* ground of appeal as a whole must therefore be dismissed as *par-*

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

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

tially inadmissible and otherwise as *unfounded.*

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

78. In its *third* ground of appeal, the second part of the *fourth* ground of appeal, the *fifth* ground of appeal and the *sixth* ground of appeal, the appellant alleges a number of infringements of the ECSC Treaty relating to the fine.

1. The absence of reasoning in the Decision explaining the level of the fine (*third* and *fourth* grounds of appeal)

79. In its *third* ground of appeal and the second part of the *fourth* ground of appeal the appellant takes issue with the alleged failure to recognise the absence of grounds in the Decision.

Submissions of the parties

80. In the *third* ground of appeal the *appellant* takes issue with paragraph 553 et seq. of the judgment under appeal and levels criticism at the Court of First Instance for considering it unobjectionable in law for the Commission not to have stated the precise method of calculation of the amount of the fine in the Decision and to only have disclosed it when requested by the Court of First Instance. The Court of First Instance has therefore committed an infringement of Community law in misapplying and misinterpreting Article 15 of the ECSC Treaty.

81. It refers, in particular, to the case-law of the Court of First Instance in the *Tréfilunion* case.[15] In paragraph 557 of the judgment under appeal the Court of First Instance relied on this and said that it was desirable for the undertakings to know all the details of the method of calculation ('detalladamente') 'without having to commence judicial proceedings against the decisions for that purpose'. According to the statements made by the Court of First Instance in paragraph 558 of the judgment under appeal, this 'certainly applies where the Commission — as in this case — has used precise mathematical formulae to calculate the fines'.

82. In paragraph 555 of the judgment under appeal the Court of First Instance nevertheless ruled that the reasoning in the Commission Decision had been adequate in that respect even though the precise method of calculation had not been disclosed until an application had been made in the proceedings in the Court of First Instance.

15 — Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063.

83. If the conclusion of the Court of First Instance were upheld this would mean that the Commission 'could add other elements to the reasoning of the Decision right up to the oral procedure in the Court of First Instance'.

84. In the second part of the *fourth* ground of appeal the appellant takes issue with paragraph 647 et seq. of the judgment under appeal and alleges that the Court of First Instance did not give adequate reasons for not comparing the amount of the fine in the Decision with those fines that the Commission had imposed in two other decisions mentioned by the appellant in the proceedings in the Court of First Instance.

85. Comparison with the size of the fines in the other decisions would have shown that the fine in the present Decision was too high in comparison with the other two decisions, which related to much more serious infringements.

86. In the opinion of the *Commission* the appellant is misconstruing the judgment of the Court of Justice *[sic]* in the *Tréfilunion* case [16] in relation to disclosure of the calculation of fines. The Court of First Instance was correct in its view that adequate reasons had been given for the amount of the fine; it did, however, give expression by way of *obiter dictum* to its preference that the Commission should provide more details of the mode of calculation.

87. The Commission has in the meantime adopted 'Guidelines on setting fines' [17] in which it has disclosed its general method of calculating fines and which it also takes into account in the reasoning of decisions. However, these guidelines were not available on the date on which the Decision was adopted.

88. The Commission argues, with regard to the omission by the Court of First Instance to compare the level of the fine in the present case with the level of the fine in comparable cases, that the appellant's assertions are inadmissible in two respects: firstly, this is mere repetition of arguments that have already been pleaded in the Court of First Instance and, secondly, this assertion relates to an appraisal of fact that lies within the purview of the Court of First Instance alone.

89. Furthermore, this ground of appeal is not well founded as the findings of the Court of First Instance in this respect did conform to Community law.

16 — Cited in footnote 15.

17 — Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

Appraisal

90. Since the arguments relating to disclosure of the precise method of calculation of the fine essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the *third* ground of appeal should be dismissed as unfounded, to paragraph 218 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

91. With reference to the view expressed in the grounds for the second part of the *fourth* ground of appeal, namely that the reasoning in the Decision was incomplete having regard to the failure to compare the amount of the fines, it should be stated that the Court of First Instance made the assumption in paragraph 649 of the judgment under appeal that the three decisions by the European Commission were not comparable and — contrary to the allegation by the appellant — also set out its reasoning for this in paragraph 650 et seq.

92. The reasoning is therefore not incomplete and the Court of First Instance quite correctly assumed that there was no breach of Article 15 of the ECSC Treaty. The second part of the *fourth* ground of appeal must therefore also be dismissed as *unfounded*.

93. The *third* ground of appeal and the second part of the *fourth* ground of appeal, taking issue with the failure by the Court of First Instance to rule that the grounds of the Decision were defective, must therefore both be dismissed as *unfounded*.

2. The issue of joint and several liability with Siderúrgica Aristrain Olaberría SL (*fifth* ground of appeal)

94. In the first part of the *fifth* ground of appeal the appellant takes issue with what it considers to be the erroneous assessment in law of the implementation of joint and several liability.

Submissions of the parties

95. The *appellant* takes issue with paragraph 131 et seq. of the judgment under appeal and criticises the assumption by the Court of First Instance that the implementation against the appellant in the Decision of joint and several liability with its sister company, Siderúrgica Aristrain Olaberría SL (hereinafter, 'Aristrain Olaberría') was lawful.

96. No reasoning is given in the Decision for the fact that the Commission held the

appellant and Aristrain Olaberría jointly and severally liable for the fine, nor for the fact that, out of the two undertakings, it only pursued the appellant.

97. In paragraphs 141 and 143 of the judgment under appeal the Court of First Instance did instead retrospectively state the grounds for joint and several liability, together with the reasoning and justification for liability being specifically targeted at the appellant. In doing so, the Court of First Instance was attempting to remedy an error or omission by the Commission by substituting its assessment for the assessment of the Commission. The appellant considers that the Court of First Instance therefore exceeded the scope of its powers as it is only entitled to annul a decision of the Commission and not to rectify it.

98. The appellant also takes issue with the assumption by the Court of First Instance that, because of the fact that the two sister companies represented one economic unit and therefore came within the term 'undertaking', the Commission acted lawfully in imposing on one of them, by way of a random decision, the fine that was levied jointly against both of them.

99. The appellant considers that the Court of First Instance has here improperly transposed to the situation in the present case the case-law of the Court of Justice on the liability of a group parent company for its subsidiary's acts in restraint of competition.

100. The *Commission* takes the view that, in holding that the two sister companies are jointly and severally liable for the acts of the group, the Court of First Instance has not added anything to what was said by the Commission, namely that the two undertakings formed part of the same group and were one 'economic unit'. The Commission has always taken this view of the law and the Court of First Instance merely went along with it.

101. Furthermore, the statements made by the Court of First Instance in paragraphs 135 to 143 of the judgment under appeal are not contrary to Community law. The Court of First Instance properly referred to the case-law of the Court of Justice with regard to the term 'undertaking' within the meaning of Article 65 of the ECSC Treaty and took into account the special feature of this case, namely that there was no 'holding company in the traditional meaning of the term'.

102. The Court of First Instance properly gave as the reason for targeting the appellant the assertion that the Commission was merely depriving itself of one of two possible joint debtors of the fine.

Appraisal

103. It should be stated, firstly, that in the first part of the *fifth* ground of appeal the appellant clearly takes the view that it was the Court of First Instance — and not the Commission — that came to the decision on the joint and several liability of the appellant and Aristrain Olaberría and stated the grounds retrospectively. It was therefore in breach of Article 33 of the ECSC Treaty because it exceeded its jurisdiction to review a decision by supplementing it.

104. Although it is true that nowhere in the Decision is any express mention made of joint and several liability, this does not mean that the Court of First Instance added that legal concept to the Decision. In paragraph 131 et seq. of the judgment under appeal the Court of First Instance carried out a detailed analysis of the Decision with regard to the mention made of the appellant and Aristrain Olaberría and the reference to them both jointly as 'Aristrain'. The conclusion reached from that analysis was that the Commission had assumed in the Decision that both undertakings were jointly and severally liable. The Court of First Instance also finds that the Commission pronounced on liability for a fine the amount of which was calculated on the basis of the combined turnover of both undertakings. That analysis finally shows that the Commission wished to pursue a claim against one of two joint debtors, namely the appellant, with the result that of the two sister companies only the appellant appears as the addressee of the Decision.

105. The Court of First Instance therefore clearly interpreted the Decision and did not add to it, so that the first part of the *fifth* ground of appeal must in any event be dismissed as *unfounded* in so far as it alleges a breach of Article 33 of the ECSC Treaty.

106. However, the appellant also takes substantive issue with the comments made by the Court of First Instance regarding the legality of the joint and several liability of both subsidiaries and the choice of the appellant as the sole addressee of the Decision.

107. The Court of First Instance also initially — and in my opinion correctly — applied the principles developed by case-law relating to the term 'undertaking' within the meaning of Community competition law (in this case Article 65(1) of the ECSC Treaty) to a situation which was not that of a parent/subsidiary relationship within a group but a special situation in which two subsidiaries of a group jointly agreed between themselves to commit certain offences in restraint of competition without it being possible to

ascertain any parent company that coordinated or shaped the behaviour of the two subsidiaries in any way.

