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

In Case T-136/94,

Eurofer ASBL, an association formed under Luxembourg law, established in Luxembourg, represented by Norbert Koch, of the Brussels Bar, 17-25 Avenue de la Liberté, Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by Julian Currall and Norbert Lorenz, of its Legal Service, and Géraud de Bergues, a national civil servant on secondment to the Commission, and subsequently by Jean-Louis Dewost, Director-General of its Legal Service, Julian Currall and Guy Charrier, a national civil servant on secondment to the Commission, acting as Agents, assisted by Heinz-Joachim Freund, Rechtsanwalt, Frankfurt, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg

defendant,

* Language of the case: German.

APPLICATION, principally, for the annulment of Articles 2 and 3 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: C.W. Bellamy, acting as President, A. Potocki and J. Pirrung, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 23, 24, 25, 26 and 27 March 1998

gives the following

Judgment [1]

The facts giving rise to the action

A — *Preliminary observations*

1 The present action seeks the annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1, hereinafter 'the Decision'), by which the Commission found that seventeen European steel undertakings and the applicant had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) of the ECSC Treaty, and imposed fines on fourteen undertakings operating within that sector for infringements committed between 1 July 1988 and 31 December 1990.

1 — Only the grounds of the present judgment which the Court considers it appropriate to publish are reproduced here. The factual and legal background to the present case is set out in the judgment of 11 March 1999 in Case T-141/94 *Thyssen* v *Commission* [1999] ECR II-347.

2 It is apparent from recital 12(b) of the Decision that the applicant is the European Confederation of Iron and Steel Industries. The majority of its members are associations of undertakings, but it also includes a number of undertakings (such as British Steel). Article 2 of its Statutes provides as follows:

'The objects of Eurofer shall be, taking account of Articles 2 and 3 of the Treaty establishing the ECSC:

— to establish cooperation between national associations and between the undertakings of the European steel industry;

— to represent the common interests of its members vis-à-vis third parties, in particular the Commission of the European Communities and other international organisations concerned with the interests of the iron and steel industry.

The members of Eurofer shall achieve these objectives by:

— establishing mechanisms for consultation in order to facilitate the harmonisation of investment decisions and the rationalisation of production, while respecting the objectives referred to in Article 46 of the Treaty establishing the ECSC;

— exchanging information concerning all problems of common interest, in particular production, the market and employment,

...'

...

D — *The Decision*

18 The Decision was received by the applicant on 3 March 1994 under cover of a letter of 28 February 1994 from Mr Van Miert ('the Letter'). Articles 1 to 3 are worded as follows:

'*Article 1*

The following undertakings have participated, to the extent described in this Decision, in the anti-competitive practices listed under their names which prevented, restricted and distorted normal competition in the common market ...

...

Article 2

Eurofer has infringed Article 65 of the ECSC Treaty by organising an exchange of confidential information in connection with the infringements committed by its members and listed in Article 1.

Article 3

The undertakings and associations of undertakings mentioned in Articles 1 and 2 shall henceforth bring to an end the infringements referred to in Articles 1 and 2 to the extent that they have not already done so. To this end, the undertakings and associations of undertakings shall refrain from repeating or continuing any of the acts or behaviour specified in Article 1 or as the case may be Article 2 and shall refrain from adopting any measures having equivalent effect.'

19 For the infringements described in Article 1 that took place after 30 June 1988 (after 31 December 1989[2] in the case of Aristrain and Ensidesa), Article 4 of the Decision imposes fines on fourteen undertakings. The applicant is among the addressees of the Decision listed in Article 6.

...

2 — The date mentioned in the French and Spanish versions of the Decision. The German and English versions give the date as 31 December 1988.

The claim for annulment of Article 2 of the Decision

...

C — *The existence of a decision taken by the applicant*

Summary of the applicant's arguments

106 The applicant claims that it did not adopt any decision within the meaning of Article 65(1) of the Treaty in relation to the exchange of information and that it did not even address any recommendation in that regard to the undertakings concerned.

107 By definition, decisions within the meaning of that article are taken by the competent organs and their adoption by an association presupposes that that association is required by its statutes to coordinate the activities of its members (Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 31). Furthermore, those decisions must be binding on the members of the association (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 88, 89 and 91, and *Verband der Sachversicherer* v *Commission*, cited above, paragraph 30) or, failing that, must have been followed by them (*Van Landewyck and Others* v *Commission*, cited above). It is impossible to assimilate to a decision by an association the actual acts of the association concerned, of its organs or of its subordinate authorities if those acts are not binding on its members. Such an approach would change the prohibition of agreements into a prohibition of making recommendations.

108 In the present case the Decision does not explain how a decision by an association satisfying those criteria could have been taken by the applicant. The applicant's actual conduct was regarded as merely indicative of the existence of a decision of that type (recital 281 of the Decision). Furthermore, the factors taken into consideration by the Commission, namely the existence of tables and their circulation, the fact that the exchange of information corresponds to the applicant's role as defined in its statutes and the need for authorisation by its members before it can act (see recitals 143, 144 and 281 of the Decision), are insufficient to establish that there was such a decision.

Findings of the Court

109 The Court observes at the outset that, according to Article 2 of the Decision and recitals 317, 279 and 281 thereof, the applicant organised the exchange of the information in issue on the basis of a decision which it had adopted and thereby infringed Article 65(1) of the Treaty. It follows that the Commission considers that the applicant is the author of that infringement.

