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

In Case T-144/89,

Cockerill Sambre, formerly Steelinter SA, a company incorporated under Belgian law, established in Brussels, represented by Michel Waelbroeck and Alexandre Vandencasteele, of the Brussels 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 Norbert Koch, Enrico Traversa and Julian Currall, of its Legal Service, acting as Agents, and Nicole Coutrelis and André Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

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),

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.

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.

For the German market, on 31 May 1983 the Federal Cartel Office granted authorization for the establishment of a structural crisis cartel of German producers of welded steel mesh, which, after being renewed once, expired in 1988. The purpose of the cartel was to reduce capacity; it also provided for delivery quotas and price fixing, the latter being authorized, however, only for the first two years of its operation (points 126 and 127 of the Decision).

On 20 June 1985, the French Competition Commission issued a notice concerning the competitive situation on the welded steel mesh market in France, which was followed by Decision No 85 — 6 DC of 3 September 1985 of the French Minister for the Economy, Finance and Budget, imposing fines on a number of French companies for taking action and engaging in practices whose object or effect was to restrict or distort competition and hamper the normal functioning of the market in the period 1982 to 1984.

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.

6 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.

7 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'.

8 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)'

9 According to the Decision (points 14 and 195(e)), Tréfileries de Fontaine l'Evêque (TFE) is a production unit belonging to the Cockerill-Sambre group. Another undertaking in that group is Frère-Bourgeois Commerciale SA (FBC), which markets the welded steel mesh manufactured by TFE. The Decision adds that, as from 1 April 1986, FBC was renamed Steelinter SA, the company which brought this action. By document of 30 December 1989, Cockerill Sambre gave notice of its intention to put Steelinter into voluntary liquidation. Following that decision, Cockerill Sambre gave formal notice that it wished to continue the proceedings commenced by Steelinter. The applicant will therefore be referred to as either FBC or TFE.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 18 October 1989, the applicant brought the present action for the annulment of the Decision. Ten of the thirteen other addressees of that Decision also brought an action.

11 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.

12 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.

13 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.

14 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.

15 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

16 The applicant claims that the Court should:

— annul the Decision and order the Commission to pay the costs;

in the alternative:

— annul Article 3 of the Decision, in so far as it imposes on the applicant a fine of ECU 315 000 or, at least, reduce the fine to a token amount and, in any event, order the Commission to pay the costs.

17 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

18 The applicant puts forward, essentially, two pleas in law in support of its application. The first alleges infringement of Article 85(1) of the Treaty and the second infringement of Article 15(2) of Regulation No 17.

The plea as to infringement of Article 85(1) of the Treaty: the evidence of the agreements

I — *In the French market*

A — *For the period 1981-1982*

The contested measure

19 The Decision (points 23 to 50 and point 159) censures the applicant for participating, between April 1981 and March 1982, in a first set of agreements on the French market. Those agreements involved, first, the French producers (Tréfilunion, STPS, SMN, CCG and Sotralentz) and, secondly, the foreign undertakings operating in the French market (ILRO, Ferriere Nord, Martinelli, Boël/Trébos, TFE, FBC and Tréfilarbed). Their object was to set prices and quotas with a view to limiting imports of welded steel mesh into France.

Arguments of the parties

20 The applicant maintains that the Commission has not proved its participation in any meetings or agreements. It claims that it had no interest in participating in any agreement sharing the French market since its plant was not able to manufacture products conforming to standard French specifications and that it was not until 1982 that, thanks to a substantial increase in prices in France which enabled it to

become competitive despite its inappropriate plant, it succeeded in increasing its sales there.

21 It states that the fact that a quota had, without its knowledge, been allocated to it in a note of 23 October 1981 (annex 1 to the statement of objections, point 48 of the Decision) has no probative force since, if a quota arrangement is to operate in practice, even the undertakings that do not subscribe to it have to have a fixed quota allocated to them. It also challenges the evidential value of the document, since it came from a third-party undertaking. Finally, it claims that the quota allocated to it did not reflect the true economic situation since, as is apparent from the document in question, its deliveries fell far short of the quota allocated (58 tonnes instead of 4 000).

22 The applicant also considers that the Commission cannot use against it a handwritten note concerning the meeting held in Paris on 1 April 1981 (annex 25 to the statement of objections), since point 49 of the Decision, which refers to it, begins with the words 'As regards Usines Gustave Boël ...'. It adds that that note does not refer expressly to it but to 'Charleroi' and that, even if it could be regarded as having the same identity as 'Charleroi', the note in question cannot constitute proof of the fact that the meeting took place, its subject-matter, or the fact that the applicant took part, any more than that any agreement was concluded. Finally, it observes that the note indicates that the volume of 8 000 tonnes for the Belgian producers was 'already negotiated', and that, accordingly, there was no reason to discuss quotas if an agreement already existed.

