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

In Case T-148/89,

Tréfilunion SA, a company incorporated under French law, established in Puteaux (France), represented by Robert Collin and Richard Milchior, 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 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.

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 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).

4 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. The undertakings of which the applicant is the successor (see paragraph 9 below) were fined FF 800 000 and FF 200 000 for participation in certain conduct described in that decision in the last quarter of 1982, at the beginning of 1983 and from June 1983 to September 1984.

5 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 It is apparent from the Decision (points 12 and 195) that the applicant, Tréfilunion SA (Tréfilunion II), must be regarded as the successor of two undertakings which participated in the agreements: Tréfilunion (Tréfilunion I) and Chiers-Châtillon-Gorcy (CCG). The first undertaking, Tréfilunion I, was until 1 January 1987 a wholly owned subsidiary of the Sacilor group. In addition to welded steel mesh, Tréfilunion I also made other wire products. CCG was renamed Tecnor in 1983. During the second half of 1987, Tréfilunion I was taken over by Tecnor with retroactive effect to 1 January 1987. The company thus created was renamed Tréfilunion (Tréfilunion II). When the name Tréfilunion (TU) is used here, it will be a reference to Tréfilunion I unless otherwise indicated. The French welded steel mesh producers fell at that time into two categories. The first comprised the so-called 'integrated' producers, which included the subsidiaries of the old nationalized steel groups Sacilor and Usinor. Among them, Tréfilunion and Société Métallurgique de

Normandie (SMN) were wholly owned subsidiaries of the old Sacilor group, whilst CCG-Tecnor and Société des Treillis et Panneaux Soudés (STPS) were subsidiaries of the old Usinor group, which held 98% and 99.99% of their capital respectively. The second category comprised the so-called 'non-integrated' or 'independent' producers, namely Fabrique de Fer de Maubeuge, Tecta, Gantois, Sotralentz and Tréfileries du Sud-Est.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 27 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 in so far as it applies to the applicant;

in the alternative,

— cancel the fine imposed by that decision;

in the further alternative,

— reduce the fine;

— order the Commission to pay the costs.

17 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

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

The plea as to breach of procedural rules

I — *The lack of any translation of the annexes to the statement of objections*

19 According to the applicant, the statement of objections had annexed to it documents in their original language, of which certain extracts were translated both in the statement of objections and in the Decision. However, it considers that the failure to provide a complete translation of those annexes constitutes a breach of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59, hereinafter 'Regulation No 1'), and in particular Article 3 thereof, which provides 'Documents which an institution sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State', and a breach of the rights of the defence which, according to the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 16, relate to the 'contentious proceedings which follow the delivery of the statement of objections'.

20 The Commission replies that although the Decision and the statement of objections are procedural documents and fall within the definition of 'documents' in Regulation No 1, the annexes are merely documentation of which it took possession and on which it relied. Such annexes must therefore be made available as they stand to the persons concerned, that is to say in their original language, and the persons concerned may — or may not — then challenge the manner in which they have been interpreted. It emphasizes that, in any event, only the statement of objections and the Decision set out its position, as relied on against the addressee.

21 The Court considers that, as the Commission rightly pointed out, both the Decision and the statement of objections are procedural documents specifically provided for as such in Article 19(1) of Regulation No 17 and Article 2(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), which define the Commission's position vis-à-vis their addressee. Accordingly, they must be regarded as 'documents' within the meaning of Article 3 of Regulation No 1 and must therefore be sent to their addressee in the language of the case. On the other hand, the annexes to the statement of objections which do not emanate from the Commission must be regarded as supporting documentation on which the Commission relies and must therefore be brought to the attention of the addressee as they are, so that the addressee can apprise himself of the interpretation of them which the Commission has adopted and on which it has based both its statement of objections and its Decision. Moreover, in the present case, it must be pointed out that, as the applicant has conceded, relevant extracts from the annexes are included in French both in the body of the Decision and in the statement of objections. The Court considers that that presentation allowed the applicant to determine precisely on what facts and legal reasoning the Commission relied and therefore properly to defend its rights.

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

II — *The failure to disclose certain documents*

23 The applicant maintains that the Commission also breached the rights of the defence because neither the telex of 14 July 1983 sent by Martinelli to Italmet, the agent for Ferriere Nord and Martinelli in France (annex 34 to the statement of objections, point 57 of the Decision) nor the telex of 3 November 1983 from Mr Duroux, Tréfilunion's representative, to Mr François, Italmet's representative (annex 35 to the statement of objections, point 58 of the Decision) was disclosed to it, even though the Commission relied on them as evidence of a Franco-Italian agreement for the period 1983-1984. It adds that its lawyers were able to examine the file at the Commission's offices but could not examine all the documents held by the Commission, in particular those which the Commission did not regard as being of concern to the French companies and the French associations which they represented. It was thus impossible for them to peruse the two documents mentioned above.

24 The Commission considers that neither of those two annexes to the statement of objections constitutes indispensable evidence of the existence of the 1983-1984 agreements and the participation of the applicant therein.

25 The Court finds that the documents mentioned by the applicant were not disclosed to it when the statement of objections was sent. It follows that the applicant was entitled to consider that they were not important to the case. It follows that they cannot be regarded as admissible evidence as far as it is concerned (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 21, and Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833, paragraph 37). Nevertheless, the question whether those documents provide essential support for the findings of fact made by the Commission against the applicant in the Decision falls to be considered by

the Court in its examination of the question whether those findings are well founded (*DSM* v *Commission*, paragraph 40).

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

I — *The relevant market*

Arguments of the parties

26 The applicant considers that the Commission is wrong to treat welded steel mesh as being a similar product in all the Member States and therefore as substitutable regardless of its country of origin. The applicant states that it manufactured products in France in accordance with a range determined by the Association Technique pour le Développement de l'Emploi du Treillis Soudé (hereinafter 'ADETS'), reflecting the products officially approve by the French Ministry for Industry. The applicant states that the German product range was similar to that of Belgium and the Netherlands, but very different from the French range, particularly as regards weight, and consequently that more square metres of product and a larger number of spot welds were needed in France, giving rise to higher costs in the first-mentioned country. Those technical differences underlie the price differences between the two markets and, by disregarding them, the Commission did not correctly analyse the relevant market.

27 The applicant also claims that welded steel mesh is not a product that is directly interchangeable as between countries because there are different standards and it is necessary to obtain authorizations, approvals or certifications for exports, so that the position is not as described in point 5 of the Decision, where it is stated that intra-Community trade is most intensive in the border regions. Nevertheless, it concedes that such certification was not necessary for imports into or sales within

France of the products in question but only for their use in public contracts. The applicant concludes that there is not a Community market in welded steel mesh but rather a market in French products, a market in German products, a market in Italian products and a market in Benelux products.

28 The Commission considers that, in view of the conclusive evidence of the existence of agreements, the applicant's views on the interchangeability or otherwise of the products are not such as to cast doubt on the legality of the Decision. The Commission rejects the view that the existence of different technical standards in the various countries creates genuine barriers and, referring to a Tréfilunion memorandum of 1 December 1981 (annex 5 to the statement of objections, point 24 of the Decision), maintains that the increase of prices found in the Decision was the result of the agreements themselves and not of the manufacturing conditions for the products in question. It adds that, whilst it is true that certification constitutes a barrier to trade, it is no less certain, first, that Tréfilunion exerted its influence within ADETS to use that measure against foreign producers (see in that connection point 137 of the Decision) and, secondly, that certification is compulsory only for public contracts. In any event, the requirement of certification should encourage undertakings not to restrict such competition as actually remains (Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 133 and 134). Finally, the Commission adds that the existence of cross-border trade was established on the basis of figures which are not contested by the applicant.

Findings of the Court

29 The Court considers that the points raised by the applicant are not such as to establish that the Commission's definition of the relevant market in the Decision is

incorrect. Even if certain differences exist between the applicable standards, in particular on the French market, which might give rise to differences in production costs, it must be observed, first, that in the memorandum of 1 December 1981 (annex 5 to the statement of objections, point 24 of the Decision) Tréfilunion itself stated that 'the market in standard mesh products is becoming a European market because the trend in the technical regulations is towards the adoption of uniform rules for manufacturing, monitoring and use of those products' and that the high prices in France in 1981 were the result of an artificial situation since Tréfilunion had 'succeeded in damming up' the flow of imports by preparing and securing acceptance of a barrage in the form of an agreement among the producers including the significant foreigners.

30 Secondly, it must be emphasized that the applicant admits, in its application, that the various national markets can be supplied by different Community producers which have adapted their production plant to the relevant standards and it concedes that certification is necessary in France only for public contracts.

31 Thirdly, it must be pointed out that the importance of the trade in welded steel mesh between Member States is highlighted by the table in point 4 of the Decision and in the tables reproduced in points 7, 8, 9 and 10, the figures in which are not contested by the applicant.

32 Finally, numerous documents referred to by the Commission evidence the applicant's concern to limit imports from the other Member States, which shows that the applicant's assertions are factually defective.

33 In view of the foregoing, the Court considers that the Commission's analysis of the market is not incorrect and that the applicant's complaint must therefore be rejected.

II — *The evidence of the agreements*

A — *In the French market*

(1) *The period 1981-1982*

The contested measure

34 The Decision (points 23 to 50 and point 159) accuses the applicant of participating, between April 1981 and March 1982, in a first set of agreements in 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

35 The applicant does not deny having participated in the various meetings mentioned in the documents referred to in the Decision. However, as far as quotas are concerned, it claims that the documents referred to by the Commission in fact show the opposite of what the Commission contends. The table in annex 6 to the statement of objections (point 29 of the Decision) in its view shows, for the period April 1980 to April 1982, uncertain trends in the pattern of deliveries by the four French producers whilst it is apparent from point 26 of the Decision that, after an increase between January 1981 and July-August 1981, imports remained stable over the last four months of the year. That information, supported by various tables produced

by the applicant, concerning the figures for deliveries of welded steel mesh on the French market, disproves the view that there was any sharing of the markets. Moreover, the applicant claims that annex 6, mentioned above, relates only to French producers, which means that it cannot be regarded as evidence of an agreement with foreign producers.

36 As regards prices, the applicant maintains that the existence of an agreement has not been proved. It claims that a price increase was needed in order to re-establish positive margins, as is apparent from its memorandum of 1 December 1981 (annex 5 to the statement of objections, points 24, 27 and 28 of the Decision) and says that it is not surprising that other companies might have followed it since Tréfilunion was the leading company on the French market, its price lists were regularly published in the journal *Le Moniteur des Travaux Publics* and discounts were calculated on the basis of those lists. Moreover, the applicant states that the telex of 9 March 1982 from Italmet to Ferriere Nord (annex 18 to the statement of objections, point 41 of the Decision) shows that, in order to apply a temporary discount of FF 325, it was not necessary to 'to ask the permission of their Italian, Belgian and German partners'.

37 The applicant considers that the Decision is vitiated by an inadequate statement of the reasons on which it is based, in so far as it does not disclose whether the Commission considered that the contested conduct came to an end in April or June 1982. It observes that, whilst point 23 gives the duration as April 1981 to March 1982, in points 42 to 45 the Decision mentions discussions on extension of the alleged agreements, and in point 159 it refers only to the agreements dating from 1981-1982. The applicant states that it was only after it instituted proceedings that the Commission specified that the infringement ascertained was brought to an end in March 1982 and submits that the Court must take that fact into account in reducing the fine in the event of its not annulling the Decision.

38 The Commission contends, with regard to quotas, that it did not rely solely on the table in annex 6 to the statement of objections (point 29 of the Decision) — which

in fact enabled it to ascertain the quotas allocated to the French producers — but also on the Tréfilunion memorandum of 1 December 1981 (annex 5 to the statement of objections, points 24, 27 and 28 of the Decision) and on the account of the meeting of Tréfilunion's executive committee of 2 March 1982 (annex 7 to the statement of objections, point 29 of the Decision), which documents enabled it to interpret that table and incontestably demonstrate the existence of a quota agreement.

39 As regards prices, the Commission observes that they were determined by the discounts which were negotiated under the agreement, as is apparent from the memorandum from Mr Marie, director of Tréfilunion, of 9 April 1981 (annexes 12 and 12A to the statement of objections, point 34 of the Decision; see also annexes 21, 22 and 23 to the statement of objections, points 41 and 43 of the Decision). The Commission considers that point 41 of the Decision shows the exact opposite of what the applicant claims; the Commission wonders why it was necessary to say at a meeting that the French producers 'were not bound to ask the permission of their ... partners' if the undertakings took their Decisions freely and without concertation.

40 Regarding the duration of the infringement, the Commission states that the Decision indicates twice (points 23 and 29) that the first set of 1981-1982 agreements lasted from April 1981 to March 1982. It adds that even though the infringement seems to have gone on after that date, it took account of that period only and it goes without saying that the fine does not cover the period after 31 March 1982.

Findings of the Court

41 The Court observes, at the outset, that the applicant relies on the figures contained in tables produced by it without challenging part of the evidence against it produced by the Commission.

42 The Court considers that the documents produced by the Commission together show that the applicant participated in the French market agreements over the period 1981-1982. It is clear from two telexes of 17 March 1981 and 9 April 1981 (annexes 9 and 11 to the statement of objections, points 32 and 33 of the Decision) and from Mr Marie's memorandum of 9 April 1981 (annex 12 to the statement of objections, point 34 of the Decision) that the applicant took part in a meeting in Paris on 1 April 1981 with Italian and Belgian producers at which agreements were concluded with the Italian producers on quotas, catalogue prices, discounts, penetration premiums and the exchange of information concerning the French market in welded steel mesh. Another Tréfilunion memorandum, dated 23 October 1981 (annex 1 to the statement of objections, points 46 and 48 of the Decision), concerning a meeting between Tréfilunion and Tréfilarbed, discloses the existence of a quota agreement with Tréfilarbed and the Belgian undertakings Boël-Trébos and Steelinter.

43 Regard should also be had to the terms of the Tréfilunion internal memorandum of 1 December 1981 (annex 5 to the statement of objections, points 24, 27 and 28 of the Decision) which states, *inter alia*, that 'Tréfilunion succeeded in damming-up the flow of imports by preparing and securing acceptance of a barrage in the form of an agreement among the producers including the significant foreigners. There followed an artificial situation in which prices became relatively high on our market in 1981 and import tonnages were broadly maintained at their 1980 level'. The same memorandum adds: 'The secure maintenance of the agreement on prices means for the French producers at least self-limitation of their tonnages on their own market at the present level'. The memorandum also contains the following passage: 'In the discussions between producers from different countries dealing with the market shares to be granted, the arguments of those who have gained access profiting from the positions they have acquired are obviously very strong. The example offered in France, in the context of the recent agreement, shows the importance of these previously acquired positions.'

44 That very clear documentary evidence is corroborated by a Ferriere Nord memorandum concerning a meeting of 18 February 1982 in Paris between Tréfilunion,

ILRO, Martinelli, Italmet and Ferriere Nord (annex 16 to the statement of objections, point 38 of the Decision), to the effect that Mr Marie stated, on that occasion, that 'the agreement made at the beginning of 1981 has yielded the results hoped for in terms of quantity and price'.

45 Finally, the Court notes that, as the Commission rightly pointed out, the Decision (points 23 and 29) specified the duration of the agreement as April 1981 to March 1982. The Commission determined that period by reference to a Ferriere Nord memorandum (annex 15 to the statement of objections, point 37 of the Decision) concerning a meeting of 20 October 1981, attended by Tréfilunion and the Italian producers, which states that 'The results of the March agreement (from 1 April 1981) are satisfactory on the whole and have caused the price quotations to rise both for the French and for the Italians', and to a memorandum of 23 March 1982 (annex 7 to the statement of objections, point 29 of the Decision) reporting on the meeting of the executive committee of Tréfilunion of 2 March 1982, which states that it was agreed to 'continue to the end in carrying out the current agreement which expires on 31 March'. Consequently, the applicant cannot complain that the duration of its participation in the agreement was not specified in the Decision.

46 In view of the foregoing, it must be concluded that the Commission has established to the requisite legal standard that the applicant participated in the price and quota agreements covering the French market for the period April 1981 to March 1982.

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

(2) *The period 1983-1984*

The contested measure

48 The Decision (points 51 to 76 and 160) accuses the applicant of 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 — FBC marketing the production of TFE — 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 in 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. It fixed the quotas of the French integrated producers at 60.5%, 40.5% thereof being for the Sacilor group (Tréfilunion and SMN) and 20% for the Usinor group (CCG and STPS), those of the non-integrated French producers at 18% and those of Belgium, Italy and Germany at 13.95% of consumption on the French market 'under an agreement between those producers and the French industry'.

Arguments of the parties

49 The applicant does not deny the contacts mentioned by the Commission in points 52 and 53 of the Decision (Annexes 27 and 28 to the statement of objections) between it and the Italian producers whilst 'preparing the ground' and, in particular, at the meeting of 23 February 1983, but it rejects the view that those contacts

resulted in the conclusion of an agreement sharing 39% of the French market among the French non-integrated producers, and the Belgian, Italian and German producers.

50 As regards contacts with Tréfilarbed, referred to in point 55 of the Decision, allegedly resulting in an agreement on Tréfilarbed's quota, the applicant states that the purpose of that agreement, according to the Decision, was to facilitate a rapid improvement in prices, which the Commission purports to demonstrate by referring to certain matters in point 56. The applicant considers that the Commission has produced no evidence in that regard and that therefore its assertion is entirely unsubstantiated.

51 As regards the October 1983 protocol of agreement, the applicant states that it was not signed and that, if the agreement existed, it never had any impact either on market shares or on prices. It adds that, according to the opinion of the French Competition Commission, the foreign producers refused to associate themselves with that agreement and that the Commission did not take account of that finding, failing to specify what new factual evidence enabled it to conclude that the non-French undertakings had participated in that agreement.

52 As regards quotas, the applicant denies the existence of any agreement, owing to the erratic evolution of the French producers' market share, which, it claims, is apparent both from the information contained in the Jenny report, prepared for the French Competition Commission, and from the note drawn up on 10 August 1984 in preparation for Tréfilunion's budget for 1985 and 1986 (annex 39 to the statement of objections, point 62 of the Decision).

53 As regards prices, the applicant maintains that the Commission has not proved the existence of an agreement resulting in price concertation and that the so-called price directives were not observed by the parties to the alleged agreement. Moreover, the applicant submits that the Commission is not entitled to rely on the documents mentioned in points 57 and 58 of the Decision to prove the existence of a price

agreement. With respect to point 57, it states that a price agreement concluded in October 1983 could not already have been applied retroactively in July; with respect to point 58, it states that annex 35 to the statement of objections was not disclosed to it.

54 The Commission states, with regard to the 'preparation of the ground', that it is undeniable that the French integrated producers and the Italian producers reached an agreement on their respective market shares at the meeting of 23 February 1983 (annexes 27, 28 and 29 to the statement of objections, points 53 and 54 of the Decision) and that that was merely the first stage in a comprehensive agreement, with other participants.

55 Regarding the agreement with Tréfilarbed, the Commission states that, contrary to the applicant's assertion, it relied not on the matters set out in point 56 to prove Tréfilarbed's adhesion to the agreement but on the exchange of correspondence between Sacilor and Tréfilunion, on the one hand, and Arbed on the other (annexes 30 to 33 to the statement of objections).

56 As regards the protocol of agreement, the Commission observes that it was found at the premises of Tréfilunion and Tréfilarbed and that it was signed by the latter. However, even without a signature, it is not without probative force. The Commission contends that the market shares of the various undertakings indicated in the protocol are exactly those decided upon at the Franco-Italian meeting of 23 February 1983 and endorsed by telex correspondence with Tréfilarbed in June 1983 and that the protocol refers to that 'agreement' concluded earlier (point 61(ii) of the Decision). The reality of that agreement is also confirmed by Mr Marie's memorandum of 30 October 1984 (annex 50 to the statement of objections, point 72 of the Decision). As regards the opinion of the French Competition Commission, the Commission considers that it is not bound by the latter's conclusions, particularly with respect to non-French undertakings, and it states that it obtained additional evidence which was not in the possession of the French authorities.

57 As regards quotas and prices, the Commission contends that the copious documentary evidence referred to by it shows that the agreements operated on the terms set out in the protocol, that the price directives were applied and that prices rose as a result of the quota agreement.

Findings of the Court

58 The Court considers that the documents produced by the Commission — without there being any need to rely on the documents not disclosed to the applicant, in particular annexes 34 and 35 to the statement of objections — together sufficiently show the existence of the agreements at issue, the applicant's participation and its leading role in negotiations, and the implementation of the agreements. In the face of such evidence, the applicant's assertions cannot be regarded as substantiated.

59 As regards the time spent 'preparing the ground', the Court considers that the documents produced by the Commission concerning the meeting of 23 February 1983 between, on the one hand, the French integrated producers and, on the other, ILRO, Martinelli and Ferriere Nord (annexes 27, 28 and 29 to the statement of objections, points 53 and 54 of the Decision) show that the two parties arrived at an agreement on the sharing of the French market. At that meeting, it was agreed that 61% of the French market would be allocated to the integrated French producers and that the remaining 39% would be shared as follows: 19% for the French non-integrated producers, 3% for the Belgian producers, 7% for the Germans and 10% for the Italians, that is to say about 23 000 tonnes a year. It is clear that, at that time, there was no agreement on the part of the Belgian and German producers and the non-integrated French producers since they were not present at the meeting at which the agreements were adopted, but that fact does not disprove that there was an agreement between the integrated French producers and the Italian producers. At the same time, the latter reached agreement on a price 'recovery' from April 1983. As regards the agreement with Tréfilarbed, it need merely be

pointed out that the applicant does not challenge the many documents (annexes 30 to 33 to the statement of objections) evidencing the existence of contacts between the French producers and Tréfilarbed and the conclusion of an agreement allocating a quota of 7.55% of the French market to Tréfilarbed.

60 As regards the protocol of agreement, regard must be had to the various statistics (annexes 42 and 43 to the statement of objections, points 64 and 65 of the Decision) giving monthly figures for the turnover of each party to the agreement on the French market and their market shares. Those tables contain figures exactly corresponding to the content of the protocol of agreement. To that evidence must be added the fact that the applicant's sales figures appear under the heading 'total contracting parties' and that they are compared, in absolute terms and in terms of market share, with figures appearing in the column entitled 'references'.

61 That evidence is corroborated by the fact that a telex of 13 April 1984 shows that the French producers, through the intermediary of Mr Marie, invited the foreign producers to a meeting 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 the markets' (annex 47 to the statement of objections, point 67 of the Decision).

62 Also noteworthy in this context is Mr Marie's internal memorandum of 30 October 1984 (annex 50 to the statement of objections, point 72 of the Decision) which states that the results of the plans for 1985 and 1986 are dependent on two fundamental factors, namely 'negotiations for 1985 and, if possible, for 1986, which I must conduct on the same basis as those which have been applied since September 1983 and which expire at the end of December 1984'. Mention must also be made of a Tréfilunion memorandum dated 19 September 1984 entitled 'Current state of the welded mesh market in France' (annex 49 to the statement of objections, point 71 of the Decision) which refers on several occasions to the 'increase' and the

higher level of prices and that 'this is the direct result of a new awareness of the part of European producers operating on the French market'.

63 With respect to the opinion of the French Competition Commission, the Court finds the applicant's argument unacceptable. First, as rightly emphasized by the European Commission, the latter 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 national authorities.

64 It follows that the Commission has established to the requisite legal standard that the applicant participated in the agreements on the French market during the period 1983-1984, the object of those agreements being to set prices and quotas with a view to limiting imports of welded steel mesh into France.

65 The applicant's complaint must therefore be rejected.

(3) *The exchange of information criticized in point 161 of the Decision*

The contested measure

66 According to the Decision (point 161), the indirect exchange of information between the members of ADETS (including the importer Tréfilarbed) carried out in implementation of the agreements on the French market dating from 1983-1984,

which was coordinated by ADETS, constitutes a concerted practice according to the principles established by the Court of Justice in the European Sugar Cartel case (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, points 173 and 174). According to the Decision, the individual communication to competitors of data concerning the quantities sold by individual firms constitutes a restriction and distortion of competition which, in the present case, in view of Tréfilarbed's involvement, was likely to affect trade between Member States.

Arguments of the parties

67 The applicant maintains that the Decision is drafted in such a way that it cannot determine whether it was penalized for participating in that indirect exchange of information. It submits that, if it was, the Commission misapplied the principles laid down in the *Suiker Unie* judgment, according to which the Treaty rules only prohibit the exchange of information if its object or effect is to influence the conduct of a competitor in the market, that is to say as regards the future. In the present case, however, the indirect exchange of information between the members of ADETS related to the past and not the future, as the Decision indicates when referring to 'individual deliveries to the French market'. Furthermore, the applicant considers that the imputation of that infringement to it implies that it was penalized more than once for the same conduct.

68 The Commission contends that that exchange of information was not penalized as such but constitutes one of the aspects of the implementation of the agreements on the French market in 1983-1984. It provides additional evidence of their existence and, moreover, it bolstered their effects and implemented them, thus contributing to aggravation of the infringement found against the applicant. With respect to the *Suiker Unie* judgment, the Commission considers that, whilst it is true that the exchange of information concerned the turnover achieved by each undertaking (thus, indeed, relating to 'the past'), the fact remains that its purpose was to define

the forthcoming deliveries of each of them on the basis of observance of quotas. The Commission considers that that distinction between past and future information is artificial and irrelevant. Finally, the Commission states that there is no duplication of penalties since it did not penalize simultaneously and then separately the exchange of information and the price and quota agreements but took the view that those agreements embodied, among other arrangements, a system for the exchange of information.

69 The applicant, in its reply, observes that, in its defence, the Commission stated that the exchange of information criticized in point 161 of the Decision was not penalized as such but simply as 'one of the aspects of the implementation of the 1983-1984 agreement on the French market'. According to the applicant, the Court should find that the wording of point 161 indicates that the exchange of information constituted not an aggravating circumstance but rather a concerted practice, thus appearing to represent a separate infringement, and should therefore annul that part of the Decision, for which the Commission cannot alter the statement of reasons.

70 The Commission replies that it made no change to the reasons relied on in its defence, that its explanations merely provide clarification and that point 161 of the Decision is clear in that respect since it indicates that the exchange of information took place in implementation of the agreements at issue.

Findings of the Court

71 The Court does not consider that point 161 of the Decision is to be construed as suggesting that the indirect exchange of information was imputed to the applicant as an infringement distinct from its participation, ascertained in point 160 of the

Decision, in the quota and price agreements implemented on the French market in the period 1983-1984.

72 First, point 161 correctly describes the exchange of information as a concerted practice according to the principles established by the Court of Justice in *Suiker Unie*. This Court finds that, as the Commission stated, the exchange of information did not relate only to deliveries already made but was intended to facilitate constant monitoring of current deliveries in order to ensure adequate effectiveness of the agreement, as is apparent from annex I to the protocol of agreement, according to which, in order to ensure that the agreement operates as satisfactorily as possible, it is necessary to provide ... statistical information required for that purpose: ten-day statements ... of orders sent and orders recorded; and 'such statements will enable the secretariat to ensure progressive planning for the industry'. In accordance with the principles laid down in *Suiker Unie*, such an exchange of information clearly constitutes a concerted practice having as its object or effect distortion of competition within the Common Market.

73 Secondly, the Court considers that the fact that the exchange of information constitutes a concerted practice and is described as such in point 161 does not mean, as the applicant wrongly claims, that the Decision must be interpreted as treating that exchange of information as an infringement distinct from that mentioned in point 160. Point 161 makes it clear that the indirect exchange of information in question occurred between the members of ADETS under the agreement referred to in point 160 and that clarification must be interpreted as forming part of the description of the circumstances in which the exchange of information took place, not as meaning that the exchange of information did not form part of the agreement in question.

74 The applicant's complaint must therefore be rejected.

B — *The Benelux Market*

The contested measure

75 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 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).

76 The Decision (point 164) states that, although no quotas were agreed at the meetings in Breda and Bunnik (proposals for quotas were discussed but nothing apparently came of them), the fact remains that data for individual companies were communicated to competitors with a view to preparing the ground for a quota cartel and, in particular, export figures were sent by Tréfilunion to Boël/Trébos (point 85 of the Decision), in breach of Article 85 of the Treaty.

Arguments of the parties

77 The applicant admits having participated in several meetings concerning the Belgian and Dutch markets and concedes that there were price agreements. Nevertheless, it claims that those agreements had no influence on market shares and that, at each meeting, it was found that the previous meeting had been unsuccessful and it was necessary to change the decisions adopted at it. It also claims that it held a very small share of the Belgian market, because of the existence of the German crisis cartel which facilitated German exports to Belgium and led to a fall in market prices.

78 The Commission replies that the claimed non-observance of prices does not alter the existence of the infringement, which comes into being as soon as prices are fixed jointly. It points out that the applicant itself recognizes that decisions were in fact taken. The Commission emphasizes that the fact that the applicant allegedly had a small market share does not mean that it did not participate in the agreements, such participation, moreover, being apparent from the documents referred to in points 97, 98 and 101 of the Decision (telexes set out in annexes 68, 69 and 73 to the statement of objections). In fact, Tréfilunion refrained from selling on the Benelux markets because of the agreements in which it participated with a view to raising prices.

Findings of the Court

79 The Court finds that the applicant admits its participation in the meetings and that, at those meetings, decisions were taken concerning prices. It must be stated that non-observance of the agreed prices does not change the fact that the object of those meetings was anti-competitive and that, therefore, the applicant participated in the agreements: at most, it might indicate that the applicant did not implement the agreements in question. There is no need to take account of the concrete effects of an agreement, for the purposes of applying Article 85 (1) of the Treaty, where it

appears, as it does in the case of the agreements referred to in the Decision, that the object pursued is to prevent, restrict or distort competition within the Common Market (Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45).

80 In any event, the Court considers that the applicant cannot argue that its small market share is attributable to the existence of the German crisis cartel because, as is apparent from the telex of 3 April 1984 from Tréfilunion to Boël (annex 69 to the statement of objections, point 97 of the Decision) and a telex of 21 June 1984 from Tréfilunion to Thibodraad (annex 73 to the statement of objections, point 101 of the Decision), that small share is attributable to the course of conduct it adopted as a result of participating in the agreements with a view to not undermining the decisions taken concerning prices on the Benelux market.

81 It follows that the Commission has established to the requisite legal standard that the applicant participated in the agreements concerning prices on the Benelux market in the period August 1982 to November 1985.

82 The Court also finds that the applicant has in no way disputed the fact that it disclosed information to its competitors in preparation for a quota cartel. Accordingly, it must be concluded that the Commission has proved to the requisite legal standard the existence of a concerted practice within the meaning of Article 85 of the Treaty (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 258 to 261).

83 The applicant's complaint must therefore be rejected.

C — *The 1985 agreement between BStG and Tréfilunion concerning trade interpenetration between Germany and France*

The contested measure

84 The Decision (points 135 to 143 and 176) criticizes the applicant for participation in agreements concerning trade interpenetration between Germany and France with the German undertaking BStG. Those agreements were allegedly concluded during a conversation of 7 June 1985 between Mr Müller, the chief executive of BStG, and Mr Marie, a director of Tréfilunion, as appears from an internal memorandum from Mr Marie of 16 July 1985 (annex 106 to the statement of objections) and an internal memorandum from Mr Müller of 27 August 1985 (annex 107 to the statement of objections). According to the Decision (point 140), the concessions made by each side in the conversation were adhered to, as evidenced by the facts that neither Tréfilunion nor the other French producers complained to the Commission about the German structural crisis cartel and that BStG's works at Gelsenkirchen (Germany) did not export catalogue mesh to France. Moreover, it is apparent from the two memoranda that any future export business was to be linked to a delivery quota.

85 According to the Decision (point 176), the arrangements which were made during the conversation of 7 June 1985 between Mr Müller and Mr Marie concerning trade interpenetration between France and Germany constitute a restriction of competition between French and German producers which was likely to affect trade between Member States.

Arguments of the parties

86 The applicant considers that the event referred to was simply a contact between Mr Müller and Mr Marie. It claims that no decision was taken, as evidenced by the fact that the conversation was the subject of a qualified report by the two parties.

According to the applicant, although there were discussions, they were not directly intended to establish an agreement restricting Franco-German interpenetration in trade in welded steel mesh. The applicant considers that the Commission has not proved any reduction of German penetration in France. The applicant points out that Mr Müller wrote in his memorandum that he would find out about 'any possibilities of limiting interpenetration'. The applicant concludes that no action was taken to restrict competition from Germany.

87 The Commission rejects Tréfilunion's assertions and points out that Mr Marie's report of 16 July 1985 includes 'conclusions' which refer to certain concessions confirmed 'for the time being'. Those concessions were merely a first stage 'pending our next meeting', but they were nevertheless real and were already tending to limit interpenetration between France and Germany.

Findings of the Court

88 The Court finds that the Decision (point 140) holds that the applicant engaged in general concertation with BStG to limit mutual penetration by their products in Germany and France, that conduct being manifested in three ways: Tréfilunion would not lodge a complaint with the Commission against the German crisis cartel; BStG's works in Gelsenkirchen would not export catalogue mesh to France for a period of two to three months; and, finally, the parties agreed to make their future exports subject to quotas.

89 The Court considers that it can be concluded from an analysis of the two memoranda mentioned above (see paragraph 84) that the Commission has established to the requisite legal standard that there was concertation between the applicant and

BStG regarding the first two matters referred to. In his memorandum, under the heading 'Conclusions', Mr Marie wrote that 'no complaint will be lodged in Brussels against the Kartellvertrag'. The memorandum from Michael Müller is also clear in that regard: 'Mr Marie agreed to refrain from lodging a complaint ...'; 'He was willing to agree to such certification [of Gelsenkirchen] if it was not made use of for two to three months ...; I accepted the two or three months waiting period'. The Court considers that Mr Marie's commitment not to lodge a complaint against the German crisis cartel must be seen as an agreement to follow a particular course of conduct towards a competitor in exchange for concessions from that competitor, forming part of an arrangement in breach of Article 85(1) of the Treaty.

90 The wording of the two memoranda also reveals that the two parties wished to achieve a balance and a limitation of mutual penetration of their products in both countries. The Court finds, first, that Mr Müller, in his abovementioned memorandum, states that 'for our part, we are very interested in limiting mutual interpenetration. However, because of the large number of participants, that is more difficult to control than would be the case at national level, but it should be done as soon as possible and certainly should be done in any event when the price is virtually the same on all the markets concerned'. In the same memorandum, Michael Müller observes that Mr Marie put forward certain proposals and wishes, including 'balance between interpenetration deliveries between both countries in absolute tonnages'. Also, in his abovementioned memorandum, Mr Marie wrote, under the heading 'Conclusions', that 'For the time being and pending our next meeting ... BStG will contact the other German producers in order to make it easier for French producers to gain access by abolishing certain measures and negotiate a penetration figure; try to reduce the activity of Moselstahl (via Stinnes) and explore the possibility of integrating Gelsenkirchen into the German total, the share to be attained on the French market remaining to be determined.'

91 In view of the foregoing analysis, the Court considers that it has been established only that the two parties envisaged concluding an agreement on quotas, subject to the reactions of the other German undertakings.

92 Accordingly, the Court considers that the Commission has established to the requisite legal standard the facts set out in the first paragraph of point 140 of the Decision, namely that Tréfilunion undertook not to lodge a complaint against the structural crisis cartel and that BStG would refrain from exporting catalogue mesh to France for a period of two to three months. On the other hand, the Court considers that the Commission has not established to the requisite legal standard that there was an agreement to link their future exports to quotas, as indicated in the second paragraph of point 140 of the Decision.

93 Consequently, it is appropriate, first, to reject the applicant's complaint regarding the agreements described in the first paragraph of point 140 of the Decision and to confirm that the Commission was right to consider that they constituted an infringement of Article 85(1) of the Treaty, and, secondly, to uphold the applicant's complaint concerning the conduct attributed to it by the second paragraph of point 140 of the Decision and to hold that, since that allegation has not been proved to the requisite legal standard, the alleged conduct cannot be caught by Article 85(1) of the Treaty.

III — *The lack of any appreciable restriction of competition or effect on trade between Member States*

Arguments of the parties

94 The applicant disputes the statement in point 159 of the Decision that the agreements implemented in 1981-1982 'appreciably affected trade between Member States as (they) directly regulated cross-border trade in goods'. According to the applicant, the fact that the products in question were not substitutable or interchangeable from one country to another because, in particular, it was necessary in

France to obtain certification on the basis of a product range drawn up by ADETS, which differed from the German, Belgian and Netherlands product ranges, leading to increased manufacturing costs for French products, precluded the possibility of any impact on intra-Community trade. In the absence of any such impact, Article 85(1) cannot apply.

95 In the alternative, the applicant submits that the Commission has not proved the existence of quota agreements and still less that such agreements had the effect of subjecting imports into France to quotas — on the contrary, imports increased. As regards price agreements, the applicant claims that it was a leader, that its prices were published and that it followed those prices. It points out that in its Decision 84/405/EEC of 6 August 1984 concerning a proceeding under Article 85 of the EEC Treaty (IV/30.350 — Zinc Producer Group, OJ 1984 L 220, p. 27, hereinafter the 'Zinc Decision') that such a situation does not deprive undertakings of the possibility of independently determining the conduct they intend to adopt in the common market. It notes that the Commission there stated: 'Under such circumstances, parallel pricing behaviour in an oligopoly producing homogeneous goods will not be in itself sufficient evidence of a concerted practice'. The applicant considers that that applies exactly to the case of welded steel mesh. In any event, in its opinion, parallel pricing on the market certainly cannot constitute an infringement.

96 The Commission considers that, in view of the conclusive evidence of the existence of the agreements, the applicant's arguments concerning the interchangeability or otherwise of products has no bearing on the legality of the Decision (see paragraph 28 above). The Commission rejects the view that different technical standards in different countries constitute genuine barriers and, referring to the Tréfilunion memorandum of 1 December 1981 (annex 5 to the statement of objections), it contends that the price increase found in the Decision resulted from the agreements themselves and not from the conditions applicable to manufacture of the products in question.

97 The Commission does not dispute the fact that welded steel mesh is a uniform product (at least within each category) and that the producers hold an oligopoly, as in the context of the Zinc Decision, but in its view that is no basis for claiming that there was no agreement in the present case. The evidence in its possession in this case relates not only to pricing but also includes documents showing the existence of an agreement. It points out that, according to the Zinc Decision itself: 'However, sufficient evidence may result from parallel pricing in combination with other indications, such as contacts between undertakings on desirable price changes prior to price changes, or the exchange of information which reinforces contacts to this kind.' It also considers that, whilst 'parallel conduct' does not constitute an infringement, it is nevertheless indicative of an agreement. The concerted practice constitutes the infringement and is evidenced by the parallel conduct. The fact that Tréfilunion was in the position of market leader does not account for the parallel prices, since the prices charged incorporated markdowns from those price lists.

Findings of the Court

98 First, the Court points out that the applicant's arguments concerning the Commission's allegedly incorrect analysis of the market have already been rejected (see paragraph 29 et seq. above).

99 Article 85(1) of the Treaty prohibits as incompatible with the Common Market all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions or share markets or sources of supply.

100 It follows from that provision that the only relevant questions are whether the agreements in which the applicant participated with other undertakings had as their object or effect the restriction of competition and whether they were capable of affecting trade between Member States (Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 216 and 224).

101 The Court points out that it is apparent from its findings relating to the setting up of the agreements that the Commission established to the requisite legal standard that the applicant participated in agreements on the French market in the period 1981-1982, the object of which was to restrict competition within the Common Market, in particular by fixing prices and volumes of sales.

102 The Court also points out that it is settled law that, in order that an agreement, decision or concerted practice may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States and the influence thus foreseeable must give rise to a fear that the realization of a single market between Member States might be impeded (*Van Landewyck and Others* v *Commission*, cited above, paragraph 170).

103 It must also be observed that under Article 85(1) of the Treaty, the restrictions of competition ascertained do not need actually to have appreciably affected trade between Member States, it being necessary only to establish that the agreements in question are capable of having that effect (Case 19/77 *Miller* v *Commission* [1978] ECR 131, at p. 152).

104 In any event, it must be emphasized that the restrictions of competition were likely to divert patterns of trade from the course which they would otherwise have

followed, since their object and effect was to impose quotas on imports. As is apparent from the findings made regarding the setting up of the agreements, the effect of the latter was to give effect to quota arrangements for imports and fix prices on the various markets. Moreover, those agreements were directly concerned with regulation of cross-border movements of products, and German, Belgian, Italian, French and Dutch producers participated in them. The Commission was therefore right to find that the agreements in which the applicant participated were liable to affect trade between Member States.

105 For the sake of completeness, the Court finds that the fact that Tréfilunion held the position of leader and that its prices were published does not undermine the Commission's findings regarding the setting up of the agreements, which were based on a number of documents running contrary to the contentions of the applicant.

106 The applicant's complaint must therefore be rejected.

IV — *Justification*

Arguments of the parties

107 The applicant submits that, in Case 258/78 *Nungesser and Eisele* v *Commission* [1982] ECR 2015, the Court of Justice conceded that it was reasonable to conclude that certain specific circumstances, falling outside the exemptions provided for by Article 85(3) of the Treaty, might be conducive to the disapplication of Article 85(1), even where the conditions at issue were previously regarded as restrictive of competition. Those dicta, in the applicant's view, apply by analogy to the present case, where there was an oligopoly by virtue of which the German producers

enjoyed, at least from 1983 onwards, a preferential situation. The structural crisis cartel had fixed delivery quotas only for the German internal market and thus favoured exports as a result of the fact that German undertakings could obtain a refund of DM 80 per tonne if they did not exhaust their quotas. The applicant was therefore faced with the need to react to that competition and its conduct was therefore justified. That situation rendered Article 85(1) of the Treaty inapplicable, at least as from 1983.

108 The Commission replies that the applicant is mistaken to claim that, by reason of particular circumstances, such as the existence of the German crisis cartel from 1983, Article 85 should not apply to the conduct of other undertakings 'responding to competition of that kind'. An infringement of the competition rules by certain undertakings can never justify an infringement by others, a situation which does not involve any 'rule of reason' which the applicant purports to educe from the *Nungesser* judgment. The Commission points out that all the agreements referred to in Article 85(1) of the Treaty are prohibited *ipso jure*, regardless of the reasons for which they were concluded. The Commission points out that, in the *Nungesser* judgment, the circumstances were very special and totally different from those of the present case and no 'rule of reason' can therefore be inferred from it as a basis for removing agreements restrictive of competition from the purview of Article 85(1) of the Treaty on the pretext that other agreements exist in the same product sector.

Findings of the Court

09 It must be borne in mind that the Commission has established to the requisite legal standard that the object of the agreements was anti-competitive within the mean

ing of Article 85(1) of the Treaty. Moreover, the fact that the infringement of Article 85(1) of the Treaty, in particular subparagraphs (a) and (c), is a clear one necessarily precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement *per se* of the competition rules (Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265).

110 Consequently, the applicant's complaint cannot be upheld.

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

I — *Insufficient examination of the economic and legal context*

Arguments of the parties

111 The applicant maintains that the Commission should have taken account of the economic and legal context in the building sector and wire rod sector. First, it submits that the construction industry, from which the main demand for welded steel mesh comes, was faced, in France and the other countries of the Community, with a serious crisis between 1976 and 1985, leading to a steep decline in demand for welded steel mesh. Secondly, it submits that there is a close link between welded steel mesh and wire rod, the latter being covered by a system of quotas and prices and price regulation. It adds that, between June and October 1982, welded steel mesh prices were frozen in France. In those circumstances, it considers that it was obliged to initiate a restructuring plan with a view to improving its productivity, reducing the number of its production sites, reducing its workforce and adjusting

its products to take account of new requirements and technological developments. It claims that, although the restructuring agreements were not signed or notified to the Commission, that fact should not prevent their being taken into account. It considers that the circumstances of the present case are no different from those giving rise to the Zinc Decision or Commission Decision 84/380/EEC of 4 July 1984 concerning a proceeding under Article 85 of the EEC Treaty (IV/30.810 — Synthetic fibres, OJ 1984 L 207, p. 17, hereinafter 'the Synthetic Fibre Decision'), in which, it claims, the Commission conceded that, even where the agreements have not been notified, it is permissible to take account of the fact that agreements limiting and controlling production, even if not leading to any improvement in the structure of supply, may in fact have been intended to help the undertakings get out of a difficult economic situation (point 100 of the Zinc Decision).

12 The applicant also claims that by virtue of Commission Decision 84/388/EEC of 23 July 1984 concerning a proceeding under Article 85 of the EEC Treaty (IV/30.988 Agreements in and concerted practices in the flat-glass sector in the Benelux countries, OJ 1984 L 212, p. 13, hereinafter 'the Flat Glass Decision'), it is unnecessary for an actual plan to have existed in the shape of a formal agreement between the undertakings concerned and that there is likewise no need to prove the existence of a causal link between the contested agreement and the restructuring for a reduction of penalties to be available.

13 The Commission replies that, in its Decision (points 200, 201 and 202), it took account, in determining the amount of the fine, of the crisis existing in the welded steel mesh sector. It adds that the decisions cited by the applicant concern different situations: in the Synthetic Fibre Decision it granted an exemption under Article 85(3) of the Treaty for an agreement on coordinated reduction of capacity, which had been notified to it; in the Zinc Decision, it prohibited a quota and price agreement under Article 85(1) of the Treaty.

114 The Commission states that the *Twelfth Report on Competition Policy* indicates that it may accept agreements which provide for a coordinated reduction of overcapacity, which contain a detailed and binding programme of closures and do not otherwise limit the individual decision-making freedom of undertakings. However, it considers that the applicant's alleged restructuring plan cannot be described as an agreement for the coordinated reduction of overcapacity in a period of structural crisis and that, in any event, neither the applicant nor any other participant in the agreements made any notification to it to that effect.

115 As regards the price control authorized by French law as in force at the material time, the Commission observes that the period in which prices were frozen (14 June to 31 October 1982) does not overlap with the period determined by it as the period of the infringement.

Findings of the Court

116 The Court observes that the Commission stated in the Decision that it had taken account of a number of circumstances applicable to all the undertakings, which prompted it to limit the fines to an amount considerably below the level which would normally be justified (point 208 of the Decision). Among such circumstances, the Decision refers to the fact that 75 — 80% of the price of welded steel mesh is attributable to the price of wire rod, a product which was subject to production quotas; the structural decline in demand; the existence of excess capacity and short-term market fluctuations; the low profitability of the industry (point 201 of the Decision), and the relationship between welded steel mesh and reinforcing bars (point 202 of the Decision).

117 The Court also considers that the applicant cannot rely on the three Commission decisions — in the Synthetic Fibre, Zinc and Flat Glass cases — since they relate to circumstances fundamentally different from those of the present case. The Synthetic Fibre Decision concerns an agreement for the coordinated reduction of capacity, which had been notified and was granted an exemption under Article 85(3) of the Treaty. In the Zinc and Flat Glass Decisions, the Commission prohibited quota and price agreements, although, as in the present case, the prevailing crisis was taken into account as a mitigating circumstance. The Court also considers that the applicant's alleged restructuring plan cannot be regarded as an agreement for the coordinated reduction of overcapacity and that, in any event, it was open to the producers to notify their agreements to the Commission under Article 85(3) of the Treaty, which would have enabled the Commission, if appropriate, to rule as to whether they met the criteria laid down by that provision. Since the applicant did not avail itself of that opportunity, it cannot rely on the crisis to justify setting up secret agreements contrary to Article 85(1) of the Treaty.

118 Finally, the Court points out that the applicant is not entitled to rely on provisions of national law authorizing price controls since, first, it is settled law that the fact that conduct on the part of undertakings was known, authorized or even encouraged by national authorities has no bearing, in any event, on the applicability of Article 85 of the Treaty or, where appropriate, Article 86 (Case 229/83 *Leclerc and Others* [1985] ECR 1 and Case 231/83 *Cullet* [1985] ECR 305; Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 71) and, secondly, as the Commission rightly emphasized, the period in which prices were frozen was not included in the period of infringement determined by the Decision.

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

II — *The existence of* force majeure *and the Commission's alleged failure to act*

Arguments of the parties

120 The applicant maintains that the fact that the German welded steel mesh market is itself covered by a structural crisis cartel, authorized by the Federal Cartel Office, published in the *Bulletin of the European Communities* and tolerated by the Commission for four years, constituted a case of *force majeure*, prompting it to conclude that the cartel was lawful for the purposes of both German law and Community law, no similar legal solution having been adopted for French producers under French law. It considers that it is appropriate to apply by analogy the judgment in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223 (hereinafter the 'Zoja judgment'), in which the Court reduced the fine imposed on the applicants in consideration of the time taken by the Commission to react between the lodgment of a complaint by the third party, the Zoja company, and its decision to initiate a procedure.

121 The Commission replies that the existence of the German cartel cannot justify an agreement like that for which the applicant was criticized, because an infringement of the competition rules by certain undertakings cannot in any circumstances justify an infringement by others. It states that the German cartel was a national agreement adopted in conformity with national procedures and authorized by the Federal Cartel Office, whereas the French producers had entered into agreements which included foreign producers and, therefore, intra-Community trade was inevitably affected. It adds that, if the French producers wished to benefit from a 'similar legal solution' under Community law, they should have observed the procedures laid down by Community law. Moreover, the Commission has made it clear that the German cartel was published in the *Thirteenth Report on competition policy* (and not in the *Bulletin of the European Communities*), which did not appear until 1984 (No 188, p. 127). The applicant cannot therefore rely on that publication in an attempt to justify its conduct in 1981-1982 and 1983-1984.

122 As regards its alleged failure to act, the Commission contends that two years did not pass between its receipt of the notification of the cartel from the Federal Cartel Office and the commencement of its investigations. The Commission contends that it acted as soon as it was apprised of the adverse effects of the German cartel on intra-Community trade.

123 The Commission considers that the parallel with the Zoja case is not relevant. In that case, the Court criticized the Commission for determining the duration of an infringement as two years, extending to the date of the decision, even though it received a complaint only six months after the inception of that infringement. In the present case, the Commission took the view that the infringements committed by the undertakings occurred between 27 May 1980 and 5 November 1985, the date on which it commenced its investigations (Article 1 of the Decision). The duration of the infringement taken into account for calculation of the fine did not therefore include a period following the date on which the Commission became aware of the conduct for which the applicant was criticized.

124 Finally, the Commission states that the incentive to export prompted by the existence of the German crisis cartel, in so far as it influenced the conduct of undertakings established in other Member States, was taken into account in reducing the amount of the fine (point 206 of the Decision).

Findings of the Court

25 The Court cannot accept the applicant's argument that the existence of the structural crisis cartel in Germany gave rise to a case of *force majeure*. It is settled law that the concept of *force majeure* must be understood in the sense of abnormal and unforeseeable circumstances, beyond the control of the person seeking to rely on it, the consequences of which could not have been avoided despite the exercise of all due care (Case 199/87 *Jensen* [1988] ECR 5045, paragraph 21). In the present case, none of those circumstances forming part of the concept of *force majeure* is

relevant to the German crisis cartel, which was a national agreement covered by German rules and procedures, which took effect in accordance with those rules. Moreover, it must be observed that the applicant's director himself, in his internal memorandum of 16 July 1985 concerning his conversation with Mr Müller, undertook not to lodge a complaint with the Commission against the German cartel.

126 In the present case, in view of the intrinsic gravity and manifest nature of the infringement of Article 85(1) of the Treaty and in particular subparagraphs (a) and (c) thereof, the Court considers that the applicant cannot claim to have been convinced that the agreements in which it participated were lawful. It could not have been unaware that, to qualify for an exemption, such agreements had to be notified to the Commission or that the requirement of notification under Article 4(2) of Regulation No 17 could not be waived for those agreements.

127 Moreover, it must be emphasized that, even on the assumption that the Commission has failed to fulfil certain of its obligations under Article 155 of the EEC Treaty by failing to ensure the application of Community competition law, that fact cannot justify any infringements of Community law such as those committed by the applicant in the present case (see *Van Landewyck*, cited above, paragraph 84).

128 Finally, the Court finds that the Decision also took account, as a mitigating circumstance, of the existence of the structural crisis cartel in Germany, which led the parties in other Member States to seek to protect themselves but does not justify the unlawful measures taken by them (point 206 of the Decision).

129 The complaint must therefore be rejected.

III — *Failure to specify the criteria for determining the amount of the fine*

130 The applicant states that Tréfilunion II comprises Tréfilunion I and the company CCG-Tecnor and that the fine imposed therefore covers infringements attributed to both companies; but it claims that it is not altogether clear from the Decision what fine was imposed on each company for which infringement and for what duration. It states that Tecnor did not participate in the alleged Franco-German agreement of 1985 or the Benelux market agreement. Finally, the applicant claims that, as well as giving no details of the basis of the fine, the Commission failed to specify the reduction accorded in respect of the mitigating circumstances ascertained.

131 The Commission considers that the applicant has no grounds for complaining of any defect in the statement of reasons, since it is apparent from the Decision that CCG participated in the agreements on the French market from 1981-1982 and 1983-1984, whilst it did not find that CCG-Tecnor had participated in the agreement on the Benelux market or the 1985 agreement on the German market. It follows that the fines imposed on Tréfilunion II relate both to the infringements committed by Tréfilunion I (agreement on the French market in 1981-1982 and 1983-1984, the Benelux agreement and the bilateral agreement on the German market) and those committed by CCG-Tecnor (agreements on the French market, 1981-1982 and 1983-1984).

132 The Court considers that the applicant's argument is unfounded. It need merely be pointed out that point 159 of the Decision clearly indicates that Tréfilunion and CCG, among others, participated in the agreements put into effect on the French market in 1981-1982, that point 160 also indicates that those two undertakings

participated in the agreements implemented on the French market in 1983-1984 and that CCG-Tecnor is not mentioned in the points which specify the undertakings which participated in the other agreements.

133 The Court also finds that, in the 'legal assessment' part of the Decision, the Commission sets out the various criteria for evaluation of the gravity of the infringements imputed to the applicant and the various circumstances which palliated the economic consequences of the infringement. Consequently, the Court considers that the Decision, taken as a whole, provided the applicant with the information necessary to determine whether or not it was well founded and enables the Court to carry out its review of legality. As regards the mitigating circumstances, it should be borne in mind that, in its written answer to the questions put to it by the Court, the Commission indicated that no mitigating circumstance existed in relation to the applicant individually.

134 The applicant's complaint must therefore be rejected.

IV — *The excessive amount of the fine*

A — *Reference to the applicant's turnover*

Arguments of the parties

135 The applicant maintains that the Commission did not state whether it took as a basis the overall turnover of the undertaking or only the turnover for France, or possibly, in the case of Tréfilunion I, for the Benelux countries. The applicant,

referring to the Opinion of Advocate General Van Gerven in Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261, p. 262, complains that only court proceedings against a Commission decision make it possible to determine how a fine which is regarded as excessive was calculated.

