PRICE FIXING (STEEL): THE BRITISH STEEL CASE

Subject: Price fixing
Market sharing
Information agreements
Fines

Industry: Steel; steel beams

Parties: British Steel plc
(See also paragraph 3 of the judgment below)
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-151/94 (British Steel plc v Commission of the European Communities) dated 11 March 1999

(Note. ECSC Treaty decisions are not always relevant to the interests of industries other than those covered by that Treaty. In the present case, however, there are some general points of interest, particularly about price fixing, market sharing and systems for the exchange of information. Article 65 of the ECSC Treaty - which has not been renumbered under the Amsterdam Treaty - corresponds broadly to the old Article 85 of the EC Treaty in prohibiting restrictive agreements and concerted practices. The proceedings here result from an application, principally, for the annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams. Since the judgment is long, amounting to no fewer than 700 paragraphs, the report which follows is restricted to a summary of the contents, with some illustrative paragraphs and the court's ruling.

Much of the judgment is concerned with the arrangements made by the Commission in connection with the "crisis cartel" of the 1980s, of which the present case is in some respects a consequence. Although these arrangements are peculiar to the steel industry, they have a moral for all industries. There was a time when it was Commission policy to encourage certain arrangements, in the interests of the restructuring of the European steel industry, to promote market sharing and price support; and the present case may be seen in some respects as a hangover from that policy. Interference with competitive conditions, even for the best reasons of public policy, can have serious long-term consequences and may encourage industries to continue practices which, though accepted and indeed encouraged by the authorities during a period of crisis, become infringements of the competition rules when the crisis is over. These considerations carried some weight with the court, which made a general reduction in the level of fines imposed under the Commission's decision. Every other argument was rejected, except the relatively narrow point that British Steel had not participated in an agreement to share the Italian market. The fact that the Court upheld this point resulted in a further reduction of the fine imposed on British Steel under the Commission's decision; and the judgment is another useful source of information about the criteria for setting the levels of fines.)

A Preliminary observations

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

2 The applicant, British Steel plc ("British Steel" or "the applicant"), is the largest crude steel producer in the United Kingdom. In the business year ending on 31 March 1990, it had a consolidated turnover of UK £5,113m and its sales of beams in 1990 totalled UK £286.5m. It was the largest Community producer of beams in 1989.

3 Ten other parties to which the Decision was addressed have also brought actions before the Court. They are.

NMH Stahlwerke GmbH (NMH), in Case T-134/94;
Eurofer ASBL (Eurofer), in Case T-136/94;
ARBED SA (ARBED), in Case T-137/94;
Cockerill-Sambre SA (Cockerill-Sambre), in Case T-138/94;
Thyssen Stahl AG (Thyssen), in Case T-141/94;
Unimetal Societe Francaise des Aciers Longs SA (Uminetal), in Case T-145/94;
Krupp Hoesch Stahl AG (Krupp Hoesch), in Case T-147/94;
Preussag Stahl AG (Preussag), in Case T-148/94;
Siderflrgica Aristrain Madrid SL (Aristrain), in Case T-156/94; and
Empresa Nacional Siderurgica SA (Ensidesa), in Case T-157/94.

[Paragraphs 5 to 38 of the judgment refer to the relations between the steel industry and the Commission from 1970 to 1990 and, in particular to:

the crisis in the 1970s and the creation of Eurofer,
the quota system established from 1980 to 1988,
events preceding the end of the "manifest crisis regime" on 30 June 1988,
the monitoring system implemented with effect from 1 July 1988,
the Stainless Steel decision of 18 July 1990 and
the Commission's reflections on the future of the ECSC Treaty after 1990.]

[Paragraphs 39 to 48 describe the administrative procedure before the Commission and paragraphs 49 to 73 describe the procedure before the Court of First Instance. The operative part of the Commission's decision is set out in full in paragraph 47.]

[Paragraphs 74 to 103 consider and reject the applicant's plea that the rights of the defence had been infringed. Paragraphs 104 to 154 consider and reject the applicant's plea that essential procedural requirements within the Commission had been infringed; the Court looked at allegations of a lack of a quorum in the Commission's proceedings, at the allegation that there was a difference between the decision adopted by the Commission and the version of the decision notified to the applicant, at the alleged lack of authentication of the decision and the fact that there

was no indication of the date on which the minutes of the Commission's meeting were signed. The court's observations provide a useful guide to future litigants on the extent to which this kind of argument is sustainable.]

[Paragraphs 155 to 239 consider the facts set out in the Commission's decision, on the basis of which the infringements were found. In particular, the paragraphs of the Court's judgment look at:

agreements allegedly concluded in 1986 and 1987,
the agreement on prices in Germany and France allegedly concluded before 2 February 1988,
target prices allegedly fixed before 25 July 1988,
target prices allegedly fixed on 18 October 1988,
target prices allegedly set at the meeting on 10 January 1989,
target prices for the Italian and Spanish markets allegedly set at the meeting on 7 February 1989,
target prices allegedly agreed on at the meeting of 19 April 1989,
fixing of the prices applicable in the United Kingdom from June 1989,
the agreement allegedly reached at the meeting of 11 July 1989 to carry forward to the fourth quarter of 1989, on the German market, the target prices for the third quarter of that year,
the decision allegedly adopted at the meeting of 12 December 1989 concerning the target prices to be achieved in the first quarter of 1990,
fixing of prices for category 2c on the French market, as revealed by the announcement of Unimetal during the meeting on 14 February 1990, fixing of the prices applicable in the United Kingdom in the second quarter of 1990,
fixing of the prices applicable in the United Kingdom in the third quarter of 1990 and
the expert economic report submitted by the applicants.

In paragraph 159 of the judgment, there is a salutary reminder of the way in which the Court is obliged to examine this evidence.]

159 Before examining individually the agreements and concerted practices detailed in the [Commission's] decision, it should be observed first of all that the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact (see the Opinion of Mr Vesterdorf, acting as Advocate-General, in case T-1/89, Rhone-Poulenc v Commission)

[Paragraphs 240 to 482 of the judgment are concerned with the legal analysis of the facts. For the most part, particularly in the discussion of price fixing and market sharing, rules peculiar to the ECSC Treaty are applied. However, in the discussion of information exchanges, the case law developed under the old Articles 85 and 86 of the EC Treaty is invoked. Paragraph 400 illustrates the point: it follows a reference to the special requirement that steel producers should cooperate with the Commission in certain ways.]

400 Subject to that reservation, and regard being had in particular to the fundamental principle of the [ECSC] Treaty that the competition to which it refers consists in the interplay on the market of the strengths and strategies of independent and opposed economic units, the Court finds that the Commission did not err in law in referring, at recital 271 of the decision, to certain decisions it had adopted under the EC Treaty in cases involving oligopolistic markets. With particular regard to the United Kingdom Agricultural Tractor Registration Exchange decision, it must be pointed out that both this court and the court of

justice have ruled that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders: Case T-35/92, John Deere v Commission, paragraph 51; and Case C-7/95P, John Deere v Commission, paragraphs 88 to 90. The Court considers that the same applies a fortiori where, as here, the information exchanged was the subject of regular discussions between the participating undertakings.

[Paragraphs 483 to 588 are concerned with the extent to which the Commission was involved in the infringements of which the applicant was accused. This is a pertinent point in the context of the peculiar interference of the Commission in the activities of the steel industry, particularly during the period of the "manifest crisis regime". Indeed, the court looked separately at the involvement of the Commission both during that period and afterwards. However, the court concluded, in paragraph 546, that there was "no evidence before this Court to suggest that the Commission encouraged or tolerated, on this occasion, the various forms of collusion of which the applicant was accused in the Decision"]

[Paragraphs 589 to 699 of the judgment are concerned with the applicant's allegations of the Commission's misuse of powers and, in particular, with the following matters, all of which should be noted by those making similar claims in future litigation:

- the statement of reasons in the Decision explaining the fine,
- the increase in the fine on account of re-offending,
- the criterion of turnover used in calculating the fine,
- the economic impact of the infringements,
- "aggravating circumstances",
- "extenuating circumstances",
- the duration of the infringement,
- the fine imposed on the applicant for its participation in the information-exchange systems,
- double application of the base rate used to fix the fine,
- the general level of the fines imposed in the Decision in comparison with other ECSC decisions of the Commission and with the provisions of Article 65(5) of the ECSC Treaty,
- a comparison between the fines imposed by the Decision and those imposed by the Cement decision and
- the Court's exercise of its unlimited jurisdiction.

Many of the applicant's arguments and Court's dicta in this section have a bearing on the appropriate line which parties faced with heavy fines may be well advised to follow. A selection from the paragraphs of this section of the Court's judgment is given below.]

592 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 for dealing with the circumstances of the case (see, for example, Case C-331/88, Fedesa et al, paragraph 24; Case T-143/89, Ferriere Nord v Commission, paragraph 68; and Case T-57/91, NALOO v Commission, paragraph 327).

593 The prosecution and punishment of infringements in competition matters are a legitimate objective of Community action ...

[In paragraph 613, the Court notes the applicant's point that, "at the press briefing on 16 February, 1994, Mr Van Miert [Commissioner for Competition Policy] recognised that, during the aftermath of the crisis regime, there could have been some ambiguity, and that the Commission's decision itself acknowledged, in recital 311, that there might have been misunderstandings about the operation of Article 65 of the [ECSC] Treaty during the crisis regime". The Court does not seem to have reacted to this point, except to the extent that it reviewed the "economic impact" of the infringements: see paragraph 660 below.]

[The following paragraphs refer to the increase in the fine on account of re-offending or "recidivism", as the Court calls it]

631 Recitals 305 and 306 of the Decision read as follows:

> The Commission press release of 2 May 1988 made at the time of the inspection in the Stainless Steel case leading to Decision 90/417/ECSC gave a clear warning that the Commission would not tolerate illegal arrangements organised by the industry. In addition, some of the undertakings involved (British Steel, Thyssen and Usinor Sacilor) were fined for their participation in the Stainless Steel flat products cartel in that Decision which was published in the Official Journal of the European Communities in August 1990 and was widely discussed in both the specialised and general press. The attitude of the Commission towards illegal agreements and concerted practices had therefore been clear from at least May 1988.

632 It appears from the answers given by the Commission during these proceedings that, in the case of the three undertakings mentioned in recital 306 (the applicant, Unimetal and Thyssen), the total amount of the basic fine, obtained by adding the sub-amounts for the various infringements listed in Article 1, was increased by one third by reason of the recidivist nature of those three undertakings' conduct, regard being had to the Stainless Steel case closed by decision of 18 July 1990.

633 The Court finds that recitals 305 and 306 of the Decision do not contain a sufficient statement of reasons to enable the undertakings in question to ascertain that their fine was thus increased on account of re-offending, to comprehend the size of that increase, or to ascertain the reasons for which the Commission considered that such an increase was justified.

634 Recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements. In this case, the only factor of this kind relates to the fact that the applicant was penalised by the Stainless Steel decision of 18 July 1990. Yet the greater part of the infringement period, from 30 June 1988 to the end of 1990, taken into account in the present case against the applicant, pre-dates the Stainless Steel decision.

635 It follows that, in so far as the increase in the fine imposed on the applicant, in particular, was based on the consideration that the Commission had already penalised it for similar infringements in the Stainless Steel decision, the Decision is vitiated by an error of law, since that fact cannot be taken into account as an aggravating circumstance in relation to infringements committed before the Stainless Steel decision was adopted.

640 Furthermore, the Decision makes no reference to the statement of objections in the Stainless Steel case. The reasons for a decision must appear in the actual

body of the decision and, save in exceptional circumstances, explanations given ex post facto cannot be taken into account: see, most recently, Case T-334/94, Sarrio v Commission, paragraph 350.

641 In any event, a statement of objections is, by its very nature, merely a preparatory act not in the nature of a decision and does not require the undertaking concerned to alter or reconsider its commercial practices: Case 60/81, IBM v Commission, paragraphs 17 to 19; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, Cimenteries CBR and Others v Commission, paragraph 34). Furthermore, the Commission has indicated before the Court neither the date nor the content of the statement of objections on which it relies.

642 It follows that Article 4 of the Decision must be annulled to the extent to which it imposed on the applicant an increase in the fine for the recidivist nature of its conduct.

[On the economic impact of the infringement, the following paragraph is important.]

660 The Court finds that, in recital 303 of the Decision, the Commission exaggerated the economic impact of the price-fixing agreements found here, as compared with the competition which would have existed had it not been for such infringements, having regard to the favourable economic climate and the latitude given to undertakings to conduct general discussions on price forecasts, between themselves and with DG III, in the context of meetings organised by DG III on a regular basis.

661 Taking those matters into account, the Court holds, in the exercise of its unlimited jurisdiction, that the fine imposed on the applicant for the various price-fixing agreements and concerted practices should be reduced by 15%. On the other hand, it finds that there are no grounds for granting such a reduction in relation to either the market-sharing agreements or the exchanges of information on orders and deliveries, to which the same considerations do not apply.

Court's Ruling

The Court: 1 Annuls Article 1 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding under Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as it finds that the applicant participated in an agreement to share the Italian market which lasted three months;

2 Sets the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at € 20,000,000;

3 Dismisses the remainder of the action;

4 Orders the applicant to bear its own costs and to pay half of the defendant's costs. The defendant shall bear half of its own costs. □