108. As can also be seen *inter alia* from the judgment of the Court of Justice in the *ICI* case [18] cited by the Court of First Instance in paragraph 136 of the judgment under appeal, legally separate companies are to be deemed 'undertakings' within the meaning of Community competition law (in this case, Article 65(1) of the ECSC Treaty) if they form one 'economic unit'. The appellant has not denied that this was the case here.

109. The appellant is really taking issue with the conclusion drawn from this, namely that, because they form one economic unit, Aristrain Olaberría and the appellant are to be held jointly and severally liable for a fine that is calculated on the basis of the combined turnovers of sister companies. The Court of First Instance relied in this respect on the case-law of the Court of Justice in the *ICI* case [19] and transposed those principles to the circumstances in this case.

110. As the appellant has rightly established, the circumstances in the case cited were such that a claim was only being targeted at the group parent company for the acts of a group subsidiary in restraint of competition; it was not a case concerning the joint and several liability of two companies.

111. In the judgment in the *Metsä-Serla* case [20] the Court of Justice has now expressly ruled that, in cases involving a number of companies acting in restraint of competition as an 'economic unit', it is also possible in principle for there to be joint and several liability if one undertaking has acted on behalf of and in the interest of the other jointly liable undertakings.

112. In the case under appeal — as the Court of First Instance ruled in paragraph 134 et seq. of the judgment under appeal — the appellant and Aristrain Olaberría acted in the anti-competitive practices complained of in their mutual interests, that is to say 'on behalf of and in the interest of' the other company. The fact that there was no ascertainable parent company that coordinated or shaped the practices by the two companies in any way cannot affect the legal assessment. The case-law of the Court of Justice does not reveal whether there has to be vertical influence or whether unilateral influence is required. What is relevant, in fact, is just that such influence *did* take place and that it was exerted in the interests of the

18 — Case 48/69 *ICI* v *Commission* [1972] ECR 619.

19 — Cited in footnote 18.

20 — Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, at paragraph 26. The judgment relates to the Decision of the Commission of 13 July 1994 in proceedings under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1).

company providing the influence. This was the case here, although the situation was the special one of mutual influence within a relationship of equal standing.

113. The first part of the *fifth* ground of appeal is therefore also *unfounded* in so far as the appellant takes issue with the alleged erroneous legal assessment of joint and several liability.

114. The issue of joint and several liability *per se* is to be distinguished from the issue of *implementation* of that liability. According to the Decision, therefore, the appellant alone was the target.

115. In paragraph 143 of the judgment under appeal the Court of First Instance simply states that it was not an 'illegality' for the Commission to 'merely deprive itself of a debtor, in the person of the latter company, with joint and several liability'.

116. I consider that this reasoning fails to address the concept of joint and several liability and gives unilateral consideration to the interests of the Commission alone.

117. Joint and several liability means, in fact, that two companies are the debtors of the whole fine (calculated on the basis of their combined turnovers). Furthermore, in principle, the Commission can properly choose to target a claim at one of the two debtors. The making of a claim must be distinguished from liability *per se* as it does not take effect until the Commission targets one of the two joint debtors. Until that time both joint debtors may decide independently of the Commission which of them is to pay what part of the fine or whether one of them alone is to make payment. The Commission deprived the appellant of that decision-making independence in Article 6 of the Decision by making the appellant the sole addressee of the Decision.

118. Furthermore, as a result of only the appellant being named as the addressee in Article 6 of the Decision it is made the sole debtor. The Decision, as an instrument enforceable under Article 92 of the ECSC Treaty, can therefore only be enforced against the appellant. If, in the event of enforcement proceedings being brought against it, the appellant should wish to have recourse [21] against Aristrain Olaberría, there would be a risk of the respondent in those proceedings — properly — being able to rely on the fact that Article 6 of the Decision, which shows the parties to whom it was addressed, gives the appellant as the

21 — In the case of actions for recourse as a result of joint and several liability a judgment debtor would have to rely on the national law applicable.

sole debtor, so that it has paid the fine on the basis of its own liability and not on the basis of joint liability.

119. On the whole, therefore, the party/parties concerned could suffer serious disadvantage as a result of the fact that the Commission made its selection from a number of joint debtors in the Decision and did not wait until the enforcement stage to do so. The Court of First Instance has not taken this into account, which is all the more serious as it is impossible to see what benefits, if any, the Commission could have derived from proceeding in this way. [22]

120. The first part of the *fifth* ground of appeal must therefore be considered *well founded* in so far as the appellant takes issue with the fact that the Decision was only addressed to it and not also to Aristrain Olaberría.

121. Under the first sentence of Article 54 of the ECSC Statute the judgment under appeal must therefore be set aside in so far as it only makes reference to the appellant out of two undertakings with joint and several liability. As the Court of First Instance investigated all of the relevant facts the case has reached the decision stage and the Court of Justice can make a final ruling on it under the second sentence of Article 54 of the ECSC Statute.

122. Articles 4 and 6 of the Decision must therefore be *set aside* in so far as they only refer to the appellant out of two undertakings with joint and several liability.

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

123. In the second part of the *fifth* ground of appeal the appellant takes issue with what it considers to be inadequate consideration of the fault principle.

Submissions of the parties

124. The *appellant* takes issue with paragraph 627 et seq. of the judgment under appeal confirming the finding in paragraph 305 et seq. of the Decision that all of the addressees of the Decision must

22 — Not even the threatened insolvency of a joint debtor — which was evidently not the case here — would necessarily mean that such procedure was essential because in the event of joint and several liability all of the joint debtors would be liable for the debt so that there would be a solvent debtor for the whole of the fine at the enforcement stage in any event. In its decision on the 'Cartonboard' cases (cited in footnote 20) the Commission — a few months after the Decision in this case — listed all of the joint debtors as addressees in the operative part of the decision.

have been aware from the information obtained during the investigations by the Commission in May 1988 and from the subsequent decision in 1990 in the 'stainless steel flat products' case [23] that their conduct was anti-competitive.

125. It alleges that there has been an infringement of Community law because the Court of First Instance wrongly held that an aggravating factor could be derived from knowledge of a particular matter even though that knowledge has only been deduced from evidence against other undertakings concerned and because the Court of First Instance did not carry out an individual examination of the validity of the allegation in question in relation to the appellant.

126. The *Commission* considers this criticism inadmissible as it relates to appraisals of fact.

127. Nor is it well founded as the appellant has distorted the arguments of the Court of First Instance clearly expressed in the paragraphs of the judgment under appeal that are the subject of complaint.

23 — Commission Decision of 18 July 1990 relating to a proceeding under Article 65 of the ECSC Treaty concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (90/417/ECSC) (OJ 1990 L 220, p. 28).

Appraisal

128. Paragraph 305 et seq. of the Decision considered by the Court of First Instance relate to public knowledge of the Commission's press release of 2 May 1988 on the inspections in the 'stainless steel flat products' case and of the subsequent decision of 18 July 1990. They also refer to the specific knowledge of the unlawful nature of the restraints of competition penalised there, being an accusation that can be levelled, in any event, at those undertakings that were involved *both* in the practices complained of on the markets for 'stainless steel flat products' *and also* in the restraints of competition pursued in the Decision, amongst which the appellant undisputedly did not number.

129. Both the Commission and the Court of First Instance, which went along with it in the judgment under appeal, draw their conclusions that the unlawful nature of the practices on the steel beams markets must have been known to all of the addressees of the Decision from an *overall consideration* of the general and special circumstances. This constitutes an appraisal of fact that, save with regard to examination of potential distortion, is not amenable as such to review on appeal.

130. The second part of the *fifth* ground of appeal must therefore be dismissed as *inadmissible*.

4. Assessment of the date with reference to which the anti-competitive practices are imputed to the appellant (*fifth* ground of appeal)

131. In the third part of the *fifth* ground of appeal the appellant takes issue with the ruling upholding the Decision in relation to calculation from a certain date.

Submissions of the parties

132. The *appellant* takes issue with paragraph 226 of the judgment under appeal in which the Court of First Instance, when examining the price-fixing arrangements within the Poutrelles Committee, establishes firstly that the date of '31 December 1989' that is shown in the Spanish and French versions of Article 4 of the Decision as the date of commencement of the offences by the appellant is a 'transcription error' (*'error de transcripción'*) and should have been '31 December 1988'.

133. The appellant takes the view that the Court of First Instance erred in law in considering a 'transcription error' in the operative part of the Decision to be immaterial.

134. It also accuses the Court of First Instance of inconsistent grounds in its judgment as it referred in support of its assumption to the German and English versions of the Decision in which the date is, in the opinion of the Court of First Instance, correctly given as '31 December 1988'. However, these versions of the wording of the Decision were not in the language of the proceedings as far as the appellant was concerned.

135. The appellant argues that paragraph 226 of the judgment under appeal conflicts with the statements made by the Court of First Instance in paragraph 209 of the judgment under appeal since there the Court of First Instance took the opposite view in connection with differences in the Italian wording of the Decision. It ruled in paragraph 209: 'differences in the Italian version of the Decision are immaterial, especially as the Italian wording of the Decision is not directed at the applicant'.

136. In the opinion of the *Commission* this argument is unfounded. Even if it were to be assumed that the Court of First Instance should not have referred to the other language versions of the Decision, the Court of First Instance did properly find that the correct date '31 December 1988' followed from the reasoning in the Decision.

Appraisal

137. It should be mentioned with regard to the criticism by the appellant of the issue concerning the material nature of a clerical error in the operative part of the Decision that the Court of First Instance properly refers in the paragraph of the judgment under appeal complained of to the case-law of the Court of Justice,[24] according to which clerical errors are immaterial if the context and the aims pursued by legislation support an interpretation that differs from the wording.

138. It should be established with regard to the alleged inconsistency of grounds in the judgment under appeal, firstly, that the Court of First Instance did not contradict itself in paragraphs 209 and 226 in relation to the significance of language versions of the Decision that are not in the language of the proceedings simply because the Court of First Instance was dealing in the first paragraph mentioned with a quite different issue.[25]

139. Furthermore, in paragraph 226 of the judgment under appeal the Court of First Instance does not, when stating the reasons for its view that this was a transcription error, confine itself to making a comparison with language versions that were not in the appellant's procedural language. The Court of First Instance is principally relying on other parts of the Decision — which are the same in all the language versions — overall consideration of which shows that there was a transcription error in Article 4 of the Decision.

140. The Court of First Instance refers to paragraph 313 et seq. of the Decision (in 'Part II Legal Appraisal') in which the date '31 December 1988' is given as the date of commencement of the infringements by the Spanish manufacturers affected by the Decision. The Court of First Instance also refers to Article 1 of the operative part of the Decision in which the period of the various infringements under the name 'Aristrain' is given as '24 months'. Calculating backwards from the end of the critical period, therefore, this means that the offences began not later than 1 January 1989.

141. Contrary to the view taken by the appellant, the Court of First Instance did therefore provide adequate and consistent grounds for its assumption, so that the third part of the *fifth* ground of appeal must therefore be dismissed as *unfounded*.

24 — Case C-30/93 *AC-ATEL* [1994] ECR I-2305.

25 — The issue there was that handwritten amendments to the wording of the Decision that were proven to have been made after the Commission had adopted the Decision could not be significant in relation to the question of *correspondence between the versions as notified and as adopted* if these amendments were made in a language version of the Decision that was not the language of the proceedings and was therefore not notified.

5. The calculation of the fine in ecus (*sixth* ground of appeal)

Submissions of the parties

142. The *appellant* takes issue with the fact that in paragraph 659 et seq. the Court of First Instance considered it irreproachable in law for payment of the fine to be imposed on the applicant in ecus under Article 1 of the Decision.

143. This meant that the level of the fine payable would be determined on the basis of the relevant turnover at the average rate of exchange for the reference year whereas, if the fine had been payable in national currency, it would have been paid at the rate of exchange that applied on the day before payment was made.

144. The appellant argues that the Court of First Instance erred in law in stating that the Commission has to convert the various turnover figures notified to it into one uniform currency in order to be able to compare them. It is quite possible to establish just from the percentage applied to turnover, determined according to the length of the infringement and the individual undertaking's involvement in infringements of the competition rules, whether one fine that is imposed is higher than another.

145. Hence, there are no objective reasons justifying use of a system that discriminates against undertakings whose national currencies have been devalued during the course of the reference years. The Court of First Instance has therefore infringed natural justice by ratifying the choice that the Commission made from the various methods of calculation.

146. Nor did the Court of First Instance take account of the fact that the date of payment of the fine would differ from the date on which the amount was fixed.

147. The *Commission* takes the view that this ground of appeal is unfounded and that the appellant has not suggested any practicable alternative method.

148. It argues that it is logical to take as the basis the turnover and rate of exchange for the year of the infringement since that actually reflects the significance of the infringement in the context at the time and enables expression to be given with great accuracy to all and any advantages that might have resulted from the infringement.

149. As for payment of the fine, the Commission makes it clear that there is no obligation to make payment in a national currency; it can also be paid in ecus.

150. What is more, the rate of exchange on the date on which the amount of the fine was set and on the date of its payment may well have been different but this is due to the fact that the appellant decided not to pay the fine immediately or deposit the amount of the fine in a bank account in 1994.

Appraisal

151. In paragraph 87 et seq. of its judgment in the *Sarrió* [26] case, in relation to the same problem (but based on infringements of competition rules within the scope of the EC Treaty, that is to say in relation to Council Regulation No 17 [27]) the Court of Justice ruled:

'In the present case, the appellant has not shown how the Court of First Instance, in not calling in question the Commission's method of calculation based on the turnover in the last full year of the infringement, infringed Regulation No 17 or general principles of law.

First, Regulation No 17 does not prohibit the use of the ecu in order to fix the fines. Next... the Commission used one and the same method of calculating the fines imposed on undertakings for having participated in the same infringement and that method enabled it to assess the size and economic power of each undertaking and the scope of the infringement committed, in the light of the economic reality as it appeared at the time the infringement was committed.

Lastly, as regards, in particular, monetary fluctuations, they are an element of chance which may produce advantages and disadvantages which the undertakings have to deal with regularly in the course of their business activities and whose very existence is not such as to render inappropriate the amount of a fine lawfully fixed by reference to the gravity of the infringement and the turnover achieved during the last year of the period over which it was committed. In any event, the maximum amount of the fine, determined by virtue of Article 15(2) of Regulation No 17 by reference to turnover in the business year preceding the adoption of the Decision, limits the possible harmful consequences of monetary fluctuations.'

26 — Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991. The judgment relates 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).

27 — Council Regulation of 21 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ English Special Edition, 1959-1962, p. 87).

152. As it is impossible to see why these principles should not apply, or should apply differently, within the scope of application of Article 65(5) of the ECSC Treaty relevant here, the appellant's argument must be rejected on the same grounds.

153. The *sixth* ground of appeal must therefore be dismissed as *unfounded*.

E — The ground of appeal challenging the decision on costs (*seventh* ground of appeal)

Submissions of the parties

154. The *appellant* takes issue with paragraph 717 of the judgment under appeal and criticises the Court of First Instance for not ordering the Commission to pay the costs and interest that would be incurred when lodging security or making any payment of a fine — despite an application being made to that effect. Its claim is based on Article 91 of the Rules of Procedure of the Court of First Instance (hereinafter, the 'Rules of Procedure').

155. It bases its claim, allegedly misjudged by the Court of First Instance, on the following: where the final nature of a Commission Decision depends upon confirmation by an independent and impartial tribunal — in this case, the Court of First Instance — the costs and interest arising when security is lodged do not become a charge on it until the tribunal has undertaken that comprehensive review. Otherwise the tribunal would not have unlimited jurisdiction over an appeal for the purposes of Article 6 of the ECHR and there would be a violation of that provision.

156. The *Commission* takes the view that the application made by the appellant in the proceedings in the Court of First Instance — asking for the Commission to be ordered to pay the costs and interest that the appellant would incur when lodging security or making any payment of a fine — was properly dismissed.

157. Firstly, the Commission does not understand how it is possible to attribute to the Court of First Instance the assertion that the Commission Decision does not become final until the Court of First Instance has confirmed it. This must be a misinterpretation of another part of the judgment under appeal that deals with the conformity of the proceedings before the Commission with Article 6 of the ECHR.

158. The Commission also contends that, whilst it generally accepts a bank guarantee in order to avoid enforcement of a fine

during the course of proceedings before the Court of First Instance, this does not alter the fact that the Decision is an enforceable instrument under Article 92 of the ECSC Treaty and that proceedings issued in the Court of Justice under Article 39 of the ECSC Treaty do not have suspensory effect. If fines were not to bear interest until confirmed by the Court of First Instance, Article 39 would be a rule without substance; this would also lead to judicial proceedings being commenced simply in order to delay payment of a fine.

159. Finally, the Commission refers to paragraphs 111 to 118 of the judgment under appeal, in which the Court of First Instance expressed its opinion on the alleged infringement of Article 6 of the ECHR and on unlimited jurisdiction and its significance.

Appraisal

160. The first question that arises is whether the *seventh* ground of appeal should be dismissed as *inadmissible* for infringement of the rule against raising new issues [28] during appeal proceedings.

161. Paragraph 717 of the judgment under appeal criticised by the appellant does not, in fact, show that the application that the appellant considers to have been the subject of an error of law on the part of the Court of First Instance — that is to say, the application asking for the Commission to be ordered under Article 91 of the Rules of Procedure to pay costs and interest arising from lodging security or making any payment of a fine — formed any part of the proceedings before the Court of First Instance.

162. The paragraph quoted only shows that the appellant applied for the Commission to be ordered to bear the 'costs incurred during the administrative procedure' under Article 87(3) of the Rules of Procedure or Article 34 of the ECSC Treaty. 'Costs and interest arising from lodging security or making any payment of a fine' are, however, costs that only arise as a result of the Decision, that is to say at a later date, so that they cannot in any event be costs incurred during the administrative procedure.

163. Nor can it be assumed that the judgment might perhaps have contained an incomplete presentation of the party's arguments since — as is evident from paragraph 714 et seq. of the judgment under appeal — even the appraisal only concerns itself with the issue of liability for the costs of the administrative procedure before the Commission.

28 — See the judgment cited in footnote 14.

164. Caution would seem be appropriate here, however, in that according to the parties' concurring arguments both the appellant and the Commission are assuming that application for the Commission to be ordered to 'bear the costs and interest arising from lodging security or making any payment of a fine' was also made in the proceedings before the Court of First Instance.

165. In the *Alexopoulou* case [29] the Court of Justice evidently considered it possible in law, with regard to the issue of determining whether a plea has already been the subject of proceedings before the Court of First Instance, to refer back *sua sponte* to the files in the Court of First Instance in the event of doubt even though — as in this case — the appellant has not relied on the files in those proceedings despite its assumed awareness of a possible loophole in the judgment of the Court of First Instance.

166. As can be seen from point VI of the application in the proceedings before the Court of First Instance, the criticism relating to the costs and interest arising from lodging security or making any payment of a fine is not an issue that is raised for the first time in the appeal proceedings, so that the *seventh* ground of appeal would appear to be *admissible* to this extent.

29 — Case C-155/98 P *Alexopoulou* v *Commission* [1999] ECR I-4069.

167. Although — as the appellant appreciates — this is therefore a criticism of inadequate reasoning in the judgment under appeal, the appellant did not anywhere in its argument direct criticism at an infringement of Article 30 of the ECSC Treaty, but just at the error in law in assessing the liability for costs.

168. The issue that therefore arises is whether the appellant has raised the wrong ground of appeal since if the judgment under appeal (as established) *does not make any mention at all* of the applications made by the appellant in the proceedings before the Court of First Instance it will hardly be possible for the Court of Justice to review the substantive validity of its assessment of that specific costs issue.

169. However, it would seem to be the case that if the appellant had raised the proper ground of appeal (infringement of the rule that judgments should state the reasons on which they are based, Article 30 of the ECSC Statute) that ground of appeal would have been well founded. In that eventuality the Court of Justice would have to quash paragraph 717 of the judgment under appeal for inadequate reasoning pursuant to the first sentence of Article 54 of the ECSC Statute and refer the case back to the Court of First Instance pursuant to the second sentence. In the event of the application then being refused by the Court of First Instance the Court of Justice would have to review the appraisal by the Court of First Instance during the course of any second appeal proceedings.

170. However, as the second sentence of Article 54 of the ECSC Statute provides an alternative whereby the Court of Justice may immediately give final judgment in the matter where the state of the proceedings so permits, it would seem appropriate here, for economic procedural reasons, for the Court of Justice itself to decide the issue of liability for the costs claimed in this case, by way of an exception, and to refer in this context to the legal basis claimed by the appellant in the application before the Court of First Instance.

171. The question is, therefore, whether Article 91 of the Rules of Procedure is the proper basis of claim for reimbursement of the costs and interest arising from lodging security or making any payment of a fine.

172. The Court of Justice has already ruled in the order in the *Krupp* case, [30] in relation to the costs incurred when lodging security, that 'expenses... in providing a bank guarantee... cannot be regarded as expenses incurred "for the purpose of the proceedings" within the meaning of the abovementioned provision. [31] The fact that the putting-up of the guarantee was one of the two conditions on which the commission was willing to allow the applicant to avoid execution of the decision imposing the fine... is not sufficient to render the expenses in question expenses incurred "for the purpose of the proceedings" in that action'.

173. The appellant's argument relating to the non-final nature of the Decision is less comprehensible in the context of the loss of interest incurred in the event of payment of a fine. As the Commission rightly states, the Decision is directly enforceable under Article 92 of the ECSC Treaty in conjunction with the first sentence of Article 39 of the ECSC Treaty, in any event, so that the Commission has a similar direct entitlement to interest if an addressee of the Decision does not pay the fine by the end of the payment period.

174. The appellant's argument would therefore not really appear to be questioning the Commission's fundamental entitlement to interest where fines are not paid. The argument is evidently directed at entitlement to interest on that part of the fine that was reduced by the Court of First Instance in the judgment under appeal or at the corresponding proportion of the cost of providing a bank guarantee so that execu-

30 — Order of the Court of Justice in Case 183/83 *Krupp* v *Commission* [1987] ECR 4611, at paragraph 10.

31 — As the order was pronounced before the Court of First Instance was set up the provision in question was the identically worded Article 73(b) of the Rules of Procedure of the Court of Justice.

tion of the Decision could be temporarily avoided.

175. Since the arguments put forward by the appellant have not been couched in these terms, however, I refer on this problem in general to the statements made by the Court of First Instance in paragraph 697 of the judgment in the parallel case of *British Steel*. [32]

176. The *seventh* ground of appeal, in which the appellant criticises the Court of First Instance for not having granted the application for the Commission to be ordered under Article 91 of the Rules of Procedure to bear the costs and interest arising from lodging security or making any payment of a fine, must therefore be dismissed as *unfounded*.

32 — Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629. Although the applicant in that case had not asked for an award of interest and costs that it itself had incurred it had asked for (ultimately proportionate) repayment of the fine paid to the Commission without legal justification 'plus default interest'. The Court of First Instance referred to the entitlement to redress from the Commission under Article 34 of the ECSC Treaty. Where an undertaking has therefore already paid all or part of a fine declared void by the Court of First Instance, it is basically entitled to reimbursement of the interest claimed. In the judgment of the Court of First Instance of 10 October 2001 in Case T-171/99 *Corus* v *Commission* [2001] ECR II-2967, pronounced in a corresponding action by *British Steel*, the Court of First Instance spelt out the entitlement to redress in concrete terms and ruled that it was possible in principle in certain circumstances to claim compensation under Article 34 of the ECSC Treaty for costs and interest that might be incurred by an applicant in proceedings before the Court of First Instance on account of (and in the amount of) the fine declared void. It also ruled that the entitlement to redress does in any event also encompass payment of default interest on the part of the fine unduly paid.

F — The ground of appeal alleging that the duration of the proceedings amounted to a breach of Article 6 of the ECHR (*ninth* ground of appeal)

Submissions of the parties

177. The *appellant* invokes the judgment of the Court of Justice in the *Baustahlgewebe* case. [33] It takes the view that the judicial proceedings that lasted more than five years and were preceded by three years of administrative procedure before the Commission have delayed pronouncement of a decision in the case to such an extent that a violation of Article 6 of the ECHR has been committed.

178. It takes the view, in particular, that the Commission's reservations about allowing it access to the documents necessary for the defence were responsible for the delay.

179. Hence, the appellant argues, it should not have to pay any interest for the period during which the proceedings in the Court of First Instance were delayed and impeded due to the conduct of the Commission.

180. The *Commission* contends that the circumstances in this case are different to those in the *Baustahlgewebe* case. In this case it was obliged under Article 23 of the

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

ECSC Statute and two orders by the Court of First Instance [34] to send all documents in the case to the Court of First Instance, to examine all of the documents and ascertain those that could be forwarded to the applicants.

181. The Court of First Instance also subjected the documents and correspondence to an in-depth examination of this kind at the applicants' instigation.

Appraisal

182. Since the arguments put forward essentially correspond to those presented by the appellant *Thyssen Stahl* in Case C-194/99 P, I refer, in relation to the grounds on which the *ninth* ground of appeal should be dismissed as unfounded, to paragraph 231 et seq. of the Opinion that I am delivering today in the aforementioned case. Those grounds apply *mutatis mutandis*.

183. Since it cannot therefore be assumed that there has been any failure to vindicate rights within a reasonable time, there is no need to go any further into the question of whether the consequence of such a failure might also encompass loss of entitlement to interest for the duration of the proceedings before the Court of First Instance. [35]

184. The *ninth* ground of appeal, criticising the duration of the proceedings, must therefore be dismissed as *unfounded*.

IV — Costs

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

34 — Orders of the Court of First Instance of 19 June 1996 in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537 and of 10 December 1997 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.

35 — In the judgment in the *Baustahlgewebe* case (cited in footnote 33) the consequence was said to be the reduction in the fine itself.

V — Conclusion

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

— set aside the judgment of the Court of First Instance of 11 March 1999 in Case T-156/94 *Aristrain* v *Commission* in so far as it rules that the imposition of a fine on Siderúrgica Aristrain Madrid SL alone was valid;

— declare void Articles 4 and 6 of the Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as out of two jointly liable undertakings mention is only made therein of Siderúrgica Aristrain Madrid SL;

— dismiss the rest of the appeal;

— order Siderúrgica Aristrain Madrid SL to bear its own costs and four fifths of the costs of the Commission of the European Communities.