JUDGMENT OF THE COURT (Fifth Chamber)

2 October 2003 *

In Case C-196/99 P,

Siderúrgica Aristrain Madrid SL, established in Madrid (Spain), represented by A. Creus Carreras and N. Lacalle Mangas, abogados,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 11 March 1999 in Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall and W. Wils, acting as Agents, assisted by J. Rivas de Andrés, abogado, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and S. von Bahr, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 May 1999, Siderúrgica Aristrain Madrid SL brought an appeal under Article 49 of the ECSC Statute of the Court of Justice against the judgment of the Court of First Instance of 11 March 1999 in Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645 ('the judgment under appeal'), by which the Court of First Instance dismissed in

part its application for 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 contested decision'). By that decision, the Commission imposed a fine on the appellant under Article 65 of the ECSC Treaty.

Facts and the contested decision

2 According to the judgment under appeal, the European steel industry underwent, from 1974 onwards, a crisis characterised by a fall in demand giving rise to problems of excess supply and capacity and low prices.

3 In 1980, after having attempted to manage the crisis by way of unilateral voluntary commitments given by undertakings as regards the amount of steel put on the market and minimum prices ('the Simonet Plan') or by fixing guide and minimum prices ('the Davignon Plan', the 'Eurofer I' agreement), the Commission declared that there was a manifest crisis within the meaning of Article 58 of the ECSC Treaty and imposed mandatory production quotas for, inter alia, beams. That Community system came to an end on 30 June 1988.

4 Long before that date, the Commission had announced in various communications and decisions that the quota system was to be abandoned, pointing out that the end of that system would mean a return to a market characterised by free competition between undertakings. However, the sector continued to be affected by excess production capacity which, according to expert opinion, had to undergo a sufficient and rapid reduction to enable undertakings to meet world competition.

5 From the end of the quota system, the Commission set up a surveillance system involving the collection of statistics on production and deliveries, monitoring of market developments and regular consultation with undertakings on the market situation and trends. The undertakings in the sector, some of which were members of the Eurofer trade association, thus maintained regular contact with DG III (Directorate-General for the 'Internal Market and Industrial Affairs') of the Commission ('DG III') by way of consultation meetings. The surveillance system came to an end on 30 June 1990 and was replaced by an individual and voluntary information scheme.

6 At the beginning of 1991, the Commission carried out a series of inspections in the offices of a number of steel undertakings and associations of undertakings in the sector. A statement of objections was sent to them on 6 May 1992. Hearings were held at the beginning of 1993.

7 On 16 February 1994, the Commission adopted the contested decision, by which it found that 17 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. By that decision, it imposed fines on 14 undertakings for infringements committed between 1 July 1988 and 31 December 1990.

The proceedings before the Court of First Instance and the judgment under appeal

8 On 18 April 1994, the present appellant brought an action before the Court of First Instance for annulment of the contested decision.

9 By the judgment under appeal, the Court of First Instance granted the present appellant's application in part and reduced the fine imposed on it.

Forms of order sought by the parties

10 The appellant claims that the Court should:

'1. annul the judgment [under appeal] on the ground of all or some of the defects indicated, and draw from the annulment of that judgment all legal consequences, whether the Court rules expressly on the substance or refers the case back to the Court of First Instance, and, in particular:

(a) annul the judgment [under appeal] in so far as [the Court of First Instance] finds that the [contested] decision does not infringe Community law by reason of misapplication and misinterpretation of Article 65 of the ECSC Treaty and, accordingly, annul [that] decision on that ground;

(b) rule on the substance, in so far as it is ready for judgment, or, if not, refer the case back to the Court of First Instance in order that it may rule on the grounds set out below, and accordingly annul the [contested] decision in so far as it relates to these grounds or, in the alternative, reduce the fine imposed on the appellant:

— joint responsibility,

— failure to state reasons,

— inconsistency,

— infringement of the principles of equality and proportionality in expressing the fine in ecus,

— failure to order the Commission to pay to the applicant at first instance the full expenses and interest resulting from the establishment of a guarantee or from payment of the entirety or part of the fine; the Court should rule that the interest on the fine should not begin to accrue until the judgment of the Court of First Instance becomes enforceable, and should accordingly order the Commission to pay the expenses and interest accrued on the guarantee or payment of the fine,

— *idem* in relation to the eighth and ninth pleas in the present appeal;

(c) refer the case back to the Court of First Instance, in so far as it is not ready for judgment, in order that the latter may rule on:

— the plea relating to misuse of powers;

2. order the [Commission] to pay the costs and rule also that the [Commission] must pay the costs in the proceedings at first instance, in the event that the Court of Justice upholds in whole or in part the pleas in law set out in the... appeal.'

11 The Commission contends that the Court should:

1. dismiss the appeal;

2. order the appellant to pay the costs.

The grounds of appeal

12 The appellant raises nine grounds of appeal:

1. misinterpretation and misapplication of Article 65 of the ECSC Treaty and contradictory grounds in relation to the assessment of the infringements allegedly committed;

2. misapplication of the notion of misuse of powers;

3. infringement of Article 15 of the ECSC Treaty as regards the statement of reasons for the level of the fines;

4. inadequate statement of reasons as regards:

   (a) the finding that the quorum for adoption of the contested decision was achieved and the refusal to order the measure of inquiry sought by the appellant in that regard,

   (b) the refusal to take into account the level of the fines imposed in other cases involving cartels;

5. infringement of Community law in assessing:

   (a) the line of argument relating to the legal person obliged to pay the fine imposed as a result of the conduct of two separate companies;

   (b) the aggravating circumstance of awareness that the conduct complained of was illegal;

   (c) the date set by the Commission in the operative part of the contested decision as the beginning of the infringements which it attributed to the appellant;

6. infringement of the principles of equal treatment and proportionality in assessing the arguments concerning the account taken of the devaluations of the Spanish peseta as against the ecu;

7. infringement of Community law in that the Court of First Instance failed to order the Commission to pay the expenses and interest resulting from the establishment of a guarantee or any payment of the fine;

8. infringement of Article 33 of the Rules of Procedure of the Court of First Instance and of procedural guarantees;

9. infringement of the right to a fair decision within a reasonable period of time.

13 The paragraphs of the judgment under appeal challenged by each of the grounds of appeal will be indicated as those grounds are examined.

The appeal

The first ground of appeal

14 The first ground of appeal alleges infringement of Community law as a result of the misinterpretation and misapplication of Article 65 of the ECSC Treaty and

contradictory grounds in relation to the assessment of the infringements allegedly committed on the market governed by that Treaty.

15 This ground of appeal is directed against:

— paragraphs 314 to 336 of the judgment under appeal, in which the Court of First Instance examined the analysis of the conduct in question in relation to the criterion of 'normal competition' referred to in Article 65 of the ECSC Treaty;

— paragraphs 413 to 439 of the judgment under appeal, in which the Court of First Instance examined the contested decision in order to determine whether the exchange of information in question had been regarded as a separate infringement and assessed whether that exchange had been anti-competitive;

— paragraphs 465 to 519 of the judgment under appeal, in which the Court of First Instance examined the arguments alleging involvement of the Commission in the infringements of which the appellant was accused;

— paragraphs 612 to 623 and 645 of the judgment under appeal, in which the Court of First Instance examined the economic impact of the infringements with a view to determining the level of the fine.

16 The appellant submits essentially that:

— the Court of First Instance misinterpreted the concepts of 'agreement' and 'concerted practice' in Article 65 of the ECSC Treaty in using the criteria for applying Article 85 of the EC Treaty (now Article 81 EC) even though the economic and normative contexts of the two Treaties are different and the steel market has special characteristics, such as a large degree of transparency, which make parallel pricing possible;

— in light of the need for meetings to exchange information in connection with application of the ECSC Treaty and of the requests made by DG III that such meetings be held, the Court of First Instance erred in law in finding, in particular in paragraph 233 of the judgment under appeal, that mere attendance at such meetings was sufficient to establish participation in anti-competitive activities.

17 According to the appellant, the Court of First Instance acknowledged that its allegations and the witnesses' statements were well founded since, as is clear from paragraphs 606 to 623 of the judgment under appeal, it reduced by 15% the fine imposed on the appellant in respect of the various price-fixing agreements and concerted practices.

18 The appellant also complains that the Court of First Instance, in paragraph 420 of the judgment under appeal, rejected the Commission's assessment, set out in its written response of 19 January 1998 and at the hearing, that the exchange of information was not a separate infringement. In substituting its own assessment for that of the Commission in this way, the Court of First Instance exceeded its jurisdiction.

19 The Commission contends that the argument based on misinterpretation of Article 65 of the ECSC Treaty is unfounded. It claims that the judgment under appeal contains sufficient grounds for the finding that the prohibition on price-fixing, within the meaning of that article, had been breached and that Article 60 of that Treaty does not preclude application of Article 65.

20 With respect to attendance at meetings at which information was exchanged, the Commission takes the view that the appellant is mixing up the 'lawful' meetings, referred to in paragraph 232 of the judgment under appeal, and the secret meetings with an illegal purpose, which are described in paragraphs 510 and 511 of that judgment. The complaint against the appellant relates only to attendance at the latter meetings.

21 The Commission claims that the complaint alleging rejection of the view it submitted during the proceedings on whether the exchange of information was a separate infringement is inadmissible because it was raised for the first time before the Court. That complaint is also unfounded because the Court of First Instance's task in the action was to review the contested decision and not to examine such an assessment.

22 The Commission contends that the claim that DG III was aware of and even encouraged the anti-competitive practices alleged against the appellant is untrue and it refers to paragraphs 510 and 511 of the judgment under appeal. Those paragraphs contain findings of fact, which may not be the subject of review by the Court.

Findings of the Court

23 In paragraphs 315 to 320 of the judgment under appeal, the Court of First Instance examined the context of Article 65(1) of the ECSC Treaty. In paragraphs

321 to 331 of that judgment, it also examined whether Article 60 of that Treaty was relevant to the assessment, in the light of Article 65(1), of the conduct of which the appellant was accused. In paragraph 332 of the judgment under appeal, it examined Articles 46 to 48 of the ECSC Treaty and concluded, in paragraph 333, that none of the articles referred to in the present paragraph allowed the undertakings to breach the prohibition in Article 65(1) by concluding agreements or engaging in concerted practices relating to price-fixing of the kind at issue in this case.

24 The Court finds that all of the reasons set out by the Court of First Instance in that regard were correct in law.

25 In paragraphs 413 to 420 of the judgment under appeal, the Court of First Instance examined whether the contested decision treated the information exchange systems complained of as a separate infringement. However, it should be observed that the appellant does not establish, and, moreover, does not seek to establish, how the Court of First Instance infringed Community law by interpreting itself the contested decision rather than relying on the explanations provided by the Commission's representatives in the reply of 19 January 1998 and at the hearing. In any event, it is sufficient to point out that, when the Court of First Instance rules on an application for annulment of a Community measure, it must interpret that measure itself.

26 In the light of its analysis of the ECSC Treaty, the Court of First Instance, when assessing whether the exchange of information in question was anti-competitive, was right to take the view, in paragraph 421 of the judgment under appeal, that Article 65(1) of that Treaty is based on the principle that every trader must determine independently the policy which he intends to follow on the common market.

27 Similarly, there is no rule in the ECSC Treaty from which it could be inferred that attendance at the meetings complained of ought to have been assumed to be

lawful. The Court of First Instance was therefore entitled to find, in paragraph 233 of the judgment under appeal, and in doing so did not infringe the legal rules on evidence, that attendance by an undertaking at meetings involving anti-competitive activities suffices to establish the participation of that undertaking in those activities, in the absence of evidence capable of establishing the contrary.

28 As regards the argument concerning the alleged need for undertakings to exchange information with each other within the framework of their cooperation with DG III, it is appropriate to observe that the appellant invokes no argument calling into question the assessment made by the Court of First Instance in paragraphs 478 to 519 of the judgment under appeal. In those paragraphs, the Court of First Instance demonstrated that the undertakings concerned had concealed from the Commission the existence and the content of the discussions adversely affecting competition which they had held and of the agreements which they had concluded. In paragraph 512 of the judgment under appeal, it stated that, in any event, the provisions of Article 65(4) of the ECSC Treaty have an objective content and are binding on both undertakings and the Commission, which cannot exempt those undertakings.

29 Contrary to what the appellant claims, the fact that the Court of First Instance reduced the fine to take account of the economic impact of the exchange of information on prices does not call into question the anti-competitive nature of that exchange. The Court of First Instance's review of the measure imposing the penalty on the appellant under Article 65(5) of the ECSC Treaty is distinct from that as to whether there has been an infringement within the meaning of Article 65(1).

30 The Court of First Instance therefore did not contradict itself, in paragraphs 621 to 623 of the judgment under appeal, by taking into account the conduct of the Commission in order to assess the economic impact of the infringement and reduce the fine even though it had concluded, in paragraphs 510 and 511 of that judgment, that the infringement consisting of the exchange of information had been committed without the knowledge of the DG III officials.

31 It follows from all of the above findings that the first ground of appeal is unfounded.

The second ground of appeal

32 The second ground of appeal alleges that the Court of First Instance erred in law when applying the notion of misuse of powers because it failed correctly to examine either the appellant's argument in that regard or the evidence on which it relied.

33 This ground of appeal is directed against paragraphs 526 to 532 of the judgment under appeal, which are worded as follows:

'526 The Court points out that, in parallel to the administrative procedure conducted by DG IV [Directorate General for "Competition" of the Commission] in this case, DG III conducted negotiations with the steel industry to bring about a thorough restructuring of the industry, partially financed through Community funds. Those negotiations were broken off, in the absence of agreement between the parties, on 15 February 1994, the day before the [contested] decision was adopted, during a meeting attended by representatives of the industry and Commission Members Bangemann and Van Miert.

527 According to settled case-law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaty for dealing with the

circumstances of the case (see, for example, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68, and Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraph 327).

528 The prosecution and punishment of infringements in competition matters are a legitimate objective of Community action, in accordance with the fundamental provisions of Articles 3 and 4 of the Treaty. If the commission of such infringements has actually been proved and it has been established that the fines have been calculated in an objective and proportionate way, the decision imposing such fines, in accordance with Article 65(5) of the Treaty, cannot be regarded as being vitiated by misuse of powers except in exceptional circumstances.

529 In this case, neither the co-existence of parallel negotiations between the Commission and the industry on restructuring the European steel industry, dating back to the 1980s, or even the 1970s, nor the "coincidence" between the failure of those negotiations and the adoption of the [contested] decision, and the questions which this raised among some members of the European Parliament or journalists, constitutes *per se* evidence of misuse of powers.

530 Nor has the Court found, in the file submitted to it under Article 23 [of the ECSC Statute of the Court of Justice], any evidence to establish that the procedure followed here for applying Article 65 of the Treaty was used for the purpose of forcing the steel industry to restructure itself or to penalise its lack of cooperation in that regard. There is indeed no reason to suspect that the procedure did not follow a normal course, from the first inspections in January 1991 to the adoption of the [contested] decision on 16 February 1994, and including the statement of objections notified to the undertakings concerned on 6 May 1992, the analysis of their replies

sent around August 1992, their hearing in January 1993, the internal investigation carried out at the request of the interested parties in January/February 1993, the sending of the minutes of the hearing in two parts, on 8 July 1993 and 8 September 1993, and the preparation of the draft decision, with translations into the various languages and consultation of the various services concerned. Furthermore, the applicant has not challenged the Commission's statement that the hearing was postponed from September 1992 to January 1993, a period of approximately four months, at the actual request of some of the undertakings, in order to enable their lawyers to concentrate on their defence in the antidumping proceedings instituted against them, at that time, by the American authorities.

531 Finally, the argument that the [contested] decision would not have been adopted in its final form if the negotiations with the steel industry had not been broken off the previous day is not supported by any evidence whatsoever. The same is true of the allegations based on the existence of a parallel procedure in the "coils" sector, which the applicant has merely referred to in its written pleadings. Accordingly, the Court takes the view that it is unnecessary to grant the measure of inquiry sought.

532 The applicant's arguments alleging misuse of powers must therefore be rejected as unfounded.'

34 The appellant submits that the Court of First Instance erred in law in the judgment under appeal by not giving it an opportunity to remove the uncertainty arising from the clear evidence of a misuse of powers found in this case and relied on by it in its written pleadings.

35 The Court of First Instance thus failed to take account, first, of the existence of an investigation, parallel to that which led to the contested decision, concerning the 'coils' market, second, of the fact that the contested decision was adopted one day

after the negotiations between the Commission and the undertakings in the Community steel sector aimed at settling their differences had been abandoned and, third, of the statements made by Mr Van Miert, a Member of the Commission, at the press conference of 16 February 1994 in which he described the fine imposed as 'exemplary' and suggested that it was possible that, when the fine was imposed, account was taken of circumstances other than those strictly related to the investigation.

36 The appellant also complains that the Court of First Instance restricted its examination to the documents in the case-file, without finding it necessary to conduct an additional inquiry in order to establish the relevance of the evidence submitted, even though, in the appellant's view, the case-file contained documents which could have given rise to, at least, reasonable doubt.

37 The Commission takes the view that this ground of appeal is inadmissible because the appellant is merely restating arguments already raised at first instance.

38 The Commission submits, moreover, that the ground of appeal is unfounded as the Court of First Instance gave ample reasons for its decision in paragraphs 529 to 531 of the judgment under appeal.

Findings of the Court

39 The Court of First Instance rightly observed, in paragraph 527 of the judgment under appeal, that, according to settled case-law, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed by one of the Treaties for dealing with the circumstances of the case.

40 Moreover, as is clear from Article 32d(1) CS and Article 51 of the ECSC Statute of the Court of Justice, an appeal lies on a point of law only. Therefore, the Court of First Instance has sole jurisdiction to find and appraise the relevant facts and to assess the evidence, except where those facts and that evidence have been distorted (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 49 and 66; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 194; and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 69).

41 However, the Court may examine whether the Court of First Instance has responded to the parties' pleas and given proper grounds for its judgment (see, to that effect, Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraphs 119 to 122).

42 Contrary to what the appellant claims, the Court of First Instance examined and expressly referred, in paragraph 529 of the judgment under appeal, to the circumstances surrounding the adoption of the contested decision, namely the parallel negotiations on restructuring the steel industry, the coincidence between the failure of those negotiations and that adoption and the questions which this raised.

43 It cannot validly be claimed that the Court of First Instance similarly failed to take account of the statements made by Mr Van Miert at the press conference of 16 February 1994 simply because it did not expressly cite them also in paragraph 529 of the judgment under appeal. It must be held that, in referring to 'the questions which [the contested decision] raised among some members of the European Parliament or journalists', the Court of First Instance took into account all of the factors relating to the adoption of that decision, which necessarily included those statements.

44 Contrary to what the appellant claims, the Court of First Instance also took into account the parallel procedure in the 'coils' sector, to which it expressly referred in paragraph 531 of the judgment under appeal.

45 Given that the Court of First Instance found, in that paragraph, that no evidence of a misuse of powers could be detected in the existence of that parallel procedure, which is an assessment of evidence not subject to review by the Court in appeal proceedings, it acted consistently in concluding that it was unnecessary to grant the applications for measures of inquiry into that procedure.

46 It follows from all of those findings that the second ground of appeal is unfounded.

The third ground of appeal

47 The third ground of appeal alleges infringement of Article 15 of the ECSC Treaty in that the Court of First Instance failed to censure the inadequate statement of reasons given in the contested decision with regard to the calculation of the fines.

48 This ground of appeal is directed against paragraphs 557 to 559 of the judgment under appeal, which are worded as follows:

'557 In its judgment in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 142, the Court stressed that it was desirable for undertakings — in order to be able to define their position in full

knowledge of the facts — to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them by a decision for infringement of the rules on competition, without being obliged, in order to do so, to bring court proceedings against the Commission decision.

558 That applies *a fortiori* where, as here, the Commission has used detailed arithmetical formulas to calculate the fines. It is desirable in such a case that the undertakings concerned and, if need be, the Court should be in a position to check that the method employed and the steps followed by the Commission are free of error and compatible with the provisions and principles applicable in regard to fines, and in particular with the principle of non-discrimination.

559 It must, however, be pointed out that such figures, provided at the request of one party or of the Court pursuant to Articles 64 and 65 of the Rules of Procedure, do not constitute an additional *a posteriori* statement of reasons for the [contested] decision, but are rather the translation into figures of the criteria set out in the [contested] decision where they are themselves capable of being quantified.'

49 The appellant submits that, by rejecting the plea alleging failure to state reasons in the contested decision with regard to the calculation of the fines and by failing to take account of the principles to which it itself referred in paragraphs 557 and 558 of the judgment under appeal, the Court of First Instance infringed Article 15 of the ECSC Treaty. To uphold the Court of First Instance's finding in this regard would be tantamount to enabling the Commission to add new reasons to those already contained in a decision imposing a fine up to the oral phase of judicial proceedings.

50 The Commission contends that the appellant has misinterpreted the judgment in *Tréfilunion*, cited above. The Court of First Instance found that adequate reasons had been given in the present case for the level of the fine, while stating *obiter dictum* that it is desirable for the Commission to provide more details of the method of calculating such a penalty. The Commission states, moreover, that, following the contested decision, it adopted guidelines for the calculation of fines.

Findings of the Court

51 The first paragraph of Article 15 of the ECSC Treaty provides that '[d]ecisions, recommendations and opinions of the Commission shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained.'

52 It is settled case-law that the purpose of the obligation to state the reasons on which an individual decision is based is to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested (Case 32/86 *Sisma* v *Commission* [1987] ECR 1645, paragraph 8).

53 In the present case, the Court of First Instance was correct in law to take the view, in paragraph 555 of the judgment under appeal, that the contested decision contains, in recitals 300 to 312, 314 and 315 of its grounds, an adequate and relevant statement of the factors taken into account in assessing the general gravity of the various infringements alleged and to find, in paragraph 556 of that judgment, that Article 1 of the contested decision detailed the period taken into account for each infringement.

54 The grounds of the contested decision refer, in recital 300, to the gravity of the infringements and state the factors taken into consideration in fixing the fine. Account was thus taken, in recital 301, of the economic situation of the steel industry, in recitals 302 to 304, of the economic impact of the infringements, in recitals 305 to 307, of the fact that at least some of the undertakings were aware that their conduct was or might have been contrary to Article 65 of the ECSC Treaty, in recitals 308 to 312, of misunderstandings which might have arisen during the period of the crisis regime and, in recital 316, of the duration of the infringements. The contested decision also sets out in detail the participation of each undertaking in each infringement.

55 It must be concluded that the information contained in the contested decision enabled the undertaking concerned to ascertain the reasons for the measure adopted in order to assert its rights and allows the Community judicature to review the legality of that decision. It follows that the Court of First Instance did not infringe Article 15 of the ECSC Treaty in finding that adequate reasons had been given in the contested decision with regard to the calculation of the level of the fines.

56 With regard to statements of figures relating to the calculation of fines, it is appropriate to point out that, however useful and desirable such figures may be, they are not essential to compliance with the duty to state reasons for a decision imposing fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own power of assessment (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 75 to 77, and *Limburgse Vinyl Maatschappij*, cited above, paragraph 464).

57 The Court of First Instance was therefore correct and did not contradict itself in stating, in paragraphs 557 and 558 of the judgment under appeal, that it is desirable for figures relating to the calculation of fines to be provided while at the same time finding, in paragraph 559 of that judgment, that the reasons given in the contested decision were adequate as regards the level of the fines.

58 It follows from these findings that the third ground of appeal is unfounded.

The fourth ground of appeal

59 The fourth ground of appeal, which can be divided into two limbs, alleges failure to state reasons in the judgment under appeal as regards the achievement of the quorum for adoption of the contested decision and criticises the refusal of the Court of First Instance to take account of the level of the fines imposed in other cases involving cartels falling within the scope of the EC Treaty.

