OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 February 1997 *

1. By this appeal, Ferriere Nord SpA, a company incorporated under the laws of Italy ('Ferriere Nord' or 'the appellant') asks the Court to set aside the judgment of 6 April 1995 in *Ferriere Nord* v *Commission* ('the contested judgment'), [1] by which the Court of First Instance dismissed its application for annulment of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty [2] ('the contested decision').

Facts and procedure

2. The contested decision imposes fines on fourteen manufacturers of welded steel mesh [3] for having, in the words of Article 1, '... 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'.

3. According to the findings of the Court of First Instance, the contested decision alleges more specifically that the appellant '... participated in two sets of agreements concerning the French market ... intended to determine prices and quotas in order to limit imports of welded steel mesh into France, and to set up an exchange of information', the first set of agreements having been implemented between April 1981 and March 1982, the second set between the beginning of 1983 and the end of 1984. [4]

4. In common with ten of the thirteen other addressees, Ferriere Nord brought an action before the Court of First Instance for annulment of the decision in so far as the decision concerned itself; in the alternative, it claimed that the fine of ECU 320 000 imposed on it should be set aside or reduced to an equitable amount.

* Original language: French.

1 — Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917.

2 — 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.

3 — According to paragraph 1 of the contested judgment, which reproduces the definition set out in point 1 of the decision, welded steel mesh 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.'

4 — Paragraph 15 of the contested judgment.

5. The appellant put forward three pleas in law in support of its application: infringement of Article 85(1) of the Treaty, infringement of Article 15(2) of Regulation No 17, [5] and misuse of powers. The Court of First Instance rejected all those pleas and ordered Ferriere Nord to pay the costs.

6. The appellant brought this appeal by application lodged at the Registry of the Court of Justice on 19 June 1995 in which it claims that the contested judgment should be set aside. In its reply, it claims in the alternative that the fine should be substantially reduced and that the Commission should be ordered to pay the costs incurred both at first instance and on appeal. The Commission claims that the appeal should be dismissed, the validity of the contested decision upheld and the appellant ordered to pay the costs.

7. This appeal is organized around two pleas: it maintains that the Court of First Instance erred in law in interpreting and applying, first, Article 85(1) of the Treaty and, second, Article 15 of Regulation No 17.

8. I shall consider each of those pleas in turn, setting out their substance as I do so. I would observe, as a preliminary point, that, whereas most of the arguments put forward by Ferriere Nord on appeal may appear to repeat those already put forward before the Court of First Instance, they nevertheless contest the interpretation and application by that Court of Community provisions and hence satisfy the requirements of Article 51 of the Statute of the Court of Justice and of Article 112(1)(c) of the Rules of Procedure. [6]

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

9. This first plea breaks down into three parts. Essentially, the appellant maintains that the Court of First Instance:

— did not take account of the Italian version of Article 85(1) of the Treaty, according to which an agreement must have as 'its object *and* effect' the prevention, restriction or distortion of competition;

— failed to evaluate the detrimental effects on trade between Member States of the

5 — 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).

6 — See points 18 and 19 of my Opinion in the pending case of *De Rijk* v *Commission*, Case C-153/96 P [1997] ECR I-2901, I-2903.

agreements to which the appellant was a party;

— wrongly assessed the economic and legal links between the market in welded steel mesh — the product to which the anti-competitive agreements related — and the market in wire rod, a product coming under the ECSC Treaty which is upstream of the market in welded steel mesh and on which the latter product is dependent.

The Italian version of Article 85

10. After finding that the appellant had admitted to being a party to the agreements between producers of welded steel mesh and that it did not dispute the object of those agreements, namely to fix prices and quotas, [7] the Court of First Instance observed as follows:

'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.' [8]

It then concluded from this that:

'It follows from the wording of that provision that the only relevant questions are whether the agreements to which the applicant was a party with other undertakings had as their object or effect the restriction of competition and whether they might have affected trade between Member States ...'. [9]

11. In answering those questions, the Court of First Instance found, on the basis of the factual evidence adduced, that:

'By fixing prices and quotas, the agreements to which the applicant was a party had as their object or effect the restriction of competition and might have affected trade between Member States ...'. [10]

7 — Paragraph 25 of the contested judgment.

8 — Paragraph 26 of the contested judgment.

9 — Paragraph 27 of the contested judgment.

10 — Paragraph 28 of the contested judgment.

12. The appellant had put forward in support of its application a plea based on the Italian version of Article 85(1), which, unlike the other language versions, refers to agreements which have as their object *and* effect the restriction of competition. [11] It concluded from this that that provision lays down a cumulative and not an alternative condition and that if that cumulative condition was not satisfied, it could not be charged with any infringement. The Court of First Instance held, however, that:

'The applicant may not rely on the Italian version of Article 85 of the Treaty in order to require the Commission to demonstrate that the agreement had both an anti-competitive object and effect. That version cannot prevail by itself against all the other language versions, which, by using the term "or", clearly show that the condition in question is not cumulative but alternative, as the Court of Justice has consistently held since its judgment in [Case 56/65] *Société Technique Minière* [[1966] ECR 235, at 249]. The uniform interpretation of rules of Community law requires that they be interpreted and applied in the light of the versions existing in the other Community languages (judgments of the Court of Justice in Case 19/67 *Van der Vecht* [1967] ECR 345 at p. 354, and in Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415, paragraph 18).' [12]

13. The appellant asserts that, in interpreting Article 85, the Court of First Instance wrongly refused to take account of the actual effects of the agreement in as much as it referred only to its anti-competitive object. In this connection, it accuses the Court of First Instance of wrongly basing its reasoning on case-law which did not relate to the Italian version of Article 85. It further maintains that it appears from the cases cited by the Court of First Instance that the other language versions should be called in aid only where the meaning of one version of a provision is not clear, which is not true of the Italian version of Article 85.

14. The appellant's argument cannot be upheld either as regards the alleged cumulative nature of the conditions laid down by Article 85 or as regards the alleged irrelevance of the case-law cited.

15. Suffice it to say that the Court of First Instance was right in law when it pointed out that it is now established, by settled case-law, that the condition laid down in Article 85(1) is alternative and not cumulative. In particular, the judgment in *Société Technique Minière*, to which the Court of First Instance referred, leaves the matter in no doubt:

'... for the agreement at issue to be caught by the prohibition contained in Article 85(1) it must have as its "object or effect the

11 — That version reads as follows: '1. Sono incompatibili con il mercato comune et vietati tutti gli accordi tra imprese, tutte le decisioni di associazioni d'imprese e tutte le pratiche concordate che possano pregiudicare il commercio tra Stati membri e che abbiano *per oggetto e per effetto* di impedire, restringere o falsare il gioco della concorrenza all'interno del mercato comune ...' (my emphasis).

12 — Paragraph 31 of the contested judgment.

prevention, restriction or distortion of competition within the Common Market".

The fact that these are *not cumulative* but alternative requirements, indicated by the conjunction "or", leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied.

This interference with competition referred to in Article 85(1) must result from all or some of the clauses of the agreement itself.

Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.

...'. [13]

13 — At 249.

16. The later judgment in *Consten and Grundig* v *Commission* [14] clearly confirms that analysis:

'... for the purpose of applying Article 85(1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.' [15]

17. I would observe, for completeness' sake, that the Court has maintained that approach in more recent cases. In the 1990 judgment in *Sandoz Prodotti Farmaceutici* v *Commission*, [16] the Court held that:

'For the purpose of the application of Article 85(1) there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or

14 — Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299.

15 — At 342. See also Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at 407-408.

16 — Case C-277/87 *Sandoz prodotti farmaceutici* v *Commission* [1990] ECR I-45 (summary publication).

distortion of competition within the common market ...'. [17]

18. Consequently, it may be inferred with certainty from the Court's case-law that Article 85(1) does not require an agreement to have both an anti-competitive object and an anti-competitive effect. It is only if the content of the agreement does not disclose an anti-competitive object that it will be necessary to determine whether it has adverse effects on competition. In other words, it will be necessary to go into any deleterious effect on the market only if it *cannot* be found that the object of the agreement is prohibited.

19. Consequently, the Court of First Instance was right in law to reject the appellant's argument based on the claim that the conditions laid down in Article 8(1) of the Treaty are cumulative.

20. That conclusion is unaffected by the fact that that argument could be derived from the Italian version of that provision. According to the case-law cited by the Court of First Instance, '... the need for a *uniform* interpretation of Community [provisions] necessitates that this passage should not be considered in isolation, but that, in cases of doubt, it should be interpreted and applied in the light of the versions existing in the other ... languages'. [18] '[I]t must be borne in mind that Community legislation is drafted in several languages and that the different languages versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.' [19]

21. Accordingly, the Court of First Instance cannot be accused of not having taken account of the Italian version of Article 85(1) of the Treaty in interpreting and applying that provision, since it had to respect the overriding requirement of uniform interpretation of Community law.

Effects on trade between Member States

22. The appellant claims that the Court of First Instance erred in law by failing to consider in what respect the agreements to which it was a party affected trade between Member States. It considers that, to be contrary to Article 85, an agreement must be capable of affecting (pregiudicare) trade between Member States to an appreciable extent. In its view, however, the agreements in question were not capable of affecting trade between France and Italy to an appreciable extent.

17 — Paragraph 3 of the summary, at I-46.

18 — *Van der Vecht*, at 354; my emphasis.

19 — *CILFIT* v *Ministry of Health*, paragraph 18.

23. It refers in this regard to *Béguelin Import*, [20] which sets out the requirements for the application of Article 85 in the following terms:

'To be incompatible with the common market and prohibited under Article 85, an agreement must be one which "may affect trade between Member States" and have "as [its] object or effect" an impediment to "competition within the common market". [21]

...'

'Finally, in order to come within the prohibition imposed by Article 85, the agreement must affect trade between Member States and the free play of competition to an appreciable extent. [22]

...'

24. That judgment simply confirms the case-law to the effect that an agreement is caught by Article 85 only if there is a sufficient degree of probability that it may have an influence on the pattern of trade in such a way that it might hinder the attainment of a single market between States. That condition must be understood by reference to the actual circumstances of the agreement. Only actual examination can bear this out. [23]

25. Whilst the appellant considers that factual aspects (intra-Community trade confined to frontier regions) peculiar to the circumstances of the case suffice to rule out the possibility that its participation in the agreements at issue had any influence whatsoever on intra-Community trade in welded steel mesh, it seems to me that, on the contrary, the contested judgment scrupulously took account of the facts of the dispute in analysing the arguments put forward by the appellant in its application, as reiterated in its appeal, and that it rejected them after setting out detailed reasoning.

26. The Court of First Instance rightly held in accordance with this Court's case-law that it is enough, for the purposes of Article 85(1), that the agreements at issue were *capable* of affecting trade to an appreciable effect, and that there is no need to establish that there were such effects.

20 — Case 22/71 *Béguelin Import* [1971] ECR 949.
21 — Paragraph 10.
22 — Paragraph 16.
23 — See, for example, Case 5/69 *Völk* [1969] ECR 295, paragraph 7, and Case 1/71 *Cadillon* [1971] ECR 351, paragraph 8.

27. The Court of First Instance was therefore perfectly justified in stating that the restrictive effect may be caught by Article 85(1) if the following two conditions are met: it is sufficient that the effect either actually occurred or was capable of occurring; the damage which it was capable of causing to competition must have been appreciable:

'With regard to the effect on trade between Member States, Article 85(1) of the Treaty does not require that the restrictions on competition which have been established have actually affected trade between Member States, but only requires that it be established that such agreements are capable of having that effect (judgment in [Case 19/77] *Miller* [[1978] ECR 131], paragraph 15).' [24]

28. The reference made by the Court of First Instance to the judgment in *Miller* appropriately calls to mind this Court's completely unambiguous view on this point:

'In prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition, Article 85(1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, 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.' [25]

29. The Court of First Instance then analysed the context of the case before concluding that the market could have been appreciably affected:

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

Furthermore, assuming, as the applicant claims, that the agreements did not alter the total market share held by the Italian producers and that its exports remained far below its allocated quota, it is nevertheless the case that the restrictions on competition which have been established were likely to divert patterns of trade from the course which they would otherwise have followed

24 — Paragraph 32.

25 — *Miller*, paragraph 15.

(judgment in [Joined Cases 209/78 to 215/78 and 218/78] *Van Landewyck* [[1980] ECR 3125], paragraph 172). The object of the agreements was to allocate quotas for imports into the French market in order to bring about an artificial increase in prices on that market.' [26]

30. Moreover, the appellant considers that the Court of First Instance was wrong to cite (at paragraph 27 of the contested judgment) the judgment in *Enichem Anic* v *Commission*. [27] It argues that, whereas that case was concerned with an agreement between all producers in the Community with a view to sharing the market by means of the individual allocation of annual sales 'quotas', trade between States was very limited in the case of welded steel mesh.

31. That argument cannot be upheld and the reference made by the Court of First Instance is entirely relevant.

32. The Court of First Instance rightly held that '... the question whether, having regard to the applicant's weak position on the French market, its own participation in those agreements could restrict competition or affect trade between Member States is irrelevant'. The only relevant factor — which was indeed considered, as I have just observed — was whether, in accordance with *Enichem Anic* v *Commission*, as cited by the Court of First Instance, the infringement in which the appellant took part was capable as a whole of infringing Article 85 of the Treaty:

'... the applicant's argument that its own activities could not have restricted competition must be rejected since the relevant question is not whether the applicant's individual participation was capable of restricting competition but whether the infringement in which it participated with others could have had that effect. The undertakings which took part in the infringement held in the Decision to have been committed account for nearly the whole of that market, which would clearly indicate that the infringement which they committed together could restrict competition.' [28]

33. Consequently, the argument that the Court of First Instance misinterpreted the concept of detrimental effect on trade between Members States within the meaning of Article 85 of the Treaty cannot be upheld.

26 — Paragraphs 33 and 34 of the contested judgment.

27 — Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 216 and 224.

28 — *Enichem Anic* v *Commission*, paragraph 216.

Effect of the regime for wire rod on the market in welded steel mesh

34. In its action before the Court of First Instance, the appellant observed that, in assessing the impact on competition of the agreements at issue, the economic and legal context relating to wire rod could not be ignored in view of the close links between the market in welded steel mesh, the product to which the anti-competitive agreements related, and the market in wire rod, a product coming under the ECSC Treaty. In so far as the price of welded steel mesh largely depends on the price of wire rod, if the agreements at issue had had the effect of increasing the price of welded steel mesh, that outcome coincided with the Commission's wish, as manifested in its policy of restructuring the steel industry, of seeing the price of wire rod increase, since the rise in the price of wire rod was brought about by the increase in the price of welded steel mesh.

35. At paragraph 29 of the contested judgment, the Court of First Instance conceded as follows:

'With regard to the effect on competition, it is true, as the applicant observes, that the price of welded steel mesh depends largely on that of wire rod'. [29]

It considered, however, in making its determination of the facts submitted to it in the exercise of its sole jurisdiction as tribunal of fact, as follows:

'but it does not follow from this that any possibility of effective competition in that sector was precluded. The producers still had a sufficient margin to allow effective competition in the market. The agreements could therefore have had an appreciable effect on competition (judgment of the Court of Justice in *Van Landewyck and Others* v *Commission* [cited above], paragraphs 133 and 153).'

36. Reiterating the reasoning it had already expounded before the Court of First Instance, the appellant argues on appeal that the Court of First Instance failed to assess its argument that the agreement relating to welded steel mesh was lawful on the ground that it helped to decrease production of wire rod, and referred to irrelevant case-law.

29 — In so doing, however, it emphasized a factor which had already been taken into account by the decision. In the factual part of the decision, point A(2) states that 'The value added in welded steel mesh compared with its intermediate material, wire rod, is relatively small (20 to 25%). Its final price depends greatly, therefore, on the price of the intermediate material.'

37. To my mind, the Court of First Instance cannot be accused of having failed to consider the appellant's reasoning in this regard.

38. It considered that the essential aspect was whether there was potential for effective competition on the market in question. The Court of First Instance answered that question in the affirmative and concluded that the agreements in the market in welded steel mesh were capable of having an appreciable effect on competition.

39. Consequently, that argument should be rejected.

Second plea alleging that the fine is unfair

40. By its second plea the appellant maintains that the Court of First Instance misinterpreted and misapplied Article 15(2) of Regulation No 17, which gives the Commission simply a power to impose a fine, without requiring it to do so. It argues that the Court of First Instance considered it settled that where the competition rules have been infringed, the Commission must impose a fine.

41. Conversely, it argues that it is possible not to impose a fine where this is warranted by the circumstances. Specifically it contends that the Court of First Instance failed to consider all the arguments which it put forward in order to evaluate whether a fine was justified in this case and whether the fine was imposed in accordance with criteria of fairness. In this connection, it raises an argument which it considers to be 'determinative'. It relates to the close link between the market in welded steel mesh and the market in wire rod, which, in its view, should have had a bearing on whether the fine was justified and on its amount. It refers chiefly to the judgment in *Suiker Unie and Others* v *Commission*, [30], in which this Court considerably reduced the amount of the fines imposed by the Commission on the ground that the latter had not taken account of the legislative background and economic context of the conduct to which exception was taken — that is to say of the extent to which the system introduced by the common organization of the markets was capable of affecting conditions on the sugar market. It takes the view that the situation in this case is no different from the one considered by this Court in *Suiker Unie* and accuses the Court of First Instance of having failed to discern any similarity between the situation of the sugar in *Suiker Unie* and that of wire rod in this case on the ground that in the former case there was a common organization of the market and in the other a quota and price regime. In the appellant's view, a quota and price regime under the ECSC is tantamount to a common organization of the agricultural markets.

42. Lastly, the appellant seeks to obtain a reduction in the fine by raising a series of arguments which it maintains the Court of First Instance failed to take into account. I shall examine those arguments in turn.

30 — Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663.

43. By this plea, the appellant is in fact contesting the Court of First Instance's interpretation and application of Article 15(2) of Regulation No 17 as regards (a) the qualifying conditions on account of which the Commission may inflict a fine and (b) the determination of the amount of the fine.

44. Under Article 15(2) of Regulation No 17:

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

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

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

45. As far as the actual principle of imposing a fine is concerned, the Court of First Instance cannot be accused, as the appellant alleges, of not having specified the optional nature of a fine in the event of a finding of an infringement of Article 85(1). The wording of Article 15(2) of Regulation No 17 ('The Commission *may*') is sufficient to establish this and the Court of First Instance is not under any obligation to point this out in order not to infringe that provision.

46. The only requirement laid down in Article 15(2) in order for the Commission to exercise its power, according to the case-law of this Court, is that there must have been a finding that the infringements were committed '... intentionally or at least negligently, so that the undertakings concerned are liable to pay a fine as provided for in Article 15(2) of Regulation No 17 in respect thereof ...'. [31] The Court of First Instance took care to call that qualifying condition to mind in paragraph 41 of the contested judgment before going on in paragraph 42 to find that it was fulfilled:

'In the present case, having regard to the intrinsic seriousness and obvious nature of the infringement of Article 85(1) of the Treaty, and in particular subparagraphs (a) and (c) thereof, the Court considers that the applicant cannot claim that it did not act deliberately.'

47. Neither can it be accepted that the Court of First Instance failed to establish that it was justified in imposing the fine, in particular as regards its amount, and that it did not take account of the appellant's arguments.

48. The second subparagraph of Article 15(2) of Regulation No 17 provides that, in fixing the amount of the fine, regard is to be had to 'the gravity and to the duration of the

31 — *Suiker Unie and Others* v *Commission*, paragraph 611. See also the order of the Court of Justice of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 53.

infringement'. The requirement relating to the 'gravity of the infringement' is interpreted by this Court as having to be established in the light of a number of factors, such as the legislative and economic context of the sector in question. This is among the avenues by which the appellant seeks to obtain a reduction in the amount of the fine which has been imposed on it.

49. As for what the appellant regards as its 'determinative' argument, that is to say the link with the market in wire rod, which it considers should have a bearing on the justification or the amount of the fine, it must be held that the Court of First Instance duly set forth the appellant's reasoning (paragraphs 58, 59 and 60 of the contested judgment) before setting out its reasons for rejecting it (paragraphs 63 to 66).

50. In particular with regard to the alleged parallel with the link between sugar and beet considered by this Court in the judgment in *Suiker Unie*, the Court of First Instance described the appellant's claims thus in paragraph 58 of its judgment:

'In those cases there was a common organization of the markets for sugar which was intended to guarantee, by a system of prices and quotas, fair remuneration for the base product, sugar beet. Here there is "a common organization of the markets" at the level of the basic product, wire rod, the aim of which is to protect that product directly, although there is no provision made for the processed product. Without any rules governing deliveries and prices of the processed product, welded steel mesh, there was risk that the protection given to wire rod would have been ineffective. That is why the producers filled that gap in the system with their own rules on their own initiative. The Court ought therefore to make a considerable reduction in the fine, as the Court of Justice did in the judgment in the *Suiker Unie* case, on the ground that the scope for applying the competition rules was greatly reduced.'

51. In the judgment in *Suiker Unie*, this Court, after setting out the basis for the principle of imposing a fine, [32] stated the criteria for determining its amount:

'In fixing the amount of the fines under Article 15(2) [of Regulation No 17] regard shall be had both to the gravity and the duration of the infringement so that the Court has to take particular account of the legislative background and economic context of the conduct to which exception is taken, the nature of the restrictions of competition, as well as the number and size of the undertakings concerned.' [33]

32 — Paragraph 611.
33 — Paragraph 612.

After this, the Court justified the reduction in the fine in terms of the specific characteristics of the market in sugar:

'The common organization of the market in sugar, which moreover is tending to emerge from its initial transitional phase and ... only left a residual field available for competition, has therefore helped to ensure that sugar producers continue to behave in an uncompetitive manner.

Although this situation cannot lead to acceptance of practices which are likely to make still worse what are, from the point of view of the Treaty, the disadvantages of such a system, it nevertheless means that the behaviour of the parties concerned cannot be regarded with the usual severity.' [34]

'Having regard to these factors the fines imposed ... must be reduced ...'. [35]

52. The Court of First Instance rejected as follows the alleged parallel to be drawn between the market situation considered in *Suiker Unie* and the instant case:

'the applicant cannot rely on the judgment in *Suiker Unie*, since that judgment relates to a situation which is fundamentally different in two respects from that in the present case. First, the *Suiker Unie* case concerned a common organization of an agricultural market falling within the EEC Treaty, whereas the present case concerns a system of pricing and production quotas falling under the ECSC Treaty. Secondly, in the *Suiker Unie* case, it was the derived product which was the subject of a common organization of the market, whereas in the present case it is the basic product which is the subject of the pricing and production quota system. It follows that, at an economic level, the situation with which the *Suiker Unie* judgment was concerned and that in the present case are fundamentally different, and the applicant can therefore not rely on that judgment in support of its claims.' [36]

53. Accordingly, contrary to what the appellant contends, the Court of First Instance did pay sufficient attention to its arguments. In particular, it clearly established that, unlike the situation considered by this Court in *Suiker Unie*, the market in welded steel mesh is such that there can be effective competition and that the agreements on that market amounted to an infringement of Article 85 justifying imposition of the fine laid down in the contested decision.

34 — Paragraphs 619 and 620.
35 — Paragraph 624.
36 — Paragraph 63.

54. As regards lastly the series of arguments put forward by the appellant with a view to obtaining a reduction in the fine imposed on it, they need not detain us long since, in applying Article 15(2) of Regulation No 17, once again the Court of First Instance cannot be accused of having failed to take them into account.

55. For the purposes of fixing the amount of the fine, the gravity of the infringement, which has to be taken into account, '... has to be determined by reference to numerous factors, such as, in particular, the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, *no binding or exhaustive list of the criteria which must be applied has [to be] drawn up*'. [37]

56. It is therefore not so much whether a list of arguments was taken into consideration, but whether two factors, one relating to the duration of the infringement, the other to its gravity, which has to be assessed in the light of a general context, were present which is determinative in assessing the amount of the fine imposed. In applying the second subparagraph of Article 15(2) of Regulation No 17 as it did, the Court of First Instance did investigate whether those two conditions were satisfied.

57. As far as the duration of the infringement is concerned, the assessment of which is not contested by the appellant, I would refer to the facts set out in paragraph 15 of the contested judgment.

58. As regards the gravity of the infringement, suffice it to say that the Court of First Instance did not shirk from considering the matters raised in support of the appeal.

59. Accordingly, the appellant's argument that it acted with the intention of safeguarding the market in wire rod 'in accordance with the provisions adopted by the Commission' was considered and rejected by the Court of First Instance in paragraph 64 of the contested judgment on the ground that it could not be relied upon as a 'mitigating factor'.

60. Furthermore, the appellant's allegation that it did not benefit in any way from the alleged infringement was considered by the Court of First Instance in paragraph 53 et seq. of the contested judgment, where it is stressed that the decision did in fact take account of the unprofitable nature of the production of welded steel mesh in general and of the appellant's position in particular.

61. As for the argument that the appellant had acted 'with a view to integrating and not

37 — Order in *SPO and Others* v *Commission*, paragraphs 53 and 54; my emphasis.

partitioning the markets', it was not raised as such during the proceedings before the Court of First Instance. However, as the Commission has pointed out, that argument falls within the broader context of an infringement committed intentionally or negligently and, as such, was correctly analysed in paragraphs 41 and 42 of the contested judgment.

62. As to the appellant's contention that it was not party either to the agreements relating to the Benelux market or to those relating to the German market, even though it had a considerable interest in the latter, the Court of First Instance cannot be accused of having failed to pay heed to this argument, since, in any event, the decision accuses the appellant only of having participated in the agreements relating to the French market, not of having participated in those relating to the Benelux or German markets.

63. Lastly, the argument that the appellant did not encourage the anti-competitive agreements on the Italian market, even though it had been in a position to do so having regard to its important position on that market, — an argument which was not taken up by the Court of First Instance — seems to me to carry no weight: the appellant cannot use as a mitigating factor the claim that it did not engage in prohibited practices to a greater extent than it actually did.

64. The plea alleging misinterpretation and misapplication of Article 15(2) of Regulation No 17 should therefore also be rejected.

Conclusion

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

— dismiss the appeal in its entirety;

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