23 The Commission replies that the quota of 4 000 tonnes allocated to the applicant is not a 'notional' quota granted unilaterally and in the abstract merely for account-

ing purposes and that it is apparent from the note of 23 October 1981 that the Belgian producers' share was indeed included 'in the latest arrangements'.

24 With regard to point 49 of the Decision, the Commission considers that, whilst the fact that it starts with a reference to another undertaking can be regarded as technically defective drafting, that defect does not mean that it, and the note to which it refers, cannot be relied on as against the applicant. The Commission also points out that it is clear that the reference to 'Charleroi' is a reference to the applicant since the latter's registered office is at Charleroi and, in everyday language, it is common to identify an undertaking by the name of the place where it is established. Finally, the Commission observes that the fact that the quotas had already been negotiated does not mean that the meeting did not deal with other matters, such as practical operational aspects or the sharing of quotas.

Findings of the Court

25 The Court considers that it may be concluded from the documents produced by the Commission that the applicant participated in the agreements on the French market in 1981 and 1982. It is clear from the Ferriere Nord note (annex 25 to the statement of objections, point 49 of the Decision), concerning a meeting held in Paris on 1 April 1981 between the French, Italian and Belgian producers, that at that time a volume of 8 000 tonnes had 'already' been 'negotiated' for the Belgian producers. As regards the Commission's use of that document, the applicant cannot contest the identification with it of the reference to 'Charleroi'. In everyday language it is common to refer to a legal person or institution by the name of the place where it is established or the building which it occupies. Moreover, the applicant cannot claim that point 49 of the Decision and the document mentioned in it cannot be used against it. Even if the wording of the Decision is not the most appropriate, it must be borne in mind that that note was disclosed to the applicant, which implies that the Commission regards it as evidence used against the applicant. Finally, as regards the scope of the term 'already negotiated', it must be emphasized, as the Commission rightly did, that a meeting of that kind can deal

with a wide variety of matters, besides the negotiation of quotas, and, therefore, the applicant's conclusion that there was no reason to discuss quotas is irrelevant.

26 Another note, dated 23 October 1981, from Tréfilunion (annex 1 to the statement of objections, points 46 and 48 of the Decision) also shows that, according to the 'recent agreement', the quota of the other Belgian producer was 4 000 tonnes.

27 The Commission was therefore right to infer from those two documents that the applicant was granted a quota of 4 000 tonnes as a result of the agreements concluded, prompting Tréfilarbed, according to the second document, to complain that they reserved 'too good a share for the Italian and Belgian producers'.

28 As regards the argument that the applicant's deliveries fell far short of its supposed quota, it must be pointed out that a quota involves a prohibition of delivering certain quantities, not an obligation to deliver them. That is why it is possible to negotiate a quota in the hope of being able to use it up entirely, even if circumstances make it impossible to do so. It must be pointed out that, although the applicant declared that it had no interest in participating in the agreements on the French market, it admitted that a substantial increase in prices enabled it to increase its sales since, at those prices, it was competitive. That shows that it had an interest in participating in an agreement and explains why it was unable to use up the quota that it had negotiated in the hope that an increase in prices would enable it to be competitive and make full use of that quota.

29 In view of all the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard the applicant's participation in the agreements whose object was to fix prices and quotas on the French market during the period 1981-1982.

30 The applicant's complaint must therefore be rejected.

B — *For the period 1983-1984*

The contested measure

31 The Decision (points 51 to 76 and 160) censures the applicant for having participated in a second series of agreements involving, on the one hand, the French producers (Tréfilunion, STPS, SMN, CCG and Sotralentz) and, on the other, the foreign producers operating in the French market (ILRO, Ferriere Nord, Martinelli, Boël/Trébos, TFE, FBC and Tréfilarbed). The purpose of those agreements was to fix prices and quotas with a view to limiting imports of welded steel mesh into France. That set of agreements was put into effect between the start of 1983 and the end of 1984 and was formalized by the adoption on 14 October 1983 of a 'protocol of agreement' concluded for the period 1 July 1983 to 31 December 1984. That protocol recorded the results of the various negotiations between the French, Italian and Belgian producers and Arbed concerning the quotas and prices to be applied on the French market and fixed the quotas of Belgium, Italy and Germany as 13.95% of consumption on the French market 'under an agreement between those producers and the French industry'. The applicant is said not to have observed those agreements after June 1984 (point 76 of the Decision).

Arguments of the parties

32 The applicant maintains that it took no part in any agreements on the French market in 1983-1984.

33 It claims that the telex of 24 May 1983 mentioned in point 55 of the Decision was not disclosed to it and cannot therefore be used against it. It adds that, in any event, that document proves not the existence of an agreement but the non-existence of an agreement since it states that 'the agreement ... is virtually secured', which does not mean that it was in fact secured.

34 The applicant considers that the protocol of agreement of October 1983 does not contain any actual agreements but rather a list of agreements to be entered into. There is in its view no evidence of the existence of the agreement provided for by that protocol and still less of any participation in it by the applicant.

35 Moreover, according to the applicant, the documents containing its delivery statistics and market shares (annexes 41 and 42 to the statement of objections, point 62 of the Decision) give no indication that it participated in the protocol of agreement. It states that it gratuitously provided to the Association Technique pour le Développement de l'Emploi du Treillis Soudé ('ADETS') its figures for exports to France for statistical purposes. It states that those tables contain columns indicating penalties and carry overs, within a limit of 15% of the under-use of quotas, from one period to the next; the fact that it does not appear in those columns shows that it did not have any quota.

36 Finally, the applicant expresses the view that the French Competition Commission concluded, even when it had the protocol of agreement in its possession, that the foreign producers had refused to participate in those agreements.

37 The Commission replies that the applicant's participation in the 1983-1984 agreements is evidenced by several documents mentioned in the Decision. It mentions, first, the telex of 24 May 1983, arguing, in response to the applicant's submissions, that the exact date on which the Belgian producers agreed to the amount of their quota is of scant importance. That telex provides evidence of the fact that the Belgian producers took part in the discussions and, therefore, in the arrangements for sharing the French market. It refers, secondly, to the protocol of agreement

of October 1983, the preamble to which, the Commission emphasizes, expressly purports to regulate Belgian, German and Italian imports. Thirdly, it mentions the ADETS tables and considers that the applicant's argument concerning arrangements to offset over-use or under-use of quotas is unfounded since the 15% rule mentioned by the applicant applied only to the French undertakings and Arbed (that is to say, the signatories to the protocol). That does not, it contends, mean that the 'foreign' undertakings were not parties to the agreement with the French industry, in so far as the 'foreigners' were parties to the separate agreement referred to in the protocol. The same is true of the calculation of penalties. The Commission also submits that the applicant did indeed comply with the agreement because its average deliveries for the period January-April 1984 represent 1.0025% of the market, which is close to its quota of 1.09%.

38 Finally, the Commission observes, with regard to the opinion of the French Competition Commission, that the latter had in its possession only the protocol of agreement, whereas it had other documents at its disposal which enabled it to ascertain the infringement. Moreover, the Commission considers that it cannot be bound by the findings of national authorities, particularly regarding foreign undertakings.

Findings of the Court

39 The Court finds that the Decision criticizes the applicant for having participated in all the agreements entered into on the French market (point 51) which were prepared in the first half of 1983 and resulted in a protocol of agreement recording the outcome of the various negotiations (point 60). According to the Decision (point 60(c)), 'the Belgian involvement is apparent from the "protocole d'accord" itself', whereas the quota allocated to FBC is evidenced by documents containing monthly and cumulative comparisons between quotas and actual deliveries (point 62). The Decision states that, in May and June 1984, the Belgian companies were beginning

to exceed their combined quotas (point 73) and concludes from this that FBC and the others ceased to comply with the agreements after June 1984 (point 76).

40 It must first be observed that the Commission has no evidence of FBC's involvement in the 1983 discussions. The applicant was not present at the Milan meeting of 23 February 1983 at which those discussions took place (annexes 27 and 29 to the statement of objections, point 53 of the Decision). Moreover, the telex of 24 May 1983 from Mr Chopin de Janvry, a representative of Sacilor, concerning a meeting of 19 May (annex 30 to the statement of objections, point 55 of the Decision) was not disclosed to the applicant and cannot therefore be relied on against it.

41 It is nevertheless necessary to establish whether FBC's involvement might be inferred from later documents. The Commission has produced documents of two kinds to show FBC's participation in the quota arrangements covering the French market for the period 1983-1984. First, there is a document entitled 'protocol d'accord "Treillis soudé"', dated 14 October 1983, and, secondly, a set of tables giving for January, February, March, May and June 1984 the sales figures of the various producers on the French market and their market shares, incorporating a comparison of those figures with 'references'.

42 The Court finds that the preamble to the protocol of agreement stresses the need to 'limit and regulate Belgian, Italian and German imports (Tréfilarbed excepted), fixing them at 13.95% of consumption on the market within the framework of an agreement between those producers and French producers' and that that figure corresponds precisely with the 'reference' allocated in the tables to the Belgian and Italian producers.

43 That exact correspondence is of particular importance in view of the fact that the applicant was closely involved in the drawing up of those tables. In January 1984, Tréfilunion had in its possession figures for the applicant's monthly sales since July 1983, since they are included in the aggregate figure for its sales in the January 1984 table (annex 42 to the statement of objections, point 62 et seq. of the Decision). The applicant has not denied in these proceedings that the figures in the tables correspond very closely to its actual sales and it has given no valid explanation as to why it gratuitously forwarded those figures to ADETS, of which it was not a member at that time.

44 To that evidence must be added the fact that the applicant's sales figures appear under the heading 'total contracting parties' and are compared in absolute terms and in terms of market share with figures appearing in the column entitled 'references'.

45 Finally, that evidence is corroborated by the fact that it is clear from a telex of 13 April 1984 that the applicant was called to a meeting to be held on 15 May 1984, the purpose of which was 'analysis of our cooperation so far, review of the European market and, on the basis thereof, the drawing up of a timetable for price rises with amounts to be established, and interpenetration of markets' (annex 47 to the statement of objections, point 67 of the Decision).

46 As regards the opinion of the French Competition Commission, the Court cannot accept the applicant's argument. First, as it rightly emphasized, the European Commission was entitled to reach its own conclusions, on the basis of the evidence available to it, which was not necessarily the same as that in the possession of the French Competition Commission. Secondly, the European Commission cannot be bound by the conclusions of the national authorities, particularly in relation to foreign undertakings.

47 In view of all the foregoing, the Court considers that the Commission was right to conclude that the applicant had participated in the quota arrangements on the French market until June 1984.

48 The applicant's complaint must therefore be rejected.

II — *In the Benelux market*

49 The Decision finds against the applicant for having participated in agreements concerning the Benelux States, including in particular quota arrangements and price agreements.

A — *The quota arrangements*

The contested measure

50 The Decision (points 78(b) and 171) criticizes the applicant for having participated in agreements between German producers and Benelux producers (the 'Breda group') consisting in the application of quantitative restrictions to German exports to Belgium and the Netherlands and communication of export figures of certain German producers to the Belgo-Dutch group.

Arguments of the parties

51 The applicant maintains that it cannot be criticized for having participated in 'quota arrangements between German producers and Benelux producers'. It observes that the telex from Mr Müller of BStG, of 15 December 1983 (annex 65(b) to the statement of objections, point 92 of the Decision), criticizes it for selling substantial quantities in Germany. It submits that the Commission's thesis is based on the hypothesis that the German and Belgian undertakings had agreed that each would remain within the limits of its market and would limit its exports. The Commission itself recognized that TFE did not participate in a quota agreement for the German market, this, its says, being borne out by the fact that TFE increased its exports to Germany. Since it did not participate in such an agreement, the applicant asks how it could have ensured that the German producers limited their exports to the Benelux countries.

52 In its defence, the Commission states: 'It is true, as the applicant says, that the Commission did not determine that it has participated in a quota arrangement, either in the Benelux market or in the German market'. At the hearing and in response to a question put to it by the Court, the Commission confirmed that position. The Commission explained that, in its application, the applicant had spoken of agreements covering the Benelux market but had made no reference to the problem of quantitative restrictions on exports from Germany to the Benelux countries. It stated that there was a general agreement between the 'Breda group' and the German producers when the German structural crisis cartel was set up. The purpose of that agreement was to ensure that the parties did not cause disturbance to each other and also to make certain, first, that the German cartel's prices were observed and, secondly, that there was supervision of the respective quantities. The Commission also confirmed that it had not criticized the applicant for participation in the agreement on quantitative restrictions on deliveries to Germany, since it had no evidence to that effect.

Findings of the Court

53 The Court observes that, in the course of these proceedings, the Commission has stated that 'it did not determine that the applicant has participated in a quota arrangement, either in the Benelux market or in the German market'.

54 However, it must be noted that the Decision did in fact criticize the applicant for having participated in such an agreement (point 171) and that, in its application, the applicant defended itself against that criticism.

55 It must be concluded that the Commission no longer maintained that criticism in the proceedings before the Court.

56 In any event, it must be observed that the telex of 15 December 1983 mentioned in point 171 of the Decision cannot be regarded as evidence of the applicant's participation in the agreement in question. Nothing in the telex supports that conclusion: indeed, it seems rather to prove the contrary since it refers to close concertation with Boël/Trébos and not with the applicant and criticizes the latter for increasing its exports to Germany.

57 For those reasons, the applicant's complaint must be upheld and the Decision must be annulled to the extent to which it finds that the applicant participated in agreements intended to limit German exports to the Benelux countries.

B — *The price agreements*

The contested measure

58 The Decision (points 78(a) and (b), 163 and 168) criticizes the applicant for having participated in agreements between the main producers selling on the Benelux market, including the 'non-Benelux producers', and in agreements between the German producers exporting to the Benelux States and the other producers selling in the Benelux States concerning observance of the prices fixed for the Benelux market. According to the Decision, those agreements were decided on at meetings held in Breda and Bunnik (Netherlands) between August 1982 and November 1985, attended (point 168 of the Decision) by at least Thibodraad, Tréfilarbed, Boël/Trébos, FBC, Van Merksteijn, ZND, Tréfilunion and, among the German producers, at least BStG. The Decision is based on numerous telex messages sent to Tréfilunion by its agent for the Benelux States. Those messages contain precise details of each meeting (date, place, those present and those absent, subject-matter — discussion of the market situation, proposals and decisions concerning prices — and determination of the date and place of the next meeting).

Arguments of the parties

59 The applicant admits having participated in the Breda and Bunnik meetings but denies that they were anti-competitive in intent, maintaining, therefore, that its participation did not constitute an infringement of Article 85(1) of the Treaty.

60 According to the applicant, the sole purpose of the meetings was the exchange information between participants in order to determine the ideal price level for welded steel mesh. Such an exchange of information is not liable to affect

competition because the information discussed was already available to each of the participants, each of whom individually could draw the same conclusions as those reached at the meetings. The prices of the basic product, wire rod, and those of the directly competing product, concrete reinforcing bars, are known because both those products, being covered by the ECSC Treaty, must be published in the lists provided for in Article 60 of that Treaty. Even if no information were exchanged, the ideal price for welded steel mesh could thus be determined by the producers individually.

61 The applicant adds that the prices discussed at the meetings were not binding, were always indicative and were never applied.

62 The Commission states that the meetings went far beyond the exchange of information, as is apparent from the reports of them, long extracts from which are given in points 84 to 111 of the Decision. They were, according to the Commission, devoted to the periodical fixing of minimum prices. The fact that those prices were never actually observed is not relevant to the view to be taken of those meetings. The result was a price agreement, prohibited as such by Article 85 of the Treaty by virtue of its object.

63 The Commission contends that the object of the exchange of information purportedly taking place at those meetings, as indicated by the applicant, corresponds precisely to what the Court has held to be prohibited by Article 85 of the Treaty, namely 'removing in advance any uncertainty as to the future conduct of their competitors' (Joined Cases 40 to 48, 50, 54, 55, 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663).

64 The Commission states, finally, that whilst it is true that the price of welded steel mesh left little room for competition, the fact remains that a margin existed, which was not insignificant and should not have been distorted by agreements between undertakings.

Findings of the Court

65 The Court considers that it is clear from the numerous documents mentioned in points 84 to 112 of the Decision that the purpose of the meetings attended by the applicant was anti-competitive.

66 Contrary to the applicant's contention, it is not true that the meetings held in Breda and Bunnik were concerned solely with the exchange of information between the participants in order to determine the ideal price level for welded steel mesh. On the contrary, the reports of those meetings, contained in numerous telexes sent to Tréfilunion by its agent for the Benelux countries (points 84 to 111 of the Decision) clearly show that the purpose of the meetings was, *inter alia*, discussion of the market situation and proposals and decisions concerning the prices of the various types of welded steel mesh — which were minimum prices that had to be observed.

67 The fact that the prices were or were not respected or that the price of welded steel mesh is influenced by the price of wire rod and the competing product, reinforcing bars, does not change the anti-competitive nature of those meetings. First, there is no need to take account of the concrete effects of agreements for the purposes of applying Article 85(1) when it is apparent, as in the case of the agreements found to exist by the Decision, that they have as their object the prevention, restriction or distortion of competition within the common market (judgment of the Court of Justice in Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45). Secondly, whilst it is true, as the applicant observes, that the price of welded steel mesh depends largely on that of wire rod, that does not mean that there was no opportunity for effective competition in that sphere. There remained for the producers a sufficient margin to allow effective competition on the market. Consequently, the agreements had an appreciable effect on competition (judgment of the Court of Justice in Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 133 and 153).

68 As regards the effect on trade between Member States, it must be borne in mind that Article 85(1) of the Treaty does not require the restrictions of competition ascertained actually to have appreciably affected trade between Member States but merely requires that it be established that such agreements are capable of having that effect (judgment of the Court of Justice in Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15).

69 In the present case it must be stated that the restrictions of competition found to exist were likely to distort trade patterns from the course which they would have otherwise have followed (*Van Landewyck*, paragraph 172). The purpose of the agreements was to partition the markets and facilitate an artificial increase of prices in each of them.

70 In view of all the foregoing, it must be concluded that the applicant, which does not deny having attended at least twenty meetings and participated in them without publicly distancing itself from what occurred at them, took part in the agreements and thereby infringed Article 85(1) of the Treaty.

71 The applicant's complaint must therefore be rejected.

III — *In the German market*

The contested measure

72 The Decision (point 147) criticizes the applicant for having participated in agreements on the German market to ensure observance of the prices in force on that

market. The Decision states that the participants in that Decision were Boël/Trébos and TFE/FBC, on the one hand, and BStG on the other (points 153, 154 and 181 of the Decision).

Arguments of the parties

73 The applicant denies having participated in any agreement covering the German market. It admits that in 1985 it was selling in Germany at the market price, that is to say the cartel price, but it maintains that the Commission would be wrong to perceive therein a concerted practice — it had no interest in selling below the German prices since it was operating at full capacity and could not therefore hope to increase its sales by lowering its prices. Moreover, it had to avoid any risk of retaliation on the part of the German producers and authorities. The latter were authorized, by virtue of Commission Decision 234/84/ECSC of 31 January 1984 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1984 L 29, p. 1), to lodge a complaint with the Commission against exporters which disturbed traditional patterns of trade.

74 The applicant also denies that the telex of 11 January 1984 from Mr Peters of Tréfilunion to Mr Marie, also of Tréfilunion (annex 66 to the statement of objections, points 95 and 153 of the Decision) proves its participation in any price agreement since it shows that the meeting to which it relates did not result in the conclusion of an agreement.

75 As regards the note of 24 April 1985 (annex 112 to the statement of objections, point 153 of the Decision), the applicant states that it cannot be examined in isolation but must be considered in conjunction with the telex of 17 April 1985 (annex 111 to the statement of objections, point 153 of the Decision). According to the applicant, that telex indicated to the leaders of the group that there were doubts as to the business abilities of the commercial representatives of FBC, in that they were

not selling at the price which the market would bear. The person who signed the note of 24 April 1985, concerned to restore his credibility as a seller, contradicted the telex of 17 April 1985 and stated that they were selling at the market price.

76 The Commission points out that TFE/FBC actually participated in meetings attended by the German undertakings at which sales prices on the German market were discussed.

77 As regards the telex of 11 January 1984, the Commission observes that that document provides evidence of actual concertation on the prices charged by the Belgian producers on the German market since the latter drew attention to their observance of the cartel prices on the German market in support of their criticism of the prices charged in the Benelux countries by the German producers.

78 As regards the telex of 17 April 1985 and the note of 24 April 1985, the Commission, rejecting the applicant's explanation, states that it is wholly abnormal for an undertaking to write to a competitor to say that it is following a policy which is leading it into ruin and that such conduct constitutes unlawful concertation.

79 The Commission considers that, in view of that evidence of actual concertation on prices, the applicant's efforts to explain its reasons for displaying a particular attitude in the market are not conducive to proving that there was no infringement of Article 85 of the Treaty.

80 The Commission states that the applicant's arguments concerning the risk of retaliation are untenable since Decision 234/84/ECSC of 31 January 1984 applies only to products covered by the ECSC Treaty, and welded steel mesh falls within the scope of the EEC Treaty.

81 As regards the applicant's explanations that 'it had no interest in selling below the cartel prices', the Commission considers it unconvincing since selling cheaper is clearly a way of increasing market share.

Findings of the Court

82 The Court considers that, in order to establish the applicant's participation in the price agreement on the German market, the Commission properly relied on the telex of 11 January 1984 from Mr Peters to Mr Marie (annex 66 to the statement of objections, points 95 and 153 of the Decision), which reports on a meeting held in Breda on 5 January 1984, attended by the applicant, Boël/Trébos, BStG, Tréfilarbed, Tréfilunion and other Dutch undertakings. That telex states: 'The usual participants asked the representatives of Baustahlgewebe to stop upsetting the Benelux market by exporting large quantities there at very low prices. The Germans defended themselves by saying that the Belgians (Boël and more recently Frère-Bourgeois) were exporting comparable tonnages to Germany. The Belgians said that they were observing the German market prices, and it was better to talk about a market percentage rather than tonnes. Nothing specific was decided.' That telex shows that, if the Belgian producers were observing the German market prices, they did so in return for a limitation of exports by BStG to the Benelux countries and a minimum price charged by the latter on that market.

83 The Commission is also right to refer, in support of its analysis, to the telex of 17 April 1985 (annex 111 to the statement of objections), sent by the German association Walzstahlvereinigung to Cockerill Sambre. That telex concerns the 'deliveries of Belgian welded steel mesh to the Federal Republic of Germany'. In it, TFE, a subsidiary of Cockerill Sambre, is criticized for undercutting the general price level in Germany (DM 810 per tonne) with quotations of DM 770 per tonne.

Cockerill-Sambre was asked to make it clear to its subsidiary, TFE, that prices on the German market were picking up and to put pressure on it to observe better price discipline.

84 With respect to the risk of retaliation mentioned by the applicant, the Court observes that, as the Commission correctly pointed out, Decision 234/84/ECSC of 31 January 1984 applies only to products covered by the ECSC Treaty. Consequently, the applicant ran no risk by selling welded steel mesh below the cartel price.

85 As to the statement that it had no interest in selling below the cartel prices because it was operating at full capacity, it must be emphasized that such an argument presupposes that the prices on the German market were lower than those charged on the other markets. If the prices on the German market were higher than those charged on other markets and if there had been no agreements, the applicant could have reduced its exports to other States so as to redirect them to the German market.

86 In view of all the foregoing, the Commission has established to the requisite legal standard that the applicant participated in agreements in the German market with a view to ensuring observance of the prices in force on that market.

87 It follows that the applicant's complaint must be rejected.

The plea as to infringement of Article 15 of Regulation No 17

I — *Failure to identify the criteria for determining the gravity of the infringements*

Arguments of the parties

88 The applicant maintains, first, that by imposing a single fine for three separate infringements, the Commission deprived it of the possibility of examining the merits of the Decision as regards the gravity and duration of the infringements. It adds that, according to the judgment of the Court of Justice in Joined Cases 100 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, a single fine is justified where the different infringements may be regarded as a single breach of the rules but that such an approach ceases to be appropriate in a case such as this in which there is a set of different agreements and those agreements were concluded between different parties, as the Decision itself states in point 22. The applicant considers that the Commission thereby failed to fulfil the obligation to state reasons imposed on it by Article 190 of the Treaty.

89 It maintains, first, that the Decision did not take account of the specific features of the conduct of each of the undertakings concerned and, more particularly, that of the applicant. Article 1 of the Decision merges all the infringements without even distinguishing the particular nature, duration and specific characteristics of the participation of each undertaking. More specifically, it states that the Commission did not specify the duration of its participation in the agreements on the French market in 1983-1984 or in those on the German market. Finally, the applicant states that the mere fact of being fined an amount representing a lower percentage of its turnover in the product concerned than that applied to the other undertakings does not suffice to show that all the mitigating circumstances relating to it were taken into account.

90 In reply the Commission states that it did not impose a single fine for three separate infringements: the Decision is concerned not with distinct agreements but, as stated in point 22 thereof, with a complex of agreements which together produced far-reaching regulation of a substantial part of the common market. The undertakings participated at the same time in several agreements in separate partial geographic markets, although the result, at any given time, was partitioning of the Community market. Thus, in 1984 TFE/FBC participated at the same time in an agreement on the French market, an agreement on the Benelux market and an agreement on the German market. The Commission contends that the applicant's reference to the *Musique Diffusion* judgment does not support its view since the Court gave judgment in that case 'without it being necessary to express a view on the possible existence of principles of Community law relating to the overlapping of fines imposed for several separate infringements'.

91 The Commission contends that it indicated clearly its determination of the duration and gravity of each infringement. As regards duration, the Commission points out that it clearly specified in the Decision the duration of the applicant's participation in the various agreements. It also states that it took full account of the specific circumstances of the applicant's conduct in point 200 et seq. of the Decision. That is why, taking account of all those factors, it imposed on the applicant a fine amounting to 2.5% of its turnover in the relevant market (welded steel mesh in the Community of Six), whereas for certain other participants in the agreement the proportion applied was as high as 3, 3.15 and even 3.6%.

Findings of the Court

92 It is settled law that the Commission may impose a single fine for several infringements (see *Suiker Unie and Others* v *Commission*, cited above, Case 27/76 *United Brands* v *Commission* [1978] ECR 207 and *Musique Diffusion Française and*

Others, cited above; that applies particularly where, as in this case, the infringements ascertained in the Decision were concerned with the same type of conduct on different markets, in particular the fixing of prices and of quotas and exchange of information, and the undertakings involved in those infringements were, largely, the same. The fact cannot be ignored that the applicant was involved in agreements covering several markets, such as the French and Benelux markets.

93 It must also be emphasized that the imposition of a single fine did not prevent the applicant from judging whether the Commission had correctly appraised the gravity and duration of the infringements. In its reading of the Decision, the applicant artificially isolates a part of it, whereas, since the Decision constitutes a single whole, each part of it should be read in the light of the others. The Court considers that the Decision, read as a whole, provided the applicant with the indications necessary for it to identify the different infringements for which it was criticized and the specific features of its conduct and, more particularly, the evidence as to the duration of its participation in the various infringements.

94 The Court also notes that the applicant has not provided any evidence for its assertion that, in view of the duration and particular gravity of the infringements of which it was found guilty, the Decision did not take account of all the mitigating circumstances existing in relation to it as compared with the other undertakings penalized by the Decision. On the contrary, it must be borne in mind that, in its written replies to the questions put to it by the Court, the Commission indicated that a mitigating factor had been taken into account in relation to the applicant, namely the fact that its participation in the infringements was limited to the activities that were of interest to it.

95 It follows that the applicant's complaint must be rejected to the extent to which it goes beyond the scope of the first plea in law.

II — *The error regarding the turnover figure adopted as a basis for determination of the fine*

Arguments of the parties

96 The applicant objects to the fact that the Commission took its turnover in welded steel mesh as the basis for calculating the fine imposed on it. A significant part of its turnover is attributable to the sale of tailor-made mesh which, by its very nature, cannot be the subject of a restrictive agreement and should not therefore have been taken into account as part of its turnover in the products covered by the agreements. By disregarding that factor, the Commission committed an error of appraisal regarding the determination of its fine as opposed to the fines imposed on the other undertakings.

97 The Commission replies that it took account only of the turnover in welded steel mesh, even though, by virtue of the case-law of the Court of Justice (*Musique Diffusion*, cited above, and Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261, paragraph 39), it could have used the undertaking's entire turnover. Having elected to use only the turnover in the product concerned, the Commission was under no obligation to exclude the portion relating to tailor-made mesh. Tailor-made mesh, although indeed constituting a sub-market within the welded steel mesh market, does not constitute a separate market (point 3 of the Decision).

Findings of the Court

98 The Court finds that the Decision correctly determined the amount of the fine imposed on the applicant by taking account of the applicant's turnover in welded

steel mesh as a whole, including tailor-made mesh, since that turnover gives an indication of the scale of the infringement (judgment in *Musique Diffusion*, cited above, paragraph 121). It is incontestable that the infringement must have had, and did have, an impact on the price of tailor-made mesh, which do not form part of a market separate from that of the other types of welded steel mesh.

99 It follows that this complaint must be rejected.

100 Since the Commission has not established to the requisite legal standard that the applicant participated in an agreement to limit German exports to the Benelux countries, the Court, in the exercise of its unlimited jurisdiction, considers that the fine of ECU 315 000 imposed on the applicant must be reduced by one-fifth to ECU 252 000.

Costs

101 Under Article 87(2) 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. However, under Article 87(3), the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared. Since the action has been partially successful and both parties have applied for costs, the Court considers that the circumstances of the case will be properly taken into account if the applicant is ordered to pay its own costs and three-fifths of the Commission's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) **Annuls Article 1 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) as regards the finding therein that the applicant participated in an agreement to limit German exports to the Benelux countries;**

2) **Reduces the amount of the fine imposed on the applicant by Article 3 of that decision to ECU 252 000;**

3) **Dismisses the application as regards the remaining claims;**

4) **Orders the applicant to bear its costs and to pay three-fifths of the Commission's costs;**

5) **Orders the Commission to bear two-fifths of its costs.**

Kirschner Bellamy Vesterdorf

García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 6 April 1995.

H. Jung H. Kirschner

Registrar President

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