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

In Case T-141/89,

Tréfileurope Sales SARL, formerly called Tréfilarbed SA, then Tréfilarbed Luxembourg-Saarbrücken SARL, a company incorporated under Luxembourg law, established in Luxembourg, represented by Dominique Voillemot, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Norbert Koch, Enrico Traversa and Julian Currall, of its Legal Service, acting as Agents, and Nicole Coutrelis and André Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for the annulment of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh, OJ 1989 L 260, p. 1),

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

composed of: H. Kirschner, President, C. W. Bellamy, B. Vesterdorf, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing from 14 to 18 June 1993,

gives the following

Judgment

Facts

1 This case concerns Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1989 L 260, p. 1) (hereinafter 'the Decision'), in which the Commission imposed a fine on 14 producers

of welded steel mesh for having infringed Article 85(1) of the EEC Treaty. The product with which the contested Decision is concerned is welded steel mesh. It is a prefabricated reinforcement product made from smooth or ribbed cold-drawn reinforcing steel wires joined together by right-angle spot welding to form a network. It is used in almost all areas of reinforced concrete construction.

2 As from 1980 a number of agreements and practices, which gave rise to the Decision, came into being in that sector on the German, French and Benelux markets.

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

4 On 20 June 1985, the French Competition Commission issued a notice concerning the competitive situation on the welded steel mesh market in France, which was followed by Decision No 85 — 6 DC of 3 September 1985 of the French Minister for the Economy, Finance and Budget, imposing fines on a number of French companies for taking action and engaging in practices whose object or effect was to restrict or distort competition and hamper the normal functioning of the market in the period 1982 to 1984. The applicant was fined FF 10 000 for participation in a cartel whose object and effect was to distort competition from the end of September 1983 to April 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 Before 1 August 1984, Tréfilarbed SA was a management and marketing subsidiary of the Arbed group, which controlled the welded steel mesh production companies at Ghent (Belgium), Roermond (Netherlands) and St Ingbert (Germany), together with other wireworks and sales offices in Paris and Ghent, among other places. In 1984, Tréfilarbed SA became a marketing company, named Tréfilarbed

Luxembourg-Saarbrücken SARL, the capital of which was held in equal shares by Arbed SA and Techno Saarstahl GmBH (a wholly owned subsidiary of Saarstahl). According to the Decision (point 195(d)), Tréfilarbed Luxembourg-Saarbrücken must therefore be regarded as the successor of Tréfilarbed SA and as liable for the acts done by the latter and for its own conduct after 1 August 1984. The Decision states that the conduct for which Tréfilarbed Luxembourg-Saarbrücken SARL must be regarded as liable also includes the actions of its subsidiaries in France, Belgium and the Netherlands, since Tréfilarbed SA or Tréfilarbed Luxembourg-Saarbrücken SARL and its subsidiaries are to be regarded as a single undertaking. In 1993 following a decision of the Arbed and Usinor-Sacilor/Saarstahl groups to concentrate their wire production carried out by Schmerbeck & Kuhlmann, Techno Saarstahl, Tréfilarbed Bissen and Tréfileurope France, Tréfilarbed Luxembourg-Saarbrücken SARL changed its name to Tréfileurope Sales SARL (hereinafter 'Tréfilarbed').

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 13 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 order 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:

— declare Articles 1 and 3 of the Decision null and void, wholly or in part, in so far as they concern Tréfilarbed;

in the alternative,

— amend Article 3 of the Decision, cancelling or substantially reducing the fine imposed on Tréfilarbed;

— order the Commission to pay the costs, for which supporting documents will be produced in due course.

17 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

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

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

I — *The relevant market*

A — *The product market*

Arguments of the parties

19 The applicant maintains that the Commission's analysis of the market in its Decision is general and superficial and that it committed a manifest error in determining the relevant market.

20 The applicant observes that the Decision (point 3) states that there are different types of welded steel mesh: standard mesh, catalogue mesh and tailor-made mesh. Contrary to the statement made in the Decision, the applicant maintains that those three types of mesh are not in competition with each other and do not constitute one and the same market. The applicant considers that there are two distinct markets: the market in standard mesh or *Lagermatten* and the market in tailor-made mesh or *Zeichnungsmatten*. Those two types differ as regards their method of manufacture, their external features, the users' needs which they satisfy and their prices. Standard mesh is flat, of a standard format and mesh, manufactured by entirely automatic machines and likely to be in store at warehouses awaiting purchasers. Tailor-made mesh is manufactured in accordance with particular specifications provided by the design office for the project for which it is intended; it is not held in stock but delivered direct to the site and the builder often requires 'just in time' delivery, which imposes particular constraints on the supplier regarding transport. The applicant states that catalogue mesh and *Listenmatten* are not of the same type and do not constitute a uniform category. The term *Listenmatten* includes, in principle, tailor-made mesh. However, there are *Listenmatten* of a simple type, which are not standard but are standardized.

21 The applicant stresses the difference, in terms of prices, between those two categories of mesh, deriving from the difference in value added, which is very low — 20 to 25% of the price — in the case of standard mesh, and much higher — 50 to 80%, and even 100% — in the case of tailor-made mesh. The applicant adds that the cost components of standard mesh are fairly straightforward whilst those of tailor-made mesh vary according to the work involved. On the basis of a chart annexed to its application, the applicant claims that whilst it is true that the price patterns for the two kinds of mesh are not entirely unconnected, the two prices nevertheless vary independently. As regards the influence of the prices of standard mesh on tailor-made mesh, the applicant submits that it is only in entirely abnormal circumstances — such as a steep drop in the price of standard mesh — that a user would use standard mesh rather than tailor-made mesh, a situation which did not arise in the period 1980 to 1985.

22 The applicant concludes that the two categories of mesh described above are not interchangeable from the user's point of view and therefore constitute separate markets, and that the product with which tailor-made mesh is really in competition is concrete reinforcing bars.

23 The Commission considers that the applicant's description of the market does not in any way conflict with its own description. It states that it recognized the difference between standard mesh and tailor-made mesh, in particular as regards cost prices, and that that is why it expressed the view, in point 3 of the Decision, that tailor-made mesh indeed constitutes a sub-market. It does not accept, however, that there are two separate markets. As regards the influence of the prices of the various kinds of mesh on each other, the Commission observes that, according to the applicant's statements, the substitution of standard mesh for tailor-made mesh is technically possible, which shows that they are interchangeable. The fact that such substitution has not occurred is attributable, as the applicant itself has conceded, to the fact that the prices of standard mesh have not fallen to a level such that it could effectively compete with tailor-made mesh. A manufacturer of tailor-made mesh has an interest in participating in the fixing of standard mesh prices and that was precisely the aim pursued by the fixing of prices under the price agreements relating to the Benelux market, for participating in which the applicant is criticized.

Findings of the Court

24 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 or semi-standardized mesh, *Listenmatten* 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'.

25 As regards the prices of standard mesh and tailor-made mesh to which the applicant refers, the Court finds that they are not far removed from each other. That closeness of prices clearly derives, as the applicant itself recognizes, 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.

26 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 the applicant has conceded 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. Moreover, it became apparent at the hearing that that situation existed for part of the period covered by the agreements.

27 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.

28 The possibility of producing different kinds of welded steel mesh and the fact that the prices of those different kinds of product influence each other are evidenced by several documents used as a basis for the Decision. One such document is the letter of 6 June 1980 (annex 55 to the statement of objections, point 79 of the Decision) from Tréfilunion to STA concerning the meeting held on 27 May 1980 in Brussels between Thibodraad, Arbed, Van Merksteijn, Tréfilunion and TFE, which states 'the firm Van Merksteijn, which far and away dominates the market in standard products and manufactures only products in that range, manifestly wishes to keep prices low in order to perpetuate its domination over imports in that niche of the market and the other local producers, including Mr Bakker himself, who seems already to have practically abandoned standard mesh in favour of semi-standard and tailor-made mesh, just like Arbed'. It is also apparent from a telex from the applicant of 22 June 1983 (annex 33 to the statement of objections, point 55 of the Decision) that the applicant also included tailor-made mesh in the agreement concerning the French market for the period 1983 and 1984. Moreover, according to a letter from Tréfilarbed France to Tréfilarbed Luxembourg of 4 November 1983 (annex 36 to the statement of objections, point 59 of the Decision) 'the position to be maintained was that outlined at our meeting in Paris with Mr Marie on 28 March 1983, that is to say to limit the agreements to standard and "rationalized" mesh representing at least 95% of the present market'. Mention must also be made of the existence of an internal Thibodraad report dated 3 March 1980 concerning a discussion with Arbed on 24 February 1980 (annex 83 to the statement of objections, point 117 of the Decision) in which it is stated that it would be preferable to work with basic prices and maximum prices for all types of mesh. There is also a Tréfilarbed report of 7 May 1980 describing a visit to Van Merksteijn on 28 April 1980 (annex 81 to the statement of objections, point 114 of the Decision), according to which 'since production is oriented towards standard mesh and sales to the trade fall outside the purpose pursued, there is no direct competition between Van Merksteijn and Thibo/Staalmat or Tréfilarbed; this does not mean that the level of prices charged by Van Merksteijn for standard mesh cannot have some influence on that of catalogue mesh'. The possibility open to certain producers to operate

on the purportedly different mesh markets is also apparent from an internal Tréfilarbed memorandum of 18 December 1981 concerning another visit to Van Merksteijn on 1 December 1981 (annex 82 to the statement of objections, point 116 of the Decision). Finally, the Court finds that the delivery contracts of 24 November 1976 and 22 March 1982 concluded 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 concerned with standard and non-standard mesh.

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

B — *The geographical market*

Arguments of the parties

30 In the applicant's view, the Commission was right to consider three national markets separately: the French market, the German market and the Benelux market. Those three markets display different features from the economic point of view and as regards the administrative requirements imposed by each Member States: thus, imports into a Member State are virtually impossible without compliance with the rules in force and without certification or approval, whereas, as the applicant concedes, it is possible to dispose of the products concerned on two markets if the production plant is adapted to the requirements of each of those markets. However, Tréfilarbed considers that the real market in welded steel mesh covers a radius of 150 km from the point of production and may itself be divided by a frontier. The reason for this is that the cost of transport is exceptionally high in relation to

the cost of the product. It follows that competition only operates in the natural sales area and between producers whose production, transport and marketing costs are sufficiently close to allow some penetration. Competition does not therefore operate at the level of national markets.

31 The applicant therefore regards as incorrect the finding in point 22 of the Decision that 'this complex of agreements had the effect of producing far-reaching regulation of a substantial part of the common market'. According to the applicant, the regulation of a substantial part of the common market perceived by the Commission amounts in practice to no more than incidental protection measures against penetration in border areas and the alleged partitioning of a substantial part of the common market affected only the volumes produced at an economic distance from the border. The applicant maintains that it endeavoured not to become associated with the national agreements so as to preserve its freedom, given that its plants were located in a border area and its selling area extended into the border areas of several Member States. It adds the cross-border aspect of those agreements had as its sole object and effect the protection of each of the national systems in the border areas.

32 The Commission agrees with the applicant's statement that the welded steel mesh market is essentially regional and cross-border rather than national. However, unlike the applicant, it concludes from that fact that trade between Member States was clearly capable of being affected by the agreements operated in that market and that Article 85 was therefore applicable to them.

33 As regards the applicant's arguments concerning the cross-border nature of the national agreements, the Commission notes that Tréfilarbed states quite plainly that

the agreements in which it took part had the object and effect of hampering the economic inter-penetration sought by the Treaty. It adds that, once Tréfilarbed was effectively present in the French, German and Benelux markets and became associated with agreements covering those markets, it was really a party to agreements distorting competition in the common market and affecting trade between Member States. The Commission adds that the protection measures against penetration in border zones were certainly not just an incidental feature but were the very *raison d'être* of the agreements concerned.

34 As regards the various certification rules to which the applicant alludes, the Commission observes that they do not constitute compulsory specifications — except in the particular case of certification for public works contracts — and that they do not represent an insuperable barrier, as is apparent from the agreements at issue; moreover, the pattern of intra-Community trade in welded steel mesh showed an increase between 1980 and 1985 from 8.5% to 15% of production. The Commission observes that the existence of such a barrier to trade, which must be tolerated until a Community standard is adopted, makes it necessary for undertakings not to restrict such competition as actually remains (judgment of the Court of Justice in Joined Cases 209 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 133 and 134).

Findings of the Court

35 The Court finds, first, that the applicant's views in no way contradict those of the Commission. Point 5 of the Decision states that intra-Community trade is most intensive in the border regions and that transport costs are high although, when the

price of the product is relatively high in the market concerned, transport costs do not present an insurmountable obstacle.

36 First, it must be observed that the Commission was not wrong to find, in point 22 of the Decision, that a substantial part of the common market was regulated by the various agreements. The fact that competition in respect of the product in question operates essentially, as the parties agree, in the various border areas necessarily implies that the national market is affected in the natural selling area and the fact that that area occupies only part of the geographical territory of a Member State does not mean that the national market as a whole is not affected. Similarly, the presence of a cross-border element in the agreements, reflected by protection of border areas, cannot be regarded as an incidental feature but must be seen, as the Commission rightly emphasized, as the *raison d'etre* of the agreements at issue. The Court finds that the applicant itself recognizes that the cross-border element of the agreements had the object and effect of protecting national systems. It follows that the various agreements did in fact affect intra-Community trade.

37 Secondly, it must be emphasized that the applicant admits, in its application, that the various national markets can be supplied by Community producers which have adapted their production plant to comply with the relevant standards; moreover, it does not deny that certification is necessary only for public works contracts.

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

II — *The evidence of the agreements*

A — *The French market*

(1) *For the period 1981-1982*

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

Arguments of the parties

90 The applicant admits having taken part in the meetings concerning agreements and having had discussions concerning quotas, but denies having participated in an agreement and adhering to it. It claims that the Commission is wrong to infer from its participation in the meetings that it participated in the agreements.

91 It claims, first, that if it took part in the meetings it was because it was forced to do so in order to avoid negative reactions, since the French producers brought considerable pressure to bear on it.

42 Secondly, the applicant states that the opinion of the French Competition Commission of 20 June 1985 concerning the competitive situation in the welded steel mesh market in France, and the decision of the French authorities of 3 September 1985 based on that opinion, related to agreements covering the periods 1981-1982 and 1983-1984, but that Tréfilarbed had not been found guilty of any infringement during the period 1981-1982.

43 Thirdly, it considers that Article 85(1) of the Treaty does not apply to negotiations between undertakings, even though their purpose is illegal, provided that they do no result in an agreement.

44 Fourthly, the applicant contests the Commission's interpretation of, and the conclusions which it draws from, the various documents allegedly constituting evidence of its participation in the agreements.

45 As regards the meeting with Tréfilunion of 20 October 1981 (Tréfilunion note of 23 October 1981, annex 1 to the statement of objections, point 46 of the Decision), the applicant recognizes that, at that meeting, Tréfilunion offered it a quota of 1 300 tonnes a month but states that it did not accept it, claiming that its actual market share in France was greater. The applicant adds that that document shows that it was not apprised of FBC's quota, which would not have been the case if it had been a party to the agreement.

46 As regards the meeting of 21 April 1982 with all the French producers (except Sotralenz) (annex 24 to the statement of objections, point 45 of the Decision), the applicant admits having been there but states that the only decision to which it subscribed concerned the amount of the discounts for May and June 1982 only. The report of that meeting shows that on that date it was not bound by any quota; in fact, it shows that, in response to a request from Tréfilunion that it renew the pre-

vious year's agreements, it replied that it was unnecessary to adopt an agreement on quotas.

47 Referring to its telex of 25 May 1983, addressed to Mr Chopin de Janvry, representing Sacilor (annex 312 to the statement of objections, point 55 of the Decision), the applicant states that the terms used in it — 'even at that time, they forced our hand to make us accept an agreement' — do not show acceptance of any agreement but rather are indicative of an aim.

48 The applicant considers that the table in annex 6 to the statement of objections (point 29 of the Decision) shows an increase of exports (from 24.28 to 26.95%) to the French market from 1980 to 1981, which belies the Commission's statement that imports into France were subject to a quota. In the applicant's view, the 7.4% arrived at by comparing the last two columns of that table does not constitute a quota attributed to it but merely an estimate of its position in the market concerned. The applicant has produced a table giving figures for its shipments to prove that it did not agree to or observe any quota.

49 Finally, the applicant states that the Commission has not established any link between the price increases and the alleged agreements and claims that, if imports into France have increased, that is because importers, and Tréfilarbed in particular, charged competitive prices in order to increase their market share.

50 The Commission observes that the applicant admitted its participation in the meetings relating to the agreements and that it does not deny that they were anti-competitive in intent. The fact that such participation involved exchanges of views on the ideal allocation of products does not mean that it does not constitute an infringement of Article 85(1) of the Treaty, since such participation is in itself contrary to that provision.

51 It adds that the documents mentioned in the Decision are sufficient to establish that the applicant took an active part in the agreements. The fact that the applicant did not observe the prices and the quotas does not alter the fact that there was an infringement.

52 The Commission points out that it is not bound in any way by the findings of the French authorities (judgment of the Court of Justice in Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 27) and that it was able to obtain certain evidence which was not in the possession of those authorities (in particular, annexes 1 and 24 to the statement of objections).

Findings of the Court

53 The Court notes that the applicant admits its participation in the meetings but denies having signed price and quota agreements. It must be observed, however, that the applicant does not dispute that the purpose of the meetings in which it took part was to fix prices and quotas. 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.

54 The Court considers that the documents produced by the Commission establish that the applicant participated in the agreements concerning the French market in 1981 and 1982. It is apparent from the Tréfilunion note of 23 October 1981 (annex 1 to the statement of objections, point 46 of the Decision) that the applicant participated in a meeting held in Paris on 20 October 1981 with Tréfilunion. At that meeting, Tréfilarbed did not display opposition to the principle of sharing of the markets and it did not express itself like an operator that had not participated in the current agreement. Indeed, it referred explicitly to the 'latest arrangements' with the Italian and Belgian producers and considered that their share was 'too good' by comparison with that of Tréfilarbed. It is apparent from that note that the applicant's representative then referred to Tréfilarbed's share. The note also

refers to a quota of 1 300 tonnes for the applicant: 'Tréfilunion stated that Tréfilarbed had to deliver monthly about 500 tonnes to Woippy and Strasbourg ..., which would leave it some 800 tonnes for other customers'.

55 Another Tréfilarbed note, dated 23 April 1982, concerning the meeting held with the French producers on 21 April 1982 shows that one of the aims pursued was the 'renewal of last year's agreements', no distinction apparently having been made between the old participants in those agreements and possible new ones, including Tréfilarbed, who were invited to become future participants. Whilst it is true that Tréfilarbed showed a preference, for the future, for fixing a tonnage in absolute terms rather than granting quotas, that fact does not disprove the existence of an agreement during the previous period, first because it is a declaration regarding the future and secondly because, in any event, it comes within the scope of a market-sharing agreement intended to impose a quantitative limit.

56 The applicant's participation in the agreements is borne out by the telex of 25 May 1983 from Tréfilarbed to Sacilor in which the applicant's representative states that 'even at that time, they forced our hand to make us accept an agreement that did not suit us' and complains that Tréfilarbed had only 'a quota of 6.3% for St Ingbert and 0, 75% for Ghent' through having agreed to the limitations which the French producers had imposed on the Italian producers and on the applicant.

57 As regards the applicant's argument concerning the increase in exports, it must be borne in mind that it is settled law that an increase, even a large one, in the volume of trade between Member States is not sufficient to exclude the possibility that the agreement may affect that trade in such a way as to detract from attainment of the objectives of a single market between those States (judgment of the Court of Justice in Cases 56 and 58/84 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 341).

58 The Court considers that the applicant cannot rely on the fact that it participated in the meetings against its will. It could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in such meetings (see the judgment of the Court of First Instance in Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 128).

59 As regards the opinion of the French Competition Commission, the Court cannot accept the applicant's argument. First, as the European Commission rightly pointed out, it was entitled to draw its own conclusions from the evidence available to it, which was not necessarily the same as that in the possession of the French Competition Commission; secondly, the European Commission cannot be bound by the findings of national authorities.

60 Finally, the Court considers that the applicant is not exculpated by the fact that it did not respect the prices and quotas. The Court of Justice has held that there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market (Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45, paragraph 15).

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

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

(2) *For the period 1983-1984*

The contested measure

63 The Decision (points 51 to 76 and 160) accuses the applicant of having participated in a second series of agreements involving, on the one hand, the French producers (Tréfilunion, STPS, SMN, CCG and Sotralentz) and, on the other, the foreign producers operating in the French market (ILRO, Ferriere Nord, Martinelli, Boël/Trébos, TFE, FBC — FBC dealing with marketing the production of TFE — and Tréfilarbed). The purpose of those agreements was to fix prices and quotas with a view to limiting imports of welded steel mesh into France. That set of agreements was put into effect between the start of 1983 and the end of 1984 and was formalized by the adoption in October 1983 of a 'protocol of agreement' concluded for the period 1 July 1983 to 31 December 1984. That protocol recorded the results of the various negotiations between the French, Italian and Belgian producers and Arbed concerning the quotas and prices to be applied on the French market and fixed the quotas of Belgium, Italy and Germany as 13.95% of consumption on the French market 'under an agreement between those producers and the French industry'.

Arguments of the parties

64 The applicant admits having participated in the agreements. However, it maintains that it put up strong resistance and complied only under constraint in order to avoid reprisals.

65 The applicant also states that it did not observe the agreements and that it always made deliveries in excess of its quota.

66 As regards prices, the applicant states that, whilst it is true that the protocol of agreement mentions a 'price directive', the Decision nevertheless did not in any way establish that any such directive was ever issued or respected.

67 As regards the duration of the infringement, the applicant takes exception to the statement made in point 76 of the Decision that it ceased to comply with the agreements after June 1984. It maintains that it exceeded the quotas that had been allocated to it in mid-1983. In support of that assertion, the applicant has produced a table indicating its exports into France from July 1983 to March 1984, which show that it delivered quantities equivalent to 8.33%, thereby exceeding its quota of 7.55%.

68 The Commission observes that the applicant has admitted its participation in the agreements. It contends that even if Tréfilarbed put up strong resistance regarding the level of quotas suggested to it, it did not oppose the principle of sharing of the market. On the contrary, by consenting to the conditions of the agreement, the applicant's representative, Mr Buck, observed that 'the agreement is, in my opinion insufficiently severe in that no penalty or guarantee is provided for' (annex 33 to the statement of objections, point 55 of the Decision).

69 As regards prices, the Commission states that the protocol of agreement contained a clause under which the participants undertook to observe the price directives from the secretariat.

Findings of the Court

70 The Court finds that the applicant admits its participation in the agreements concerning the French market in the period 1983-1984 and does not dispute the purpose of them, namely to fix prices and quotas.

71 The Court considers that, for the same reasons as those set out in paragraph 58 above, the applicant cannot invoke the fact that it took part in the agreements against its will. Moreover, the Court considers that the wording of the telex which the applicant's representative sent to Tréfilunion, containing the statement 'the agreement is, in my opinion insufficiently severe in that no penalty or guarantee is provided for', tends to undermine the applicant's argument in that regard.

72 Finally, the Court notes that, for the same reasons as those set out in paragraph 60, the fact that the applicant did not observe the prices and quotas is not such as to exculpate it.

73 So far as concerns the duration of the applicant's participation in the agreements, attention must be drawn to the lack of clarity of the figures for the quantities which the applicant claims to have delivered in France from July 1983 to March 1984: 12 373 tonnes according to the application, 900 tonnes according to the reply. In any event, even if it is assumed that the correct figure is that given in the application, namely 12 373 tonnes, it need merely be pointed out that the applicant has adduced no evidence to support its assertions and that the 8.33% claimed by Tréfilarbed differs little from the 7.71% mentioned in point 65 of the Decision.

74 It follows that the Commission has established to the requisite legal standard the applicant's participation in the agreements in the French market during the period

1983-1984, whose object was to fix prices and quotas with a view to limiting imports of welded steel mesh into France.

75 The applicant's complaint must therefore be rejected.

B — *The Benelux market*

76 The Decision criticizes the applicant for having participated in agreements concerning the Benelux market, involving collusion on both quotas and prices.

(1) *The price agreements*

77 The Decision (points 78(b) and 171) criticizes the applicant for having participated in agreements between German producers and Benelux producers (the 'Breda Club') 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.

78 The Court notes that the applicant does not deny its participation in the agreements on quantitative restrictions on German exports to the Benelux countries or those on the communication of export figures.

(2) *The price agreements*

The contested measure

79 The Decision (points 78(a), 163 and 168) criticizes the applicant for having participated in price agreements between the main producers selling in the Benelux market, including the 'non-Benelux' producers, and in agreements between the German producers who export to the Benelux countries and the other producers selling in the Benelux countries concerning compliance with the prices fixed for the Benelux market. According to the Decision, those agreements were decided on at meetings held in Breda and Bunnik (Netherlands) between August 1982 and November 1985, attended (point 168 of the Decision) by at least Thibodraad, Tréfilarbed, Boël/Trébos, FBC, Van Merksteijn, ZND, Tréfilunion and, among the German producers, at least BStG. The Decision is based on numerous telex messages sent to Tréfilarbed 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 market situation, proposals and decisions concerning prices — and determination of the date and place of the next meeting).

Arguments of the parties

80 The applicant admits having participated in all the meetings concerning the Benelux market at which information was exchanged about the market situation and prospects and at which agreements were concluded on the prices of standard and catalogue mesh. It maintains, however, that it attended them only in order to familiarize itself with market conditions, that it played a purely passive role, that it never entered into commitments with other participants and that it had no interest in the agreements because it sold only tailor-made mesh which, in its view, is not in direct competition with standard and catalogue mesh. However, the applicant recognizes that it delivered a residual quantity of standard or catalogue mesh, but at prices considerably higher than those fixed at the meetings, since the manufacture of

standard mesh on machines designed to produce tailor-made mesh — the only type which Tréfilarbed had in Ghent and Roermond — involves substantial additional costs.

81 The Commission wonders why the applicant had an interest in participating in the meetings for several years and why it undertook chairmanship of the group on 31 August 1984 if the agreements were of no concern to it. The Commission also contends that the price levels for standard mesh influence those of tailor-made mesh, even though the producers of tailor-made mesh have an immediate interest in taking part in fixing the prices of standard mesh to ensure that they are as low as possible. The Commission emphasizes that it was the applicant itself which declared that it was only in wholly abnormal circumstances — such as a steep drop in the price of standard mesh — that a user would opt for standard mesh rather than tailor-made mesh.

Findings of the Court

82 First, it should be noted that the applicant's arguments concerning the Commission's allegedly incorrect analysis of the relevant market have already been rejected above.

83 The Court notes that the applicant admits its participation in the meetings but denies having subscribed to price 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.

84 The Court finds that, contrary to its assertions, the applicant did not confine itself, at the meetings, to gathering information on the markets but in fact took an active part. It must be noted that the applicant was always regarded as a habitual participant in the meetings. It was also perceived by its partners as an undertaking whose opinion should be ascertained in order to establish a common position. That is apparent in particular from the letter from Thibodraad to Tréfilarbed of 16 December 1983 (annex 65(a) to the statement of objections, point 93 of the Decision), which was accompanied by a copy of the telex from Mr Müller, the manager of BStG, of 15 December 1983. Finally, it must be emphasized that it is apparent from the telex of 31 August 1984 (annex 74 to the statement of objections) from Tréfilunion that the applicant chaired the Breda and Bunnik meetings on 24 August 1984, following the departure of the representative of Thibodraad, the previous chairman.

85 In any event, even if it is assumed that the applicant refrained, at least in part, from participating actively in the meetings, the Court considers that, having regard to the manifestly anti-competitive nature of the meetings, as evidenced by the numerous telexes from Mr Peters to Tréfilunion mentioned in the Decision, 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 meetings 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).

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

87 The applicant's complaint must therefore be rejected.

(3) *The gentlemen's agreement between Tréfilarbed and Thibodraad and Van Merksteijn*

The contested measure

88 The Decision (points 114, 115, 116 and 172) criticizes the applicant for having participated in a 'gentlemen's agreement' under which, on the one hand, Van Merksteijn did not produce catalogue mesh and, on the other, Tréfilarbed, in Ghent and Roermond, and Thibodraad did not produce standard mesh. According to the Decision, that agreement must be regarded as a restriction of competition between the parties to it, which was likely to affect trade between Member States because each of them thereby relinquished the right to manufacture and sell the product yielded to the other party through its own sales network, which in each case covered several Member States and was not identical with the sales network of the other. That agreement already existed before 1 December 1981, or at least came into being not later than on that date, and lasted at least until the beginning of the Commission's investigations (6 and 7 November 1985). The Decision (point 191) finds that the gentlemen's agreement cannot be regarded as an agreement or concerted practice concerning specialization which was eligible for an exemption since the aggregate turnover of the parties thereto, including the consolidated group turnover of Arbed and Hoogovens (see Article 4 of Commission Regulation (EEC) No 2779/92 of 21 December 1972, Article 4(3) and Article 5 of Commission Regulation (EEC) No 3604/82 of 23 December 1982, and Articles 6 and 7 of Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialization agreements (OJ, English Special Edition 1972 (28-30 December), p. 80, OJ 1982 L 376, p. 33, and OJ 1985 L 53, p. 1, respectively) exceeded the limits of ECU 150, 300 and 500 million fixed by Article 3 of the regulation in force while the agreement was in operation.

Arguments of the parties

89 The applicant acknowledges that there were discussions between the representatives of the three undertakings but claims that they consisted merely in the

exchange of information and opinions, without any obligation attaching to any of the parties. It adds that the parties confined themselves to noting their respective production capacities and to expressing their intention to continue to apply the same production policy.

90 It considers that the Commission has produced no proof or evidence that, after their discussions, the parties to them engaged in any concerted practice with a view to limiting their respective investments in the creation of new capacity for the production of products manufactured by the other partners.

91 The applicant criticizes the Commission for failing to apply Regulations Nos 3604/82 and 417/85 on the ground that the aggregate turnover of the participating undertakings, including the consolidated group turnover of Arbed and Hoogovens, allegedly exceeded the limits of ECU 150, 300 and 500 million. In the applicant's view that reflects an excessively formalistic approach because, as large steel-making groups are involved, the turnover ceilings will almost inevitably be exceeded, even though the agreement under examination may respond to a genuine need and reflect a truly rational economic approach.

92 The Commission considers that the applicant has put forward no argument to support its claim that the gentlemen's agreement did not constitute a genuine agreement.

93 The Commission states that, in any event, the applicant's description of its meeting with Van Merksteijn discloses the existence of a concerted practice, within the meaning of the judgment of the Court of Justice in Joined Cases 40 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 173, 174 and 175, so that it cannot escape the application of Article 85(1) of the Treaty.

94 The Commission also states that observance of the ceilings laid down in block exemption regulations is required not for formalistic reasons but by virtue of a mandatory provision, in view of the need to ensure that competition is not eliminated in respect of a substantial part of the products in question (sixth recital in the preambles to Regulations Nos 2779/72, 3604/82 and 417/85). Nevertheless, the Commission points out that the undertakings concerned could have notified their specialization agreements to it with a view to obtaining an individual exemption under Article 85(3) of the Treaty.

Findings of the Court

95 The Court of Justice has held that, for there to be an agreement within the meaning of Article 85(1) of the Treaty, it is sufficient for the undertakings in question to have expressed their joint intention to conduct themselves in the market in a particular way (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and *Van Landewyck and Others* v *Commission*, cited above, paragraph 86).

96 The Court considers that the Commission was entitled to treat the gentlemen's agreement as amounting to the faithful expression of the joint intention of the parties to the agreement with regard to their conduct in the common market and therefore as constituting an agreement covered by Article 85(1) of the Treaty (see *Chemiefarma*, cited above, paragraph 112). The Court observes that the wording of the applicant's note of 18 December 1981 concerning the visit to Van Merksteijn, ZND and Thibodraad on 1 December 1981 (annex 82 to the statement of objections, point 116 of the Decision) leaves no doubt as to the existence of the agreement. The note stated: 'Our gentlemen's agreement: Merksteijn produces no catalogue mesh, Tréfilarbed no standard mesh (in Ghent and Roermond) was confirmed', and 'Van Merksteijn considered it necessary to alert us to the fact that TM (Thy Marceinelle) is on the point of also entering the catalogue mesh market'. Moreover, in it the applicant stated in turn that it agreed to 'putting pressure on Thibodraad to persuade it not to enter the standard mesh market' and finally noted that 'Thibo, too, was again urged to abide by our gentlemen's agreement with Van

Merksteijn'. In view of that evidence, which emanates from the applicant itself, the Court considers that the arguments put forward by it in its pleadings are factually deficient.

97 It follows that the Commission has established to the requisite legal standard that an agreement existed between Tréfilarbed and Thibodraad, on the one hand, and Van Merksteijn, on the other, under which the latter did not produce catalogue mesh while Tréfilarbed (in Ghent and Roermond) and Thibodraad did not produce standard mesh. Because of its intrinsic gravity and obviousness, that agreement constitutes an infringement of Article 85(1) of the Treaty, in particular subparagraph (c) thereof, and was therefore liable to affect trade between Member States and to restrict competition within the common market.

98 As regards observance of the turnover ceilings laid down in the abovementioned block exemption regulations, the Court notes, for the sake of completeness, that, as the Commission has rightly contended, the existence of those ceilings in the regulations concerned constitutes a mandatory provision reflecting the need to ensure that competition is not eliminated in respect of a substantial part of the products concerned. Moreover, it must be noted that the applicant did not ask the Commission to adopt an individual exemption decision under Article 85(3) of the Treaty.

99 The applicant's complaint must therefore be rejected.

(4) *Contacts and bilateral agreements between Tréfilarbed and Thibodraad*

100 The Decision (points 117 to 124 and 173) criticizes the applicant for being a party to an agreement with Thibodraad on the prices of catalogue mesh from at least 1 January 1982 and to an agreement on tailor-made mesh prices from at least 1 October 1983. According to the Decision, the bilateral price agreement concern-

ing catalogue mesh was replaced by comprehensive price agreements reached in Breda and Bunnik and the agreement on tailor-made mesh was maintained until the end of 1984. The Decision states that the agreements had as their object or effect the elimination or considerable restriction of competition between the participants and were also likely to affect trade between Member States, since both undertakings exported considerable volumes and, moreover, Tréfilarbed was established in several Member States.

101 The Commission finds that the applicant does not deny its participation in the abovementioned bilateral agreements.

C — *The German market*

102 The Decision (points 147 and 182) criticizes the applicant for being a party to agreements in the German market whose object was, first, to regulate the exports of Benelux producers to Germany and, secondly, to ensure compliance with the prices obtaining on the German market. According to the Decision, the applicant, BStG, Boël/Trébos, TFE/FBC and Thibodraad were parties to those agreements.

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

(a) The contested measure

103 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.

104 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).

105 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. The Commission rejects the argument advanced by BStG and Tréfilarbed that, since Arbed had an interest of 25.001% 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% does not give 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.

106 The Court notes that the applicant contests both the Commission's refusal to apply Regulation No 67/67 to the contracts at issue and also its refusal to regard them as an agreement internal to the group to which the undertakings concerned belonged. Those two points must be considered separately.

(b) *The application of Regulation No 67/67*

Arguments of the parties

107 The applicant claims that before 1972 BStG was a company that marketed the production of its partners, including Arbed. In 1972, following suggestions from the Bundeskartellamt, BStG itself became a producer and purchased certain machines that were located in the factories belonging to its partners, including the Cologne (Germany) works of Felten & Guillaume, the property of Arbed, which was closed in 1976, and machines belonging to BStG were transferred to the Roermond works, also owned by Arbed. From then on, on the basis of production contracts, the partners, including Arbed, undertook production on behalf of BStG, using machines owned by BStG. Thus, all the Roermond production from BStG machines belonged to BStG. At the same time, Bouwstaal Roermond had its own machines, from which the welded steel mesh production was marketed in Benelux by Tréfilarbed and in Germany through BStG, under the exclusive distribution contracts at issue.

108 The applicant states that, according to the Decision (point 189), the only reason for which the exclusive distribution contracts did not satisfy the conditions laid down by Regulation No 67/67 was that they were to be regarded 'as part of a comprehensive market-sharing arrangement to which more than two undertakings were party'. The applicant considers that the Decision is wrong to state that the agreements were part of an arrangement and maintains that Regulation No 67/67 was indeed applicable to them and that they were therefore eligible for the block exemption provided for by the regulation throughout their term.

109 It considers that the Commission arbitrarily took instances of 'actions not in any way related to each other' for which there was objective justification unconnected with the existence of any agreement. Thus, the agreements in question, introduced in 1976 at a time when there was no question of any cartel, were merely commercial arrangements of the traditional kind deriving from changes over a period of time in Arbed's capital holding in BStG, the purpose of which was adequately and efficiently to supply the German market without Arbed having to set up a parallel sales network to market the production of its own machines at Roermond and without its having to compete with its own subsidiary. In that context, the applicant claims that the prohibition whereby Bouwstaal Roermond was precluded from delivering any further quantities to Germany during the term of the contract is merely a reflection of the exclusivity granted to the German distributor, whereby its position would not be weakened by direct or indirect competition.

110 The applicant also rejects the Commission's view that a distribution contract ceases to be bilateral if an agreement between several undertakings exists in parallel with it.

111 The applicant claims that those agreements covered only a very small part of the German market, namely 0.60% of the total supplies to it, and that consequently the quantities produced at Roermond on its own machines and delivered through BStG could not have had any real influence on competition and the structure thereof in Germany.

112 The applicant also states that, immediately on receiving the statement of objections, it informed the Commission of its intention to remedy the situation with respect to the exclusive supply contracts and in fact adopted another solution, and it was assured by Commission officials during the administrative procedure in this case that the Commission would not revert to the matter.

113 The Commission submits that the contracts are not of the traditional commercial type but are contracts providing for import quotas for Bouwstaal Roermond on the German market, together with an exclusive right for BStG to distribute those quotas. Under those contracts, BStG undertook the exclusive sale in Germany of a maximum annual volume of welded steel mesh from the Roermond works of Bouwstaal Roermond, and Arbed SA afdeling Nederland gave a commitment, for the term of those contracts, not to make direct or indirect deliveries to Germany.

114 The Commission considers that the delivery contracts should be examined in their general context and rejects the applicant's view that an exclusive distribution contract must be regarded as a strictly bilateral relationship, regardless of whatever other agreements the parties to the agreement may be involved in. As the Court of Justice has held (Case 23/67 *Brasserie de Haecht* v *Commission* [1967] ECR 407), under Article 85(1) of the Treaty regard must be had to the effects of agreements in the context in which they occur, that is to say in the economic and legal context of the agreements concerned. Accordingly, they must be examined in conjunction with the overall agreement with which they are connected, that is to say the agreement on prices and quantitative restrictions on Belgian and Dutch exports to Germany. In that connection, the Commission refers to the telex of 15 December 1983 sent to Thibodraad and forwarded by the latter to Tréfilarbed (annex 65(b) to the statement of objections, point 92 of the Decision), in which Mr Müller stated that there was 'close cooperation' between Boël/Trébos and BStG and adds that he wishes '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'. It is therefore important to place the delivery agreements between Tréfilarbed Roermond and BStG in that general context in order to appreciate that the issue concerned not various instances of 'actions not in any way related to each other' but rather a very consistent course of conduct. In that context and in the light of the case-law mentioned above, the market share accounted for by the sales of the production from the Tréfilarbed Roermond machines in Germany alone has no bearing on the applicability or otherwise of Article 85(1) of the Treaty.

115 Finally, the Commission recognizes that it is true that the exclusive distribution contract between Tréfilarbed Roermond and BStG was discussed with its officials before it adopted its Decision. However, the Commission states that those

discussions related to the abandonment of that agreement and new arrangements for the distribution in Germany of the products manufactured at Roermond, following reorganization measures in the Arbed and BStG group. In its letter of 11 August 1988, the official responsible had in fact given a favourable opinion regarding the future arrangements envisaged by Tréfilarbed and BStG, but without prejudice to the Commission's position concerning the action and practices noted in the past. The Commission concludes that its staff never therefore gave any assurance to Tréfilarbed regarding the quotas fixed in the distribution agreement between Tréfilarbed Roermond and BStG.

Findings of the Court

116 First, the Court observes that even if it were assumed that the applicant's allegations concerning the opinion supposedly given by Commission officials on the agreements in question — which the Commission forcefully rejects — could be regarded as true, opinions given in such circumstances could not in any case convey the impression that they commit the Commission, since such officials had no authority to give such a commitment (judgment of the Court of Justice in Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraph 20).

117 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), referred to above, 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 ...'.

118 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.

119 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).

120 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 BStG 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.

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

122 Furthermore, the Court considers that the applicant is not entitled to rely on the fact that the agreements related to only a very small part of the German market and that Tréfilarbed Roermond's deliveries through BStG could not have had any real influence on competition. It is clear from the wording of Article 85(1) of the Treaty that the only relevant questions are whether the agreements in which the applicant participated with other undertakings had the object or effect of restricting competition and whether they were liable to affect trade between Member States. Therefore, the question whether the applicant's individual participation in those agreements could, notwithstanding their limited scale, restrict competition or affect trade between Member States is entirely irrelevant (judgment of the Court of First Instance in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 216 and 224). It must also be observed that Article 85(1) of the Treaty does not require the restrictions of competition ascertained actually to have appreciably affected trade between Member States but merely requires that it be established that such agreements are capable of having that effect (judgment of the Court of Justice in Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15).

123 Consequently, this part of the plea must be rejected.

(c) *The existence of a group relationship*

Arguments of the parties

124 The applicant contests the Commission's refusal to accept that the contracts at issue were a matter entirely internal to the group. According to the applicant there were

several factors additional to the fact that Arbed holds 25% of the capital of BStG which justify treating the relations between those companies as if they were relations within a group. Although BStG is a limited company, a Gesellschaft mit beschränkter Haftung (hereinafter 'GmbH'), there exists between its members and itself a joint governance agreement (in German: Mehrmütterorganschaft mit Beherrschungsvertrag) making its structure similar to that of a partnership — in which German law clearly prohibits any competition between a partner and his firm — under which Arbed was very closely involved in its management and shared management responsibility. Similarly, there is an 'agreement for the transfer of the company results to its members' which confers on each of them a direct interest in fostering to the maximum the profitability of their joint enterprise. It would be contrary to that interest to undermine the joint enterprise by competing with it from outside. The applicant maintains that, by virtue of that agreement, the commercial relations which existed between BStG and Tréfilarbed must be regarded as having been internal to the group and the agreements establishing those relations as not being caught by the prohibition contained in Article 85(1) of the Treaty.

125 The Commission states that whilst it is true that German company law, more than that of most other Member States, allows various forms of control, particularly in the case of GmbHs, the fact nevertheless remains that, as the Court of Justice has held (Case 15/74 *Centrafarm and Peijper* [1974] ECR 1147), the only cases not covered by Article 85 are agreements or concerted practices between undertakings belonging to the same group where the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action in the market and where those agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings. The Commission also criticizes the applicant for waiting until the proceedings before the Court before referring to information which it considers important to the appraisal of its legal relationship with BStG and, moreover, for doing so by means of simple statements unsupported by any further details to disprove the view that a mere interest of 25.001% does not create a parent-subsidiary relationship.

Findings of the Court

126 On being invited to do so by the Court, the applicant produced a contract for the pooling of results between the members of BStG — meeting as the 'Vereinigung der Gesellschafter der Baustahlgewebe' (Association of the members of BStG) — and BStG (August 1962), the statutes of the Association of members of BStG (13 July 1970) and the annex to them, together with the agreement concerning the entry of Arbed Saarstahl GmbH into that association (January-February 1986). The parties explained the content of and reasons for that contract at the hearing.

127 The Court observes that, according to the contract for the pooling of results, BStG acts solely in accordance with the unanimous wishes of the members; its profits are transferred to the association of members which, if they arise, bears any losses.

128 The Court also observes that, according to the statutes of the association of members of BStG, its members are all the holders of shares in BStG and membership status is based on the number of shares held in BStG. The association must be regarded as a commercial undertaking operating in all BStG's fields of activity. Where resolutions are passed by the association, each member has the same number of votes as are available to him at general meetings under the Statutes of BStG. Resolutions of the association are passed by a simple majority of the votes available on the basis of the capital held, provided that they are cast by at least two members. Where a larger majority is required by law or by the statutes for resolutions to be passed at a general meeting of BStG, that majority is also required for resolutions of the association.

129 An analysis of the abovementioned documents shows that the relationship between Arbed and 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. 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.

130 That finding is corroborated by the statements of BStG at the hearing to the effect that the joint governance contract and the contract for the pooling of results were concluded essentially for tax reasons, because the latter made it possible to transfer the losses and profits of BStG to its members. Because of the constraints of German tax law, all the members had to be German. That is why Arbed did not participate directly in that contract but was represented by a German partner, St Ingbert (and previously by Felten & Guillaume).

131 Finally, 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.

132 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.

133 It follows that the second part of the plea must be rejected.

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

The contested measure

134 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 into Germany via Luxembourg. According to the Decision, that agreement constituted a restriction of competition likely to affect trade between Member States.

Arguments of the parties

135 The applicant states that before 1972 BStG 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.

136 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. Although the quantities thus appropriated from the BStG stocks were then restored to those stocks out of subsequent production, BStG was fully entitled, according to the applicant, to complain about the procedure resorted to, which was in breach of the agreement concluded between the parties concerned. Although those responsible for the operation did not commit 'theft' to the detriment of BStG, they nevertheless, in particular, succeeded in selling in Germany products of German origin on which the royalties due to BStG had not been paid in accordance with the stipulations of the cartel contract.

137 That, according to the applicant, accounts for the letters sent by Mr Müller on 27 April 1984 to Mr Rimbeaux, of Tréfilarbed St Ingbert, and Mr Schürr, of Tréfilarbed Luxembourg (annex 110A to the statement of objections, point 152 of the Decision). The 'clear and unambiguous' agreements to which Mr Müller refers are the agreements concluded by BStG with St Ingbert, on the one hand, for production, storage, marketing, management and all other operations relating to the machines belonging to BStG, and with Tréfilarbed, on the other hand, for supplies of mesh conforming to the German standards for the Luxembourg market, and the promise made the previous year not to resume the activities complained of.

138 The Commission states that it is apparent from those explanations that, under the agreement concluded between BStG and Tréfilarbed concerning supplies of mesh conforming to the German standards intended for Luxembourg, parallel imports into Germany were prohibited. It concludes that an infringement of Article 85(1) of the Treaty was thereby committed.

139 The Commission also stresses that Mr Müller's letter of 27 April 1984 does refer to an agreement and that Mr Müller himself, in response to the Commission's statement of objections, explained that such action to combat reimports was intended to ensure compliance with the delivery quotas fixed by the cartel.

Findings of the Court

140 The Court finds that the applicant concedes that it had concluded an agreement with BStG under which the applicant 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 Mr 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 110A to the statement of objections).

141 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).

142 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.

143 The Court considers the fact that the welded steel mesh appropriated by the applicant, whose reimport into Germany was prohibited was produced on machines owned by BStG to be immaterial in this respect. 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.

144 It follows that the Commission has established to the requisite legal standard that the applicant participated in an agreement with BStG 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.

145 The applicant's complaint must therefore be rejected.

146 Furthermore, it must be pointed out that in a judgment delivered today in Case T-145/89 *BStG* v *Commission*, this Court had held that, as far as BStG is concerned, 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 BStG. As a result, BStG 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 the applicant a clause prohibiting exports. In view of that fact and 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 took the view that the very specific circumstances of that case should, with respect to BStG's conduct, be regarded as constituting mitigating circumstances.

147 However, the Court considers that the circumstances of the present case are not such that the abovementioned mitigating circumstances can be regarded as applying to the applicant. In any event, even if it were assumed that the circumstances of

this case were such that mitigating circumstances could be regarded as applying to the applicant, they would merge with the circumstances taken into account by the Commission in point 206 of the Decision in favour of all the non-German producers. Point 206 of the Decision indicates that the existence of the German structural crisis cartel was regarded as constituting mitigating circumstances as far as the non-German producers were concerned.

(3) *The agreements intended to protect the German market*

Arguments of the parties

148 The applicant asserts that, in points 182 and 183 of the Decision, the Commission, taking an arbitrary and undifferentiated approach, lumps together various instances of conduct allegedly concerning relations between Benelux and Germany, to which almost all the Belgian and Dutch producers, as well as BStG, were allegedly parties. It claims that those accusations are vague, that it is not in a position to ascertain whether it is embraced by them, and that, apart from the exclusive distribution contracts concluded with BStG, it did not participate or have any involvement in the price agreements and quantitative restrictions of Belgian and Dutch exports to Germany.

149 The applicant claims that it carried on no commercial activity in Germany because all the quantities of mesh produced by the Roermond works, whether manufactured on BStG's machines or its own, were marketed in Germany by BStG.

150 The applicant admits having participated in the Breda and Bunnik meetings but maintains that it was merely an observer, that it did not engage in the concertation

and that it kept out of and remained independent from such concertation. Finally, the applicant argues that the fact that Thibodraad forwarded to it Mr Müller's telex of 15 December 1983 is normal since it participated in the meetings and since Mr Müller had asked Thibodraad to consider its position with its colleagues in the Breda group.

151 The Commission contends that the applicant's participation in the agreements intended to protect the German market derived from its habitual participation in the Breda and Bunnik meetings, in which BStG also took part in order to discuss inter-penetration between the Benelux market and the German market, as is apparent from the numerous documents mentioned in the Decision. It adds that the fact that the telex of 15 December 1983 from Mr Müller was forwarded to the applicant by Thibodraad also demonstrates its implication in the agreements.

152 The Commission contends that the fact that the applicant had no activity of its own in Germany, because of its exclusive distribution contract with BStG, does not change the fact that it is a producer in the Netherlands selling part of its production in Germany.

Findings of the Court

153 It must be borne in mind that the Court has held (see paragraph 117 et seq. and paragraph 126 et seq. above) that the exclusive distribution contracts between BStG and the applicant (Roermond) did not fulfil the conditions laid down by Regulation No 67/67 and were contrary to Article 85(1) of the Treaty, that the applicant (St Ingbert) participated in an agreement with BStG concerning reimports of

welded steel mesh into Germany, also adjudged (see paragraph 140 et seq. above) to be contrary to Article 85(1) of the Treaty, and that those two agreements were intended to protect the German market.

154 Moreover, it must be observed that the applicant's implication in the agreements intended to protect the German market is apparent from the telex from Mr Müller of 15 December 1983. That telex, addressed to Thibodraad, refers to the meeting held at Breda on 5 December 1983, in which the applicant, Thibodraad, Van Merksteijn, FBC, Boël/Trébos, ZND, Tréfilunion and BStG took part. Mr Müller expresses his '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'. A copy of that telex was forwarded to the applicant by letter from Thibodraad of 16 December 1983 (annex 65A to the statement of objections, point 93 of the Decision) so that 'we can then inform Mr Müller of our point of view'.

155 The applicant's implication in the agreements is also apparent from the telex dated 11 January 1984 from Mr Peters of Tréfilunion to Mr Marie of Tréfilunion (annex 66 to the statement of objections, points 95 and 153 of the Decision), which refers to a meeting held at Breda on 5 January 1984, in which the applicant, Boël/Trébos, FBC, BStG, Tréfilunion and other Dutch undertakings took part. 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.'

156 In view of that evidence, the Court cannot accept the applicant's argument that it carried on no commercial activity in Germany because the fact that it produced welded steel mesh in Roermond and the fact that that mesh was sold in Germany

by BStG showed that it had a great interest in benefiting from the high prices on the German market.

157 Finally, the Court points out that it has already held above that the applicant participated in the Breda and Bunnik meetings and that, contrary to its assertions, its participation was active. It must be noted that the applicant was always regarded as a regular participant in the meetings. The applicant was also perceived by its partners as an undertaking whose opinion had to be ascertained in order to establish a common position. That fact is particularly apparent from the letter from Thibodraad to Tréfilarbed of 16 December 1983 (annex 65A to the statement of objections, point 93 of the Decision), with which Mr Müller's telex of 15 December 1983 was forwarded as an enclosure. Finally, it must be emphasized that it is apparent from the abovementioned telex of 31 August 1984 from Tréfilarbed that the applicant took over the chairmanship of the Breda and Bunnik meetings on 24 August 1984 following the departure of the representative of Thibodraad who had previously acted as chairman.

158 In any event, even if it were assumed that the applicant did not take part, at least not an active part, in the meetings, the Court considers that, in view of their manifestly anti-competitive purpose, the applicant, by taking part but not publicly distancing itself from what occurred at them, gave the impression to the other participants that it subscribed to the results of the meetings and approved them (judgments of the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission*, cited above, paragraph 232, and Case T-12/89 *Solvay* v *Commission*, cited above, paragraphs 98, 99 and 100).

159 It follows that the Commission has established to the requisite legal standard that the applicant participated in the agreements designed to protect the German market.

160 The applicant's complaint must therefore be rejected.

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

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

Arguments of the parties

61 In its application, the applicant claims that the Commission committed an error by treating as a single infringement instances of offending conduct which were not linked to each other and occurred in different markets. In response to the Commission's denial that it had ever taken the view that there was only one general agreement, having concluded that there was a complex of different agreements operating at different times and in different geographical markets, the applicant, in its reply, claimed that the Commission had imposed on it a single fine for all the acts objected to, without indicating the portion of the fine or the percentage attributable to each infringement. That approach prevents any comparative analysis of the Commission's assessment of the gravity of the infringements committed by the applicant and by the other individual undertakings. The applicant considers that the Commission thereby failed in its duty to state the reasons on which its decision was based.

62 The applicant submits that the Decision incorrectly states, in point 22, that the agreements had the effect of regulating a substantial part of the common market. The applicant considers that what occurred was concertation at national level, of somewhat differing scope and timing, whereas the Commission merged all those disparate elements by reference to the common factor of their cross-border nature, which led to an 'exaggerated' assessment, with particularly detrimental results. For the applicant, the regulation of a substantial part of the common market perceived by the Commission amounted in practice to no more than a set of measures providing incidental protection from penetration of border areas, and the alleged partitioning of a substantial part of the common market affected only the volumes produced at an economic distance from the border.

163 In reply the Commission states that the fine imposed on Tréfilarbed is not the arithmetic sum of several separate fines for separate infringements: the Decision is concerned not with distinct agreements, as stated in point 22 thereof, but with a complex of agreements which together produced far-reaching regulation of a substantial part of the common market. The undertakings participated at the same time in several agreements in separate partial geographic markets, although the result, at any given time, was partitioning of the Community market. Thus, in 1982 Tréfilarbed participated at the same time in an agreement on the French market, an agreement on the Benelux market and an agreement on the German market. The Commission concludes that in those circumstances it cannot properly be accused of artificially treating the infringements in an undifferentiated manner.

164 The Commission adds that the measures ensuring protection against penetration of the cross-border areas were in no way 'incidental' but in fact were the *raison d'être* of the agreements in question. The fact that those measures related first and foremost to the penetration of border areas in no way lessens their illegality but merely derives from the fact that intra-Community trade in welded steel mesh is essentially located in those areas because of the costs of transporting the product.

Findings of the Court

165 It is settled law that the Commission may impose a single fine for several infringements (see *Suiker Unie and Others* v *Commission*, cited above, Case 27/76 *United Brands* v *Commission* [1978] ECR 207 and Joined Cases 100 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825); that applies particularly where, as in this case, the infringements ascertained in the Decision were concerned with the same type of conduct on different markets, in particular the fixing of prices and of quotas and exchange of information, and the undertakings involved in those infringements were, largely, the same. The fact cannot be ignored that the applicant was, at a given time, involved in agreements covering several markets, such as the French, German and Benelux markets.

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

167 The Court points out that the applicant's arguments concerning the relevant geographical market have been rejected above.

168 The Court cannot accept the applicant's argument that the Commission, by lumping all the agreements together by reference to the common factor of their cross-border nature, arrived at an inappropriately 'exaggerated' result. Although the Commission found that there was a set of different agreements at different times on different markets, it also found that the object of the agreements was the same, namely the fixing of prices and quotas, and that the same undertakings participated at the same time in different agreements in several markets.

169 It must therefore be concluded from the above considerations that the Commission, by stating in point 22 of its Decision that all the agreements in question, by regulating the various partial markets, produced far-reaching regulation of a substantial part of the common market, did not commit any error of legal assessment.

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

II — *Lack of any intention or negligence on the part of the applicant*

Arguments of the parties

171 The applicant claims to have acted in good faith and denies acting with intent. It asserts, first, that most of the undertakings operating in the welded steel mesh market regarded themselves as steel undertakings, covered by the ECSC Treaty, and therefore as being bound by the anti-crisis arrangements introduced by the Community, which included the fixing of prices and of production quotas. Moreover, it states that the German welded steel mesh market was itself the subject of a structural crisis cartel authorized by the Bundeskartellamt and tolerated by the Commission. It is in its view undeniable that the existence of the cartel had led producers in the sector to introduce price control measures and quotas, being under the impression that what was lawful in Germany must be lawful everywhere else. The applicant maintains that those two circumstances prompted the undertakings in the sector to believe that their conduct was beyond criticism.

172 The applicant claims that it is under threat of withdrawal of certification by the French producers and that its cooperative behaviour is accounted for by that continuing pressure.

173 The Commission rejects as unacceptable the excuse that the undertakings thought they were covered by the ECSC Treaty as regards welded steel mesh. If that were the case — which is unlikely, since they were aware that, by contrast with the case of 'ECSC products', there were no fixed prices at Community level or any levy to be paid on the basis of Article 49 of the ECSC Treaty — they were at the very least guilty of acting negligently, which also justifies the imposition of fines under Article 15(1) of Regulation No 17.

174 As regards the German crisis cartel, the Commission states that, at point 206 of its Decision, the cartel was taken into account as a mitigating circumstance in calculating the fine. It also points out that the cartel was not set up until 1983, that is to say after several of the infringements had been committed. Finally, the Commission considers that unlawful conduct cannot be justified by reference to the conduct of other undertakings, whether or not the latter's conduct amounted to an infringement.

175 In response to Tréfilarbed's explanation that its 'cooperation' with the French producers enabled it to avoid forfeiting certification, the Commission states that coercive bargaining of that kind does not escape Article 85(1) of the Treaty and that, whatever the reality and the intensity of such threats as might have been addressed to the applicant, the latter has produced no evidence to show that it reacted to them in a manner conforming with Community competition law.

Findings of the Court

176 The Court points out 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 C-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* [1992] ECR II-1389, paragraph 350).

177 The Court also notes that the Commission took account of a number of circumstances applicable to all the undertakings, which prompted it to reduce the fines considerably below the level which would normally be justified (point 208 of the Decision). Those circumstances include the fact that 75 to 80% of the price of welded steel mesh is attributable to the price of wire rod, a product subject to the system of production quotas, the structural decline in demand, the existence of

excess capacity, short-term market fluctuations and the rather low profitability of the sector (point 201 of the Decision) and the relationship between welded steel mesh and reinforcing bars (point 202 of the Decision). The Decision also took account, as a mitigating circumstance, of the existence of a structural crisis cartel in Germany, which led the parties established in other Member States to seek to protect themselves, although that did not justify the measures which they took (point 206 of the Decision).

178 The applicant's fears of suffering retaliation from its competitors cannot justify its participation in the agreements. Even if its fears were founded, the applicant could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the agreements at issue (see the judgment in *Hüls* v *Commission*, cited above, paragraph 128).

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

III — *The disproportionate nature of the fine*

Arguments of the parties

180 The applicant considers that the fine of ECU 1 143 000 imposed on it is excessive and disproportionate. It claims that the percentage of turnover applied to it, namely 3%, is higher than the average percentage of 2.5% applied to the other undertakings and considers that it is unjustified and unjust that it should have been treated more severely than the other undertakings. The applicant adds that the Commission penalized it more severely because, in assessing the gravity of the alleged

infringements, it lumped the national markets and agreements together by reference to borders. The applicant submits that the Commission did not take account of the geographical position of its works, all close to the borders of the three markets, which gave the impression that it would necessarily be involved in all concertation regarding cross-border movements. That fact, it says, prompted the Commission to attribute greater blame to it than to the other undertakings which, because of the location of their works, operated in only one or two national markets, whereas it did not have the least intention of bringing about partitioning. On the contrary, partitioning would have been harmful to it since it necessarily had to export its products. The applicant adds that, since its natural geographical market straddles borders and practically occupies the central area of the Community, any agreement in which it might have participated could have taken effect only in that selling area, which is geographically determined.

181 The Commission states that it did not attribute to Tréfilarbed any 'greater blame' than to undertakings which had been a driving force in setting up the agreements and that precisely the contrary is stated at the end of point 207 of the Decision. The Commission states that Tréfilarbed received a heavier fine, in terms of percentage of turnover, than the average of the others because not all the undertakings participated, like Tréfilarbed, in all the offending agreements. The Commission adds that the rate applied to Tréfilarbed is lower than the maximum rate applied, namely 3.6%, and that two other undertakings received heavier fines than the applicant.

182 The Commission does not accept the view that Tréfilarbed's geographical situation necessarily implies that it participated in cross-border agreements and states that it is paradoxical for an undertaking, which is necessarily present in the market of several Member States, to rely on that situation precisely in order to escape, if it can, the application of Community law. The Commission observes that, if Tréfilarbed's reasoning were accepted, it would follow that the principles of free movement laid down in the Treaty did not apply to border areas.

Findings of the Court

183 Pursuant to Article 15(2) of Regulation No 17, the Commission may impose fines of between ECU 1000 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.

184 The Court also finds that the applicant has not produced sufficient evidence to show that, having regard to the duration and the particular gravity of the infringements which it was found to have committed, it was treated with greater severity than other undertakings covered by the Decision.

185 As regards the difference between the percentages of 3% applied to the applicant and 3.6% applied to Tréfilunion, the undertaking to which the Decision applied the highest percentage, the Court does not consider it disproportionate. Indeed, even though an aggravating circumstance exists in the case of Tréfilunion — the fact that it was one of the initiators and one of the main perpetrators of the conduct penalized — the fact remains that the Decision imputes to the applicant a larger number of infringements than those found against Tréfilunion. Similarly, the difference between the percentage applied to the applicant and the lower percentage applied to other participating undertakings is justified by the fact that there are mitigating circumstances applicable to them but not to the applicant.

186 Finally, the Court considers that the applicant cannot invoke the geographical location of its works to support its claim that it did not participate in the agreements. The Commission determined that the applicant had participated in the agreements not because its works were located near the borders but because its participation was apparent from the evidence as a whole. The geographical location of the applicant's works did not necessarily imply that it participated in cross-border agreements but obviously made it more easily possible for it to participate in agreements covering the different markets.

187 Consequently, the applicant's complaint must be rejected.

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

Arguments of the parties

188 The applicant claims that it was penalized by the French authorities as an importer in France and that it was not proper for the Commission to impose on it an additional fine for the same action in the same market merely because the conduct of which it was accused was of a 'cross-border' nature. The applicant considers that the Commission has not established that its penalty related to different action or that it had discovered fresh instances of offending conduct. The applicant criticizes the Commission for imposing on it a fine 800 times higher than that imposed by the French competition authorities. That enormous difference of assessment was explained by the Commission only by a vague reference to 'the wider effect of those [French] arrangements, including their effect on trade between Member States' (point 205 of the Decision). Finally the applicant claims that, in merely reducing its fine by the amount of the fine imposed on it in France, the Commission did not take account of the prior national decision in the manner laid down

by the Court in Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1. The applicant considers that, if that judgment is construed correctly, a Community authority, when taking action after a national authority has already done so, must take account of all the grounds of the national decision and not just the amount of the fine imposed by that authority.

189 The Commission considers that the comparison with the French authorities' decision is irrelevant since that latter concerned only a national market, and the Commission cannot, in applying Article 85 of the Treaty, be bound by the decisions of national authorities.

190 Moreover, the Commission contends that the French decision found only that the applicant had participated in the agreement covering the French market between 1983 and 1984. There was thus no reason to be surprised by the large difference between the fine imposed by the French authorities and that imposed on Tréfilarbed for the long list of infringements of which it was found guilty. The Commission adds that it obtained evidence indicating that Tréfilarbed was guilty of an infringement within the French market in 1981 and 1982, whereas the French authorities did not do so. Moreover, the Commission is unable to follow the applicant's interpretation of the judgment in *Walt Wilhelm*, which is at variance with the case-law of the Court of Justice. In conformity with that judgment, the Commission could therefore only deduct the amount of the fine already imposed in France.

Findings of the Court

191 The Court points out that the Court of Justice has held that the possibility of concurrent sanctions resulting from two parallel procedures pursuing different ends is

acceptable as a result of the special system of sharing jurisdiction between the Community and the Member States with regard to cartels. However, the Court of Justice has established that, by virtue of a general requirement of natural justice, the Commission must take account of penalties which have already been borne by the same undertaking for the same action, where they have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory (see in that connection *Walt Wilhelm*, cited above, paragraph 11, and Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, paragraph 3). It must be noted that that course was followed in this case, the Commission having taken account, in point 205 of the Decision, of the fine already imposed by the French authorities.

192 As regards the difference between the fine imposed by the Commission and that imposed by the French competition authorities, the Court considers that the Commission was entitled to draw inferences from the evidence available to it, which was not necessarily the same as that before the French competition authorities, and that it cannot be bound by the conclusions reached by those authorities. It is settled law that any difference which may exist between the legislation of a Member State in the field of competition and the rules laid down in Articles 85 and 86 of the Treaty cannot in any circumstances serve to restrict the Commission's freedom of action in applying Articles 85 and 86 so as to compel it to adopt the same assessment as the authorities responsible for implementing the national legislation (*CICCE* v *Commission*, cited above, paragraph 27).

193 The applicant's complaint must therefore be rejected.

194 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

195 Under Article 87 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. Since the applicant has been unsuccessful and the Commission has applied for an order for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) Dismisses the application;

2) Orders the applicant to pay the costs.

Kirschner Bellamy Vesterdorf

García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 6 April 1995.

H. Jung H. Kirschner

Registrar President

Table of Contents