JUDGMENT OF THE COURT (Fifth Chamber)
2 October 2003 *

In Case C-176/99 P,

ARBED SA, established in Luxembourg, represented by A. Vandencasteele, avocat,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 11 March 1999 in Case T-137/94 *ARBED* v *Commission* [1999] ECR II-303, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall and W. Wils, acting as Agents, assisted by J.-Y. Art, avocat, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and S. von Bahr, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 May 1999, ARBED SA brought an appeal under Article 49 of the ECSC Statute of the Court of Justice against the judgment of the Court of First Instance of 11 March 1999 in Case T-137/94 *ARBED* v *Commission* [1999] ECR II-303 ('the judgment under appeal'), by which the Court of First Instance dismissed in part ARBED's

application for, inter alia, annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1) ('the contested decision'). By that decision, the Commission imposed a fine on the appellant under Article 65 of the ECSC Treaty.

Facts and the contested decision

2 According to the judgment under appeal, the European steel industry underwent, from 1974 onwards, a crisis characterised by a fall in demand giving rise to problems of excess supply and capacity and low prices.

3 In 1980, after having attempted to manage the crisis by way of unilateral voluntary commitments given by undertakings as regards the amount of steel put on the market and minimum prices ('the Simonet Plan') or by fixing guide and minimum prices ('the Davignon Plan', the 'Eurofer I' agreement), the Commission declared that there was a manifest crisis within the meaning of Article 58 of the ECSC Treaty and imposed mandatory production quotas for, inter alia, beams. That Community system came to an end on 30 June 1988.

4 Long before that date, the Commission had announced in various communications and decisions that the quota system was to be abandoned, pointing out that the end of that system would mean a return to a market characterised by free competition between undertakings. However, the sector continued to be affected by excess production capacity which, according to expert opinion, had to undergo a sufficient and rapid reduction to enable undertakings to meet world competition.

5 From the end of the quota system, the Commission set up a surveillance system involving the collection of statistics on production and deliveries, monitoring of market developments and regular consultation with undertakings on the market situation and trends. The undertakings in the sector, some of which were members of the Eurofer trade association, thus maintained regular contact with DG III (Directorate-General for the 'Internal Market and Industrial Affairs') of the Commission by way of consultation meetings. The surveillance system came to an end on 30 June 1990 and was replaced by an individual and voluntary information scheme.

6 At the beginning of 1991, the Commission carried out a series of inspections in the offices of a number of steel undertakings and associations of undertakings in the sector. A statement of objections was sent to them on 6 May 1992. Hearings were held at the beginning of 1993.

7 On 16 February 1994, the Commission adopted the contested decision, by which it found that 17 European steel undertakings and one of their trade associations had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) of the ECSC Treaty. By that decision, it imposed fines on 14 undertakings for infringements committed between 1 July 1988 and 31 December 1990.

The proceedings before the Court of First Instance and the judgment under appeal

8 On 8 April 1994, the present appellant brought an action before the Court of First Instance for, inter alia, annulment of the contested decision.

9 By the judgment under appeal, the Court of First Instance granted the present appellant's application in part and reduced the fine imposed on it.

Forms of order sought by the parties

10 The appellant claims that the Court should:

— set aside the judgment under appeal;

— either, as the case stands at present, annul the contested decision and order the Commission to pay the costs of both sets of proceedings or, in the alternative, refer the case back to the Court of First Instance and reserve the costs.

11 The Commission contends that the Court should:

— reject all the grounds of appeal raised by the appellant;

— uphold the judgment under appeal in its entirety;

— order the appellant to pay the costs of the present proceedings.

The grounds of appeal

12 The appellant raises five grounds of appeal:

1. infringement of the rights of the defence during the administrative procedure in so far as the Court of First Instance failed to censure the fact that the appellant had not received a statement of objections;

2. erroneous assessment, as regards the question whether there was a quorum, of the minutes of the Commission meeting during which the contested decision was adopted;

3. infringement of the right to compliance with essential procedural requirements in so far as the Court of First Instance erred in taking the view that the contested decision had been properly authenticated;

4. infringement of the rights of the defence during the proceedings before the Court of First Instance;

5. infringement of Article 65 of the ECSC Treaty.

The appeal

The first ground of appeal

13 The first ground of appeal alleges infringement of the rights of the defence during the administrative procedure. It is directed against paragraphs 94 to 102 of the judgment under appeal, in which the Court of First Instance ruled on recital 322 of the grounds for the contested decision.

14 Recital 322 states:

'Only TradeARBED [SA ("TradeARBED")] took part in the various arrangements and agreements. However, TradeARBED is a sales company that sells, inter alia, beams on a commission basis for its parent company ARBED SA. TradeARBED receives a small percentage of the sales price for its services. To ensure equality of treatment, this Decision is addressed to ARBED SA, the beams-producing company in the ARBED group, and the turnover in the relevant products is the turnover of ARBED and not of TradeARBED.'

15 Paragraphs 94 and 95 of the judgment under appeal are worded as follows:

'94 As regards, second, the question whether the Commission breached the applicant's rights of defence by addressing to it a decision imposing on it a fine calculated on the basis of its turnover, without first having formally sent it a statement of objections or even indicated its intention of imputing to it liability for the infringements committed by its subsidiary, the Court observes that the procedural rights on which the applicant relies are, in the present

case, guaranteed by the first paragraph of Article 36 of the ECSC Treaty, which provides that before imposing a pecuniary sanction as provided for in the Treaty the Commission must give the party concerned the opportunity to submit its comments.

95 As to whether, in the present case, ARBED was given the opportunity to submit its comments before the [contested] decision was adopted, the Court finds that the Commission did not at any point in the administrative proceedings formally advise the applicant of its intention to impute to it liability for the conduct of TradeARBED called in question in the statement of objections and, accordingly, to impose on it a penalty calculated on the basis of its own turnover. The Court considers that such an omission could constitute a procedural irregularity capable of adversely affecting the applicant's rights of defence.'

16 In paragraph 96 of the judgment under appeal, the Court of First Instance referred to a set of facts which had occurred during the administrative procedure. It continued as follows:

'97 It follows from all the foregoing that, in particular: (a) either ARBED or TradeARBED, as applicable, replied without distinction to the requests for information which the Commission addressed to TradeARBED; (b) ARBED regarded TradeARBED as merely its sales "agency" or "organisation"; (c) ARBED spontaneously regarded itself as the addressee of the statement of objections formally notified to TradeARBED, of which it was fully aware, and instructed a lawyer to defend its interests; (d) the applicant's lawyer presented himself without distinction as either counsel for ARBED or counsel for TradeARBED; and (e) ARBED was requested to provide the Commission with certain information concerning its turnover for the products and the period of infringement referred to in the statement of objections.

98 The Court concludes that throughout the administrative procedure there was some uncertainty as to the respective roles and liability of the two companies ARBED and TradeARBED, as regards both the substantive issues (see also the numerous documents in the Commission's file which refer sometimes to ARBED and sometimes to TradeARBED) and the procedural aspects. This confusion persisted up to the stage of the written procedure before the Court, since in point 1 of the application (p. 3) the applicant stated that it (and not TradeARBED) had replied to the statement of objections on 3 August 1992 (this assertion, which was described as a "clerical error", was rectified by the applicant's lawyer in a corrigendum of 8 April 1994).

99 In the light of that confusion, the Court also considers that the statement of objections necessarily came within ARBED's control, that ARBED took it for granted from the outset that the Commission was holding it liable for the conduct of its subsidiary TradeARBED and that, accordingly, it could not seriously imagine that the amount of the fine which it might eventually be required to pay, as an undertaking subject to the prohibition in Article 65 of the Treaty, would be calculated by reference only to TradeARBED's turnover (see also point 12 of the statement of objections, which refers to the turnover of the ARBED group). Indeed, it even received confirmation that that would not be the case in the form of the request for information on its own turnover.

100 Furthermore, ARBED was given the opportunity to submit its observations on the objections which the Commission proposed to uphold against TradeARBED, both through its subsidiary and by the participation in the administrative hearing of two members of its legal department, assisted by a lawyer who, according to the information in the file referred to above, represented both companies. ARBED also had the opportunity to submit its observations on the imputation of liability contemplated by the Commission when it was requested to provide information concerning its turnover. In

that regard, the Court has already found that the applicant could not take that request to mean anything other than that the Commission intended to hold it liable for TradeARBED's conduct.

101 Having regard to all the facts of the case, moreover, the Court considers that Mr Temple Lang's letter of 30 June 1992, in which he stated that ARBED was not the addressee of the statement of objections and apparently denied it the right of access to the file for that reason, regrettable though it might be, did not in fact adversely affect the applicant's rights of defence; nor did the applicant put forward any plea based specifically on such a refusal.

102 Having regard to all the specific circumstances of the present case, the Court therefore considers that such an irregularity is not such as to entail the annulment of the [contested] decision in so far as it concerns the applicant.'

17 By its first ground of appeal, the appellant claims that the Court of First Instance was wrong to reject its plea for annulment of the contested decision alleging that, after having sent TradeARBED a statement of objections in which all of the objections were attributed to that undertaking, the Commission then took the contested decision against the appellant without first informing it of its intention or of the reasons which, in the Commission's opinion, justified that course of action and without giving the appellant an opportunity to make known its point of view on that intention and the formal reasons for it.

18 The Commission contends that the judgment under appeal should be upheld. It submits that the Court of First Instance examined the question whether the

failure to inform the appellant formally and expressly of the Commission's intention to impute to it liability for the conduct of TradeARBED was such as to constitute an infringement of the rights of the defence. After stating detailed reasons, the Court of First Instance found that the appellant had been given an opportunity, during the procedure before the Commission, to submit its point of view on that imputation.

Findings of the Court

19 In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9).

20 That principle requires, in particular, the inclusion in the statement of objections addressed by the Commission to an undertaking on which it intends to impose a penalty for infringement of competition rules of the essential factors taken into consideration against that undertaking, such as the facts alleged, the classification of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively during the administrative procedure brought against it (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 26; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 29; and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 135).

21 Given its importance, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person (see

Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 143 and 146).

22 It is common ground that, in the present case, the statement of objections did not state that fines might be imposed on the appellant. Moreover, as the Court of First Instance observed in paragraph 101 of the judgment under appeal, the appellant was not the addressee of the statement of objections and was denied a right of access to the file for that reason.

23 While it is undisputed that the appellant was aware of the statement of objections addressed to its subsidiary TradeARBED and of the procedure which had been initiated against that subsidiary, it cannot be concluded from that fact that the appellant's rights of defence were not infringed. Ambiguity as to the legal person on whom the fines would be imposed, which could have been dispelled only by properly addressing a fresh statement of objections to the appellant, persisted up to the end of the administrative procedure.

24 It follows that the Court of First Instance was wrong to conclude from the facts of the present case, in paragraph 102 of the judgment under appeal, that the failure to address a statement of objections to the appellant was not such as to entail annulment of the contested decision, in so far as it concerned the appellant, on the ground of infringement of the rights of the defence.

25 Since the first ground of appeal is well founded, the judgment under appeal must be set aside without its being necessary to examine the other grounds of appeal.

The action on the substance

26 Under Article 61 of the Statute of the Court of Justice, if an appeal is well founded and the Court of Justice quashes the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is the case here.

27 It follows from paragraphs 19 to 23 of this judgment that the action is well founded and that the contested decision must be annulled in so far as it concerns the appellant.

Costs

28 Under the first paragraph of Article 122 of the Court's Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, the Court must make a decision as to costs. Under Article 69(2) of those Rules, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

29 The Commission has been unsuccessful in its defence and the appellant has applied for costs to be awarded against the Commission. The Commission must therefore be ordered to pay the costs of both the proceedings before the Court of First Instance and the present appeal proceedings.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Annuls the judgment of the Court of First Instance of 11 March 1999 in Case T-137/94 *ARBED* v *Commission*;

2. Annuls Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as it concerns ARBED SA;

3. Orders the Commission of the European Communities to pay the costs of both the proceedings before the Court of First Instance and the present appeal proceedings.

Wathelet Edward La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber