JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
6 April 1995 *

In Case T-152/89,

ILRO SpA, a company incorporated under Italian law, established in Lecco-Pescarenico (Italy), represented by Maurice Laredo, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Enrico Traversa, of its Legal Service, acting as Agent, and Alberto dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh, OJ 1989 L 260, p. 1),

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: H. Kirschner, President, C. W. Bellamy, B. Vesterdorf, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing from 14 to 18 June 1993,

gives the following

Judgment

Facts

1 This case concerns Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1989 L 260, p. 1) (hereinafter 'the Decision'), in which the Commission imposed a fine on 14 producers of welded steel mesh for having infringed Article 85(1) of the EEC Treaty. The product with which the contested Decision is concerned is welded steel mesh. It is a prefabricated reinforcement product made from smooth or ribbed cold-drawn reinforcing steel wires joined together by right-angle spot welding to form a network. It is used in almost all areas of reinforced concrete construction.

2 As from 1980 a number of agreements and practices, which gave rise to the Decision, came into being in that sector on the German, French and Benelux markets.

3 On 6 and 7 November 1985 Commission officials, acting under Article 14(3) 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, hereinafter 'Regulation No 17'), carried out simultaneous investigations without prior warning at the premises of seven undertakings and two associations, namely: Tréfilunion SA, Sotralentz SA, Tréfilarbed Luxembourg/Saarbrücken SARL, Ferriere Nord SpA (Pittini), Baustahlgewebe GmbH, Thibodraad en Bouwstaalprodukten BV, NV Bekaert, Syndicat National du Tréfilage d'Acier (STA) and Fachverband Betonstahlmatten eV; on 4 and 5 December 1985 they conducted other investigations at the premises of ILRO SpA, GB Martinelli, NV Usines Gustave Boël (Afdeling Trébos), Tréfileries de Fontaine-l'Evêque, Frère-Bourgeois Commerciale SA, Van Merksteijn Staalbouw SA and ZND Bouwstaal BV.

4 The evidence found in those investigations and the information obtained under Article 11 of Regulation No 17 led the Commission to conclude that between 1980 and 1985 the producers in question had infringed Article 85 of the Treaty through a series of agreements or concerted practices relating to delivery quotas for, and the prices of, welded steel mesh. The Commission initiated the procedure provided for in Article 3(1) of Regulation No 17 and, on 12 March 1987, a statement of objections was sent to the undertakings concerned, which replied to it. A hearing of their representatives took place on 23 and 24 November 1987.

5 At the end of that procedure the Commission adopted the Decision. According to the Decision (point 22), the restrictions of competition derived from a set of agreements or concerted practices fixing prices and delivery quotas and sharing markets

for welded steel mesh. Those agreements, according to the Decision, concerned different parts of the common market (the French, German or Benelux markets), but affected trade between Member States because undertakings established in various Member States participated in them. The Decision states that 'there was no general agreement between all manufacturers in all the Member States concerned, but rather a complex of different agreements, the parties to which were not always the same. Nevertheless, as a result of the regulation of the individual sub-markets this complex of agreements had the effect of producing far-reaching regulation of a substantial part of the common market'.

6 The operative part of the Decision is as follows:

'*Article 1*

Tréfilunion SA, Société Métallurgique de Normandie (SMN), Chiers-Châtillon-Gorcy (Tecnor), Société de Treillis et Panneaux Soudés, Sotralentz SA, Tréfilarbed SA, or Tréfilarbed Luxembourg/Saarbrücken SARL, Tréfileries Fontaine l'Évêque, Frère-Bourgeois Commerciale SA (now Steelinter SA), NV Usines Gustave Boël, Afdeling Trébos, Thibo Draad-en Bouwstaalprodukten BV (now Thibo Bouwstaal BV), Van Merksteijn Staalbouw BV, ZND Bouwstaal BV, Baustahlgewebe GmbH, ILRO SpA, Ferriere Nord SpA (Pittini), and GB Martinelli fu GB Metallurgica SpA have infringed Article 85(1) of the EEC Treaty by participating from 27 May 1980 until 5 November 1985 on one or more occasions in one or more agreements or concerted practices (hereinafter referred to as "agreements") consisting in the fixing of selling prices, the restricting of sales, the sharing of markets and in measures to implement these agreements and to monitor their operation.

Article 2

The undertakings named in Article 1 which are still involved in the welded steel mesh sector in the Community shall forthwith bring the said infringements to an end (if they have not already done so) and shall henceforth refrain in relation to their welded steel mesh operations from any agreement or concerted practice which may have the same or similar object or effect.

Article 3

The following fines are hereby imposed on the undertakings named below in respect of the infringements found in Article 1:

1. Tréfilunion SA (TU): a fine of ECU 1 375 000;

2. Société Métallurgique de Normandie (SMN): a fine of ECU 50 000;

3. Société des Treillis et Panneaux Soudés (STPS): a fine of ECU 150 000;

4. Sotralentz SA: a fine of ECU 228 000;

5. Tréfilarbed Luxembourg/Saarbrücken SARL: a fine of ECU 1 143 000;

6. Steelinter SA: a fine ECU 315 000;

7. NV Usines Gustave Boël, Afdeling Trébos: a fine of ECU 550 000;

8. Thibo Bouwstaal BV: a fine of ECU 420 000;

9. Van Merksteijn Staalbouw BV: a fine of ECU 375 000;

10. ZND Bouwstaal BV: a fine of ECU 42 000;

11. Baustahlgewebe GmbH (BStG): a fine of ECU 4 500 000;

12. ILRO SpA: a fine of ECU 13 000;

13. Ferriere Nord SpA (Pittini): a fine of ECU 320 000;

14. GB Martinelli fu GB Metallurgica SpA: a fine of ECU 20 000.

Articles 4 and 5 (omissis)'

Procedure

7 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 30 October 1989, ILRO SpA (hereinafter 'ILRO') brought the present action for the annulment of the Decision. Ten of the thirteen other addressees of that Decision also brought an action.

8 By orders of 15 November 1989 the Court of Justice assigned this case and the ten other cases to the Court of First Instance pursuant to Article 14 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1). Those actions were registered under numbers T-141/89 to T-145/89, and T-147/89 to T-152/89.

9 By order of 13 October 1992 the Court of First Instance ordered that, on account of the connection between the above cases, they should be joined for the purposes of the oral procedure, pursuant to Article 50 of the Rules of Procedure.

10 By letters lodged at the Registry of the Court of First Instance between 22 April 1993 and 7 May 1993 the parties replied to the questions put to them by the Court.

11 Having regard to the replies to those questions and upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry.

12 The parties presented oral argument and answered questions put to them by the Court at the hearing which took place from 14 to 18 June 1993.

Forms of order sought

13 The applicant claims that the Court should:

— annul the Decision, with all the legal consequences.

14 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

15 The Court notes that the Decision (points 23, 51, 159 and 160) alleges that the applicant participated in two sets of agreements concerning the French market. Those agreements are said to have involved the French producers (Tréfilunion, STPS, SMN, CCG and Sotralentz) and the foreign producers operating on the French market (ILRO, Ferriere Nord, Martinelli, Boël/Trebos, Tréfileries de Fontaine l'Évêque (TFE), Frère-Bourgeois Commerciale (FBC) and Tréfilarbed) and were intended to determine prices and quotas in order to limit imports of welded steel mesh into France, and to set up an exchange of information. The first set of agreements in which the applicant allegedly participated is said to have been implemented between April 1981 and March 1982. The applicant is alleged to have participated in the second set of agreements between the beginning of 1983 and May 1984 (point 70 of the Decision). That second set of agreements is alleged to have been formalized by the adoption of a 'protocole d'accord' in October 1983.

Arguments of the parties

6 The applicant, which admits having participated in the meetings concerning the agreements, puts forward three arguments to show that the Commission is wrong to infer from its participation in the meetings that it participated in the agreements.

7 First, it claims that it attended only some of the meetings, at which it confined itself to gathering information concerning the state of the market and the production of the various participants.

8 Secondly, the applicant claims that, in the marketplace, it never observed the decisions adopted at the meetings regarding either its prices or its deliveries. In that connection, it refers, for the period 1981-1982, to a telex of 15 March 1982 (point 40 of the Decision), sent by Mr Castelnuovo of Boël/Trébos to Mr Pittini of Ferriere Nord, according to which 'Mr Montanelli of ILRO is selling in France ... fairly large quantities of mesh at prices well below those agreed in the context of the Franco-Belgian-Italian agreement of early 1981' and to an opinion of the French Competition Commission of 20 June 1985 according to which 'foreign producers (for example, ILRO) and certain independent companies (for example, Sotralentz) then began to undercut the subsidiaries of the steel groups and considerably to increase their share of the national market (which rose from 29% in December 1981 to 41% in February 1982)'.

9 Thirdly, it states that, although it took part in the meetings, it did so because it was constrained to do so under threat of withdrawal of certification of its products by the French authorities, at the request of its French competitors, as is apparent from the fact that, on 4 December 1985, the Commission brought an action before the Court of Justice against the French Republic for removal of the barriers placed in the way of imports of ILRO products into France.

20 The applicant concludes that since, it did not sign the agreements and always refused to conform with the directions issued under them, it cannot be accused of having infringed Article 85(1) of the Treaty.

21 The Commission observes that the applicant admitted its participation in the meetings concerning the agreements and does not deny their anti-competitive aim.

22 It adds that the documents mentioned in the Decision are sufficient to establish that the applicant took an active part both in the formation and in the implementation of the agreements. ILRO did not merely follow the initiatives taken by the other producers but also directly negotiated the Italian 'penetration quotas' and the price levels to be observed on the French market. The fact that ILRO sometimes deviated slightly from the decisions adopted in the context of the agreements, far from showing that it did not participate in them, proves, on the contrary, that it was fully implicated in them.

Findings of the Court

23 The Court notes that the applicant has admitted participating in the meetings concerning the agreements and does not deny their purpose, namely to fix prices and quotas. It is therefore necessary to consider whether the arguments put forward by the applicant may in fact show that the Commission was wrong to infer from its participation in the meetings that it participated in the agreements.

24 It must first be observed that, at those meetings, the applicant did not confine itself to gathering market information but, in some of them, took an active part. At a meeting on 4 January 1983 in Milan, Italy, Mr Montanelli, ILRO's representative, stated that he 'wished to conclude a new agreement and stated he would enter into commitments on behalf of ILRO and Pittini' (Ferriere Nord), considering that 'a

desirable price of welded mesh on the French market would be, on the basis of a wire rod price of FF 1 725, FF 2 625, giving FF 900 for value added and transport', as is shown by the note of the meeting held at Tréfilunion (point 52 of the Decision). Similarly, at a meeting of 23 February 1983, at which agreement was reached on the sharing of quotas (61% for the French integrated producers, 19% for the French non-integrated producers, 3% for Belgium, 7% for Germany, 10% for Italy), and on two successive price increases (FF 200 to 300 as from April 1983, FF 300 for July), Mr Montanelli stated that 'if an overall agreement is not achieved by 10 March at the latest, no commitment as to FF 700 can be given for April', as is shown by two notes by Mr Cattapan concerning that meeting (point 53 of the Decision) and a note by Mr Haller, the representative of CCG (point 54 of the Decision).

25 Furthermore, even if it were assumed that the applicant did not take as active a part at the meetings as the other producers, the Court considers that, in view of the manifestly anti-competitive purpose of the meetings, the applicant, by taking part without publicly distancing itself from what occurred at them, gave the impression to the other participants that it subscribed to the results of the meetings and would act in conformity with them.

26 It must be pointed out that, at the meeting held in Paris on 1 April 1981, attended by the applicant and the French, Italian and Belgian producers, it was agreed that, for a period of 12 months from April 1981, the Italian producers would have a quota of 32 000 to 33 000 tonnes, of which 24 000 to 25 000 would be for the applicant. That meeting fixed the prices for the various kinds of welded mesh, the rebates, the penetration premiums and the various procedures for exchanging information. That is apparent from the telex dated 9 April 1981 from Italmet, the agent in France for Ferriere Nord and Martinelli, to Martinelli (point 33 of the Decision), from the memorandum dated 9 April 1981 (point 34 of the Decision) by Mr Marie, the director of Tréfilunion's welded mesh division and President of the Association Technique pour le Développement de l'Emploi du Treillis Soudé from 1983, and from the Tréfilunion table headed 'Imports of welded mesh from Italy' (point 35 of the Decision).

27 Consequently, the applicant cannot in this case base any defence on the attitude taken by it at the meetings.

28 It must be emphasized, secondly, that the applicant participated in the implementation of the agreements. For the period 1983-1984, various documents (points 64 and 65 of the Decision) indicate the deliveries and market shares month by month for each of the undertakings that signed the protocol of agreement of October 1983. The fact that the figures in those documents relating to the applicant correspond to the content of the protocol of agreement is sufficient to prove that the applicant participated in its implementation over the relevant period.

29 The Court notes that the Commission relies on two pieces of evidence to show that the applicant participated in the implementation of the agreements in force in the period 1981-1982. They are two notes from Ferriere Nord (points 37 and 38 of the Decision) concerning meetings of 20 October 1981 and 18 February 1982 attended by, among others, the applicant, from which it appears that those present were satisfied with the implementation of the agreements.

30 The two pieces of evidence produced by the applicant are not such as to overturn those produced by the Commission regarding the period preceding the beginning of 1982. The telex dated 15 March 1982 from Boël/Trébos to Ferriere Nord (point 40 of the Decision) shows that, in the months or weeks prior to that date, the applicant no longer observed the agreements, whereas the opinion of the French Competition Commission shows that, from January 1982, the applicant 'began' undercutting and increasing its share of the national market, which indicates that the French Competition Commission considered that the applicant had been observing prices and quotas before that date.

31 It follows that the Commission has established to the requisite legal standard that, until the beginning of 1982, the applicant participated in the implementation of the agreements in force over the period 1981-1982.

32 The fact that the applicant ceased observing the prices and quotas agreed on at the meetings during the first months of 1982 does not exonerate it. The Court of Justice has held that there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market (Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45).

33 Thirdly, it must be pointed out that the applicant's fears of suffering retaliation from its competitors and the French authorities cannot justify its participation in agreements whose purpose was to restrict competition. Even if its fears were founded, the applicant could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the agreements at issue (see Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 128).

34 It follows that, as found in the Decision, by participating in agreements which were intended to restrict competition within the Common Market and were liable to affect trade between Member States, the applicant infringed Article 85(1) of the Treaty.

35 The application must therefore be dismissed.

Costs

36 Under Article 87 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Since the applicant has been unsuccessful and the Commission has applied for an order for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Kirschner Bellamy Vesterdorf

García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 6 April 1995.

H. Jung H. Kirschner

Registrar President