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

In Case T-17/99,

KE KELIT Kunststoffwerk GmbH, established in Linz (Austria), represented by G. Grassner and W. Löbl, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

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

* Language of the case: German.

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,

Registrar: G. Herzig, Administrator,

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

gives the following

Judgment

1 The applicant is an Austrian company operating in the district heating sector; it markets pre-insulated pipes which it purchases from the Danish company Løgstør Rør A/S ('Løgstør').

2 to 7 ...

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

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

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

11 Still according to the decision, in 1994 an agreement was reached between all the producers to fix quotas for the whole of the European market. This European cartel involved a two-tier structure. The 'directors' club', consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each of those undertakings in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, 'contact groups' consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 As regards the Austrian market, the decision states that a contact group met every three or four weeks: the first meeting taken into account by the decision was held in December 1994 and was organised by the applicant. The last meeting was held in April 1996.

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

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole,

can be considered to constitute an 'agreement' prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

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

'*Article 1*

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

The duration of the infringements was as follows:

...

— in the case of KE KELIT from about January 1995 up to [March or April 1996];

...

The principal characteristics of the infringement consisted in:

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

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

— agreeing prices for the product and for individual projects,

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

— in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to

hinder its commercial activity, damage its business or drive it out of the market altogether.

...

Article 3

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

...

(e) KE KELIT Kunststoffwerk GmbH, a fine of ECU 360 000;

...'

16 to 22 ...

Law

23 The applicant relies in essence on five pleas in law. The first plea alleges factual errors in applying Article 85(1) of the EC Treaty. The second plea alleges infringement of the rights of defence. The third plea alleges infringement of the principle of equal treatment in the imposition of the fine. The fourth plea alleges infringement of general principles and errors of assessment in determining the amount of the fine. The fifth plea alleges infringement of the obligation to state reasons.

I — *First plea in law, alleging factual errors in applying Article 85(1) of the Treaty*

A — *The aspects of the infringement in respect of which the applicant is criticised*

1. Arguments of the parties

24 The applicant denies having participated in the various infringements set out in Article 1 of the decision. The Commission incorrectly acknowledged only that the applicant did not take part in the concerted measures against Powerpipe.

25 First, the applicant did not participate in the sharing of the national markets, and then of the entire European market, under a system of quotas. The applicant never attended the meetings of the directors' club and was not a member of the

producers' association 'European District Heating Pipe Manufacturers Association'. The Commission itself recognises, in point 124 of the decision, that quotas for the Austrian market were agreed by the directors' club and that the applicant was therefore presented with a *fait accompli*. Furthermore, the applicant's sales in Austria were attributed to Løgstør as part of its European quota. Contrary to what the Commission claims, the applicant was unable to demand that other undertakings concerned observed their quotas. Since the applicant was acting as a retailer, it cannot be said to have been involved as a 'local producer', as the decision states in point 153.

26 Nor, second, can the allocation of national markets to certain producers and the organisation of the withdrawal of other producers be imputed to the applicant. Since the applicant only operated on the Austrian market and was not itself a producer, it had no power to allocate national markets or to organise the withdrawal of other producers.

27 Third, the applicant cannot be implicated in the price-fixing agreements, a fact which, moreover, the Commission failed to explain either in the statement of objections or in the decision. As a retailer of pre-insulated pipes, the applicant did not have the opportunity to conclude agreements on prices.

28 Fourth, neither the statement of objections nor the decision alleges that the applicant allocated projects to producers and manipulated bidding procedures. It has not been proved that the allocation of projects was discussed at meetings of the contact group or that projects were allocated within that framework. The Commission has not demonstrated that prices were fixed or that the prices of various bids were determined in its favour. In point 84 of the decision, the Commission stated only that prices were discussed, not that they were fixed.

29 According to the applicant, it cannot be inferred from the document in annex 110 to the statement of objections, which sets out the projects and the various bidders, and also figures representing the prospects of each of the bidders, that the tenders were manipulated. Apart from the fact that that document was drawn up by Pan-Isovit, it does not show either that the tenders were manipulated or that the applicant was involved. If there had been any manipulation of the tenders, there would have been no point in mentioning an assessment of the prospects of being awarded a project.

30 The defendant contends that the applicant participated in a cartel at European level, although it was in the form of acts relating solely to the Austrian market. It is not disputed that the applicant was aware that its activities formed part of a wider system. Apart from the concerted measures against Powerpipe, the applicant might be associated with all the main characteristics of the infringement set out in Article 1 of the decision.

2. Findings of the Court

31 It is common ground that the decision criticises the applicant for having participated in the comprehensive cartel covering the whole of the common market, as described in the first paragraph of Article 1 of the decision.

32 It is also common ground that the Commission does not criticise the applicant for having participated in the concerted measures against Powerpipe, referred to in the fifth indent of the third paragraph of Article 1 of the decision as one of the principal characteristics of the cartel.

33 As regards the other principal characteristics of the cartel, referred to in the first, second, third and fourth indents of the third paragraph of Article 1 of the decision, it must be held that the Commission was correct to find that the applicant had been involved.

34 As regards, first of all, the 'allocat[ion of] individual projects to designated producers and [the] manipulat[ion of] the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question', the statements by ABB and Pan-Isovit to the effect that the applicant attended the meetings of the Austrian contact group at which the undertakings divided the projects (ABB's supplementary reply of 13 August 1996 to the request for information of 13 March 1996 ('ABB's supplementary reply') and Pan-Isovit's reply of 17 June 1996 to the request for information of 13 March 1996 ('Pan-Isovit's reply')) are corroborated by all the documents in annexes 109 and 110 to the statement of objections. First, the allocation of projects for the Austrian market is confirmed by the letter of 3 May 1995 from Isoplus Hohenberg, of the *de facto* Henss/Isoplus group, to Dr Henss (annex 109 to the statement of objections), which, as regards the applicant, states, after describing the attitude of ABB, Dansk Rørindustri and Pan-Isovit to the quotas and/or the allocation of projects, that 'Logstör-Kelit' 'also [kept] its promises' and which further describes, among certain 'isolated disturbances', the fact that a project which 'was to be awarded to Kelit' was obtained by Tarco. Second, as regards the table containing the list of projects on the Austrian market found at Pan-Isovit's premises (annex 110 to the statement of objections), the precise information about the bids of other undertakings and also about the prospects of each of the undertakings mentioned being awarded a project cannot be understood as anything other than the result of an exchange of information between the undertakings. The fact that that exchange is the result of arrangements to allocate the projects is confirmed by the reference in that table to, as bidders for the 'Berceliusplatz' project, the applicant and, with a higher offer, Pan-Isovit, since the same project is referred, in the document in annex 109 to the statement of objections, as being a project which 'was to be awarded to Kelit' and which was eventually obtained by Tarco. Furthermore, it follows from Annex 72 to the statement of objections, cited in point 72 of the decision, that Henss/Isoplus, at least, was using, in connection with the sharing of projects on the German market, a table also referring to the bidders' prospects, together with other tables

drawn up by the participants in the cartel which indicated the undertaking designated as 'favourite' to which a project had been allocated.

35 Next, as regards the 'agree[ment] of prices for the product and for individual projects', it should be observed that, in any event, the allocation of projects within the Austrian market made it necessary to manipulate bids on the basis of arrangements concerning tender prices of each of the undertakings intending to tender. In addition, the fact that prices were discussed between the undertakings operating on the Austrian market is demonstrated by the assertion in the document in annex 109 to the statement of objections that all the undertakings were complaining of the fact that the 'Eu-Liste' price list was not applicable.

36 In that context, the applicant cannot avoid being held responsible for the price-fixing agreement by claiming that it could have only a certain influence on the prices charged by Løgstør. Such a situation did not deprive the applicant of all autonomy as regards its pricing policy and, in any event, increased its interest in reducing competition on prices.

37 Last, as regards 'dividing national markets and eventually the whole of the European market among [producers] on the basis of quotas' and 'allocating national markets to particular producers and arranging the withdrawal of other producers', the applicant acknowledges that it was informed by ABB in January 1995 that the producers had divided the Austrian market on the basis of quotas and that it was aware at that time that the meetings of the Austrian contact group were part of a wider plan. The applicant must therefore have been aware of the fact that other national markets had been divided between producers and that, as a result, certain producers might withdraw from markets allocated to other producers.

38 It follows that, since the applicant participated in allocating projects within the Austrian market, the Commission was entitled also to attribute to it its involvement in sharing national markets at European level. It is settled case-law that an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (see, in that regard, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 203).

39 In that regard, it does not avail the applicant to claim that it did not itself participate in allocating the national markets to producers or in fixing the individual quotas of each producer in the markets which were divided. It is clear from the decision that the Commission is not criticising the applicant for having itself participated in the discussions leading to the fixing of quotas and to the allocation of national markets to certain producers. It should be recalled, on that point, that the Commission stated, when describing the structure of the European cartel, that the contact groups did not decide quotas but were involved in assigning individual projects and in coordinating the collusive bidding procedure (point 68 of the decision). Furthermore, the Commission stated that the applicant was only involved in the arrangements on the Austrian market, where it was allocated a quota of 23%, and that it may well have been presented with a *fait accompli*, as the quotas were agreed by the directors' club, which the applicant did not attend (second paragraph of point 124 of the decision).

40 In any event, a passive approach on the applicant's part is contradicted by its letter of 12 January 1995 to Løgstør (annex 106 to the statement of objections), in which it urged Løgstør to increase the applicant's quota on the Austrian market.

41 Last, the applicant cannot rely on the fact that it is not itself a producer of pre-insulated pipes, to which the present procedure relates. Although the Commission described the principal characteristics of the cartel by designating the participants as 'producers', and although in certain points in the decision it incorrectly described the applicant as a 'producer', it is clear from the decision, and in particular from points 17 and 82, that the Commission was calling into question the applicant's participation in the cartel as an undertaking marketing, on its own behalf, district heating pipes purchased from Løgstør. Accordingly, the applicant cannot criticise the Commission for having failed to take its capacity as a retailer into account.

42 It follows from all the foregoing that the arguments relating to the aspects of the infringement in which the applicant was found to have been involved must be rejected.

B — *The existence of restriction on competition*

1. Arguments of the parties

43 The applicant states that, as an undertaking depending on its supplier, Løgstør, it could not be imputed with the infringement in respect of which the Commission criticises it. Even if the link of economic dependence that may exist between contractual partners did not prevent the finding of an agreement, the Commission's practice in adopting decisions shows that it may decline to impose a fine on an undertaking which is dependent or which has been forced to enter into the agreement in restraint of competition.

44 The quotas and high prices imposed on the applicant restricted its commercial autonomy. Not only was the applicant obliged to pay higher prices to Løgstør, but the rebates granted to it were also reduced. As supplier, Løgstør was able to determine the applicant's turnover without the slightest intervention on the applicant's part, merely by agreeing or refusing to supply it. As the applicant has already stated in its observations on the statement of objections, Løgstør restricted its deliveries to the applicant.

45 Since the quotas and prices were imposed unilaterally by Løgstør and the other producers, there can no longer be any question of a vertical agreement.

46 The defendant observes that, although it may take the economic dependency of a member of a cartel into account and not impose a fine, it is under no obligation to do so. In the present case, the decision to impose a fine cannot be criticised, since the applicant participated in a particularly serious horizontal arrangement, in particular in relation to the allocation of various projects and the manipulation of the tender procedures, with full knowledge that the markets were being shared on a pan-European basis, and since, moreover, the Commission took account of the applicant's particular situation and adjusted its fine accordingly.

2. Findings of the Court

47 First of all, it should be observed that, in criticising the applicant for participating in an agreement to share the national markets and individual projects between producers, on the basis of quota-fixing and the manipulation of tendering procedures and also a price-fixing agreement, the Commission found that the applicant had participated in a horizontal agreement between operators on the district heating market.

48 In that context, the applicant cannot claim that, because it was dependent on Løgstør for deliveries, it no longer had the necessary autonomy to participate in an agreement on its own behalf. Although the applicant's scope for manœuvre was limited because it depended on Løgstør for its supplies, that does not alter the conclusion that the applicant, by participating on its own behalf, in an agreement on the Austrian market, restricted competition on that market. Although it is true that the bonds of economic dependence existing between participants in an agreement is liable to affect their freedom of initiative and decision, the existence of those bonds does not make it impossible to refuse to consent to the agreement which is proposed to them (Joined Cases 32/78 and 36/78 to 82/78 *BMW and Others* v *Commission* [1979] ECR 2435, paragraph 36).

49 Nor has the applicant adduced any evidence that it was under pressure owing to restriction in deliveries from Løgstør, since the evidence referred to in its reply relates solely to Løgstør's attitude in relation to the applicant's activities outside the Austrian market.

50 In any event, even assuming that the applicant was the victim of pressure brought to bear by Løgstør, it could not rely on the fact that it participated in the cartel under constraint from the other participants, since it could have complained to the competent authorities about the pressure brought to bear on it and have lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the activities in question (see Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 123 and 128, and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 58).

51 The plea in law must therefore be rejected in so far as the applicant disputes the existence of a restriction of competition.

C — *The effect on trade between Member States*

1. Arguments of the parties

52 The applicant submits that its participation in the meetings of a national contact group was not capable of affecting trade between Member States, although such an effect is a constituent element of the infringement defined in Article 85(1) of the Treaty. The fact that the applicant was or was not aware that it was taking part in a wider plan made no difference. For the purpose of determining whether the applicant can be held responsible for the cartel, it is irrelevant whether the agreements concluded within the directors' club, of which Løgstør formed part, affected trade between Member States. In any event, even if an agreement had to be imputed to it, the applicant never acted in the knowledge that it was capable, by its actions, of exercising any influence whatsoever on the common market.

53 Furthermore, even if it had not participated in the meetings of local suppliers, it could not have increased its trade on the Austrian market, since its quota was controlled by Løgstør, which directed the applicant's economic conduct.

54 The defendant observes that it explained in points 149 and 150 of the decision that the infringement had an appreciable effect on trade between Member States. That impact on trade derives from the cartel as a whole and it is of no relevance whether the infringement committed by each of its members produced such an effect. The applicant knew that the arrangements relating to its own market were part of a wider plan. Furthermore, the products it sold were all imported from Denmark.

2. Findings of the Court

55 First, as stated in paragraphs 37 to 40 above, the Commission was correct to criticise the applicant for infringing Article 85 of the Treaty by participating, in the Austrian market, in an infringement which exceeded the scope of the Austrian market alone.

56 Nor does the applicant dispute the Commission's assertion, in point 149 of the decision, that the global cartel of which cooperation on the Austrian market formed part had an appreciable effect upon trade between Member States and that by the end of 1994 it covered the whole common market and virtually all trade throughout the Community in the district heating sector.

57 In those circumstances, the applicant cannot deny that the infringement in respect of which it is criticised is capable of affecting trade between Member States within the meaning of Article 85(1) of the Treaty.

58 It follows from the text of Article 85(1) of the Treaty that the only relevant questions are whether the applicant participated in an agreement with other undertakings having as its object or effect the restriction of competition and whether that agreement was capable of affecting trade between Member States. Consequently, the question whether the individual participation of the undertaking concerned could, notwithstanding its small scale, restrict competition or affect trade between Member States or whether the applicant intended partitioning the markets, thereby infringing Article 85 of the Treaty, is irrelevant (Case T-142/89 *Boël* v *Commission* [1995] ECR II-867, paragraphs 88 and 99, and *Tréfileurope* v *Commission*, cited above, paragraph 122). Since the

Commission has established to the requisite legal standard that the infringement in which the applicant participated was apt to affect trade between Member States, it is not necessary for it to demonstrate that the applicant's individual participation affected trade between Member States (see Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 305).

59 In any event, the restriction of the applicant's market share to a specific quota of the Austrian market was apt to affect its imports of pipes from its Danish supplier, Løgstør, and, consequently, to affect trade between Member States.

60 For all those reasons, the plea in law put forward by the applicant must also be rejected in so far as it relates to the effect on trade between Member States.

II — *The plea in law alleging infringement of the rights of defence*

A — *Infringement of the right to be heard as regards the aspects of the infringement in respect of which the applicant is criticised*

1. Arguments of the parties

61 The applicant criticises the Commission for having infringed its rights of defence by failing to inform it in the statement of objections of all the infringements referred to in Article 1 of the decision. The only thing in respect of which the

Commission appears to criticise the applicant was its participation in meetings between local suppliers and its awareness of a wider plan. Those complaints are not among the elements of the infringement found in the decision, whereas the elements contained in the decision were never alleged beforehand to the applicant. The Commission therefore did not specifically criticise it in respect of the infringements set out in Article 1 of the decision before adopting the decision. None the less, the statement of objections should be drafted in sufficiently clear terms to enable those concerned to be aware of the conduct in respect of which the Commission is criticising them.

62 The defendant observes that, although it is true that the characteristics set out in Article 1 of the decision do not all apply to the applicant, it is also true that the acts in respect of which it is criticised are set out clearly and comprehensibly at various places in the decision. The grounds of the decision correspond to the grounds of the statement of objections.

2. Findings of the Court

63 Observance of the rights of the defence, which constitutes a fundamental principle of Community law and which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure, requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39).

64 It is settled case-law that the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly

to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63).

65 In the present case, it is necessary to determine the extent to which the Commission, in the decision, complains that the applicant, first, participated directly in the infringement as described in the first and third paragraphs of Article 1 of the decision and, second, was aware of the other aspects of the infringement.

66 In that regard, as regards the Austrian market, the decision refers in points 66 to 68 to the structure of the European cartel in force from 1994, consisting of a higher level, the directors' club, and a lower level, the various contact groups set up for each large national market, including, in particular, Austria. When describing the implementation of the cartel on the Austrian market, in points 82 to 84, the decision states, in particular, that the first meeting of the Austrian contact group was organised by the applicant and that the quotas proposed by the directors' club were communicated to it by ABB. According to point 84 of the decision, the Austrian contact group met regularly in order to implement the agreed market-share division, with discussion of prices and market-shares and if necessary adjustments concerning individual projects in order to keep market-shares in line with quotas. In the same point, the decision mentions that the applicant participated in those meetings, the last of which was held in April 1996.

67 Then, in point 124 of the decision, the Commission states that the applicant was aware that the arrangements in Austria were part of a wider scheme and that it

was only involved in the arrangements on the Austrian market, that it did not attend meetings of the directors' club or those of the contact group for Germany and was unaware of and had no part in the measures undertaken against Powerpipe.

68 Those complaints were set out, in wholly similar terms, in the statement of objections. A description of the cartel analogous to that in Article 1 of the decision may be found on pages 1 and 2 of the statement of objections sent to the applicant. The two-level structure of the European cartel is described in the same terms as those of the decision on pages 27 and 28 of the statement of objections, just as the description of the implementation of the cartel on the Austrian market on pages 35 and 36 of the statement of objections corresponds to the description in the decision. The Commission also stated in the statement of objections that the first meeting of the Austrian contact group was organised by the applicant and set out the quotas proposed by the directors' club and communicated by ABB. At the same place, the statement of objections states that the Austrian contact group met regularly in order to implement the agreed division, with discussion of prices and market shares and if necessary adjustments concerning individual projects in order to keep market shares in line with quotas. The statement of objections further stated that the applicant was among the participants in those meetings and that the Austrian contact group met until April 1996.

69 The Commission then stated, on page 56 of the statement of objections, that the two local suppliers — KE KELIT and Sigma Tecnologie di rivestimento SrL ('Sigma') — only participated in the activities of the cartel in their domestic markets, although they were aware of the fact that the meetings within the contact group for their market formed part of a wider plan, since they knew that the quotas allocated to them had been decided by the directors' club. On page 66 of the statement of objections, the Commission again stated that the applicant did not take part in the concerted measures against Powerpipe.

70 In the light of the consistency between the complaints set out in the contested decision and the objections communicated to the applicant during the administrative procedure, the applicant cannot maintain that the Commission did not criticise it in the statement of objections in respect of the infringements set out in Article 1 of the decision.

71 It follows that the plea in law must be rejected in so far as concerns the aspects of the infringement in respect of which the applicant is criticised.

72 to 89 ...

III — *The plea in law alleging infringement of the principle of equal treatment in the imposition of the fine*

A — Arguments of the parties

90 The applicant complains that the Commission infringed the principle of equal treatment by not imposing fines on other undertakings that also acted as retailers tied to producers of pre-insulated pipes or even as producers. In that regard, the applicant names other undertakings which played a role similar to its own.

91 As regards the Austrian market, there was, first, Infratec Gruner & Partner GmbH, formerly Krobath & Gruner Infratec GmbH ('Infratec'). In annex 109 to the statement of objections, Infratec was identified as a dealer in Dansk Rørindustri's products. Second, there was Steinbacher, which was represented at meetings of the Austrian contact group (see annex 109 to the statement of objections). Steinbacher was not a dealer for a specific producer, but sold pre-insulated pipes which it produced itself.

92 According to the applicant, those undertakings, which were in a situation comparable to the applicant's, were treated differently by the Commission. Like the applicant, Infratec was represented at the meetings of the contact group and had a quota which was allocated to the producer. If those factors led to the conclusion that the undertakings concerned were not members of the cartel, as the Commission concludes, that reasoning should also have been applied to the applicant. As regards the argument that, unlike the applicant, Infratec did not have its own quota, since the quota was allocated to Dansk Rørindustri, the applicant observes that annex 109 to the statement of objections shows that that applied to it too, since its quota was allocated to Løgstør.

93 As regards the other national markets, the applicant refers to other undertakings which participated as representatives of pipeline producers in contact group meetings. As regards the Italian market, the decision confirms that Socologstor, whose sales were included in the quota allocated to Løgstør for the whole of Europe, as was the case for the applicant, took part in contact group meetings. As regards the United Kingdom market, it is apparent from Pan-Isovit's reply that that undertaking acted on that market through its United Kingdom representative, which took part in meetings. As regards the German market, an undertaking mentioned at various points in the annexes to the statement of objections represented Dansk Rørindustri at least in connection with one district heating project (see annex 135 to the statement of objections), and took part in the meeting held in Frankfurt on 10 January 1995. As regards the Netherlands market, ABB's further reply mentions the names of directors of two undertakings. The first of those undertakings sold pre-insulated pipes purchased from Løgstør

and, according to ABB, took part in meetings in 1995. The second undertaking, too, was a supplier of pre-insulated pipes, which it purchased from Henss/Isoplus.

94 When those comparable situations are seen from the viewpoint of competition law, there are no differences which would justify their being treated differently by the Commission. On the contrary, by imposing no fine on the undertakings in question, the decision actually runs counter to the aim it pursues. By its decision, the Commission distorted competition, since the applicant was the only supplier to be fined and, accordingly, to suffer a slur on its reputation owing to the publication of the decision, while other suppliers and even producers of pipes did not have to bear the financial burden represented by a fine.

95 The defendant observes that the applicant's argument is bound to fail, since the Commission established that the applicant participated in the infringement and that it therefore bore part of the responsibility. Even if the Commission was wrong not to fine other undertakings in the same situation, the applicant cannot rely on that fact to challenge a penalty which was properly imposed on it.

96 In any event, at least as regards the Austrian undertakings, the applicant's reasoning is inconsistent with the facts. Infratec's situation was not comparable with the applicant's, since Dansk Rørindustri had a quota for the European market as well as for the Austrian market, whereas Løgstør had a European quota but not a quota on the Austrian market. Sales of Løgstør products by the applicant were ascribed to Løgstør under its European quota. As regards

Steinbacher, it, too, was not a member of the cartel or, at least, there was insufficient proof of its participation in the cartel, so that the Commission was not entitled to take measures against it.

B — Findings of the Court

97 It is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

98 The applicant has not established any proof that either of the undertakings to which it refers actively participated in the meetings of the contact groups or was allocated its own quota on the national market comparable with the proof established by the Commission in regard to the applicant, as described in paragraphs 34 to 41 above.

99 As regards Steinbacher, which is referred to in the document in annex 64 of the statement of objections as having its own quota on the Austrian market and whose name is on the list of projects in annex 110 to the statement of objections, the documents gathered by the Commission include information making it doubtful, at least, that Steinbacher participated to the same extent as the applicant. The fact that it was not perceived as participating in the cartel is

confirmed by Løgstør's reply of 17 January 1995 to the applicant's letter of 12 January 1995 (annex 107 to the statement of objections), where it is stated that Løgstør considered that there was no need to be concerned about the allocation of a quota to that undertaking, since its district heating division was expected to close; and Steinbacher is referred to in the letter of 3 May from Isoplus Hohenberg to Dr Henss (annex 109 to the statement of objections) as having offered dumping prices. Nor is there anything in that document or in the statements of other participants in the cartel to indicate that Steinbacher participated in a meeting of the contact group.

100 As regards Infratec, although it was referred to in the same letter of 3 May 1995 from Isoplus Hohenberg to Dr Henss as an undertaking which at the time was 'still comply[ing] with the agreements' and in ABB's further reply as having participated in the meetings of the contact group, none the less, unlike the applicant's, its name is not among the participants in the Austrian contact group set out in annex 67 to the statement of objections or among those mentioned by Pan-Isovit in its reply, and it is not on the list of projects set out in annex 110 to the statement of objections.

101 Furthermore, even on the assumption that the situation of some undertakings to which the contested decision was not addressed was comparable to that of the applicant, that could not in any event constitute a ground for setting aside the finding of an infringement by it, provided that the infringement was properly established on the basis of documentary evidence (*Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 146). It is settled case-law that where the conduct of an undertaking infringes Article 85(1) of the Treaty it cannot escape any penalty on the ground that no fine was imposed on other economic operators when, as in the present case, those other undertakings' circumstances are not even the subject of proceedings before the Community judicature (*Ahlström Osakeyhtiö and Others* v *Commission*, cited above,

paragraph 197, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 176, and Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 56).

102 The plea in law must therefore be rejected.

IV — *The plea in law alleging infringement of general principles and errors of assessment in setting the amount of the fine*

103 to 185 ...

C — *The double penalty*

1. Arguments of the parties

186 The applicant maintains that although its acts are attributable to Løgstør, fines were imposed on both Løgstør and itself. Only one fine can be imposed in respect of their separate, but connected, conduct. That solution should have been applied to the applicant in view of its relations with Løgstør.

187 The defendant contends that there was no double penalty, since the applicant's participation in the cartel in the context of the Austrian contact group constituted an independent infringement of Article 85 of the Treaty.

2. Findings of the Court

188 The applicant cannot rely on the fact that its quota was determined by the directors' club, which Løgstør attended, and that it depended on Løgstør for supplies, to escape its own responsibility for the infringement.

189 As stated in paragraph 48 above, the Commission correctly established that even though the applicant's scope for manœuvre was limited because it depended on supplies from Løgstør, it none the less participated on its own behalf in an agreement on the Austrian market. In that regard, it was the applicant, not Løgstør, that met with its competitors on the Austrian market in order to discuss prices and allocate the individual projects on the basis of the quotas allocated to each of them. The Commission was therefore correct to impute cooperation on the Austrian market to the applicant and not to Løgstør, even though it criticised Løgstør for participating in the cartel covering the whole common market.

190 The plea in law must therefore be rejected in so far as it alleges a double penalty.

191 to 209 ...

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung
Registrar

P. Mengozzi
President