110 Furthermore, the applicant, the majority of whose members are national associations of European steel-manufacturing undertakings (see paragraph 2 above), is an 'association of undertakings' within the meaning of Article 65 of the Treaty. Having regard to the purpose of that provision, the concept of association of undertakings must be interpreted as also covering entities consisting of associations of undertakings, as the Commission observed in recital 280 of the Decision.

111 As to whether the applicant adopted a decision within the meaning of Article 65(1) of the Treaty, it must first be noted that the applicant includes among its objectives cooperation 'between the undertakings of the European steel industry' (Article 2, first paragraph, first indent, of its statutes) and that it is

required to realise those objectives, *inter alia*, by 'exchanging information concerning all problems of common interest, in particular production, the market and employment' (Article 2, second paragraph, second indent, of its statutes).

112 Second, it is common ground that the applicant itself was responsible for gathering, compiling and circulating the statistics at issue in the present case. In its letter of 30 July 1990 to the chairman and the secretariat of the Poutrelles Committee, cited at recital 44 of the Decision, the applicant expressly distinguished its own activities ('we decided to suspend any circulation which discloses individual figures') from the analogous activities of the Poutrelles Committee ('we ask you to kindly abstain from any similar exchange or circulation in the framework of your Committee').

113 Third, it must be presumed that the applicant's staff could not have organised the exchange of information in issue without authorisation by the competent organs or, at least, the express or tacit approval of its members.

114 Fourth, it is common ground that the undertakings that participated in the exchange in issue, in particular by communicating their individual figures, were affiliated either to the applicant or to one of its member associations (see recital 281 of the Decision).

115 In the light of these elements, the Court considers that the Commission was entitled to conclude at recitals 281 and 282 of the Decision that the exchange of information at issue could not have been effected without an express of implied decision by the applicant organising and administering that exchange.

116 As regards that applicant's argument that a decision for the purposes of Article 65(1) of the Treaty must be binding on its members, it is sufficient to point out that an act may be described as a decision by an association of undertakings without necessarily being binding on the members concerned, at least to the extent to which the members concerned by the decision comply with it (see, by analogy, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 20, *Van Landewyck* v *Commission*, cited above, paragraphs 88 and 89, and *Verband der Sachversicherer* v *Commission*, cited above, paragraphs 29 to 32). In the present case that hypothesis is sufficiently established by the fact that the undertakings communicated their figures to the applicant on a continuous basis and, without raising any objections, received the tables prepared by the applicant on the basis of all the information sent to it. Those facts show that the applicant at least recommended that all the undertakings concerned exchange information and that the undertakings did as it recommended.

117 Even supposing that the applicant's activities were the result of an express or tacit agreement between its members that it should be responsible for collecting and circulating the statistics in issue, although no formal decision had been taken by the applicant's organs, such an agreement must be classified as a decision by an association of undertakings for the purposes of Article 65(1) of the Treaty, since the agreement in question was necessarily adopted within the context of the activities of the association, which itself assumes responsibility for collecting and circulating the information in issue, in accordance with its role as defined in its statutes.

118 Consequently, the Commission was properly entitled to conclude that there was a decision by an association of undertakings of such a kind as to render the applicant liable.

119 Furthermore, the matters set out in the Decision enabled the applicant to protect its rights and the Court to exercise its power of review and thus constituted an adequate statement of reasons.

120 It follows that the arguments relating to the absence of any decision taken by the applicant must be rejected in their entirety.

D — *The exclusion of associations from the class of addressees of the prohibition in Article 65 of the Treaty*

Summary of the applicant's arguments

121 The applicant argues that, even supposing that there was a decision by an association of undertakings in the present case, such an association cannot by itself infringe the prohibition in Article 65 of the Treaty, unlike its member undertakings.

122 That argument is consistent, first, with Article 65(4) and (5) of the Treaty, providing, respectively, that any agreement or decision prohibited by paragraph (1) is void and that the Commission may impose fines or periodic penalty payments, provisions which are aimed solely at undertakings.

123 Second, only undertakings, economic entities which act autonomously, have the freedom of action protected by Article 65 of the Treaty. Consequently, any anticompetitive effects of a decision taken by an association pursuant to the applicable statutes concern only the undertakings belonging to the association, in so far as they are bound by that decision. In such a case the decision in question reflects a consensus between at least two undertakings, which is an essential ingredient of a decision if Article 65 of the Treaty is to apply. Under the applicant's statutes, however, its organs have no power to regulate, by means of a decision, the market conduct of European steel producers. Furthermore, the majority of the applicant's members are themselves associations of undertakings,

and the undertakings belonging to those associations are not bound by decisions taken by the applicant. It is irrelevant whether the decision in question is or is not binding on the association itself.

124 Third, in the applicant's view undertakings alone can satisfy the subjective conditions regarding prohibition of agreements.

125 Last, the fact that it is impossible for an association to infringe that prohibition is confirmed by the rules relating to authorisations (Article 65(2) of the Treaty), which form an indivisible whole with the prohibition (see the second subparagraph of Article 65(4) of the Treaty and, in relation to the EEC Treaty, the judgment in Case 13/61 *De Geus en Uitdenbogerd* v *Bosch and Others* [1962] ECR 45). Only undertakings can be the addressees of such an authorisation, as indicated by the expression 'undertakings concerned' in Article 65(2)(c) of the Treaty and the fact that any authorisation concerns the conduct of undertakings on the market (specialisation agreements or joint-buying or joint-selling agreements).

126 The applicant considers that its argument is not contradicted either by Article 48 of the Treaty, which is essentially declaratory in nature and does not itself establish any prohibition, or by the case-law of the Court of Justice. On the latter point, it argues, *inter alia*, that the judgment in Case 67/63 *Sorema* v *High Authority* [1964] ECR 151, at pp. 161-162, concerns a different set of circumstances from that of the present case.

Findings of the Court

127 Article 65(1) of the Treaty prohibits 'All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly

or indirectly to prevent, restrict or distort normal competition within the common market'.

128 Article 65(4) of the Treaty provides that:

'Any agreement or decision prohibited by paragraph 1 of this Article shall be automatically void and may not be relied upon before any court or tribunal in the Member States.

The Commission shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this Article.'

129 Article 65(5) of the Treaty provides that: 'On any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce... an agreement or decision which is automatically void... or has engaged in practices prohibited by paragraph 1 of this Article, the Commission may impose fines or periodic penalty payments...'.

130 Although it does indeed follow from Article 65(5) of the Treaty that an association of undertakings cannot be made the subject of a fine or a periodic penalty payment, there is nothing in the wording of Article 65(1) of the Treaty to support the view that an association which has adopted a decision tending to prevent, restrict or distort normal competition is not itself covered by the prohibition laid down in that provision.

131 That interpretation is confirmed both by Article 65(4) of the Treaty, which also refers to such decisions, and by the judgment in *Sorema* v *High Authority*, cited

above, in which the Court of Justice held that Article 65(1) of the Treaty also applies to associations to the extent to which their own activity or that of their member undertakings tends to produce the effects referred to therein (at p. 162). That finding is also confirmed, according to the Court of Justice, by Article 48 of the Treaty, which allows associations to engage in any activity not contrary to the Treaty.

132 Contrary to what the applicant contends, it also follows from the judgment in *Sorema* that an association of undertakings within the meaning of Article 65(1) of the Treaty may be the addressee of a decision authorising an agreement pursuant to Article 65(2) of the Treaty (pp. 161-165).

133 The applicant's argument that an association of undertakings within the meaning of Article 65(1) of the Treaty cannot infringe the prohibition laid down in that provision must therefore be rejected.

E — *The Commission's power to adopt a decision confirming that there is an infringement imputable to the applicant*

Summary of the applicant's arguments

134 The applicant is of the view that Article 65 of the Treaty does not empower the Commission to adopt a decision confirming an infringement that can be imputed to it. In particular, neither paragraph (4) nor paragraph (5) of Article 65 provides for such a power.

135 Article 65(4) of the Treaty concerns only the Commission's incidental power to find that infringements have occurred in the context of proceedings before the courts of the Member States and does not confer any general power on the Commission to adopt decisions containing such findings. Furthermore, the legal consequences provided for in Article 65(4), namely that anticompetitive agreements or decisions are void and may not be relied on before the courts, do not concern associations, but only the parties to those agreements or decisions, namely undertakings.

136 Article 65(5) of the Treaty authorises the Commission only to determine fines and periodic penalty payments. It does not allow the Commission to adopt decisions making findings of infringements of Article 65(1). That power does, admittedly, include the power to order the person concerned to cease or refrain from repeating or continuing the infringements and, where such an order is made, to find indirectly that the infringement has occurred. However, that power exists only in regard to undertakings as defined in Article 80 of the Treaty.

Findings of the Court

137 It follows from the second subparagraph of Article 65(4) of the Treaty that the Commission has sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any agreements or decisions by associations of undertakings referred to in Article 65(1) are compatible with that provision.

138 The Court considers that Article 65(4) of the Treaty cannot be interpreted as meaning that it applies only incidentally, in the context of proceedings before a national court, as the applicant claims. It follows that in the present case that provision constitutes a sufficient legal basis for the finding of the infringement referred to in Article 2 of the Decision.

139 The applicant's argument that the Commission was not empowered to adopt Article 2 of the Decision must therefore be rejected.

F — *Pleas and arguments concerning the anticompetitive nature of the system in respect of which the applicant is accused*

Summary of the parties' arguments

140 The applicant claims, first, that Article 2 of the Decision infringes the obligation to state reasons referred to in the first paragraph of Article 15 of the Treaty, in that the finding of a connection between the conduct in respect of which it is accused and the infringements by its members listed in Article 1 of the Decision implies that it participated in those infringements. That assumption finds no support in the grounds of the Decision.

141 Second, the applicant maintains that during the administrative procedure it was not put in a position to submit observations concerning the activities of the Poutrelles Committee (with the exception of the 'Traverso method'), whereas, according to Article 2 of the Decision, those activities were connected with the infringement which it was found to have committed. The Commission thus breached the applicant's rights of defence.

142 Third, the applicant considers that the Commission was wrong to take the view at recital 317 of the Decision that an association can infringe Article 65(1) of the Treaty by participating in an infringement committed by third parties, namely its members.

143 Fourth, the applicant puts forward a series of arguments to the effect that the exchange of information in respect of which it is accused had neither the object nor the effect of restricting normal competition within the meaning of Article 65(1) of the Treaty.

144 In that regard, the applicant first of all claims that the acts in respect of which it is accused did not have the *objective* of restricting competition and, accordingly, did not 'tend' to do so. It is not sufficient for the purposes of the application of Article 65 of the Treaty that such a restriction should, where appropriate, appear as the mere *effect* of the conduct in question (see recital 283 of the Decision) or that it *may* create such an effect (see recital 281 of the Decision). The verb '*tendre à*' in French, the only authentic language of the ECSC Treaty, refers to the objective of the conduct in question, as does the term '*abzielen*' in the German translation of the Treaty.

145 In the present case, the objective of the alleged decision, which is to achieve greater transparency in the market through the exchange of information, cannot in the applicant's view be classified as anticompetitive.

146 In any event, the exchange of information on deliveries cannot have entailed restrictions on competition in any way whatsoever.

147 On the most plausible interpretation of the Decision, the Commission concluded that there was a restrictive effect provided that the system for the exchange of information in its view made possible or facilitated the subsequent coordination, by means of price-fixing and market-sharing, of the economic conduct of the undertakings. The applicant maintains that that reasoning is not sufficient for the system to be described as anticompetitive. Rather, the Commission should have established that the system itself limited the freedom of the participant undertakings to act independently and autonomously.

148 Even if the Decision were interpreted as meaning that the exchange of information constitutes a separate infringement rather than a measure preparatory to such an infringement, it would still not be permissible to conclude that there was a restrictive effect on competition. The freedom of action of the undertakings concerned was not affected either by their receiving the information in question or by their providing information in return.

149 The figures which the participant undertakings *received* did not enable them to determine the future conduct of the competitor concerned, since they were historical figures concerning past deliveries made pursuant to transactions concluded at least three and a half months (in the majority of cases six months, in some cases seven months or more) before the information in question was circulated. In any event, knowledge of a competitor's future conduct on the market does not in itself constitute a restriction on competition but, on the contrary, a factor that encourages competition, since it makes it easier for the undertaking concerned to direct its future conduct.

150 Although the obligation to *communicate* certain figures may limit the freedom of action of the traders concerned by depriving them of the advantages of possible competitive initiatives, the exchange in respect of which the applicant is accused did not produce such an effect. The historical figures did not include any information about the various transactions, customers, prices, terms of business or other details. They concerned at least eight categories of products lumped together under the designation 'beams'. These categories included a significant number of sections and dimensions. The products in the various categories are, according to the applicant, not interchangeable. It is incorrect, therefore, to state that the circulation of that information made it possible for each undertaking to establish what form of conduct its competitors were engaging in on individual markets (recital 283 of the Decision).

151 In any event, because price lists and conditions of sale are made public, as provided for in Article 60 of the Treaty, each undertaking was automatically aware of the essential parameters of its competitors' future transactions, since competition on the markets of the ECSC concerns fundamentally price lists. The applicant concludes that the exchange of information in issue could not have restricted the competition governed by the rules of the Treaty.

152 As regards the characteristics of the markets concerned, the applicant claims that, with more than sixteen producers in the Community and a very strong influence from imports from non-member countries, the beam sector does not display an oligopolistic structure. Far from maintaining a position of solidarity, the manufacturers maintain relations of strong rivalry. Furthermore, secret competition between manufacturers is prohibited by the rules of Article 60 of the Treaty. Since Article 65 of the Treaty only protects lawful competition, the prevention of prohibited (secret) competition does not infringe that provision.

153 It is also irrelevant whether that information falls to be classified as 'trade secret[s]' (recital 283 of the Decision). Moreover, such secrets may, in the view of the applicant, be lawfully disclosed with the consent of the undertaking concerned.

154 Last, the applicant stated at the hearing that at the material time it was circulating two distinct types of statistics, namely statistics broken down by company which had their origin in the beginning of the crisis regime, and statistics resulting from accelerated inquiries, aggregated as regards the participant undertakings.

155 The applicant claims that recitals 143 to 146 and 283 of the Decision do not clearly state which of the two types of statistics is being referred to. The Commission refers to figures sent two months after the end of the reference quarter (recital 145), which corresponds to the hypothesis of statistics broken down by company. On the other hand, it refers to the term 'fast bookings' (recital 143), which corresponds to the hypothesis of aggregated statistics resulting from accelerated investigations. Similarly, in its reply of 23 February 1998 to the questions put by the Court, the Commission emphasised the interest of speed presented by the statistics for the undertakings, whereas the information in the statistics broken down on a company-by-company basis was also available (and sometimes more rapidly) within the framework of the monitoring and the Walzstahl-Vereinigung system described in recitals 39 to 60 of the Decision. These factors give reason to a belief that in the Decision the Commission was referring to aggregated statistics resulting from the accelerated inquiries.

However, the exchange of such aggregated statistics does not infringe Article 65 of the Treaty and could not have facilitated the commission of the other infringements referred to in the Decision.

156 The Commission contends that the word 'connection' in Article 2 of the Decision does not mean that the applicant participated in the conduct of the undertakings referred to in Article 1. The wording and structure of the passages detailing the infringement by the applicant (recitals 143 to 146 and 279 to 283) clearly show that the Commission regarded this as being a quite separate infringement.

157 In reality, the word 'connection' refers, first, to the similarities between the infringements committed by the undertakings and that committed by the applicant. Thus, the statistics compiled by the applicant concerned the same product (beams), almost the same undertakings, the same relevant period and the same method of collecting figures (tables of orders and deliveries) as the information exchanged within the framework of the Poutrelles Committee (see the passages of the Decision cited above). Furthermore, both systems for the exchange of information had the same effects (see recital 283 of the Decision) and the same objective, namely to enable the undertakings to maintain their traditional trade flows and to monitor implementation of the price-fixing and market-sharing agreements (on the latter point, see the internal briefing note cited in recital 59 of the Decision).

158 Second, the figures distributed by the applicant supplemented those distributed within the Poutrelles Committee (of which the applicant and the undertakings concerned were aware, see point 273 of the statement of objections), and contributed to the infringements committed by its members.

159 In any event, since the beams market is an oligopolistic market in homogeneous products, the Commission was entitled to censure the exchange of information

organised by the applicant, irrespective of whether that was in any way connected with the infringements committed by the undertakings within the Poutrelles Committee.

160 In that regard, the Commission refers, *inter alia*, to the explanations in points 272 to 284 and 470 to 474 of the statement of objections. In particular, according to point 474 of the statement of objections the exchange of information organised by the applicant enabled each undertaking to 'determine the past or present conduct of its competitors on each market and established between them a system of solidarity and mutual influence which led to the coordination of their economic activities'. The Commission maintains that it is in respect of this coordination that the undertakings are accused in Article 1 of the Decision. Consequently, the connection referred to in Article 2 of the Decision does not introduce any new factor on which the applicant was unable to adopt a position.

161 As regards, more particularly, the anticompetitive nature of the exchange of information in issue, the Commission explains that the figures in question were circulated two months after the expiry of the reference quarter. The availability of such figures, which cannot be classified as purely historical, enabled the undertakings to be aware of their competitors' conduct on the Community markets. Although such an increase in transparency may, in principle, increase competition, the position is otherwise in the case of an oligopolistic market, such as the market in beams, where it strengthens the interaction and solidarity of undertakings and reduces the intensity of competition. In the present case, the discussions held within the Poutrelles Committee were designed to consolidate existing trade flows and prevent competitors from entering the domestic markets of the various undertakings. By being aware of their competitors' conduct the undertakings were in a position to decide whether they should ask them to change that conduct.

162 Furthermore, the exchange of information complained of benefitted only the participating producers, while it deprived their customers of the opportunity of benefiting from the secret competition that normally exists even on oligopolistic markets. Article 60 of the Treaty does not affect that reasoning. Although the publication of the price lists required by that article means that not only

competitors but also purchasers are informed, the exchange of figures of which the applicant is accused benefitted only the former.

163 In answer to a question put by the Court, the Commission stated that the purpose of the exchange of information was to facilitate the implementation of the price-fixing and market-sharing agreements and thus to commit the infringements set out under (b) and other of the various heads in Article 1, which were made possible owing to the undertakings' use of the figures provided by the applicant. Article 2 of the Decision expresses, in the light of that conduct and in accordance with the explanations set out in recital 283, the idea that the applicant was liable on its own account, in connection with the infringements in respect of which the undertakings were themselves liable according to Article 1.

164 At the hearing the Commission further emphasised, still in the context of Article 2 of the Decision, the functional link which existed between the exchange of information and the Traverso method. This link is described in recitals 72 and 74 of the Decision.

Findings of the Court

1. The statistics referred to in the Decision

165 It follows from the investigation carried out by the Court that at the material time the applicant was circulating two distinct types of statistics. First, as is apparent from recital 144 of the Decision and Annex II thereto, it circulated the figures for orders on an aggregate basis, and also figures for deliveries, broken down by company and subdivided into the markets of the Member States. According to recital 145 of the Decision, the figures for deliveries were distributed to the

participant undertakings no longer than approximately two months after the end of the quarter or month in question. It is also stated that this exchange dates back at least to 1986.

166 Second, in 1989 the applicant established a system for the rapid exchange of information, under which the monthly figures for orders and deliveries for the various national markets were circulated to the declaring undertakings on an aggregate basis. This system of accelerated statistics was brought to the Commission's notice at a meeting held on 21 March 1989 and the resulting rapid figures were subsequently forwarded to the Commission on a regular basis in the context of the surveillance system established by Decision No 2448/88 and the preparation of programmes indicating foreseeable developments provided for in Article 46 of the Treaty.

167 Contrary to what the applicant claims, however, it follows clearly from recitals 143 to 145 and 283 of the Decision, read together, that the figures which it is accused of circulating are those for deliveries broken down by company and national market, which is also confirmed by the documents referred to in Annex II to the Decision. Although the use of the expression 'fast bookings' in recital 143 tends to confuse, it follows that the Decision is aimed not at the system of aggregate statistics for orders and deliveries resulting from the accelerated inquiries brought to the Commission's knowledge in 1989 but at the exchange of statistics for deliveries on a company-by-company basis introduced in 1986.

168 The applicant's argument alleging a contradiction in the facts established in the Decision must therefore be rejected.

2. The interpretation of Article 2 of the operative part of the Decision

169 In order to assess the applicant's remaining arguments, the Court must first consider whether Article 2 of the operative part of the Decision accuses it of a separate infringement of Article 65(1) of the Treaty or whether, on the contrary, the applicant's actions were unlawful because of their connection with the infringements committed by the beam-producing undertakings described in Article 1 of the operative part of the Decision.

170 Article 2 of the operative part of the Decision is worded as follows:

'Eurofer has infringed Article 65 of the ECSC Treaty by organising an exchange of confidential information in connection with the infringements committed by its members and listed in Article 1.'

171 It is settled case-law that the operative part of a decision must be interpreted in the light of the grounds thereof (see, for example, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

172 Recital 283 of the Decision is worded as follows:

'The circulation of information through Eurofer tended to have the same detrimental effects on competition as the systems for the exchange of information described above (see recitals 263 to 272). Eurofer provided the companies which were (directly or indirectly) its members with information on the deliveries made by their competitors. The circulation of such information which is normally regarded as a trade secret made it possible for each company to establish what form of conduct its competitors were engaging in on individual markets. This

exchange of information thereby resulted in the normal risks of competition being replaced by practical cooperation and in conditions of competition different from those obtaining in a normal market. Such conduct is contrary to Article 65(1) of the ECSC Treaty.'

173 It is clear from recital 283 of the Decision that in the Commission's view the circulation of the information in question by the applicant constitutes a separate infringement of Article 65(5) of the Treaty, irrespective of the connection between that exchange of information and the other infringements of which the participant undertakings are accused.

174 That interpretation is also consistent with point 474 of the statement of objections, where the Commission expressed its views as follows:

'The circulation of information through Eurofer tended to have the same detrimental effects on competition as the systems for the exchange of information described above (see points 435 to 456). Eurofer provided its (direct or indirect) members with information on the orders recorded and deliveries made by their competitors. The circulation of such information, which is normally regarded as a trade secret, made it possible for each company to determine its competitors' past or present conduct on each market and established between them a system of solidarity and mutual influence that led to the coordination of their economic activities. This exchange of information thereby resulted in the normal risks of competition being replaced by practical cooperation and in conditions of competition different from those obtaining in a normal market. Such conduct is incompatible with Article 65(5) of the ECSC Treaty.'

175 It follows, first, that the Commission always considered that the exchange of information of which the applicant is accused constituted a separate infringement of Article 65(1) of the Treaty and, second, that the applicant was put in a position during the administrative procedure to present its views on that question.

176 As regards the significance of the words 'in connection with the infringements committed by its members and listed in Article 1', it is apparent from the actual wording that that phrase cannot be interpreted as meaning that the unlawful nature of the circulation of the information in question by the applicant depends entirely on a link between that exchange of information and the other infringements committed by its members and listed in Article 1 of the Decision. Moreover, such an interpretation would be inconsistent with recital 283 of the Decision.

177 None the less, the second paragraph of recital 317 of the Decision states:

'In this case, Eurofer facilitated the implementation of infringements of Article 65 of the ECSC Treaty by its members, by organising an exchange of some of the necessary confidential information. However, since those members are already being fined in respect of the infringements, including exchanges of confidential information in connection with price fixing and market sharing, the Commission does not consider it necessary to impose any additional fines on them for the behaviour of their association.'

178 Although the drafting of Article 2 of the Decision is not a model of clarity, the Court concludes that that provision, interpreted in the light of the grounds of the Decision, finds (i) that the exchange of confidential information through the intermediary of Eurofer in itself infringed Article 65(1) and (ii) that there is a connection between that exchange of information and the other infringements listed in Article 1 of the Decision.

179 In the light of those findings, the applicant's argument that the Commission is accusing it merely of participating in infringements committed by third parties must be rejected. As the Court has just observed, the Decision finds the applicant guilty of a separate infringement of Article 65(1) of the Treaty, which it committed itself by organising the exchange of the information in issue.

180 It follows from the foregoing that the legality of Article 2 of the operative part of the Decision depends, first, on whether the exchange of information organised by the applicant constitutes as such a separate infringement of Article 65(1) of the Treaty and, second, on whether there was a connection between that exchange of information and the other infringements listed in Article 1 of the Decision. The Court will examine those two issues in turn.

3. The separate nature of the infringement of Article 65(1) of the Treaty consisting in the exchange of information organised by the applicant

181 In Opinion 1/61 [1961] ECR 243, the Court of Justice stressed that the purpose of Article 4(d) of the Treaty was to prevent undertakings from acquiring, by means of restrictive practices, a position allowing them to share or exploit markets. According to the Court of Justice, that prohibition, to which effect is given by Article 65(1) of the Treaty, is of strict application and distinguishes the system established by the Treaty (p. 262). Furthermore, in Case 66/63 *Netherlands* v *High Authority* [1964] ECR 533, at pp. 548 and 549, the Court of Justice held that the competition referred to in the Treaty consists in the interplay of the strengths and strategies of independent and opposed economic units on the market.

182 In the present case it is common ground that after the end of the crisis period on 30 June 1988 the applicant continued to organise and administer a system for the exchange of information set up in 1986 at the latest in the context of the 'I' and 'i' quota system then in force (see paragraph 7 above). Under that system, the applicant circulated to the undertakings producing beams statistics concerning the deliveries made by their competitors on the principal Community markets, broken down by company and by Member State. These statistics were circulated approximately two months after the end of the quarter or month in question.

183 According to recital 283 of the Decision, this exchange of information infringed Article 65(1) of the Treaty in that '[t]he circulation of such information which is normally regarded as a trade secret made it possible for each company to

establish what form of conduct its competitors were engaging in on individual markets. This exchange of information thereby resulted in the normal risks of competition being replaced by practical cooperation and in conditions of competition different from those obtaining in a normal market. Such conduct is contrary to Article 65(1) of the ECSC Treaty'.

184 The Commission also considered that the exchange of information organised by the applicant tended to have the same detrimental effects on competition as the systems for the exchange of information organised by the Poutrelles Committee and described in recitals 263 to 272 of the Decision, in connection with which the participant undertakings exchanged statistics on orders and deliveries, also broken down by company and by national market, which were discussed within the Poutrelles Committee (see recitals 39 to 46 of the Decision). Under this so-called 'monitoring' system, recent figures on orders were circulated each week and delivery figures were circulated less then three months after the end of the quarter concerned (recital 267 of the Decision).

185 It is true that, unlike the monitoring organised by the Poutrelles Committee, the exchange of information organised by the applicant did not involve the statistics on orders broken down by company and by country, but only the exchange of delivery statistics, broken down by company and by country.

186 It must, however, be pointed out, first, that the statistics relating to the deliveries in question are normally regarded as strictly confidential, as the Commission observed at recital 283 of the Decision. Contrary to what the applicant claims, the Court considers that such figures, which show the participants' recent market share and are not in the public domain, are by their very nature confidential figures.

187 In the second place, the exchange of information in issue was limited to producers which had acceded to the arrangement, to the exclusion of consumers and other competitors.

188 In the third place, the exchange of information in issue related to homogenous products (see recital 269 of the Decision), with the result that competition based on product characteristics played only a limited role. There is nothing in the file to support the conclusion that, as the applicant suggests, more precise information concerning the nature of the products or even the identity of the customers would have been necessary to satisfy the participants' interest in knowing the position of their competitors on the market.

189 In the fourth place, the Court notes that in 1989 nine of the undertakings which participated in the exchange of information in issue (namely TradeARBED, Peine-Salzgitter, Thyssen, Unimétal, Cockerill-Sambre, Ferdofin, Ensidesa, Saarstahl and British Steel) accounted for approximately 60% of apparent consumption (recital 19 of the Decision). Such a market structure, which, contrary to what the applicant claims, presents an oligopolistic nature, capable in itself of reducing competition, makes it all the more necessary to protect the undertakings' autonomy of decision and also residual competition.

190 In the fifth place, the information at issue in the present case made it possible, *inter alia*, for the participant undertakings to know very precisely the market share of each of their competitors and, in particular, the extent to which each of them was delivering outside its 'traditional market'.

191 The fact that the system was set up in 1986 at the latest, in the context of the quota system then being administered by the applicant, indicates that the initial purpose of the system was to monitor compliance with the quotas allocated to each of the participant undertakings, in a context in which the Commission was pursuing a policy of stabilising 'traditional flows' (see paragraph 7 above). The

fact that the exchange in question continued after the quota system ended on 30 June 1988 (see documents nos 3482 and 3483) made it possible for the undertakings to monitor the extent to which each of them was continuing to comply with the traditional markets which had served as the basis for the quota system. By its very nature, such an exchange of information tended to maintain the compartmentalisation of the markets with reference to traditional flows.

192 In the sixth place, the exchange of information in issue was effected at a time when the industry had a forum, namely the Poutrelles Committee, in which the participant undertakings met regularly to discuss, *inter alia*, interpenetration of the various national markets by the participant undertakings, as may be seen from recitals 49 to 60 of the Decision. During these discussions the undertakings regularly referred to past figures (recitals 51, 53, 57 and 58), in regard to which they used the expression 'traditional flows' (recital 57). Likewise, threats were made in respect of conduct that was deemed excessive (recital 58) and on an number of occasions the undertakings criticised attempted to explain their conduct (recitals 52 and 56).

193 In that regard, even though the Commission has not specifically stated that the discussions referred to at recitals 44 to 60 of the Decision took place both on the basis of the figures resulting from the monitoring organised by the Poutrelles Committee and on the basis of the exchange of information administered by the applicant, the Court observes, by way of example, that the delivery figures for the first two quarters of 1989 circulated by the applicant (documents nos 3162 and 3163) are the same as those mentioned for those two quarters in the table referred to in recital 55 of the Decision (document no 1864) sent by Peine-Salzgitter to British Steel at the beginning of March 1990, which contains a handwritten message from Peine-Salzgitter worded as follows: '[a]ccording to these figures there is — I fear — no backlog due to British Steel plc!'.

194 Seventh, and contrary to what the applicant claims, the figures in question, which in any event were circulated less than three months after the end of the quarter concerned, were sufficiently up to date to enable the undertakings concerned effectively to follow movements in their competitors' market shares and to react where appropriate.

195 It follows that the information which the undertakings received under the arrangements in question was capable of appreciably influencing their conduct, by reason of the fact that each undertaking knew that it was being kept under close scrutiny by its competitors and that it could, if necessary, react to the conduct of its competitors, on the basis of data concerning relatively recent deliveries.

196 It follows that the information exchange system in question tended to prevent, restrict or distort normal competition within the meaning of Article 65(1) of the Treaty by making it possible for the participating producers to substitute practical cooperation between them for the normal risks of competition.

197 It also follows that the conduct of which the applicant stands accused is not covered by point II.1 of the 1968 communication, which, according to its actual wording, does not apply to exchanges of information which reduce the decision-making autonomy of participants or is liable to facilitate coordinated conduct on the market. Furthermore, the present case involves an exchange of individualised data, in the context of an oligopolistic market in homogenous products, which tended to compartmentalise markets by reference to traditional flows.

198 In so far as the applicant refers to Article 60 of the Treaty as justification for the system in question, its arguments cannot be accepted. In the first place, that provision is limited to the area of prices and does not concern information on quantities placed on the market. Second, the publication of the prices, as provided for under Article 60(2) of the Treaty, is supposed to benefit consumers, among others (see, *inter alia*, Case 1/54 *France* v *High Authority* [1954 to 1956] ECR 1, at p. 9), whereas the benefit of the systems in question was confined to the participating producers alone. Likewise, Article 47 of the Treaty does not authorise the Commission to divulge information on the competitive conduct of undertakings in the area of quantities solely for the benefit of producers any more than Article 46 does. For those same reasons, the applicant cannot plead any general principle of transparency inherent to the ECSC Treaty, *a fortiori* since the information involved in this case was confidential information which, by its very nature, constitutes business secrets.

199 With regard to the arguments on the need to exchange information within the context of cooperation with the Commission, based on Articles 5 and 46 to 48 of the ECSC Treaty and on Decision No 2448/88, there is nothing in those provisions which expressly allows an exchange of information between undertakings such as that at issue here. The question whether such an exchange was implicitly authorised by the conduct of DG III will be examined in Part G below.

200 Subject to that reservation, and regard being had in particular to the fundamental principle of the Treaty that the competition to which it refers consists in the interplay on the market of the strengths and strategies of independent and opposed economic units (*Netherlands* v *High Authority*, cited above, at pp. 548 and 549), the Court finds that the Commission did not err in law in referring, at recital 271 of the Decision, to certain decisions which it had adopted under the EC Treaty in cases involving oligopolistic markets. With particular regard to Decision 92/157/EEC of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange), OJ 1992 L 68, p. 19, it must be pointed out that both this Court and the Court of Justice have ruled that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders (Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, paragraph 51, and Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraphs 88 to 90).

201 The Court observes, furthermore, that in recitals 279 to 283 of the Decision the Commission provided adequate legal grounds to support its view that the arrangements in question were contrary to normal competition.

202 It follows from all of the foregoing that the applicant's arguments relating to the exchange of information as a separate infringement of Article 65(1) of the Treaty must be rejected in their entirety, subject to the Court's findings in Part G below.

4. The connection between the exchange of information organised by the applicant and the infringements listed in Article 1 of the Decision

203 The Court has already held that the unlawful nature of the exchange of information organised by the applicant does not depend on its alleged connection with the infringements committed by its members and listed in Article 1 of the Decision, since that exchange constitutes a separate infringement of Article 65(1) of the Treaty.

204 However, it must also be held that the exchange of information organised by the applicant was operated in parallel with the exchange of information on orders and deliveries organised by the Poutrelles Committee concerning the same undertakings. The exchange of information in issue was therefore also operated during the period taken into account for the various infringements of Article 1 of the Decision. It is common ground, therefore, that this exchange took place within the context of a wider infringement, as described in the Decision.

205 Consequently, the Court considers that the words 'in connection with the infringements committed by its members and listed in Article 1' are to be interpreted as a subsidiary consideration, whereby the Commission merely found that the exchange of information organised by the applicant formed part of a wider series of infringements of which the addressees of the Decision stood accused, although the applicant was not accused of having participated in the other infringements in question.

206 Having regard to the subsidiary nature of this finding, the Commission was not required to provide further reasoning.

207 It is also common ground that the applicant, as an addressee of the statement of objections, was placed in a position during the administrative procedure to make known its views on the entire factual framework within which the only exchange of information of which it stands accused took place.

208 Accordingly, the arguments whereby the applicant criticises the Commission for having found in Article 2 of the Decision that the exchange of confidential information organised by the applicant was connected with the other infringements listed in Article 1 must be rejected in their entirety.

...

The claim for annulment of Article 3 of the Decision

Summary of the applicant's arguments

220 The applicant contends that the obligation which Article 3 of the Decision imposes on it to bring to an end the infringement referred to in Article 2, to refrain from repeating or continuing any of the acts or behaviour specified in Article 1 and to refrain from adopting any measures having equivalent effect infringes Article 65(5) of the Treaty. That provision, the only legal basis on which injunctions of that type can be based, concerns solely undertakings, to the exclusion of associations.

221 The applicant further claims that the complaint alleging a failure to state reasons which it puts forward in respect of Article 2 of the Decision also applies to Article 3. Article 3 does not make it possible to determine whether the prohibition which it includes, in the applicant's case, refers to an activity in the context of the system which it organised itself or an activity connected with that of the Poutrelles Committee or with other restrictions on competition similar to those in respect of which the Decision criticises the undertakings.

222 Furthermore, the obligation to refrain from any 'measures having equivalent effect' is not sufficiently reasoned. In the absence of a precise definition of the elements constituting such a measure, Article 3 of the Decision in the final analysis prohibits any restriction of competition whatsoever and thus fails to specify the obligations of the persons concerned, as is required of orders to cease infringements and to refrain from repeating or continuing them.

Findings of the Court

223 The Court has already established that an association of undertakings such as the applicant can infringe Article 65(1) of the Treaty and that the Commission is entitled to make a finding of such an infringement on the basis of Article 65(4) of the Treaty.

224 Furthermore, by placing the applicant under an obligation, in Article 3 of the Decision, to bring to an end the conduct found to constitute an infringement in Article 2 and to refrain from repeating or continuing that conduct, the Commission merely set out the consequences, as regards its future conduct, of the finding of infringement made in Article 2 (see, in that regard, 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, paragraph 184).

225 As regards the scope of Article 3 of the Decision, it follows from the findings already made by the Court that Article 3 refers to the exchange of information organised by the applicant and described at recitals 143 to 146 and 279 to 283 of the Decision.

226 The injunction against 'adopting any measures having equivalent effect' is purely declaratory, since it may be analysed as tending to prevent the undertakings from repeating conduct found to be illegal (Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 39). In any event, the

Commission is entitled to take action against any subsequent infringements on the basis of Article 65 of the Treaty itself (see *Fiatagri and New Holland Ford* v *Commission*, cited above, paragraph 39).

227 The court further considers that the injunction is sufficiently precise, since the grounds of the Decision reveal, at recitals 143 to 146 and 279 to 283, the factors which led the Commission to find that the conduct described in Article 2 was illegal (see Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraph 42, and *Fiatagri and New Holland Ford* v *Commission*, cited above, paragraph 39).

228 The claim for the annulment of Article 3 of the operative part of the Decision must therefore be rejected.

Costs

229 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has asked for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear the costs.**

Bellamy Potocki Pirrung

Delivered in open court in Luxembourg on 11 March 1999.

H. Jung C.W. Bellamy

Registrar President