OPINION OF ADVOCATE GENERAL LÉGER
delivered on 3 February 1998 *

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1. By this appeal Baustahlgewebe GmbH ('BStG' or 'the appellant'), a company incorporated under German law, is asking the Court to set aside the judgment of the Court of First Instance of 6 April 1995 in *Baustahlgewebe* v *Commission* [1] 'the judgment appealed against' or 'the judgment'), partly dismissing its 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 [2] ('the contested Decision' or 'the Decision') and fixing the fine imposed on the appellant at ECU 3 million.

I — Facts and procedure

2. The product to which the Decision relates is welded steel mesh. This 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.

3. According to the contested Decision, there are several types of welded steel mesh:

— mesh from stock or standard mesh (Lager- oder Standardmatten),

— catalogue mesh (Listenmatten),

— tailor-made mesh (Zeichnungsmatten). [3]

4. In paragraphs 2 and 3 of the judgment the Court of First Instance found as follows:

' 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 authorisation 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 authorised, however, only for the first two years of

1 — Case T-145/89 [1995] ECR II-987.

2 — IV/31.553 — Welded steel mesh, OJ 1989 L 260, p. 1.

3 — See I, A, paragraph 3, of the Decision. According to the Court of First Instance, the appellant recognises a fourth type, that is to say, catalogue mesh of the semi-standardised type ('Lettermatten'), which is similar to standard mesh (see paragraph 38 of the judgment).

its operation (points 126 and 127 of the Decision).'

5. In the contested Decision, the Commission fined 14 producers 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") 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'.

6. With regard to the facts giving rise to the action before the Court of First Instance, it appears from the judgment that the contested Decision criticises the appellant in particular for:

on the German market:

— 'participation in agreements concerning trade interpenetration between Germany and France with the French undertaking Tréfilunion. Those agreements were allegedly concluded during a conversation of 7 June 1985 between Michael Müller [4] and Mr Marie, a director of Tréfilunion ...'. The Court of First Instance adds that 'according to the Decision ... the concessions made by each side at the meeting were adhered to, as evidenced by the facts that neither Tréfilunion nor the other French producers complained to the Commission about the German structural crisis cartel and that the applicant's works at Gelsenkirchen (Germany) did not export catalogue mesh to France' and that 'any future export business was to be linked to a delivery quota'; [5]

— with regard to 'the agreements intended to protect the German structural crisis cartel against uncontrolled imports of welded steel mesh, ... having participated in an agreement with Sotralentz concerning quota arrangements for exports by the latter to Germany'; [6]

— 'having participated in agreements concerning the German market intended, first, to regulate exports by Benelux producers to Germany and, secondly, to observe the prices in force on the German market'; [7]

4 — Chief Executive of BStG and legal representative and chairman of the Fachverband Betonstahlmatten (paragraph 25), which is 'the professional association of the German welded steel mesh manufacturers. Almost all manufacturers are members' (point 18, footnote 2, of the Decision).

5 — Paragraph 59.

6 — Paragraph 69.

7 — Paragraph 83.

— '[in the] desire to restrict or regulate imports into Germany ...', concluding two supply contracts of 24 November 1976 and 22 March 1982 with Bouwstaal Roermond BV (later Tréfilarbed Bouwstaal Roermond) and Arbed SA afdeling Nederland. 'In those contracts, BStG took over exclusive sales in Germany, at a price to be fixed according to specific criteria, of a specified annual volume of welded steel mesh from the Roermond works. Bouwstaal Roermond BV and Arbed SA afdeling Nederland undertook, for the term of those contracts, not to make any direct or indirect deliveries to Germany'. [8] 'The Decision ... states that the exclusive distribution agreements did not satisfy the conditions of Commission Regulation (EEC) No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10, ...), at least since the making of the wider arrangements on trade between Germany and Benelux. Since that date those agreements had to be regarded as part of a comprehensive market-sharing arrangement ...'; [9]

— 'having participated in an agreement with Tréfilarbed stopping reexports of welded steel mesh from the St Ingbert works to Germany via Luxembourg'; [10]

on the Benelux market:

— 'having participated in agreements between the German producers exporting to the Benelux States and the other producers selling in the Benelux States concerning observance of prices fixed for the Benelux market. According to the Decision, those agreements were decided on at meetings held in Breda and Bunnik between August 1982 and November 1985 ...' [11] 'The Decision ... also criticises the applicant for having participated in agreements between the German producers, on the one hand, and the Benelux producers (the "Breda club"), on the other, consisting in the application of quantitative restrictions to German exports to Belgium and the Netherlands and communication of export figures of certain German producers to the Belgo-Dutch group.' [12]

7. The Commission imposed on BStG a fine of ECU 4.5 million.

8. On 20 October 1989 the appellant brought an action for the annulment of the contested Decision. By orders of 15 November 1989 the Court of Justice referred this case and 10 others connected with it to the Court of First

8 — Paragraph 95.
9 — Paragraph 96.
10 — Paragraph 110.
11 — Paragraph 123.
12 — Paragraph 124.

Instance pursuant to Article 14 of Council Decision No 88/591/ECSC, EEC, Euratom, of 24 October 1988 establishing a Court of First Instance of the European Communities. [13]

9. BStG claimed that the Court should annul the provisions of the Decision applying to it or, alternatively, that the fine should be reduced to a reasonable amount, and that the Commission should be ordered to pay the costs. BStG also sought authorisation to examine certain documents relating to the procedure before the Commission and to the relations between the Commission, the Bundeskartellamt and the representatives of the German cartel association concerning the structural crisis cartel.

10. The Commission claimed that the Court of First Instance should dismiss the application as unfounded and order the appellant to pay the costs.

11. In support of its application the appellant put forward three pleas in law alleging breach of the rights of the defence, infringement of Article 85(1) of the Treaty and infringement of Article 15(2) of Council Regulation No 17. [14]

13 — OJ 1988 L 319, p. 1.

14 — Regulation of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

II — The judgment appealed against

12. The Court of First Instance gave judgment annulling Article 1 of the contested Decision 'as regards the finding therein that the [appellant] participated in an agreement with Sotralentz SA to set quotas for the latter's exports to the German market and the finding that an agreement existed between the [appellant] and Tréfilunion to make their future exports subject to quotas'. Consequently, the Court of First Instance reduced the fine of ECU 4.5 million to ECU 3 million and dismissed the application with regard to the remaining claims.

III — The appeal

13. With its appeal, BStG asks the Court of Justice, first, to set aside the judgment of the Court of First Instance in so far as it fixes the fine at ECU 3 million, dismisses its application and orders it to pay part of the costs and, second, to annul Articles 1, 2 and 3 of the contested Decision in so far as they apply to the appellant and were not annulled by that judgment.

14. In the alternative, BStG asks that the fine be reduced to a reasonable amount. It also

seeks an order for costs against the Commission. [15]

15. The Commission, for its part, seeks the dismissal of the appeal and an order for costs against the appellant.

16. In support of its appeal, BStG complains that the Court of First Instance:

— infringed the appellant's right to legal protection within a 'reasonable period' because of the excessive length of the proceedings;

— infringed the principle of 'orality' in that the judgment was delivered 22 months after the closure of the oral procedure;

— disregarded the principles applying in the matter of proof;

— misapplied the provisions of the Rules of Procedure concerning the offer of evidence out of time;

— dismissed the appellant's request for access to the Commission's files;

— misapplied Article 85(1) of the Treaty;

— contravened Article 15 of Regulation No 17 with regard to fixing the fine. [16]

17. I shall examine each of these pleas in the order given above, and as the first is the most important I shall consider it at some length.

15 — French translation of the appeal, p. 2.

16 — Appeal, paragraph 6.

IV — Discussion of the pleas in support of the appeal

A — *First plea: failure to give judgment within a 'reasonable time'*

18. BStG contends that the time taken by the Court of First Instance to give judgment on its application was excessive, thus contravening Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). The appellant points out that the principle of a 'fair hearing' laid down by that provision comprises the right of any person to have his action tried within a 'reasonable time'.

19. The appellant considers that the length of the procedure was in no way due to the circumstances of the case but must, on the contrary, be attributed to the Court of First Instance, and that such a delay constitutes a procedural irregularity which justifies setting aside the judgment and annulling the contested Decision, as well as closure of the procedure. Alternatively, the appellant claims that the excessive length of the procedure constitutes in any event a 'ground for reducing the penalty'.

20. The Commission does not agree that the length of the procedure was excessive.

21. Before the Court considers the duration of proceedings which may appear lengthy, as almost five and a half years elapsed between the lodging of the document instituting the proceedings and the date of the judgment of the Court of First Instance, including deliberations lasting almost 22 months, the Court of Justice will have to decide whether BStG's plea is admissible and, above all, examine the implications of the plea with particular care.

22. The Court is, of course, familiar with the provisions of the Convention. BStG's claims argue for measures to which the Court normally has recourse when exercising its appellate jurisdiction. However, some difficulty appears to arise with regard to the Court's exercise of its power of annulment or the power to reduce the fine in order to ensure that Article 6 of the Convention is applied.

1. *Admissibility of the plea*

(a) The provision relied upon

23. One of the questions raised by this plea concerns the Court's jurisdiction to take cognisance of the principle on which it has based.

24. With regard to the principles of the Convention, the Court observed quite recently that, 'as the Court has consistently held (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33), fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The Convention has special significance in that respect. As the Court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognised and guaranteed (see, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).' [17]

25. Article F(2) of the Treaty on European Union [18] reaffirmed the European Union's respect for the Convention, so that it is now accepted that it is within the Court's remit to secure respect for the rights recognised by the Convention.

26. It is clear from the Court's case-law that the Convention lays down rules all of which are not merely safeguarded in Community law by the Court. Those rules also guide the Court in formulating fundamental principles which are of the utmost importance in this area.

27. It must also be observed that the constitutional traditions common to the Member States make a substantial contribution to the development of these fundamental principles.

28. Like those traditions, the Convention is the source which has inspired not only the fundamental rights, but also the other general principles of Community law. [19]

17 — See the judgment in Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14. For the development of the case-law, see the judgments in Case 4/73 *Nold* v *Commission* [1974] *ECR 491*, paragraph 13; Case 36/75 *Rutili [1975] 1219*, paragraph 32; Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22; Case 257/85 *Dufay* v *Parliament* [1987] ECR 1561, paragraph 10; and Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 17.

18 — Article F(2) provides that: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

19 — The distinction between fundamental rights and the other general principles of law is not an easy one to draw, particularly as both are safeguarded by the Convention in so far as it aims to protect 'human rights and fundamental freedoms' and makes no distinction between them. The criterion for distinguishing the former from the latter may appear from the idea that, 'by comparison with general principles, the term "fundamental rights" is, on the contrary, reserved for "human rights", i.e. the objective rights inherent in the human person and of an essentially individual nature': J.-P. Puissochet, 'La Cour de justice et les principes généraux du droit', 10th Congress of the European Lawyers on Judicial protection of rights within the Community system, *Les Annonces de la Seine*, 10 October 1996, No 69, p. 3. Concerning the Convention and national constitutional traditions, and the general principles of law other than fundamental rights, see Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; and Joined Cases C-74/95 and C-129/85 *X* [1996] ECR I-6609, paragraph 25.

29. The existing case-law on the subject has in particular been developed in cases concerning respect for the principles of the Convention in connection with certain Community administrative procedures in the area of, for example, the civil service [20] and competition law, [21] and cases concerning the interpretation of Community law in the light of those principles. [22] In particular, Article 6 of the Convention has been applied in quite a number of cases. [23]

30. In the present case it is not a matter of ensuring respect for the principle of a 'fair hearing' on the part of a Member State or a Community institution in relation to a disputed measure. The issue in the present appeal is whether judicial proceedings before the Court of First Instance respected the right to legal process within a 'reasonable time', a right which forms part of the abovementioned principle. [24] The Court of First Instance, like the national courts and the other Community institutions, is subject to the principles of the Convention.

31. Article 6 of the Convention enshrines the right of any person to a 'fair ... hearing within a reasonable time', which is available where a court is required to determine 'his civil rights and obligations or ... any criminal charge against him'. It cannot be disputed — and the Commission does not dispute — that, in the light of the case-law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a 'criminal charge'. [25]

20 — See, for example, *Dufay* v *Parliament* and *X* v *Commission*, cited above.

21 — See, for example, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 22 et seq., and Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 30.

22 — See, for example, *Johnston*, cited above, paragraph 18, concerning the principle of effective judicial control enshrined by a Community directive, and *ERT*, cited above, paragraph 41 et seq., concerning the principle of freedom of expression in relation to the power of the Member States to restrict, for particular reasons, the freedom to provide services.

23 — See, for example, Case 98/79 *Pecastaing* [1980] ECR 691, paragraphs 21 and 22; Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 6 et seq.; *Johnston*, cited above; *Dufay*, cited above; Case C-60/92 *Otto* [1993] ECR I-5683, paragraph 11; Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 13 et seq.; Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 50 et seq. However, the Court does not so far appear to have classified the principle of a 'fair hearing' or any of the rights of which it consists as being a 'fundamental right'.

24 — In the judgment in Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 26, the Court of Justice dismissed a plea to the effect that the Court of First Instance had disregarded the right to a 'fair hearing'.

25 — On this point it is sufficient to refer to the opinion delivered on 30 May 1991 by the European Commission of Human Rights, which may be applied to the present case. With regard to a pecuniary sanction imposed on an undertaking by a national authority in the area of competition law, the Commission took the view that 'the Minister's decision to impose a fine constituted, for the purposes of the Convention, determination of a criminal charge, and the fine had all the aspects of a criminal penalty' (European Court of Human Rights, *Société Stenuit* v *France*, Series A No 232, paragraph 65). The European Commission of Human Rights referred to the case-law of the European Court of Human Rights and observed (paragraph 62) that the measure in question 'affected the general interests of society normally protected by criminal law'. It went on to say (paragraph 63) that '"these generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended ... to be deterrent and usually consisting of fines and of measures depriving the person of his liberty" (European Court of Human Rights, judgment [of 21 February 1984] Öztürk ... [Series A No 73])', before concluding that the matter was a criminal case within the meaning of the Convention.

32. Therefore, the principle pleaded by BStG is one of those which it is the Court's task to ensure is respected.

33. For the sake of completeness, let me add that, although it has not yet been positively established by the Court, [26] I think there is no doubt that Article 6 applies to legal persons because it is clear from the case-law of the European Commission of Human Rights that the pronoun 'everyone' covers legal persons as well as natural persons. [27]

34. Furthermore, legal persons do not differ from natural persons to such an extent that their safeguards must be limited, for the proper administration of justice, in actions to which they are parties.

35. Although the nature and extent of the damage suffered by reason of the length of proceedings may be very different, depending on whether the penalty is a term of imprisonment or a fine, or whether the amount of the fine must be paid by the party concerned from his own resources which are intended to meet his everyday needs, an excessive delay in giving judgment cannot be tolerated in either case. In my opinion, these differences are relevant only to the question whether the length of the procedure is 'reasonable'. They also lead to sanctions or redress suited to the nature of the offence.

36. Therefore everyone must be entitled to have his case disposed of within a 'reasonable time'.

(b) The nature of the plea

37. Under Article 168a of the EC Treaty, there is a right of appeal to the Court of Justice 'on points of law only and in accordance with the conditions laid down by the Statute'. Article 51, first paragraph, of the EC Statute of the Court of Justice provides that: 'An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance.'

26 — Paragraph 30 of the *Orkem* judgment cited above begins as follows: 'as far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law ...'. The reservation as to whether that provision is applicable to legal persons is only apparent because, in reality, the reservation refers to the *investigation stage*.

27 — According to the opinion delivered in the *Société Stenuit* v *France* case cited above, the Commission 'considers that a corporate entity can claim the protection of Article 6 of the Convention when a "criminal charge" has been made against it' (paragraph 66).

38. In certain respects, the question whether a period of time is excessive might be regarded as a question of fact which, as such, would be outside the jurisdiction of the Court of Justice.

39. However, I take the view that this is a question of law because the Court will not confine itself to confirming a series of facts. The Court will have to distinguish the facts according to their respective influence on the length of the period in question, after carrying out an exercise consisting in either classifying them as matters which may indicate shortcomings in the administration of justice or accepting that they may justify the length of time taken. In determining in this way whether the duration of the proceedings was reasonable or unreasonable, the Court makes a legal assessment which produces legal effects.

40. Furthermore, the period of time in question is attributed to the Court of First Instance itself, so that the Court of Justice is not being asked to review an assessment or a legal characterisation of the facts by that Court and to substitute its own.

41. Let me add that, in any event, if the Court of Justice had no obligation to review the correct application of Article 6 of the Convention by the Court of First Instance, this would imply *de facto* that the latter is not subject to the Convention.

42. I consider that the plea concerning the excessive length of the proceedings is admissible from this viewpoint also.

(c) The measure sought

43. With regard to the measure sought by the appellant if it were found that the Court of First Instance had contravened Article 6 of the Convention, I would merely observe that, in principle, this is within the normal jurisdiction of the Court. Article 54 of the Statute provides that, if the appeal is well founded, the Court is to quash the decision of the Court of First Instance and the former may then give final judgment where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

44. Therefore the Court of Justice is perfectly able to reduce or even discharge the fine imposed on any party or, if it does not have the necessary facts, it may refer the case back to the Court of First Instance for this purpose.

45. However, it is at this stage that the question of the scope of BStG's plea arises.

2. The scope of the plea

46. First of all, it is clear that, were the Court to find that the time taken by the Court of First Instance in giving judgment in the action is not 'reasonable' within the meaning of Article 6 of the Convention, this could not lead to referring the case back to the latter Court. After quashing the judgment appealed against, the Court of Justice could not permit the further time necessary for re-examination of the case to be added to the period which has elapsed since the matter was first brought before the Court of First Instance. The remedy would actually be worse than the ailment.

47. However, there seems little point in re-examining the case with regard to the plea concerning the excessive length of the procedure. If procedural irregularities justify quashing the judgment appealed against, it is justifiable to re-examine the case because of the connection between the breach of procedural rules and the action. As we have seen, Article 51 of the EC Statute of the Court of Justice requires a breach of procedure 'which adversely affects the interests of the appellant' in order for the Court to have jurisdiction. In most cases such procedural irregularities disregard the principles laid down to safeguard the parties. Under those circumstances, a retrial before the first court, complying this time with the rules of procedure, is undoubtedly the best response to the parties' complaints.

48. Nevertheless, as we have just seen, if the case has to be re-examined because of the annulment of excessively long proceedings, this would not only not remedy the damage, which has, so to speak, been suffered once and for all, but would actually be likely to increase it.

49. Consequently, the Court of Justice is the only court which could take effective action on a breach of Article 6 of the Convention by the Court of First Instance.

50. Therefore, assuming that the length of time in question does not meet the requirements of the Convention, the next question is what action the Court could take on BStG's application for the fine to be reduced or remitted.

51. First, it is necessary, as I have said, to examine the principles developed by the national legal systems to resolve similar problems, in order to determine whether there is a common legal tradition which might offer guidance to the Court.

52. Although the legal systems of all the Member States recognise a right to a hearing within a 'reasonable time', they do not all lay down the same remedies for the infringement of that principle. The procedures of the crim-

inal courts differ from one Member State to another. They often act purely on the directions of the judge, there being no basis in constitutional law or even, sometimes, in statute, for the steps they take. In some States the prosecution is ruled inadmissible (Federal Republic of Germany, Kingdom of Belgium and Kingdom of the Netherlands) or withdrawn (Kingdom of Belgium and Ireland). The penalty may also be reduced (Federal Republic of Germany, Kingdom of Belgium, Kingdom of Spain, Republic of Finland, Grand Duchy of Luxembourg, Kingdom of the Netherlands and Kingdom of Denmark, in the case of imprisonment) or suspended (Federal Republic of Germany and Kingdom of Belgium). In the Kingdom of Spain, the defendant may petition for a pardon where the principle of 'reasonable time' has not been adhered to.

53. However, in most Member States a breach of the principle does not affect the validity of the proceedings in question. It merely enables *an action for compensation* to be brought before the competent court.

54. The Member States appear for that reason to regard a right to compensation as the most appropriate way of settling cases where a 'reasonable time' has been exceeded.

55. It does not seem to me that modifying the penalty or taking steps with regard to the actual prosecution is a suitable remedy for exceeding time limits, quite apart from the fact that the rules are not the same in all the Member States.

56. If the appellant's plea is indeed based on a point of law, I do not think it is of the kind which permits the sanction imposed by the Commission, as partly upheld by the Court of First Instance, to be called into question.

57. In so far as sanctions imposed are based on grounds of Community law, they can be reviewed in any case following reconsideration of those grounds. It is because the Court of First Instance misapplies the law applicable to the case that the Court of Justice has the right to quash the judgment entirely or in part and thus to remit or reduce the fine imposed. [28] The interpretation of the law given by the Court of Justice when exercising its power of review leads to a different assessment of the degree of liability of the party in question and may be such as to call into question the penalty imposed. Therefore a connection exists between the subject-matter

28 — This follows by contrary inference from paragraph 31 of Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, which states 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)'.

of the proceedings and the penalty ultimately imposed.

58. That is not the case here because neither the finding that the acts with which BStG was charged, nor the assessment of its responsibility in carrying out the agreements, nor the application of the relevant law were affected by the time (however long) taken by the Court of First Instance to examine the contested Decision.

59. Furthermore, as this complaint has no connection with any defective interpretation of the Community law applicable to the case, a re-examination of the matter would in no way answer the plea that the proceedings were not contested within a 'reasonable time'. The absence of any connection means that the Court cannot, in default of a provision expressly authorising it to do so, recognise a right to plead that the proceedings were not conducted within a 'reasonable time' in order to reduce or remit, by amending the judgment appealed against, the fine imposed on BStG. I think it would be difficult to identify criteria for choosing between remitting and reducing the fine or, if it were reduced, the criteria necessary for determining the amount of the fine, unless there were some method of evaluating the damage, which could then be deducted from the fine.

60. However, this course would entail two main drawbacks. As it is based on the idea of compensation, it would require the amount of the redress to be deducted from a penalty. It may appear strange to deduct a sum fixed in proportion to certain damage from a sum primarily fixed by reference to the gravity of certain conduct. In this way the present appeal procedure, which is directed against a judgment imposing a penalty, would acquire a dual purpose. Above all, the Court of Justice cannot give a proper ruling on a question of damage without having the information necessary for evaluating it, unless it orders the re-opening of the oral procedure.

61. For all these reasons I conclude that BStG's plea is invalid and consequently I propose that the Court dismiss it without further consideration.

62. However, it seems to me impermissible, and even legally unacceptable, to hold that Article 6 of the Convention lays down a rule with which it is the Court's task to secure compliance while, at the same time, proposing that the Court should not give a ruling on a plea based on that Article, without mentioning (although there is no requirement to do so) the remedy which, in my view, could make up for the inadequacy of the relevant provisions.

3. *Action for liability as the appropriate remedy*

63. As an appeal is not an effective response where proceedings are not conducted within a 'reasonable time', I think an action for compensation must represent the means for preventing this principle of the Convention from becoming a dead letter when it is raised against proceedings before the Court of First Instance.

64. Let me outline the factors which, in my opinion, would permit the Court, if necessary, to rule as admissible an action for compensation on the ground that the Court of First Instance had breached the rule requiring proceedings to be conducted within a 'reasonable time'.

65. The action for compensation exists in the common legal tradition of the Member States and in Community law. As we have seen, the national legal systems recognise the principle of compensation for the damage suffered by the party concerned as a result of a breach of the 'reasonable time' rule. Article 215, second paragraph, of the Treaty allows an action to be brought for the non-contractual liability of the Community arising from damage caused by its institutions. In his Opinion in the *SGEEM and Etroy* v *EIB* case, [29] Advocate General Gulmann contended that the word 'institutions' in Article 215 refers to Article 4 of the Treaty, which lists the Community institutions. [30] However, the Court went further in finding that the term should not be understood as referring only to the institutions listed in Article 4. [31] Consequently, it does not appear that the Court of Justice or the Court of First Instance should be regarded as being outside the ambit of Article 215. [32]

66. In the procedural respect, however, there is a serious difficulty in that, under Article 3(1) of the abovementioned Decision 88/591, as amended by Article 1 of the Council Decision of 8 June 1993, [33] the Court of First Instance itself has jurisdiction to hear such actions when they are brought by natural or legal persons.

67. Again without prejudging the issue whether the time taken by the Court of First Instance to give judgment was unreasonable or its own share of the responsibility in the present case, it is not feasible to entrust a judicial body with the task of determining whether its own conduct is wrongful or unlawful. This would unquestionably be contrary to the principle of an impartial tribunal laid down in Article 6(1) of the Convention.

29 — Case C-370/89 [1992] ECR I-6211.

30 — Point 14 of the Opinion.

31 — See paragraph 16 of the judgment.

32 — For the problems arising from the principle of the liability of the Community Courts, see B. du Ban, 'Les principes généraux communs et la responsabilité non-contractuelle de la Communauté', *Cahiers de Droit Européen*, 1977, No 4, p. 397.

33 — Decision 93/350/Euratom/ECSC, EEC, amending Decision 88/591 (OJ 1993 L 144, p. 21).

I think it would be difficult to avoid such a conflict by referring the case back to a differently constituted court from that which gave the original judgment because, if we adopt the approach taken by the Strasbourg Court, a change in the constitution of a court may not be enough to remove entirely the impression of partiality which would arise from a judgment concerning the court which it itself delivers. [34]

68. Furthermore, it is clear from the preambles to Decisions 88/591 and 93/350 that the establishment of a second court, i. e. the Court of First Instance, is designed to improve the judicial protection of individuals. It is hardly possible to envisage a more serious breach of this requirement than by allowing one of the parties to act as judge in its own case.

69. Therefore Article 3 of Decision 88/591 must be read in the light of the principle of impartiality laid down by the Convention, particularly as it is difficult to imagine that the Community legislature could have conceived that the scope of that decision would cover the examination by the Court of First Instance of its own liability.

70. Although the jurisdiction of the Court of Justice in this area necessarily leads to the examination by a single court of the plea in question, it is accepted that a two-tier judicial system, as understood in the Community legal order and in general, ensures that justice is done. However, this procedural safety net, designed to reduce the risk of mistakes in law by means of a review of the law applied by the Court of First Instance, must not deprive the parties of the essential safeguard of the impartiality of the court before which they bring their action. It cannot be denied that the two-tier court system is only one aspect of judicial protection. Therefore the principle of impartiality, which precludes the assessment by a court of its own conduct, must in this case take precedence.

71. In those circumstances, the jurisdiction of the Court of First Instance in actions brought by natural or legal persons under Article 178 of the Treaty must be understood, for the purpose of the protection of individuals, as not extending to actions for compensation relating to judicial acts of that Court itself.

34 — The European Court of Human Rights carries out not only a subjective assessment of the impartiality of the court in question, but also an objective assessment: 'the existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect' (European Court of Human Rights, *Hauschildt* judgment of 24 May 1989, series A No 154, paragraph 46). The Court adds that 'in this connection, even appearances may be of a certain importance' (paragraph 48). The example of a court which has to decide whether its own functioning was illegal or wrongful in order to determine an action for compensation, even if its constitution is altered so that the judges who gave the original judgment are not the same as those who have to assess the court's own liability, seems to me a perfect illustration of a breach of the principle of impartiality.

72. Consequently, for an action such as that in question here, Article 178 of the Treaty prevails and the Court of Justice retains jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215.

73. The second paragraph of Article 215 lays down the principle of the Community's non-contractual liability by referring to the 'general principles common to the laws of the Member States'. As we have seen, most Member States allow compensation for damage arising from disregard of the right to obtain judgment within a 'reasonable time'.

74. The Court of Justice should therefore, as it is authorised to do by the second paragraph of Article 215, seek guidance in that common tradition in finding an identical means of settling disputes which supplements, within its own scope, the area covered by the appeal. Consequently, it is only a matter of remedying the deficiencies of this action in order to reply to a specific plea in an area which, in addition, is more concerned with the machinery of justice than the adjudicative function of the courts.

75. Finally, the admissibility of such an action is subject to the conditions of general law, such as the five-year limitation period of Article 43 of the EC Statute of the Court of Justice, which provides that the period runs from 'the occurrence of the event giving rise [to non-contractual liability]'. In the present case, the event in question is the judgment delivered at the end of a period found to be 'unreasonable'.

76. These are the steps which could be contemplated to ensure the effectiveness of Article 6 of the Convention in regard to a 'reasonable time'.

B — *Second plea: infringement of the so-called principle of 'orality'*

77. BStG contends that, in giving judgment 22 months after the closure of the oral procedure, the Court of First Instance infringed the so-called principle of 'orality'. According to the appellant, this is an unwritten fundamental principle of Community procedure, upheld by the codes of procedure of the Member States.

78. The appellant submits that the abovementioned principle means that only the arguments put forward during the oral procedure can be taken into account in a court's decision. It adds that the principle enables the parties to set out their views clearly and rapidly, thereby enabling the court to form a direct, personal opinion on the case and the parties' arguments. The two years which elapsed between the hearing and the judgment under challenge blurred the impressions

left by the hearing and, therefore, BStG considers that this irregularity in the procedure must lead to the judgment being set aside.

79. The Commission considers that the oral element does not have primacy in the Community law on the organisation of the courts and that this plea must be dismissed.

80. The principle of orality, as recognised in the legal systems of the Member States, appears to have a number of different aspects.

81. In the strict sense, the principle means that a party has the right to state his case in the course of a hearing during which he or his representative has an opportunity to speak and to reply to the court's questions. The courts and tribunals of the Member States have rules which combine written and oral procedural elements in varying proportions, but the principle of orality is common to all of them. This is also true of the procedure before the Court of First Instance, which includes an oral phase. [35]

82. In the wider sense, the principle of orality comprises the immediacy of the proceedings, which means that the court must have direct and personal contact with all those taking part in the hearing. [36]

83. The concept of 'immediacy' (or 'Unmittelbarkeit' in German law, 'immédiateté' in French law, 'inmediación' in Spanish law and 'imediaçao' in Portuguese law) takes full account of the requirements of the principle of orality where it calls for a direct relationship between the court and the party concerned. 'Immediacy' *in physical terms*, which means that the court cannot interpose an intermediary between itself and the party or his representative, presupposes that a judge who was not present at the hearing cannot contribute to the decision in the case. Article 33(2) of the Rules of Procedure of the Court of First Instance provides that 'only those Judges who were present at the oral proceedings may take part in the deliberations'.

84. The aspect of the principle of orality which is at issue in the present case is 'immediacy' *in time*. The Court of First Instance is alleged to have allowed too much time to

35 — See Articles 46, first paragraph, as amended, and 18, first paragraph, of the EC Statute of the Court of Justice, and Article 53 et seq. of the Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 (OJ 1991 L 136, p. 1, corrigendum OJ 1991 L 317, p. 34).

36 — The following account of this principle in French criminal law may, in substance, be applied here: 'Trial courts must, in principle, form their view on the evidence produced before them, both orally and directly, that is to say, they must decide by reference to what they hear (or see) during the hearing, and not by reference to written documents in the police or preliminary investigation files. In fact, it is desirable that courts should not reach a decision only by reference to a file, but after obtaining a personal, human impression of the perpetrators of and the witnesses to the offence': P. Bouzat and J. Pinatel, *Traité de droit pénal et de criminologie*, Vol. II, 1970, paragraph 1336.

elapse between the date of the hearing and the delivery of judgment, so that the benefit of the hearing was lost, so to speak, as the memory of it faded in the minds of the judges.

85. Because of its temporal dimension, this aspect may appear to relate to the issue of 'reasonable time'. Furthermore, the time taken by a court to give judgment is a factor which is taken into account by the Strasbourg Court to assess whether a period of time is 'reasonable'. It is one of the aspects of the criterion, used by that Court, of the effect of the conduct of the competent authorities, in this case the courts, on the length of the period in question. [37]

86. However, the two aspects are not comparable because, considered in isolation, failure to meet the requirement of 'immediacy' goes to the substance of the case. A breach of the rule invalidates the oral proceedings and its benefits because the content of the discussion, which is an additional element inseparable from the written file, is missed by the judges who constituted the court. A judgment delivered under these conditions may thus overlook essential aspects of the case. In contrast, a breach of the 'reasonable time' principle does not affect the decision. Consequently the damage which it causes cannot be confused with the penalty.

87. It follows that a breach of the two principles does not produce the same consequences. Contrary to what is possible in the case of 'reasonable time', and as in the case of other procedural irregularities which may affect a plaintiff's interests, the proceedings may be annulled and reopened where his interests have not been irremediably damaged.

88. However, before giving a ruling on the plea in question, the Court must state its views on the existence and, if necessary, the force in Community law of the principle of 'immediacy', which means that its place in the Community legal order must be determined.

89. There is no procedural rule which states that judgments of the Court of First Instance must be delivered within a particular period or even within a period which could be described as reasonable, taking care not to confuse the use of this adjective with that referring to 'time' in Article 6 of the Convention, which is more general.

90. However important it is, it does not appear that the principle of 'immediacy' can

37 — European Court of Human Rights, judgments of 7 July 1989 *Unión Alimentaria Sanders SA*, Series A No 157, paragraphs 36 and 41; 26 February 1992 *Biondi*, Series A No 228-C, paragraph 18; and 23 June 1994 *De Moor* v *Belgium*, Series A No 292-A, paragraph 67.

be counted among the general principles of law the observance of which is ensured by the Court. [38]

91. As I have already stated, the Convention does not distinguish the question of the time taken by a court to give judgment from the general problem of 'reasonable time'. Moreover, the requirements of Article 6 of the Convention relate only to a public hearing. [39] However, there is no question arising with regard to the public nature of the hearing in the present case.

92. In the vast majority of Member States the courts must give their decisions within a specified period, normally soon after the conclusion of the hearing (Federal Republic of Germany, Republic of Austria, Kingdom of Belgium, Republic of Finland, Kingdom of the Netherlands and Kingdom of Denmark), or even on the same day, subject to certain exceptions, as the conclusion of the oral proceedings (United Kingdom of Great Britain and Northern Ireland, Kingdom of Spain, Hellenic Republic, Ireland, Portuguese Republic and Kingdom of Sweden).

93. However, two qualifications must be made. Firstly, the rules which give effect to the principle of 'immediacy', unlike the 'reasonable time' principle in certain Member States, are not constitutional but, rather, statutory. They are normally included in codes of civil, criminal or administrative procedure. Secondly, their effectiveness is not systematically guaranteed because, in addition to those States which do not specify a maximum time-limit, there are others which do not attach any penalty to failure to meet the specified time-limit, at least not by invalidating the proceedings in question (United Kingdom of Great Britain and Northern Ireland, Kingdom of Belgium and Kingdom of Denmark).

94. Furthermore, in the present case the question of 'immediacy' arises in relation to a non-national court. The laws of the Member States do not on their own permit the identification of a common supralegal tradition justifying the acceptance of a general principle of law applying to their own courts when dealing with cases based on Community law. In those circumstances, those laws can with even less cause be regarded as suggesting, without the support of a Community provision or a rule contained in international instruments concerning the protection of human rights (such as the Convention), that a rule exists which requires a Community court such as the Court of First Instance to adhere to a time-limit for giving judgment. We have seen that there are no provisions of that kind which imply such a rule.

38 — See points 24 and 25 of this Opinion.

39 — Article 6(1) provides that 'everyone is entitled to a fair and *public* hearing' (emphasis added). The same wording is used in Article 14(1) of the International Covenant on Civil and Political Rights of 16 December 1966 (see R. Lillich, *International Human Rights Instruments*, 1990, p. 170.6). The Covenant likewise does not lay down any principle concerning the time taken by courts, after the hearing has taken place, to give judgment.

95. Of course, care must be taken to ensure that the absence of a rule laying down a maximum period within which a judgment must be delivered does not amount to an acceptance that there is no time-limit whatever to the length of deliberations or lead to the dismissal of any appeal against proceedings which could be described as interminable. On this point it is sufficient to observe that it is precisely the 'reasonable time' principle, already examined, which aims to meet this requirement.

96. Therefore I must conclude that the plea relating to the principle of orality is inadmissible.

C — *Third plea: breach of the principles applying in the matter of evidence*

97. BStG objects to the reasoning whereby the Court of First Instance found the facts in question to have been established to the requisite legal standard and dismissed four times the appellant's complaints, its offer concerning witnesses and its request to appear. [40]

40 — The Court of First Instance uses the same reasoning for several offences in four passages of the judgment, as follows: paragraphs 67 and 68, 93 and 94, 119 and 120, and 137 and 138.

98. The appellant contends that the Court of First Instance fundamentally disregarded the principles relating to evidence, concerning both its presentation and its assessment. The Court of First Instance is said merely to have verified that the Commission had 'legally succeeded' in producing proof of certain allegations so as to support the decision in question. The appellant also claims that the Court of First Instance did not ascertain whether the evidence produced by the Commission could have been interpreted differently or whether the evidence offered by the appellant could have cast doubt on the Commission's evidence.

99. The appellant's plea has five limbs:

— the Court of First Instance applied an incorrect criterion, when assessing the evidence, by failing to consider whether the indicia adduced by the Commission could be explained otherwise than by the existence of an agreement;

— by refusing to examine the evidence offered, the Court of First Instance failed to fulfil its 'obligation to examine the case' and breached the 'fair hearing' principle;

— furthermore, the Court of First Instance failed to observe the principle of 'unfettered assessment of evidence' by not examining in detail the appellant's account of the facts and the evidence which it offered to produce;

— the Court of First Instance did not apply the rule that the defendant should be given the benefit of the doubt;

— the offers of evidence by BStG were refused on inadequate grounds, contrary to the right to a fair hearing.

100. The Commission considers it necessary to point out that an appeal to the Court of Justice may be based only on pleas alleging infringement of rules of law, excluding the assessment of facts, and that the criterion used by the Court of First Instance to assess the facts falls logically within the latter category. The Commission disputes the appellant's argument that the Court of First Instance must always allow requests for measures of inquiry and observes that the measures of procedural organisation taken by the Court, in the form of questions to the appellant, show that the Court did not neglect to examine the appellant's evidence.

101. BStG replies that the Court of Justice has jurisdiction to hear an appeal on the ground of a procedural irregularity and that it may examine the rules and the general principles of law concerning the burden of proof in the same way as the procedural rules for the administration of evidence. BStG adds that measures for the organisation of procedure cannot replace measures of inquiry and that the unjustified refusal of an offer of evidence amounts to a premature assessment of evidence prohibited by Community law.

1. *The criterion for examination by the Court of First Instance*

102. First of all, let me say that the appellant has no justification for saying that the Court of First Instance did not carry out an adequate examination of the facts which it put to it. It is clear from paragraph 61 of the contested judgment concerning the 1985 agreement between BStG and Tréfilunion, paragraphs 84 to 86 concerning the agreements on quotas and prices with the Benelux producers, paragraphs 111 to 113 concerning the agreement between BStG and Tréfilarbed, and paragraphs 125 and 126 concerning quota and price agreements on the Benelux market, that the Court gave a complete account of BStG's arguments.

103. In its reply to the Commission, BStG makes it clear that the issue is not the assess-

ment of the evidence itself, but the Court's criterion for assessing it and the extent of its review. [41]

104. I do not think that the distinction made by the appellant is justified. To cast doubt on the criterion used by the Court of First Instance amounts indirectly to questioning its discretion, that is to say, criticising the conclusions it reached on the evidence put before it. The appellant does the same in claiming that the Court of First Instance did not take account of other, more favourable, assumptions, because it was by exercising its discretion that it ruled out those assumptions and took a different approach.

105. Therefore it is necessary to apply the settled case-law of the Court of Justice which states that it is clear from both Article 49, first paragraph, of the EC Statute of the Court of Justice, Article 168a of the Treaty and Article 51 of that Statute, and also from Article 112(1)(c) of the Rules of Procedure of the Court of Justice, that the latter does not have jurisdiction to make findings as to the facts or, in principle, to examine the evidence used by the Court of First Instance in support of those facts. According to the same case-law relating to the abovementioned provisions, it is for the Court of First Instance alone to assess the value which should be attached to the items of evidence produced to it. [42] Therefore, such appraisal does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice. [43]

106. In support of its complaint, BStG has failed entirely to show that the Court of First Instance manifestly misinterpreted the evidence before it. Moreover, in this part of its submissions BStG does not specify which statements in the Court's judgment, which it contends should be set aside, allegedly indicate such distortion.

107. Let me add, although it is not really necessary, that BStG's argument may also be understood as insisting on a requirement that a more complete statement should be given of the reasons on which the judgment is based, including observations on alternative explanations, favourable to the applicant, of the facts submitted to the Court of First Instance. The Court of First Instance, it argues, has an obligation to show that it did not fail to examine the facts in the light of the explanations given by one of the parties.

41 — See paragraph 36 of the appeal.

42 — See, in particular, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 47 to 49 and 66; the order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 36 to 41; *Blackspur DIY and Others* v *Council and Commission*, cited above, paragraph 29; and the order in Case C-55/97 P *AIUFFASS and AKT* v *Commission* [1997] ECR I-5383, paragraphs 24 and 25.

43 — See, in particular, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, and *Blackspur*, cited above, paragraph 29.

108. Obviously, the Court of First Instance must state the reasons on which its judgments are based. [44] Those judgments must therefore clearly state the reasons which convinced the Court and the reasoning of the Community authority which led to the Court's conviction, in such a way that the parties may be aware of the elements in the reasoning which were accepted and so that the Court of Justice can exercise its power of review.

109. However, it seems to me excessive, where the reasoning of the judgment is based on detailed facts, as in the present case, and not on assumptions, to require the Court of First Instance to indicate why it formed the view that the circumstances adduced by one party to throw a different light on the facts in issue lacked persuasive power. It cannot be inferred, from the fact that there was no formal discussion by the Court of First Instance of the explanations offered by one party, that those matters were not examined, since the Court's reasoning is based on detailed circumstances and implicitly, but necessarily, excludes the appellant's arguments.

