# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
20 March 2002 *

In Case T-15/99,

**Brugg Rohrsysteme GmbH**, established in Wunstorf (Germany), represented by T. Jestaedt, H.-C. Salger and M. Sura, lawyers, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by W. Mölls and É. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1) or, in the alternative, for reduction of the fine imposed on the applicant by that decision,

* Language of the case: German.

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,
Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 23 October 2000,

gives the following

## Judgment [1]

### Facts of the case

1 The applicant is a German company operating in the district heating sector and marketing pre-insulated pipes.

2 to 7 ...

1 — Only the grounds of the judgment which the Court considers it appropriate to publish are reproduced here. The factual and legal background to the present case is set out in the judgment of the Court of First Instance of 20 March 2002 in Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705.

8 On 21 October 1998, the Commission adopted Decision 1999/60/EC relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691.E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), corrected before publication by a decision of 6 November 1998 (C(1998) 3415 final) ('the decision' or 'the contested decision') finding that various undertakings and, in particular, the applicant had participated in a series of agreements and concerted practices within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC) (hereinafter 'the cartel').

9 According to the decision, at the end of 1990 an agreement was reached between the four Danish producers of district heating pipes on the principle of general cooperation on their domestic market. The parties to the agreement were ABB IC Møller A/S, the Danish subsidiary of the Swiss/Swedish group ABB Asea Brown Boveri Ltd ('ABB'), Dansk Rørindustri A/S, also known as Starpipe ('Dansk Rørindustri'), Løgstør Rør A/S ('Løgstør') and Tarco Energi A/S ('Tarco') (the four together being hereinafter referred to as 'the Danish producers'). One of the first measures was to coordinate a price increase both for the Danish market and for the export markets. For the purpose of sharing the Danish market, quotas were agreed upon and then implemented and monitored by a 'contact group' consisting of the sales managers of the undertakings concerned. For each commercial project ('project'), the undertaking to which the contact group had assigned the project informed the other participants of the price it intended to quote and they then submitted tenders at a higher price in order to protect the supplier designated by the cartel.

10 According to the decision, two German producers, the Henss/Isoplus group and Pan-Isovit GmbH, joined in the regular meetings of the Danish producers from the autumn of 1991. In these meetings negotiations took place with a view to sharing the German market. In August 1993, these negotiations led to agreements fixing sales quotas for each participating undertaking.

11 Still according to the decision, an agreement was reached between all these producers in 1994 to fix quotas for the whole of the European market. This European cartel involved a two-tier structure. The 'directors' club', consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each of these undertakings both in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, 'contact groups' consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 With regard to the German market, the decision states that following a meeting between the six main European producers (ABB, Dansk Rørindustri, Henss/Isoplus, Løgstør, Pan-Isovit and Tarco) and Brugg Rohrsysteme GmbH ('Brugg') on 18 August 1994, a first meeting of the contact group for Germany was held on 7 October 1994. Meetings of this group continued long after the Commission carried out its investigations at the end of June 1995 although, from that time on, they were held outside the European Union, in Zurich. The Zurich meetings continued until 25 March 1996.

13 As a characteristic feature of the cartel, the decision refers in particular to the adoption and implementation of concerted measures to eliminate Powerpipe, the only major undertaking which was not a member. The Commission states that certain members of the cartel recruited key employees of Powerpipe and gave Powerpipe to understand that it should withdraw from the German market. Following the award to Powerpipe of an important German project, a meeting took place in Düsseldorf in March 1995 which was attended by the six major producers and Brugg. According to the Commission, it was decided at that meeting to organise a collective boycott of Powerpipe's customers and suppliers. The boycott was subsequently implemented.

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end

of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

15 On those grounds, the operative part of the decision is as follows:

'*Article 1*

ABB Asea Brown Boveri Ltd, Brugg Rohrsysteme GmbH, Dansk Rørindustri A/S, Henss/Isoplus Group, Ke-Kelit Kunststoffwerk Ges mbH, Oy KWH Tech AB, Løgstør Rør A/S, Pan-Isovit GmbH, Sigma Tecnologie Di Rivestimento S. r. l. and Tarco Energie A/S have infringed Article 85(1) of the Treaty by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the pre-insulated pipes sector which originated in about November/December 1990 among the four Danish producers, was subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market.

