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

In Case T-21/99,

Dansk Rørindustri A/S, established in Fredericia (Denmark), represented by K. Dyekjær-Hansen, K. Høegh and C. Karhula Lauridsen, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by É. Gippini Fournier and H.C. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

defendant,

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

* Language of the case: Danish.

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 October 2000,

gives the following

Judgment [1]

Facts of the case

1 The applicant is a Danish company, also known as Starpipe, and produces district heating pipes.

2 to 7 ...

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

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

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

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

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

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

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

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

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

'*Article 1*

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

The duration of the infringements was as follows:

— in the case of... Dansk Rør,... from about November/December 1990 to at least March or April 1996,

...

The principal characteristics of the infringement consisted in:

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

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

— agreeing prices for the product and for individual projects,

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

— in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to hinder its commercial activity, damage its business or drive it out of the market altogether.

...

Article 3

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

...

(c) Dansk Rørindustri A/S, a fine of ECU 1 475 000;

...'

16 to 23 ...

The application for measures of inquiry

24 Pursuant to Article 68 of the Rules of Procedure of the Court of First Instance, the applicant requested in its observations of 20 June 2000 that its director, its

executive director and the chairman of its board of directors be heard, first, on whether the applicant participated in the meeting of 24 March 1995 in Düsseldorf, second, whether, by refusing to participate in the purchase of Powerpipe at the meeting of 5 May 1995 in Budapest, the applicant withdrew its participation in the action against Powerpipe and, third, as to the real object of the meeting held during a conference in Stockholm between 11 and 13 June 1995.

25 The Court considers, however, that the applicant did not provide sufficient reasons to justify hearing the witnesses in question. In the absence of new elements of fact which came to light after the adoption of the contested decision, and having regard to the fact that the witnesses referred to are members of the management or the board of directors of the applicant, the applicants cannot adduce any evidence which the applicant was unable to put forward in its application or reply.

26 For those reasons, the Court did not grant the witness application.

Substance

27 The applicant relies, essentially, on three pleas in law. The first plea in law alleges errors of fact and of law in the application of Article 85(1) of the Treaty. The second plea in law alleges infringement of certain general principles during the administrative procedure. The third plea in law alleges infringement of general principles and errors of fact in the determination of the amount of the fine.

I — *The plea in law alleging errors of fact and of law in the application of Article 85(1) of the Treaty*

A — *The classification of the cartel as a single continuous cartel*

1. Arguments of the parties

28 to 31 ...

32 According to the applicant, the cartel was not reactivated until the end of the summer of 1994. After the cartel broke up in October 1993, the applicant did not participate in the bilateral and trilateral contacts which subsequently took place between certain undertakings and began to participate again only in so far as it was summoned to meetings. It di not take part in, and was not invited to, the meetings of 3 May and 9 May 1994, when agreements on prices and the quota system concerning Germany were reinstated. The applicant was presented with a *fait accompli*.

33 to 34 ...

35 According to the defendant, from March 1994 the plenary meetings between the six producers were resumed, with the participation of the managing directors and the sales managers. The applicant did not deny having participated in the preliminary meetings of 7 March and 15 April 1994 on the resumption of the cartel. It therefore does not avail the applicant to submit that it did not attend the

subsequent meetings in May 1994. As subsequent events showed that the applicant had decided to remain in the cartel, the degree of enthusiasm which it may have shown in resuming the anti-competitive practices has no relevance to the calculation of the duration of the cartel.

36 ...

2. Findings of the Court

37 to 56 ...

— The resumption of the applicant's participation in the cartel

57 Contrary to what the Commission alleges, there is no indication in the evidence to which it refers, namely Tarco's reply of 31 May 1996 and Løgstør's reply of 25 April 1996 to the Commission's request for information of 13 March 1996 (hereinafter 'Tarco's reply' and 'Løgstør's reply'), that the applicant attended the meetings of 7 March and 15 April 1994. First, as regards Tarco's reply, it should be observed that, as regards the meeting of 7 March 1994, that meeting was a meeting of 'a number of managing directors and sales directors for Germany'. Whereas Tarco states at the same place that the participants in the meeting were 'probably' representatives of ABB, Løgstør, Pan-Isovit and itself and that a representative of Henss/Isoplus was to take part but was unable to do so, it goes on to state that it cannot confirm whether the applicant was represented. Then, as regards the participants in the meeting of 15 April 1994, Tarco's reply mentions only 'a number of managing directors and sales managers for Germany', without

identifying those participants. Second, the table of business trips made by Løgstør's sales director attached to Løgstør's reply merely confirms that Løgstør was represented at a meeting held on 15 April 1994 and does not identify the other participants. It follows that the Commission has adduced no evidence that the applicant was present at the two meetings in question.

58 Furthermore, it is common ground that the applicant was not present at the meeting of 3 May 1994.

59 Next, as regards the meeting of 18 August 1994, which the applicant does not deny having attended, it should be pointed out that in the letter of invitation to that meeting, sent on 10 June 1994 to Mr Henss and to the directors of the applicant, ABB, Løgstør, Pan-Isovit and Tarco (annex 56 to the statement of objections), the coordinator of the cartel stated: 'Since the list of 9 May 1994 is incomplete as regards certain heads and since comparisons of bids have therefore led to confrontations and significant differences of interpretation, I shall supplement the missing heads by the enclosed list.' In the light of ABB's reply, according to which there was a price list which, following a meeting in Hanover on 3 May 1994, was to be applied for all deliveries to German suppliers, it must be concluded that, when the meeting of 18 August 1994 was being organised, it was envisaged that discussions would continue on a price list which was to be applied when tenders were submitted and which had already taken effect, albeit with some problems. Furthermore, the existence of such a list is confirmed by Tarco in its reply.

60 In that regard, it should be observed that, according to ABB's reply, measures designed to 'improve' price levels in Germany were discussed at the meeting of 18 August 1994. According to ABB, those measures may have included providing new price lists to the coordinator of the cartel in order to draw up a new common price list and also an agreement under which rebates on list prices would not

exceed a maximum agreed before the end of 1994 and under which the price lists would be imposed from 1 January 1995, although, on the latter point, the agreement may have also been concluded at a later meeting (ABB's reply). Although ABB's account of what took place at the meeting of 18 August 1994 is not confirmed by other participants in the cartel, it is clear, having regard to the conclusions that must be drawn from the invitation to that meeting, that the discussions on 18 August 1994 supplemented the common price list agreed in May 1994, if they did not confirm it.

61 Having regard to the reference to the price list in the letter of invitation received by the applicant to the meeting of 18 August 1994 and to the fact that it attended that meeting, it must be observed that the Commission has established to the requisite legal standard that the applicant participated in an agreement on prices from August 1994.

62 As regards the period April to August 1994, however, the Commission erred in determining the duration of the infringement in the applicant's case. If there is no evidence directly establishing the duration of an infringement, the principle of legal certainty requires that the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79). Since the anti-competitive activities were in abeyance between October 1993 and March 1994, as the Commission itself acknowledges, and since there is no evidence that the applicant participated in anti-competitive activities during the period April to August 1994, the Commission cannot accuse it of having resumed its participation in the cartel in question before August 1994.

63 The applicant's complaint must therefore be upheld in so far as it denies having participated in the cartel during the period April to August 1994.

64 to 141 ...

II — *The plea alleging infringement of general principles during the administrative procedure*

A — *Arguments of the parties*

142 The applicant claims that the Commission infringed the principle of equal treatment and the requirement of fair proceedings in so far as it only warned ABB not to continue the infringement, whereas a small undertaking like the applicant was less capable than ABB of realising the gravity and the consequences of the cartel, and in particular of continuing it.

143 That procedural defect is of real significance, since the Commission, when taking account of the continuation of the cartel in calculating the amount of the fines, ignored the fact that the participants in the cartel other than ABB, and in particular the applicant, had not received such a warning.

144 By treating the participants differently as regards the possibility of realising the consequences of continuing the infringement, the Commission also infringed its obligations to ensure equal and fair proceedings, and in doing so infringed the fundamental rights which the Community judicature is called upon to protect in accordance with the constitutional traditions common to the Member States and also with international agreements, including the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). The requirements of a fair hearing are binding on the Commission when it is dealing with a case, regardless of whether or not the Commission is a 'tribunal' within the meaning of the Convention.

145 In the applicant's submission, the consequent infringement of the principle of equal treatment must lead to the annulment of the Decision, in so far as the Commission held the applicant liable for continuing the infringement after ABB had received a warning or, in the alternative, to a reduction in the amount of the fine.

146 The defendant contends that there was neither a procedural defect nor an infringement of fundamental rights providing grounds for annulling the Decision or for reducing the amount of the fine. Because of the investigations, the applicant was aware of the fact that there was a manifest infringement of the competition rules, which was confirmed by the attempts to conceal the activities of the cartel by continuing the meetings in Zurich. The warning sent to ABB was due to special circumstances, in particular the risk that the complainant would become insolvent if the members of the cartel continued their action. No legal significance was attributed to the warning given to ABB, either for the assessment of the unlawful conduct or for the fixing of the amount of the fine.

B — *Findings of the Court*

147 In point 108 of the Decision, in the section headed '*Continuation of the cartel after the investigations*', the Commission stated:

'ABB, at high level within the group, had been made aware by the Directorate-General for Competition, on 4 July 1995, of the fact that evidence of its involvement in a very serious infringement had been obtained during the investigations.

The consequences of continuing of the cartel were explained — and no doubt understood — at that time.'

148 In that regard, it should be observed, first, that the Commission is not required, during an investigation pursuant to Regulation No 17, to warn the undertakings concerned that their conduct is illegal or of what the consequences of continuing it will be.

149 However, the fact that an undertaking participating in an infringement of the Community competition rules receives an express warning from the Commission may have consequences on the assessment of its conduct for the purpose of determining the amount of the fine. Such a warning, in so far as it informs an undertaking that an investigation by the Community authorities responsible for competition is taking place, may encourage the undertaking concerned to put an end to the conduct being investigated, which may lead to a reduction in the duration of the infringement, one of the factors which the Commission must take into account when determining the amount of the fine in accordance with Article 15(2) of Regulation No 17.

150 The fact that an undertaking receives a warning that its conduct is illegal may also have legal consequences, since when the Commission is taking mitigating or aggravating circumstances into account, its assessment of whether the undertaking concerned ceased or continued the infringement depends on whether or not it received a warning.

151 In the present case, however, it is common ground that on 29 June 1995, the Commission carried out investigations at the premises of most of the undertakings involved in the proceedings leading to the contested decision, including the applicant's. It follows that the applicant must have been aware that the Commission was in the process of conducting an investigation under the Community competition rules.

152 Furthermore, it follows from the Decision that the Commission, when assessing the fact that the infringement continued after the investigations as an aggravating circumstance, did not take into account the fact that the undertakings were or were not expressly warned.

153 On that point, it should be pointed out that, as regards the express warning received by ABB, the Decision refers, among the aggravating circumstances affecting that undertaking, to 'its continuation of such a clear-cut and indisputable infringement after the investigations despite having been warned at high level by the Directorate-General for Competition of the consequences of such conduct' (point 171 of the Decision). It is apparent from that passage that the Commission, when taking aggravating circumstances into account, relied not on the fact that ABB had received a warning at high level, but on the fact that it deliberately continued a manifest infringement after the investigations. The interpretation that, in that context, the reference to the warning given to ABB is intended only to confirm the fact that that undertaking, when continuing the infringement, was aware, even at a high level, that its conduct was contrary to the competition rules is corroborated, first, by the fact that it is again stated, in point 169 of the Decision, that the measures taken by ABB to continue the operation of the cartel for nine months after the investigation were taken at a senior level of group management and, second, by the assertion that, for other undertakings, like the applicant, the fact that they continued the infringement after the investigations was also taken into account as an aggravating circumstance.

154 In those circumstances, the applicant cannot claim to have been subjected to unequal treatment.

155 As regards the principle of a fair hearing, even though, according to a consistent line of decisions, the Commission is not a 'tribunal' within the meaning of Article 6 of the Convention (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 81; Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 7; and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39), it is none the less obliged to observe the general principles of

Community law during the administrative procedure (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 8; *Shell* v *Commission*, cited above, paragraph 39).

156 None the less, since in order to substantiate its complaint relating to infringement of the requirements of a fair hearing the applicant merely repeats the argument alleging unequal treatment, this complaint must also be rejected.

157 Accordingly, the plea cannot be upheld.

III — *The plea in law alleging infringement of general principles and errors of fact in assessing the amount of the fine*

158 to 182 ...

B — *Infringement of the principles of equal treatment and proportionality*

1. Arguments of the parties

183 to 188 ...

189 Last, the applicant observes that the classification as a particularly serious infringement was possible only because the Commission classifies the infringement as being continuous throughout the period considered. On that point, the Commission should have taken into consideration the fact that it was not a continuous infringement, but that there were two separate periods during which the applicant participated in the infringement.

190 to 195 ...

196 As regards the argument relating to the duration of the infringement, the defendant observes that, when calculating the amount of the fine, the gravity of the infringement is to be assessed independently of its duration. In the present case, the duration of the infringement was taken into account, in accordance with the guidelines, after the gravity of the infringement had been taken into consideration, in order to determine any increase in the fine. In that regard, the defendant again emphasises that the infringement was a continuous infringement.

2. Findings of the Court

197 to 212 ...

— Determination of the amount of the fine according to the duration of the infringement

213 In so far as the applicant claims that the Commission should not have made a finding that it participated in a continuous cartel, reference should be made to

paragraphs 64 to 69 above, where it was held that the Commission correctly accused the applicant of having participated in a single, continuous infringement although it did not find that the applicant had participated in an uninterrupted manner throughout the whole period from November 1990 to March 1996.

214 However, as regards the period during which the anti-competitive activities were in abeyance, it was held in paragraph 62 above that the Commission erred in accusing the applicant of having participated in the cartel during the period April to August 1994.

215 It should be recalled that, when assessing the duration for the calculation of the amount of the fine to be imposed on the applicant, the Commission took into consideration the fact that the applicant had participated for more than five years and also the fact that the arrangements were in abeyance between 1993 and the beginning of 1994 in fixing the increase over the starting-point of its fine at 1.4 (see paragraph 55 above).

216 Consequently, having regard to the period of several months during which the applicant's participation has not been proved, the Court, in the exercise of its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, considers it proper to reduce the increase in respect of the duration of the alleged infringement to 1.35.

217 to 249 ...

IV — *Conclusions*

250 It follows from the foregoing, in particular from paragraph 62 above, that the Commission made an error of assessment in so far as it accused the applicant of having participated in the cartel during the period between April and August 1994. On that point, the Decision must be annulled.

251 As the Court decided in paragraph 216 above, as regards the fine to be imposed on the applicant, the rate of increase over the starting-point for calculating the amount of that fine according to the duration of its participation must be reduced to 1.35. However, having regard to the calculations to be made in accordance with the aggravating circumstances and to the application of the Leniency Notice, and also to the limit of 10% of turnover achieved by the undertaking concerned during the previous financial year, as provided for in Article 15(2) of Regulation No 17, the Court finds that the amount of the fine to be imposed on the applicant is the same as the amount stated in Article 3(c) of the Decision. Since there is therefore no need to reduce the fine imposed on the applicant, the remainder of the application must be dismissed.

Costs

252 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that each party bears its own costs. As the action has been successful only to a very limited extent, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) in so far as it finds that the applicant infringed Article 85(1) of the Treaty by participating in the infringement referred to in that article during the period April to August 1994;**

2. **Dismisses the remainder of the application;**

3. **Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;**

4. **Orders the Commission to bear 10% of its own costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung
Registrar

P. Mengozzi
President