136 The Commission replies that it took as the basis for calculation of the fine the turnover in welded steel mesh achieved by the undertakings on the relevant geographical market, that is to say the 'Community of Six' (France, Germany, Italy and the Benelux countries), and did so because the geographical market as a whole was affected by all the agreements. It explains that, in view of the seriousness of the infringement and the fact that Tréfilunion I participated in agreements on the French market, the Benelux market and the German market, it took as its basis for calculating the fine imposed on Tréfilunion I 3.6% of the relevant turnover, namely FF 38 209 000 x 3.6%, giving a sum equivalent to ECU 1 375 000, from which it deducted the amount of the fine already imposed in France by the Minister for the Economy, Finance and Budget of approximately ECU 125 000 (FF 800 000). In the case of CCG-Tecnor, the Commission explains that it opted for 2% of the relevant turnover since the infringements found to have been committed by that undertaking related only to the 1981-1982 and 1983-1984 agreements on the French market. The fine therefore was FF 7 790 000 x 2%, namely a sum equivalent to ECU 155 000, from which it also deducted the amount of the fine imposed on CCG in France of approximately ECU 30 000 (FF 200 000). The final fine imposed on Tréfilunion II thus amounted to ECU 1 375 000, representing 2.99% of the aggregate turnover of Tréfilunion I and CCG-Tecnor on the relevant geographical market. The Commission also states that the percentage of turnover adopted in calculating the fine is wholly comparable with those used in the cases cited by the applicant.

137 In its reply, the applicant submits, first, that the explanations given by the Commission in its defence show that the passages of the Decision concerning the amount of the fine were not correctly drafted or reasoned. Secondly, it observes

that it is unable to verify how the Commission arrived at the basis of the fine imposed since it had never been asked to disclose its turnover in welded steel mesh on the relevant geographical market. Nor did the Commission state which year or years it took into consideration, or the date taken as a reference point for conversion into ECU.

138 The Commission replies that it is not true that it never asked the applicant to indicate its turnover in welded steel mesh on the relevant geographical market. It is apparent from a letter from the applicant's lawyer of 1 June 1989 (annex 3 to the rejoinder) that it was the applicant which failed to provide that information, arguing that its exports to other Community countries were very limited. The Commission itself was therefore obliged to estimate that turnover, by deducting from the overall 1985 tonnages delivered (annex 1 to the rejoinder) the exports to non-member countries (annex 2 to the rejoinder). In order to calculate the turnover in French Francs on the basis of that information, it applied a simple rule of three to the 1985 figures, then converting the result into ECU, at the rates applying at the end of 1985 (annex 4 to the rejoinder). For Tecnor, the calculation was exactly the same, except that 1984 was taken into account, being the last year in which the infringements found against it were committed.

139 The Commission points out that Article 15(2) of Regulation No 17 allows fines to be imposed of up to 10% of the total turnover of the undertaking (Joined Cases 100 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 118, and *Tipp-Ex* v *Commission*, cited above) and that, in the present case, it applied a dual limitation, in respect of the geographical market (only the Community of Six) and in respect of the product concerned (welded steel mesh).

Findings of the Court

140 Pursuant to Article 15(2) of Regulation No 17, the Commission may impose fines of between ECU 1 000 and ECU 1 000 000, and the latter figure may be increased up to a ceiling of 10% of the turnover achieved during the previous year by each of the undertakings that participated in the infringement. For determination of the amount of the fine within those limits, that provision requires account to be taken of the gravity and duration of the infringement. Since the term 'turnover' has been interpreted by the Court of Justice as meaning the total turnover (*Musique Diffusion Française*, cited above, paragraph 119), it must be concluded that the Commission, which took account not of the total turnover achieved by the applicant but only of the turnover in welded steel mesh in the Community of Six and did not exceed the 10% ceiling, did not therefore, having regard to the gravity and duration of the infringement, infringe Article 15 of Regulation No 17.

141 As regards the applicant's complaint concerning the inadequacy of the statement of the reasons on which the Decision is based regarding the method of calculation of the fine, it must be borne in mind that the Commission must, when publishing its decisions, take account of the legitimate interest of undertakings in not having their business secrets divulged (Article 21(2) of Regulation No 17) and that, by virtue of the case-law of the Court of Justice, the Commission is not required to indicate, in the administrative procedure, the criteria according to which it plans imposing any fine (see Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 17 to 21).

142 Consequently, the Court considers that, although it is desirable for undertakings — in order to be able to define their position in full knowledge of the facts — to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them, without being obliged, in order to do so, to bring court proceedings

against the Commission decision — which would be contrary to the principle of good administration — in the present case, having regard to the case-law cited, the information contained in the Decision and the lack of cooperation on the part of the applicant (in that connection, see the following paragraph), the complaint concerning an inadequate statement of reasons cannot be upheld.

143 For the sake of completeness, it must be pointed out that the applicant cannot challenge the Commission's calculation method in determining the fine with respect to the turnover of Tréfilunion I and Tecnor on the relevant market because it is apparent from the letter from the applicant's lawyer of 1 June 1989 that it deliberately did not disclose to the Commission its figures for exports to the Community market. Moreover, it must be stated that the applicant has not claimed that the figures submitted by the Commission in the present proceedings were in any way incorrect.

144 The applicant's complaint must therefore be rejected.

B — *The taking into account of the value added by welded steel mesh producers*

145 The applicant claims that the Commission should have taken account of the fact that the value added by the producers of welded steel mesh was only about 20%, that limited figure being attributable to Community rules. It considers that a comparison of the fine with the value-added component of the product shows that it was excessive and that the fact that competition can operate only in respect of a very limited proportion of the manufacturing costs very considerably reduces the gravity of any restrictive agreement.

146 The Commission replies that the applicant's assertion is not supported by any evidence and finds no basis in Article 15(2) of Regulation No 17. Moreover, it considers that the fact that price competition can operate only in respect of a limited part of the production costs constitutes an aggravating circumstance.

147 The Court finds that the Decision (point 201) did take account — and accordingly reduced the general level of the fines — of the fact that 75-80% of the price of welded steel mesh is attributable to the price of wire rod, for which, throughout the relevant period, production quotas had been introduced by the Commission on its own initiative, under Article 58 of the ECSC Treaty, as part of the policy pursued by it in order to remedy the structural crisis in the steel industry.

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

C — *The taking into account of the fine imposed by the French authorities*

149 The applicant claims that the Commission indicated that it had taken into account numerous mitigating circumstances, including, by virtue of the judgment of the Court in Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1, the fines already imposed by the French authorities, but that the Decision does not indicate by what method the Commission calculated the fine and, likewise, it is not apparent from point 205 of the Decision to what extent it took account of the French fine, in particular as regards the Benelux market. In the applicant's view, it was penalized on the basis of the same facts by both the national and Community authorities, since the French authorities took account of the French market and the Benelux market.

150 The Commission states that the fines already imposed in France were deducted from the total fine which it would have arrived at in normal circumstances; there is thus no breach of the principles laid down by the Court of Justice in *Walt Wilhelm and Others*.

151 The Court points out that the Court of Justice has held that the possibility of concurrent sanctions resulting from two parallel procedures pursuing different ends is acceptable as a result of the special system of sharing jurisdiction between the Community and the Member States with regard to cartels. However, the Court of Justice has established that, by virtue of a general requirement of natural justice, the Commission must take account of penalties which have already been borne by the same undertaking for the same action, where they have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory (see in that connection *Walt Wilhelm*, cited above, paragraph 11, and Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, paragraph 3).

152 It must be noted that that course was followed in this case, the Commission having taken account, in point 205 of the Decision, of the fine already imposed by the French authorities by decision No 85-6 DC of the French Minister for the Economy, Finance and the Budget, which was expressly based on Article 50 of Order No 45-1483 of 30 June 1945 and was therefore adopted under national competition law in relation to the effects of the agreement on the domestic market.

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

154 In view of all the foregoing considerations and the fact that the Commission has not established to the requisite legal standard the existence of an agreement between the applicant and BStG to make their future exports subject to quotas, the Court considers, in the exercise of it unlimited jurisdiction, that the fine imposed on the applicant should be reduced from ECU 1 375 000 to ECU 1 235 000.

Costs

155 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 four-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 an agreement existed between the applicant and Baustahlgewebe GmbH to make their future exports subject to quotas;

2. Reduces the amount of the fine imposed on the applicant by Article 3 of that decision to ECU 1 235 000;

3. Dismisses the application as regards the remaining claims;

4. Orders the applicant to bear its costs and to pay four-fifths of the Commission's costs;

5. Orders the Commission to bear one-fifth 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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