JUDGMENT OF THE COURT (Fifth Chamber)
11 July 1989 *

In Case 246/88

S. C. Belasco, SA Compagnie générale des asphaltes, Antwerpse Teer- en Asfaltbedrijf NV, De Boer en Co. NV, Kempisch Asfaltbedrijf NV, Limburgse Asfaltfabrieken PVBA, Lummerzheim en Co. NV and **Vlaams Asfaltbedrijf Huyghe en Co PVBA,** represented by André De Bluts, Georges Vandersanden and Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of J. Biver, 8, rue Zithe,

applicant,

v

Commission of the European Communities, represented by Claire Durand, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

supported by

Guido Aerts, acting as administrator of the insolvent Société Usines Pol Madou NV, represented by Michel Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 avenue Marie-Thérèse,

intervener,

APPLICATION for the annulment of Commission Decision IV/31.371 relating to a proceeding under Article 854 of the EEC Treaty or, in the alternative, the cancellation or at least a reduction of the fines imposed on the applicants,

* Language of the case French.

THE COURT (Fifth Chamber)

composed of: R. Joliet, President of Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: J. Mischo
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing and further to the hearings on 21 April 1988 and 14 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 May 1988 and his further Opinion delivered on 28 February 1989,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 September 1986, Société coopérative des asphalteurs belges ('Belasco'), Compagnie générale des asphaltes SA ('Asphaltco'), Antwerpse Teer- en Asfaltbedrijf NV ('ATAB'), De Boer en Co NV ('De Boer'), Kempisch Asfaltbedrijf NV ('KAB'), Limburgse Asfaltfabrieken PVBA ('LAF'), Lummerzheim & Co NV ('Lummerzheim') and Vlaams Asfaltbedrijf Huyghe & Co PVBA ('Huygue') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission Decision of 10 July 1986 (IV/31.371, Official Journal 1986, L 232, p. 15) in which the Commission found that those undertakings had committed several infringements of Article 85(1) of the EEC Treaty or, in the alternative, the cancellation or at least a reduction of the amount of the fines imposed on them by that decision.

2 Belasco is a cooperative association set up in 1955, comprising a number of Belgian roofing felt manufacturers. The other applicants are members of Belasco, whose principal activity is assisting in establishing the standards which the Institut Belge de Normalisation (Belgian Standards Institution) lays down (hereinafter referred to as 'IBN standards').

3 The members of Belasco entered into an agreement among themselves which took effect from 1 January 1978 and provided essentially for the adoption of price lists and of sales conditions for all deliveries of roofing felt in Belgium, the allocation of quotas determining the market share to be held by each of the members, joint advertising, the study and promotion of ways of standardizing and rationalizing production and distribution, and a prohibition of gifts to customers and sales at a loss. That agreement replaced an agreement concluded at the end of 1966 in similar terms.

4 The agreement also provided for the adoption of defensive measures against competition from foreign undertakings or competition resulting from the establishment of new undertakings or the discovery of products to replace roofing felt. The members of Belasco also undertook to contribute to the purchase of any plant for the manufacture of the products concerned in the event of a company's insolvency or the sale of an undertaking consequent on the exercise of rights by a third party and not to sell or hire out any plant for the manufacture of such products. Observance of the agreed prices, quotas and discounts was monitored by an accountant and penalties were provided for in the event of infringements of the agreement or of decisions adopted at the general meeting. In such cases, the members were obliged to pay a fixed sum into a common fund, failing which that sum might be deducted from the cash deposit lodged with Belasco by each member.

5 The agreement was implemented by resolutions passed at the general meeting of Belasco and supplemented by two agreements concluded in May and October 1978 between members of Belasco and non-members for a joint reduction of the discounts granted to customers.

6 The products covered by the agreement and by the other measures mentioned above were, on the one hand, the 'Belasco' products, which include 'Benor' products approved by the IBN and similar products not meeting IBN requirements

and, on the other, roofing felt enhanced by the addition of plastic substances, usually with a polyester base, known as 'new' products, and other products, such as mastics and liquid bitumen, used largely in conjunction with roofing felt, known as 'ancillary products'.

7 The Commission considered that the main agreement and the agreements supplementing it, together with the measures for their implementation, constituted infringements of Article 85(1) of the Treaty and therefore imposed fines on Belasco and its members.

8 In support of their application, the applicants make submissions relating essentially to non-fulfilment of the conditions for the application of Article 85(1) of the Treaty, infringement of Council Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87), infringement of the principle of equality of treatment, infringement of essential procedural requirements in so far as the statement of the reasons on which the decision was based was incorrect, contradictory and inadequate, and the inappropriate amount of the fines.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I — Infringement of Article 85(1) of the Treaty

A — *Distortion of competition within the common market*

1. *The adoption of a common price list for Belasco products and common prices for ancillary products and new products*

10 The applicants maintain that a common price list for Belasco products was adopted not in order to distort competition but only for the purpose of submitting, as recommended by the Belgian administration itself, collective applications for price

rises so as to obtain the requisite authorizations more rapidly than would have been the case if applications had been submitted individually. They claim that in any case the common price list did not have the effect of distorting competition since, on the one hand, the prices charged on the market varied in practice from one undertaking to another and, on the other, the price lists in question were notified to undertakings that were not members of Belasco, which thus had an opportunity to adjust their prices in such a way as to improve their position on the market by comparison with that of the members of Belasco.

11 With regard to the joint fixing of prices for ancillary products, the applicant state that the Commission itself had recognized in its decision that the prices were not observed in practice. They assert that no price list ever existed for ancillary products, even though the general meeting did adopt a position on this matter on 10 occasions. As regards new products, they claim that the Commission also conceded in its decision that it had not been established that common prices had actually been applied.

12 It is apparent from the file on the case that, first, the applicants did not confine themselves to submitting joint applications for price increases but also acted in concert regarding the apportionment of the authorized increases as between the various products and the best time at which to put them into effect. The common price list was supplemented by measures concerning the discount rates to be granted. The adoption of the common price list was thus intended to restrict price competition.

13 It must also be stated that the notification to undertakings that were not Belasco members of draft applications for price increases to be submitted to the administrative authorities and of draft price lists implementing the increases allowed was intended to encourage those undertakings to align their prices with those of the members in order to reinforce the effects of the cartel beyond its membership. It has been established that the draft documents in question were notified to the non-member undertakings as part of arrangements between them and Belasco intended to associate them with the pricing policies, price discounts and other measures agreed by the members of Belasco and to induce them to adopt the same conduct on the market.

14 It must also be observed that common prices for new products were fixed on several occasions by the general meeting, even if, as the Commission concedes (point 107 of the decision), those products were treated in a less restrictive manner than the others.

15 Finally, it must be pointed out that, although the prices fixed for new products may not have been observed in practice, the decisions of the general meeting fixing them were intended to restrict competition.

16 Consequently, the arguments relating to the purpose of the common price list and the non-application of common prices for new and ancillary products cannot be accepted.

2. *The prohibition of gifts and sales at a loss*

17 According to the applicants, the prohibition of gifts and sales at a loss merely reflected the Belgian legal provisions concerning unfair competition.

18 That argument cannot be upheld. The Belgian Law of 14 July 1971 on commercial practices (*Moniteur belge*, 30.7.1971, p. 9087) referred to by the applicants relates only to sales to final consumers and therefore does not apply to relations between economic agents such as those involved in this case. Therefore, the prohibition of gifts and sales at a loss at issue in this case could only have been intended to ensure that the agreed pricing rules were not evaded by such practices, resulting in competition between the undertakings concerned.

3. *Implementation of quotas*

19 The applicants maintain that, although the agreement allocated quotas that were monitored and enforced by a system of penalties in the form of compensation payments, that system was never applied.

20 In this regard, it need merely be stated that observance of the quotas was in fact monitored, as is proved by the fact that those undertakings which had exceeded their quotas agreed to pay by way of penalty sometimes substantial sums to undertakings which had not achieved their quotas. The applicants' argument is thus contradicted by the facts.

4. *The discounts*

21 According to the applicants, the level of discounts was never agreed. On the contrary, each member of Belasco applied its own discounts according to the importance of the customer and the volume of the order, as is shown by the invoices furnished to the Commission as examples.

22 In the first place it must be stated that, as the Commission has demonstrated, the agreement concluded on 30 October 1978 laid down rules on discounts which were actually applied until July or August 1980. It is true that those rules were not always observed but when they were infringed complaints were made to the general meeting by the aggrieved members.

23 It must then be stated that the argument that an analysis of the invoices furnished to the Commission proves wide disregard of the rules on discounts cannot be accepted. As the Commission has correctly pointed out, those invoices prove only that, whilst the 1978 agreement was in force, only three customers of Belasco members received discounts.

5. *The principle of stability of clientele*

24 The applicants maintain that the principle whereby each undertaking must deal only with its own customers, which it describes as the principle of stability of clientele, was never observed. The list of customers lost and won during the period under review clearly proves that statement.

25 It must be observed in that regard that several members asked at general meetings that more favourable offers should not be made to certain customers. Moreover, certain members complained about losses of customers to other members. Those complaints were considered by the general meeting and on occasion investigations were conducted to establish whether they were well founded. Moreover, in January 1978, when a price campaign was being carried out by International Roofing Company SA, which was not a member of Belasco, the general meeting encouraged members to retain their own customers. Finally, the principle of stability of clientele was reaffirmed by the chairman of the general meeting in 1981.

26 Those facts show that the principle of stability of clientele was applied by the applicants, even if only to a limited extent, as the Commission has conceded (point 74(vi) of the decision).

6. *Concerted action against foreign undertakings*

27 The applicants maintain that no concerted action was taken to prevent the takeover of Usines Pol Madou ('UPM'), a former member of Belasco, by competitors, in particular a foreign undertaking. UPM's insolvency resulted from incautious management and not from concerted action on the part of the members of Belasco.

28 It must be pointed out that, as the Commission has shown, the applicants endeavoured to avoid the possibility of a takeover of UPM, which was insolvent at the time, by one or more foreign undertakings because they were not members of the cartel. It must be acknowledged that that concerted action, which formed part of a campaign against other producers and importers, was intended to restrict competition or to strengthen the applicants' position on the market. The applicants' arguments in that connection are therefore unfounded and must be

rejected. It must also be pointed out that, as the applicants admitted at the hearing, the concerted action taken to induce IKO, a producer which was not a member of Belasco, to abandon a low-price policy was successful.

7. The adoption of standardization and rationalization measures

29 The applicants claim that the implementation of a common programme for Belasco products, the decisions relating to coordination of the characteristics of new products, the use of the name Belasco and the joint advertising to promote that name were not of such a nature as to affect competition but were measures intended to improve product quality, to rationalize manufacture and distribution and to standardize the range of products available to architects.

30 It must be observed in this regard that those measures were taken under the 1978 agreement and served to intensify its restrictive purpose. The standardization measures were intended to prevent the members from differentiating their products and to obviate competition between members. Moreover, the joint advertising measures, such as use of the Belasco mark, restricted competition in so far as they presented a uniform image of products in a sector in which individual advertising may facilitate differentiation and therefore competition. The arguments put forward in this connection must therefore be rejected.

31 It is apparent from the foregoing that the submission that competition was not adversely affect must be rejected as unfounded.

B — *The effect on trade between the Member States*

32 The applicants claim that the cartel in question involved only Belgian undertakings, covered only products manufactured by those undertakings and applied only to the Belgian market. They add that collective action against foreign producers has not been proved and that the Commission has conceded that it found no evidence that the measures suggested or decided upon had actually been

taken. They conclude that trade between Member States was not affected by the cartel.

33 It must first be recalled that, as the Court has consistently held, the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected.

34 Moreover, since the market concerned is susceptible to imports, the members of a national price cartel can retain their market share only if they defend themselves against foreign competition.

35 The agreement in this case provided for protective and defensive measures, in particular in the event of increased competition from foreign undertakings. The members also undertook, with a view to precluding any increase in the competitiveness of other undertakings, particularly foreign undertakings, not to transfer any production plant to any third party, not to manufacture for third parties and to obtain possession of the production plant of any of them which might become insolvent.

36 Thus, in February 1984 the general meeting decided that supplementary discounts would be granted by its members to the customers of an importer of roofing felt (Canam Sales) and in July 1980 the members emphatically told the competent regional authorities that UPM, a former member of the cartel which had become insolvent, should not be purchased by a foreign undertaking. On the same occasion they expressed their interest in taking UPM over themselves.

37 The size of the market share held by the members of Belasco enabled them not only to apply the measures decided upon but also to do so effectively. The applicants held between 57 and 60% of the market in roofing felt, the remainder of the market being shared by their competitors (about 20%) and by importers. The Commission correctly excluded from that market synthetic products, whose price is much higher than that of roofing felt and whose application calls for

highly skilled personnel. Those products are intended for specific uses and are not therefore substitutable for the products covered by the agreements and practices at issue.

38 Accordingly, although the contested agreement relates only to the marketing of products in a single Member State, it must be held to be capable of influencing intra-Community trade.

II — Infringement of Article 15 of Regulation No 17

39 The applicants maintain that the contested decision infringed Article 15 of Regulation No 17. In support of that claim they argue that the infringements committed and their effects on the market were unintentional.

1. *The unintentional nature of the infringements*

40 The applicants maintain — and assert that the Commission itself conceded — that they did not realize that their agreement infringed Article 85(1) of the Treaty. They renewed the 1966 agreement in good faith. Mere negligence cannot justify the fines imposed on the applicants, since no fine was imposed on the undertakings which were not members of Belasco even though the Commission had considered them negligent.

41 As the Court has held (*inter alia* in Case 19/77 *Miller International Schallplat'en GmbH* v *Commission* [1978] ECR 131), it is not necessary for an undertaking to have been aware that it was infringing Article 85 for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition.

42 In view of the nature of the clauses of the main agreement and other agreements in question and of the measures adopted for their implementation, that was the situation in this case.

2. *The effects of the infringements on the market*

43 The applicants claim that the Commission has not specified how it took account of the effects of the infringements on the market when determining the amount of the fines. Those effects were challenged in the responses to the statement of objections and therefore clarification of them was required. The failure to provide it constitutes an infringement of Article 154 of Regulation No 17.

44 It need merely be stated in this regard that in points 76 to 82 of the contested decision the Commission clearly indicated the restrictions on competition deriving from each of the concerted practices, together with the effects thereof on the market.

45 Accordingly, the submission alleging an infringement of Article 15 Regulation No 17 is unfounded and must therefore be rejected.

III — Infringement of the principle of equality of treatment

46 The applicants claim that the Commission infringed the principle of equality by treating them differently from the non-members.

47 It need merely be stated in regard to this submission that the respective situations of the members of Belasco and the non-members were not comparable. The non-members were not parties to the contested agreement and the only infringements found in their case related solely to the agreements on discounts concluded in October 1978 which, moreover, did not cover new products.

48 It follows that the submission alleging an infringement of the principle of equality of treatment must be rejected.

IV — The statement of reasons was incorrect, contradictory and inadequate

1. *The incorrect and contradictory nature of the statement of reasons*

49 The applicants maintain that the Commission contradicted itself by charging them with having undertaken to define jointly the characteristics of their products whereas in the decision it stated that that charge did not relate to the participation of the members of Belasco in the establishment of IBN standards, which presupposes that standardized products must have been on the market for 10 years. On this point it must be stated that, as pointed out above, the measures designed to achieve product uniformity were taken under the 1978 agreement and served to reinforce its restrictive purpose. Their purpose was not therefore to enable IBN standards to be established.

50 The Commission is also alleged to have contradicted itself by stating that the effects of a cartel must be taken into account when infringements are appraised whereas it did not at any stage take into consideration the effects of the cartel on the relevant market. On this point it must be stated that, as noted above, the Commission did indeed analyse the effects of the cartel on the market.

51 The contested decision is said to contain a further contradiction in so far as it states, on the one hand, that the deliveries of the members of the cartel accounted for 57 to 60% of the consumption of the relevant products (point 88) and, on the other, that those deliveries represented at least 70% (point 91). That argument cannot be accepted. As the Commission pointed out, the percentage mentioned in point 88 concerned deliveries by the members alone whilst the figure in point 91 concerned the market share held by both members and non-members.

52 The decision is also said to be contradictory for stating in point 88 that the collective action against competitors was by no means hypothetical whereas according to point 61 the Commission found no evidence that anything came of the two operations suggested by one of Belasco's members. That argument cannot be accepted. The applicants admitted at the hearing that the action undertaken against IKO had been effective and, even though the Commission was not able to specify what effects the other concerted actions had, it may be concluded, having regard to the nature thereof and the means available to the members of the cartel by virtue of their market share, that the actions were not purely hypothetical.

53 Finally, the applicants maintain that the Commission contradicted itself in objecting that they had concluded an agreement relating also to new coverings whereas it did not include Derbit, a roofing-felt producer which was not a member of Belasco, among the addressees of the decision on the ground that that company manufactured only new products, thereby admitting that the cartel did not extend to those products. That argument likewise cannot be accepted. Derbit was excluded from the addressees of the decision not because it produced only new products but because it was not among the non-member companies which had entered into agreements with the members of Belasco.

2. *Inadequacy of the statement of reasons*

54 The applicants maintain that the Commission did not adequately state the grounds for its objections concerning quotas and discounts, did not examine the reports compiled by an auditor, which showed that none of the commitments entered into by the signatories to the agreement had been observed, and did not reply to their arguments regarding the effects of the cartel on the market.

55 It must be observed first of all that, as pointed out above, the Commission did indeed examine the effects of the cartel on the market and its implementation by the members of Belasco with respect to compliance with quotas and discounts. As regards the alleged failure to reply to the applicants' arguments, it must be pointed out that, as the Court has held (*inter alia* in Joined Cases 142 and 156/84 *British American Tobacco Company Limited and Another* v *Commission* [1987] ECR 4487), although under Article 190 of the Treaty the Commission is required to set out all the circumstances justifying the adoption of a decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings.

56 In the light of the foregoing considerations, it must be stated that the Commission indicated the matters of fact and the legal considerations on the basis of which it determined that the competition rules had been infringed and imposed fines on the applicants. The statement of the reasons on which the contested decision was based cannot therefore be regarded as inadequate.

57 The submission relating to the incorrect, contradictory and inadequate nature of the statement of reasons must therefore be rejected.

V — The amount of the fines

58 It must be stated in the first place that some of the arguments advanced by the applicants with a view to securing a reduction of the fines are the same as those relied on in support of the submission that the contested decision infringed Article 15 of Regulation No 17; those arguments have already been rejected.

59 The applicants also maintain that the new products did not come within the scope of the agreement and that the members of Belasco adopted their own independent commercial policies with regard to them.

60 It must be stated in the first place that, according to the very wording of the agreement, it applied to 'felts of all kinds . . . impregnated with bitumen, both those now known in the trade as "roofing felt" . . . and any materials of the same type that may be manufactured in the future to satisfy the same needs' (paragraph 1(b) of the chapter entitled 'Object of the agreement') and therefore to the new products.

61 As is apparent from the documents before the Court, certain measures for the implementation of the agreement related to new products. The latter were included in the calculation of quotas, were covered by pricing agreements and were subject to the limits fixed for discounts. Moreover, standardization measures were adopted in relation to them.

62 It must therefore be held that the agreement covered new products even though, according to points 4(c) and 74(xi) of the contested decision, its application to those products was progressive.

63 The applicants also assert that the cartel lasted only from 1 January 1978 to 31 December 1983 and that although there were contacts between the members

after the latter date they were even more negligeable than those which occurred during the currency of the agreement.

64 That argument cannot be accepted. It must be pointed out that, according to its terms, the agreement was automatically renewed for a period of five years if not terminated by 31 December 1983. Not only did the applicants not terminate the agreement, they also took measures for its implementation until 9 April 1984 (determination of quotas to apply from 1 January 1984 and arrangements for the accountant to visit members) and discussed amendments to be made thereto after that date.

65 The following fines were imposed: ECU 420 000 (European currency units) on ATAB, ECU 150 000 on Asphaltco, ECU 200 000 on Lummerzheim, ECU 30 000 on LAF, ECU 75 000 on KAB, ECU 75 000 on De Boer, ECU 50 000 on Huyghe and ECU 15 000 on Belasco. Those fines represent between 0.75 and 2.5% of the total turnover of the undertakings concerned in 1983, that is to say a level considerably lower than the limit of 10% provided for in Article 15(2) of Regulation No 17.

66 It must be stated that in fixing the amount of the fines the Commission took account of the total turnover of each of the undertakings concerned and of its turnover for supplies of roofing felt in Belgium and, in Belasco's case, its annual expenses. The Commission also took the view that individual features of the cartel such as the restrictions on prices, market-sharing and concerted measures against competitors rank amongst the most serious interferences with freedom of competition.

67 The Commission also took account of the less restrictive nature of the treatment applied to the new products by the members of Belasco, of the duration of the cartel and of the fact that the principle of stability of clientele was observed to only a limited extent.

68 Consideration of the arguments put forward by the parties and of the Commission's reasoning have not disclosed any grounds for reducing the fines. Accordingly, the submission concerning their reduction must be rejected.

69 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

70 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered jointly and severally to pay the costs, including those of the intervener.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the applicants jointly and severally to pay the costs, including those of the intervener.

Joliet Slynn

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 11 July 1989.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber