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

In Case T-149/89,

Sotralentz SA, a company incorporated under French law, established in Drulingen (France), represented by Xavier de Mello, Philippe Pepy and Jean Christian Percerou, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Bruno Decker, 16 Avenue Marie-Thérèse,

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 certain conduct described in the Decision 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)'

Procedure

9 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 23 October 1989, the applicant, Sotralentz SA (hereinafter

'Sotralentz'), brought the present action for the annulment of the Decision. Ten of the thirteen other addressees of that Decision also brought an action.

10 By orders of 15 November 1989 the Court of Justice assigned this case and the ten other cases to the Court of First Instance pursuant to Article 14 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1). Those actions were registered under numbers T-141/89 to T-145/89, and T-147/89 to T-152/89.

11 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.

12 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.

13 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.

14 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

15 In its application, the applicant claims that the Court should annul the Commission Decision or, in the alternative, reduce its severity.

16 In its reply, it claims that the Court should:

— declare that the procedure against it concerned its participation in three separate 'agreements';

— annul the Decision wholly or so far as appropriate;

— or, in the further alternative, having regard to the pleas set out in its submissions, amend the Decision and, in a new decision, declare that Sotralentz did not commit the first and third infringements found against it and confirm the second infringement only as defined by Sotralentz; consequently, reduce the fine imposed on it to a token fine;

— order the Commission to pay the costs.

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 four pleas in law in support of its application. They are: first, lack of powers on the part of the Commission; secondly, breach of the rights of the defence; thirdly, infringement of Article 85(1) of the Treaty; and, fourthly, infringement of Article 15 of Regulation No 17.

19 Although the applicant set out its pleas in the order given above, the Court considers it appropriate to consider first the plea as to the Commission's lack of powers, secondly the plea as to infringement of Article 85(1) of the Treaty, and, lastly, the pleas as to breach of the rights of the defence and infringement of Article 15 of Regulation No 17.

The plea as to the Commission's lack of powers

Arguments of the parties

20 The applicant states that the French authorities gave a decision on the same facts as the Commission, namely the fixing of prices and quotas on a single national market in which national producers and common market importers operated, although the French decision related only to French undertakings or undertakings whose centre of operations was France (Tréfilarbed). That decision was expressly based on the order of 30 June 1945 and, by implication but necessarily, on Community law. The applicant maintains that, by virtue of the general principle *ne bis in idem*, the Commission has no powers to give a decision on the same facts and that the French undertakings cannot now be found guilty again by application of the same economic and legal principles to the same facts.

21 The applicant maintains that, even though the Court of Justice held in Case 14/68 *Walt Wilhelm* [1969] ECR 1 that the same agreement can in principle be the sub-

ject of parallel proceedings, the present case differs from that one. That case was concerned with a situation where the two sets of proceedings had been commenced on about the same date and the laws that fell to be applied — German law and Community law — differed regarding the circumstances in which they could be invoked and the geographical area in which they applied. The position is different in this case. The subject-matter of the proceedings brought by French authorities and by the Commission is exactly the same, namely an international agreement fixing, on a national market, quotas for imports and the prices charged by all the traders concerned, including importers.

22 Finally, the applicant observes that both the opinion of the French Competition Commission and the decision of the French Minister make specific mention of the adverse effect on trade between Member States brought about by the agreements, in which foreign undertakings participated. They add that, if the Commission obtained important new evidence, neither the Decision nor the statement of objections specifies what new facts are disclosed by that evidence or, more importantly, how they specifically concerned the applicant.

23 The Commission replies, first, that the applicant is wrong to claim that the French authorities gave a decision on the basis of Community law and on the same facts as those covered by the Decision. For the Commission, the French decision is nothing more than a decision taken in implementation of Article 50 of Order No 45-1483 of 30 June 1945 and the view that it is also based 'by implication but necessarily' on Community law has no legal significance. When the French authorities intend to apply Community competition law, they do so explicitly. The Commission also states that the French decision took account of the effects of the agreements not on intra-Community trade but on the domestic market, as is clear from paragraph X.1. C. of the opinion on which it is based.

24 Secondly, the Commission rejects the applicant's interpretation of the judgment in *Walt Wilhelm*. In its view, whilst it is true that the *Walt Wilhelm* judgment was

given in respect of circumstances different from those of this case, the *a contrario* conclusion which the applicant purports to draw, namely that the fact that there were concurrent proceedings at Community and national level in *Walt Wilhelm* means that, here, the Commission lacks powers because in this case the Decision came later than the action by the French authorities, is entirely without foundation. Paragraph 4 of *Walt Wilhelm* states 'in principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission'. If the situations examined by a national authority may be 'likely' to be the subject of a Commission decision, that clearly means, in the Commission's view, that it retains full powers to act in relation to situations already examined by a national authority. It is clear, in the Commission's view, that it cannot be divested of the powers conferred on it by Article 89 of the EEC Treaty as a result of action taken by a national competition authority.

25 Finally, the Commission submits that it had evidence that was not available to the French Competition Commission (see, in particular, annexes 6 and 21 to the statement of objections).

Findings of the Court

26 It must be emphasized that the Court of Justice has held that one and the same agreement may, in principle, be the subject of parallel proceedings, one set before the Community authorities under Article 85 of the Treaty and the other before the national authorities under domestic law. The Court of Justice has made it clear that, in principle, the national competition authorities may take action regarding situations likely to be the subject of a Commission decision; however, if the ultimate general aim of the Treaty is to be respected, that parallel application of the national system can be allowed only in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the

full effect of the measures adopted in implementation of those rules (*Walt Wilhelm*, paragraph 4).

27 It follows that the Commission retains its powers to examine, under Community competition law, facts which have already been examined by the national authorities.

28 The Court finds that, in the present case, Decision No 85-6 DC, cited above, of the French Minister for the Economy, Finance and the Budget, is based on the opinion of the French Competition Commission of 20 June 1985 and explicitly on Article 50 of Order No 45-1483, as indeed the applicant has itself acknowledged; it was thus taken under national competition law in relation to the effects of the agreement on the domestic market. Moreover, the Court considers that the Commission, as the latter correctly pointed out, was entitled to arrive at its own conclusion on the basis of the evidence available to it, which was not necessarily the same as that in the possession of the French Competition Commission, and it cannot be bound by the conclusions reached by the national authorities.

29 Furthermore, the case-law of the Court of Justice has accepted the possibility of concurrent sanctions resulting from two parallel procedures pursuing different ends, the acceptability thereof deriving from 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 conduct, 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).

30 The Court finds 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.

31 It follows that the present plea must be rejected.

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

32 The applicant disagrees, first, with the Commission's analysis of the market. It asserts that it did not participate in the agreements on the French market in 1981-1982. It then alleges that there is an error in the Decision concerning its participation in the agreements on the French market in 1983-1984. Finally, it denies having participated in an agreement with BStG on the setting of quotas for its exports to Germany.

I — *The relevant market*

Arguments of the parties

33 First, the applicant claims that the Decision is vitiated by omissions on technical and economic matters to such an extent that the Court is precluded from carrying

out its review. In particular, the applicant maintains that the Decision (point 3) is wrong to list three categories of mesh (standard, catalogue and tailor made), since there are only two types of machine, those which can produce only standard mesh and those which can produce tailor-made mesh. It considers that those two types of mesh are not in competition with each other and asserts that, for such competition to exist, it would be necessary, as a result of external events which are hardly envisageable or a systematic fall in the price of standard mesh, for the latter to 'drive out' tailor-made mesh. However, the applicant concedes that such a situation arose during the period under review.

34 The Commission observes that the wording of the applicant's complaint might give the impression that it relates to the statement of the reasons on which the Decision is based. However, the Commission considers that it is apparent from pages 8 to 14 of the application, to which the applicant itself refers, that the complaint merely comprises a number of considerations concerning definition of the relevant market. The Commission emphasizes that where, in point 3, it states that 'a high degree of substitutability exists, especially between standard mesh and catalogue mesh' and that 'within [the welded steel mesh market] there is a sub-market for tailor-made mesh', the Decision says nothing that conflicts with the applicant's statements.

Findings of the Court

35 The Court considers that, as the Commission rightly pointed out, the applicant's complaint relates to aspects of the definition of the relevant market and that its views in that regard are unfounded. The Court finds, first, that the documents referred to in points 86 to 107 of the Decision reveal the distinctions between standard mesh and catalogue mesh, the prices of which are different. Moreover, the applicant's analysis of the Decision is incorrect, since point 3 of the Decision indicates that there is a high degree of substitutability between standard mesh and catalogue mesh and that, in the welded steel mesh market, there is a sub-market for tailor-made mesh. Furthermore, the Court finds that, according to the applicant's own statements, there are, and have been, occasions when the various types of welded steel mesh can compete with one another.

36 The applicant's complaint must therefore be rejected.

II — *The evidence of the agreements*

A — *In the French market*

(1) *For the period 1981-1982*

The contested measure

37 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

38 The applicant denies having participated in those agreements and submits that the Commission has given no proof of any such participation.

39 The applicant considers that the table in annex 6 to the statement of objections, reproduced in point 29 of the Decision, which indicates the quantities of welded

steel mesh delivered by the French producers from 1978 to 1981 and the quotas attributed to each undertaking, does not constitute clear proof. That table, it says, was drawn up in October 1982; it takes 1981 into account and refers to the first half of 1982, and there is nothing to show that any quotas were envisaged for the period April 1981 to March 1982. The applicant also wonders what the point would be, in October 1982, of calculating quotas relating to ten months of 1981 and the first two months of 1982.

40 The applicant considers that the telex sent by Mr Marie of Tréfilunion to Mr Cattapan of Ferriere Nord on 23 April 1982 (annex 21 to the statement of objections, point 42 of the Decision), which deals with the 'renewal' or continuation of the 1981-1982 agreements — which expired on 31 March 1982 — for the next three or four months, proves the opposite of what the Commission infers from it. Mr Marie wrote 'Sotral's final decision will not be known until week 17. It must not change the decision taken by us all'. According to the applicant, the Commission's interpretation of those words is incorrect since it is apparent that the awaited decision could be positive or negative and that if, in the future, Sotralentz's abstention was to have no effect, that means that the position would have been the same in the past. The applicant's view in that regard is, it maintains, confirmed by the minutes of the meeting held on 21 April 1982 by the 'nationalized undertakings' club' and its associates (annex 24 to the statement of objections, point 45 of the Decision), in the absence of Sotralentz, in which it is stated that 'Mr Sigward (Tréfilunion) will try to have a meeting with Mr Lentz (Sotralentz) within a week to ask him to join in the agreements to be taken at that meeting'.

41 The Commission maintains, with regard to the table contained in Annex 6 to the statement of objections, that, although it was drawn up at the end of 1982, it provides a perfect illustration of the operation of the agreements in the period 1981-1982 and that it shows that Sotralentz was indeed one of the undertakings involved. The quotas were, to a considerable extent, allocated on the basis of the market shares previously achieved by each of the participating undertakings, according to a mechanism described in point 27 of the Decision, on the basis of an internal Tréfilunion memorandum dated 1 December 1981 (Annex 5 to the statement of objections, point 24 of the Decision), which itself referred to the 'recent agreement'. That fact is thus established independently of the table concerned. The applicant cannot

object that the table is valid only for the period in which it was prepared, that is to say the second half of 1982. In the column headed 'quotas', that table shows a share of 7.40% for Tréfilarbed. For 1980, that share of the French market represented exactly 15 600 tonnes, that is to say the 1 300 tonnes per month referred to at the meeting between Tréfilarbed and Tréfilunion on 20 October 1981, as shown by a Tréfilunion memorandum dated 23 October 1981 (annex 1 to the statement of objections, point 46 of the Decision). That finding should be considered in conjunction with the abovementioned memorandum of 1 December 1981, in which Mr Duroux of Tréfilunion states that, on the French market in 1981, 'the tonnages of the penetrators (were) substantially maintained at their 1980 level'. It is thus clear, in the Commission's view, that the table in annex 6 to the statement of objections provides a perfect extrapolation of the 1981-1982 agreements and properly describes the way they operated, regardless of whatever specific measures might have been taken at the end of 1982 in response to the calculations which it contains.

42 The Commission adds that the report of the meeting of 21 April 1982 (annex 21 to the statement of objections) and the telex from Mr Marie of 23 April 1982 (annex 24 to the statement of objections) are documents which postdate the 1981-1982 agreements and relate to the continuation thereof. Those documents show that new agreements were to be concluded, Sotralentz being invited to participate. For the Commission, those documents thus show that Sotralentz was still regarded, at that time, as a member of the 'French party' which should be consulted for the purpose of negotiating the conditions to be imposed on the Italian producers when the 1981-1982 agreements were extended. If that were not the case and if, as Sotralentz explains, it did not participate in the 1981-1982 agreements, there would be no reason for it to be consulted concerning extension of the agreements with the Italian producers. As regards Mr Marie's statement that the Sotralentz decision 'must not change the position taken by us all', that too should, in the Commission's opinion, be seen in the context of negotiations with the Italian producers and means that the latter were to be precluded from arguing, on the basis of any differing stance on the part of Sotralentz (or its future non-observance of the new prices just agreed), that it should not fulfil the agreed commitments.

Findings of the Court

43 The Court finds that, in making its finding against the applicant, the Commission relies on a combined reading and overall assessment of, first, documents which, in its opinion, prove the existence of agreements on the French market during the period 1981-1982, in particular the table in annex 6 to the statement of objections, the Tréfilunion memorandum of 23 October 1981 (annex 1 to the statement of objections) and the Tréfilunion internal memorandum of 1 December 1981 (annex 5 to the statement of objections) and, secondly, documents which, again in the Commission's opinion, prove the existence of endeavours to extend those agreements, in particular the telex from Mr Cattapan, of Ferriere Nord, to Italmet, the representative in France of Ferriere Nord and Martinelli, of 20 April 1982 (annex 20 to the statement of objections, point 42 of the Decision), the telex from Mr Marie to Mr Cattapan of 23 April 1982 (annex 21 to the statement of objections, point 42 of the Decision) and the report of the meeting of 21 April 1982 (annex 24 to the statement of objections, point 45 of the Decision). The latter documents, in conjunction with those mentioned above, in its view prove Sotralentz's participation in the 1981-1982 agreements.

44 The Court considers that the documents which establish the existence of endeavours by various undertakings to extend the agreements implemented in 1981-1982 do not, alone, constitute direct proof of the applicant's participation in those agreements; those documents merely show that the undertakings which had already agreed to that extension were interested in obtaining Sotralentz's participation as well, and likewise their efforts to achieve that end. Those documents also prove that, at the material time, Sotralentz did not align itself with the agreements at issue, as the Commission itself has in fact recognized; finally, they indicate the existence of threats against Sotralentz in the event of its not agreeing to an extension of the agreements.

45 Consequently, the evidence of Sotralentz's participation in anti-competitive practices should be found in other documents. As regards the table in annex 6 to the statement of objections, which the Commission regards as an essential piece of

evidence, it must be pointed out that it is dated 1 October 1982; that it is a composite document, as the Commission also conceded at the hearing, resulting from the addition of two columns relating to the quotas allegedly applicable from April 1981 to March 1982; that the first of those columns indicates the quota of an undertaking (TECTA) which does not appear in the second column, a discrepancy for which the Commission, in response to a question put to it by the Court at the hearing, was unable to give a coherent explanation; and finally, that the quotas allegedly allocated to the various undertakings are different in each column. Taken together, those circumstances raise doubts as to the intrinsic reliability of that document.

46 It should be noted that that table refers only to the French producers, without any mention of the quotas allegedly allocated to the foreign importers. For that reason, the Court considers that that table, in isolation, does not — as the Commission has indeed recognized throughout the written and oral procedure — constitute proof of the applicant's participation, imputed to it in the Decision, in agreements to which the foreign producers were parties and which affected intra-Community trade, the situation relied on to justify the Commission's intervention. It is true that the Commission has attempted to account for the table by reference to other evidence, concerning the existence and operation of the agreements and, in that regard, relied in particular on the Tréfilunion internal memorandum of 1 December 1981 (annex 5 to the statement of objections), which refers to the 'recent agreement', and the memorandum of 23 October 1981 (annex 1 to the statement of objections), which mentions discussions within its scope. However, those annexes were not notified to Sotralentz and cannot therefore be used against it in any way; in any case, moreover, neither of the two memoranda refers expressly or by implication to Sotralentz.

47 In the light of the foregoing, the Court considers that the Commission has not established to the requisite legal standard that the applicant participated in the agreements on the French market over the period 1981-1982.

48 Consequently, the applicant's complaint must be upheld and the Decision must be annulled to the extent to which it finds against the applicant for participating in the agreements put into effect on the French market in the period 1981-1982.

(2) *The period 1983-1984*

The contested measure

49 The Decision (points 51 to 76, 160 and 161) censures the applicant for having participated in a second series of agreements on the French market. Those agreements involved, first, the French producers (Tréfilunion, STPS, SMN, CCG and Sotralentz) and, secondly, the foreign producers operating on the French market (ILRO, Ferriere Nord, Martinelli, Boël/Trébos, TFE/FBC — FBC marketing TFE's production — and Tréfilarbed) and were intended to define prices and quotas, with a view to limiting imports of welded steel mesh into France and to exchanging information. That series of agreements was implemented from the beginning of 1983 to the end of 1984 and was formalized by the adoption on 14 October 1983 of a 'protocol of agreement' concluded for the period 1 July 1983 to 31 December 1984. That protocol records 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 fixes the quotas for Belgium, Italy and Germany at 13.95% of consumption on the French market 'in the context of an agreement concluded between the latter producers and the French industry'.

Arguments of the parties

50 The applicant admits having participated in those agreements. However, it maintains that it put up strong resistance and complied only under duress in order to avoid reprisals. As regards the duration of its participation, it maintains that it

ceased at the end of June 1984 and draws attention to the fact that neither in the statement of objections nor in the Decision did the Commission specify a date of cessation, whereas, in point 76 of the Decision, the Commission gives June 1984 as the date on which the participation of Arbed and the Belgian undertakings came to an end.

51 The Commission replies that Sotralentz is not mentioned in point 76 of the Decision because it is unaware whether or not Sotralentz complied with the protocol of agreement — which was to take effect until 31 December 1984 — beyond June 1984 and that, in view of that doubt, no fine was imposed on it for the period following that date. The Commission points out that, although the particular situation of the applicant within the 1983-1984 agreements is not expressly mentioned, the fact remains that it stated, in its Decision, that there had been differences in 'the degree and duration of the involvement of the undertakings involved' (point 203) and that 'price and quota discipline among the parties was sometimes poor' (point 200).

Findings of the Court

52 The Court finds that the applicant has admitted its participation in the agreements put into effect on the French market in the period 1983-1984, but contests the duration of its participation.

53 The Court considers, first, that the applicant cannot rely on the fact that it participated in those agreements under duress. Even if it is accepted that pressure was actually brought to bear upon it, it could have complained to the competent authorities and lodged a complaint with the Commission under Article 3 of Regulation No 17, rather than participating in the agreements concerned (see the

judgment of the Court of First Instance in Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 128).

54 As regards the duration of the applicant's participation in those agreements, it must be observed that the protocol of agreement of October 1983 was concluded for the period 1 July 1983 to 31 December 1984. The Court considers that the Decision must be construed as meaning that the duration of the infringement imputed to the participants is 1 July 1983 to 31 December 1984, except where the Decision expressly indicates another date. In that connection, it must be noted that, in point 70 of the Decision, the Commission indicates that ILRO did not observe the agreements from May 1984 onwards, whereas in point 86 it states that Boël/Trébos, TFE/FBC and Arbed ceased to comply with them from June 1984. Consequently, the Court considers that, since the Decision did not specifically mention Sotralentz, the period of the infringement attributed to it is 1 July 1983 to 31 December 1984.

55 The Court cannot accept the Commission's argument that, being unaware whether or not Sotralentz complied with the agreements after June 1984, it refrained, in view of that doubt, from imposing a fine for the period after June 1984. If the Commission was not in a position to prove that the applicant continued participating in the agreements after June 1984 and, accordingly, did not impose a fine for the period after that date, it was under an obligation to say so in the Decision so that the applicant would be in a position to determine how the duration of its participation had been evaluated in relation to the overall duration of the infringement. That obligation was not discharged by the fact that, in point 203 of the Decision, the Commission stated, in general terms, that it took account of the degree and duration of the infringements committed by the undertakings involved.

56 Accordingly, the applicant's complaint must be upheld in part and the Decision must be annulled to the extent to which it finds against the applicant for participating in the agreements put into effect on the French market during the period 1983-1984 beyond June 1984.

B — *The agreement between BStG and Sotralentz*

The contested measure

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

58 The Decision emphasizes that BStG and Sotralentz tried to justify that correspondence by reference to the existence of a patent licensing agreement between the two companies under which Sotralentz produced catalogue mesh in France under a BStG patent. In disclosing figures for its shipments, Sotralentz was merely fulfilling its notification and payment obligations under that agreement. According to the Decision (point 145), that argument can be refuted as follows: (a) the notification obligations of a licensee concern his entire production and not only deliveries to a specific market; (b) BStG indicates the exact figures for supplies to the German market, a fact which can be explained only by the existence of a quota arrangement; and (c) BStG's patent had expired before the information in question was communicated and Sotralentz was therefore no longer subject to any notification or payment obligations.

Arguments of the parties

59 The applicant maintains that the exchange of information for which it is criticized is accounted for by the existence of a patent licence agreement between BStG and itself. It was found necessary to enter into that contract, dated 28 June 1979, after an Austrian patent ceased to be valid in 1976, in order to enable the applicant to manufacture ribbed bolted mesh and to gain entry, because of its proximity, to the South-West German market. The licence granted by BStG was valid for Germany and the Netherlands.

60 The applicant maintains that that agreement justifies the monthly exchange of information concerning quantities delivered in Germany, which was intended to facilitate the discharge by the parties of their mutual obligations. As regards the absence of information on the quantities delivered to the Netherlands, the applicant claims that they fell far short of the ceiling laid down in the agreement and that, therefore, monthly or quarterly monitoring was unnecessary. The applicant also points out that the licence agreement had no connection with any sharing of the German market and antedated the establishment of the German crisis cartel by three-and-a-half years.

61 The Commission states that it did not treat the licence agreement with BStG, as such, as an infringement, but insists that the fact that BStG gave details to Sotralentz of all the deliveries to Germany is certainly indicative of the existence of a quota agreement. For the Commission, the fact that the exchange of information was monthly, together with other evidence in the file, supports its conclusion that the exchange of information criticized in the Decision did not arise from obligations under the licence agreement.

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

Findings of the Court

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

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

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

66 As regards the number of patents covered by the licence agreement of 28 June 1979 and their periods of validity, the Court, having regard to the answers given by the parties to the questions put to them in the course of the written procedure and at the hearing, finds that BStG was the proprietor of patents for France, the Netherlands and Germany. In the case of France, BStG held patent No 1 578 746 (procédé pour l'obtention d'une barre d'armature de béton — process for the manufacture of a concrete reinforcing bar) and patent No 6 920 046 (trellis d'armature soudé par points — spot welded reinforcing mesh); for the Netherlands, BStG was the proprietor of patent No 135 455 (werkwijze voor het vervaardigen van een stalen wapeninsgsstaaf voor beton — process for the manufacture of a concrete reinforcing bar); and, for Germany, BStG was the proprietor of patent

No 1 609 605 (Verfahren und Vorrichtung zum Herstellen eines Betonbewehrungsstabes — process and device for the manufacture of a concrete reinforcing bar), valid until 3 January 1985, and of patent No 1 759 969 (Punktgeschweisste Bewehrungsmatte — spot welded reinforcing mesh), valid until 25 June 1986.

67 Article 5 of the licence agreement concluded on 28 June 1979 between BStG and Sotralentz gave BStG the right to limit for each calendar year the quantity of licensed products which Sotralentz was authorized to distribute. However, the agreement gave Sotralentz a guarantee that that maximum annual quantity could not be fixed by BStG as less than 1% of total sales of welded steel mesh and reinforcing bars in Germany and 2.5% of total sales of welded steel mesh and reinforcing bars in the Netherlands. For 1979, the agreement provided for a ceiling of 12 500 tonnes for Germany and 4000 tonnes for the Netherlands for the distribution of the products covered by the patents.

68 The licence agreement also provided for the payment of a royalty of DM 1.5 per tonne to be paid quarterly for the quantities of licensed products distributed by Sotralentz (Article 6(1) and (5)). It was established at the hearing that, instead of being paid, that royalty was taken into account in relation to the purchase of certain tools by Sotralentz from BStG's 'machines' division. The licence agreement provided for a penalty in the event of the prescribed annual quantity being exceeded by 200 tonnes (Article 8). It also stipulated that Sotralentz was required to keep proper accounts of deliveries of products covered by the agreement, which could be inspected at all times by BStG (Article 6(6) and (7)). Finally, the agreement had entered into force on 1 March 1979 for an indefinite period, but was to expire no later than the date of extinguishment of the last remaining licence (Article 9).

69 In view of the foregoing, the Court considers that in the present case the conclusion drawn by the Commission to the effect that the exchange of information

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

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

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

The pleas as to breach of the rights of the defence and infringement of Article 15 of Regulation No 17

72 The applicant has put forward, with respect to all the findings set out in the Decision, two pleas, alleging breach of the rights of the defence and infringement

of Article 15 of Regulation No 17. Since the plea concerning infringement of Article 85(1) of the Treaty has been upheld with respect to the infringements found against the applicant on the French market in the period 1981-1982 and regarding the existence of an agreement with BStG, it is unnecessary to adjudicate on those pleas in relation to those infringements. Nevertheless, it is necessary to examine those pleas in relation to the finding of an infringement on the French market in the period 1983-1984, but without consideration of the arguments which the Court has, by implication, already upheld in relation to the other infringements.

I — *Breach of the rights of the defence*

73 The applicant alleges, first, that the Commission gave an inadequate statement of reasons by failing to examine, in the Decision, its argument concerning the fact that it acted under duress and by not specifying the duration of its participation. It need merely be pointed out that the Court has already given its view on the applicant's claim that it acted under duress and on the duration of its participation (see paragraphs 53, 54 and 55 above) and that it is settled law that, although under Article 190 of the EEC Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and law raised by every party during the administrative procedure (judgments of the Court of Justice in Joined Cases 240, 241, 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 88, and of the Court of First Instance in Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 324). Accordingly, that complaint must be rejected.

74 Secondly, the applicant criticizes the Commission, in general, for finding against it in respect of objections which were not notified to it initially. In that regard, it need

merely be pointed out that, as stated above (see paragraph 50 et seq.), the applicant has admitted its participation in the agreements on the French market for the period 1983-1984 and that it does not specify in detail, anywhere in its pleadings, what objections the Commission did not notify to it initially.

75 Accordingly, the present plea must be rejected.

II — *Infringement of Article 15 of Regulation No 17*

76 First, the applicant complains that the Commission did not individualize the fine imposed on it in relation to the three infringements imputed to it. In that regard, it must be pointed out that it is settled law that the Commission may impose a single fine for several infringements (see Joined Cases 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 54, 55, 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, 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). It follows that that complaint must be rejected.

77 Secondly, the applicant claims that the fine imposed is excessive, having regard to the profits which it derived from its business as a whole. The Court considers that, whilst the Commission is certainly entitled to take such a consideration into account, it is not the only one that it must take into account. Furthermore, it must be borne in mind that, 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. In any event, it must be emphasized that the Commission took account, when determining the amount of the fine, of the financial and economic circumstances of the undertakings involved (point 203 of the Decision). That complaint must therefore be rejected.

78 Thirdly, the applicant criticizes the Commission for imposing on it a fine 115 times higher than that imposed by the French competition authorities. The Court has held above (see paragraph 28) that the Commission was entitled to reach its own conclusions, on the basis of the evidence available to it, which was not necessarily the same as that in the possession of the French authorities, and that it cannot be bound by the conclusions of those authorities. Moreover, any similarity there may be 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 certainly cannot 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 (Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 27). Consequently, the applicant's complaint must be rejected.

79 Accordingly, the present plea must be rejected.

80 In the light of the foregoing, the Court considers that the fine of ECU 228 000 imposed upon the applicant is not appropriate, by reason of its non-participation

in an agreement on price and quota fixing on the French market over the period 1981-1982, its shorter period of participation in the agreements implemented on the French market in the period 1983-1984 and its non-participation in an agreement with BStG on quotas for its exports to the German market. Consequently, in the exercise of its unlimited jurisdiction, the Court sets at ECU 57 000 the amount of the fine imposed on the applicant.

Costs

81 The Commission contends that, in any event and whatever the outcome of the proceedings, it cannot be ordered to pay the costs incurred by Sotralentz, since the latter failed to ask for them in its application.

82 In that connection, it must be noted that the Court of Justice and the Court of First Instance have consistently held that the fact that the successful party did not ask for costs until the hearing does not debar the Court from awarding them (see the judgment of the Court of Justice in Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185 and the Opinion of Advocate General Warner in that case, at p. 1274, and the judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367). Since, in the present case, the applicant asked in its reply for costs to be awarded against the Commission, it is, *a fortiori*, appropriate to award costs to it.

83 Consequently, it is appropriate to take account of the principle laid down in Article 87(2) of the Rules of Procedure, under which the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared. Since the action has been partially successful, the Court considers that the circumstances of the case will be properly taken into account if the Commission is ordered to pay its own costs and one-half of the applicant's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh) as regards the findings therein that the applicant participated in an agreement defining price and quotas on the French market in the period 1981-1982, that it participated after June 1984 in an agreement having the same object on the French market in the period 1983-1984, and that it participated in an agreement with Baustahlgewebe GmbH having to set quotas for its exports to the German market;**

2. **Reduces the amount of the fine imposed on the applicant by Article 3 of that decision to ECU 57 000;**

3. **Dismisses the application as regards the remaining claims;**

4. **Orders the Commission to bear its costs and to pay one-half of the applicant's costs;**

5. **Orders the applicant to bear one-half of its costs.**

Kirschner Bellamy Vesterdorf

García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 6 April 1995.

H. Jung H. Kirschner

Registrar President