The first limb of the fourth ground of appeal

60 The first limb of the fourth ground of appeal alleges that inadequate grounds were given in the judgment under appeal as regards the existence of a quorum for adoption of the contested decision and the refusal to order production of documents relevant to that question.

61 First, the appellant challenges the Court of First Instance's analysis of the minutes of the Commission meeting during which the contested decision was adopted ('the minutes'). Second, it takes the view that the Court of First Instance should, of its own motion, have ordered an additional inquiry or, at least, given adequate reasons for its refusal to order the additional measures of inquiry sought by the appellant.

62 The Commission contends that this limb of the ground of appeal is inadmissible because it is directed against the assessment of facts by the Court of First Instance.

63 The limb is, the Commission argues, in any event unfounded because the reasoning given by the Court of First Instance, in paragraphs 116 to 131 of the judgment under appeal, satisfies the legal requirements. In addition, the appellant has misinterpreted page 40 of the minutes, which the Court of First Instance examined in paragraphs 125 to 128 of that judgment.

Findings of the Court

64 As has been pointed out in paragraph 40 of this judgment, the Court of First Instance has sole jurisdiction to find and appraise the relevant facts and to assess the evidence. The appellant, which is not alleging distortion by the Court of First Instance of the content of the minutes, cannot therefore call into question the Court of First Instance's assessment of that document.

65 As regards the first part of this limb of the ground of appeal, which alleges a failure to state reasons in the judgment under appeal as regards the quorum required for adoption of the contested decision, suffice it to state that the Court of First Instance examined that question in paragraphs 187 to 202 of the judgment under appeal. In paragraphs 195 to 200 of that judgment, it responded in a precise and detailed manner to the appellant's argument that the quorum was not achieved when the contested decision was adopted by the college of Commissioners.

66 It follows that adequate reasons were given in that respect in the judgment under appeal.

67 As regards the second part of this limb of the ground of appeal, which relates to the statement of reasons for the refusal to grant the application for production of documents, it should be observed that it is for the Community judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced. With regard to the Court of First Instance, it follows from Article 49 read in conjunction with Article 65(b) of its Rules of Procedure that a request for production of documents is a measure of inquiry which the Court may order at any stage of the proceedings (see Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, paragraphs 49 and 50).

68 Given that a copy of the minutes, that is to say, of the document required under the Commission's Rules of Procedure as laid down in Commission Decision 93/492/Euratom, ECSC, EEC of 17 February 1993 (OJ 1993 L 230, p. 15) for the purpose of recording the course of Commission meetings, was available to the Court of First Instance, it was under no obligation whatsoever to adopt a further measure for taking evidence in order to procure other documents if it formed the view that such a measure was unnecessary to establish the truth (see, to that effect, *Limburgse Vinyl Maatschappij*, paragraph 404).

69 The Court of First Instance's examination of the minutes, in paragraphs 190 to 199 of the judgment under appeal, and the conclusion, reached in paragraph 200, that the requisite quorum had been achieved are sufficient justification for legal purposes for its assessment, set out in paragraph 223, that it was unnecessary to order the measures of inquiry sought by the appellant.

70 It follows that the part of the first limb of the fourth ground of appeal alleging failure to give reasons for the refusal to order a measure of inquiry is unfounded.

The second limb of the fourth ground of appeal

71 By the second limb of its fourth ground of appeal, the appellant submits that the Court of First Instance refused to take into account the level of fines imposed in other cases of cartels falling within the scope of the EC Treaty, without stating the reasons on which that refusal was based.

72 This limb of the fourth ground of appeal is directed against paragraphs 649 to 652 of the judgment under appeal, which are worded as follows:

'649 The Court considers that no direct comparison can be made between the general level of the fines applied in the [contested] decision and the level applied in [Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1, the "Cartonboard decision")] and [Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1, "the Cement decision")].

650 In the first place, the calculation made in the [contested] decision, which pre-dates the Guidelines, was not carried out by having recourse to the method laid down therein, which involves a basic fine and increases in line with duration.

651 Second, the Cartonboard and Cement decisions also pre-date the Guidelines and do not indicate that they would have followed the method which those guidelines lay down.

652 Third, the Court considers that the factual and legal framework of the present case is too far removed from that of the Cartonboard and Cement cases for a detailed comparison of the three decisions to serve any useful purpose in assessing the fine to be imposed on the applicant in the present case.'

73 The appellant submits that the Court of First Instance wrongly failed to censure the infringement of the principle of equal treatment which the Commission committed by employing — despite the similar context — a less favourable method in the present case than in other cases and, in particular, by imposing a fine which, expressed as a percentage of turnover, was greater in proportion to the seriousness of the infringement and its duration than those imposed in the Cartonboard and Cement decisions. The judgment under appeal includes no ruling in that respect, a fact which constitutes a manifest failure to state reasons with regard to an essential component of the argument.

74 The Commission contends that this limb of the ground of appeal is inadmissible for two reasons. First, it is a simple restatement of arguments already put forward before the Court of First Instance and, second, it is directed against an assessment of facts, which falls within the sole jurisdiction of that Court.

75 Moreover, the complaint is unfounded since the Court of First Instance's reasoning satisfies the legal requirements.

Findings of the Court

76 In paragraphs 650 to 652 of the judgment under appeal, the Court of First Instance set out three grounds for its finding that a comparison of the level of the fines applied in the contested decision with the level applied in the Cartonboard and Cement decisions would serve no purpose.

77 In paragraphs 650 and 651 of the judgment under appeal, it rightly pointed out that both the contested decision and the Cartonboard and Cement decisions pre-dated the Guidelines adopted by the Commission and, therefore, did not use the method provided for in those guidelines, involving a basic fine and increases in line with duration of the infringements.

78 In paragraph 652 of the judgment under appeal, the Court of First Instance took the view that the factual and legal framework of the contested decision was too far removed from that of the Cartonboard and Cement decisions for a detailed comparison of the three decisions to serve any useful purpose in assessing the fine to be imposed on the appellant.

79 In so doing, the Court of First Instance sufficiently justified for legal purposes its finding, stated in paragraph 649 of the judgment under appeal, that no direct comparison could be drawn between the general level of the fines imposed in the decisions referred to.

80 In making that finding, the Court of First Instance did not infringe the principle of equal treatment but explained why such an infringement could not be established by way of a simple comparison of the level of the fines imposed in those decisions.

81 Difficulties in comparing the level of fines imposed on undertakings which have participated in different agreements on different markets at times which, in some cases, are separated by long intervals may also be encountered as a result of the conditions necessary for implementing an effective competition policy. As the Court of First Instance rightly pointed out in paragraph 644 of the judgment under appeal, the fact that the Commission penalised certain types of infringement in the past with fines of a particular level cannot prevent it from

raising that level within the limits indicated in Article 65(5) of the ECSC Treaty if that is necessary to ensure the effectiveness of Community competition policy (see, by analogy, Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 109).

82 Similarly, as was pointed out in paragraph 56 of this judgment, the Commission cannot, by using arithmetical formulas to determine the level of fines, divest itself of its own power of assessment in that regard.

83 It follows from all of the above findings that the second limb of the fourth ground of appeal is unfounded.

84 The fourth ground of appeal is therefore unfounded.

The fifth ground of appeal

85 By its fifth ground of appeal, the appellant complains that the Court of First Instance committed several errors in law. This ground of appeal can be divided into three limbs.

The first limb of the fifth ground of appeal

86 The first limb of the fifth ground of appeal is directed against paragraphs 140 to 143 of the judgment under appeal, which are worded as follows:

> '140 Since the Commission had duly established that [the appellant] and Aristrain Olaberría [SL ("Aristrain Olaberría")] had participated equally in the various infringements which they were found to have committed by Article 1 of the operative part of the [contested] decision, and since the two companies must be regarded as constituting a single "undertaking" for the purposes of Article 65(5) of the Treaty, the Court considers that, in the specific circumstances of the case, the Commission was entitled to impute to the former responsibility for the latter's behaviour and, as it did in Article 4 of the operative part of the [contested] decision, to take the latter's turnover into account in calculating the amount of the fine payable by the former.
>
> 141 The Court considers that in a situation in which, owing to the family composition of the group and the dispersal of its shareholders, it was impossible or exceedingly difficult to identify the legal person at its head to which, as the person responsible for coordinating the group's activities, responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the two subsidiaries [namely the appellant] and Aristrain Olaberría jointly and severally responsible for all the acts of the group, in order to ensure that the formal separation between those companies, resulting from their separate legal personality, could not prevent a finding that they had acted jointly on the market for the purposes of applying the rules on competition (see [Case 48/69] *ICI* v *Commission* [[1972] ECR 619, paragraph 140).

142 It follows that in the present case the Commission was entitled to impose on the two sister companies a single fine of an amount calculated with reference to their combined turnover and to render them jointly and severally liable for payment.

143 It also follows that, by including only [the appellant] in the group of addressees of the [contested] decision, although it calculated the fine with reference to its turnover combined with that of Aristrain Olaberría, the Commission was not guilty of any illegality but merely deprived itself of a debtor, in the person of the latter company, with joint and several liability.'

87 The appellant claims that the Court of First Instance was wrong to approve the Commission's imposing on it alone, by the contested decision, a fine penalising an unlawful course of conduct which was also adopted by its sister company, Aristrain Olaberría. It does not dispute that the two companies are part of the same group. However, it takes the view that this cannot justify imposing on one company alone, in an arbitrary manner, a fine penalising the conduct of the whole group.

88 The appellant adds that the contested decision does not contain a statement of reasons in this regard and that the Court of First Instance erred in law in substituting its own reasons for those lacking in that decision.

89 The Commission contends that, when the Court of First Instance ruled that the two sister companies were jointly and severally responsible for the actions of the group, it added nothing to the Commission's statements that the two undertakings were part of the same group and formed an 'economic and business unit'. The remainder of the reasoning set out by the Court of First Instance in paragraphs 135 to 143 of the judgment under appeal is correct in law.

90 Moreover, the Commission submits that the Court of First Instance did not 'rewrite' the contested decision. It merely confirmed that the fact that the Commission imposed the fine on just one of the two undertakings concerned and dispensed with a joint and several co-debtor cannot justify annulment of that decision.

Findings of the Court

91 Recital 16(b) of the grounds of the contested decision is worded as follows:

'José María Aristrain Madrid SA and José María Aristrain SA (hereinafter together referred to as "Aristrain") are steel-producing companies belonging to the Aristrain group whose shares are held by members of the Aristrain family. In 1990, the group turnover was [ESP] 73 216 million of which... was for beams. José María Aristrain Madrid SA and José María Aristrain SA are now known as Siderúrgica Aristrain Madrid SL and Siderúrgica Aristrain Olaberría SL respectively.'

92 The contested decision subsequently refers only to 'Aristrain' and thus covers both the appellant and Aristrain Olaberría as regards involvement in the events complained of and the attribution of responsibility for the infringements.

93 With respect to the fine, recital 323 of the grounds of the contested decision is worded as follows:

'In the case of the two Aristrain companies, both of which produce beams, this Decision is addressed to one of them, Siderúrgica Aristrain, Madrid SL, formerly

José María Aristrain, Madrid SA. The fine imposed also takes into account the behaviour of Siderúrgica Aristrain Olaberría SL, formerly José María Aristrain SA.'

94 That recital indicates the Commission's choice as to the addressee of the contested decision but contains no reasons whatsoever for that decision.

95 The fact that only the appellant was chosen as debtor of the fine imposed in respect of the acts of that undertaking and of Aristrain Olaberría is all the more incomprehensible since, in recital 16(b) of the grounds of the contested decision, the Commission acknowledges that they are two separate companies and since, subsequently, that decision makes no reference to specific circumstances relating to the attribution of responsibility for the infringements, thereby suggesting that those infringements are to be attributed to each company to the extent of its own involvement.

96 However, it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27).

97 In the present case, however, the contested decision does not establish that the appellant had the power to direct the conduct of Aristrain Olaberría to the point of depriving it of any real independence in determining its own course of action on the market.

98 The Court of First Instance was wrong to rule, in paragraph 141 of the judgment under appeal, that it is possible to impute to a company all of the acts of a group even though that company has not been identified as the legal person at the head of that group with responsibility for coordinating the group's activities.

99 The simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other.

100 The contested decision states no reasons in that regard and even contains an internal contradiction since it suggests that responsibility for the infringements found to have been committed must be attributed to both companies in equal measure while at the same time ordering only one of them to pay a global fine covering the acts of both.

101 It follows that, in not censuring the failure to state reasons in the contested decision with respect to this issue and in finding, in paragraph 142 of the judgment under appeal, that the Commission was justified in imposing on the two companies jointly and severally a single fine at a level calculated by reference to their combined turnover and, in paragraph 143 of that judgment, that the Commission could demand payment of that fine from the appellant alone, the Court of First Instance committed errors in law which must lead to annulment of the judgment under appeal in respect of those matters.

102 Since this annulment of the judgment under appeal is only partial, it is appropriate to proceed with the examination of the grounds of appeal.

The second limb of the fifth ground of appeal

103 The second limb of the fifth ground of appeal is directed against paragraphs 624 to 628 of the judgment under appeal. Paragraphs 627 and 628 of that judgment are worded as follows:

> '627 The Court finds that the three items of evidence specifically mentioned in recital 307 of the [contested] decision, that is to say, the internal notes prepared by Usinor Sacilor, Peine-Salzgitter and Eurofer, are not relied on as a specific aggravating circumstance against those three parties, but tend rather to show, in conjunction with recitals 305 and 306, that all of the undertakings to which [that] decision was addressed were aware that they were infringing the prohibition set out in Article 65(1) of the Treaty. For the reasons already indicated, the Court finds that the applicant could not have been unaware that its conduct was unlawful.
>
> 628 In those circumstances, the Court finds that, in the exercise of its unlimited jurisdiction, there is no reason to set aside the aggravating circumstance taken into account in this regard against the applicant in recitals 305 to 307 of the [contested] decision, and it is not necessary to determine whether it was aware of the inspections carried out in connection with the Stainless Steel case or whether the three documents mentioned in recital 307 of [that decision] may be used against it.'

104 The appellant claims that the judgment under appeal infringes Community law in that the aggravating circumstance of awareness that its conduct was illegal was attributed to the appellant on the basis of evidence relating to other undertakings and that the Court of First Instance refused to satisfy itself as to whether the allegation in question was true.

105 The Commission takes the view that this limb of the ground of appeal is inadmissible because it is directed against assessments of facts. Moreover, it is unfounded because it distorts the Court of First Instance's reasoning, which is, none the less, clearly stated in paragraphs 627 and 628 of the judgment under appeal.

Findings of the Court

106 This limb of the ground of appeal is based on a manifestly incorrect reading of the judgment under appeal. The Court of First Instance did not conclude that the appellant was aware that its conduct was illegal from the evidence referred to in recital 307 of the grounds of the contested decision which was supplied by other undertakings but established that the appellant was aware of that illegality when making other assessments which have not been challenged by the appellant. That is the case, in particular, with respect to the assessments made in paragraphs 541 to 548 of the judgment under appeal, in which the Court of First Instance held that the appellant had been aware that its conduct was illegal and rejected the argument that it had acted in good faith.

107 It follows that the second limb of the fifth ground of appeal is manifestly unfounded.

The third limb of the fifth ground of appeal

108 The third limb of the fifth ground of appeal is directed against paragraph 226 of the judgment under appeal, which is worded as follows:

'Under Article 1 of the [contested] decision, the Commission accused the applicant of having engaged in price-fixing within the [Eurofer Committee, called the "Poutrelles Committee"]. The period taken into account for the purposes of

the fine was 24 months, from 1 January 1989 to 31 December 1990 (see recitals 80 to 121, 223 to 243, 311, 313 and 314, and Article 1 of [that] decision). In that regard, it is true that Article 4 of the [contested] decision, in the Spanish and French versions, states that the fine imposed on the applicant is for the infringements committed "after 31 December 1989". However, it follows both from the German and English versions of Article 4 and from the grounds of the [contested] 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 Aristrain participated in the infringement of price-fixing in the Poutrelles Committee for 24 months), in the light of which the operative part must be interpreted, that the reference to that date instead of 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* v *Hauptzollamt München-Mitte* [1994] ECR I-2305, paragraphs 21 to 24).'

109 The appellant submits that the Court of First Instance infringed Community law in finding that such a 'clerical error' in the operative part of the contested decision was irrelevant.

110 In addition, the appellant complains that the Court of First Instance's reasoning was incoherent in so far as, in order to establish and confirm that it was indeed an error, it referred, in paragraph 226 of the judgment under appeal, to the German and English versions of the contested decision even though, in response to the appellant's arguments concerning the errors detected in the Italian version of that decision, it merely declared, in paragraph 209 of that judgment, that that question 'is... irrelevant, particularly since the Italian version of the [contested] decision was not addressed to the applicant'.

111 The Commission contends that this argument is unfounded. Even if it is accepted that the Court of First Instance could not refer to other language versions of the contested decision, adequate reasons were nevertheless provided for the classification given by the Court of First Instance to the error found by way of the reference to the grounds of that decision, which the appellant does not challenge.

Findings of the Court

112 By this limb of the ground of appeal, the appellant is essentially alleging that the Court of First Instance distorted the contested decision in taking the view that the fine imposed on the appellant had been for infringements committed after 31 December 1988 even though Article 4 of that decision, in the Spanish and French versions, stated that the fine was to penalise infringements committed 'after 31 December 1989'.

113 It is clear from recitals 80 to 121, 223 to 243 and 311 of the grounds of the contested decision and, more specifically, from recitals 313 and 314 of the grounds and Article 1 of that decision, referred to by the Court of First Instance in paragraph 226 of the judgment under appeal, that the infringement period chosen was the period of 24 months from 1 January 1989 to 31 December 1990.

114 The Court of First Instance was therefore right and did not distort the content of the contested decision in finding that the reference to 31 December 1989 rather than 31 December 1988 in the Spanish and French versions of Article 4 of that decision was a clerical error.

115 Since such a clear clerical error does not affect the validity of a measure but at most authorises the author of that measure to rectify the error, the Court of First Instance was likewise right to take the view, in paragraph 226 of the judgment under appeal, that that mere typing error did not affect the content of the measure under challenge, namely the contested decision.

116 The third limb of the fifth ground of appeal is consequently unfounded.

117 It follows from the above findings that the first limb of the fifth ground of appeal is well founded and the remaining limbs are unfounded.

The sixth ground of appeal

118 The sixth ground of appeal alleges infringement of Community law as a result of the misinterpretation and misapplication of the principles of equal treatment and proportionality in that the Court of First Instance failed to assess correctly the devaluations of the Spanish peseta as against the ecu, which led to an increase in the fine imposed on the appellant as compared with those imposed on the undertakings from Member States whose currencies were not devalued or revalued.

119 This ground of appeal is directed against paragraphs 658 to 666 of the judgment under appeal, which are worded as follows:

'658 The Court observes that, according to Article 4 of the [contested] decision, the fines are payable in ECU.

659 There is nothing to prevent the Commission from expressing the amount of the fine in ECU, a monetary unit convertible into national currency. That also makes it easier for the undertakings to compare the amounts of

the fines imposed. Furthermore, the possibility of converting the ECU into national currency distinguishes that monetary unit from the "unit of account" referred to in Article 15(2) of Regulation No 17 [of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87)], 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 must be fixed in national currency (Joined Cases 41/73, 43/73 and 44/73 — Interpretation — *Société Anonyme Générale Sucrière and Others* v *Commission and Others* [1977] ECR 445, paragraph 15).

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

661 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 [*Musique Diffusion Française*, cited above], paragraph 122).

662 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 on the basis of the value of each national currency of the Member States, the Commission acted correctly in converting the turnover figure of each of the undertakings into ecus.

663 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 case, 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 [*Musique Diffusion Française*], paragraphs 120 and 121). Second, 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.

664 Thus, the argument that the turnover figure for the reference year should have been converted into ecus on the basis of the exchange rate applicable on the date of adoption of the [contested] 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 the [contested] decision was 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 [contested] decision had been applied, that is merely the logical consequence of fluctuations in the real values of the various national currencies.

665 In addition, the undertakings to which the [contested] 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. The applicant itself achieves a considerable proportion of its turnover on export markets (according to the letter of 27 January 1995 from its auditors, the applicant achieved a turnover in beams of ESP 6 067 974 000 in Spain and ESP 3 853 431 000 in the rest of the ECSC in 1990; these figures are ESP 12 717 803 000 and ESP 5 109 707 000 respectively in the case of its sister company, Aristrain Olaberría). Where a decision such as the [contested] decision here at issue penalises infringements of Article 65(1) of the Treaty and where the undertakings to which that decision is addressed 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.

666 In the light of the foregoing, the applicant's argument must be rejected.'

120 The appellant challenges the calculation of the level of the fine on the basis of a conversion of the turnover in question at the average exchange rate of the reference year used even though the fine was to be paid in national currency at the rate applicable on the day prior to payment.

121 In the appellant's view, the Court of First Instance erred in law in holding that, in order to be able to compare the different turnover figures provided, the Commission had to convert them into a single currency unit. Only the percentage applied to the turnover, which was determined by reference to the duration of the infringement and of the participation of each undertaking in the infringement, actually enables it to be established whether one fine imposed is higher than another.

122 Submitting that there is no objective reason justifying the use of that system and that to apply that system clearly discriminates against those undertakings whose currency was devalued over the course of the reference years, the appellant claims that the Court of First Instance infringed the principle of equality in approving the choice made by the Commission between the various possible options and calculation methods.

123 The appellant goes on to criticise the Court of First Instance for having failed to take account of the fact that the fine was paid at a different time from that at which the level was fixed.

124 The Commission contends that this ground of appeal is unfounded and that the appellant has not proposed any other practicable method.

125 The Commission maintains that it is logical to use turnover and the exchange rate of the year of the infringement because that method reflects in real terms the scope of the infringement at the time of its commission and enables all the benefits which may have been derived from the infringement to be taken into account with great accuracy.

126 The Commission states that it is not compulsory to pay a fine in national currency since it is also possible to pay it in ecus.

127 In addition, the Commission points out that, if there was a difference in the rate between the time when the level of the fine was determined and the time when it was paid, that is because the time at which the appellant chose to pay the fine was subsequent to that at which the level was fixed. The appellant could have frozen the amount of the fine in a bank account in 1994.

Findings of the Court

128 The Court of First Instance was right to hold that it was relevant to take into account the turnover achieved by each undertaking during the reference year, that is to say, the last full year of the chosen period of infringement, when assessing the gravity of the infringement committed by each undertaking. When the size and economic strength of an undertaking at the time of the infringement are being assessed, it is necessary to refer to the turnover achieved at that time and not that achieved at the time when the decision imposing the fine was adopted (see, to that effect, *Sarrió*, cited above, paragraph 86).

129 The appellant fails to show how the use of that reference year breached the principle of equal treatment or that of proportionality. On the contrary, the use of a reference year common to all the undertakings involved in the same infringement means that each undertaking is assured of being treated in the same way as the others since the penalties are determined in a uniform manner without taking account of extrinsic and uncertain factors which might have affected the turnover between the last year of the infringement and the time when the decision imposing the fines is adopted. Moreover, the fact that the reference year was part of the infringement period enabled the scale of the infringement committed to be assessed in the light of the economic reality as it appeared during that period.

130 First of all, as regards the fixing of the fine in ecus on the basis of turnover converted at the exchange rate applicable in 1990, the conversion of the turnover achieved in the reference year at the exchange rate applicable at that time makes it possible to avoid distorting the assessment of the respective size of the undertakings involved in the infringement by taking account of extrinsic and uncertain factors, such as changes in the value of national currencies during the subsequent period (*Sarrió*, paragraph 86).

131 Next, Article 65(5) of the ECSC Treaty does not prohibit the fixing of a fine in ecus. On the contrary, the use of a common currency to fix the fines imposed on undertakings which have taken part in the same infringement is justified by the need to penalise those undertakings in a uniform manner.

