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

In Case T-16/99,

Lögstör Rör (Deutschland) GmbH, established in Fulda (Germany), represented by H.-J. Hellmann and T. Nägele, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

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

* Language of the case: German.

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,
Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 October 2000,

gives the following

Judgment [1]

Facts of the case

1 The applicant is a German company producing district heating pipes and until the middle of 1998 was called Pan-Isovit GmbH. It was purchased by the Danish company Løgstør Rør A/S at the end of 1996.

2 to 7 ...

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

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

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

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

11 Still according to the decision, an agreement was reached between all these producers in 1994 to fix quotas for the whole of the European market. This

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

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

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

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of

the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

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

'*Article 1*

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

The duration of the infringements was as follows:

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

...

The principal characteristics of the infringement consisted in:

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

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

— agreeing prices for the product and for individual projects,

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

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

...

Article 3

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

...

(h) Pan-Isovit GmbH, a fine of ECU 1 500 000;

...'

16 to 22 ...

Substance

23 The applicant relies in essence on five pleas in law. The first plea alleges errors of fact and of law in applying Article 85(1) of the EC Treaty. The second alleges infringement of the right of defence. The third alleges infringement of Article 15(2) of Regulation No 17 and of general principles and errors of assessment in determining the fine. The fourth alleges that the obligation to state reasons was infringed in connection with the determination of the fine. Last, the

fifth plea alleges that the rate of interest applied if the fine is not paid immediately is excessive.

24 to 206 ...

III — *Third plea in law, alleging infringement of Article 15(2) of Regulation No 17, infringement of general principles and errors of assessment in determining the fine*

207 to 353 ...

F — *The incorrect determination of the applicant's turnover*

1. Arguments of the parties

354 The applicant claims that in calculating the fine the Commission incorrectly took the amount of ECU 1 910 000 as the basis for setting the limit of 10% of the turnover achieved during the previous financial year by each undertaking participating in the infringement.

355 The applicant states that the Commission began with a total turnover figure of 37 526 242 German marks (DEM), representing, according to the Commission,

approximately ECU 18.9 million, i.e. the amount indicated by the applicant in its reply of 19 March 1998 to the request for information of 24 February 1998. In that letter, the applicant none the less emphasised that the total turnover figure included an 'internal' turnover figure corresponding to trading relations within the group, which came to DEM 5 211 500. That internal turnover cannot be taken into account, since an undertaking's real economic weight is determined by its external turnover. Since in reality that internal turnover figure represents DEM 5 363 850, the determining amount for the purposes of the maximum ceiling of the fine laid down in Article 15 of Regulation No 17 is therefore DEM 32 162 392, or approximately ECU 16.2 million.

356 It is the Commission's consistent practice when adopting decisions to differentiate between internal turnover and external turnover. Thus, such a distinction was established by the Commission in its notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 C 66, p. 25). The distinction was also confirmed by the Court of First Instance in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, where the Court referred to total turnover in order to determine the amount of the fine.

357 The defendant observes that the 'internal' turnover must be taken into consideration for the purpose of applying the limit of 10% laid down in Article 15 of Regulation No 17. Supplies to subsidiary companies and sister companies are equally important in assessing the contributory capacity of the undertaking which is reflected in the 10% limit laid down in Regulation No 17.

2. Findings of the Court

358 It follows from the case-law that when determining the amount of the fine the Commission is entitled to use a turnover figure which comprises, in addition to

the turnover from sales of the product concerned to third persons, the value of internal deliveries of the product to establishments which are owned by the undertaking and do not therefore have separate legal personality from it (*Europa Carton* v *Commission*, cited above, paragraphs 121 and 122).

359 First, no provision states that internal supplies within one company may not be taken into account in order to determine the amount of the fine. Second, the upper limit for a fine, set at 10% of the undertaking's turnover, seeks to prevent fines from being disproportionate in relation to the size of the undertaking and, since only total turnover can effectively give an approximate indication of that size, that percentage must be understood as referring to the total turnover (*Europa Carton* v *Commission*, cited above, paragraphs 123 to 125).

360 To ignore the value of internal deliveries would inevitably give an unjustified advantage to vertically integrated companies. In such a situation the benefit derived from the cartel may not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 62; *Europa Carton* v *Commission*, cited above, paragraph 128).

361 As regards the argument based on the rules applicable to concentrations between undertakings, it suffices to find that the exclusion of any 'internal sales' when calculating the overall turnover figure for undertakings in the context of concentrations, as provided for in Article 5 of Regulation No 4064/89, is explained by the fact that if such transactions were included the same turnover

would be counted twice (*Europa Carton* v *Commission*, cited above, paragraph 130). That did not happen in the present case.

362 Last, *Parker Pen* v *Commission* does not lead to a different interpretation, since it makes no reference to the question of taking into account sales internal to a company.

363 The plea in law put forward by the applicant must therefore be rejected in so far as it alleges an incorrect determination of its turnover.

364 to 389 ...

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. Orders the applicant to pay the costs.

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung

Registrar

P. Mengozzi

President