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

In Case T-157/94,

**Empresa Nacional Siderúrgica, SA (Ensidesa)**, a company incorporated under Spanish law established in Avilés (Spain), represented by Santiago Martinez Lage and Jaime Pérez-Bustamante Köster, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

**Commission of the European Communities**, represented initially by Julian Currall and Francisco Enrique González-Diaz of its Legal Service, and Géraud Sajust 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 Ricardo García Vicente, of the Madrid

* Language of the case: Spanish.

Bar, 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,

APPLICATION 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 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 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 According to the Decision, the applicant Empresa Nacional Siderúrgica, SA (hereinafter 'Ensidesa') is a major steel producer in Spain, 99.99% of its shares being owned by the Instituto Nacional de Industria, an undertaking belonging to the public sector.

1 — The grounds of the present judgment are broadly identical or similar to those of 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 120, 331 to 349, 373 to 378, 413 to 456 and 614 to 625, 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.

3 In 1990 Ensidesa's consolidated turnover amounted to ECU 1 437 million, including ESP 12 757.5 million, or ECU 99 million (in round figures) at the average ECU/ESP exchange rate in force in 1990, in respect of beams.

...

D — *The Decision*

48 The Decision, which the applicant received under cover of a letter of 28 February 1994 from Mr Van Miert ('the Letter'), receipt of which it acknowledged on 7 March 1994, 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".

...

Ensidesa

(a) Exchange of confidential information through the Poutrelles Committee (24)

(b) Price fixing in the Poutrelles Committee (24)

(c) Market sharing, France (3)

(d) Market sharing, British Steel, Ensidesa and Aristrain (8)

(e) Harmonisation of extras (x)

...

*Article 4*

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 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:

...

Empresa Nacional Siderúrgica SA ECU 4 000 000

...

*Article 6*

This Decision is addressed to:

...

— Empresa Nacional Siderúrgica SA

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 1 of the Decision**

...

A — *Breach of the applicant's rights of defence*

Summary of the applicant's arguments

77 The applicant first of all argues, with reference to Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 47), that the Commission breached the applicant's rights of defence by not clearly and expressly warning it in the statement of objections that it was accused of having participated in two practices which the Decision considered incompatible with Article 65 of the Treaty, namely the price-fixing agreements and the harmonisation of extras within the framework of the Poutrelles Committee.

78 As regards these two accusations, the statement of objections merely set out, in the part dealing with the facts, a summary of all the meetings of the Poutrelles Committee (see points 110 to 271) and, in the part dealing with the law, a summary of the two practices in question (see points 409 to 430), without in any way specifying which companies were accused in respect of those facts.

79 As regards price-fixing, the applicant maintains more particularly that the references to the Spanish market could have been provided by one of the two other Spanish companies (Unesid and Aristrain) to which the Commission sent a statement of objections. The mere fact that the statement of objections indicates (at point 425) that, like six other undertakings, Ensidesa had received a fax from British Steel, did not enable the applicant to conclude that it had been accused in that respect.

80 As regards the harmonisation of extras, the applicant maintains more particularly that the references to the 'Spanish' could also be to any accused, since its name appeared only in a fax sent by the Walzstahl-Vereinigung to fifteen undertakings (see point 264 of the statement of objections).

81 The applicant therefore considered that those objections did not concern it and so informed the Commission in its written observations on the statement of objections, when it asked the Commission to inform it expressly if that were not the case. The applicant received no reply to that request and complains that the Commission did not repair the lack of clarity of the accusation or point out to the applicant the misinterpretation that it was in the process of committing.

82 Furthermore, since the applicant considered, on the basis of the statement of objections, that those two objections did not concern it, it saw no reason not to communicate to the Commission everything it knew about them, which led it to incriminate itself. Had it been aware that the Commission was accusing it in respect of those two objections it would have challenged their accuracy and would not have provided the Commission with a detailed description of the Spanish undertakings' participation in the practices in question.

83 By a second argument the applicant, referring to Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, maintains that the Commission infringed the rules set out in the *Twelfth Report on Competition Policy* (pages 40 and 41) or, in any event, deprived them of any useful effect by merely

attaching to the statement of objections a numbered list of the documents in a file of 5 766 pages (see Annex 5 to the application), without any indication of their content or origin. Furthermore, when the applicant obtained physical access to the file the documents were not arranged according to any criterion, classified by objection or numbered in any logical order. Ensidesa requested the Commission to make good these procedural defects in its written observations on the statement of objections, but received no reply.

84 By a third argument the applicant maintains that the Commission breached its rights of defence by communicating to it, in an annex to the statement of objections, only a translation by extract of those passages from the 5 766 documents making up its file that supported a finding of guilt. Nor were the minutes of the hearing translated into Spanish, with the exception of what was said by those representing Ensidesa and Aristrain. Consequently, the applicant was from the outset unable to have a complete and accurate knowledge of the file and was obliged to translate hundreds of documents in order to ensure its defence. It thus had less time to prepare its reply to the statement of objections, which affected its capacity to defend itself against the objections made against it. In its written observations in reply to the statement of objections the applicant requested that this formal defect be repaired, but received no reply.

Findings of the Court

85 The rights of the defence invoked by the applicant are, in this case, guaranteed by the first paragraph of Article 36 of the ECSC Treaty, according to which the Commission must, before imposing a pecuniary sanction provided for in that Treaty, give the party concerned an opportunity to submit its comments (see Case 9/83 *Eisen und Metall Aktiengesellschaft* v *Commission* [1984] ECR 2071, paragraph 32, and Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 7).

86 As regards compliance with that guarantee in the present case, the statement of objections sent to the undertakings concerned on 6 May 1992 was individualised for each of the addressees in that it indicated the relevant conduct and evidence concerning it.

87 With more particular regard to the applicant, moreover, point 32(f) of the statement of objections states that 'Ensidesa confirmed its participation... in all the meetings [of the Poutrelles Committee referred to at point 30], apart from those of 21 September and 7 November 1989'. Chapter VIII of the statement of objections also contains a detailed description of the infringements of the rules on competition, and states in the case of each of the addressees the evidence on which the Commission relies. As regards the legal assessment, Ensidesa is referred to at point 399 of the statement of objections as one of the companies that regularly attended the meetings of the Poutrelles Committee and which participated in the cooperation resulting from those meetings. At point 401 the Commission states that 'the parties' general plan was to meet and reach agreement on specific questions, in particular, and on a number of occasions: the fixing of target prices, the harmonisation of extras...'. The arrangements relating to the agreement and its implementation, as regards those two infringements, are described in points 409 to 425 and 426 to 430, respectively, of the statement of objections.

88 It follows from the foregoing that, in the absence of an express statement to the contrary in the statement of objections, the applicant must necessarily have felt that it was concerned by all the objections connected with the functioning of the Poutrelles Committee as described in detail in Chapter VIII of the statement of objections and evaluated from a legal aspect in Chapter IX, and more particularly by those relating to the agreements on price-fixing and the harmonisation of extras concluded within that Committee.

89 It follows that the applicant was placed in a position to submit its written comments on the objections taken into account in its case within the prescribed

period. Its argument that the Commission refused to respond to the request for clarification which it submitted in those comments must therefore be rejected as unjustified, in particular since in its letter of 4 June 1992 requesting further time to respond to the statement of objections (Annex 13 to the application) the applicant did not allege that the accusation lacked clarity.

90 Nor, since the Commission's objections were clearly communicated to it, was the applicant wrongly induced to incriminate itself in its reply to the statement of objections, which, moreover, as the Commission observes, was voluntary.

91 Next, the Commission enclosed with the statement of objections a copy of the documents on which it specifically relied as against each of the undertakings concerned (Annex 3 to the statement of objections) and a summary list of all the documents constituting the file assembled in the present case ('Access List', Annex 2 to the statement of objections). As well as stating the date on which each document was drawn up and providing a very brief identification, the list grouped the documents, according to type, under twelve numbered headings and specified the extent to which they would be accessible to each of the undertakings concerned. The Commission also invited the undertakings to come and consult all the accessible documents on its premises.

92 It follows from the foregoing that in the present case the Commission did comply with the procedure for access to the file described in its *Twelfth Report on Competition Policy* (pages 40 and 41), as approved in the case-law of the Court of Justice and the Court of First Instance in the context of the EC Treaty (see judgments in *Hercules Chemicals* v *Commission*, cited above, paragraphs 53 and 54, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 38, Case T-65/89 *BPB*

*Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 29 to 33, upheld by judgment of the Court of Justice in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraphs 12 to 33, and judgment in Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraphs 77 to 104).

93 The Court has also been able to ascertain in the present case that all the documents relating to the applicant in the file which the Commission sent to it pursuant to Article 23 [of the ECSC Statute of the Court of Justice] were classified in Annex 2 to the statement of objections as 'accessible' or, in the case of a small number of British Steel internal documents, as 'partially accessible'. As regards the latter category, the applicant has not disputed that the objections are based only on extracts from the documents to which it was given access.

94 It is also common ground that the applicant had access to the file in accordance with the procedure set out in the Commission's letter of 6 May 1992. It was therefore able to obtain copies of all the documents which the Commission regarded as 'accessible' or 'partially accessible'.

95 For the remainder, the applicant has not specified before the Court in what way the presentation of the documents listed in Annex 2 to the statement of objections was not sufficient to enable it to locate the documents concerned when it consulted the file, since those documents were numbered in the same way.

96 As regards the allegation that in both the statement of objections and the Decision the Commission cited the incriminating documents with reference only to their date, without at the same time referring to the number in the file, it is true that

such a system makes it less easy for the parties concerned and the Court to identify the documents in question, especially in a case, like this one, involving thousands of documents, and that it would be more in keeping with good administrative practice for the Commission, in such circumstances, to identify the documents which it cites not only by reference to the date but also by reference to their file number.

97 However, the absence of any reference in the statement of objections or in the Decision to the numbers which the Commission gave the documents for the purpose of constituting its file is not of such a kind as to have adversely affected the applicant's rights of defence, since the applicant was able to identify the documents in question solely from the reference to the date, both in the list of documents in Annex 2 to the statement of objections and in the Commission's file.

98 As regards, finally, the fact that there was no Spanish translation of certain documents, it should be observed at the outset that the Commission cannot be required to translate more documents than those on which it bases its objections. These documents must also be regarded as incriminating documents on which the Commission relies and, accordingly, must be brought to the addressee's attention as such in such a way that the addressee is aware of the interpretation which the Commission has put on them and on which it has based both the statement of objections and the Decision. In the present case, Annex I to the statement of objections contained a translation of all the extracts from the documents cited in their original language in the statement of objections. The Court considers that this approach enabled the applicant to determine precisely on what facts and legal reasoning the Commission had relied and therefore properly to defend its rights (see Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 21).

99 The Court considers that in those circumstances the applicant has not established that it was not put in a position during the administrative procedure

properly to comment on the documents relied on against it in the statement of objections.

100 As regards the minutes of the hearing, it follows from Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraphs 72 to 75) that Article 9(4) of Commission Regulation 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), which provides that the essential content of the statements made by each person heard is to be recorded in minutes which are to be read and approved by him, obliges the Commission to send to the parties a copy of the minutes in order to enable them to check whether their own statements have been properly recorded, but does not oblige it where, because the various parties expressed their views in different languages, the minutes themselves are written in a number of languages, to translate the statements made by the other parties. The Court considers that the same principles must apply here.

101 Furthermore, the applicant does not allege that the lack of a translation of the parts written in a language other than Spanish resulted in the minutes containing substantial inaccuracies or omissions in its regard which could have had harmful consequences capable of vitiating the administrative procedure (see Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 52).

102 It follows from all the foregoing that the present complaint must be rejected in its entirety.

...

C — *The breach of Article 65(1) of the Treaty*

...

*Price-fixing (target prices) within the Poutrelles Committee*

1. The findings of fact

155 According to Article 1 of the Decision, the Commission accuses the applicant of having participated in an infringement involving price-fixing within the Poutrelles Committee. The period taken into account for the purposes of the fine is 24 months, between 1 January 1989 and 31 December 1990 (see recitals 80 to 121, 223 to 243, 311, 313 and 314, and Article 1 of the Decision). In that regard, it is true that Article 4 of the Decision, in the Spanish and French versions, states that the fine imposed on the applicant is for the offences committed 'after 31 December 1989'. However, it follows both from the German and English versions of Article 4 and from the grounds of the Decision (see recitals 313 and 314, concerning the consequences of the transitional period provided for in the Act of Accession of Spain, and Article 1, which states that Ensidesa took part in the price-fixing infringement within the Poutrelles Committee for 24 months), in the light of which the operative part must be interpreted, that the reference to that date, rather than to 31 December 1988, is a mere clerical error which has no effect on the content of the contested measure (see Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraphs 21 to 24).

...

E — *The special competitive situation of the Spanish steel producers until 31 December 1992*

*Summary of the applicant's arguments*

446 The applicant observes that when Spain acceded to the ECSC in 1986 the Spanish steel industry was subjected to a system of export quotas, adopted on the basis of Article 52 of the Act of Accession and Article 6 of Protocol No 10 annexed to that Act. At recital 313 of the Decision the Commission acknowledges, *inter alia*, that these provisions clearly restricted Ensidesa's freedom to sell into the other Member States. Consequently, Ensidesa was not fined for its participation in the infringements up to 31 December 1988, the date of the expiry of the transitional measures.

447 The applicant contends, however, that the Spanish steel industry was not fully integrated into the ECSC and that it was therefore unable to compete with Community producers in conditions of equality until after 31 December 1992, owing to the provisions of Article 379 of the Act of Accession, which provided that up to that date the Member States — and, reciprocally, Spain — could adopt protective measures in order to rectify a situation where a sudden increase in trade was liable to give rise to serious difficulties. Until that date Ensidesa did not know what the system of free competition under the ECSC Treaty consisted of. It criticises the Commission, in particular, for having failed to analyse its conduct in the light of that factor.

448 The applicant also criticises the Commission for having failed to take account of the fact that when its exports to the ECSC markets ceased to be subject to quantitative restrictions, from 1 January 1989, the practices of the members of the Poutrelles Committee had existed for many years, so that the Spanish producers had to accept the rules of the game as they existed.

*Findings of the Court*

449 Article 379 of the Act of Accession provides as follows:

'1. If, before 31 December 1992, the difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a new Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market.

In the same circumstances, any present Member State may apply for authorisation to take protective measures with regard to one or both of the new Member States.

...

2. On application by the State concerned, the Commission shall, by emergency procedures, determine the protective measures which it considers necessary specifying the circumstances and the manner in which they are to be put into effect.

...

3. The measures authorised under paragraph 2 may involve derogations from the rules of the EEC Treaty and the ECSC Treaty, and of this Act, to such an extent and for such periods as are strictly necessary in order to attain the objectives

referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.'

450 Clearly, the mere possibility that protective measures may be adopted pursuant to that provision, which applies to all sectors of the economy and involves the exercise by the Commission, acting upon application by a Member State, of a wide discretion, cannot justify an undertaking's participation in agreements and concerted practices prohibited by Article 65(1) of the Treaty. The possibility of being authorised to derogate, in certain defined circumstances, from the normal rules on the functioning of the common market is the responsibility of the Commission alone and doe not dispense undertakings from the obligation to comply with the rules on competition of the Treaty in all other circumstances.

451 Furthermore, the applicant's participation in the infringements of which it is accused was not necessary, even if, as it claims, it intended to adopt a line of conduct such as to prevent the adoption of protective measures *vis-à-vis* exports of Spanish steel to the other markets of the ECSC. All that was necessary in such a situation was to fix the volume of its exports unilaterally at a level that would enable it to avoid adoption of such measures.

452 The argument that the applicant was required to accept the 'rules of the game' established within the Poutrelles Committee must be rejected for the reasons already set out, in substance, in paragraphs 363 and 364 above.

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

...

B — *The failure to take the devaluation of the peseta into account and the choice of reference year*

*The applicant's arguments*

463 The applicant submits that the Commission acted unlawfully in calculating the amount of the fine on the basis of its turnover in beams for 1990, converted into ecus at the average ecu/peseta exchange rate in force in 1990 (ECU 1 = ESP 129.43) rather than at the rate in force on the day immediately before the Decision was adopted (ECU 1 = ESP 158.243).

464 In allowing the Commission to determine the fines, Article 65(5) of the Treaty establishes as the basis for calculation the 'turnover on the products which were the subject of the agreement'. In Ensidesa's case that turnover was achieved in pesetas and it is necessarily in that currency that the Commission should have calculated the amount of the fine, even if it meant converting it into ecus at the official exchange rate in force on the day before the Decision was adopted.

465 In support of that argument, the applicant relies on Joined Cases 41/73, 43/73 and 44/73 — Interpretation *Société Anonyme Générale Sucrière and Others* v *Commission* [1977] ECR 445, paragraph 13, where the Court held that although the fine may be expressed in ecus, it must be 'calculated by reference to the turnover of the undertaking concerned, which can only be expressed in a national currency'. That rule, which was laid down in the context of the EC Treaty, applies *a fortiori* in the context of the ECSC Treaty, which nowhere refers to fines expressed in ecus, unlike Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ English Special Edition 1959-62, p. 87).

466 The principle of equal treatment on which the Commission relies to justify its approach does not in any way require that the turnover be converted into ecus. The applicant claims that if a fine is fixed in the form of a percentage of turnover the comparison that the Commission seeks to defend in the name of that principle may in any event be made. Whether the amount of the fine, once fixed, is or is not converted into ecus, it is unnecessary and unlawful to convert the turnover into ecus.

467 In the present case, provisionally accepting that 1990 should be the reference year, the turnover on the basis of which the fine was calculated came to ESP 12 758 million, the amount declared by Ensidesa and set out in the Decision. On the assumption that the Court should reject the applicant's other arguments and accept the coefficient of 4% applied by the Decision, the fine should be fixed at ESP 510 320 000, and, converted into ecus at the official exchange rate in force on the day before the Decision was adopted, should therefore amount to ECU 3 200 000, not the ECU 4 000 000 imposed by the Decision.

468 The applicant considers, however, that the Commission should have taken as the relevant turnover, for the purpose of calculating the fines, the turnover for the year preceding the date of the adoption of the Decision for which consolidated accounts were available, namely, in the applicant's case, 1992, not the year corresponding to the final year of the infringement, 1990. Following that method and the rule which the applicant proposes for the calculation of fines in general, Ensidesa considers that the fine imposed on it should have come to ESP 389 560 000 (4% of ESP 9 739 000 000, the turnover for 1992), or, after conversion into ecus at the exchange rate applicable on the day before the Decision was adopted, ECU 2 460 000.

469 The applicant bases its arguments on the wording of Article 15(2) of Regulation No 17, which, in mentioning 'the preceding business year', refers to the year preceding the date of adoption of the Decision (see Opinion of Advocate General Sir Gordon Slynn in Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission*, hereinafter 'the *Pioneer* judgment', [1983] ECR 1825, 1914, at p. 1951), on a unanimous body of academic opinion and on the practice of the Commission itself in the context of the EC Treaty. Although Regulation No 17 is not applicable to matters

concerning the ECSC Treaty, the same principles should be applied in the present case, in so far as Article 65(5) does not prohibit it, since, in the *Twentieth Report on Competition Policy* the Commission stated that the time had come to bring the competition rules of both Treaties as far into alignment as possible.

*Findings of the Court*

470 First, there is nothing to prevent the Commission from expressing the amount of the fine in ecus, a monetary unit convertible into national currencies. That also makes it easier for undertakings to compare the amounts of the fines imposed. Furthermore, the possibility of converting the ecu into national currencies distinguishes that monetary unit from the 'unit of account' referred to in Article 15(2) of Regulation No 17, which, as the Court of Justice has expressly recognised, since it is not a currency in which payment is made, necessarily implies that the amount of the fine be fixed in a national currency (*Société Anonyme Générale Sucrière and Others* v *Commission*, cited above, paragraph 15).

471 The applicant's criticisms in regard to the legality of the Commission's method of converting the undertakings' reference turnover into ecus at the average exchange rate for that year (1990) cannot be accepted, as the Court has already held in T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 394 et seq.

472 First of all, the Commission should ordinarily use one and the same method of calculating the fines imposed on the undertakings penalised for having participated in the same infringement (see the *Pioneer* judgment, cited above, paragraph 122).

473 Second, in order to be able to compare the different turnover figures sent to it, which are expressed in the respective national currencies of the undertakings

concerned, the Commission must convert those figures into a single monetary unit. As the value of the ecu is determined in accordance with the value of each national currency of the Member States, the Commission rightly converted the turnover figure of each of the undertakings into ecus.

474 The Commission also acted correctly in taking the turnover in the reference year (1990) and converting that figure into ecus on the basis of the average exchange rates for that same year. In the first place, the taking into account of the turnover achieved by each undertaking during the reference year, that is to say, the last complete year of the period of infringement found, enabled the Commission to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those aspects being relevant for an assessment of the gravity of the infringement committed by each undertaking (see the *Pioneer* judgment, cited above, paragraphs 120 and 121). In the second place, taking into account, in order to convert the turnover figures in question into ecus, the average exchange rates for the reference year adopted enabled the Commission to prevent any monetary fluctuations occurring after the cessation of the infringement from affecting the assessment of the undertakings' relative size and economic power and the scale of the infringement committed by each of them and, accordingly, its assessment of the gravity of that infringement. The assessment of the gravity of an infringement must have regard to the economic reality as revealed at the time when that infringement was committed.

475 Consequently, the argument that the turnover figure for the reference year should have been converted into ecus on the basis of the exchange rate at the date of adoption of the Decision cannot be upheld. The method of calculating the fine by using the average rate of exchange for the reference year makes it possible to avoid the uncertain effects of changes in the real value of the national currencies which may, and in this case actually did, arise between the reference year and the year in which a decision is adopted. Although this method may mean that a given undertaking must pay an amount, expressed in national currency, which is in nominal terms greater or less than that which it would have had to pay if the rate of exchange at the date of adoption of the decision had been applied, that is merely the logical consequence of fluctuations in the real values of the various national currencies.

476 In addition, the undertakings to which the Decision was addressed generally carry out their activities in more than one Member State through the intermediary of local representatives. As a result, they operate in several national currencies. Where a decision such as the Decision at issue penalises infringements of Article 65(1) of the Treaty and where the addressees of the decision generally pursue their activities in several Member States, the turnover for the reference year converted into ecus at the average exchange rate used during that same year is made up of the sum of the turnovers achieved in each country in which the undertaking operates. It therefore takes full account of the actual economic situation of the undertakings concerned during the reference year.

477 In the light of the foregoing, the applicant's arguments must be rejected.

C — *The excessive nature of the fine*

...

*Findings of the Court*

485 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 not exceeding twice the turnover on the products which were the subject of the

agreement, decision or practice prohibited by this Article; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10% of the annual turnover of the undertakings in question in the case of fines, and 20% of the daily turnover in the case of periodic penalty payments.'

The specific arguments put forward by the applicant

486 For the reasons already set out above, the Commission must be considered to have properly assessed the nature, scope, importance and, subject to what is said below, the duration of the applicant's participation in the infringements of which it is accused in the Decision.

487 The Court has thus found that the applicant took part in 26 of the 28 meetings held by the Poutrelles Committee, an organ whose anti-competitive object has been established by the Commission, during the period of the infringement taken into account in its case and, in particular, that it participated in the two types of infringement described at recital 300 of the Decision as 'serious [and] justifying the imposition of large fines', namely price-fixing and market-sharing. The applicant has not disputed that description. Furthermore, infringements of that type are indisputably serious and are also expressly referred to in Article 65(1) of the Treaty.

488 The Court has also noted, at paragraphs 449 to 451 above, that the safeguard clause inserted into Article 379 of the Act of Accession did not in any event justify the applicant's participation in agreements and concerted practices prohibited by Article 65(1) of the Treaty.

489 As regards the favourable treatment of Acerinox in the *stainless steel* case, this was justified, *inter alia*, by the fact that that undertaking had 'requested and obtained from its Community partners an assurance that there was no problem'. The applicant has adduced no evidence that the same applied in the present case.

490 The Court has also found that the applicant could not have been unaware that the conduct in question was illegal, at least from 30 July 1988.

491 In that regard, it is appropriate to point out, once again, that the infringements consisting of price-fixing and market-sharing agreements, such as those in which the applicant was properly found to have participated, are expressly referred to in Article 65(1) of the Treaty and are therefore obvious.

492 As regards the exchanges of confidential information, it follows from the findings of the Court (see paragraph 354 above) that they had an object comparable to market-sharing with reference to traditional flows. The applicant could not reasonably have imagined that such exchanges were not covered by Article 65(1) of the Treaty. On the contrary, the fact that the members of the Poutrelles Committee were aware of their illegality may be concluded from the dual monitoring system set up within Eurofer, one constituent of which, concerning aggregate figures, was spontaneously brought to the Commission's knowledge, while the other, concerning individual figures, was limited to the participant undertakings, including the applicant (see paragraph 427 et seq. above).

493 Furthermore, the fact that an undertaking did not play a particularly active role or act as instigator does not excuse its participation in the infringement (Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 49 et seq., and Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 18).

494 The applicant has adduced no evidence that it was subject to coercion on the part of the other undertakings in the sector and forced to join the Poutrelles Committee (see paragraph 364 above).

495 As regards the applicant's alleged cooperation with the Commission during the administrative procedure, it should first of all be pointed out that in its reply of 23 August 1991 to a request for information pursuant to Article 47 of the Treaty, the applicant stated that it had no list of the participants in the meetings of the Poutrelles Committee or any minutes or documents relating to those meetings, whereas the evidence in the file shows that it regularly received such documents.

496 This alleged cooperation is, furthermore, clearly contradicted by the applicant's written submissions. At paragraph 6 of its reply (see also paragraph 13 of its application) the applicant states that 'if Ensidesa had been aware that the Commission was accusing it in respect of those two objections [namely price fixing and the harmonisation of extras] it would have challenged their accuracy and would not have provided the Commission with a detailed description of the Spanish producers' participation...'. It follows that in its reply to the statement of objections the applicant spontaneously admitted the substance of the Commission's allegations of fact only in so far is it did not consider that they were directed against it.

497 The Commission correctly considered that the applicant, by replying in that way, did not conduct itself in a manner which justified a reduction in the fine on grounds of cooperation during the administrative procedure.

498 Finally, the applicant's decision following the statement of objections not to attend any further meetings of the Poutrelles Committee has no bearing on the assessment to be made of its earlier conduct, especially where it was intentionally concealed from the Commission. In any event, the fact that a deliberate

infringement was brought to an end cannot be regarded as a mitigating circumstance where it was brought to an end as a result of the Commission's intervention.

499 In the light of the foregoing, the arguments based on the safeguard clause in Article 379 of the Act of Accession, the situation of the undertaking Acerinox in the *stainless steel* case, the minor and involuntary role which the applicant claims to have played in the practices associated with the Poutrelles Committee and its collaboration with the Commission must be rejected in their entirety.

500 As regards the duration of the infringement, for the reasons already explained at paragraph 155 above the material error in the Spanish and French versions of Article 4 of the Decision is not to be taken into account. Thus the period taken into account by the Commission for the purpose of the fine is indeed 24 months, from 1 January 1989 to 31 December 1990, in the case of the Spanish producers, whereas it is generally 30 months, from 1 July 1988 to 31 December 1990, in the case of the other producers.

501 It follows from the detailed explanations provided by the Commission at the hearing, moreover, that it adjusted the fines in order to reflect, in particular, the duration of each infringement, except in the case of the agreements on the harmonisation of the prices of extras. The Commission thus properly took account of the shorter duration of the Spanish producers' participation in the price-fixing agreements and the exchanges of confidential information within the Poutrelles Committee, since the amount of the fine imposed on them under that head came to 80% (24/30) of the amount of the fine they would have been required to pay if, like the majority of the other producers, they had participated in the infringements since 1 July 1988.

502 The Commission also stated at recital 252 of the Decision that '[f]or the reasons set out at recital 313, Ensidesa and Aristrain will not be held responsible for their participation in the agreement of 15 November 1988'. On the other hand, the applicant's participation in the four other agreements on the harmonisation of

extras concluded between 1 January 1989 and 31 December 1990 was established. It appears, however, that the Commission did not take account of the applicant's lesser participation in these agreements when it calculated the amount of the fine to be imposed under that head, which was fixed at a flat rate of 0.5% of the relevant turnover for all the undertakings in question (subject to a separate reduction of 10% in the case of Aristrain and Ensidesa, since there had been no harmonisation of extras in Spain: see paragraph 277 above).

503 Having regard to those considerations, the Court considers, in the exercise of its unlimited jurisdiction, that the amount of the fine imposed on the applicant in respect of its participation in the agreements on the harmonisation of extras must be reduced by 20%.

504 For the rest, the Court considers that the Commission took proper account of the shorter duration of the infringements of which the Spanish producers were accused.

...

The Court's exercise of its unlimited jurisdiction

535 First, neither Article 1 of the Decision nor the first table setting out the various price-fixing agreements at recital 314 of the Decision finds that the applicant participated in any price-fixing agreement on the Spanish market. However, it is apparent from the detailed explanations provided by the Commission at the hearing that the applicant was fined ECU 79 200 for such an infringement. According to the Commission, which refers to recitals 174 and 276 of the Decision, it is apparently due to an error that those factors were not set out in recital 314 and Article 1 of the Decision.

536 Since the operative part of the Decision does not find that the applicant participated in that infringement it need not be taken into account for the purpose of calculating the fine. The fine must therefore be reduced by ECU 79 200, following the method of calculation used by the Commission.

537 For the reasons set out in paragraph 502 above, the amount of the fine imposed on the applicant in respect of its participation in the agreements on the harmonisation of extras must also be reduced by 20%. The fine must therefore be reduced by ECU 89 100, taking into account the mitigating circumstance peculiar to the Spanish producers, following the method employed by the Commission.

538 For the reasons explained in paragraph 512 et seq.[3] above, moreover, 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 above concerning the alleged price-fixing agreement on the Spanish market and the agreements on the harmonisation of extras, that reduction comes to ECU 350 460, following the method of calculation used by the Commission.

539 Finally, the Commission did not accuse the applicant of having participated in the concerted practice involving the fixing of the prices applicable in the United Kingdom during the second quarter of 1990, although such an infringement was found to have occurred in the case of certain other undertakings (see paragraph 204 above). Although that factor does not affect the duration of the infringement consisting in price-fixing within the Poutrelles Committee, in which the applicant is accused of having been involved in Article 1 of the operative part of the Decision, it is of such a kind as to reduce the degree of the applicant's participation in that infringement in comparison with that of the other undertakings concerned. In that regard, the Court considers, in the exercise of its unlimited jurisdiction, that the fine should be reduced by ECU 125 000, following the method used by the Commission.

3 — See *Thyssen* v *Commission*, [1999] ECR II-347, paragraph 640 et seq.

540 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.

541 The Court considers that the Commission's general approach in determining the level of the fines 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.

542 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 3 350 000.

...

On those grounds,

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

hereby:

1. Fixes the amount of the fine imposed on the applicant by Article 4 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a procedure pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams at EUR 3 350 000;

2. Dismisses the remainder of the action;

3. Orders the applicant to bear its own costs and to pay three quarters of the defendant's costs. The defendant shall bear one quarter of its own costs.

Bellamy Potocki Pirrung

Delivered in open court in Luxembourg on 11 March 1999.

H. Jung

Registrar

C.W. Bellamy

President