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

In Case T-148/94,

Preussag Stahl AG, a company incorporated under German law, established in Salzgitter (Germany), represented by Horst Satzky and Bernhard M. Maassen, of the Brussels Bar, Martin Heidenhain, Rechtsanwalt, Frankfurt, and Constantin Frick, Rechtsanwalt, Bremen, with an address for service in Luxembourg at the Chambers of René Faltz, 6 Rue Heinrich Heine,

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 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, J. Pirrung, Judges,

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment [1]

The facts giving rise to the action

A — *Preliminary observations*

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

2 The applicant, formerly named Stahlwerke Peine-Salzgitter AG (referred to in the Decision as 'Peine-Salzgitter'), is part of a group of companies, the parent company of which is Preussag AG. It is one of the principal steel producers in

1 — The grounds of the present judgment are broadly identical or similar to those in the judgment of 11 March 1999 in Case T-141/94 *Thyssen* v *Commission* [1999] ECR II-347, with the exception of, in particular, paragraphs 74 to 91, 373 to 378, 566 to 574 and 614 to 625 of that judgment, which have no equivalent in the present judgment. Likewise, the infringements of Article 65(1) of the Treaty which the applicant is alleged to have committed in certain national markets are not the same as those which the applicant in *Thyssen* v *Commission* is alleged to have committed. In the present case the partial annulment of Article 1 of the Decision is based essentially on the fact that there is no evidence that the applicant participated in the infringement referred to in paragraph 1 of the operative part of the present judgment.

Germany and its combined turnover was DEM 3 225 million in 1989/1990. In 1990 its sales of beams in the Community reached DEM 352 million, or ECU 172 million.

...

D — *The Decision*

47 The Decision, which the applicant received on 3 March 1994 under cover of a letter of 28 February 1994 from Mr Van Miert ('the Letter'), contains the following operative part:

'*Article 1*

The following undertakings have participated, to the extent described in this Decision, in the anti-competitive practices listed under their names which prevented, restricted and distorted normal competition in the common market. Where fines are imposed, the duration of the infringement is given in months except in the case of the harmonisation of extras where participation in the infringement is indicated by "x".

...

Peine-Salzgitter

(a) Exchange of confidential information through the Poutrelles Committee and the Walzstahl-Vereinigung (30)

(b) Price-fixing in the Poutrelles Committee (30)

(c) Price-fixing in the German market (3)

(d) Price-fixing in the Italian market (9)

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

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

(g) Market sharing, France (3)

(h) Market sharing, Germany (6)

(i) Market sharing, Italy (3)

(i) Harmonisation of extras (x)

...

Article 4

For the infringements described in Article 1 which took place after 30 June 1988 (31 December 1989[2] in the case of Aristrain and Ensidesa) the following fines are imposed:

...

Preussag Stahl AG	ECU 9 500 000

...

...

2 — This is the date given in the French and Spanish versions of the Decision; the German and English versions give the date as 31 December 1988.

Article 6

This Decision is addressed to:

...

— Preussag Stahl AG

...'.

...

The alternative claim for annulment of Article 4 of the Decision or, at least, reduction of the amount of the fine

...

B — *The absence of fault on the applicant's part and the alleged need to define the prohibited practices rather than impose fines*

...

Findings of the Court

640 The Court has already found that the Commission's alleged participation in the infringements of which the applicant is accused has not been established in the present case (see part D above). The Court has also found that the applicant could not have failed to be aware that the conduct in question was illegal, at least after 30 June 1988, and that the Commission did not unlawfully 'bring [the ECSC Treaty] into alignment with' the EC Treaty. Likewise, there is nothing in the various earlier opinions, decisions, comments or reports of the Commission to induce the applicant to conclude that any of its conduct was lawful. It follows that on this point the arguments alleging that the applicant acted in good faith and committed no error must be rejected.

641 Nor can the Court accept the argument that in the light of the Commission's previous administrative practice the applicant could not foresee that a fine would be imposed. First, a number of Commission decisions have given rise to fines in the past (see decisions referred to in the *Fifteenth General Report of the High Authority*, 1966, p. 185 (paragraph 221); Decision 70/118/ECSC of the Commission of 21 January 1970 relating to a proceeding pursuant to Article 65 of the ECSC Treaty, concerning agreements and concerted practices on the German market in ferrous scrap (*Journal Officiel* 1970 L 29, p. 30); Decisions C(80) 236 final/1, 2 and 3 of 27 March 1980, adopted in the field of special steels, summarised in the *Tenth Report on Competition Policy*, paragraphs 109 and 110, and the stainless steel decision, cited above). Second, and in any event, the fact that a specific decision was, where appropriate, preceded by similar cases in which the Commission did not consider that there was reason to impose a fine cannot deprive it, in the context of that decision, of the power to impose sanctions expressly conferred on it by Article 65(5) of the Treaty (see in that

regard, in the context of the EC treaty, Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 53).

642 The argument relating to the contradiction which allegedly existed between the rules on prices appearing, in particular, in Article 60 of the Treaty and the true situation on the market must also be rejected, for the reasons stated at paragraphs 280 to 285 above. [3]

643 The argument that, instead of imposing fines, the Commission should have defined the prohibited practices, as provided for in the second subparagraph of Article 60(1) of the Treaty, finds no support in Case 6/54 *Netherlands* v *High Authority* [1954 to 1956] ECR 103. The power to adopt such a definition in the context of Article 60 of the Treaty has nothing to do with the prohibition of anti-competitive agreements and concerted practices referred to in Article 65 of the Treaty.

644 It follows that the arguments alleging an absence of fault on the applicant's part and the alleged need to define the prohibited practices rather than impose a fine must be rejected.

C — *The disproportionate nature of the fine*

...

3 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraphs 310 to 316.

— The economic situation of the applicant and of the steel industry

670 The applicant's argument concerning the low level of its profits compared with that of other undertakings, which is revealed by the figures set out in recital 301 (note 1) of the Decision, is irrelevant. The fines imposed on the various undertakings were calculated on the basis not of their profits but of their turnover, as prescribed in Article 65(5) of the Treaty.

671 In applying this criterion to each undertaking, pursuant to Article 65(5) of the Treaty, the Commission took sufficient account of the relative economic importance of each of them in the Community market in beams, the only market affected by the infringements. In this context the applicant's reference to its small size on the market in crude steel is irrelevant. The same applies in regard to Mr Van Miert's statement to the European Parliament.

...

676 The Commission was correct in law to disregard the fact that the applicant, according to its explanation of German tax legislation, is unable to deduct the fine from its taxable income. The tax legislation of a Member State cannot be a relevant criterion in the fixing of a fine for an infringement of Community competition law.

677 As regards, last, the difficulties that the industry was allegedly experiencing in adapting at the end of the crisis regime, the Court has already found that the undertakings were aware in September 1985, if not earlier, that they had entered a transitional regime. The Commission also adopted various measures intended to accompany the transition, in particular the surveillance system provided for in Decision No 2448/88.

678 The arguments concerning the applicant's and the steel industry's economic situation must therefore be rejected.

...

— The Court's exercise of its unlimited jurisdiction

724 The Court has already annulled Article 1 of the Decision in so far as it finds that the applicant participated in an agreement to fix prices on the German market (see paragraphs 410 to 413 above). The fine imposed by the Commission for that infringement was set at ECU 90 300.

725 For the reasons set out in paragraph 509 [4] above, the period from 1 July 1988 to 31 December 1988 must also be excluded in calculating the fine relating to the infringement of price-fixing on the Danish market, which, in the case of the applicant, means a reduction of the fine by ECU 17 200, following the method used by the Commission.

726 Finally, for the reasons explained in paragraphs 687 to 693 [5] above, the Court considers that the total amount of the fine imposed for the price-fixing agreements and concerted practices should be reduced by 15% in view of the fact that the Commission exaggerated to some extent the anti-competitive effects of the infringements which it found to have occurred. If account is taken of the reductions already mentioned concerning the pricing agreements on the German and Danish markets, that reduction comes to ECU 811 410, following the method of calculation used by the Commission.

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

5 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraphs 640 to 646.

727 Applying the Commission's method, the fine imposed on the applicant should therefore be reduced by ECU 918 910.

728 By its nature, the fixing of a fine by the Court, in the exercise of its unlimited jurisdiction, is not an arithmetically precise exercise. Moreover, the Court is not bound by the Commission's calculations, but must carry out its own assessment, taking all the circumstances of the case into account.

729 The Court considers that the Commission's general approach in determining the level of the fines (paragraph 629 above) [6] is justified by the circumstances of the case. The infringements involving price-fixing and market-sharing, which are expressly prohibited by Article 65(1) of the Treaty, must be treated as particularly serious since they involve direct interference with the essential parameters of competition on the market in question. Likewise, the systems for the exchange of confidential information, in which the applicant is accused of having been involved, had a purpose similar to market-sharing according to traditional flows. All of the infringements taken into account for the purpose of the fine were committed, following the end of the crisis regime, after the undertakings had received appropriate warnings. As the Court has found, the general objective of the agreements and practices in question was precisely to prevent or distort the return to normal competition entailed by the ending of the manifest crisis regime. The undertakings, moreover, were aware of their unlawful nature and deliberately concealed them from the Commission.

730 Having regard to all of the foregoing and the entry into effect, on 1 January 1999, of Council Regulation (EC) No 1103/97 of 17 June 1997 laying down certain provisions concerning the introduction of the euro (OJ 1997 L 162, p. 1), the amount of the fine must be fixed at EUR 8 600 000.

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

...

On those grounds,

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

hereby:

1. Annuls Article 1 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as it finds that the applicant participated in a price-fixing agreement on the German market for a period of three months;

2. Sets the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at EUR 8 600 000;

3. Dismisses the remainder of the action;

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

Bellamy Potocki Pirrung

Delivered in open court in Luxembourg on 11 March 1999.

H. Jung C.W. Bellamy

Registrar President