110. On this point BStG merely gives a general appraisal of the reasoning of the Court of First Instance judgment and fails to offer any support for its own argument. [45]

111. Consequently the first limb of the third plea must be ruled inadmissible.

2. The obligation on the Court of First Instance to 'examine the case' and the 'fair hearing' principle

112. According to BStG, these principles require the Court of First Instance to allow offers of evidence, save in certain limited cases which have not been shown to exist here. It considers that the refusal of its offers to produce witnesses and to appear personally amounts to a premature assessment of evidence, which is incompatible with the principles of the rule of law. BStG adds that, even if no offers had been made, the principle that in criminal proceedings a court must enquire into the facts without being bound by the parties' applications means that it must of its own motion extend its examination to all the evidence, and that this obligation to examine the case of its own motion means also that the Court of First Instance ought to have attempted to obtain the best possible evidence.

44 — Articles 33 and 46, first paragraph, of the EC Statute of the Court of Justice. See the orders in Case C-59/96 P *Koelman* v *Commission* [1997] ECR I-4809, paragraphs 54 and 55, and in *AIUFFASS and AKT* v *Commission*, cited above, paragraph 23.

45 — The Court of Justice has already held that the failure by the Court of First Instance to take account of certain evidence was within the jurisdiction of the Court of Justice, but that proof of such failure had to be adduced beforehand so that conclusions could be validly drawn from it (see Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraphs 32 and 33). This is all the more true where a party claims that the Court failed to take account of an explanation given by it in order to place in a more favourable light the acts which it is alleged to have committed.

113. First of all, it must be borne in mind that the Court of Justice has jurisdiction to review observance of the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence. [46]

114. Apart from that derived from Article 6 of the Convention, the principles on which the appellant relies are not embodied in specific rules which would make it possible to ascertain their meaning and effect and to establish whether they have binding force. I must therefore confine my discussion to the provisions of the Convention.

115. Article 6(3)(d) provides that 'Everyone charged with a criminal offence has the following minimum rights: ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. [47]

116. That provision, as construed by the European Court of Human Rights, does not impose an unconditional obligation on a court to accept offers of witness evidence by parties.

117. For example, in the *Vidal* v *Belgium* judgment of 22 April 1992, the Strasbourg Court observed that 'Article 6§(3)(d) ... leaves it to [the national courts], again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system ... it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter" ...'. [48]

118. Therefore it appears that the right to obtain an examination of a witness is conditioned by the 'fairness' of the proceedings, which may be deemed to be affected in a case in which the testimony of a witness requested by the person charged is refused where it might have given the court evidence capable of countering the testimony of a prosecution witness.

119. In the present case it must be held that the Court of First Instance did not carry out the examination of witnesses in a way which indicates an arbitrarily selective assessment of the testimony necessary for its decision.

120. Concerning BStG's argument that offers of evidence by parties may be refused only subject to very strict conditions, regard must be had to Article 66(1) of the Rules of Procedure of the Court of First Instance: 'The

46 — See, in particular, the order in *San Marco* v *Commission*, cited above, paragraph 40.

47 — The wording of Article 14(3)(e) of the International Covenant on Civil and Political Rights, cited above, is identical.

48 — European Court of Human Rights, Series A No 235-B, paragraph 33.

Court of First Instance, after hearing the Advocate General, shall prescribe the measures of inquiry *that it considers appropriate* by means of an order setting out the facts to be proved.' [49] This confirms that the Court of First Instance remains competent to assess the relevance of the evidence put before it. [50]

121. In addition, the Court of First Instance cannot be required to examine systematically the witnesses offered by the parties, without interfering with the smooth conduct of the proceedings, which is frequently threatened by delaying tactics, or to refrain from exercising its discretion with regard to the evidence before it, which includes the option to refuse a measure if it considers that sufficient information is provided by the documents in the file.

122. In this respect the Court of First Instance appears to be justified in making any decision to accept offers of evidence subject to the condition that the party concerned should specify grounds likely to justify the examination requested. [51]

123. Moreover, the Court of First Instance ordered measures of procedural organisation in the form of questions to which the parties were asked to reply in writing. [52] It is common ground that, of the seven questions put to the appellant, five related expressly to its offers of evidence and at least one aimed to obtain from the appellant particulars of 'the concrete, factual reasons why it [disputed] the manifest content of the documents produced'. [53]

124. This shows, if confirmation were needed, that the Court of First Instance did not neglect to examine the offers of evidence submitted to it.

125. In my opinion, therefore, it was with a view to the proper administration of justice and in compliance with the relevant rules that the Court of First Instance was able to accede to the requests for personal appearance and for the hearing of witnesses without prejudging the main issue, as the Court guarded against any risk of an arbitrary decision by examining the reasons for the offers of evidence, subject to giving sufficient grounds in law for the decision on the main issue, as we shall see later, when discussing the plea alleging breach of Article 85(1) of the Treaty.

49 — Emphasis added.

50 — See the order in Case C-140/96 P *Dimitriadis* v *Court of Auditors* [1997] ECR I-5635, paragraphs 27 and 28. The Court of Justice has also ruled that the Court of First Instance may refuse a request for an expert opinion on the ground that the measure of inquiry requested 'would serve no useful function for the Court, which considers that it has received sufficient information from the entire course of the proceedings'. It is true that the plea was not immediately directed against that ground (see Case C-326/91 P *De Compte* v *Parliament* [1994] ECR I-2091, paragraph 123).

51 — See Case 35/67 *Van Eick* v *Commission* [1968] ECR 329.

52 — See paragraphs 13 and 14 of the judgment.

53 — See paragraph 29 of the Commission's statement in reply.

3. *The principles of 'unfettered assessment of evidence' and 'benefit of the doubt'*

126. In the third limb of the third plea, BStG complains that the Court of First Instance omitted to examine the facts in detail and to exhaust all the sources of information available to it. It also complains, in the fourth limb, that the Court did not give it the benefit of the doubt resulting from its explanation of the evidence presented by the Commission.

127. In reality the appellant is seeking to challenge the Court's appraisal of the value of the evidence before it. As I have pointed out, [54] such appraisal does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice. BStG adduces nothing to support its argument to show that the conclusions reached by the Court of First Instance in its reasoning on the basis of the evidence before it were manifestly wrong.

128. As I have already said, it is for the Court of First Instance, precisely by virtue of the same discretion as that to which the appellant refers, to decide whether that evidence is sufficient to establish the facts so that no doubt remains.

129. Furthermore, it must be noted that BStG has not put forward any argument to show that the Court of First Instance made a mistake in law in its appraisal, neither has it specified the points criticised in the judgment which it seeks to have annulled. The appellant has not referred to the breach of any rule of law and merely disputes the assessment of the facts by the Court of First Instance.

130. The third and fourth limbs of the third plea must for that reason be ruled inadmissible.

4. *Reasons for refusing offers of evidence*

131. The reply to the argument that the Court of First Instance did not state sufficient reasons for refusing BStG's offers of evidence is closely related to the Court's discretion to assess the value of the evidence available to it. In other words, if the Court considers that the probative value of the documents in the file is sufficient to persuade the Court, it must then — first and foremost — state the grounds justifying the decision on the main issue. If

54 — Point 105 above.

this condition is fulfilled, I consider that the Court can then refuse, with a brief statement of reasons, the offers of evidence made to it.

132. It follows that the Court of First Instance was not in breach of the obligation to state reasons by merely indicating that it would not take action on the appellant's offers with regard to the examination of witnesses and its own personal appearance, because the Court took care to set out first the reasons why it considered that the Commission had established to the requisite legal standard the acts alleged to have been committed by BStG. I shall consider this last-mentioned statement of reasons, in so far as it is challenged, when I come to the sixth plea alleging breach of Article 85(1) of the Treaty.

133. The fifth limb of the third plea must accordingly be dismissed as unfounded and that plea dismissed in its entirety.

D — *Fourth plea: breach of the rules concerning offers of evidence out of time*

134. BStG complains that the Court of First Instance misinterpreted Article 48(1) of its Rules of Procedure when it refused the appellant's offers of evidence as being out of time in paragraphs 94, 120 and 138 of the judgment.

135. The Commission replies that the Court followed its settled case-law in finding that offers of evidence made for the first time in the reply constitute a delay for which reasons must be given.

136. In the paragraphs referred to by BStG, the Court dismissed the offers, which the appellant made in the reply, concerning the examination of witnesses and the appellant's own personal appearance, on the ground that they were out of time because the appellant had not shown any reason which prevented it from making them in the original application.

137. Article 48(1) of the Rules of Procedure provides that 'in reply or rejoinder a party may offer further evidence. *The party must, however, give reasons for the delay in offering it*'. [55]

138. It is clear from this that the parties must set out the circumstances justifying the offer

55 — Emphasis added.

of evidence at the stage of the reply. The purpose of this requirement is to enable the Court of First Instance to assess the merits of the reasons given for the delay and to decide on the admissibility of such offers in full knowledge of the facts. This is because the offers are not only made at an advanced stage of the procedure, but they may also give rise to further delays in the course of the procedure and new measures of inquiry may have to be ordered if the Court considers them necessary.

139. Therefore the Court of First Instance correctly applied Article 48(1) of its Rules of Procedure in justifying the refusal of BStG's offers of evidence by the fact that no reasons were given for the delay in offering it.

140. The appellant does not deny that the offers of evidence appeared for the first time in the reply and that it gave no reasons for the delay. It merely seeks to justify it at the appeal stage, contrary to Article 48(1), which requires the reasons for the delay to be set out before the Court of First Instance.

141. Furthermore, the appellant suggests that the scope of Article 48(1) is narrower than it really is because it proposes that decisions of inadmissibility should be limited to offers of evidence which may delay the proceedings and, according to the appellant, this was not the case with regard to its offers of evidence. The appellant goes on to suggest that Article 48(1) can be used only to refuse offers of new evidence in support of new facts.

142. Apart from the fact that the appellant did not set out these arguments before the Court of First Instance in an attempt to justify its delay, which obviously means that it cannot do so before the Court of Justice, this interpretation of Article 48(1) is not consistent with its wording, as the application of the provision does not appear to depend on whether the offer of evidence would actually affect the proper conduct of the proceedings. In addition, Article 48(1) does not require reasons for delay to be given only in relation to offers to prove new facts. It is clear that the appellant is making these distinctions in order to mitigate the breach of that rule which the Court of First Instance found that it had committed.

143. Finally, BStG considers, in the alternative, that the judicial duty of care and the quasi-criminal nature of the penalties imposed mean that the Court of First Instance must examine of its own motion the evidence relied upon, even if there is a delay in offering it. Article 48(1) should thus apply only in proceedings which do not have a punitive purpose.

144. As I have already mentioned, [56] the appellant does not relate to any specific rule the principles which it relies upon to challenge, on grounds other than the abovementioned provisions of Article 48, the refusal by the Court of First Instance to accept its offers of evidence. The appellant's suggested questioning of the validity of that rule requires at the very least that it should set out before the Court of Justice an argument with precise and specific references. As the appellant has not done so, it is sufficient to observe, once again, that there are no grounds for making distinctions between proceedings where Article 48 itself does not do so.

145. The plea alleging breach of the rules concerning offers of evidence out of time must therefore be declared inadmissible.

E — *Fifth plea: infringement of the right of access to the file*

146. The appellant claims that the Court of First Instance infringed the rights of the defence by refusing its request for access to the file.

147. In dismissing, first, the request for the production of all the procedural documents, the Court of First Instance observed that

'the [appellant] does not deny having received, in the course of the administrative procedure before the Commission, all the documents from the file that were of direct or indirect concern to it and on which the statement of objections was based',

and that

'the [appellant] has not produced any evidence to show that other documents were relevant to its defence',

which led the Court to conclude that

'the [appellant] was enabled to put forward, as it wished, its views on all the objections made by the Commission against it in the statement of objections which was addressed to it and on the evidence supporting those objections, mentioned by the Commission in the statement of objections or in the annexes thereto, and that, accordingly, the rights of the defence have been safeguarded'.

The Court added that

'It follows that, both in preparing its application and in the proceedings before the Court, the [appellant's] lawyers have had an opportunity to examine the legality of the Decision

56 — See point 114 above.

in full knowledge of the circumstances and fully to provide for the [appellant's] defence'. [57]

148. Second, in dismissing the request for the production of all the documents from the Federal Cartel Office and the documents concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German undertakings involved in the structural crisis cartel, the Court of First Instance observed that:

'the [appellant] does not claim that, through not having such documents at its disposal, it was unable to defend itself against the objections raised against it and that it has adduced no evidence to show how such documents might contribute to determination of the present dispute'

and that

'in any event, ... the documents concerned relate to the structural crisis cartel which does not, as such, form part of the infringements covered by the Decision ... and ..., therefore, the documents relating to that cartel are unconnected with the subject-matter of these proceedings'. [58]

149. BStG contends that the rule that the Commission must make available to undertakings involved in a procedure pursuant to Article 85(1) of the Treaty all the documents, whether in their favour or otherwise, which it has obtained during the course of the investigation applies not only to the administrative procedure, but also to the procedure before the Court of First Instance. The Court's demand for evidence to show that other documents are relevant to the appellant's defence fails to take account of the fact that the appellant cannot judge the importance of a document the existence and contents of which are unknown to it. The importance attached to the structural crisis cartel in the contested judgment means that the refusal of the request for the production of documents relating to the cartel amounts to an infringement of the rights of the defence.

150. I have previously had occasion to set out the reasons why I consider it essential to make it a fundamental principle of Community law that an undertaking involved in a procedure under Article 85(1) of the Treaty should have a right of access to the entire file during the administrative procedure. [59]

151. Access to documents, whether incriminating or exculpatory, makes it possible to verify not only whether the Commission has disregarded the latter type, but above all that it has evaluated them correctly.

57 — Paragraph 34 of the judgment.
58 — Ibid., paragraph 35.

59 — See point 87 et seq. of my Opinion in *BPB Industries and British Gypsum* v *Commission*, cited above.

152. Adherence to this principle during the administrative procedure has now been facilitated by the method described by the Commission, with a view to greater transparency, in the *Twenty-third Report on Competition Policy* of 5 May 1994:

'With the Statement of Objections the Commission sends a copy of all the documents on which it is relying to establish the existence of an infringement. It also sends any documents that, on the basis of careful examination of the file, appear to go against or contradict the Commission's case (known as "exculpatory" documents). If an undertaking thereafter makes a reasoned request that the Commission re-examine its file to determine whether it has any further documents which concern a specified matter that the undertaking considers useful to its defence, the Commission will do so, and forward any such documents.' [60]

153. In the present case I do not think that the requirements relating to the transparency of the administrative procedure were disregarded, during the judicial proceedings, as a result of the decision of the Court of First Instance not to grant the request for access to the file.

154. As the Court of First Instance observed in paragraph 34 of its judgment, BStG received all the documents that were of direct or indirect concern to it and on which the statement of objections was based. Furthermore, in exercising its absolute power to make factual findings, the Court observed, in paragraph 23, that the letter of 12 March 1987 from the Director-General for Competition accompanying the statement of objections showed that 'the main documents concerning the case were enclosed and that, in order to avoid any disclosure of business secrets, only the documents of direct or indirect concern to the addressee undertaking were enclosed', adding that 'the undertakings were entitled, in order to prepare their observations, to examine other documents held by the Commission, subject to obtaining prior authorisation'.

155. In order to explain why it did not request authorisation at that time, BStG states that it was not represented by a lawyer during the administrative procedure and that it did not examine the file since the complaints of which it had been notified did not hold it responsible.

156. However, after observing that the letter of 12 March 1987 showed 'that the Commission considered that the addressee undertakings had infringed Article 85 of the Treaty', [61] the Court of First Instance states that the appellant was '*one of the addresses* of the

60 — COM(94) 161 final. More recently, the Commission has clarified the procedural rules which aim to reconcile respect for the rights of the defence, which require effective access to the file, and protection for confidential information concerning firms. The Commission gives a broad definition of 'communicable documents' which excludes only documents covered by business secrets, other confidential documents and internal Commission documents (Commission Notice 97/C23/03 on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation No 4064/89 (OJ 1997 C 23, p. 3)).

61 — Paragraph 23 of the judgment.

statement of objections ..., that it was *designated by name* on several occasions in the analysis contained in the factual part and in the legal assessment of the statement of objections ... and that it received numerous annexes on which the Commission based its objections'. [62] The Court adds that the appellant sent a letter to the Commission in which it submitted written observations on the statement of objections and asked for a hearing.

157. It is clear from these numerous findings that BStG was directly implicated by the statement of objections. The Court of First Instance was therefore justified in finding that the fact that BStG did not appoint a lawyer was a matter of its own choice and that the administrative procedure was not affected by a breach of the rights of defence. It should be added that the appellant does not deny that it refrained from enquiring as to the Commission's position, in spite of the information in the statement of objections, concerning the extent of the appellant's involvement in the offences in question. Consequently, the Court of First Instance was justified in finding, without infringing the rights of defence, that it was unnecessary to order the Commission to produce the documents requested, as the appellant had not adduced any evidence to show that other documents were necessary for its defence.

158. On this point I think that the effective grant of the right of access to the file, as confirmed during the administrative procedure, entitled the Court of First Instance to require the appellant to produce 'evidence to show that other documents were relevant to its defence' [63] before ordering the production of documents during the judicial proceedings. There can certainly be no question of requiring the undertaking concerned to show the effects which the document requested might have had on the decision, which presupposes that the undertaking knew the detailed contents of the document. This would amount to imposing on it an impossible burden of proof. [64] The undertaking must merely provide the Court with information showing that the document could be useful for the purposes of the case.

159. For reasons of the proper administration of justice, the right of access cannot be absolute. It must therefore not be possible for the undertaking concerned to challenge the failure to disclose any document in the file without previously identifying it and without showing — to however limited an extent — how it will assist that undertaking. [65]

160. It would also be necessary for the undertaking to be aware of the document's exist-

62 — Ibid., paragraph 24, emphasis added.

63 — Ibid., paragraph 34.

64 — See points 119 and 120 of my Opinion in *BPB Industries and British Gypsum* v *Commission*, cited above.

65 — Point 120 of my Opinion in *BPB Industries and British Gypsum* v *Commission*, cited above. See also the Opinion of Advocate General Cosmas delivered on 15 July 1997 in Case C-199/92 P *Hüls* v *Commission*, not yet published, points 52 to 56.

ence, which is precisely what the principle of access to the entire file aims to safeguard. [66]

161. In the *BPB Industries and British Gypsum* v *Commission* judgment the documents which were not disclosed were identified, so that the only point in dispute was whether they 'fell within the categories of documents which the Commission may legitimately refuse to disclose by reason of their confidential nature'. [67]

162. In the present case, paragraph 23 of the contested judgment shows that, among the documents requested, those of direct or indirect concern to the appellant had already been disclosed, the others being covered by the obligation of secrecy.

163. It is clear that, under those circumstances, BStG could not request the production of documents which had already been sent. With regard to those which were not disclosed, it is sufficient to observe that, during the administrative procedure, the appellant did not try to ascertain their subject-matter or the reasons why they were confidential, although it was aware that they would in principle not be disclosed and the Commission had informed it of its right to examine them, subject to authorisation.

164. With regard to the request to examine the documents sent to the Commission by the Federal Cartel Office and those concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German undertakings involved in the structural crisis cartel, the grounds for refusing BStG's request do not appear excessive. [68]

165. The contested Decision gives a very detailed account of the connection between the structural crisis cartel and the anti-competitive conduct found to exist, [69] from which it appears, as the Court of First Instance confirmed in paragraph 55 et seq. of its judgment, that the cartel did not, as such, form an integral part of the infringements ascertained by the Commission. As the appellant was unable to point to a particular document, on the ground that the documents were apparently not included in the Commission's file and therefore had not already been sent to the appellant, the latter ought at least to have stated the reasons why it considered it would be useful to examine them, since they were not directly connected with the conduct the subject of complaint, other than that described by the Decision. It seems to me reasonable, on the same grounds as those relating to the

66 — The problem of the identification of documents useful to the defence of undertakings involved in inquiries into a suspected offence now appears to have been resolved by the Commission Notice cited above, which provides for an enumerative list of documents, with continuous numbering of all the pages of the investigation file (paragraph 1.4).

67 — Paragraph 24.

68 — See point 148 above.

69 — See paragraph 126 et seq. of the Decision.

procedural documents, that this should be a preliminary requirement for a request by BStG for production. The Court of First Instance was therefore entitled to find that the appellant had failed to state reasons justifying access to these documents.

166. The plea alleging infringement of the right of access to the file must for these reasons be dismissed.

F — *Sixth plea: infringement of Article 85(1) of the Treaty*

167. According to BStG, the contested judgment contravenes Article 85 of the Treaty by failing to assess certain facts put forward by BStG and by disregarding certain matters referred to in Article 85(1) and (3).

1. *Demarcation of the market*

168. BStG contends that the Court of First Instance did not give sufficient grounds for part of its judgment dealing with the demarcation of the market in question. BStG argues that, contrary to what the Court says, it never stated that it could manufacture standard mesh on its machines or that catalogue mesh and standard mesh were interchangeable. Under those circumstances, BStG indicates that it had no interest in participating in agreements concerning standard mesh.

169. The appellant adds that it would not have been a suitable partner for entering into an agreement with producers from other Member States because less than 2% of its production was exported to other Member States and 99% of those exports were of catalogue mesh. BStG complains that the Court of First Instance did not note this point and that it failed to examine the submissions based on the small size of the markets for catalogue mesh outside Germany and on the insignificant delivery flows between States.

170. The Commission considers that BStG is wrongly trying to obtain a review by the Court of Justice of factual findings.

171. Regarding BStG's capacity to produce other types of welded steel mesh, the Court of First Instance found that 'certain undertakings to which the Decision relates, including the [appellant], have the capacity to produce different kinds of welded steel mesh, so that it may reasonably be concluded that there is some capacity in the industry to adapt the production plant in order to produce the different kinds of welded steel mesh'. [70]

70 — Paragraph 41 of the judgment.

172. It is unfortunate that the Court of First Instance did not set out the evidence for its statement that the appellant had the capacity to produce several kinds of welded steel mesh. The power of the Court of First Instance, recognised by the Court of Justice, to make factual findings and to evaluate the facts does not go so far as to permit it to proceed by mere assertion.

173. However, the reasoning of the Court of First Instance in paragraph 41 of the judgment is purely by way of addition, as the word 'also' indicates. Proof of BStG's capacity to produce types of welded steel mesh other than catalogue mesh is not a decisive factor in its interest in concluding agreements relating to standard mesh if the Court of First Instance has shown, as we shall see, that the two types of mesh are interchangeable. Consequently this cannot be used to challenge the validity of the judgment. [71]

174. Concerning the interchangeability of the products, the Court of First Instance observed, on the basis of factual findings and assessments which are not open to review by the Court of Justice, that 'the prices of standard mesh and *Listenmatten* to which the [appellant] refers ... are not far removed from each other'. [72] It added that '*the use of standard mesh on a site where tailor-made mesh should normally be used is in fact possible* where the price of standard mesh is so low that the prime contractor can be assured of a significant saving, covering the additional costs and compensating for the technical disadvantages arising from the change of material'. [73]

175. The Court of First Instance has given sufficiently clear reasons why it considered that certain circumstances linked to price levels could induce traders to opt for standard mesh instead of catalogue mesh, thereby demarcating a common market for the two products and showing that the appellant could have had an interest in participating in agreements within that market.

176. The Court of First Instance also confirmed the existence of that interest in making it clear that this price situation favouring interchangeability 'existed for part of the period covered by the agreements'. [74]

177. It must be added that the parts of the judgment relating to the appellant's production of other types of mesh and to the inter-

71 — See, in particular, *De Compte* v *Parliament*, cited above, paragraph 123. With regard to the validity of a judgment certain grounds of which reveal an infringement of Community law, but the operative part of which appears well founded on other legal grounds, see the judgments in Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28, and Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 33.

72 — Paragraph 39 of the judgment.

73 — Paragraph 40 of the judgment, emphasis added.

74 — Ibid.

changeability of standard mesh and catalogue mesh are not supported by the appellant's alleged acknowledgement that they were true, contrary to what it claims.

At most, the Court of First Instance states in paragraph 38 of the judgment that the Commission and BStG were in agreement on the description of the market in question, whereas it is clear from the judgment that there was an appreciable difference in the parties' approach.

In actual fact, the Court of First Instance found that BStG drew a distinction between standard mesh, catalogue mesh of the *Lettermatten* or semi-standardised type, catalogue mesh of the *Listenmatten* type and tailor-made mesh, claiming that the first two types are very similar to each other and that the last two types are also similar to each other but nevertheless display essential differences from the first two. The Court concluded from this that the Decision says nothing to the contrary where it states that 'a high degree of substitutability exists, especially between standard mesh and catalogue mesh' and 'the relevant product market can therefore be said to be the market for welded steel mesh in general, within which there is a sub-market for tailor-made mesh'. [75]

It seems to me that BStG's distinction between a group consisting of standard mesh and semi-standardised mesh, on one hand, and a group consisting of catalogue mesh and tailor-made mesh, on the other, is not the same as the Commission's distinction between catalogue mesh and tailor-made mesh. At this point, therefore, the Court gave contradictory grounds for its judgment.

178. However, I do not think that this defective reasoning can affect the validity of the contested judgment because the reasoning of the judgment relating to the potential substitution of the products in question is sufficient to justify the appellant's interest in concluding agreements on the market in question. [76]

179. With regard to the alleged absence or reasons concerning the small share of BStG's production which is exported, the fact that the exported products were almost entirely catalogue mesh, and concerning the insignificance of the markets for catalogue mesh outside Germany and international flows, the Court of First Instance amplified the grounds for its earlier finding that the different kinds of welded steel mesh are interchangeable.

180. In paragraph 136 of the judgment the Court stated that 'there is a link between the prices of the various kinds of welded steel

75 — Paragraph 38 of the judgment.

76 — See point 173 and the related footnote, along with point 174 et seq. of this Opinion.

mesh, since the price of standard mesh has an influence on that of catalogue mesh and tailor-made mesh ... As an exporter of catalogue mesh, the [appellant] must inevitably have wished to maintain the prices of standard mesh within a certain bracket, as compared with catalogue mesh'.

181. Above all, in replying to the appellant's complaints, the Court added that 'those exports [of catalogue mesh by BStG] were not particularly limited in absolute terms since ... they reached 18 000 tonnes in 1985, including 5 128 tonnes to other Member States of the Community of Six, reflecting export turnover within the Community of DM 4 969 032'.

182. It is clear from all of the foregoing that the Court of First Instance did not fail to fulfil its obligation to state reasons and that the limb of the sixth plea dealing with this point must be declared unfounded.

2. *Application of Article 85(1) of the Treaty to the alleged agreement between BStG and Tréfilunion*

183. In paragraphs 67 and 68 of its judgment the Court of First Instance stated that 'the Commission has established to the requisite legal standard the facts set out in the first paragraph of point 140 of the Decision, namely that Tréfilunion undertook not to lodge a complaint against the structural crisis cartel and that the [appellant] would refrain from exporting catalogue mesh to France for a period of two to three months' and the Court confirmed that 'the Commission was right to consider that they constituted an infringement of Article 85(1) of the Treaty'.

184. BStG claims that the judgment fails to indicate why the agreements with Tréfilunion constituted an infringement of Article 85(1) of the Treaty. The appellant complains that the Court of First Instance did not assess the facts by reference to the requirements laid down by that provision.

185. The appellant contends that the Court of First Instance did not examine its submission that Tréfilunion's undertaking not to lodge a complaint with the Commission against the appellant was a political decision and did not amount to a restriction of competition. BStG adds that the Court likewise did not state its views on whether Mr Müller's undertaking not to export catalogue mesh from the Gelsenkirchen works to France for two or three months was also capable of bringing about such a restriction or of affecting trade between Member States.

186. The Commission submits that the Court made a proper assessment of the contested facts by attaching to them the applicable rule. The Commission adds that some of the appellant's arguments contain new factual allegations which cannot be considered at the appeal stage, but this is disputed by BStG.

187. The appellant's complaint relating to the alleged breach of Article 85(1) of the Treaty must be construed as alleging a lack of reasoning in the judgment of the Court of First Instance or a failure to reply to submissions, which amounts to the same thing.

188. The Court of First Instance found that 'the Decision (point 140) holds that the [appellant] engaged in general concertation with Tréfilunion to limit mutual penetration of their products in Germany and France, that conduct being manifested in three ways: Tréfilunion would not lodge a complaint with the Commission against the German structural crisis cartel; the [appellant's] works in Gelsenkirchen would not export catalogue mesh to France for a period of two to three months; and, finally, the two parties agreed to make their future exports subject to quotas'. [77]

189. From an analysis of two internal memoranda, one by Mr Marie, a director of Tréfilunion, dated 16 July 1985, and the other by Mr Müller, dated 27 August 1985, the Court concluded that 'the Commission has established to the requisite legal standard that there was concertation between the [appellant] and Tréfilunion regarding the first two matters referred to'. The Court considered that 'Mr Marie's commitment not to lodge a complaint against the German cartel must be seen as an agreement to follow a particular course of conduct towards a competitor in exchange for concessions from that competitor, forming part of an agreement in breach of Article 85(1) of the Treaty'. [78]

190. It is therefore clear that, by specifying the role played in the formation of the agreement by Mr Marie's undertaking not to lodge a complaint against the structural cartel, the Court expressly replied to BStG's complaint concerning the Decision. The words used by the Court show that this conduct is not in itself anti-competitive but that it is one of the elements of the agreement which gave rise to concessions in the form of a restriction of exports for a certain time.

191. With regard to the fact that the judgment states no reasons relating to the absence of anti-competitive effects and of interference with trade between Member States, which are said to result from Mr Müller's undertaking not to export, it must be observed that BStG

77 — Paragraph 63 of the judgment.

78 — Paragraph 64.

did not raise those complaints before the Court of First Instance, so that the latter was justified in confining the statement of reasons in the judgment to the submissions relied upon by the appellant.

192. It is clear from paragraph 61 of the judgment, which summarises BStG's submissions to the Court of First Instance, that those submissions merely contend that the memoranda written by Mr Marie and Mr Müller do not prove the conclusion of an agreement. Consequently, apart from the argument that the decision not to lodge a complaint (to which the Court replied, as has been seen) did not have the effect of restricting competition, no further arguments or submissions were raised to which the Court should have replied, and this is confirmed by BStG's application and reply.

193. Furthermore, if such is BStG's intention, it cannot be allowed to submit new pleas before the Court of Justice. The Court's case-law consistently refers to Article 48(2) of the Rules of Procedure of the Court of First Instance, which prohibits the introduction of new pleas in law in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. The Court of Justice has observed that 'to allow a party to put forward for the first time in proceedings before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court — whose appellate jurisdiction is limited — a case of wider ambit than that which came before the Court of First Instance. In an appeal, the Court's jurisdiction is thus confined to a review of the findings of law on the pleas argued at first instance.' [79]

194. It must therefore be found, as I have just stated, that those pleas were not discussed before the Court of First Instance.

195. The second limb of the sixth plea must therefore be ruled partly unfounded and partly inadmissible.

3. *Application of Article 85(1) of the Treaty to the alleged quota and price agreements between BStG and the Benelux producers*

196. BStG complains that the Court of First Instance erred in law in finding that the Commission had established to the requisite legal standard that BStG took part in price and quota agreements with the Benelux producers relating to the German market. The appellant contends that the Court failed to take account of relevant essential facts on which the appellant relied and which none the less cast doubt

79 — See *Commission* v *Brazzelli Lualdi*, cited above, paragraphs 57 to 59, and the orders in *San Marco* v *Commission*, cited above, paragraphs 49 and 50, and in Case C-49/96 P *Progoulis* v *Commission* [1996] ECR I-6803, paragraphs 31 to 33.

on the interpretation of the documents on which the contested Decision is based. The appellant adds that the Court misrepresented the evidence before it.

197. As the Commission correctly observes, BStG is seeking to present as a question of law its criticism of the assessment of the facts by the Court of First Instance.

198. I take the view that the appellant's argument does not meet the requirements laid down, according to the settled case-law of the Court of Justice, for appeals to be admissible. [80]

199. It is clear from the Treaty provisions, the EC Statute of the Court of Justice and its Rules of Procedure, cited in point 105 above, that an appeal must indicate specifically the parts of the judgment which the appellant seeks to set aside and the arguments which specifically support such an application. The Court has held that this requirement is not fulfilled where the appeal merely repeats or reproduces literally the pleas and arguments presented before the Court of First Instance. In reality, such an appeal merely seeks a re-examination of the application to the Court of First Instance, which, under Article 49 of the EC Statute of the Court of Justice, is outside the latter's jurisdiction.

80 — See, in particular, the judgments of the Court of Justice cited in footnote 42 and the orders in Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraphs 10 to 13, and in *Koelman* v *Commission*, cited above, paragraphs 52 and 53. See, more specifically, the order in *San Marco* v *Commission*, cited above, paragraphs 59 and 60.

200. In paragraphs 77 to 79 of the appeal, BStG reproduces lengthy passages from its replies to the questions of 22 April 1993 from the Court of First Instance, in which the appellant gives its own interpretation of some of the documents on which the contested Decision is based. In those observations, which it had already put to the Court of First Instance, BStG explains in essence that the documents in question show that Mr Müller acted as the representative of the Fachverband and the governing board of the German structural crisis cartel association, and not as the chairman of the board of BStG. In these passages it also denies that the documents produced show that BStG was involved in establishing an agreement.

201. The appellant is thus merely contending that the Court of First Instance did not take account of its arguments, but does not refer to any specific plea in law.

202. It also follows from the relevant provisions that it is for the Court of First Instance alone to assess the value which should be attributed to the documents produced before it, provided that the general principles of law and the procedural rules on the burden of

proof and the production of evidence are observed.

203. We have seen, when examining the other pleas, that the Court of First Instance observed the rules and principles applying in the matter of evidence. So far as the present plea is concerned, BStG maintains none the less that the Court misrepresented the evidence before it, but this is not proved by BStG inasmuch as it merely reproduces its original argument.

204. Further, contrary to what BStG claims, the Court of First Instance did not fail to examine its arguments. This is clear beyond doubt from paragraphs 84 to 87 of the contested judgment, which summarise BStG's complaints in support of this limb of the sixth plea. Reading them confirms that they repeat the appellant's reasoning at the stage of the original application. It must also be noted that in paragraph 92 of the judgment the Court of First Instance replied expressly to BStG's argument that Mr Müller acted as chairman of the Fachverband Betonstahlmatten or of the governing board of the cartel and likewise, in paragraph 90 et seq., the Court set out the reasons why it considered that BStG was involved in the agreements with Benelux producers.

205. Consequently BStG has not adduced any serious arguments to show that the Court of First Instance erred in law in its assessment, nor has it specified the parts of the judgment which it seeks to have set aside. In reality, the appellant is not pleading the breach of any rule of law but is merely disputing the assessment of the facts by the Court of First Instance.

206. The third limb of the sixth plea must therefore be declared inadmissible.

4. *Non-application of Regulation No 67/67 to the exclusive distribution agreements between BStG, on the one hand, and Bouwstaal Roermond BV and Arbed SA afdeling Nederland, on the other*

207. According to BStG, the contested judgment does not contain a sufficient statement of reasons. First, the Court of First Instance failed to show that the agreements with Bouwstaal Roermond BV and Arbed SA afdeling Nederland involved a prohibition of parallel imports. On this point, BStG claims that paragraph 103 of the judgment shows that the Court itself was uncertain.

208. Second, the appellant argues that the Court of First Instance did not rule on the Commission's toleration of the agreements in question, which had been submitted to it

when the steel industry of Luxembourg and the Saar was being reorganised.

209. The Commission submits that the appellant's argument that parallel imports were not prohibited in the agreements is a question of assessment of the facts by the Court of First Instance and is therefore not open to appeal. The Commission adds that the submission concerning its supposed toleration of the agreements in question is a new plea which must be declared inadmissible.

210. I think I must agree with the Commission.

211. I have already mentioned the principles developed by the Court's case-law concerning the admissibility of appeals on a point of law. Those principles exclude the assessment of facts from the Court's jurisdiction. [81]

212. The appellant's criticism of the Court of First Instance judgment falls within this logic and cannot be treated as disputing the legal assessment of the facts.

213. It is not disputed that an exclusive distribution agreement with clauses prohibiting parallel imports or having comparable effects cannot be covered by Regulation No 67/67. The point in issue, however, is whether the agreements in question come within that category on the ground that they prevent parallel imports.

214. Only the first of these two problems relates to the legal assessment of the facts. By taking this approach, the Court of First Instance shows that, because of the nature which they are found to have, the facts fall within a particular legal category from which legal consequences flow. When, further on, the Court assesses the facts, it carries out, in contrast, a concrete, detailed examination of those facts in order to determine their salient characteristics. The Court's approach then requires a factual examination of the documents in the file in the sense that this approach takes account of the specific features of the case before it. In the present case, the Court of First Instance examined the provisions of the agreements and the conditions for implementing them in order to identify their particular nature.

215. I accordingly take the view that it is an assessment of facts when the Court observes that, as the agreements stipulate that throughout their currency Bouwstaal Roermond BV and Arbed SA afdeling Nederland are not to make direct or indirect deliveries to the Federal Republic of Germany, 'the meaning of the words "directly or indirectly" ... goes beyond a straightforward commit-

81 — See point 198 et seq. of this Opinion.

ment by a supplier only to deliver to BStG products for resale'. [82]

216. The Court of First Instance observes that 'this view is based on two factors. First, Tréfilarbed Roermond had undertaken expressly not to make deliveries of any kind ... even deliveries not intended for resale. Secondly, the word "indirectly" could be interpreted by the reseller as committing the supplier to take to take the action necessary to preclude deliveries to Germany from other countries, that is to say to control the other exclusive distributors with a view to prohibiting them from exporting to Germany'. [83]

217. The Court adds that 'the abovementioned contractual clauses [may be interpreted] in the light of the complaints from the applicant contained in its letter of 26 September 1979 ... in which it criticises Arbed regarding indirect deliveries to Germany "through Eurotrade, Alkmaar"', which the Court finds is 'conducive to the conclusion that there was absolute territorial protection contrary to the spirit and letter of Regulation No 67/67'. [84]

218. As the appellant observes, the judgment may appear to be based on a dubious ground when, in paragraph 103, the Court of First Instance states that 'the word "indirectly" *could* be interpreted by the reseller as committing the supplier to take the action necessary to preclude deliveries to Germany from other countries'. [85]

219. It would be possible to find once again that the ground in question is not the only ground in support of the Court's assessment of the facts before it. Assuming that this part of the reasoning were invalid, it would follow that the account of the other factors establishing territorial protection would be sufficient to consider that the obligation to state reasons had been fulfilled. The fact that this particular ground is superfluous would mean that its questionable nature should not have radical consequences.

220. However, I think that the meaning of the ground in question is explained and reinforced by other parts of the judgment and that it is the first stage in a more general process of reasoning. The relative uncertainty attaching to the word 'indirectly' is to a large extent removed by paragraph 105 of the judgment, which refers to complaints by the appellant to Arbed concerning indirect deliveries to Germany. This reference to the practices arising from the agreements confirms the Court's assumption, based on the actual provisions of those agreements, that the true objective of the contracting parties was ter-

82 — Paragraphs 102 and 103 of the judgment.
83 — Paragraph 103.
84 — Paragraph 105.
85 — Emphasis added.

ritorial protection. The clause prohibiting the making of deliveries 'indirectly' to Germany is therefore only one item of evidence among others.

221. As can be seen, the ground in question appears to fulfil the Court's obligation to state reasons when read in conjunction with the other parts of the reasoning.

222. Finally, paragraph 98 of the contested judgment shows that the appellant had already maintained before the Court of First Instance that the agreements in question were not intended to prevent parallel imports. It is clear that BStG's complaint, which is identical to that raised before the Court of First Instance, seeks to question that Court's assessment of the facts.

223. Consequently, the part of the appellant's argument concerning the very existence of stated reasons must be declared unfounded, while the part relating to the substance of those reasons must be dismissed as inadmissible because it seeks to challenge the Court of First Instance's assessment of the facts.

224. I also take the view that the plea alleging that the Commission tolerated the exclusive distribution agreements must be dismissed inasmuch as the Court of First Instance did not fail to comply with its obligation to state reasons.

225. It is true that BStG stated before the Court of First Instance that 'according to the information in the possession of the [appellant's] contracting partner, the agreements were ... submitted on several occasions to the approval procedure with the Commission in connection with the reorganisation of the Luxembourg and Saar steel industry, and the Commission never expressed any doubts as to their legality', [86] and that the Court did not state any views on the subject.

226. To establish the extent of the Court's obligation to state reasons, it is necessary to determine the exact nature of the observations in question.

227. If these constituted a plea in law, they could not have been introduced in the course of proceedings, at the stage of lodging the reply, unless they were accompanied by proof that they were based on matters of law or fact which came to light in the course of the procedure, which is unlikely and, in any event, has not been proved. In that case, however, the Court would at least have had to rule on the admissibility of the plea.

86 — Paragraph 17 of the reply.

228. However, it seems to me that BStG's complaint must be regarded as an argument in support of a plea already presented at the stage of the application, rather than as a plea *stricto sensu*. [87]

229. Although the Court of First Instance has a duty to give a ruling on all the pleas in law and arguments raised by the parties, I consider that it need not do so where the arguments relied upon do not fulfil certain minimum conditions.

230. It seems to me contrary to the principles of the proper administration of justice to require the Court of First Instance to reply to every argument of the parties where these are found to be merely general and unspecified allegations which do not appear to be supported by any proof whatever. Such a requirement, on the pretext of protecting the parties against a denial of justice or failure to state reasons, would be likely to encourage the proliferation of unfounded complaints, some of which could arise from the parties' sole aim of weakening the Court's judgment in order to secure the option of challenging its validity, if necessary.

231. In the form in which it is worded, BStG's argument has the characteristics of complaints of this kind. First, it takes the form of a mere allegation consisting of a non-specific reference to information which the appellant admits it does not possess because it is said to be in the hands of its contracting partner. Second, BStG makes no offer of any kind to substantiate the truth of its complaints. Having regard to these circumstances, I am bound to conclude that the substance of the complaint was not such as to justify dealing with it separately from the plea relating to the application of Regulation No 67/67, to which the Court of First Instance did reply.

232. I therefore propose that the Court find that BStG's argument did not call for a separate reply from the Court of First Instance and that the complaint of the lack of a statement of reasons be dismissed as unfounded.

233. The fourth limb of the sixth plea must accordingly be dismissed in its entirety.

5. *Application of Article 85(1) of the Treaty to the quota and price agreements for the Benelux market*

234. The Court of First Instance found that 'the Commission has established to the requisite legal standard that the [appellant] par-

87 — The Commission's toleration of the agreements in question is pleaded by BStG to support the plea that they are exempted pursuant to Regulation No 67/67. This plea was raised when the action was brought before the Court of First Instance. The reply shows that the appellant considers that the exemption of the agreements is confirmed by the fact that the Commission raised no objection when it was notified of the agreements. For the distinction between an argument and a plea, see the judgment in Case C-153/96 P *De Rijk* v *Commission* [1997] ECR I-2901, paragraph 19, and my Opinion in that case, point 21.

ticipated in the price agreements on the Benelux market and in the agreements on quantitative restrictions on German exports to the Benelux and the communication of export figures'. [88]

235. BStG contends that the Court of First Instance misapplied Article 85(1) of the Treaty because it failed to take account of important information which BStG had put before it. The appellant states that the Court of First Instance overlooked the fact that BStG employees attended producers' meetings only as representatives of the structural crisis cartel association or of the Fachverband, and not as representatives of BStG. The appellant points out that it was not interested in price agreements relating to standard or semi-standard mesh, and that there were few meetings at which German representatives were present.

236. The appellant adds that the reasoning of the judgment is contradictory and contends that mere presence at a meeting during which other undertakings conclude an agreement on prices cannot amount to a breach of the abovementioned provision if the undertaking in question does not itself distribute the products which are the subject of the agreement. As BStG exports catalogue mesh to the Benelux countries, it cannot be accused of participating in agreements relating to the prices of standard mesh.

237. The Commission takes the view that the appellant's complaints seek to question the Court of First Instance's assessment of the evidence before it, which is not a question of law subject to review by the Court of Justice, unless that evidence was misrepresented. The Commission adds that such misrepresentation has not been proved. Finally, it observes that the reasoning of the Court of First Instance is not contradictory.

238. Once again, I wish merely to refer to my earlier remarks relating to the Court's settled case-law regarding the exclusive jurisdiction of the Court of First Instance to make findings as to the facts and to examine the evidence before it. [89]

239. Regarding the issue of Mr Müller's capacity, the Court of First Instance observed that it could not 'for the same reasons as those set out in paragraph 92 above, accept the [appellant's] argument that Michael Müller, its chief executive, acted only in his capacity as chairman of the Fachverband Betonstahlmatten or of the supervisory body of the cartel and not as chairman of the [appellant]'. [90]

240. The Court considered that 'that argument is not supported by any evidence'. It

88 — Paragraph 137 of the judgment.

89 — See points 105 and 198 et seq. above.

90 — Paragraph 135 of the judgment.

added that 'at the hearing, Mr Müller stated that "throughout the term of the cartel agreement, he never acted in the name of the association for matters of any importance whatsoever on the German or other markets"'. [91]

241. The Court of First Instance acted entirely in accordance with the rules on the burden of proof in finding that the appellant had not proved its statements. As it was not disputed that Mr Müller, BStG's representative, had attended meetings designed to fix prices, [92] the Court rightly took the view that it was for BStG to prove that he had acted in other capacities.

242. The Court of First Instance was therefore entitled, in its absolute discretion, to find that this had not been proved, and it is thus not for the Court of Justice to question that conclusion.

243. The Court of First Instance likewise gave an express ruling on BStG's interest in concluding agreements on the Benelux market. As I have already mentioned, [93] the Court of First Instance stated that it could not 'accept the [appellant's] argument as to its lack of interest in participating in the price agreements by reason of the small quantities of catalogue mesh exported by it. It must be observed, first, that those exports were not particularly limited in absolute terms since ... they reached 18 000 tonnes in 1985, including 5 128 tonnes to other Member States of the Community of Six, reflecting export turnover within the Community of DM 4 969 032. Secondly, it must be borne in mind that there is a link between the prices of the various kinds of welded steel mesh, since the price of standard mesh has an influence on that of catalogue mesh and tailor-made mesh ... As an exporter of catalogue mesh, the [appellant] must inevitably have wished to maintain the prices of standard mesh within a certain bracket, as compared with catalogue mesh. Thirdly, and finally, it must be found that the agreements to which the applicant was a party were on a basis of reciprocity. BStG complied with the Benelux market prices and quotas and the Benelux producers did the same on the German market.' [94]

244. This careful reasoning shows that the Court of First Instance carried out a proper examination and sufficiently established the nature of the appellant's potential interest in participating in agreements relating to the prices of standard or semi-standard mesh. Consequently, here again the Court's conclusion cannot be questioned without contravening the jurisdiction rules.

91 — Paragraph 92.
92 — Paragraph 131.
93 — Points 179 to 182 above.
94 — Paragraph 136 of the judgment.

245. Finally, the judgment shows that the Court did not overlook the meetings attended by the appellant's representatives since it observes that BStG 'admits its participation in certain meetings' [95] and finds that 'the [appellant] participated in six meetings', [96] so that it cannot be argued that the Court of First Instance disregarded this point. In fact it appears that, in exercising its absolute power to make findings as to the facts, the Court did not consider that the relative proportion of meetings which the appellant's representatives could have attended was such as to reduce the company's responsibility. On this point, as on the previous points raised by BStG, the Court of Justice would have jurisdiction only if the evidence submitted to the Court of First Instance had been misrepresented.

246. However, the appellant has neither proved nor claimed that such misrepresentation occurred. This is shown by the fact that it merely reproduces in its appeal part of its replies to the Court's questions, [97] which, furthermore, were partly summarised by the Court in paragraph 125 of the judgment. The passage reproduced is accompanied only by the argument that the Court of First Instance ignored the appellant's statement, thus showing that the purpose of its claim is to obtain a review of its application to the Court of First Instance which, pursuant to Article 49 of the EC Statute of the Court of Justice, is outside the jurisdiction of the latter.

95 — Paragraph 131.

96 — Paragraph 132.

97 — Paragraphs 91 and 93 of the appeal.

247. BStG has thus not adduced any serious arguments to show that the assessment by the Court of First instance was mistaken in law, and it fails to specify the parts of the judgment which it seeks to have set aside. In fact, the appellant does not claim that any rule of law whatever has been broken, but merely disputes the factual findings of the Court of First Instance.

248. With regard to BStG's allegation that the grounds of the judgment are contradictory, it must be said that a reading of the passage directly challenged and of BStG's arguments does not, as I shall show, reveal any contradiction whatever in the reasoning of the Court of First Instance.

249. The appellant cites paragraph 132 of the Court's judgment, in which it 'considers that, having regard to the manifestly anti-competitive object of the meetings, as evidenced by the numerous telexes from Mr Peters to Tréfilunion, the [appellant], by taking part without publicly distancing itself from what occurred at them, gave the impression to the other participants that it subscribed to the results of the meeting and would act in conformity with them ... This finding is not altered by the fact that, at the meetings concerned, the German producers were criticised by the others. It is apparent from the telex messages from Mr Peters ... that the [appellant] was regarded as the undertaking which should, and did in fact, encourage certain German producers to observe the prices on the Benelux market.'

250. This passage, which infers BStG's responsibility from its participation in the meetings, is challenged by the appellant on the grounds that it had no interest in concluding agreements on goods which it did not produce and that Mr Müller attended the meetings only in his capacity as representative of the structural crisis cartel.

251. Consequently these complaints do not seek to challenge any internal contradiction in the reasoning of the Court of First Instance, but seek once again to have the Court of Justice re-examine the factual findings or the assessment of the evidence by the Court of First Instance on these two points in other passages of its judgment.

252. It is unnecessary to reconsider these arguments as they have already been refuted. Suffice it to observe that they cannot refute the Court's reasoning in paragraph 132 of the judgment or even reveal any contradiction in that reasoning. BStG's arguments must therefore be rejected.

253. On the basis of all of the foregoing I propose that the sixth plea be dismissed.

G — *Seventh plea: breach of Article 15 of Regulation No 17*

254. BStG refers in particular to Article 15(2) of Regulation No 17, which reads as follows:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article 85(1) ...

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

255. In support of its plea alleging breach of this provision, BStG sets out the following arguments:

— the Commission did not carry out a separate assessment of the mitigating and aggravating circumstances of the infringements;

— the appellant's participation in the structural crisis cartel was regarded as an infringement on its part;

— the fact that the appellant was unaware that the structural crisis cartel and the measures taken to protect it were illegal was not taken into account;

— even the reduced fine imposed on it is disproportionate because a number of mitigating circumstances were not taken into account.

1. No separate assessment of mitigating and aggravating circumstances

256. BStG criticises the Court of First Instance for finding that the reasons stated in the Decision in relation to the amount of the fine were sufficient. It contends that the Court erred in finding that the Commission had carried out a separate assessment of the criteria determining the gravity of the infringements.

257. The Commission replies that the appellant's complaint is inadmissible because it repeats before the Court of Justice the arguments set out before the Court of First Instance.

258. The Court of Justice has on several occasions given rulings on pleas of mistaken assessment by the Court of First Instance of the grounds of a decision imposing a fine in competition matters. Such pleas have not been dismissed by the Court of Justice as inadmissible. [98]

98 — See, *inter alia*, Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 95 et seq.; *BPB Industries and British Gypsum* v *Commission*, cited above, paragraphs 6 and 11; Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 10 et seq.; and the order in *Koelman* v *Commission*, cited above, paragraph 62 et seq.

259. It is clear from the case-law of the Court of Justice that the Court of First Instance's assessment of the grounds of Commission decisions relating to proceedings for the application of Article 85 of the Treaty is a question of law which is open to review by the Court of Justice. The Commission's objection that the appellant's complaint is inadmissible must for that reason be dismissed.

260. In the present proceedings, the appellant claims that the Decision did not specify the misconduct alleged against it or identify clearly the different circumstances, in its favour or otherwise, surrounding the facts in question which the Commission took into account in fixing the fine.

261. In support of its complaints the appellant cites point 203 of the Decision, which states that 'in fixing the individual fines, the Commission has taken into account the degree and duration of the involvement of the undertakings involved, together with their financial and economic position'. BStG believes that this illustrates the Commission's failure to assess individually the mitigating and aggravating circumstances taken into account for the purposes of the fine.

262. It should be observed that the statement of reasons required by Article 190 of the EC Treaty must show clearly and unequivocally the reasoning of the Community authority which originated the act complained of, so that the persons concerned are informed of the reasons for the act adopted and so that the Court of Justice can carry out a review.

263. Let me say straightaway that neither the contested Decision nor the judgment of the Court of First Instance fails in respect of the obligation to state reasons.

264. Firstly, it appears that each of the paragraphs of the judgment examining the appellant's alleged infringements gives a detailed summary of the parts of the Decision relating to BStG. The Court of First Instance refers precisely to the relevant passages of the Decision which clearly identify BStG's individual conduct and the part it played in setting up or operating each of the agreements. [99] It is also significant that BStG did not consider it necessary to give particulars of those parts of the passages which might undermine the Commission's statement of the reasons for its Decision, which demonstrates that there was no serious deficiency in the statement.

265. Secondly, in reaching the conclusion that the Decision, read as a whole, provided the appellant with the information necessary for it to establish whether the Decision was founded, and enabled the Court of First

99 — The paragraphs of the judgment referring to the relevant passages of the Decision are shown in the footnotes to point 6 of this Opinion.

Instance to review the legality of the Decision, the Court made the following observations:

'The Court notes that in its reading of the Decision, the applicant artificially isolates a part of it, whereas, since the Decision constitutes a single whole, each part of it should be read in the light of the others. The Court considers that the Decision, read as a whole, provided the applicant with the indications necessary for it to identify the different infringements for which it was criticised, together with the specific features of its conduct and, more particularly, information concerning the duration of its participation in the various infringements. The Court also finds that, in its legal assessment in the Decision, the Commission sets out the various criteria by which it measured the gravity of the infringements imputed to the applicant and the various circumstances which palliated the economic consequences of the infringements.' [100]

266. The Court of First Instance rightly pointed out that the Decision could not be challenged on the basis of a partial reading. Point 197 et seq. of the Decision, cited by the appellant in its written observations, are not sufficient to establish that detailed individual reasons were not given because, as we have just seen, the Decision sets out the acts attributable to BStG for each infringement, although in different places. As clarity is required in relation to proof of the responsibility of more than one party and to the existence of a number of offences, it is not necessary to group together in the same passage of the Decision the different elements of the appellant's conduct, whether in its favour or otherwise. The Court was therefore right to observe that the various criteria for measuring the gravity of the infringements and the mitigating circumstances had been set out, and this has not been contested in detail by BStG.

267. Thirdly, as regards the aggravating circumstances found against the appellant, the Court of First Instance found that the appellant 'has not in any way countered the evidence produced by the Commission as to its active role in the agreements, as indicated by the telex of 15 December 1983 (... points 93 and 94 of the Decision) and the telex from Mr Peters of 4 March 1984 concerning the meeting of 28 February 1984 (..., point 96 of the Decision)'. [101]

268. The Court of First Instance thus refers to specific passages of the Decision relating to the appellant's conduct which are capable of justifying a harsher penalty. In these particular observations, the Commission shows that BStG was the driving force in committing the infringements and also that Mr Müller used his triple capacity. The necessary supplement to the passages in question is

100 — Paragraph 146 of the judgment.

101 — Paragraph 149 of the judgment.

provided by point 207 of the Decision, in which the Commission states that the heaviest fines should be imposed on the undertakings whose executives held senior positions in the associations of undertakings such as the Fachverband Betonstahlmatten.

269. It should be observed that the appellant does not mention these passages when it cites only point 197 et seq. in asserting that the Decision does not state sufficient reasons.

270. Fourthly, the Court of First Instance examined BStG's complaints concerning mitigating circumstances. It did in fact observe that 'in its written reply to the questions put to it by the Court, the Commission indicated that there had been no mitigating circumstances in the applicant's *individual* case'. [102]

271. I must add that the Commission set out the reasons why it took account of the characteristics and the economic importance of the industry concerned in fixing the fines. [103] As the different infringements took place in this common context, the effects of which were not limited to certain undertakings, it was not necessary for the Commission to carry out an individual assessment.

272. It follows that the complaint that the Court of First Instance incorrectly assessed the statement of reasons in the Decision concerning the circumstances of the infringements must be rejected.

2. The allegation that BStG took part in the structural crisis cartel

273. BStG asserts that the grounds of the judgment are contradictory. Whereas the Court of First Instance states in paragraphs 55 et seq. and 140 that the cartel did not, as such, form part of the infringements confirmed in the Commission's Decision, the Court states in paragraph 148 that the appellant used the cartel to protect the German market. Moreover, according to BStG, the Commission itself admits, in its written observations in the *Boël* v *Commission* [104] case before the Court of First Instance, that the existence of the cartel amounted to an infringement for which BStG was responsible.

102 — Paragraph 147, emphasis added.
103 — Point 199 et seq. of the Decision.
104 — Judgment in Case T-142/89 [1995] ECR II-867.

274. BStG adds that the principle of legitimate expectations was disregarded by the negative assessment of the structural crisis cartel because, by tolerating its existence, the Commission created a situation of expectation on which the appellant was legitimately entitled to rely.

275. The Commission considers that the Court of First Instance justified the choice made in the Decision not to find that the existence of the cartel was a mitigating circumstance in relation to BStG.

276. With this complaint the appellant is attempting to demonstrate that the Commission and the Court of First Instance found in reality that it was illegal for BStG to participate in the cartel, although the Commission was aware of its existence and, furthermore, had tolerated it.

277. In paragraphs 55 and 140 of its judgment the Court of First Instance stated that the cartel did not, as such, form part of the infringements found by the Decision. It stated the same in observing, in paragraph 148, that the appellant 'used the cartel to protect the German market against competition from producers in other Member States by means of measures incompatible with Community law'. It is quite clear from these findings that in both cases BStG is not being criticised for forming or participating in the cartel, but for using it as an instrument for anti-competitive practices.

278. This point is confirmed by the fact that, according to the Commission Decision, the object of the cartel was strictly limited to the German market because it provided for a reduction in the production capacities of German producers, for price regulation and delivery quotas in the German market. [105] However, the alleged infringements by BStG consist in acts seeking to restrict exports of welded steel mesh from Germany to *other Member States* and to fix prices *in markets other than the German market*. With regard to the agreements designed to set quotas for exports from the other Member States to Germany and to ensure adherence to the prices prevailing on the German market, BStG has not shown that the Commission considered them to be elements of the cartel agreement.

279. The Court of First Instance also noted, *inter alia*, that:

— the first paragraph of point 126 of the Decision stated that 'the agreements concerning the German market should be seen against the background of the establishment and operation of the structural crisis cartel';

105 — Point 126 et seq. of the Decision.

— point 175 of the Decision stated that certain clauses of the cartel agreement 'had, moreover, as their object, or at least as their effect, the use of the structural crisis cartel as an instrument for reaching bilateral arrangements between German producers on the one hand and producers from other Member States on the other'. [106]

280. No contradiction can therefore be found in the Commission's reasoning or in the reasons given by the Court of First instance for adopting it as its own.

281. The Commission's acknowledgment, noted by BStG in another case, in point 174 of the Decision, that it found the appellant 'responsible' for the cartel is not sufficient to contradict all the other findings of the Decision reproduced in part in the preceding paragraphs, which affirm the contrary, particularly as, although the passage in question describes the anti-competitive effects of the cartel, which the Commission has never denied, it does not express the idea that it constitutes one of the confirmed infringements. [107]

106 — Paragraph 55 of the judgment.

107 — In point 174 of the Decision, the Commission states that the cartel arrangement not only restricted competition between the cartel members in the German market, but also distorted competition in trade within the Community. The Commission adds that the arrangement was liable to affect trade between Member States.

282. Under these circumstances, I consider that the appellant cannot claim that the cartel was taken into account as an element constituting the infringements with which it was charged.

283. Consequently, the argument that the Commission tolerated the cartel (and if such tolerance were found, it would reduce BStG's responsibility to that extent) ceases to be relevant. As the cartel was not found unlawful as such, it cannot be said that the Commission went back on its toleration of the cartel, and therefore it cannot be claimed that the Commission disregarded the principle of legitimate expectations.

3. *BStG's lack of awareness that the structural crisis cartel and the conduct aiming to protect it were illegal*

284. BStG complains that the Court of First Instance did not examine its argument that it was unaware that the cartel was illegal and that it found that the offences had been committed 'intentionally' within the meaning of Article 15 of Regulation No 17. The appellant maintains that it was also unaware that conduct intended to protect the cartel, that is to say, of the kind which is the subject of this case, was illegal.

285. The Commission replies that these arguments of BStG are inadmissible because they are being put forward for the first time at the appeal stage.

286. Clearly, the last argument was not put before the Court of First Instance, and for that reason, must be declared inadmissible.

287. The first complaint is admissible. The judgment states that, before the Court of First Instance, the appellant claimed that it considered the cartel lawful and was thus unaware that it was legally defective. [108]

288. The first complaint must, however, be declared unfounded in so far as the Court of First Instance, as we have already seen, previously dismissed on adequate legal grounds, the plea that the German structural crisis cartel had been taken into account as constituting an integral part of the infringement confirmed by the Decision. As this aspect was no longer necessary for evaluating the facts, the question whether BStG was aware that the cartel was legal was not relevant in determining whether the offences which it was alleged to have committed were committed 'intentionally'.

108 — Paragraph 142 of the judgment.

4. *Disproportionate fine*

289. Finally, the appellant contends that, although the Court of First Instance reduced the fine by one third, it is still disproportionate because the Court failed to take various mitigating circumstances or principles into account. In support of its claim for a reduction in the fine, the appellant relies on:

— the principle that the penalty should be proportionate to the offence, which was disregarded when the fine was fixed at almost one third of the appellant's share capital, thereby considerably restricting its freedom of financial action;

— the national authorities' toleration of the structural crisis cartel;

— the principle that the fine should take account only of the turnover relating to the agreements in question and not the total turnover;

— the excessive duration of the administrative procedure and the proceedings before the Court of First Instance, which should be accepted as a mitigating circumstance;

— the error in fixing the fine by reference to BStG's market share;

— the principle of equality, whereby the fine imposed on it should not be abnormally high in comparison with the other fines imposed as a result of the Commission's Decision.

290. These complaints challenge the interpretation and application of Article 15(2) of Regulation No 17 by the Commission and the Court of First Instance.

291. Article 15(1), which lays down the conditions which must be met before the Commission may impose fines, states that the offences or acts in question must be intentional or negligent. Article 15(2) lays down the rules for determining the amount of the fine, which depends on the gravity and duration of the infringement.

292. The Court of Justice has held that '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'. [109]

293. In the Court's view there are accordingly no criteria which must always be taken into account or which cannot be taken into account to measure the gravity of an offence. The Court thus appears to consider that it is for the Commission to determine in each case the factors for assessing the gravity of the offence, provided, of course, that the reasons why it considers the chosen criteria appropriate are adequately stated.

294. Most of BStG's arguments therefore relate to the discretion of the Court of First Instance and may be reviewed by the Court of Justice only if there is a mistake in law, such as taking account of circumstances which are manifestly inappropriate for determining the gravity of an infringement. [110]

109 — See *Ferriere Nord* v *Commission*, cited above, paragraph 33, *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 120, and the order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

110 — See the Opinion of Advocate General Cosmas in Case C-51/92 P *Hercules Chemicals* v *Commission*, not yet published, point 29, which is in favour of stricter control by the Court of Justice of the criteria for assessing the gravity of a particular line of conduct.

295. Let me examine the appellant's complaints in the light of these legal principles and case-law.

(a) Excessive length of the proceedings

296. As the complaint that the Commission did not take account of the excessive length of the *administrative procedure* when fixing the fine was not discussed before the Court of First Instance, it must be ruled inadmissible. For the reasons already stated, [111] this point cannot be raised for the first time before the Court of Justice.

297. So far as the duration of the *judicial proceedings* is concerned, I would merely refer the Court to what I said earlier with regard to the plea alleging failure to comply with the 'reasonable time' requirement. I suggested that the duration of the proceedings could not have a mitigating effect of any kind on the penalty because there is no connection between the conduct which constitutes the offence and the time taken for judgment to be delivered. The degree of gravity of the acts in question is the same whether viewed before or after the proceedings, with the result that it cannot be mitigated on any grounds relating to the course of the judicial stage. [112]

298. Before expressing an opinion on BStG's other complaints, I must point out that some of them show that the appellant is merely repeating the arguments which it set out before the Court of First Instance and has not produced anything to show that that Court's assessment was mistaken in law. [113]

(b) Fine disproportionate by reference to share capital

299. The appellant repeats, in relation to the Court of First Instance, the argument which it set out before that Court against the Commission. [114]

300. The Court observed that 'the fact of having limited capital is the result of an economic decision taken by the [appellant] and cannot influence the amount of the fine, which is based on turnover'. [115] Consequently, the Court of First Instance did examine the reasons why the relationship between the appel-

111 — See point 193 above.

112 — See, in particular, point 56 et seq. above.

113 — See point 198 et seq. above.

114 — See paragraphs 153 and 154 of the judgment concerning breach of the principle of proportionality.

115 — See paragraph 159 of the judgment.

lant's capital and the amount of the fine had no bearing on the latter. The appellant has not adduced any argument in law which would cast doubt on the Court of First Instance's assessment and the complaint must be declared inadmissible.

(c) Failure to treat the structural crisis cartel as a mitigating circumstance

301. This argument was also raised by BStG before the Court of First Instance, which expressly refuted it in finding that 'the Commission was right not to treat the existence of the structural crisis cartel as a general mitigating circumstance in the [appellant's] case, except as indicated by the Court in paragraph 122. It should be noted, first, that the [appellant] did not avail itself of the possibility provided by Article 85(3) of the Treaty of notifying the cartel agreement to the Commission in order to obtain from it a declaration that Article 85(1) did not apply and, secondly, that the [appellant] used the cartel to protect the German market against competition from producers in other Member States by means of measures incompatible with Community law'. [116] As the appellant does not adduce any legal argument capable of placing in question the Court's reasoning, its ground of complaint must be declared inadmissible.

(d) Breach of the principle of equality

302. The complaint that the principle of equality has not been observed because of the unusually heavy fine imposed on BStG by comparison with the other fines must also be dismissed.

303. The Court of First Instance examined this point before dismissing it, observing with regard to the fine of 3.15% of turnover that 'no mitigating circumstances exist in respect of the [appellant], save as stated in paragraph 122 above, and that, conversely, there was an aggravating circumstance — as in the case of Tréfilunion, to which was applied the higher percentage of 3.60% — which ... reflects the number and extent of the infringements found against the [appellant]'. [117]

304. The inescapable conclusion is that BStG has not shown any breach of the relevant law in the reasoning of the judgment and that the

116 — Paragraph 148.

117 — Paragraph 160.

appellant is merely repeating its argument before the Court of First Instance.

(e) No justification for taking account of the market-share criterion in fixing the fine

305. BStG challenges the use of this criterion on the ground that a firm's financial resources are not proportionate to its market position. This complaint refers to a ground of the judgment in which the Court of First Instance rejected a plea for mitigation on the basis that the appellant did not belong to a large industrial entity. It appears that the criterion in question originates in the judgment itself and therefore was not discussed as such before the Court of First Instance. However, as I have already pointed out, [118] the choice of criteria for assessing the gravity of infringements is within that Court's discretion.

306. Moreover, no mistake of law is alleged in support of this complaint and it must therefore be declared inadmissible.

(f) No justification for taking account of total turnover

307. BStG complains that the Commission and the Court of First Instance calculated the fine imposed on it on the basis of its total turnover and not by reference to the turnover resulting from the agreements.

308. The Court of First Instance observed that, pursuant to Article 15(2) of Regulation No 17, the Commission could 'impose fines of between ECU 1 000 and ECU 1 000 000, and the latter figure may be increased up to a ceiling of 10% of the turnover', before finding that the Commission, '*which took account not of the total turnover* achieved by the [appellant], 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'. [119]

309. In exercising its power to make factual findings, the Court of First Instance therefore first observed that the turnover for welded steel mesh alone had served as the basis for calculating the fine. It then applied correctly the abovementioned provision by pointing

118 — See points 293 and 294 above.

119 — Paragraph 158 of the judgment, emphasis added.

out that it prescribed two potential limits, by referring, on the one hand, to an absolute amount and, on the other, to a maximum of 10% of total turnover, before finding that the Commission had complied with the relevant law by referring to a lower turnover which in any case did not exceed the authorised percentage.

310. It should be added that it does not follow at all from Article 15(2) that the turnover to which it refers means only the turnover connected with the offence in question.

311. BStG's complaint must be considered unfounded.

The seventh plea must for that reason be dismissed.

H — *Alternative claim for reduction of the fine to a reasonable amount*

312. I need only say that the Court of Justice has consistently held 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'. [120] The application must for that reason be declared inadmissible.

Conclusion

313. For the reasons set out above, I propose that the Court should:

— dismiss the appeal in its entirety;

— order the appellant to pay the costs pursuant to Article 69(2) of the Rules of Procedure.

120 — For a recent judgment, see *Ferriere Nord* v *Commission*, cited above, paragraph 31.