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

In Case T-145/89,

Baustahlgewebe GmbH, a company incorporated under German law, established in Düsseldorf (Germany), represented by Arved Deringer, Claus Tessin, Hans Jürgen Herrmann, Joachim Sedemund and Frank Montag, Rechstanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Norbert Koch, Bernd Langeheine and Julian Currall, of its Legal Service, acting as Agents, and Alexander Böhlke, Rechtsanwalt, Frankfurt am Main, 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.

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 At the material time, Baustahlgewebe GmbH (hereinafter 'BStG') was a jointly owned undertaking, whose capital was held by Thyssen Draht AG as to 34%, Klöckner Draht GmbH as to 33.5%, Arbed as to 25.001%, and Roesler Draht AG, Schwabenthal, as to 7.499%. Its capitals was DM 20 million. BStG had its own installations in Germany (Aalen, near Stuttgart, and Glinde, near Hamburg). It also had a number of machines installed in the works of its partners and sold the production from those machines in its own name. That applied in particular to the production from the St Ingbert works (Germany) and the Roermond works (Netherlands), both owned by the Arbed group. With annual sales of around 320 000 tonnes, BStG was the undertaking with by far the largest market share (about 36%) in the Federal Republic of Germany.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 20 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,

— reduce the fine imposed on the applicant in Article 3(11) of the Decision from ECU 4.5 million to a reasonable amount;

— order the Commission to pay the costs.

17 In connection with its plea as to breach of the rights of the defence, the applicant also claims that the Court should order the Commission to allow the applicant to consult the following documents:

— all the procedural documents, to the extent to which they concern the applicant;

— all documents, correspondence, notes and minutes by which the Federal Cartel Office informed the Commission of the existence of the structural crisis cartel;

— all documents, records, minutes and notes concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German companies involved in the cartel relating to the extension of the duration of the cartel.

18 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

19 The applicant puts forward, essentially, three pleas in law in support of its application. The first alleges breach of the rights of the defence, 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 the rights of the defence

20 This plea comprises two parts. The first alleges breach of the rights of the defence in the course of the administrative procedure, and the second a breach of those rights following the adoption of the Decision. In connection with this plea, the applicant also asks the Court to order the Commission to produce certain documents.

I — *The first part of the plea*

Arguments of the parties

21 The applicant complains that the Commission did not respect its right to be heard. It claims that the Commission first sought, in the statement of objections, to hold the 'German group' and the Fachverband Betonstahlmatten responsible for the alleged infringements of competition law that it was investigating, which led the applicant to believe that it was not primarily concerned. The applicant states that it was for that reason that, in the course of the administrative procedure, it did not consider it necessary to seek access to and consult the file or to appoint a lawyer. The applicant claims that it was only in the Decision that the Commission excluded the Fachverband Betonstahlmatten from the list of addressees and that it simply named the applicant in place of the 'German group', whose members had not been indicated. It states that it had no opportunity to give its views on the fact that it had become the focus of all the objections and that it was not invited by the Commission to do so. If the Commission felt obliged to address all the objections to the applicant, it should have amended the statement of objections, notified the new version to it and given it a further opportunity to give its views in writing and orally.

22 The Commission considers that the statement of objections is a preparatory procedural document, addressed solely to the undertakings against which the procedure is initiated with a view to ensuring their effective exercise of the right to be heard. It emphasises that the factual and legal assessments contained in that document are purely provisional and that the Commission is under a duty to revise them in the light of the explanations provided by those undertakings (order of the Court of Justice in Joined Cases 142/84 *British-American Tobacco and Reynolds* v *Commission* [1986] ECR 1899). The Commission maintains that where, as it is required to do, it takes account of information emerging in the course of the administrative procedure and drops objections which have been found to have an

inadequate basis as against certain persons initially concerned and where the evidence remains unchanged and the objections maintained against the other persons concerned are still valid, there is no new assessment such as to place it under an obligation to supplement the objections set out previously. At the hearing, the Commission explained that, on conclusion of the administrative procedure, it considered that it was unable to maintain its objections against the Fachverband Betonstahlmatten but still regarded BStG as one of those responsible for the practices at issue.

Findings of the Court

23 The Court notes that the letter of 12 March 1987 from the Director-General for Competition accompanying the statement of objections shows that the Commission considered that the addressee undertakings had infringed Article 85 of the Treaty. It provided them with an opportunity to express their views on the objections made, a time-limit being set for them to submit their observations in writing. Those observations could be accompanied, if necessary, by documents and proposals for hearing witnesses, and include a request for a hearing so that they could expand orally on their written observations. The signatory of that letter added that the main documents concerning the case were enclosed and that, in order to avoid any disclosure of business secrets, only the documents of direct or indirect concern to the addressee undertaking were enclosed. He also made clear that the undertakings were entitled, in order to prepare their observations, to examine other documents held by the Commission, subject to obtaining prior authorization.

24 The Court finds that the applicant was one of the addressees of the statement of objections (see points 11(a) and 16 of the Decision), that it was designated by name on several occasion in the analysis contained in the factual part and in the legal assessment of the statement of objections (see in particular points 96, 97, 98, 100, 101, 104, 143, 144, 146, 148(a), 175, 181, 182, 183 and 187) and that it received numerous annexes on which the Commission based its objections. The Court also

considers that the content of a statement of objections may be raised individually against each of the undertakings to which it is addressed, including, in this case, the applicant, unless the statement of objections contains an express statement to the contrary — and in this case it contained no such statement regarding the applicant. The question whether the Commission maintained its objections as regards the applicant in the Decision and, if so, whether it has proved the findings of fact supporting those objections to the requisite legal standard falls to be considered by the Court when examining the question whether the infringement has been proved (see the judgment of the Court of First Instance in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 37 and 40).

25 The Court also notes that the applicant sent a letter to the Commission, dated 29 May 1987, in which it submitted written observations on the statement of objections. In that letter, the applicant asked, as an alternative possibility, for a 'hearing, for the purpose of expounding or supplementing the views given below'. The applicant added that it reserved the right to produce other evidence and to arrange to be represented by lawyers of its choice. That hearing, at which the applicant was represented by Michael Müller, as both chief executive and legal representative and chairman of the Fachverband Betonstahlmatten, took place on 23 and 24 November 1987.

26 Consequently, the Court cannot accept the applicant's argument that it was not concerned by the statement of objections and that the statement of objections should have been amended so as to address all the objections to it. It must be emphasized that the applicant was expressly designated in the statement of objections as one of the persons concerned, that it received the annexed documents concerning it, that it submitted written observations and was represented at the hearing before the Commission and that the fact that it did not appoint a lawyer for the administrative procedure was a matter of its own choice, a choice which it expressly reserved the right to make. It follows that the applicant was able, on several occasions and in accordance with the legal requirements, to express its views in the course of the administrative procedure before the Commission.

27 Therefore, this part of the plea in law must be rejected.

II — *The second part of the plea*

Arguments of the parties

28 The applicant claims that, when it was preparing its application, the Commission infringed its rights of defence, in particular its right to be heard by rejecting, for the most part, its request of 30 August 1989 to be allowed to consult the file. In that letter, the applicant asked the Commission for permission to examine the documents on which the statement of objections and the Decision were based. The applicant claims that it exchanged letters with the Commission, in which it drew the Commission's attention to the fact that the fundamental right of the defence to consult the file continues to exist after the adoption of a formal decision and that the Commission replied that it had sent, as annexes to the statement of objections, the documents on which the latter was based. The applicant states that, by fax of 11 October 1989, the Commission offered to send it copies of certain documents and that, in response to that offer, the applicant asked, by fax of 16 October 1989, to have sent to it the report and the file on the inspection carried out on 6 and 7 November 1985 at its offices and the report on the inspection carried out on the same dates at the offices of the Fachverband Betonstahlmatten, and that it also sought permission to consult the minutes and other documents in which the Federal Cartel Office informed the Commission of the existence in Germany of a structural crisis cartel. The Commission, it says, did not react until the action was brought, on 20 October 1989.

29 The Commission observes that the applicant's complaint relates to an infringement allegedly committed by the Commission after notification of the Decision and states that the legality of a decision cannot depend on events occurring after its notification. The Commission emphasizes that although regard for the rights of the defence requires that the undertaking concerned should have been given an

effective opportunity to make known its point of view on the documents relied upon by the Commission in making the findings on which its decision was based, the Commission is not required, by virtue of the case-law of the Court of Justice, to divulge the contents of its file to the parties concerned (Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25). If that principle applies during the administrative procedure, *a fortiori* it must apply after that procedure is closed, as in the present case.

Findings of the Court

30 The Court finds that the applicant's request for further access to the file was made to the Commission after adoption of the Decision and thus post-dates the Decision; consequently, the legality of the Decision cannot in any circumstances be affected by the Commission's refusal to grant the requested access or the failure to forward certain documents during the course of the period allowed for an action to be brought.

31 Consequently, the second part of the plea must be rejected.

III — *The measure of organization of procedure requested by the applicant*

32 In its application, the applicant expressly claims that the Court should order the Commission to allow it to consult the following documents:

— all the procedural documents, to the extent to which they concern the applicant;

— all documents, correspondence, notes and minutes by which the Federal Cartel Office informed the Commission of the existence of the structural crisis cartel;

— all documents, records, minutes and notes concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German companies involved in the cartel, relating to the extension of the duration of the cartel.

33 The Court considers that the applicant must be deemed to be requesting a measure of organization of procedure, as provided for in Article 64(3)(d) of the Rules of Procedure.

34 In order to decide whether it is appropriate for such a measure to be adopted, it is necessary to consider, first, the request for production of all the procedural documents, to the extent to which they concern the applicant. It must be borne in mind that the applicant does not deny having received, in the course of the administrative procedure before the Commission, all the documents from the file that were of direct or indirect concern to it and on which the statement of objections was based. Furthermore, the applicant has not produced any evidence to show that other documents were relevant to its defence. Consequently, the Court considers that the applicant was enabled to put forward, as it wished, its views on all the objections made by the Commission against it in the statement of objections which was addressed to it and on the evidence supporting those objections, mentioned by the Commission in the statement of objections or in the annexes thereto, and that, accordingly, the rights of the defence have been safeguarded (judgment of the Court of Justice in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7; and judgments of the Court of First Instance in Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 51, and Joined Cases T-10, 11, 12 and 15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraphs 38 and 39). It follows that, both in preparing its application and in the proceedings before the Court, the applicant's lawyers have had an opportunity to examine the

legality of the Decision in full knowledge of the circumstances and fully to provide for the applicant's defence. Consequently, it is unnecessary to order the Commission to produce the documents mentioned.

35 It is necessary, secondly, to examine the applicant's request for production of the documentation from the Federal Cartel Office, in so far as it relates to the structural crisis cartel and the documents concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German undertakings involved in the structural crisis cartel. In that regard, it must be noted that the applicant does not claim that, through not having such documents at its disposal, it was unable to defend itself against the objections raised against it and that it has adduced no evidence to show how such documents might contribute to determination of the present dispute. It must also be pointed out, in any event, that the documents concerned relate to the structural crisis cartel which does not, as such, form part of the infringements covered by the Decision (see below, paragraph 55 et seq.) and that, therefore, the documents relating to that cartel are unconnected with the subject-matter of these proceedings. It is therefore unnecessary to adopt the measure of organization of procedure requested by the applicant.

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

I — *The relevant market*

Arguments of the parties

36 The applicant maintains that the statement contained in point 3 of the Decision to the effect that standard mesh and catalogue mesh are largely interchangeable is incorrect. It points out that, by contrast with standard mesh, what is known as catalogue mesh (*Listenmatten*) is made to measure for particular construction projects

and that, in principle, catalogue mesh cannot be used in a building other than the one for which it was specially designed. The applicant considers that a distinction must also be drawn between catalogue mesh (*Listenmatten*) and the mesh made in the Netherlands (*Lettermatten*), which is in fact semi-standardized mesh. The applicant claims that standard mesh and catalogue mesh are not interchangeable, because of their price difference (standard mesh costs DM 760 per tonne, whereas catalogue mesh costs DM 850 to 1 500 per tonne). Where standard mesh of the requisite dimensions is available, the user opts for it because of its unbeatable price and would never use catalogue mesh, which is much more expensive, instead of standard mesh. Catalogue mesh is more in competition with concrete reinforcing bars (an ECSC product), which are sold retail after being worked on in liaison with the contractor having regard to the building to be erected. To support its claims, the applicant suggests that an expert's report should be obtained.

37 The Commission contends that the price of standard mesh could not be a matter of indifference to the applicant since the price of standard mesh has an influence on that of catalogue mesh (points 3 and 114 of the Decision). As an exporter of catalogue mesh, the applicant must inevitably wish to keep the prices of standard mesh within a certain bracket, as compared with catalogue mesh. That was precisely the reason why minimum prices were fixed under the price agreements for the Benelux countries.

Findings of the Court

38 The Court observes that the applicant's description of the market does not in any way conflict with the Commission's. The applicant draws a distinction between standard mesh, catalogue mesh of the *Lettermatten* or semi-standardized type, catalogue mesh of the *Listenmatten* type and tailor-made mesh, claiming that the first two types are very similar to each other and that the last two types are also similar to each other but nevertheless display essential differences from the first two. The

Court considers that the Decision says nothing to the contrary where, in point 3, it states that 'A high degree of substitutability exists, especially between standard mesh and catalogue mesh' and 'The relevant product market can therefore be said to be the market for welded steel mesh in general, within which there is a sub-market for tailor-made mesh'.

39 As regards the prices of standard mesh and *Listenmatten* to which the applicant refers, the Court finds that they are not far removed from each other. That closeness of prices clearly derives from objective factors which influence the two mesh markets concerned, namely the price of wire rod, the raw material for both products, and the pattern of demand in the user market, that is to say the construction market, reflecting the general economic situation.

40 In view of the foregoing findings, it is necessary to consider a closely related issue, namely the influence of the prices of standard mesh on the prices of *Listenmatten* and of tailor-made mesh. In other words, it is necessary to ascertain whether a fall in the prices of standard mesh may render it substitutable for *Listenmatten* and tailor-made mesh and induce customers to opt instead for standard mesh. It should be borne in mind at the outset that the use of standard mesh on certain sites where *Listenmatten* or tailor-made mesh was to be used is possible only if the form of the structure to be erected allows this and, in any case, only if adjustments can be carried out on site which do not give rise to technical difficulties or excessive additional costs. In that regard, it should also be noted that it became apparent at the hearing that the use of standard mesh on a site where tailor-made mesh should normally be used is in fact possible where the price of standard mesh is so low that the prime contractor can be assured of a significant saving, covering the additional costs and compensating for the technical disadvantages arising from the change of material, and that such a situation existed for part of the period covered by the agreements.

41 The Court also finds that certain undertakings to which the Decision relates, including the applicant, have the capacity to produce different kinds of welded steel mesh, so that it may reasonably be concluded that there is some capacity in the industry to adapt the production plant in order to produce the different kinds of welded steel mesh.

42 Finally, the Court finds that the delivery contracts of 24 November 1976 and 22 March 1982 between BStG, on the one hand, and Bouwstaal Roermond BV and Arbed SA afdeling Nederland, on the other (annexes 109 and 109A to the statement of objections) are for standard and non-standard mesh.

43 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 in that regard must therefore be rejected, without there being any need to commission, as requested by the applicant, an expert's report.

II — *The evidence of the agreements*

A — *The absence of a comprehensive agreement*

44 The applicant contests, first of all, the existence of any comprehensive agreement. It claims that there is no proof whatsoever to support the Commission's objection that the German producers established, under its supervision, comprehensive concertation regarding inter-penetration on a European scale, made up of a network of agreements covering the various national markets. It observes that whilst it is true that its chief executive referred, within the supervisory body of the structural crisis

cartel, to isolated contacts which he had had at international level, no limitation of international trade was ever decided upon or made the subject of declarations of intent.

15 It considers that the Commission is wrong to believe that it can rely on a note of 15 October 1985 from the lawyer, Günter Müller, the executive secretary of the Wirtschaftsvereinigung Ziehereien und Kaltwalzwerke and a representative of the structural crisis cartel, as provided for in Paragraph 36 of the German Law on restrictions of competition (GWB) (annex 101A to the statement of objections, point 131 of the Decision) to one of its employees, in which Günter Müller asked for a change to the draft minutes of a meeting of the market committee so as to arrive at more neutral wording to explain the reasons for the poor market situation in the north-west area, which, it seems, was attributable to imports and deliveries of considerable quantities from undertakings not in the cartel. The applicant proposes, in that connection, that certain representatives of undertakings within the supervisory body of the structural crisis cartel and Günter Müller should be heard as witnesses.

16 The Court notes that the Commission has never considered that there was a comprehensive agreement but rather a complex of different agreements (point 22 of the Decision) operating at different times and in different geographical markets; on the contrary, the criticism made by the Decision (points 132 and 175) of the German producers in general and the applicant in particular is that they participated in bilateral agreements with the producers in other Member States.

17 Consequently, it must be concluded that the Decision does not criticize the applicant for participation in a comprehensive agreement and that, therefore, its complaint must be rejected, without there being any need to hear the witnesses suggested by the applicant.

B — *The German market*

(1) *The inclusion of the German structural crisis cartel as an integral part of the infringements found by the Decision*

Arguments of the parties

48 The applicant claims that the Commission had no right in any circumstances to impose a fine on it for its participation in the German structural crisis cartel. The latter was not in breach of the prohibition laid down in Article 85(1) of the Treaty and therefore the applicant likewise did not infringe that article, having relied on the fact that the cartel was legal. In response to the Commission's statement that the cartel agreement does not form part of the infringements ascertained in the Decision and was not held against it in the calculation of the fine imposed on it, the applicant submits that that statement clearly conflicts with the terms of the Decision, from which the contrary is apparent. In that connection, the applicant cites point 126 of the Decision, according to which 'the reference (in subsections 5(2) and 7(1) of the cartel agreement) to delivery quotas ... and not to production quotas ... was chosen knowingly and deliberately in order to use the cartel as an instrument for reaching bilateral agreements with foreign producers the object of which was the reduction of mutual market penetration (see 132 et seq.)'.

49 The applicant states that, in the 'legal assessment' part of the Decision, the Commission sets out the reasons for which the cartel was allegedly incompatible with Article 85(1) and only in point 206 (considerations concerning the amount of the

fine) does it mention the fact that the cartel was authorized by the Federal Cartel Office. It states that point 206 contains nothing to indicate that the cartel 'is not covered by the fine imposed on the applicant and does not represent the infringement ascertained by the Decision'. If the Commission had really not wished to impose a fine in respect of the cartel, it would have been easy for it to make that clear, as it did in relation to other matters (see for example the final part of point 133 of the Decision).

50 The applicant also states that it was not necessary to prohibit the cartel agreement and require it to be brought to an end, as the Decision did for each of the infringements found (points 209 and 210 of the Decision), since the period for which it was concluded had already expired. Moreover, the minutes of the hearing of 24 November 1987 show that it related almost exclusively, as regards the German market, to the question of the effects of the cartel. Michael Müller had expressly asked the Commission to confirm that the cartel agreement had no connection with the procedure but the Commission official responsible for the case answered that the Commission had not given an undertaking to exclude the cartel agreement from the procedure.

51 In the applicant's opinion, it is clear that it was actually criticized in respect of the cartel agreement in the Decision and that that agreement is the main basis of the fine imposed on it and the only explicable reason for the Commission's repeating that the applicant carried particular responsibility because of the function of its chief executive, who chaired the supervisory body of the cartel.

52 In support of its assertions, the applicant proposes that Mr Hohls, who at that time was rapporteur for the fifth section of the Federal Cartel Office, Mr Kirchstein, who at that time was chairman of the fifth section of the Federal Cartel Office, and Günter Müller should be heard as witnesses.

53 The Commission contends that the cartel agreement does not form part of the infringements found by the Decision and points out that it took account (point 206) of the authorization granted by the Federal Cartel Office and did not impose a fine in that regard. The Commission considers that it is not precluded from referring in a formal decision to infringements dealt with informally, and that such a reference does not make the infringement concerned become part of the formal decision. The Commission concedes that, in point 174 of the Decision, it considered subsections 5(2) and 7(1) of the cartel agreement to be incompatible with Article 85(1). However, it stated (point 210 of the Decision) that it was not officially prohibiting those two clauses. Instead of making a formal finding, in the operative part of the Decision, that the cartel agreement was incompatible with the competition rules and imposing a fine on the applicant as representative of the members of the cartel, the Commission confined itself to undertaking negotiations with the Federal Cartel Office and the representatives of the crisis cartel with a view to amending the clauses concerned (point 129 of the Decision), and they were in fact amended.

54 As regards the hearing of 24 November 1987, the Commission emphasizes that, at the request of Michael Müller, the Commission official responsible for the case made it clear 'without commitment and in a proper manner' that the Commission had not given any undertaking to exclude the cartel agreement from the procedure.

Findings of the Court

55 The Court considers that it can be concluded from an analysis of the Decision that the cartel does not, as such, form part of the infringements ascertained by it. The applicant cites point 126 of the Decision incompletely: the fourth paragraph of it reads as follows: 'The arrangements concerning the German market either arise out of the cartel agreement itself or are reflected in the endeavours to protect the cartel against uncontrolled imports.' The main idea in that paragraph was already

expressed in the first paragraph of point 126, namely that 'The agreements concerning the German market should be seen against the background of the establishment and operation of the structural crisis cartel.' That idea is confirmed and expressly stated in other points of the Decision. Thus, in point 130, it is stated that the cartel agreement, in particular subsections 5(2) and 7(1), were used as instruments for reaching 'bilateral agreements with foreign producers the object of which was the reduction of mutual market penetration'. In point 175, it is also stated that the clauses referred to 'had, moreover, as their object, or at least as their effect, the use of the structural crisis cartel as an instrument for reaching bilateral arrangements between German producers on the one hand and producers from other Member States on the other'. Finally, in point 206 it is stated that the cartel was used to 'to protect the German market against competition from other Member States by measures which are illegal under Community law'.

56 On the basis of that analysis, the Court considers that the cartel is treated, in the Decision, as an element which facilitated agreements between the various producers and contained clauses contrary to Article 85(1) of the Treaty; nevertheless, it cannot be inferred from the wording of the Decision that the cartel as such forms part of the infringements found by it. Indeed, point 210 makes it clear that the Commission confined itself to finding that the clauses mentioned were incompatible with Article 85(1) of the Treaty. This interpretation of the Decision is not contradicted by point 174 thereof, which merely finds that the cartel agreement distorted competition in Community trade and, consequently, was liable to affect trade between Member States. As regards point 206 of the Decision, it relates only to the legal effects of the cartel agreement in the light of the various infringements found in other points of the Decision. Consequently, it must be concluded that Article 1 of the operative part of the Decision does not, in finding the existence of agreements or concerted practices or both, refer to the crisis cartel.

57 It is therefore inappropriate to hear witnesses concerning the operation and organization of the cartel, as proposed by the applicant.

58 In view of the foregoing, it must be concluded that the German structural crisis cartel does not, as such, form an integral part of the infringements found by the Decision and that the applicant was not incriminated in the Decision for its participation in the cartel. The applicant's complaint must therefore be dismissed.

(2) *The 1985 agreement between BStG and Tréfilunion concerning trade interpenetration between Germany and France*

The contested measure

59 The Decision (points 135 to 143 and 176) criticizes the applicant for participation in agreements concerning trade interpenetration between Germany and France with the French undertaking Tréfilunion. Those agreements were allegedly concluded during a conversation of 7 June 1985 between Michael Müller 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 Michael Müller of 27 August 1985 (annex 107 to the statement of objections). According to the Decision (point 140), the concessions made by each side at the meeting 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 the applicant'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.

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

Arguments of the parties

61 The applicant maintains that the conclusions which the Commission draws from the two memoranda mentioned above are incorrect since they do not show that any arrangements were entered into. It states that that was the only meeting between Michael Müller and Mr Marie throughout the period at issue and that they met in their capacity of chairmen of associations. It is apparent from those memoranda, in its view, that Mr Marie made proposals to Michael Müller concerning the future channelling of imports, of which the latter merely took note. The applicant also considers that the comments regarding the possibility of lodging a complaint with the Commission fall within the sphere of politics and have no bearing on any restriction of competition. In support of its submissions, the applicant proposes, in its application, that evidence be heard from Mr Pillmann, its legal adviser, and, in its reply, that it should appear in the person of Michael Müller.

62 The Commission contends that it is apparent from the memoranda of 16 July 1985 and 27 August 1985 that the competitors agreed that the applicant should refrain form exporting catalogue mesh to France and that Tréfilunion should not jeopardize the existence of the structural crisis cartel by complaining to the Commission. The Commission considers that it is also apparent from those memoranda that there was an agreement to limit exports to each other and share the market by ensuring a 'balance between interpenetration deliveries between both countries in absolute tonnages'. For the Commission, that agreement in itself constituted an infringement of Article 85(1) of the Treaty, without there being any need to verify whether the intention that all the German producers should be included in the arrangement was put into effect.

Findings of the Court

63 The Court finds that the Decision (point 140) holds that the applicant engaged in general concertation with Tréfilunion to limit mutual penetration of 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 structural crisis cartel; the applicant's works in Gelsenkirchen would not export catalogue mesh to France for a period of two to three months; and, finally, the two parties agreed to make their future exports subject to quotas.

64 The Court considers that it can be concluded from an analysis of the two memoranda mentioned above (see paragraph 59) that the Commission has established to the requisite legal standard that there was concertation between the applicant and Tréfilunion 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 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.

65 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 Michael 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, includ-

ing '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.'

66 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.

67 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 the applicant 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.

68 Consequently, without there being any need to hear witnesses or order an appearance by the applicant, 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.

(3) *The agreements between BStG and Sotralentz*

The contested measure

69 The Decision (points 144 to 146 and 177), dealing with the agreements intended to protect the German structural crisis cartel against uncontrolled imports of welded steel mesh, criticizes the applicant for having participated in an agreement with Sotralentz concerning quota arrangements for exports by the latter to Germany. The Decision relies on a telex sent by BStG to Sotralentz on 24 October 1985 giving figures for deliveries to the German market and on Sotralentz's reply by telex of 4 November 1985 giving figures for its shipments to Germany in September and October 1985. According to the Decision, which in that regard is based on statements made by Michael Müller to Commission officials during the inspection of 6 and 7 November 1985, that exchange of information took place monthly and constituted at the very least a concerted practice liable to affect trade between Member States (points 144 and 177). The Decision finds, finally, that the exchange of information shows, quite apart from the existence of a quota arrangement, an effort on the part of BStG to monitor imports from France on a monthly basis (point 146), the method of calculation which also formed the basis of the cartel agreement.

70 The Decision emphasizes that BStG and Sotralentz tried to justify this correspondence by reference to the existence of a patent licensing agreement between the two companies under which Sotralentz produced catalogue mesh in France using a

BStG-patented process. The communication of quantities delivered by Sotralentz was necessary merely in order to fulfil notification and payment obligations imposed on Sotralentz under the agreement. According to the Decision (point 145), that argument can be refuted as follows: (a) the notification obligations of a licensee concern his entire production and not only deliveries to a specific market; (b) BStG indicates the exact figures for supplies to the German market, a fact which can be explained only by the existence of a quota arrangement; and (c) BStG's patent for the production of catalogue mesh had expired before the information in question was communicated and Sotralentz was therefore no longer under any notification or payment obligations towards BStG.

Arguments of the parties

71 The applicant denies that there was an agreement with Sotralentz. There was, it says, merely a patent licence agreement, a long-term bilateral contractual relationship, accompanied by payment obligations on the part of Sotralentz but there was no cooperation under any comprehensive network of agreements on interpenetration.

72 The Commission insists that the fact that BStG gave details to Sotralentz of all the deliveries to Germany is certainly indicative of the existence of a quota agreement. For the Commission, the fact that the exchange of information was monthly, together with other facts in the file, supports its conclusion that the exchange of information criticized in the Decision did not arise from obligations under the licence agreement.

73 In response to the questions put to them by the Court in the written procedure and at the hearing, the parties specified the patents covered by the licence agreement between the applicant and Sotralentz and their respective expiry dates.

Findings of the Court

74 It is necessary to establish whether the evidence referred to by the Commission, namely the monthly exchange of information and the fact that BStG gave Sotralentz details of all the quantities delivered in Germany, can be regarded as solid, specific and corroborative proof of the existence of a quota arrangement.

75 It must be borne in mind that the applicant responded to that evidence by claiming that the exchange of information was justified by the existence of a patent licence agreement between it and Sotralentz. In those circumstances, the Court must verify whether the matters raised by the Commission can be accounted for by anything other than the existence of a quota agreement, in particular the existence of a patent licence agreement between BStG and Sotralentz (see the judgment of the Court of Justice in Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to 129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307, paragraphs 70, 71 and 72).

76 The Court points out, first, that the Commission has not given its views as to whether the patent licence agreement between BStG and Sotralentz constituted an infringement of Article 85(1) of the Treaty. It follows that that question is not pertinent to the Court's assessment.

77 As regards the number of patents covered by the licence agreement of 28 June 1979 and their periods of validity, the Court, having regard to the answers given by the parties to the questions put to them in the course of the written procedure and at

the hearing, finds that BStG was the proprietor of patents for France, the Netherlands and Germany. In the case of France, BStG held patent No 1 578 746 (procédé pour l'obtention d'une barre d'armature de béton — process for the manufacture of a concrete reinforcing bar) and patent No 6 920 046 (trellis d'armature soudé par points — spot welded reinforcing mesh); for the Netherlands, BStG was the proprietor of patent No 135 455 (werkwijze voor het vervaardigen van een stalen wapeninsgsstaaf voor beton — process for the manufacture of a concrete reinforcing bar); and, for Germany, BStG was the proprietor of patent No 1 609 605 (Verfahren und Vorrichtung zum Herstellen eines Betonbewehrungsstabes — process and device for the manufacture of a concrete reinforcing bar), valid until 3 January 1985, and of patent No 1 759 969 (Punktgeschweisste Bewehrungsmatte — spot welded reinforcing mesh), valid until 25 June 1986.

78 Article 5 of the licence agreement concluded on 28 June 1979 between BStG and Sotralentz gave BStG the right to limit for each calendar year the quantity of licensed products which Sotralentz was authorized to distribute. However, the agreement gave Sotralentz a guarantee that that maximum annual quantity could not be fixed by BStG as less than 1% of total sales of welded steel mesh and reinforcing bars in Germany and 2.5% of total sales of welded steel mesh and reinforcing bars in the Netherlands. For 1979, the agreement provided for a ceiling of 12 500 tonnes for Germany and 4 000 tonnes for the Netherlands for the distribution of the products covered by the patents.

79 The licence agreement also provided for the payment of a royalty of DM 1.5 per tonne to be paid quarterly for the quantities of licensed products distributed by Sotralentz (Article 6(1) and (5)). It was established at the hearing that, instead of being paid, that royalty was taken into account in relation to the purchase of certain tools by Sotralentz from BStG's 'machines' division. The licence agreement provided for a penalty in the event of the prescribed annual quantity being exceeded by 200 tonnes (Article 8). It also stipulated that Sotralentz was required to keep proper accounts of deliveries of products covered by the agreement, which could be inspected at all times by BStG (Article 6(6) and (7)). Finally, the

agreement had entered into force on 1 March 1979 for an indefinite period, but was to expire no later than the date of extinguishment of the last remaining licence (Article 9).

80 In view of the foregoing, the Court considers that in the present case the conclusion drawn by the Commission to the effect that the exchange of information derived from a quota arrangement is not the only possible conclusion. The exchange of information reflects the terms of the patent licence agreement existing at the material time between BStG and Sotralentz and thus can plausibly be accounted for by that agreement. More particularly, the imposition on Sotralentz of a maximum annual limit for deliveries to Germany, which was to be not less than 1% of total sales recorded in German territory, the right of inspection vested in BStG regarding Sotralentz's deliveries, enabling BStG to monitor compliance with that limitation, and the payment of quarterly royalties could have made it necessary, for the purposes of proper production scheduling, for information to be exchanged monthly, emanating from BStG regarding the total quantities sold in Germany and from Sotralentz regarding the extent of its own deliveries. As regards the duration of the exchange of information, it must be observed that the agreement, which was to endure until extinguishment of the last right granted, was in force until 25 June 1986, thus covering the exchange of information criticized in the Decision, which took place in October and November 1985.

81 Since the exchange of information censured by the Decision can be accounted for by the patent licence agreement between BStG and Sotralentz, it must be concluded that the Commission has not established to the requisite legal standard the applicant's participation in a quota arrangement for exports by Sotralentz to Germany.

82 The applicant's complaint must therefore be upheld and the Decision must be annulled to the extent to which it finds against the applicant for participation in an agreement imposing quotas on Sotralentz's exports to Germany.

(4) *The quota and price agreements with the Benelux producers*

The contested measure

83 The Decision (points 147 and 182) criticizes the applicant for having participated in agreements concerning the German market intended, first, to regulate exports by Benelux producers to Germany and, secondly, to observe the prices in force on the German market. According to the Decision, the applicant, Tréfilarbed (Roermond), Boël/Trébos, TFE/FBC — with FBC marketing TFE's production — and Thibodraad were parties to those agreements (points 150, 153, 154, 179 and 181 of the Decision).

Arguments of the parties

84 The applicant denies the existence of price and quota agreements for the German market. It challenges the conclusions drawn by the Commission from the documents mentioned in the Decision; it states that the Decision contains no evidence as to the existence of the alleged comprehensive agreements on interpenetration, nor any details regarding the German undertakings' alleged participation in those agreements and that the Commission appears to have no evidence whatsoever as to the content or even the duration of the alleged agreements relating to Germany.

85 The applicant states, with regard to the limitation of Belgian exports to Germany, that the telex of 15 December 1983 contains no hint of any such agreement (participants, content, duration, and so on). It was written by Michael Müller in his capacity as chairman of the governing board of the structural crisis cartel and as chairman of the Fachverband Betonstahlmatten and not as chief executive of

the applicant. It adds that it is clear from the phrase in the telex according to which Mr Müller was trying 'in all our interests to curb or at least contain the activities of the small maverick producers' as well that Mr Müller, specifically in his capacity as chairman of the Fachverband, was seeking to resist attacks on the cartel. It adds that, although that telex refers to 'sensible cooperation talks', that was because the cartel did not authorize a legally binding export arrangement.

86 As regards the price agreements, the applicant states that it is significant that the Commission is unaware not only of the participants but also of the content, duration or any other details of the alleged agreements and that its accusations are based on mere presumptions. The applicant submits that the Commission cannot infer from the telex of 17 April 1985 (annex 111 to the statement of objections, point 153 of the Decision), sent by the German association Deutsche Walzstahlvereinigung — which has no connection with it — to Cockerill Sambre, concerning 'Belgian deliveries of welded steel mesh in Germany', that at that time there was an agreement on welded steel mesh prices in the German market. That telex merely shows that the German structural crisis cartel was referred to in the context of the International Wire Rod Commission and that the positive results of that cartel regarding prices had been highlighted on that occasion. The Walzstahlvereinigung had considered that those positive effects were threatened by TFE's low-price exports and was anxious to inform the latter of the positive results which had been obtained in Germany and to ask it to cease undermining them. Not a single word in that telex is concerned with price agreements. The applicant adds that the telex from Mr Peters, of Tréfilunion, of 11 January 1984 (annex 66 to the statement of objections) likewise does not constitute proof of an alleged agreement, since the participants in the meeting to which it refers did no more than criticize each other.

87 In its reply, the applicant proposes that Mr Broekman, the former chairman of the 'Breda circle', should be called as a witness, in support of its assertions, and that it should appear in the person of Michael Müller.

88 The Commission considers that the documents mentioned in the Decision are sufficient to establish the applicant's participation in the agreements at issue.

89 As regards the nature of Michael Müller's participation, the Commission contends that his multiple functions — in particular as chairman of BStG, the Fachverband Betonstahlmatten and the governing board of the cartel — were not contested at the hearing of 24 November 1987. Nevertheless, on that occasion, Michael Müller stated that the Fachverband had nothing to do with this case. The Commission also states that Michael Müller always used the applicant's infrastructure and acted in its name, in particular when sending the telex of 15 December 1983, even though other possibilities were available, and that the colleagues mentioned in the telex work for BStG.

Findings of the Court

90 The Court considers that the applicant's participation in the agreements concerning the German market is apparent from the telex dated 15 December 1983, sent by Michael Müller to Thibodraad (annex 65(b) to the statement of objections, point 92 of the Decision), following a meeting held in Breda on 5 December 1983, attended by the applicant, which includes the statement 'I should like to make it absolutely clear, however, that the biggest increase in cross-border trade has been in that from Belgium to Germany, which in view of the close cooperation with Boël is quite clearly attributable to the second Belgian producer ... I wish to express a continuing readiness to maintain the status quo in relation to exports to neighbouring countries or at least not to increase them any more than imports from those countries'. The applicant's involvement in those agreements is confirmed by the

telex dated 11 January 1984 sent by Mr Peters to Mr Marie (annex 66 to the statement of objections, points 95 and 153 of the Decision), which refers to a meeting held in Breda on 5 January 1984, attended by the applicant, Boël/Trébos, FBC, Tréfilarbed, Tréfilunion and other Dutch undertakings. That telex states: 'The usual participants asked the representatives of BStG to stop upsetting the Benelux market by exporting large quantities there at very low prices. The Germans defended themselves by saying that the Belgians (Boël and more recently Frère-Bourgeois) were exporting comparable tonnages to Germany. The Belgians said that they were observing the German market prices, and it was better to talk about a market percentage rather than tonnes. Nothing specific was decided'. Those two items of evidence are also corroborated by an internal memorandum dated 24 April 1985 (annex 112 to the statement of objections, point 153 of the Decision), drawn up by Mr Debelle of FBC, concerning a meeting held on the same day at Bunnik, according to which 'Mr Ruthotto (representing BStG) had confirmed during the meeting that the two Belgian producers were scrupulously observing the price agreements made at Baustahlgewebe'.

91 The Decision was also correct to rely, for corroboration of its analysis, on the telex of 17 April 1985 (annex 111 to the statement of objections) sent by the German association Walzstahlvereinigung to Cockerill Sambre. That telex concerns the 'Belgian deliveries of welded steel mesh in the Federal Republic of Germany' and, even though it does not mention BStG's participation, it proves the existence of the agreement. The telex states that 'all the German welded steel mesh producers were demonstrating discipline' on prices and TFE, a subsidiary of Cockerill Sambre, is criticized for not observing the general price level applied on the German market (DM 810 per tonne) by offering a price of DM 770 per tonne. Cockerill Sambre is asked to draw the attention of its subsidiary TFE 'to the positive evolution of prices on the German market and to encourage better price discipline'.

92 On the basis of that evidence, the Court cannot accept the applicant's argument that Michael Müller, its Chief Executive, acted only as chairman of the Fachver-

band Betonstahlmatten or of the governing board of the cartel and not as chairman of the applicant. The Court considers that that argument is not supported by any evidence. Nothing in the telex of 15 December 1983 supports that conclusion: Mr Müller sent his letter using the applicant's telex machine, and in the latter's name, and nowhere was there any mention of his capacity of chairman of the Fachverband Betonstahlmatten or the governing board of the cartel. Moreover, the letter of 16 December 1983 (annex 65(a) to the statement of objections), with which Thibodraad sent Mr Müller's telex to Tréfilarbed Gentbrugge, states: 'Please find enclosed a copy of the telex sent by Mr Müller of BStG ... Enc: copy of the telex from BStG'. Moreover, it must be borne in mind that, as the Commission emphasized at the hearing, Mr Müller stated that 'throughout the term of the cartel agreement, he never acted in the name of the association for matters of any importance whatsoever on the German or other markets'.

93 It follows from the foregoing that the Commission has established to the requisite legal standard that the applicant participated in the price and quota agreements on the German market.

94 The applicant's complaint must therefore be rejected, without there being any need to hear evidence from the witness proposed or order an appearance by the applicant in the person of Michael Müller. Moreover, the Court considers, in any event, that those proposals regarding evidence, contained in the reply, are out of time: the applicant has not given any reason why it was unable to make such proposals in its application and, consequently, they must be rejected, pursuant to Article 48(1) of the Rules of Procedure (see the judgment of the Court of First Instance in Case T-16/90 *Panagiotopoulou* v *Parliament* [1992] ECR II-89, paragraph 57).

(5) *The exclusive distribution contracts between BStG on the one hand and Bouwstaal Roermond BV and Arbed SA afdeling Nederland on the other*

The contested measure

95 According to the Decision (point 148), BStG's desire to restrict or regulate imports into Germany can be seen, as far as imports from the Netherlands are concerned, from two supply contracts of 24 November 1976 (annex 109 to the statement of objections) and of 22 March 1982 (annex 109A to the statement of objections) between BStG on the one hand and Bouwstaal Roermond BV (later Tréfilarbed Bouwstaal Roermond) and Arbed SA afdeling Nederland on the other. The latter contract had appended to it a signed memorandum of the same date in which Arbed SA afdeling Nederland undertook not to make any other direct or indirect deliveries to Germany during the term of the contract. In those contracts, BStG took over exclusive sales in Germany, at a price to be fixed according to specific criteria, of a specified annual volume of welded steel mesh from the Roermond works. Brouwstaal Roermond BV and Arbed SA afdeling Nederland undertook, for the term of those contracts, not to make any direct or indirect deliveries to Germany.

96 The Decision (point 189) states that the exclusive distribution agreements did not satisfy the conditions of Commission Regulation (EEC) No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10, hereinafter 'Regulation No 67/67'), at least since the making of the wider arrangements on trade between Germany and Benelux. Since that date those agreements had to be regarded as part of a comprehensive market-sharing arrangement to which more than two undertakings were party, and therefore Regulation No 67/67 would not be applicable to them (Article 1 in conjunction with Article 8 of Regulation No 67/67). According to the Decision (point 178), those exclusive distribution agreements represented a restriction of competition between two (competing) undertakings established in two Member States which was likely to affect trade between Member States.

Arguments of the parties

97 The applicant considers that it is surprising that the Commission should attempt to explain 'BStG's desire to restrict or regulate imports into Germany' by exclusive supply contracts existing between BStG and Bouwstaal Roermond BV, a subsidiary of the Arbed group, which itself had a holding, of 25.001%, in the capital of BStG. The applicant claims that at the Roermond Works, belonging to Arbed, there were both machines owned by BStG, the production of which belonged to the latter, and machines owned by Arbed, the production from which was the subject of exclusive supply contracts. The applicant observes that the contractual relations between BStG and Bouwstaal Roermond BV were determined by the corporate links between Arbed, as a member of BStG, and BStG. It considers that the collaboration with Bouwstaal Roermond BV was internal to the group and was based on contracts governed by company law.

98 The applicant states that the contracts in question were straightforward supply contracts between it and one of its members, under which the only obligation of the other parties was not to make deliveries within the contractual territory — that is to say Germany — to any other undertaking other than itself. There was never any question of preventing parallel imports. The applicant is of the opinion that those contracts, which had existed since the end of 1976, that is to say since the acquisition of the Roermond Works by Arbed, qualified for the exemption provided for by Article 1(1)(a) of Regulation No 67/67. Moreover, the applicant maintains that those contracts, concluded years earlier, had no substantive or temporal link whatsoever with the comprehensive interpenetration agreements to which the German and Benelux producers were parties. For that reason, it is unable to understand the Commission's assertion that the exclusive supply contracts did not come within the scope of Regulation No 67/67 because they formed 'part of a comprehensive market-sharing arrangement'.

99 The Commission points out that the two supply contracts both contain a provision whereby Bouwstaal Roermond BV and Arbed SA afdeling Nederland undertook, throughout the duration of the contract, not to make direct or indirect deliveries to Germany. Initially, that provision appeared in the contract of 24 November 1976 itself; when the contract of 22 March 1982 was concluded, it was contained in a separate memorandum of the same date, signed by the contractual parties in the same way as the supply contract itself. That note referred expressly to Arbed SA 'not making deliveries'. The Commission considers that such absolute forbearance regarding deliveries does not qualify for the exemption available under Regulation No 67/67. Since that regulation is based on the principle that parallel imports are not to be undermined, an exemption would be available only for an obligation imposed on a supplier to deliver solely to the exclusive representatives the goods covered by the contract and intended for resale within a defined area of the common market. Any other contractual undertaking by a supplier not to make deliveries in the contractual territory with a view to ensuring territorial protection would be ineligible for an exemption. Moreover, the contracts at issue were deprived of their bilateral character by their inclusion in the framework of other wider agreements with competitors (point 189 of the Decision). Furthermore, the Commission states that, in a letter sent by the applicant to Arbed SA afdeling Nederland on 26 September 1979 (annex 110 to the statement of objections, point 148 of the Decision), in which Michael Müller and Mr Ruthotto complained of deliveries of welded steel mesh in Germany contrary to the contractual arrangements, the following statement appears: 'The supply contract concluded is, of course, intended to help calm the position on the German markets specifically in order to avoid, without any disadvantage for you, inappropriate under-quoting'.

100 The Commission also states, in paragraph 178 of its Decision, that it rejects the argument advanced by BStG and Tréfilarbed that, since Arbed had an interest of 25% in BStG, that was a purely intra-group matter. As other members held larger interests (Thyssen 34% and Klöckner 33.5%), a mere holding of 25.001% cannot be regarded as giving rise to a parent-subsidiary relationship such as would mean that any restrictive agreement between those two companies would be deemed not to be caught by Article 85(1) of the Treaty.

Findings of the Court

101 The Court notes that the applicant contests, first, the Commission's refusal to apply Regulation No 67/67 to the contracts at issue and secondly its refusal to regard them as an agreement internal to the group to which the undertakings concerned belonged.

102 The Court considers that the exclusive distribution contracts in question do not fulfil the conditions laid down by Regulation No 67/67. Article 9 of the contract of 24 November 1976, between BStG and Bouwstaal Roermond, stipulates that 'throughout the currency of this contract (Bouwstaal Roermond) shall make no direct or indirect deliveries to the Federal Republic of Germany'. As regards the contract of 22 March 1982 (annex 109A to the statement of objections), between BStG and Arbed SA afdeling Nederland, regard must be had to a clause appended to that contract (annex 109B to the statement of objections) according to which 'the contracting parties agree that Arbed SA shall not, during the term of the contract, make any deliveries, directly or indirectly, to the Federal Republic of Germany. In consideration of that forbearance, Arbed shall have the benefit ...'.

103 The Court considers that the meaning of the words 'directly or indirectly' in the present case goes beyond a straightforward commitment by a supplier only to deliver to BStG products for resale. This view is based on two factors. First, Tréfilarbed Roermond had undertaken expressly not to make deliveries of any kind — forbearance which was rewarded, as is apparent from the document signed separately as an annexure to the contract of 22 March 1982 — even deliveries not intended for resale. Secondly, the word 'indirectly' could be interpreted by the reseller as committing the supplier to take the action necessary to preclude deliveries to Germany from other countries, that is to say to control the other exclusive distributors with a view to prohibiting them from exporting to Germany.

104 The Court notes that the spirit of Regulation No 67/67, as reflected in the preamble thereto and in Article 3(b)(2) thereof, is to make the exemption available under it subject to the condition that users will, through the possibility of parallel imports, be allowed a fair share of the benefits resulting from the exclusive distribution. That is consonant with settled case-law according to which an exclusive distribution contract containing no prohibition of exports cannot benefit from a block exemption under Regulation No 67/67 where the undertakings concerned are engaged in a concerted practice aimed at restricting parallel imports intended for an unauthorized dealer (see the judgments of the Court of Justice in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 35, and of the Court of First Instance in Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 88).

105 Those considerations apply with even greater force to the present case if the abovementioned contractual clauses are interpreted in the light of the complaints from the applicant contained in its letter of 26 September 1979 (annex 110 to the statement of objections, point 148 of the Decision) in which it criticizes Arbed regarding indirect deliveries to Germany 'through Eurotrade, Alkmaar', which is conducive to the conclusion that there was absolute territorial protection contrary to the spirit and letter of Regulation No 67/67.

106 It follows that the contracts in question did not fulfil the conditions laid down by Regulation No 67/67.

107 As regards the question whether those agreements must be regarded as an agreement internal to the group, the Court considers that the Arbed group's mere holding of 25.001% in BStG did not meet the conditions laid down for it to be considered that the agreements between the two companies fell outside the scope of Article 85(1) of the Treaty. In that connection, it must be borne in mind that Article 85 of the Treaty does not apply to agreements and concerted practices between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market (judgments of the Court of Justice in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 134, and

Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 35). In the present case, it must be observed that the control which Arbed exercised over BStG corresponded to its percentage holding in the capital thereof, namely 25.001%, which falls far short of a majority interest. It must be concluded that such a holding does not justify the conclusion that Arbed and BStG belonged to a group within which they formed an economic unit with the result that an agreement between those two undertakings restricting competition would not be caught by Article 85(1) of the Treaty.

108 In any event, the Court notes that BStG itself has stated that it was an autonomous and independent undertaking and that since each of its four members had a minority holding it could not be regarded as a subsidiary of a group.

109 In view of all the foregoing, it must be concluded that the Commission was right to take the view that the exclusive distribution contracts were contrary to Article 85(1) of the Treaty and therefore the applicant's complaint must be rejected.

(6) *The agreement between BStG and Tréfilarbed (St Ingbert)*

The contested measure

110 The Decision (points 152 and 180) criticizes the applicant for having participated in an agreement with BStG stopping reimports of welded steel mesh from the St Ingbert works to Germany via Luxembourg. That agreement constituted a restriction of competition likely to affect trade between Member States.

Arguments of the parties

111 The applicant states that before 1972 it was a company which marketed the production of its partners, including Arbed. In 1972, following suggestions from the Federal Cartel Office, BStG itself became a producer and purchased certain machines that were located in the works belonging to its partners, including the one at St Ingbert, the property of Arbed, which remained there. From then on, on the basis of production contracts, the partners, including Arbed, undertook production on behalf of BStG. Thus, all the St Ingbert production from the BStG machines belonged to BStG and was disposed of by the latter on the German market. At the same time, St Ingbert had its own machines, the welded steel mesh production from which was intended for export, mainly to France.

112 The applicant states that, under those production contracts, it was entitled to take limited quantities of standard mesh needed to supply Luxembourg, where the German standards are applicable; that mesh was produced on machines belonging to BStG, the only ones at St Ingbert producing mesh conforming to the German standards. The management of Tréfilarbed, having perceived the possibility of achieving profits on the German market where the prices were relatively high because of the crisis cartel, appropriated some mesh from the stocks belonging to BStG as if it was intended for Luxembourg. Through a Luxembourg trader, those quantities were sent on from Luxembourg to Germany. The applicant maintains that, since Tréfilarbed produced mesh for the German market, on machines that did not belong to it and without declaring it, that conduct constituted not only a breach of the cartel agreement but also a breach of the contracts entered into with BStG, since BStG production was involved.

113 The applicant also states that the cartel agreement provided for delivery quotas for the German works, without strict observance of which the desired reduction of

capacity could not be achieved, which they could not escape by recourse to simulated exports (official exports followed by reimports into Germany). Michael Müller was given responsibility, in his capacity as chairman of the Fachverband Betonstahlmatten, for ensuring compliance with the obligations imposed by the cartel agreement on the members of the association and, in his capacity as chief executive, of those imposed on the BStG works. It was for that reason that, in response to the statement of objections, Michael Müller referred to the cessation of reexports and the imposition of fines as measures intended to prevent bogus exports. The applicant claims that those exports, which crossed the border only on paper, were in reality deliveries intended, from the outset, for the national market and for which the DM 80 per tonne laid down in the cartel agreement was not paid. In support of its statements, the applicant proposed, in its reply, that it should appear in the person of Michael Müller.

114 The Commission contends that the agreement between the applicant and Tréfilarbed, designed to prevent reimports of welded steel mesh into Germany, is proved by the letter sent on 27 April 1984 (annex 110(a) to the statement of objections) by Michael Müller to Mr Rimbeaux, of Tréfilarbed St Ingbert, and Mr Schürr, of Tréfilarbed, in which Michael Müller complains of reexports of welded steel mesh from the St Ingbert works — bearing marks identifying BStG as the producer — via Luxembourg into Germany 'and, what is more, below the minimum cartel prices'. The Commission emphasizes that Michael Müller describes those reexports as infringements of the 'clear and unambiguous agreements made in response to similar incidents last year' and that he contends that such conduct on the part of a works belonging to BStG is intolerable and he threatens to resort to appropriate measures to bring such disturbances to an end, including the application of fines.

Findings of the Court

115 The Court finds that the applicant concedes that it had concluded an agreement with Tréfilarbed under which the latter was entitled to appropriate certain quantities of welded steel mesh manufactured at St Ingbert on machines belonging to

BStG, provided that they were resold in Luxembourg, that condition being imposed in order to obviate reimports of welded steel mesh into Germany. That is clear from the text of the letter of 27 April 1984 sent by Michael Müller to Tréfilarbed, in which Mr Müller complains of reimports into Germany 'below the minimum cartel prices' in breach of the 'clear and unambiguous agreements' concluded for that purpose (annex 110(a) to the statement of objections).

116 The Court of Justice has held that export clauses included in a sales contract under which the reseller is required to reexport the goods to a specified country constitute an infringement of Article 85 of the Treaty where they are essentially designed to prevent the reexport of the goods to the country of production so as to maintain a system of dual prices and thereby restrict competition within the common market (Cases 29 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraphs 24 and 28).

117 It must be concluded that the agreements entered into between the applicant and BStG had the object and effect of restricting competition by affecting trade between Member States and thereby upholding price differences within the common market and therefore that they are contrary to Article 85(1) of the Treaty.

118 The Court cannot accept the applicant's argument that the welded steel mesh whose reimport into Germany was prohibited was a product in respect of which BStG had any power of decision deriving from the fact that it owned the machines on which the mesh was produced. Once the products in question were appropriated by Tréfilarbed, ownership of the machines used to produce them became irrelevant, in that it could not confer on the owner any right to determine where the products might be resold.

19 It follows that the Commission has established to the requisite legal standard that the applicant participated in an agreement with Tréfilarbed to prohibit the reimport of welded steel mesh from the St Ingbert works into Germany and that that agreement was contrary to Article 85(1) of the Treaty.

20 The applicant's complaint must therefore be rejected, without there being any need to order its appearance. In any event, since the applicant has not mentioned any circumstance preventing it from making such an offer of evidence in its application, that offer must be rejected as out of time pursuant to Article 48(1) of the Rules of Procedure of the Court of First Instance (see the judgment in *Panagiotopoulou* v *Parliament*, cited above, paragraph 57).

21 Nevertheless, the Court considers that the prohibition of reimports into Germany, although contrary to Article 85(1) of the Treaty, was accounted for by the structural crisis cartel. The mere transit through Luxembourg to Germany of welded steel mesh manufactured by BStG, bearing marks identifying it as the producer, constituted a breach of the cartel in that such production escaped monitoring of compliance with the delivery quotas attributed to the applicant. As a result, the applicant was confronted with the following alternative: either to observe the clauses of the cartel agreement, which required it to verify and declare the quantity of its production disposed of on the German market, or to comply with the Treaty competition rules, under which it could not impose on Tréfilarbed a clause prohibiting exports. For its part, Tréfilarbed admits having disposed of the products in question without BStG's knowledge or consent, in breach both of the agreements concluded with the latter, under which it was entitled to dispose of part of BStG's production, and of the cartel agreement, since production reimported into Germany escaped BStG's delivery quota.

22 In view of all the foregoing and of the fact that, at that time, there was a presumption that the crisis cartel was legal, since the Commission had not made any ruling

to the contrary, the Court takes the view that the very specific circumstances of that case should, with respect to the applicant's conduct, be regarded as constituting mitigating circumstances and that, therefore, the fine imposed on the applicant for that infringement must be reduced.

C — *The Benelux market: the quota and price agreements*

The contested measure

123 The Decision (points 78(b), 163 and 168) criticizes the applicant for having participated 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 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).

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

Arguments of the parties

125 The applicant denies having participated in price agreements. It admits that some of its employees took part in 5 of the 23 meetings on the Benelux market, at which information was exchanged on the prices charged, and that price agreements for certain types of welded steel mesh may have been concluded on those occasions. However, it states that its employees took part as invited observers and representatives of the cartel or of the Fachverband Betonstahlmatten, and not in its name, and that the purpose of those meetings, which represented isolated initiatives, was to formulate complaints about the German structural crisis cartel. It adds that it had no interest in participating in agreements because it exports only catalogue mesh, of the *Listenmatten* type, that it exports only minimal quantities of such mesh, less than 2% of its production, to the Member States of the Community of Six, and that the agreements, according to Mr Peters's note, related only to the prices of standard mesh and catalogue mesh, of the partly standardized *Lettermatten* type.

126 As regards the application of quantitative restrictions to German exports to Belgium and the Netherlands and, more particularly, the telex of 15 December 1983 from Michael Müller to Thibodraad following the meeting of 5 December 1983, which constitutes the essential evidence produced in that connection by the Commission, the applicant asserts that Michael Müller drew up that telex as chairman of the Fachverband Betonstahlmatten and of the supervisory body of the cartel and not as chairman of its board of directors. The applicant states that that telex reflected a policy designed to gain acceptance of the cartel and convince foreign producers that they were not exposed to any adverse effects. It adds that the telex does not prove the existence of agreements, since its purpose was to alleviate the anxiety of the Benelux producers by promising to deal with any 'maverick' producers, an obligation attaching to Michael Müller under the cartel agreement.

127 In its reply, the applicant proposed, in support of its statements, that Mr Broekman be heard as a witness, and that it should appear in the person of Michael Müller, its former chief executive.

128 The Commission states that the Breda and Bunnik meetings shared the common feature of establishing continuing cooperation of a virtually institutionalized kind, with a view to fixing standard mesh and catalogue mesh prices in the Netherlands and Belgium. The Commission states that the applicant took part in at least six meetings and that it follows from that fact that its assertion that they represented isolated initiatives is incorrect.

129 As regards the applicant's claimed lack of interest in participating in the agreements at issue, the Commission contends first that, where the objective pursued is restriction of competition, as reflected in particular in the price agreements concerning the Benelux States, motives are irrelevant. The term 'object' used in Article 85(1) of the Treaty is used objectively. The reaching of an agreement on minimum prices by its very nature constitutes a restriction of competition. The Commission also considers that the applicant's lack of interest was not, contrary to the impression given, complete. It exported catalogue mesh and the price agreements for the Benelux concerned catalogue mesh in particular. Moreover, the price of standard mesh cannot have been a matter of indifference to the applicant in view of the link existing between the prices of the various types of welded steel mesh.

130 As regards the capacity in which Michael Müller took part in the meetings concerned, the Commission rejects the applicant's arguments for the same reasons as those set out above (paragraph 89).

Findings of the Court

131 The Court finds that the applicant admits its participation in certain meetings but denies having subscribed to price and quota agreements. It must be observed, however, that the applicant does not deny that the purpose of the meetings in

which it took part was price fixing. It must therefore be considered whether the Commission was right to infer from the applicant's participation in such meetings that it was a party to the agreements.

132 The Court finds that the applicant participated in six meetings in Breda and Bunnik: on 5 December 1983 in Breda (annex 64 to the statement of objections, point 90 of the Decision), on 5 January 1984 in Breda (annex 66 to the statement of objections, point 95 of the Decision), on 28 February 1984 in Bunnik (annex 67 to the statement of objections, point 96 of the Decision), on 29 March 1984 in Breda (annex 70 to the statement of objections, point 99 of the Decision), on 24 April 1985 (annex 112 to the statement of objections, points 108 and 153 of the Decision) and on 24 October 1985 in Breda (annex 80 to the statement of objections, point 111 of the Decision). The Court considers that, having regard to the manifestly anti-competitive object of the meetings, as evidenced by the numerous telexes from Mr Peters to Tréfilunion, the applicant, by taking part without publicly distancing itself from what occurred at them, gave the impression to the other participants that it subscribed to the results of the meeting and would act in conformity with them (judgments of the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232, and Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 98, 99 and 100). This finding is not altered by the fact that, at the meetings concerned, the German producers were criticized by the others. It is apparent from the telex messages from Mr Peters (in particular, annexes 64 and 67 to the statement of objections) that the applicant was regarded as the undertaking which should, and did in fact, encourage certain German producers to observe the prices on the Benelux market.

133 As regards the quota agreements, the Court considers that they are established by the telex of 15 December 1983 from Michael Müller, as chief executive of BStG, to Thibodraad (annex 65(b) to the statement of objections) and the telex of 11 January 1984 (annex 66 to the statement of objections) from Mr Peters to Tréfilunion. The telex of 15 December 1983 includes the statement: 'As you are aware, I am naturally concerned in all our interests to curb or at least contain the activities of the small maverick producers ... I do not deny that one German mesh producer in particular has increased its deliveries to neighbouring countries ... The German cartel agreement does not allow a legally binding export arrangement to be made. There can therefore only be sensible cooperation talks between our groups, talks which, through the cartel agreement in Germany, should have become not harder

but easier ... I hear that the next Dutch/Belgian meeting is scheduled for 5 January 1984 in Breda. If invited, I shall be glad to attend and am confident of having fairly accurate export figures for the German producers referred to. I wish to express a continuing readiness to maintain the status quo in relation to exports to neighbouring countries or at least not to increase them any more than imports from those countries'.

134 The applicant's involvement in those agreements is confirmed by the telex dated 11 January 1984 concerning the meeting of 5 January 1984. That telex states: 'The usual participants asked the representatives of BStG to stop upsetting the Benelux market by exporting large quantities there at very low prices. The Germans defended themselves by saying that the Belgians (Boël and more recently Frère-Bourgeois) were exporting comparable tonnages to Germany. The Belgians said that they were observing the German market prices, and it was better to talk about a market percentage rather than tonnes. Nothing specific was decided.' That telex shows, therefore, that, if the Belgian producers were observing the German market prices, they were doing so in return for a limitation of BStG's exports to the Benelux States and a minimum price charged by BStG on the market.

135 In view of that evidence, the Court cannot, for the same reasons as those set out in paragraph 92 above, accept the applicant's argument that Michael Müller, its chief executive, acted only in his capacity as chairman of the Fachverband Betonstahlmatten or of the supervisory body of the cartel and not as chairman of the applicant.

136 Nor can the Court accept the applicant's argument as to its lack of interest in participating in the price agreements by reason of the small quantities of catalogue mesh exported by it. It must be observed, first, that those exports were not particularly limited in absolute terms since, according to a letter from the applicant of

24 March 1989, they reached 18 000 tonnes in 1985, including 5 128 tonnes to other Member States of the Community of Six, reflecting export turnover within the Community of DM 4 969 032. Secondly, it must be borne in mind that there is a link between the prices of the various kinds of welded steel mesh, since the price of standard mesh has an influence on that of catalogue mesh and tailor-made mesh (see paragraph 38 et seq., above). As an exporter of catalogue mesh, the applicant must inevitably have wished to maintain the prices of standard mesh within a certain bracket, as compared with catalogue mesh. Thirdly, and finally, it must be found that the agreements to which the applicant was a party were on a basis of reciprocity. BStG complied with the Benelux market prices and quotas and the Benelux producers did the same on the German market.

137 Thus, the Commission has established to the requisite legal standard that the applicant participated in the price agreements on the Benelux market and in the agreements on quantitative restrictions on German exports to the Benelux and the communication of export figures.

138 Accordingly, the applicant's complaint must be rejected, without there being any need to hear the witness proposed by it or to order the applicant's appearance in the person of Michael Müller. Moreover, the Court considers, in any event, that those proposals regarding evidence, contained in the reply, are out of time: the applicant has not given any reason why it was unable to make such proposals in its application and, consequently, they must be rejected, pursuant to Article 48(1) of the Rules of Procedure (see the judgment in *Panagiotopoulou* v *Parliament*, cited above, paragraph 57).

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

139 The Court notes that the applicant criticizes the Commission for imposing a fine on it on the basis that its participation in the structural crisis cartel constituted an

infringement. The applicant states that the crisis cartel did not constitute an infringement and, therefore, the Commission was not entitled to impose a fine on it in relation to the cartel. Moreover, the applicant considers that the fine imposed on it by reason of its participation in the structural crisis cartel is in breach of the principle of the protection of legitimate expectations and the principle of the individual nature of fines.

140 The Court points out that it has been established above (see paragraph 55 et seq. above) that the structural crisis cartel does not, as such, form part of the infringements found by the Decision. Accordingly, it is unnecessary to give any decision on the applicant's complaints.

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

Arguments of the parties

141 According to the applicant, it is settled law (judgment of the Court of Justice in Joined Cases 100 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825) that every fine must be fixed and the reasons explained for it for each undertaking according to its participation and its individual fault and, in particular, account must be taken of the conduct, the role played, the profit obtained, and the turnover and value of the goods concerned. The applicant maintains that point 197 et seq. of the Decision, dealing with the calculation of the fines imposed, are so general and vague that it is impossible to apprehend how the Commission came to impose upon it a fine as high as those imposed on the other thirteen undertakings together. In its view, the undifferentiated exposition of the basis for fixing the fines constitutes not only a breach of the fundamental principle of the individual nature of penalties but also a failure adequately to state the reasons on which the Decision is based.

142 The applicant states that, in point 203, the Decision purports to have taken into account, in fixing the fines, the gravity of the infringements and their duration and also the financial and economic position of the various undertakings and to have treated the existence of the German structural crisis cartel as a mitigating circumstance as regards the non-German producers (point 206). The applicant claims that it considered the cartel to be lawful, first, because it had been authorized by the Federal Cartel Office and, secondly, because the Commission, having been officially informed of its existence, raised no objection to it. Consequently, the applicant considers that, by virtue of the principle of the protection of legitimate expectations, a penalty was inappropriate in any event and that it is wrong to speak in general terms of an infringement committed 'deliberately' (point 197 of the Decision). In its view, therefore, the statement of the reasons on which the Decision is based is defective as regards determination of the gravity of the infringements.

143 The applicant argues that, even if it were assumed that the Commission's allegations regarding its participation in agreements with French and Benelux producers were correct — a view which it rejects vigorously — the duration of its alleged participation was, in any event, minimal.

144 As regards its financial and economic position, the applicant considers it to be much less strong than that of each of the participating companies, which are wholly owned subsidiaries of groups. It maintains that it is an autonomous and independent undertaking and that, since each of its members has only a minority holding, it cannot be regarded — as the Commission appears to have regarded it in fixing the fine — as forming part of a group.

145 The Commission contends that the considerations set out in points 198 to 202 of the Decision led it to impose fines which, despite the gravity of the infringement, are substantially lower than those which would have been justified in normal circumstances. The Commission goes on to list the mitigating circumstances of which

it took account, in particular the fact that the price of welded steel mesh is dependent, as to 75 to 80%, on the price of wire rod, the structural decline in demand for welded steel mesh, the setting up of the German structural crisis cartel, the fines imposed by the French authorities on certain French undertakings and the fact that certain undertakings, which were involved in the prohibited agreements at their inception, withdrew from them and thereby rendered them less effective. It points out that point 207 of the Decision indicates that undertakings such as the applicant, whose management also occupied senior posts in the trade associations, received much higher fines than the others because of their particularly active participation. It concludes that the fines imposed are, therefore, individualized.

Findings of the Court

146 The Court notes that in its reading of the Decision, the applicant artificially isolates a part of it, whereas, since the Decision constitutes a single whole, each part of it should be read in the light of the others. The Court considers that the Decision, read as a whole, provided the applicant with the indications necessary for it to identify the different infringements for which it was criticized, together with the specific features of its conduct and, more particularly, information concerning the duration of its participation in the various infringements. The Court also finds that, in its legal assessment in the Decision, the Commission sets out the various criteria by which it measured the gravity of the infringements imputed to the applicant and the various circumstances which palliated the economic consequences of the infringements.

147 As regards mitigating circumstances, it should be borne in mind that, in its written reply to the questions put to it by the Court, the Commission indicated that there had been no mitigating circumstances in the applicant's individual case. The Court considered that the Commission properly refused to treat as a

mitigating circumstance, in the applicant's case, the fact that it did not belong to a powerful economic entity. It need merely be observed that, with an annual turnover at the material time of around 320 000 tonnes, the applicant held by far the largest share of the German market (approximately 36%).

148 The Court also considers that the Commission was right not to treat the existence of the structural crisis cartel as a general mitigating circumstance in the applicant's case, except as indicated by the Court in paragraph 122. It should be noted, first, that the applicant did not avail itself of the possibility provided by Article 85(3) of the Treaty of notifying the cartel agreement to the Commission in order to obtain from it a declaration that Article 85(1) did not apply and, secondly, that the applicant used the cartel to protect the German market against competition from producers in other Member States by means of measures incompatible with Community law.

149 As regards the aggravating circumstances relied on against the applicant, the Court notes that the applicant has not in any way countered the evidence produced by the Commission as to its active role in the agreements, as indicated by the telex of 15 December 1983 (annex 65(b) to the statement of objections, points 93 and 94 of the Decision) and the telex from Mr Peters of 4 March 1984 concerning the meeting of 28 February 1984 (annex 67 to the statement of objections, point 96 of the Decision).

150 As regards the applicant's assertion that it is not open to criticism for acting with intent, it need merely be recalled that it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally, but it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (judgments of the Court of Justice in Case 246/86

Belasco v *Commission* [1989] ECR 2117, paragraph 41, and Case 279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261; judgment of the Court of First Instance in Case T-15/89 *Chemie Linz* v *Commission*, cited above, paragraph 350).

151 Consequently, the Court considers that the Decision, read as a whole, provided the applicant with the guidance needed in order to determine whether or not it was well founded and enabled the Court to carry out its review of legality.

152 The applicant's complaint must therefore be rejected.

II — *The disproportionate nature of the fine*

Arguments of the parties

153 The applicant objects to the amount of the fine, considering it disproportionate. The fine was ECU 4.5 million (DM 9.2 million), representing about 50% of its capital and reserves (DM 20 million), and, according to the applicant, threatens its survival.

154 The applicant claims that the Commission did not state the reasons for which it imposed on it a fine amounting to 3% of its turnover, whereas its participation in the alleged infringements was very limited and, according to the Commission, no fine was imposed for participation in the cartel. In its view, moreover, it is manifestly contrary to the principles of equal treatment and proportionality to impose a fine in the excessive amount of ECU 4.5 million.

155 The Commission states that, pursuant to Article 15(2) of Regulation No 17, the point of reference for a fine is turnover, not capital and reserves as the applicant appears to believe. The Court of Justice has held (*Musique Diffusion Française*, cited above) that account may be taken either of total turnover, which gives an indication of the size and economic strength of the undertaking, or of the part of the turnover attributable to the goods involved in the infringement, which is thus indicative of the extent of the infringement. The Commission states that, in this case, the Decision is based, for all the parties concerned, on their turnover in welded steel mesh, and that the applicant's turnover exceeds that of its competitors by far.

156 As regards the percentage applied, the Commission points out that the fine imposed on the applicant represents 3.15% of its turnover in welded steel mesh, a percentage corresponding to the number and extent of the infringements found to have been committed by it, and to its greater share of responsibility, constituting a special aggravating circumstance (point 207 of the Decision). The Commission contends that the fine imposed on the applicant is, moreover, only slightly higher in relative terms, that is to say by 0.15%, than that imposed on one of the Netherlands undertakings, which paid it without bringing an action.

157 The Commission also emphasizes that, since 1979, a gradually more severe approach has been taken in the imposition of fines, with the agreement of the Court of Justice. It observes that the *Tipp-Ex* case gave the Court of Justice an opportunity to make it clear that a fine amounting to 3% of turnover in the Community falls far short of the maximum limit of 10% fixed by Regulation No 17 and cannot be regarded as excessive (*Tipp-Ex* v *Commission*, cited above).

Findings of the Court

158 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 Member States 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.

159 As regards the argument concerning the relationship between the applicant's capital and the amount of the fine, it must be pointed out that the fact of having limited capital is the result of an economic decision taken by the applicant and cannot influence the amount of the fine, which is based on turnover.

160 Finally, as regards the percentage of 3.15%, it need merely be pointed out that no mitigating circumstances exist in respect of the applicant, save as stated in paragraph 122 above, and that, conversely, there was an aggravating circumstance — as in the case of Tréfilunion, to which was applied the higher percentage of 3.60% — which, as the Commission rightly emphasized, reflects the number and extent of the infringements found against the applicant.

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

162 In the light of all the foregoing considerations and having regard to the fact that the applicant did not participate in an agreement with Tréfilunion for the purpose of linking their future exports to quotas, the fact that it did not participate in an agreement with Sotralentz on the setting of quotas for the latter's exports to the German market and the existence of a mitigating circumstance regarding the agreement between the applicant and Tréfilarbed concerning the cessation of reimports from St Ingbert into Germany, the Court considers, in the exercise of its unlimited jurisdiction, that the fine of ECU 4.5 million imposed on the applicant must be reduced to ECU 3 million.

Costs

163 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 one-third of the Commission's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) **Annuls Article 1 of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 —**

Welded steel mesh) as regards the finding therein that the applicant participated in an agreement with Sotralentz SA to set quotas for the latter's exports to the German market and the finding that an agreement existed between the applicant and Tréfilunion 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 3 million;

3) Dismisses the application as regards the remaining claims;

4) Orders the applicant to bear its costs and to pay one-third of the Commission's costs;

5) Orders the Commission to bear two-thirds 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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