

Case T-145/89

Baustahlgewebe GmbH

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 - 991

Summary of the Judgment

1. *Competition — Administrative procedure — Access to the file — Request made after adoption of the Commission's final decision — Refusal — Effect on the legality of the decision — None*
2. *Competition — Agreements, decisions and concerted practices — Relevant market — Delimitation — Welded steel mesh
(EEC Treaty, Art. 85(1))*
3. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Proof of the existence of an agreement — Evidence put forward by the Commission — Counter-arguments advanced by the undertaking concerned — Verification a matter for the Community judicature
(EEC Treaty, Art. 85(1))*

4. *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)

 5. *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)

 6. *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))

 7. *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))

 8. *Competition — Community rules — Infringements — Intentional commission — Meaning*
(Council Regulation No 17, Art. 15)
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1. The legality of a Commission decision taken against an undertaking in a competition case cannot be affected by the Commission's refusal to grant further access to the file or the failure to forward certain documents during the course of the period allowed for an action to be brought where the request for access was made after the decision was taken and thus is a factor subsequent to the adoption of the decision.
 2. 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.

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.

3. Where the Commission refers, as evidence of an undertaking's participation in a cartel prohibited by Article 85(1) of the Treaty, to circumstances described as being indicative of the existence of such a cartel and the undertaking concerned seeks to justify those circumstances by claiming that they form part of the implementation of a patent licence agreement not claimed by the Commission to be unlawful, the Court must verify whether the matters raised by the Commission can be accounted for by anything other than the existence of a cartel, in particular the existence of the licence agreement referred to.
4. 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
5. 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.
6. 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.
7. 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.

8. 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.