The duration of the infringements was as follows:

...

— in the case of Brugg from about August 1994 up to [at least March or April 1996],

...

The principal characteristics of the infringement consisted in:

— dividing national markets and eventually the whole European market amongst themselves on the basis of quotas,

— allocating national markets to particular producers and arranging the withdrawal of other producers,

— agreeing prices for the product and for individual projects,

— allocating individual projects to designated producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question,

— in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to

hinder its commercial activity, damage its business or drive it out of the market altogether.

...

*Article 3*

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

...

(b) Brugg Rohrsysteme GmbH, a fine of ECU 925 000;

...'

16 to 22 ...

## Substance

23 The applicant relies in essence on four pleas in law. The first plea alleges errors of fact in applying Article 85(1) of the Treaty. The second plea alleges infringement of the rights of defence. The third plea in law alleges infringement of general principles and errors of fact in determining the amount of the fine. The fourth plea alleges breach of the obligation to state reasons in determining the amount of the fine.

*First plea in law, alleges errors of fact in applying Article 85(1) of the Treaty*

24 The applicant claims that the Commission made errors of fact in applying Article 85(1) of the Treaty in regard, first, to the duration of its participation in the infringement, second, to its alleged participation on the concerted action against Powerpipe and, third, to its alleged participation in a cartel at Community level.

The duration of the infringement in respect of which the applicant is criticised

— Arguments of the parties

25 According to the applicant, the Commission exaggerated the duration of the infringement in its case in determining that its participation in the cartel began on 18 August 1994 and did not cease until March or April 1996.

26 First, it cannot have begun to participate in the cartel on 18 August 1994, on which date it participated in Copenhagen in a meeting of directors which took place on the occasion of a meeting of the trade association 'European Heating Pipe Manufacturers Association' ('EuHP').

27 The applicant was not officially invited to that meeting but attended, at the instigation of Mr Henss, in order to learn of the possibility of becoming a member of the association. The topics dealt with at that meeting did not interest the applicant and it did not attend continuously. Contrary to what the Commission believes, there was no discussion of proposals to raise prices in Germany or of drawing up a common price list, or at least not in the applicant's presence. It was only at the meeting that it learnt that there was cooperation in the German market between the other producers and that it was required to join in.

28 Furthermore, the fact that it did not take part in the contact group meetings held immediately after the meeting of 18 August 1994, and did not participate in those meetings until after 7 December 1994, shows that its participation in the cartel did not commence with its presence at the meeting of 18 August 1994. The assertion in point 61 of the decision that 'KWH and Brugg were not present at the meeting of 16 November [1994] but, since ABB was optimistic that they could be accommodated in the scheme, it was mandated by the cartel to work out a final agreement with these two producers' shows at the date of the meeting of 16 November 1994 that the applicant had not yet joined the cartel. Furthermore, contrary to what is stated in the decision, the applicant was not present at the meeting of 7 October 1994.

29 As regards the end of the infringement, the applicant had already ceased its participation on 25 February 1996, the date on which the last meeting in which it participated was held in Zurich.

30 The defendant observes that the meeting of 18 August 1994 must be taken as marking the beginning of the applicant's participation in the infringement. In the applicant's reply of 9 August 1996 to the request for information of 9 July 1996 ('the applicant's reply'), the applicant referred to the meeting in question among the meetings at which matters related to competition had been discussed. The applicant's entry into the cartel was complete, at any event in principle, after it participated in the meeting of 18 August 1994 without expressing its disagreement, although there was still some doubt as to the place it would occupy in the European cartel which was under construction.

31 As regards the end of the infringement, the defendant observes that the applicant itself confirmed, both during the administrative procedure and in the application, that it again participated in a meeting on 25 March 1996.

— Findings of the Court

32 The applicant does not deny having been present at a meeting of the cartel in Copenhagen on 18 August 1994.

33 As regards the objective of that meeting, it should be noted at the outset that, according to Tarco, there existed within the cartel a list of prices to be applied when submitting tenders which was communicated, probably in May 1994, by the coordinator of the cartel (Tarco's reply of 31 May 1996 to the request for information of 13 March 1996). In the letter of invitation to that meeting, sent on 10 June 1994 to Mr Henss and to the directors of ABB, Dansk Rørindustri, Løgstør, Pan-Isovit and Tarco (annex 56 to the statement of objections), the coordinator of the cartel stated: 'Since the list of 9 May 1994 is incomplete as regards certain items and the comparisons of tenders have thus led to confrontations and to significant differences in interpretation, I complete the missing items by the enclosed list'. In the light of ABB's reply of 4 June 1996 to

the request for information of 13 March 1996 ('ABB's reply'), to the effect that there was a price list which, following a meeting of 3 May 1994 in Hanover, was to be used for all deliveries to German suppliers, it must be concluded that when the meeting of 18 August 1994 was arranged it was envisaged that the discussion of that price list, which had already begun to be applied, albeit not without problems, would continue.

34 Furthermore, according to ABB's reply, certain measures designed to 'improve' price levels in Germany were discussed at the meeting of 18 August 1994. According to ABB, those measures may have included providing new price lists to the coordinator of the cartel for the purpose of drawing up a new common price list and also an agreement under which rebates on the prices in the common list would not exceed a maximum fixed before the end of 1994 and under which the prices on that list would be mandatory from 1 January 1995, although, on the last point, the agreement may also have been concluded at a subsequent meeting (ABB's reply). Although ABB's account of what occurred at the meeting of 18 August 1994 is not confirmed by other participants in the cartel, it must be held, having regard to the conclusions that must be drawn from the invitation to that meeting, that the discussions on 18 August 1994 completed if they did not confirm the common price list drawn up in May 1994.

35 As regards the applicant's participation, the latter acknowledged in its reply that it was involved at the meeting of 18 August 1994 in a discussion about the situation of competition in the market in question (applicant's reply, annex 2). In its application, it acknowledges that on that occasion, although it was not present throughout the whole meeting, it was clear that there was close cooperation on the Danish and German markets of such a kind as to endanger the survival of its business if it did not participate.

36 In that regard, the fact that the applicant was not formally invited to the meeting of 18 August 1994, but attended at the initiative of Mr Henss, is irrelevant. Nor

can the applicant maintain that it expected a discussion on technical standards. It stated in its reply that it took part in that meeting on the basis of contacts during which cooperation between competitors capable of having repercussions for the applicant was discussed. Furthermore, the applicant stated in its observations on the statement of objections that Mr Henss had advised it to participate in the meeting in order to form an idea of its participation in the EuHP and also to have an insight into the situation of the market and of the competitors present. It follows that, even if its principal aim in participating in the meeting was to join the EuHP, the applicant attended in the knowledge that the discussions within that meeting would go beyond the activities associated with the drafting of technical standards that is one of the objectives of the EuHP.

37 Since at the meeting in question the applicant became aware that there was close cooperation in the Danish and German markets, it must have been aware, at least, that the other participants were involved in a discussion of a common price list for the German market.

38 Where an undertaking participates, even if not actively, in a meeting between undertakings having an anti-competitive objective and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meeting and will act in conformity with them, it may be concluded that it is participating in the restrictive arrangements resulting from that meeting (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98, and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 85 and 86).

39 Clearly, the applicant, after becoming aware of the existence of cooperation in the Danish and German markets, did not distance itself from the anti-competitive content of the meeting. On the contrary, the fact that it was subsequently

allocated a quota for the German market shows that, following its participation in the meeting of 18 August 1994, it was regarded by the other participants in the cartel as an undertaking that must be included in the market-sharing arrangement.

40 The decision does not lend itself to a different interpretation where it refers to Løgstør's statement that ABB reported at a meeting held on 16 November 1994 that there was still no agreement with Brugg and Oy KWH Tech AB ('KWH'), but that ABB hoped that an accommodation could be found (Løgstør's observations on the statement of objections). Løgstør is referring to the process of negotiating the agreement to share the European market, during which Brugg demanded a quota of 2% on the European market and 4% on the German market. Concerning those negotiations, it is stated, still in Løgstør's observations, concerning the fact that an agreement had not been concluded at a meeting of 30 September 1994, that 'an agreement assumed the participation of KWH and Brugg'. That confirms that the applicant was regarded, following its participation in the discussion on prices, as participating in the agreement, even though at the time the negotiations to supplement the agreement on prices by a market-sharing agreement had not yet been completed.

41 Nor, since the applicant's participation in the cartel that existed between the other participants in the meeting of 18 August 1994 is sufficiently evident from its presence at that meeting, does it matter that the applicant did not immediately participate in the meetings of the German contact group.

42 As regards the end of the applicant's participation in the infringement in question, it is sufficient to state that the applicant confirmed at the hearing the information communicated in annex 2 to its reply, namely that it again participated in a meeting of the German contact group on 25 March 1996.

43 Consequently, the Commission was correct to find that the applicant participated in the infringement from about August 1994 up to March or April 1996.

44 to 66 ...

The applicant's participation in a cartel at Community level

— Arguments of the parties

67 The applicant complains that the Commission was wrong to conclude that it took part in a general cartel covering the whole common market. It points out that it only operated on the German market. Thus, it did not participate in the directors' club, but only in meetings of the German contact group. When it first participated in those meetings, the quota-sharing had already been fixed. The applicant maintains that it is clear from all the above that it was not aware that there was a cartel covering the whole common market.

68 In its reply, the applicant disputes the fact that, in addition to the quota of 4% for the German market, it was also allocated its own European quota. Nor could it have done anything with such a quota since, as far as the pipes in question were concerned, it was a retailer only on the German market. The figure of 2% of the European market resulted only indirectly, from the conversion of the German quota to the European market.

69 The defendant contends that the applicant's activities on the German market did not constitute a separate infringement but formed part of a European cartel. It knew that quotas in the national markets were decided by the directors' club. The applicant did not just have a quota of 4% for Germany, it also had a quota of 2% in relation to the European market.

70 As regards the applicant's assertion that it was not allocated its own European quota, the defendant observes that the applicant is thus disputing for the first time, in its reply, an accusation already mentioned both in the statement of objections and in the decision. In any event, the applicant cannot maintain that such a quota would have been of no use to it when it also sold the products concerned on the Danish market and had already shown an interest in obtaining assurances outside the German market, in particular an assurance that there would be no new competitors in Switzerland.

— Findings of the Court

71 It is not disputed that the applicant participated in the cartel operating on the German market and that it participated on a regular basis in the meetings of the contact group for that market.

72 Furthermore, the applicant acknowledges that the meetings of the German contact group formed part of a global cartel organised within the directors' club, whose members fixed quotas on the various national markets and agreed general prices increases for all the participants.

73 It must be borne in mind that an undertaking which has participated in a single complex infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 203).

74 The applicant does not deny having attended the meeting on 18 August 1994 in Copenhagen, at which it came clear that there was cooperation on the Danish and German markets such that it would be dangerous for the survival of its undertaking not to participate. Furthermore, the applicant acknowledged in its reply that ABB had informed it that the 'European meeting' had fixed its quota and that there was still a problem in regard to a European compensation mechanism, since Dansk Rørindustri's deliveries to the applicant had to be imputed to Dansk Rørindustri's quota. It follows that the applicant was aware, when it participated, that its quota on the German market formed part of a market-sharing arrangement organised by the producers at European level.

75 In those circumstances, the Commission was correct to accuse the applicant of participating in the general cartel covering the whole common market, while at the same time accepting that it acted mainly on the German market.

76 Accordingly, there is no need for the Court to adjudicate on whether the applicant had a quota for the European market. Even if the applicant was allocated a quota only on the German market, that would not in any way affect

the conclusion that it was aware of the fact that its quota on the German market formed part of a market-sharing arrangement organised on a Community scale.

77 It follows that the applicant's plea in law must also be rejected as regards the objection concerning its participation in a cartel on a Community scale.

78 The first plea in law is therefore rejected in its entirety.

79 to 218 ...

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

**1. Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung

Registrar

P. Mengozzi

President