

Case T-141/89

Tréfileurope Sales SARL

v

Commission of the European Communities

(Competition — Infringement of Article 85 of the EEC Treaty)

Judgment of the Court of First Instance (First Chamber), 6 April 1995 II - 797

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Relevant market — Delimitation — Welded steel mesh*
(EEC Treaty, Art. 85(1))
2. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Competition concentrated, as a result of the characteristics of the product, in the border areas of the Member States*
(EEC Treaty, Art. 85(1))
3. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Favourable effect of an agreement on the volume of intra-Community trade — Irrelevant*
(EEC Treaty, Art. 85(1))

4. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Participation allegedly under pressure — Not a factor such as to justify failure by an undertaking to notify the competent authorities*
(EEC Treaty, Art. 85(1); Council Regulation No 17, Art. 3)

5. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Criteria for assessment — Anti-competitive object — Finding to that effect sufficient*
(EEC Treaty, Art. 85(1))

6. *Competition — Agreements, decisions and concerted practices — Participation in meetings held by undertakings for an anti-competitive purpose — Sufficient basis for concluding that, if an undertaking has not distanced itself from the decisions taken, it participated in the subsequent arrangements*
(EEC Treaty, Art. 85(1))

7. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Meaning — ‘Gentlemen’s agreement’ concerning conduct in the market*
(EEC Treaty, Art. 85(1))

8. *Competition — Administrative procedure — Assurances given by officials with no authority to do so — Not binding on the Commission*
(EEC Treaty, Art. 85(1))

9. *Competition — Agreements, decisions and concerted practices — Exclusive agreements — Block exemption — Regulation No 67/67 — Exclusive distribution agreement containing no prohibition of exports — Existence of a concerted practice intended to restrict parallel imports — Not covered by the exemption*
(Commission Regulation No 67/67, Arts 1 and 3)

10. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Anti-competitive object or effect — Effect on trade between Member States — Criteria — Assessed overall and not at the level of each participant*
(EEC Treaty, Art. 85(1))

11. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Meaning — Agreements between parent company and subsidiaries that have no real freedom of action — Excluded — Condition — Actual control of one company by another, not merely a minority financial interest*
(EEC Treaty, Art. 85)

12. *Competition — Agreements, decisions and concerted practices — Export clauses in a sales contract — Obligation to resell in a specified country — Prohibited — Conditions (EEC Treaty, Art. 85(1))*
13. *Competition — Fines — More than one infringement — Imposition of a single fine — Permissible (Council Regulation No 17, Art. 15)*
14. *Competition — Community rules — Infringements — Intentional commission — Meaning (Council Regulation No 17, Art. 15)*
15. *Competition — Fines — Amount — Community penalties and penalties imposed by the authorities of a Member State for infringement of national competition law — Imposition of both — Permissible — Commission's obligation to take account of a national penalty imposed in respect of the same conduct (Council Regulation No 17, Art. 15)*
16. *Competition — Community rules — Application by the Commission — Not influenced by the application of similar national rules by a national authority (EEC Treaty, Arts 85 and 86)*

1. The market in the different kinds of welded steel mesh (including standard mesh, catalogue mesh, *Listenmatten* and tailor-made mesh) constitutes, for the purposes of Article 85(1) of the Treaty, a single market in welded steel mesh in that, first, a fall in the prices of standard mesh may render it substitutable for *Listenmatten* and tailor-made mesh and may divert customers towards standard mesh, and, secondly, there is some capacity in the industry to adapt its production plant in order to produce the different kinds of welded steel mesh.

the various border areas of the Member States concerned does not mean that decisions, agreements and concerted practices on the part of undertakings, within the meaning of Article 85(1) of the Treaty, do not affect trade in a substantial part of the common Market and therefore intra-Community trade. On the contrary, it necessarily implies that the national market is affected in the natural selling area and the fact that that area occupies only part of the geographical territory of a Member State does not mean that the national market as a whole is not affected.

2. The fact that competition in respect of the product in question operates essentially in

3. The fact that an agreement between undertakings, within the meaning of Arti-

cle 85(1) of the Treaty, is conducive to an increase, even a large one, in the volume of trade between Member States is not sufficient to exclude the possibility that the agreement may affect that trade in such a way as to detract from attainment of the objectives of a single market between those Member States.

their products and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be concluded that it is participating in the restrictive arrangements resulting from that meeting.

4. An undertaking which engages with others in anti-competitive activities with a view to fixing prices and quotas cannot rely on the fact that it did so under pressure from the other participants. It could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in such activities.
5. For the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement when it is apparent that it has as its object the prevention, restriction or distortion of competition within the common market. An undertaking which participates in an agreement sharing markets is not exculpated by the fact that it does not subsequently observe the agreed prices and quotas.
6. Where an undertaking participates, even if not actively, in meetings held by undertakings with a view to fixing the prices of their products and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be concluded that it is participating in the restrictive arrangements resulting from that meeting.
7. For there to be an agreement within the meaning of Article 85(1) of the Treaty, it is sufficient for the undertakings in question to have expressed their joint intention to conduct themselves in the market in a particular way. That is the case where there is a 'gentlemen's agreement' between a number of undertakings representing the faithful expression of such a joint intention of the parties to the agreement concerning a restriction of competition.
8. In an administrative procedure relating to an agreement within the meaning of Article 85(1) of the Treaty, assurances given by Commission officials cannot be regarded as committing the Commission where such officials have no authority to give such a commitment.
9. The spirit of Regulation No 67/67, as reflected in the preamble thereto and in Article 3(b)(2) thereof, is to make the exemption available under it subject to the condition that users will, through the possibility of parallel imports, be allowed a fair share of the benefits resulting from

the exclusive distribution. Accordingly, an exclusive distribution contract containing no prohibition of exports cannot benefit from a block exemption under Regulation No 67/67 where the undertakings concerned are engaged in a concerted practice aimed at restricting parallel imports.

10. In order to establish whether an undertaking can be found to have infringed Article 85(1) of the Treaty, the only relevant questions are whether it participated with other undertakings in an agreement having the object or effect of restricting competition and whether that agreement was liable to affect trade between Member States. The question whether the individual participation of the undertaking concerned in that agreement could, notwithstanding its limited scale, restrict competition or affect trade between Member States is entirely irrelevant.

Moreover, that provision does not require the restrictions of competition ascertained actually to have appreciably affected trade between Member States but merely requires that it be established that the agreement was capable of having that effect.

11. Although Article 85 of the Treaty does not apply to agreements and concerted practices between undertakings belonging

to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, such a situation does not exist where an undertaking exercises no control over another other than that deriving from a holding in its capital which falls far short of a majority interest.

12. Export clauses included in a sales contract under which the reseller is required to re-export the goods to a specified country constitute an infringement of Article 85 of the Treaty where they are essentially designed to prevent the re-export of the goods to the country of production so as to maintain a system of dual prices, and thereby restrict competition, within the common market.

13. The Commission may, under Article 15 of Regulation No 17, impose a single fine for several infringements. That applies particularly where several infringements were concerned with the same type of conduct on different markets, in particular the fixing of prices and of quotas and exchange of information, and the undertakings involved in those infringements were, largely, the same.

Moreover, the imposition of a single fine does not prevent the undertaking concerned from judging whether the Commission has correctly appraised the gravity and duration of the infringements or the Community judicature from carrying out its review of legality provided that the decision in question, read as a whole, provides the undertaking with the indications necessary for it to identify the different infringements for which it is criticized and the specific features of its conduct.

14. 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.
15. Although the possibility of concurrent sanctions resulting from two parallel procedures pursuing different ends is acceptable as a result of the special system of sharing jurisdiction between the Community and the Member States with regard to cartels, by virtue of a general requirement of natural justice the Commission must, in determining the amount of the fine under Article 15 of Regulation No 17, take account of penalties which have already been borne by the same undertaking for the same action, where they have been imposed for infringements of the cartel law of a Member State which have thus been committed on Community territory.
16. No similarities which may exist between the legislation of a Member State in the field of competition and the rules laid down in Articles 85 and 86 of the Treaty can in any circumstances serve to restrict the Commission's freedom of action in applying Articles 85 and 86 so as to compel it to adopt the same assessment as the authorities responsible for implementing the national legislation.