JUDGMENT OF THE COURT (Sixth Chamber)
17 July 1997 *

In Case C-219/95 P,

Ferriere Nord SpA, a company incorporated under the laws of Italy, established in Osoppo (Italy), represented by Wilma Viscardini Donà, of the Padua Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) in Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Enrico Traversa, of its Legal Service, acting as Agent, and Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, P. J. G. Kapteyn, G. Hirsch and H. Ragnemalm (Rapporteur), Judges,

* Language of the case: Italian.

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 19 June 1995, Ferriere Nord SpA, a company incorporated under the laws of Italy, brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 6 April 1995 in Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed its application for 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 contested decision').

2 As far as the facts underlying the appeal are concerned, the following emerges from the contested judgment:

— By the contested decision, the Commission imposed a fine on 14 manufacturers of welded steel mesh for having, in the words of Article 1 of the decision, '... 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") consist-

ing 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'.

— The contested decision alleges more specifically that the applicant '... participated in two sets of agreements concerning the French market. Those agreements are said to have involved the French producers ... and the foreign producers operating on the French market ... and were intended to determine prices and quotas in order to limit imports of welded steel mesh into France, and to set up an exchange of information. The first set of agreements is said to have been implemented between April 1981 and March 1982. The second set of agreements is said to have been implemented between the beginning of 1983 and the end of 1984. That second set of agreements is alleged to have been formalized by the adoption of a "protocole d'accord" in October 1983' (paragraph 15 of the contested judgment).

— On that ground, a fine of ECU 320 000 was imposed on Ferriere Nord.

3 On 18 October 1989, the applicant brought an application for annulment of the contested decision. By orders of 15 November 1989, the Court of Justice assigned the case, together with 10 other related 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).

4 The applicant's primary claim was that the Court of First Instance should annul the contested decision in so far as it concerned the applicant; in the alternative, it claimed that the fine imposed on Ferriere Nord should be set aside or reduced to an equitable amount. It claimed that, in any event, the Commission should be ordered to pay the costs. The Commission claimed that the application should be dismissed as unfounded and that the applicant should be ordered to pay the costs.

5 The applicant put forward three pleas in law in support of its application. The first alleged infringement of Article 85(1) of the Treaty, the second infringement of Article 15(2) 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'), and the third misuse of powers.

6 In its judgment, the Court of First Instance rejected all those pleas.

7 On appeal, the appellant asks this court to set aside the contested judgment and grant the form of order sought by it at first instance.

8 The Commission claims that the Court of Justice should dismiss the appeal, confirm the validity of the contested decision and order the appellant to pay the costs.

9 The appellant puts forward two pleas in support of its appeal. It maintains that the Court of First Instance erred in law in interpreting and applying, first, Article 85(1) of the Treaty and, second, Article 15(2) of Regulation No 17.

First plea, alleging infringement of Article 85(1) of the Treaty

10 This plea has three limbs. The appellant claims that the Court of First Instance (a) did not take account of the Italian version of Article 85(1) of the Treaty, (b) failed to consider in what respect the agreements to which it was a party affected trade

between Member States and (c) wrongly assessed the economic and legal links between the market in welded steel mesh and that in wire rod.

11 Before considering each limb it should be noted that, as appears from paragraph 25 of the contested judgment, the appellant has admitted to being a party to the agreements between producers of welded steel mesh and that it does not dispute the object of those agreements, namely to fix prices and quotas.

12 The first limb of the first plea is concerned with paragraphs 30 and 31 of the contested judgment, which read as follows:

'30 ... for the purpose of the application of Article 85(1) 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 (judgment of the Court of Justice in Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45).

31 The applicant may not rely on the Italian version of Article 85 of the Treaty in order to require the Commission to demonstrate that the agreement had both an anti-competitive object and effect. That version cannot prevail by itself against all the other language versions, which, by using the term "or", clearly show that the condition in question is not cumulative but alternative, as the Court of Justice has consistently held since its judgment in *Société Technique Minière* (cited above, p. 249). The uniform interpretation of rules of Community law requires that they be interpreted and applied in the light of the versions existing in the other Community languages (judgments of the Court of Justice in Case 19/67 *Van der Vecht* [1967] ECR 345 at p. 354, and in Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415, paragraph 18).'

13 The appellant complains that the Court of First Instance failed to take account of the Italian version of Article 85(1) of the Treaty, according to which an agreement must have as its object and effect the prevention, restriction or distortion of competition, with the result that the provision lays down a cumulative, and not an alternative, condition. The reasoning of the Court of First Instance in paragraph 31 of the contested judgment is incorrectly based on case-law not relating to the Italian version of Article 85. The other language versions should be called in aid only where the meaning of one version of a provision is not clear, which is not the case here.

14 Admittedly, unlike the other language versions of Article 85, it appears from the Italian version, as a result of its use of the coordinating conjunction 'e', that the agreement must have as its object and effect the prevention, restriction or distortion of competition. However, that difference cannot cast doubt on the interpretation of Article 85 given by the Court of First Instance in paragraph 30 of the contested judgment.

15 In fact, as the Court of First Instance rightly held, it is settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages (*Van der Vecht* and *CILFIT* v *Ministry of Health*, paragraph 18). This is unaffected by the fact that, as it happens, the Italian version of Article 85, considered on its own, is clear and unambiguous, since all the other language versions expressly render the condition set out in Article 85(1) of the Treaty in the form of an alternative.

16 It follows that the first limb of the first plea must be rejected.

17 The second limb of the first plea relates to paragraphs 32 to 35 of the contested judgment, which read:

'32 ... Article 85(1) of the Treaty does not require that the restrictions on competition which have been established have actually affected trade between Member States, but only requires that it be established that such agreements are capable of having that effect (judgment in *Miller*, cited above, paragraph 15).

33 In the present case, the fact that the applicant's units of production of welded steel mesh are far away from the French market is not in itself of such a nature as to hinder its exports to that market. Moreover, the applicant's arguments themselves show that the agreements were, in so far as they tended to increase prices, likely to increase its exports to France and thereby to affect trade between Member States.

34 Furthermore, assuming, as the applicant claims, that the agreements did not alter the total market share held by the Italian producers and that its exports remained far below its allocated quota, it is nevertheless the case that the restrictions on competition which have been established were likely to divert patterns of trade from the course which they would otherwise have followed (judgment in *Van Landewyck*, cited above, paragraph 172). The object of the agreements was to allocate quotas for imports into the French market in order to bring about an artificial increase in prices on that market.

35 It follows that, as is found in the Decision, by being a party to agreements which had as their object the restriction of competition within the common market and which might have affected trade between Member States, the applicant infringed Article 85(1) of the Treaty.'

18 The appellant complains that the Court of First Instance merely held in paragraph 32 that it is sufficient that the agreements to which it was a party were capable of actually affecting trade in order for them to be contrary to Article 85 of the Treaty, whereas the Court of First Instance should also have established in what respect those agreements hampered trade between Member States. In its view, the agreements at issue were not capable of actually affecting trade between Italy and France.

19 In this connection, it must be held that the Court of First Instance rightly pointed out in paragraph 32 of the contested judgment that, according to Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15, Article 85(1) of the Treaty does not require that agreements referred to in that provision have actually affected trade between Member States, which, moreover, is difficult to prove to a sufficient legal standard in most cases, but requires that it be established that the agreements are capable of having that effect.

20 Furthermore, it has been consistently held that in order that an agreement, decision or concerted practice may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to give rise to the fear that the realization of a single market between Member States might be impeded (see Case 54/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 170).

21 It follows that the second limb of the first plea must also be rejected.

22 The third limb of the first plea relates to paragraph 29 of the contested judgment:

'29 With regard to the effect on competition, it is true, as the applicant observes, that the price of welded steel mesh depends largely on that of wire rod, but it does not follow from this that any possibility of effective competition in that sector was precluded. The producers still had a sufficient margin to allow effective competition in the market. The agreements could therefore have had an appreciable effect on competition ...'.

23 The appellant complains that the Court of First Instance gave no reasons for its finding that, despite the legislative and economic context relating to wire rod, any possibility of effective competition in the sector of welded steel mesh was not for all that excluded.

24 Admittedly, the appellant does not contest the existence of a margin of competition on the market in welded steel mesh despite the ECSC regime applicable to wire rod. However, it complains that the Court of First Instance did not consider whether the agreements on welded steel mesh might not have been consistent with Article 85 of the Treaty in so far as they helped to increase the price of welded steel mesh and hence, indirectly, of wire rod. The Commission wanted the price level on the wire rod market to recover. Consequently, the appellant claims that the true aim of the agreement with French manufacturers of welded steel mesh was not to restrict competition in the sector, but to pursue the same aims as the Commission in the wire rod sector.

25 In this regard, it must be held that the Court of First Instance was right in law to find merely that there was a sufficient margin to allow effective competition in the market in welded steel mesh. The fact that the market in wire rod — upstream of the market in welded steel mesh — was subject to production quotas, and not imposed prices as the appellant seems to be arguing, has no bearing on the finding made by the Court of First Instance. In any event, the legislative and economic context of wire rod did not authorize the appellant to take part in anti-competitive

agreements relating to a derived product on the pretext of protecting the product upstream, thereby substituting itself for the competent authorities, which alone had the power to do so.

26 The whole of the first plea must therefore be rejected.

Second plea, alleging infringement of Article 15(2) of Regulation No 17

27 This plea is concerned with fixing and determining the amount of the fine in accordance with Article 15(2) of Regulation No 17.

28 Article 15(2) of Regulation No 17 provides as follows:

'The Commission may by decision impose on undertakings or associations of undertakings fines ... where, either intentionally or negligently:

(a) they infringe Article 85(1) or Article 86 of the Treaty; or

(b) ...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

29 The appellant asks that the fine imposed on it by the contested decision be abolished or, at least, reduced.

30 In this regard, it maintains that the Court of First Instance did not consider all the arguments which it raised before it or that it did not consider sufficiently to what extent they were well founded. In the alternative, it argues that, assuming the fine to be well founded in principle, its amount is in any case excessive and unjust.

31 As regards the allegedly unjust nature of the fine, it is important to point out that it is not for this Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34). In contrast, the Court of Justice does have jurisdiction to consider whether the Court of First Instance has responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine abolished or reduced.

32 It should first be pointed out (see the order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611) that, on the one hand, the first subparagraph of Article 15(2) of Regulation No 17 lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions); those conditions include the intentional or negligent nature of the infringement. On the other hand, the second subparagraph of that provision governs determination of the amount of the fine, which depends on the gravity and duration of the infringement.

33 The gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 54).

34 Second, Article 15(2) of Regulation No 17 does not require the Court of First Instance to draw attention to the optional nature of the fine. In order for the infringements in question to be liable to fines, it is sufficient for it to find that the infringements committed by the applicant were intentional and serious, as it did in paragraphs 41 and 42 of the contested judgment.

35 The appellant starts by taking up again the argument which it regards as determinative, that is to say, the close link between welded steel mesh and the quota system for wire rod. In its view, the situation is no different from the situation of sugar considered by this Court in Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, in which the Court considerably reduced the fines. It therefore criticizes the Court of First Instance for having failed to discern any similarity between that case and the instant case.

36 That argument concerns paragraph 63 of the contested judgment, in which the Court of First Instance held as follows:

'63 It must first of all be noted that the Commission took account of the link existing between the market for welded steel mesh and that for wire rod (point 201 of the Decision). For the rest, the applicant cannot rely on the judgment in *Suiker Unie*, since that judgment relates to a situation which is fundamentally different in two respects from that in the present case. First, the *Suiker Unie* case concerned a common organization of an agricultural market falling within the EEC Treaty,

whereas the present case concerns a system of pricing and production quotas falling under the ECSC Treaty. Secondly, in the *Suiker Unie* case, it was the derived product which was the subject of a common organization of the market, whereas in the present case it is the basic product which is the subject of the pricing and production quota system. It follows that, at an economic level, the situation with which the *Suiker Unie* judgment was concerned and that in the present case are fundamentally different, and the applicant can therefore not rely on that judgment in support of its claims.'

37 The appellant maintains that the two situations are comparable. In *Suiker Unie and Others* v *Commission*, the common organization in the sugar sector was necessary in order to guarantee a minimum price for beet. In this case, it was impossible to guarantee a minimum price for wire rod without also regulating the market in welded steel mesh.

38 It should be called to mind in this connection that, in fixing the amount of the fines, regard must be had to the gravity and to the duration of the infringement so that the Court has to take account of the legislative background and economic context of the conduct to which exception is taken (*Suiker Unie and Others* v *Commission*, paragraph 612).

39 Contrary to the appellant's contention, the legislative background and the economic context of the agreements at issue were sufficiently taken into account by the Court of First Instance in paragraph 63 of the contested judgment.

40 Indeed, the Court of First Instance pointed out not only that the Commission had taken account of the link between the market in welded steel mesh and that in wire rod, but also that the circumstances referred to in *Suiker Unie and Others* v *Commission* and the present case were fundamentally different.

41 It must be emphasized that in *Suiker Unie and Others* v *Commission* the relevant market was in a product subject to a common market organization in which, in particular, national sugar quotas distributed among the principal producers applied. In contrast, in the present case, the relevant market — that in welded steel mesh — is free and subject to no measure of that nature.

42 In order to obtain a reduction in the fine, the appellant then puts forward other arguments which, in its contention, were not taken sufficiently into consideration by the Court of First Instance.

43 Thus, it maintains first that it acted solely in order to safeguard the market in wire rod, in accordance with the provisions adopted by the Commission in that sector.

44 That argument goes to paragraph 64 of the contested judgment, in which the Court of First Instance held as follows:

'64. Moreover, assuming that the implementation of the agreements in question led indirectly to an increase in the prices of wire rod, an increase which the Commission wished to see, the applicant cannot rely on that fact as a mitigating factor. Undertakings may not rely on the fact that their pricing and quota agreements for a product have had an indirectly positive effect on the prices of another product which is covered by a system of production quotas introduced by the Commission, otherwise the impact of that quota system would be excessively great. The quota system for wire rod established by the Commission under the ECSC Treaty

was restricted to that product. The undertakings were not authorized to extend that system to a product governed by the EEC Treaty, such as welded steel mesh.'

45 It is sufficiently clear from that paragraph that the Court of First Instance considered the reasons for which that argument could not be regarded as being an attenuating circumstance.

46 Second, the appellant maintains that it did not derive any advantage from the agreements at issue and criticizes paragraph 53 of the contested judgment, in which the Court of First Instance found as follows:

'53. ... the fact that the applicant did not benefit from the infringement was taken into consideration in the calculation of the fine imposed on it. The Commission took account of the fact that profitability is generally unsatisfactory in the welded steel mesh sector (point 201 of the Decision) and the financial situation of the undertakings (point 203 of the Decision). Furthermore, the failure to derive profit from the infringement cannot preclude the imposition of substantial fines, since otherwise they will cease to have a deterrent effect.'

47 It also appears from that paragraph that the Court of First Instance sufficiently considered the reasons for which that argument was unfounded.

48 Third, the appellant argues that it acted with a view to integrating and not partitioning the markets.

49 Contrary to what the Commission contends, that argument was in fact raised by the appellant in its application to the Court of First Instance, but was not considered as such by that court.

50 However, it should be noted that that argument falls within the broader context of an infringement committed intentionally or negligently and, as such, was considered sufficiently in paragraphs 41 and 42 of the contested judgment, in which the Court of First Instance held as follows:

'41. ... 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 ...

42. In the present case, having regard to the intrinsic seriousness and obvious nature of the infringement of Article 85(1) of the Treaty, and in particular subparagraphs (a) and (c) thereof, the Court considers that the applicant cannot claim that it did not act deliberately. For the same reasons, the applicant can also not argue that, as a producer of steel whose activities are usually governed by the ECSC Treaty, it was unaware that those agreements were contrary to the EEC Treaty.'

51 Fourth, the appellant contends that it was not party either to the agreements relating to the Benelux markets or to those relating to the German market, even though it had a considerable interest in the latter. It also maintains that it never suggested adopting for the Italian market similar measures to the French and German measures, even though it could have done so having regard to its important position on the market.

52 Suffice it to say with regard to this point that the Court of First Instance sufficiently considered and showed in paragraph 48 of the contested judgment that those arguments were baseless:

'48. The Decision took into account the fact that the applicant did not participate in the infringements on the Benelux and German markets, since it does not indicate that the applicant participated in them. Similarly, the Decision does not find that agreements were concluded in respect of the Italian market. For the purpose of claiming that the fine imposed on it should be reduced, it does not avail the applicant to argue that the infringement committed by it was less serious than it was.'

53 Lastly, the appellant argues that, even if this Court should take the view that the fine is justified, its amount should be sharply reduced on account of the devaluation of the Italian lira against the ECU since 2 August 1989, the date on which the contested decision was adopted. It maintains that the Court should determine the amount of the fine by taking account of the value in Italian lira corresponding to the ECU exchange rate applicable at the date when the fine was fixed.

54 The Commission contends that, under Article 42(2) of the Rules of Procedure of the Court of Justice, that plea is inadmissible, since it was raised for the first time in the reply.

55 Under Article 42(2) of the Rules of Procedure of the Court of Justice, which is applicable to appeals by virtue of Article 118 of those Rules, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

56 It must be held that the argument based on the devaluation of the lira was not raised by the appellant either before the Court of First Instance or in this appeal. In order for such a plea to be admissible at the stage of the reply, the appellant should have established, in accordance with Article 42(2) of the Rules of Procedure, in what respect the devaluation of the Italian lira was a new fact which came to light in the course of these proceedings. Since the appellant has adduced no evidence of this, the plea must be rejected as inadmissible.

57 Since none of the pleas raised has been upheld, the appeal as a whole must be dismissed.

Costs

58 Under Article 69(2) of the Rules of Procedure, which is applicable to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Mancini Murray Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 17 July 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber