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

In Case T-142/89,

Usines Gustave Boël SA, a company incorporated under Belgian law, established in Brussels, represented by Georges Vandersanden and Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Rue Guillaume,

applicant,

v

Commission of the European Communities, represented by Norbert Koch, Enrico Traversa and Julian Currall, of its Legal Service, acting as Agents, and Nicole Coutrelis and André Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for the annulment of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh, OJ 1989 L 260, p. 1),

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

composed of: H. Kirschner, President, C. W. Bellamy, B. Vesterdorf, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing from 14 to 18 June 1993,

gives the following

Judgment

Facts

1 This case concerns Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1989 L 260, p. 1) (hereinafter 'the Decision'), in which the Commission imposed a fine on 14 producers of welded steel mesh for having infringed Article 85(1) of the EEC Treaty. The product with which the contested Decision is concerned is welded steel mesh. It is a prefabricated reinforcement product made from smooth or ribbed cold-drawn

reinforcing steel wires joined together by right-angle spot welding to form a network. It is used in almost all areas of reinforced concrete construction.

2 As from 1980 a number of agreements and practices, which gave rise to the Decision, came into being in that sector on the German, French and Benelux markets.

3 For the German market, on 31 May 1983 the Federal Cartel Office granted authorization for the establishment of a structural crisis cartel of German producers of welded steel mesh, which, after being renewed once, expired in 1988. The purpose of the cartel was to reduce capacity; it also provided for delivery quotas and price fixing, the latter being authorized, however, only for the first two years of its operation (points 126 and 127 of the Decision).

4 On 20 June 1985, the French Competition Commission issued a notice concerning the competitive situation on the welded steel mesh market in France, which was followed by Decision No 85 — 6 DC of 3 September 1985 of the French Minister for the Economy, Finance and Budget, imposing fines on a number of French companies for taking action and engaging in practices whose object or effect was to restrict or distort competition and hamper the normal functioning of the market in the period 1982 to 1984.

5 On 6 and 7 November 1985 Commission officials, acting under Article 14(3) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), carried out simultaneous investigations without prior warning at the premises of seven undertakings and two associations, namely: Tréfilunion SA, Sotralentz SA, Tréfilarbed Luxembourg/Saarbrücken SARL, Ferriere Nord SpA (Pittini), Baustahlgewebe GmbH, Thibodraad en Bouwstaalprodukten BV, NV Bekaert, Syndicat National du Tréfilage d'Acier (STA) and Fachverband Betonstahlmatten eV; on 4 and 5 December 1985 they conducted

other investigations at the premises of ILRO SpA, GB Martinelli, NV Usines Gustave Boël (Afdeling Trébos), Tréfileries de Fontaine-l'Evêque, Frère-Bourgeois Commerciale SA, Van Merksteijn Staalbouw SA and ZND Bouwstaal BV.

6 The evidence found in those investigations and the information obtained under Article 11 of Regulation No 17 led the Commission to conclude that between 1980 and 1985 the producers in question had infringed Article 85 of the Treaty through a series of agreements or concerted practices relating to delivery quotas for, and the prices of, welded steel mesh. The Commission initiated the procedure provided for in Article 3(1) of Regulation No 17 and, on 12 March 1987, a statement of objections was sent to the undertakings concerned, which replied to it. A hearing of their representatives took place on 23 and 24 November 1987.

7 At the end of that procedure the Commission adopted the Decision. According to the Decision (point 22), the restrictions of competition derived from a set of agreements or concerted practices fixing prices and delivery quotas and sharing markets for welded steel mesh. Those agreements, according to the Decision, concerned different parts of the common market (the French, German or Benelux markets), but affected trade between Member States because undertakings established in various Member States participated in them. The Decision states that 'there was no general agreement between all manufacturers in all the Member States concerned, but rather a complex of different agreements, the parties to which were not always the same. Nevertheless, as a result of the regulation of the individual sub-markets this complex of agreements had the effect of producing far-reaching regulation of a substantial part of the common market'.

8 The operative part of the Decision is as follows:

'*Article 1*

Tréfilunion SA, Société Métallurgique de Normandie (SMN), Chiers-Châtillon-Gorcy (Tecnor), Société de Treillis et Panneaux Soudés, Sotralentz SA, Tréfilarbed

SA, or Tréfilarbed Luxembourg/Saarbrücken SARL, Tréfileries Fontaine l'Évêque, Frère-Bourgeois Commerciale SA (now Steelinter SA), NV Usines Gustave Boël, Afdeling Trébos, Thibo Draad-en Bouwstaalprodukten BV (now Thibo Bouwstaal BV), Van Merksteijn Staalbouw BV, ZND Bouwstaal BV, Baustahlgewebe GmbH, ILRO SpA, Ferriere Nord SpA (Pittini), and GB Martinelli fu GB Metallurgica SpA have infringed Article 85(1) of the EEC Treaty by participating from 27 May 1980 until 5 November 1985 on one or more occasions in one or more agreements or concerted practices (hereinafter referred to as "agreements") consisting in the fixing of selling prices, the restricting of sales, the sharing of markets and in measures to implement these agreements and to monitor their operation.

Article 2

The undertakings named in Article 1 which are still involved in the welded steel mesh sector in the Community shall forthwith bring the said infringements to an end (if they have not already done so) and shall henceforth refrain in relation to their welded steel mesh operations from any agreement or concerted practice which may have the same or similar object or effect.

Article 3

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

1. Tréfilunion SA (TU): a fine of ECU 1 375 000;

2. Société Métallurgique de Normandie (SMN): a fine of ECU 50 000;

3. Société des Treillis et Panneaux Soudés (STPS): a fine of ECU 150 000;

4. Sotralentz SA: a fine of ECU 228 000;

5. Tréfilarbed Luxembourg/Saarbrücken SARL: a fine of ECU 1 143 000;

6. Steelinter SA: a fine ECU 315 000;

7. NV Usines Gustave Boël, Afdeling Trébos: a fine of ECU 550 000;

8. Thibo Bouwstaal BV: a fine of ECU 420 000;

9. Van Merksteijn Staalbouw BV: a fine of ECU 375 000;

10. ZND Bouwstaal BV: a fine of ECU 42 000;

11. Baustahlgewebe GmbH (BStG): a fine of ECU 4 500 000;

12. ILRO SpA: a fine of ECU 13 000;

13. Ferriere Nord SpA (Pittini): a fine of ECU 320 000;

14. GB Martinelli fu GB Metallurgica SpA: a fine of ECU 20 000.

Articles 4 and 5 (omissis)'

9 According to the Decision (points 14 and 195(f)), NV Usines Gustave Boël, afdeling Trébos, is a division of NV Usines Gustave Boël which has no legal personality. The Commission therefore addressed the Decision to the latter. The applicant will therefore be referred to as Boël, Trébos or Boël/Trébos.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 17 October 1989, the applicant brought the present action for the annulment of the Decision. Ten of the thirteen other addressees of that Decision also brought an action.

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

12 By order of 13 October 1992 the Court of First Instance ordered that, on account of the connection between the above cases, they should be joined for the purposes of the oral procedure, pursuant to Article 50 of the Rules of Procedure.

13 By letters lodged at the Registry of the Court of First Instance between 22 April 1993 and 7 May 1993 the parties replied to the questions put to them by the Court.

14 Having regard to the replies to those questions and upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry.

15 The parties presented oral argument and answered questions put to them by the Court at the hearing which took place from 14 to 18 June 1993.

Forms of order sought

16 The applicant claims that the Court should:

— declare its application admissible and well founded;

— consequently, annul the Decision, which finds that the applicant committed an infringement of Article 85 of the EEC Treaty;

— in the alternative, reduce the fine of ECU 550 000 imposed on the applicant;

— in any event, reduce the rate of interest applied to the fine to 9%;

— order the defendant to pay the costs in their entirety.

17 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

18 The applicant puts forward, essentially, two pleas in law in support of its application. The first alleges infringement of Article 85(1) of the Treaty and the second infringement of Article 15(2) of Regulation No 17.

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

I — *The evidence of the agreements*

A — *In the French market*

(1) *For the period 1981-1982*

The contested measure

19 The Decision (points 23 to 50 and point 159) censures the applicant for participating, between April 1981 and March 1982, in a first set of agreements on the French

market. Those agreements involved, first, the French producers (Tréfilunion, STPS, SMN, CCG and Sotralenz) and, secondly, the foreign undertakings operating in the French market (ILRO, Ferriere Nord, Martinelli, Boël/Trebos, TFE, FBC and Tréfilarbed). Their object was to set prices and quotas with a view to limiting imports of welded steel mesh into France.

Arguments of the parties

20 The applicant admits having taken part in the meetings concerning agreements but claims that the Commission is wrong to infer from its participation in the meetings that it participated in the agreements.

21 It claims, first, that because of its small market share in France it did not play a decisive role in the meetings and that the purpose of its participation was to keep track of developments in the market and, accordingly, determine freely, on the basis of its commercial interests, what stance to adopt.

22 As regards prices, the applicant denies that the alleged agreement enabled prices to be raised spectacularly. It adds that the Commission has not proved that it charged the same prices as other producers.

23 As regards quotas, the applicant admits having discussed the ideal allocation of products but denies having participated in and adhered to any quota arrangement. It rejects the conclusion drawn by the Commission from a Ferriere Nord hand-written note in point 49 of the Decision (annex 25 to the statement of objections), namely that, if the volume of the Belgians' sales in France was 8 000 tonnes and

4 000 tonnes was allocated to TFE/FBC — FBC marketing TFE's production — the Boël/Trébos quota must also have been 4 000 tonnes.

24 The Commission observes that the applicant has admitted its participation in the meetings relating to the agreements and that it does not deny that they were anti-competitive in intent. The fact that such participation pursued the aim of obtaining information about market developments and exchanging views on the ideal allocation of products does not mean that it does not constitute an infringement of Article 85(1) of the Treaty, since such participation is in itself contrary to that provision.

25 It adds that the documents mentioned in the Decision are sufficient to establish that the applicant took an active part in the agreements. The fact that the applicant did not observe the prices and quotas does not alter the fact that there was an infringement.

26 The Commission states, finally, that the price increase was the result of an artificial situation (point 24 of the Decision) and that it indicated (points 40 to 45 of the Decision) that differences regarding prices emerged between the parties, leading to complaints from the applicant (points 40 and 50 of the Decision).

Findings of the Court

7 The Court finds that the applicant admits its participation in the meetings but denies having signed price and quota agreements. It must be observed, however, that the applicant does not dispute that the purpose of the meetings in which it took part was to fix prices and quotas. It must therefore be considered whether the Commission was right to infer from the applicant's participation in such meetings that it was a party to the agreements.

28 The Court considers that the documents produced by the Commission establish that the applicant participated in the agreements concerning the French market in 1981 and 1982. It is apparent from the Ferriere Nord note (annex 25 to the statement of objections, point 49 of the Decision) concerning the meeting held in Paris on 1 April 1981 between the French, Italian and Belgian producers that at that time a volume of 8 000 tonnes had 'already' been 'negotiated' for the Belgian producers. Another note, dated 23 October 1981, from Tréfilunion (annex 1 to the statement of objections, points 46 and 48 of the Decision) shows that, under the 'recent agreement', the quota of the other Belgian producer was 4 000 tonnes. The Commission was right to infer from those two documents that the applicant had been allocated a quota of 4 000 tonnes under the agreements entered into, about which, according to the second document, Tréfilarbed complained because they reserved 'too good a share for the Italian and Belgian producers'.

29 A telex of 15 March 1982 from Boël to Ferriere Nord shows that the 'the Franco-Belgian-Italian agreement of early 1981' also covered prices in so far as Mr Castelnuovo, of Boël, complained that 'Mr Montanelli of ILRO is selling, through a Briançon company, rather large quantities of mesh in France at prices well below those determined' under that agreement and joined Mr Boël in thanking Mr Pittini, of Ferriere Nord, for 'preserving the market from blows' (annex 17 to the statement of objections, point 50 of the Decision).

30 In April 1982, the applicant took part in discussions with a view to adjusting and ensuring compliance with the agreements in the future, as evidenced by a note from Mr Cattapan of Ferriere Nord concerning a meeting of 6 April 1982 (annex 19 to the statement of objections, point 50 of the Decision) and a telex from the latter to Italmet, the agent in France for Ferriere Nord and Martinelli, dated 20 April 1982, which reproduces a telex of 19 April 1982 to the representatives of ILRO, Martinelli and Tréfilunion (annex 20 to the statement of objections, point 50 of the Decision), according to which note was taken of 'the initiative taken by several French producers to enter the market on conditions not in accordance with the latest directives'.

31 In view of all the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard the applicant's participation in the agreements whose object was to fix prices and quotas on the French market during the period 1981-1982.

32 It follows that the applicant's complaint must be rejected.

(2) *For the period 1983-1984*

The contested measure

33 The Decision (points 51 to 76 and 160) censures the applicant for having participated in a second series of agreements involving, on the one hand, the French producers (Tréfilunion, STPS, SMN, CCG and Sotralentz) and, on the other, the foreign producers operating in the French market (IŁRO, Ferriere Nord, Martinelli, Boël/Trébos, TFE, FBC and Tréfilarbed). The purpose of those agreements was to fix prices and quotas with a view to limiting imports of welded steel mesh into France. That set of agreements was put into effect between the start of 1983 and the end of 1984 and was formalized by the adoption on 14 October 1983 of a 'protocol of agreement' concluded for the period 1 July 1983 to 31 December 1984. That protocol recorded the results of the various negotiations between the French, Italian and Belgian producers and Arbed concerning the quotas and prices to be applied on the French market and fixed the quotas of Belgium, Italy and Germany as 13.95% of consumption on the French market 'under an agreement between those producers and the French industry'. The applicant is said not to have observed those agreements after June 1984 (point 76 of the Decision).

Arguments of the parties

34 The applicant denies having participated in the actual application of the quotas or having been allocated the quota of 2.86% which the Commission ascribed to it on the basis of documents from the Association Technique pour le Développement de l'Emploi du Treillis Soudé (hereinafter 'ADETS'). It maintains that it did not become a member of ADETS until 1986 and that it never expressed its agreement to the content of those documents. It claims to have made deliveries far in excess of the so-called quotas.

35 It adds that it is not mentioned in the protocol of agreement of 14 October 1983 and did not sign it.

36 The applicant states that there is a contradiction between the tables in annex 42 to the statement of objections, which refer to January, February and March 1984, and point 65 of the Decision, which purports to reproduce the data from those tables but in reality concerns the period July 1983 to March 1984.

37 The Commission contends that the documents prepared by ADETS (annexes 40 to 43 to the statement of objections, point 62 of the Decision) correspond exactly to the terms of the protocol of agreement, which evidences the Belgian participation (point 60 of the Decision) by virtue of an agreement concluded between the foreign producers and the French industry. It contends that the tables produced by the applicant prove nothing since they do not contain data comparable to the ADETS documents and that, in any event, deliveries well in excess of the quota did not take place until after the date specified by the Decision as marking the end of the infringement (points 73 and 76 of the Decision). The Commission considers that, in those circumstances, the fact that the applicant did not sign the protocol does not mean that it did not participate in the agreements. Moreover, the Commission emphasizes that annex 42 was prepared in respect of March 1984 but relates

to deliveries of welded steel mesh on the French market, giving cumulative figures for the entire period from July 1983 to March 1984, in exactly the same way as the table in point 65 of the Decision.

Findings of the Court

38 The Court finds that the Decision criticizes the applicant for having participated in all the agreements entered into on the French market (point 51) which were prepared in the first half of 1983 and resulted in a protocol of agreement recording the outcome of the various negotiations (point 60). According to the Decision (point 60(c)), 'the Belgian involvement is apparent from the "protocole d'accord" itself', whereas the quota allocated to Boël is evidenced by documents containing monthly and cumulative comparisons between quotas and actual deliveries (point 62). The Decision states that, in May and June 1984, the Belgian companies were beginning to exceed their combined quotas (point 73) and concludes from this that Boël and the others ceased to comply with the agreements after June 1984 (point 76).

39 It must first be observed that the Commission has no evidence of Boël's involvement in the 1983 discussions. The applicant was not present at the Milan meeting of 23 February 1983 at which those discussions took place (annexes 27 and 29 to the statement of objections, point 53 of the Decision). Moreover, the telex of 24 May 1983 from Mr Chopin de Janvry, a representative of Sacilor, concerning a meeting of 19 May (annex 30 to the statement of objections, point 55 of the Decision) was not disclosed to the applicant and cannot therefore be relied on against it.

40 It is nevertheless necessary to establish whether Boël's involvement might be inferred from later documents. The Commission has produced documents of two kinds to show Boël's participation in the quota arrangements covering the French market for the period 1983-1984. First, there is a document entitled 'protocol d'accord "Treillis soudé"', dated 14 October 1983, and, secondly, a set of tables

giving for January, February, March, May and June 1984 the sales figures of the various producers on the French market and their market shares, incorporating a comparison of those figures with 'references'.

41 The Court finds that the preamble to the protocol of agreement stresses the need to 'limit and regulate Belgian, Italian and German imports (Tréfilarbed excepted), fixing them at 13.95% of consumption on the market within the framework of an agreement between those producers and French producers' and that that figure corresponds precisely with the 'reference' allocated in the tables to the Belgian and Italian producers.

42 The fact that those figures corresponded precisely assumes particular importance in the light of the fact that the applicant was closely involved in the drawing up of those tables. In January 1984, Tréfilunion had in its possession figures for the applicant's monthly sales in France since July 1983, since they are included in the cumulative figure for its sales in the January 1984 table (annex 42 to the statement of objections, point 62 et seq. of the Decision). The figures in the tables correspond almost exactly with the applicant's actual sales, as shown by the figures which it produced at the hearing, and it has given no explanation regarding the manner in which those figures were communicated to ADETS, of which it was not a member at that time.

43 To that evidence must be added the fact that the applicant's sales figures appear under the heading 'total contracting parties' and are compared in absolute terms and in terms of market share with figures appearing in the column entitled 'references'.

44 Finally, that evidence is corroborated by the fact that it is clear from a telex of 13 April 1984 that the applicant was called to a meeting to be held on 15 May 1984, the purpose of which was 'analysis of our cooperation so far, review of the European market and, on the basis thereof, the drawing up of a timetable for price rises

with amounts to be established, and interpenetration of markets' (annex 47 to the statement of objections, point 67 of the Decision).

45 In view of all the foregoing, the Court considers that the Commission was right to conclude that the applicant had participated in the quota arrangements on the French market until June 1984.

46 The applicant's complaint must therefore be rejected.

B — *In the Benelux market*

47 The Decision finds against the applicant for having participated in agreements concerning the Benelux States, including in particular quota arrangements and price agreements.

(1) *The quota arrangements*

The contested measure

48 The Decision (point 164) states that, although no quotas were agreed at the meetings in Breda and Bunnik in the Netherlands (proposals for quotas were discussed but nothing apparently came of them), the fact remains that data for individual companies were communicated to competitors with a view to preparing the ground

for a quota cartel and, in particular, export figures were sent by Tréfilunion to Boël/Trébos (point 85 of the Decision), in breach of Article 85 of the Treaty.

49 The Decision (points 78(b) and 171) also criticizes 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.

Arguments of the parties

50 The applicant denies that, following the meeting of 26 August 1982, measures were taken jointly to create a quota cartel.

51 The Commission considers that it is incontestable that after the meeting of 26 August 1982 efforts were made to set up a quota cartel, but without success (point 112 of the Decision). However, the exchange of information between competitors which might potentially be used to set up such a cartel constituted, at the very least, a concerted practice within the meaning of Article 85 of the Treaty.

Findings of the Court

52 The Court finds that the Decision criticizes the applicant not for having participated in a quota cartel but for having exchanged information which could be used in order to set up such a cartel.

53 Since the applicant has not denied that exchange of information, which is also evidenced by the document mentioned in point 85 of the Decision, it must be concluded that the Commission has established to the requisite legal standard the existence of a concerted practice within the meaning of Article 85 of the Treaty (judgment of the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 258 to 261).

54 The Court also finds that the applicant does not deny its participation in the agreements on quantitative restrictions of German exports to the Benelux States or the transmission of export figures.

(2) *The price agreements*

The contested measure

55 The Decision (points 78(a) and (b), 163 and 168) criticizes the applicant for having participated in agreements between the main producers selling on the Benelux market, including the 'non-Benelux producers', and 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, attended (point 168 of the Decision) by at least Thibodraad, Tréfilarbed, Boël/Trébos, FBC, Van Merksteijn, ZND, Tréfilunion and, among the German producers, at least BStG. The Decision is based on numerous telex messages sent to Tréfilunion by its agent for the Benelux States. Those messages contain precise details of each meeting (date, place, those present and those absent, subject-matter — discussion of the market situation, proposals and decisions concerning prices — and determination of the date and place of the next meeting).

Arguments of the parties

56 The applicant admits having participated in meetings concerning the Benelux market at which information was exchanged on prices charged, but it insists that it attended only in order to learn about market conditions, that it played an entirely passive role and never gave any commitment to the other participants. Moreover, it rejects the view that it played a leading role in that area and asserts that the meeting of 26 August 1982 held in Breda was called not by Trébos on the initiative of Mr Boël (point 84 of the Decision) but by Mr Broekman of Thibodraad.

57 The Commission states that Trébos was present at all the Breda and Bunnik meetings at which prices were fixed and that its particular interest in that agreement is clear from its telex of 26 March 1984 mentioned in point 97 of the Decision. As regards the meeting of 26 August 1982, the Commission states that Tréfilunion's minutes of that meeting show that it was 'organized by Trébos following an initiative by Mr Boël' and that the applicant has produced no evidence to refute that statement.

Findings of the Court

58 The Court finds that the applicant admits its participation in the meetings but denies having subscribed to price agreements. It must be observed, however, that the applicant does not deny that the purpose of the meetings in which it took part was price fixing. It must therefore be considered whether the Commission was right to infer from the applicant's participation in such meetings that it was a party to the agreements.

59 The Court finds that, contrary to its assertions, the applicant did not confine itself, at the meetings, to gathering market information but in fact took an active part. In that connection, it is not important that the applicant did not organize the meeting of 26 August 1982; regard need merely be had to Mr Boël's contribution to that meeting, at which he demanded that a solution be found for the Belgian market, or the attitude of Mr De Hornois, a representative of Boël/Trébos, evinced by his telex of 26 March 1984 (annex 68 to the statement of objections, point 97 of the Decision) to Mr Marie, of Tréfilunion, which states: 'Following the Belgian market meeting of 22 March 1984, the prices for welded mesh have been raised from BFR 17 400 to BFR 18 500 for March/April. A price increase of BFR 500 is planned for May. We would be grateful if you would give these instructions to Mr Peters because we have noticed you are active on and interested in the Belgian market, despite (sic) what Mr Peters said at the last meeting in Breda'. Moreover, it must be borne in mind that the Tréfilunion telex of 3 April 1984 to Trébos (mentioned in point 97 of the Decision, annex 69 to the statement of objections) indicates the role played by Mr Boël concerning the introduction of Tréfilunion to the Belgian market.

60 Furthermore, even if it is assumed that the applicant did not participate actively in the meetings, the Court considers that, having regard to the manifestly anti-competitive nature of the meetings, as evidenced by the numerous telexes from Mr Peters to Tréfilunion mentioned in the Decision, the applicant, by taking part without publicly distancing itself from the what occurred at them, gave the impression to the other participants that it subscribed to the results of the meetings and would act in conformity with them (judgments of the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission*, cited above, paragraph 232, and Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 98, 99 and 100).

61 It follows that the Commission has established to the requisite legal standard that the applicant participated in the price agreements on the Benelux market in the period August 1982 to November 1985.

62 The applicant's complaint must therefore be rejected.

C — *In the German market*

The contested measure

63 The Decision (points 147 and 182) criticizes the applicant for being a party to agreements in the German market whose object was, first, to regulate the exports of Benelux producers to Germany and, secondly, to ensure compliance with the prices charged on the German market. According to the Decision, the applicant, Tréfilarbed (Roermond), TFE/FBC, Thibodraad and BStG were parties to those agreements (points 150, 153, 154, 179 and 181 of the Decision).

Arguments of the parties

64 The applicant denies any participation in the agreements covering the German market. It claims that it had no interest in exporting to the German market because it had a wholly owned subsidiary in Germany through which it was kept fully informed of the decisions taken by the German structural crisis cartel and, also, it made its German sales through or by agreement with that subsidiary.

65 It adds that its exports to Germany were particularly voluminous between 1983 and 1986, which shows that it did not participate in the quota arrangement.

66 Finally, the applicant claims that it sold systematically at a price DM 10 lower than the price fixed by the cartel. At the hearing, it stated that an undertaking was not prohibited from selling its products at a price level close to that of the prices

imposed on a market, particularly if that price was high and its subsidiary was obliged to observe it by reason of its membership of the cartel.

67 The Commission considers that the documents mentioned in the Decision are sufficient to establish the applicant's participation in the agreements.

68 The existence of the applicant's subsidiary does not, in the Commission's view, prove that the applicant had no interest in penetrating the German market. The Commission adds that the fact that a substantial tonnage was sent to Germany during that period clearly shows Boël's interest in penetrating the German market.

69 It observes that the increase in Boël's exports to the German market in 1982-1983 is accounted for by the increase in prices on the German market, linked with the setting up of the crisis cartel, and points out that Boël's exports stabilized between 1983 and 1985, a period which coincided with the existence of the cartel, by contrast with the other years. It regards that pattern as a consequence of the close concertation between Trébos and BStG referred to by Mr Müller, the chief executive of BStG, in his telex of 15 December 1983 (annex 65(b) to the statement of objections, point 92 of the Decision).

70 As regards prices, the Commission states that the applicant has, by implication, admitted that it set its level by reference to the cartel price, which would not have been the case if it had acted solely in response to market forces.

Findings of the Court

71 The applicant's participation in the agreements covering the German market is apparent from Mr Müller's telex of 15 December 1983 to Thibodraad following a meeting held in Breda on 5 December 1983, attended by the applicant, which states: 'I should like to make it absolutely clear, however, that the biggest increase in cross-border trade has been in that from Belgium to Germany, which in view of the close cooperation with Boël is quite clearly attributable to the second Belgian producer'. The applicant's involvement in those agreements is confirmed by a telex dated 11 January 1984 from Mr Peters to Mr Marie, which refers to a meeting held in Breda on 5 January 1984, attended by the applicant, FBC, Tréfilarbed, Tréfilunion, BStG and other Dutch undertakings. That telex states: 'The usual participants asked the representatives of Baustahlgewebe to stop upsetting the Benelux market by exporting large quantities there at very low prices. The Germans defended themselves by saying that the Belgians (Boël and more recently Frère-Bourgeois) were exporting comparable tonnages to Germany. The Belgians said that they were observing the German market prices, and it was better to talk about a market percentage rather than tonnes. Nothing specific was decided.' Those two pieces of evidence are also corroborated by an internal memorandum dated 24 April 1985 (annex 112 to the statement of objections, point 153 of the Decision) drawn up by Mr Debelle, of FBC, concerning a meeting held on the same day in Bunnik, according to which 'Mr Ruthotto (a representative of BStG) had confirmed during the meeting that the two Belgian producers were scrupulously observing the price agreements made at Baustahlgewebe'.

72 It is therefore apparent from those documents that the applicant participated in concertation with BStG concerning its exports to the German market and that, at the very least, it attempted to give the impression that it was observing the agreed prices and sales volumes.

73 In view of the foregoing evidence, the applicant cannot rely on the large volume of, and the increase in, its exports to Germany or claim that, having a subsidiary in Germany, it had no interest in exporting to that market. The Court finds that the

increase in the applicant's exports to Germany recorded between 1982 and 1983 is indicative of the interest which the German market presented for the applicant and therefore contradicts its assertion that its ownership of a subsidiary in Germany meant that it had no interest in exporting to that market. It must also be stated that, after the increase recorded in 1982 and 1983, the applicant's exports to the German market stabilized at a high level.

74 Moreover, as regards prices, the Court finds that the applicant has adduced no evidence to show that it sold systematically at a price DM 10 lower than that fixed by the German cartel and has thus been unable to refute the evidence provided by the telexes of 11 January 1984 and 24 April 1985, mentioned in point 90 of the Decision, from which it appears that the Belgian producers observed the German market prices.

75 It follows from the foregoing that the Commission has established to the requisite legal standard that the applicant participated in the price and quota agreements on the German market.

76 The applicant's complaint must therefore be rejected.

II — *The non-binding nature of the agreements*

Arguments of the parties

77 The applicant maintains that it merely took part in a number of meetings in order to obtain information. It insists that it never agreed to be or considered itself bound by the price or quota proposals put forward at the meetings and moreover those proposals were not complied with and were not in practice the subject of penalties.

78 The Commission refers to the facts established by it in the Decision and concludes that the participants had a common intention to control the evolution of the market at all times and to establish constant cooperation rather than be exposed to the risks of competition.

Findings of the Court

79 The Court considers that the facts, as established, contradict the applicant's assertion that it played a passive role in relation to the cartel and its claim that it was not and did not consider itself bound by the prices and quotas fixed at the meetings. It must be observed in that connection that, in the course of its contacts with its competitors, the applicant tried to give the impression that it was observing and would continue to observe the decisions taken in relation to the agreements, which implies that it had given commitments to them.

80 It follows that the applicant cannot claim that the agreements were not binding. The applicant's complaint must therefore be rejected.

III — *The lack of an 'appreciable' restriction of competition*

Arguments of the parties

81 The applicant claims that its market shares were so minimal that its participation in the meetings at issue could not in any sense have the object of distorting, preventing or restricting competition within the Community.

82 It maintains that, because of the transparency of the welded steel mesh market, attributable to the fact that 70 to 80% of the price of that product depends on that of wire rod and that the price is also dependent on that of reinforcing bars, a competing product the prices of which are made public, the alleged agreements could only have had a negligible effect on competition, which means that the requirement of an appreciable effect on competition, as consistently defined in the case-law of the Court of Justice, cannot be satisfied.

83 The applicant also states that, in view of the fact that both the basic product (wire rod) and a competing product (concrete reinforcing bars) were subject to a quota system imposed under the ECSC Treaty, the undertakings producing welded steel mesh felt it necessary to take measures themselves, in the absence of a specific legal instrument under Community law, in order to respond to the structural difficulties in the industry. It considers that the Commission should have taken that into account not only when fixing the level of the fine but also when making its finding as to the existence of an infringement.

84 The Commission replies that the agreements which it found to exist did have an appreciable effect on competition. The applicant's participation in the agreements should not be appraised in isolation but in the wider context of the agreements concluded between the various participants on different partial markets.

85 The Commission states that whilst it is true that the value added to welded steel mesh is relatively low, it is precisely such competition as actually remains that should not be distorted (judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 133 and 134).

86 The Commission states that it is not unaware of the economic consequences of the situation on the welded steel mesh market, as described, and that it took them into account in calculating the fine (point 201 of the Decision). However, it does not draw the same legal inferences as the applicant, which considered that it was thereby entitled to infringe the competition rules of the Treaty. The Commission

considers that, whilst undertakings are entitled to take the necessary measures to adjust to economic necessities, they may do so only in conformity with the Treaty and, in that connection, it refers to Article 85(3) of the Treaty.

Findings of the Court

87 Article 85(1) of the Treaty prohibits as incompatible with the Common Market all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions or share markets or sources of supply.

88 It follows from the text of Article 85(1) of the Treaty that the only relevant questions are whether the agreements in which the applicant participated with other undertakings had as their object or effect the restriction of competition. Consequently, the question whether the applicant's individual participation in those agreements might, despite its limited extent, restrict competition is irrelevant (judgment of the Court of First Instance in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 216).

89 As regards the absence of any effects of the agreements, the Court of Justice has held that there is no need to take account of the concrete effects of an agreement when it is apparent, as in this case, that it has as its object the prevention, restriction or distortion of competition within the common market (Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45).

90 In any event, it must be stated that the agreements did have the effect of restricting competition by limiting sales on certain markets and thereby facilitating artificial price rises (as evidenced by the documents referred to in points 50, 84 to 112 and 153 of the Decision).

91 Furthermore, the low added value of welded steel mesh by comparison with wire rod and its substitutability with concrete reinforcing bars, both of which were subject to a quota system under the ECSC Treaty, may indeed have resulted in less room for competition on the welded steel mesh market. The price of wire rod represented a floor whereas, as stated by the Commission in the Decision (point 202), as a result of the substitutability of concrete reinforcing bars for welded steel mesh, there is a limit to the extent of the price gap which can exist between the two products and the margin of price competition is reduced. However, the remaining margin was sufficient to permit effective competition on the market on which the agreements found by the Decision had an appreciable impact (*Van Landewyck* v *Commission*, cited above). The fact that that margin of effective competition remained is confirmed by the existence of the agreements penalized by the Decision, since those agreements, whose object was to restrict competition, would have been of no interest to producers if there had been no possibility of some competition remaining on the market.

92 As regards the fact that it was understandable that the producers should compensate for the lack of Community rules for a product such as welded steel mesh which was so extensively affected by the quota systems introduced under the ECSC Treaty, it must be observed that it was open to the producers to notify their agreements to the Commission under Article 85(3) of the Treaty, which would have enabled the Commission, if appropriate, to rule as to whether they met the criteria laid down by that provision. Since the applicant did not avail itself of that opportunity, it cannot use the allegation of inaction by the Commission as a pretext for setting up secret agreements contrary to Article 85(1) of the Treaty.

93 It follows that the applicant's complaint must be rejected.

IV — *The lack of any effect on trade between the Member States*

Arguments of the parties

94 The applicant claims, first, that it never had any intention, by participating in the meetings at issue, of partitioning the markets and that it never gave any undertaking, not even orally, to refrain from selling to any particular customer or from charging any particular price.

95 Secondly, it maintains that the Commission has not proved that trade between Member States was actually affected by the agreements and practices at issue. In that connection, it states, first, that intra-Community trade in welded steel mesh is not particularly intensive except in the border areas because of the high transport costs. It further contends that the Commission cannot claim that trade between Member States was affected by the existence of a comprehensive agreement; the Commission was unable to prove that any such agreement existed and examined each market partially and separately.

96 The Commission states that the applicant's intention regarding the partitioning of the markets is irrelevant to the assessment of its conduct under Article 85(1), since it participated in an agreement whose object was actually to restrict competition. Moreover, it submits that there is nothing contradictory about its examining each partial market in order to identify each agreement and each participant and then to consider the cumulative effects thereof, which must necessarily be evaluated in a wider context. The Commission did not simply infer that the agreements were liable to affect trade between Member States but concluded that trade was indeed affected (points 160, 168 and 189 of the Decision).

97 It also points out that, in Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15, the Court of Justice held that 'Article 85(1) of the Treaty does not require

proof that ... agreements have in fact appreciably affected ... trade [between Member States], which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect'.

98 Finally, it submits that transport costs do not present an insurmountable obstacle where the price of the product is relatively high on the market concerned (point 5 of the Decision).

Findings of the Court

99 It follows from the text of Article 85(1) of the Treaty that the only relevant questions are whether the agreements in which the applicant participated with other undertakings were capable of affecting trade between Member States (*Enichem Anic* v *Commission*, cited above, paragraph 224). Consequently, the question whether the applicant intended partitioning the markets, thereby infringing Article 85 of the Treaty, is irrelevant.

100 It is settled law that, for an agreement, decision or concerted practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States and the influence thus foreseeable must give rise to a fear that the realization of a single market between Member States might be impeded (*Van Landewyck and Others v Commission*, cited above, paragraph 170).

101 It should also be borne in mind that Article 85(1) of the Treaty does not require that those responsible for the restrictions on competition which have been estab-

lished actually intended that they should restrict trade between Member States or that such practices actually had an appreciable effect on trade between Member States, but merely that it be established that such agreements were capable of having that effect (*Miller* v *Commission*, cited above).

102 In any event, it must be emphasized that the restrictions of competition ascertained were likely to divert patterns of trade from the course which they would otherwise have followed, since their object and effect was to impose quotas on imports from the various producers and to fix prices on the various markets. In that regard, it must be observed that German, Belgian, Italian, French and Dutch producers participated in those agreements. The Commission was therefore right to find that the agreements in which the applicant participated were liable to affect trade between Member States.

103 The applicant's complaint cannot therefore be upheld.

104 It follows from all the foregoing that the plea as to infringement of Article 85 of the Treaty must be rejected.

The pleas as to infringement of Article 15 of Regulation No 17

I — *The failure to identify the criteria for determining the gravity of the infringements*

Arguments of the parties

105 The applicant maintains that although it is referred to several times in the factual part of the Decision there is, on the other hand, nothing in the legal assessment to

show clearly the gravity of the infringements imputed to it. However, Article 15 of Regulation No 17 requires the Commission to specify the components of infringements and the criteria adopted for the imposition of fines. The Commission made it impossible for the applicant to appraise the gravity of its conduct by comparison with that of the other undertakings, even though the fines vary considerably from one undertaking to another. Finally, the applicant states that although the Commission contends that it took account of certain mitigating circumstances, they are described only briefly without any reference being made to the undertakings concerned.

106 The Commission replies that the whole Decision must be considered, not merely the factual part. It lists all the points of the Decision in which it analysed the particular circumstances of the applicant's participation in the agreements with respect to each market. It concludes that it sufficiently identified the components of each infringement and set out the criteria for assessment of the gravity of the infringements, in particular regarding the mitigating circumstances found to be applicable to each undertaking.

Findings of the Court

107 It is settled law that the Commission may impose a single fine for several infringements, and that applies particularly where, as in this case, the infringements ascertained in the Decision were concerned with the same type of conduct on different markets, in particular the fixing of prices and of quotas and exchange of information (see Joined Cases 40 to 48, 50, 54, 55, 56, 111, 113 and 114/75 *Suiker Unie and Others* v *Commission* [1975] ECR 1163, Case 27/76 *United Brands* v *Commission* [1978] ECR 207 and Joined Cases 100 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825). The fact cannot be ignored, as the Commission has rightly pointed out, that the applicant was, at a given time, involved in agreements covering the French, German and Benelux markets.

108 It must be noted 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 persons concerned with the indications necessary for them to determine whether or not it was well founded and enabled the Court to carry out its review of legality. As regards the mitigating circumstances, it must be borne in mind that, in its written reply to the questions put to it by the Court, the Commission indicated that no mitigating or aggravating circumstances were applicable to the applicant.

109 Consequently, the complaint must be rejected.

II — *The lack of intent*

Arguments of the parties

110 The applicant claims that it acted in good faith and did not commit the infringements deliberately. It submits that the undertakings operating on the welded steel mesh market could not imagine that their exchange of information and concertation were unlawful, in view of the prevailing economic crisis and the close link between the welded steel mesh market and the wire rod and concrete reinforcing bars market, which were the subject of 'crisis measures' taken by the Commission to help the steel industry under the ECSC Treaty. In that connection, the applicant mentions the existence of committees, with their members drawn from the largest producers, set up to discuss prices and quantities of ECSC products, in particular wire rod.

111 It also submits that the German welded steel mesh market was itself the subject of a structural crisis cartel, authorized by the Federal Cartel Office and tolerated

by the Commission for four years. It is undeniable, as stated in the Decision (point 206), that the existence of that cartel prompted the producers in other Member States to protect themselves.

112 The applicant concludes that since such close concertation was permitted for wire rod and a crisis cartel had been authorized in Germany for welded steel mesh, the producers of welded steel mesh were clearly entitled to think, in good faith, that they too had the right to meet and exchange information.

113 The Commission observes that welded steel mesh is covered by the EEC Treaty, which has its own rules on concertation and formally prohibits all forms of concertation regarding quantities or prices. If producers thought that concertation was necessary because of the structural crisis in the welded steel mesh sector, they should nevertheless have observed the EEC Treaty rules. The Commission adds that the arrangements at issue were not crisis cartels, which necessarily involve a restructuring plan and can be authorized only after notification with a view to obtaining an exemption under Article 85(3). The Commission states that, when calculating the fine, it took account of the economic impact on welded steel mesh of its relationship with wire rod and concrete reinforcing bars.

114 As regards the German crisis cartel, the Commission submits that there is no Community competence in respect of any national crisis cartel and that assessments as to whether national measures go beyond the national interest and affect the Community interest are a very delicate matter. As regards its alleged failure to act, the Commission states that only two years passed between its receiving notification of the cartel from the Federal Cartel Office and its initiation of investigations. It contends that it took action as soon as it had notice of the disruptive effects of the German cartel on intra-Community trade.

115 The Commission also points out that it stated, at point 197 of the Decision, that for most of the time the participating undertakings concealed their practices. It states that the Court of Justice has consistently held (Case 246/86 *Belasco* v *Commission* [1989] ECR 2117, paragraph 41, and Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261) that 'it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition'. That is, in the Commission's view, the position in the present case, which is concerned with price and quota agreements.

Findings of the Court

116 The Court points out that it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally, but it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (judgments of the Court of Justice in *Belasco* v *Commission* and *Tipp-Ex* v *Commission*, cited above, and judgment of the Court of First Instance in Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 350).

117 The Court also notes that the Commission took account of a number of circumstances common to all the undertakings, which prompted it to reduce the fines considerably below the level which would normally be justified (point 208 of the Decision). Those circumstances include the fact that 75 to 80% of the price of welded steel mesh is attributable to the price of wire rod, a product subject to production quotas, the structural decline in demand, the existence of excess capacity, short-term market fluctuations and the rather low profitability of the sector (point 201 of the Decision) and also the relationship between welded steel mesh and reinforcing bars (point 202 of the Decision). The Decision also took account, as a mitigating circumstance, of the existence of a structural crisis cartel in Germany, which

led the parties established in other Member States to seek to protect themselves, although that did not justify the unlawful measures which they took (point 206 of the Decision).

118 The complaint must therefore be rejected.

III — *The taking into account of the effects of the infringement*

Arguments of the parties

119 The applicant maintains that the Commission committed an error of appraisal by describing the infringement as serious since the gravity of an infringement must depend on the effects on the market and, in the present case, the effects were absolutely negligible. The fine imposed on the applicant should therefore be reduced to a fairer level.

120 The Commission contends that it did not commit any error of appraisal. Contrary to the applicant's assertions, the gravity of an infringement does not depend solely on its impact on the market. Price and quota agreements are expressly mentioned in Article 85(1) of the Treaty and in themselves constitute particularly serious infringements of the competition rules. Moreover, the Commission is of the opinion that it took account of the real effects of the infringements on the market in evaluating the gravity of the infringement in this case.

Findings of the Court

121 The Court points out that the agreements in which the applicant participated had the object and effect of fixing prices and volumes of exports and imports on the

market of the original Member States of the Community and that, contrary to the applicant's assertions, the effects of those agreements cannot in any circumstances be regarded as negligible.

122 The Court considers that the conduct inherent in the agreements must be regarded as serious in view of the manifest character of the infringement of Article 85(1), in particular subparagraphs (a) and (c) thereof. Moreover, it must be pointed out that the Decision (point 200) took account of the fact that in certain cases the agreed prices and quantities were not observed by the parties, as a result of which the direct economic consequences of those infringements were somewhat palliated.

123 It follows that the Commission took due account of the effects of the infringement in assessing its gravity.

124 The applicant's complaint must therefore be rejected.

IV — *The disproportionate nature of the fine*

Arguments of the parties

125 At the hearing, the applicant claimed, first, that seen as a percentage of its turnover (3%), the fine imposed on it seemed disproportionate having regard to the fines imposed on the other undertakings. Viewed thus, its fine was almost the same as

that of the other undertakings which the Commission regarded as playing an influential role regarding the agreements (3.15% for BStG and 3.6% in the case of Tréfilunion), whereas that aggravating factor cannot be applied to it. Furthermore, the Commission failed to take account of the fact that it does not belong to a powerful economic entity, being an independent, unsubsidized family undertaking.

26 At the hearing, the applicant also criticized the Commission for taking its turnover for 1985 as the basis of the fine, that being its highest turnover over the whole of the period at issue. It considers that the Commission should have taken as a basis for its calculation the average turnover for the entire period considered.

27 The Commission contends that, as explained in the Decision, Boël is a large undertaking with subsidiaries in at least two other Member States and that is why it did not treat it as belonging to the group of independent undertakings.

Findings of the Court

28 The Court finds, first, that the Commission's replies to the questions put to it and its pleadings show that it did not take account of any mitigating or aggravating circumstances in relation to the applicant and that the applicant received a fine amounting to 3% of its turnover, whereas BStG and Tréfilunion received fines rep-

resenting 3.15% and 3.6% respectively of their turnover in welded steel mesh, even though an aggravating factor was held against them.

129 The Court finds that the applicant has not produced sufficient evidence to show that, having regard to the duration and the particular gravity of the infringements which it was found to have committed, it was treated with greater severity than BStG and Tréfilunion.

130 As regards the difference between the percentages of 3% applied to the applicant and 3.6% applied to Tréfilunion, the Court considers that it reflects, in due proportion, the fact that an aggravating factor was held against Tréfilunion. As regards the difference between the 3% applied to the applicant and the 3.15% applied to BStG, it must be pointed out that, even though an aggravating factor applied to BStG — the fact that it was one of the initiators of the conduct penalized and one of the protagonists — it is no less true that the Decision imputes to the applicant participation in the agreements covering the French market for the periods 1981-1982 and 1983-1984 and that, on the other hand, participation in those agreements is not imputed to BStG.

131 Nevertheless, the Court considers that the Commission was wrong to refuse to include the applicant among the undertakings not belonging to a powerful economic entity, for which it took account, as a mitigating circumstance, of 'the lesser effect of their unlawful conduct'. Boël/Trébos does not belong to a powerful economic entity any more than Sotralentz or ILRO, by contrast with, in particular FBC, which does belong to such an entity.

32 It follows that, by not applying the abovementioned mitigating factor to the applicant, the Commission wrongly imposed on it a fine representing 3% of its turnover in welded steel mesh for 1985.

33 As regards the choice of 1985 as the reference year for determination of the applicant's turnover for the purpose of fixing the amount of the fine, it should be noted that the applicant asserts, without having been contradicted by the Commission, that that was the year in which its deliveries of welded steel mesh were highest, whereas for most of the other producers it was the year in which their deliveries were the lowest (see Decision, table 2). Consequently, the choice of that year, which was not disclosed until after adoption of the Decision, merely exacerbated the disproportionate nature of the fine imposed on the applicant. The figure of 3% of the 1985 turnover resulted in a more substantial fine for the applicant than that imposed on the other producers.

4 The applicant's complaint must therefore be upheld.

5 Accordingly, the Court, in the exercise of its unlimited jurisdiction, considers that the fine of ECU 550 000 imposed on the applicant must be reduced by one-fifth to ECU 440 000.

The rate of interest imposed by the Commission in the event of an application to the Court

Arguments of the parties

136 The applicant states that the registered letter from the Commission accompanying the Decision indicates that, in the event of proceedings being instituted, the amount due will bear interest at the rate of 10.5%. That rate is the one applied by the European Monetary Cooperation Fund to its operations in ECU, as determined on the first business day of the month in which the Decision was adopted and published in the *Official Journal of the European Communities* (OJ 1989 C 197, p. 1), plus one-and-a-half points. The applicant considers that that increase is arbitrary and can be accounted for only by the Commission's wish to discourage applications to the Court. That is why it has asked the Court to reduce the rate of interest applied to the fine to 9%.

137 The Commission considers that that complaint is without foundation, since Article 4 of the Decision states that interest will be payable at the rate of 12.5% in the event of failure to pay the fine within a period of three months. It is therefore for the benefit of the undertakings that, specifically in order not to discourage proceedings by them before the Court, that rate is reduced in the event of an action being brought.

Findings of the Court

138 The Court considers that the Commission was entitled to adopt a higher rate than that charged by the European Monetary Cooperation Fund in the event of late payment and in any event, as far as proceedings are concerned, to discourage man-

ifestly unfounded actions brought with the sole object of delaying payment of the fine (judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 141).

39 The Court observes that the accompanying letter provided not for an increase in the rate of interest in the event of proceedings being brought but for a reduction, in such circumstances, to a rate below that which would apply in the event of late payment.

40 It follows that, contrary to the applicant's assertion, the Commission did not seek to discourage applications to the Court.

41 That complaint must therefore be rejected.

Costs

42 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared. Since the action has been partially successful and both parties have applied for costs, the Court considers that the circumstances of the case will be properly taken into account if the applicant is ordered to pay its own costs and three-fifths of the Commission's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) Reduces the amount of the fine imposed on the applicant by Article 3 of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh) to ECU 440 000;

2) Dismisses the application as regards the remaining claims;

3) Orders the applicant to bear its costs and to pay three-fifths of the Commission's costs;

4) Orders the Commission to bear two-fifths of its costs.

Kirschner Bellamy Vesterdorf

García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 6 April 1995.

H. Jung H. Kirschner

Registrar President

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