132 Lastly, as regards monetary fluctuations, these are elements of uncertainty which may give rise to advantages and disadvantages and which undertakings have to deal with regularly in the course of their business activities, and whose very existence is not such as to render inappropriate the amount of a fine lawfully fixed by reference to the gravity of the infringement and the turnover achieved during the last year of the period over which it was committed (see *Sarrió*, paragraph 89).

133 It follows that, in paragraphs 659 to 666 of the judgment under appeal, the Court of First Instance properly justified the method used by the Commission to calculate the fine and, in doing so, did not infringe the principles of equal treatment or proportionality.

134 The sixth ground of appeal is therefore unfounded.

The seventh ground of appeal

135 The seventh ground of appeal alleges infringement of Community law in that the Court of First Instance did not order the Commission to pay the expenses and interest resulting from the establishment of a guarantee or any payment of the fine.

136 The ground of appeal is directed against paragraphs 710 to 712 and 717 of the judgment under appeal, which are worded as follows:

'710 It must be stressed in this regard that, under Article 39 of the Treaty, actions brought before the Court do not have suspensory effect. It follows that the Commission cannot be required to treat in the same way an undertaking which, whether it has or has not brought an action, pays the fine on its normal due date, where appropriate by making use of the arrangements to pay by instalments at the preferential interest rate which, as here, may have been offered to it by the Commission, and an undertaking which wishes to postpone that payment until a definitive judgment has been delivered. Exceptional circumstances apart, application of default interest at the normal rate must be regarded as justified in this latter case (see Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 141, and the orders of the President of the Court of Justice in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549 and Case 392/85 R *Finsider* v *Commission* [1986] ECR 959).

711 It must also be pointed out that the possibility offered to the undertakings concerned to pay their fines in the form of five annual instalments subject, until their due date, to the basic EMCF rate, in conjunction with the possibility of obtaining a suspension of recovery measures in the event of an action being brought, represents an advantage *vis-à-vis* the formula traditionally used by the Commission where an action has been brought before the Community judicature. It follows from the general practice adopted by the Commission that the rate of interest which it demands if payment of the fine is suspended is equal to the rate applied by the EMCF to its ecu transactions in the month prior to adoption of the decision in question, increased by 1.5 percentage points. Choosing to pay by instalments, by delaying the due date for payment of four fifths of the fine, has the effect of postponing application of that rate.

712 The claim for annulment of the [letter of 28 February 1994 by which the Commission notified the appellant of the contested decision] must therefore be dismissed as unfounded, without it being necessary to rule on whether that letter constitutes a separate decision which may be challenged in an action for annulment.

...

717 The applicant's request that the defendant be ordered to bear the costs incurred during the administrative procedure cannot therefore be granted.'

137 The appellant complains that the Court of First Instance did not grant its request that the Commission should be ordered to pay the expenses and interest resulting from the establishment of a guarantee or any payment of the fine. It based that claim on, inter alia, the irregularities which, in its view, vitiated the contested decision and regarded those expenses and that interest as recoverable within the meaning of Article 91 of the Rules of Procedure of the Court of First Instance.

138 The appellant concludes from paragraphs 109 to 116 of the judgment under appeal, in which the Court of First Instance justified its unlimited jurisdiction to review the fines imposed by the Commission under Article 65 of the ECSC Treaty, that the contested decision was not definitive so long as the Court of First Instance had not confirmed it and that, therefore, it cannot be made to bear the expenses and interest resulting from the establishment of a guarantee before the Court of First Instance has completed a full judicial review of that decision.

139 The appellant therefore claims that the Court should annul paragraph 717 of the judgment under appeal in so far as the Commission was not ordered to pay the expenses and interest resulting from the establishment of a guarantee or from any payment of the fine and it should rule that the interest began to accrue only from the time at which that judgment became enforceable.

140 The Commission contends that this ground of appeal is unfounded.

141 First of all, the Commission cannot understand how it can be claimed that the Court of First Instance ruled that the contested decision would become definitive only once that Court had confirmed it. This represents a misinterpretation of the judgment under appeal.

142 The Commission contends, moreover, that its decisions imposing pecuniary obligations are enforceable under Article 92 of the ECSC Treaty and that, under Article 39 of that Treaty, actions brought before the Community judicature do not have suspensory effect. To take the view that fines generate interest only once they have been confirmed by the Court of First Instance would render Article 39 meaningless and would encourage the bringing of actions for the sole purpose of delaying the payment of fines.

143 Finally, the Commission refers to paragraphs 111 to 118 of the judgment under appeal, in which the Court of First Instance responded to the appellant's arguments concerning the alleged infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and those regarding the existence and scope of an action before a Community Court exercising its unlimited jurisdiction.

Findings of the Court

144 This ground of appeal is based on the erroneous presumption that an action brought before a Community Court exercising its unlimited jurisdiction against a Commission decision renders that decision provisional until it has been confirmed by that Court.

145 Suffice it to state in that regard, first, that, under Article 92 of the ECSC Treaty, decisions of the Commission which impose a pecuniary obligation are to be enforceable, that is to say, they may be enforced without its being necessary first to satisfy any conditions or procedural requirements and, second, that, under Article 39 of that Treaty, actions brought before the Community judicature do not have suspensory effect.

146 Moreover, it does not follow from Article 91 of the Rules of Procedure of the Court of First Instance that the expenses arising from a particular method of paying a fine owed by an undertaking under Article 65 of the ECSC Treaty, where that method of payment has been chosen by that undertaking, may be regarded as recoverable costs within the meaning of Article 91 of those Rules of Procedure.

147 It follows that the seventh ground of appeal is unfounded.

The eighth ground of appeal

148 The eighth ground of appeal alleges infringement of Article 33 of the Rules of Procedure of the Court of First Instance and of procedural guarantees in that only

three of the five judges of whom the Chamber was composed at the time of the hearing took part in the final stage of the deliberations of the judgment under appeal and signed that judgment.

149 Article 32(1) and (3) of the Rules of Procedure of the Court of First Instance is worded as follows:

'1. Where, by reason of a Judge being absent or prevented from attending, there is an even number of Judges, the most junior Judge within the meaning of Article 6 shall abstain from taking part in the deliberations unless he is the Judge-Rapporteur. In this case, the Judge immediately senior to him shall abstain from taking part in the deliberations.

...

...

3. If in any Chamber the quorum of three Judges has not been attained, the President of that Chamber shall so inform the President of the Court of First Instance who shall designate another Judge to complete the Chamber.'

150 Article 33(1) to (5) of the Rules of Procedure provides:

'1. The Court of First Instance shall deliberate in closed session.

2. Only those Judges who were present at the oral proceedings may take part in the deliberations.

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

...

5. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court of First Instance. Votes shall be cast in reverse order to the order of precedence laid down in Article 6.'

151 Paragraph 77 of the judgment under appeal states in that regard:

'The oral procedure was closed at the end of the hearing on 27 March 1998. Since two members of the Chamber were prevented from taking part in the judicial deliberations following the expiry of their mandates on 17 September 1998, the Court's deliberations were continued by the three judges whose signatures the present judgment bears, in accordance with Article 32 of the Rules of Procedure.'

152 The appellant submits that the judgment under appeal is vitiated by an infringement of Article 33 of the Rules of Procedure of the Court of First Instance since President A. Kalogeropoulos and Judge C.P. Briët, who both took part in the oral proceedings and the initial stage of the deliberations, neither took part in the final stage of those deliberations nor signed the judgment.

153 In the appellant's view, the expiry of a Judge's mandate is not one of the cases of absence or prevention from attending referred to in Article 32(1) of the Rules of Procedure. It further submits that, accordingly, not only is the judgment under appeal contrary to the provisions of Article 33 of those Rules but, in addition, it breaches fundamental procedural guarantees protected by Community law and the ECHR since deliberations are a fundamental activity of collegiate courts and tribunals.

154 The Commission contends that Article 32 of the Rules of Procedure of the Court of First Instance requires that Chambers consist of a quorum of three judges, which was the case here. It further submits that the appellant has misinterpreted Article 33 of the Rules of Procedure, which is infringed not where not all of the judges who took part in the oral proceedings are able to take part in the deliberations but rather where judges who did not take part in the oral proceedings take part in the deliberations.

Findings of the Court

155 In accordance with the second paragraph of Article 18 of the ECSC Statute of the Court of Justice, which also applies to the Court of First Instance pursuant to Article 44 of that Statute, decisions of the Court of First Instance are valid only when an uneven number of its members is sitting in the deliberations, and decisions of Chambers composed of three or five judges are valid only if they are taken by three judges. Article 32 of the Rules of Procedure of the Court of First Instance sets out how those rules are to be applied.

156 For the purpose of applying those rules, the decisive factor is not whether a judge is definitively or temporarily prevented from attending. Contrary to what the appellant claims, if a temporary absence or prevention from attending justifies a change in the composition of the Chamber hearing a case in order to allow an

uneven number of members to reach the decision, the same is true, *a fortiori*, of a definitive prevention from attending arising, for example, from expiry of a member's mandate.

157 According to Article 33(5) of the Rules of Procedure of the Court of First Instance, the relevant time in determining whether the provisions of those Rules relating to deliberations have been complied with is that of adoption, after final discussion, of the conclusions determining the Court's decision.

158 In the present case, the Second Chamber, Extended Composition, of the Court of First Instance therefore reached a valid decision in a composition reduced to three members following the expiry, after the oral procedure and the initial stage of the deliberations, of the mandates of two of the five members of whom that Chamber was initially composed.

159 As regards the alleged infringement of the ECHR, it should be observed that the appellant merely alleges such an infringement but makes no effort to demonstrate how compliance by the Court of First Instance with the provisions of its Rules of Procedure runs counter to a provision of that convention.

160 It follows that the eighth ground of appeal must be rejected as unfounded.

The ninth ground of appeal

161 The ninth ground of appeal alleges infringement of Article 6 of the ECHR in that the appellant was denied the right to a fair decision within a reasonable period.

162 The appellant submits that the Commission's reluctance to grant it access to the documents necessary for its defence and the length of the judicial proceedings, which lasted more than five years, unduly delayed the decision on the dispute to such a degree that it suffered serious harm. More specifically, it claims that the Commission is responsible for a delay of more than three years in dealing with the procedure on account of its failure to apply immediately Article 23 of the ECSC Statute of the Court of Justice and transmit the documents required.

163 The Commission states that the circumstances of this case were very different from those examined by the Court in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417. In the present case, the obligation laid down in Article 23 of the ECSC Statute of the Court of Justice to transmit to the Court of First Instance all the documents relating to the case meant that the Court of First Instance was required to examine those documents and determine which of them could be forwarded to the appellant.

164 The Commission also points out that it was at the appellant's initiative that the Court of First Instance carried out such an exhaustive analysis of the documentary evidence.

Findings of the Court

165 The general principle of Community law that everyone is entitled to a fair hearing, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law (*Baustahlgewebe*, cited above, paragraph 21, and *Limburgse Vinyl Maatschappij*, paragraph 179).

166 The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (*Baustahlgewebe*, paragraph 29, and *Limburgse Vinyl Maatschappij*, paragraph 187).

167 The Court has held in that regard that this list of criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. The purpose of those criteria is to determine whether the time taken in the handling of a case is justified. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is prima facie too long. Conversely, the time taken may be regarded as longer than is reasonable in the light of just one criterion, in particular where its duration is the result of the conduct of the competent authorities. Where appropriate, the duration of a procedural stage may be regarded as reasonable from the outset if it appears to be consistent with the average time taken in handling a case of its type (*Limburgse Vinyl Maatschappij*, paragraph 188).

168 In the present case, the proceedings before the Court of First Instance commenced with the lodging on 18 April 1994 of the application bringing the present appellant's action for annulment of the contested decision and were concluded on 11 March 1999, the date of delivery of the judgment under appeal. They thus lasted almost five years.

169 Such a duration is, prima facie, considerable. However, it should be noted that 11 undertakings brought actions for annulment of the same decision, in four languages of procedure.

170 As pointed out in paragraphs 57 to 63 of the judgment under appeal, the Court of First Instance had to rule on a variety of claims regarding access to the documents relating to the administrative procedure. The Commission having lodged, on 24 November 1994, a file containing 11 000 documents relating to the contested decision, submitting that the undertakings in question should not be given access to the documents containing business secrets or to the Commission's own internal documents, the Court of First Instance had to hear the parties on that issue, examine all the documents and decide to which documents each of the applicants might have access.

171 By order of 19 June 1996 in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537, the Court of

First Instance ruled on the applicants' right of access to the documents in the Commission's file emanating, first, from the applicants themselves and, second, from third parties not involved in the proceedings which the Commission had, in the interests of those parties, classified as confidential.

172 By order of 10 December 1997 in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293, the Court of First Instance ruled on the applicants' requests for access to the documents classified by the Commission as 'internal'.

173 Contrary to what the appellant claims, the Commission cannot be held responsible for the delay of more than three years in dealing with the procedure as a result of a failure to comply with Article 23 of the ECSC Statute of the Court of Justice. Having been asked to do so by letter of the Registry of the Court of First Instance of 25 October 1994, the Commission lodged its file at the Registry on 24 November 1994. Moreover, it cannot be held responsible for the — for the most part, new — legal difficulties relating to access to certain documents which the Court of First Instance had to resolve by way of orders following an examination of the documents which were the subject of dispute.

174 The various actions brought by the undertakings affected by the contested decision were joined for the purposes of measures of inquiry and the oral procedure. As is explained in paragraphs 64 to 74 of the judgment under appeal, a number of measures of inquiry were ordered by the Court of First Instance in order to prepare that procedure. In that connection, the Court of First Instance addressed various written questions to the parties and ordered the production of documents and the hearing of witnesses.

175 The oral procedure was closed at the end of the hearing on 27 March 1998.

176 The judgment under appeal was delivered on 11 March 1999, that is to say, on the same day as the other 10 judgments ruling on the actions brought against the contested decision.

177 It follows from the above findings that the duration of the proceedings leading to the judgment under appeal can be explained, inter alia, by the number of undertakings which participated in the concerted practice at issue and brought actions against the contested decision, which made it necessary to examine those different actions simultaneously, by the legal issues relating to access to the Commission's voluminous file, by the in-depth examination of the file by the Court of First Instance and by the linguistic constraints imposed by that Court's Rules of Procedure.

178 It follows that the duration of the proceedings before the Court of First Instance is justified in the light of the particular complexity of the case.

179 The ninth ground of appeal is for that reason unfounded.

180 It is clear from all of those findings that only the first limb of the fifth ground of appeal is well founded. The judgment under appeal must therefore be annulled in so far as the Court of First Instance declared the application for annulment of the contested decision to be unfounded as regards the order that the appellant pay a fine which also took into account the conduct of Aristrain Olaberría. The remainder of the appeal must be dismissed.

The action on the substance

181 Under Article 61 of the Statute of the Court of Justice, if an appeal is well founded, the Court of Justice must set aside the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance.

182 The grounds set out in paragraphs 91 to 101 of this judgment which justified the partial annulment of the judgment under appeal cannot lead to annulment of the contested decision in its entirety. Those grounds justify annulment of that decision only in so far as it imposes on the appellant a share of the fine also covering the conduct of Aristrain Olaberría.

183 However, the determination of the amount of that share of the fine erroneously imposed on the appellant requires an examination of the accounts of the two companies and, in particular, an examination of the turnover achieved at the time by each of them in the beams sector.

184 It must therefore be held that the state of the proceedings does not permit judgment to be given on the substance of the case. Consequently, the case must be referred back to the Court of First Instance so that it may determine the amount of the share of the fine which the appellant is still required to pay and annul the decision in respect of the surplus of the fine. The costs must be reserved.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Sets aside the judgment of the Court of First Instance of 11 March 1999 in Case T-156/94 *Aristrain* v *Commission* in so far as the Court of First Instance declared the application for 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 to be unfounded as regards the order that Siderúrgica Aristrain Madrid SL pay a fine which also took into account the conduct of Aristrain Olaberría SL;

2. Dismisses the remainder of the appeal;

3. Refers the case back to the Court of First Instance;

4. **Reserves the costs.**

Wathelet **Edward** **La Pergola**

Jann von Bahr

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber