JUDGMENT OF THE COURT
17 December 1998 *

In Case C-185/95 P,

Baustahlgewebe GmbH, a company incorporated under German law, established in Gelsenkirchen (Germany), represented by Joachim Sedemund and Frank Montag, Rechstanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 6 April 1995 in Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented initially by Bernd Langeheine, of its Legal Service, acting as Agent, then by Paul Nemitz, of its Legal Service, acting as Agent, assisted by Alexander Böhlke, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, D. A. O. Edward, H. Ragnemalm (Rapporteur), L. Sevón, M. Wathelet, R. Schintgen and K. M. Ioannou, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 3 February 1998,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 14 June 1995 Baustahlgewebe GmbH brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 6 April 1995 in Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987 (hereinafter 'the contested judgment'), in which the Court of First Instance partially annulled Article 1 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, hereinafter 'the Decision'), fixed the amount of the fine imposed by the Commission at ECU 3 million, dismissed the other heads of claim and ordered the applicant to bear its own costs and to pay one third of the Commission's costs.

The facts and the judgment of the Court of First Instance

2 According to the contested judgment, as from 1980 a number of agreements and practices, came into being in the welded steel mesh sector on the German, French and Benelux markets. The product concerned 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 which is used in almost all areas of reinforced concrete construction.

3 There are various kinds of welded steel mesh, in particular standard mesh, catalogue mesh of the *Lettermatten* or semi-standardised type, catalogue mesh of the *Listenmatten* type and tailor-made mesh.

4 For the German market, on 31 May 1983 the Bundeskartellamt (Federal Cartel Office) granted authorisation 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 authorised, however, only for the first two years of its operation. The Commission was notified by the Bundeskartellamt in 1983 of the establishment of that structural crisis cartel.

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), 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, Thibo Draad- en Bouwstaalprodukten BV (Thibodraad), 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 (TFE), Frère-Bourgeois Commerciale SA (FBC), Van Merksteijn Staalbouw BV 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 its decision in which it imposed on 14 welded steel mesh producers a fine for infringement of Article 85(1) of the Treaty. It is clear from point 22 of the Decision that the restrictions of competition derived from a set of agreements and/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.

8 With regard to the facts giving rise to the proceedings before the Court of First Instance, it appears from the contested judgment that the Decision criticises the applicant more particularly:

On the German market,

— for participation in agreements concerning trade interpenetration between Germany and France with the French undertaking Tréfilunion. Those agreements were allegedly concluded during a conversation of 7 June 1985 between Mr Müller, a director of the applicant, the legal representative of the structural crisis cartel and the President of the Fachverband Betonstahlmatten, and

Mr Marie, a director of Tréfilunion and President of the Association Française Technique pour le Developpment de l'Emploi des Trellis Soudés (ADETS). In paragraph 63 of the contested judgment, the Court of First Instance found that the Decision (point 140) held that the applicant had engaged in general concertation with Tréfilunion to limit mutual penetration of their products in Germany and France (see points 135 to 143 and 176 of the Decision and paragraphs 59 to 68 of the contested judgment);

— for having participated in agreements concerning the German market intended, first, to regulate exports by Benelux producers to Germany and, secondly, to observe the prices in force on the German market (see points 147, 178 and 182 of the Decision and paragraphs 83 to 94 of the contested judgment);

— through a desire to restrict or regulate imports into Germany, for having concluded two delivery contracts, on 24 November 1976 and 22 March 1982 with Bouwstaal Roermond BV (later Tréfilarbed Bouwstaal Roermond) and Arbed SA afdeling Nederland. In those contracts, the applicant took over exclusive sales in Germany, at a price to be fixed according to specific criteria, of a specified annual volume of welded steel mesh from the Roermond works. Brouwstaal Roermond BV and Arbed SA afdeling Nederland undertook, for the term of those contracts, not to make any direct or indirect deliveries to Germany. The Decision finds that the exclusive distribution agreements did not satisfy the conditions of Commission Regulation (EEC) No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10), at least since the making of the wider arrangements on trade between Germany and Benelux. Since that date those agreements had to be regarded as part of a comprehensive market-sharing arrangement (see points 148 and 189 of the Decision and paragraphs 95 to 109 of the contested judgment);

— for having participated in an agreement with Tréfilarbed stopping reimports of welded steel mesh from the St Ingbert works to Germany via Luxembourg (see points 152 and 180 of the Decision and paragraphs 110 to 122 of the contested judgment);

On the Benelux market,

— for having participated 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. The Decision also criticises 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 (see points 78(b), 163, 168 and 171 of the Decision and paragraphs 123 to 138 of the contested judgment).

9 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.

...'

10 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 20 October 1989, the applicant brought an action for the annulment of the Decision and, in the alternative, for a reduction of the fine, and an order that the Commission pay the costs. By orders of 15 November 1989 the Court of Justice assigned this case and 10 other cases concerning the same decision 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).

11 Those actions were registered under numbers T-141/89 to T-145/89, and T-147/89 to T-152/89. 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 its Rules of Procedure. In the case under appeal here, the written procedure before the Court of First Instance was completed on 5 July 1990. On 16 February 1993 the First Chamber of the Court of First Instance decided, upon hearing the report of the Judge-Rapporteur, to open the oral procedure and to ask the parties to answer certain questions in writing before the hearing. On 18 May 1993 the Report for the Hearing was notified to the parties, and they presented oral argument and answered questions put to them by the Court of First Instance at the hearing on 14 to 18 June 1993. The Court of First Instance delivered judgment on 6 April 1995.

12 In the contested judgment the Court of First Instance held that, having regard to the fact that the applicant did not participate in an agreement with Tréfilunion for the purpose of linking their future exports to quotas and to the fact that it did not participate in an agreement with Sotralentz on the setting of quotas for the latter's exports to the German market and having regard to the existence of a mitigating circumstance regarding the agreement between the applicant and Tréfilarbed concerning the cessation of reimports from St Ingbert into Germany, Article 1 of the Decision should be partially annulled and the fine of ECU 4.5 million imposed on the applicant should be reduced and set at ECU 3 million. The Court of First Instance dismissed the application as regards the remaining heads of claim and ordered the applicant to bear its own costs and to pay one third of the Commission's costs.

The appeal

13 In its appeal, the appellant claims that the Court of Justice should:

— set aside the contested judgment in so far as it imposes on the appellant a fine of ECU 3 million, dismisses its application and orders it to bear its own costs and to pay one third of the Commission's costs, and declare the proceedings closed;

— in the alternative, annul the contested judgment and refer the case back to the Court of First Instance for the proceedings to be continued;

— annul Articles 1, 2 and 3 of the Decision, to the extent to which they concern the appellant and were not annulled by the contested judgment;

— in the alternative, reduce the fine to a reasonable amount;

— order the Commission to pay the costs of the proceedings at first instance and of the appeal.

14 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

15 In support of its appeal, the appellant claims that, because the duration of the proceedings was excessive, the Court of First Instance infringed its right to a hearing

within a reasonable time as laid down in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter 'the EHRC') and, by delivering its judgment 22 months after the close of the oral procedure, infringed the general principle of promptitude. Moreover, the Court of First Instance applied an incorrect analytical criterion in assessing the evidence by failing to verify whether the circumstances mentioned by the Commission might have been accounted for otherwise than by the existence of a restrictive agreement and refused to examine the evidence produced by the applicant. By so doing, the Court of First Instance infringed the principles applicable in the taking of evidence. Moreover, the Court of First Instance infringed the rights of the defence by rejecting the appellant's request that the Commission be ordered to allow it to consult all the documents of the administrative procedure and certain documents concerning the German structural crisis cartel.

16 The appellant also maintains that, as regards definition of the relevant market and the alleged restrictive agreements

— between the applicant and Tréfilunion regarding trade interpenetration between Germany and France,

— with the Benelux producers regarding the German market and

— on quotas and prices on the Benelux market,

the Court of First Instance infringed Article 85(1) of the Treaty by not properly stating reasons and/or by misdescribing the facts. Also, with regard to the exclusive distribution contracts concluded between the applicant, on the one hand, and Bouwstaal Roermond BV and Arbed SA afdeling Nederland, on the other, the Court of First Instance did not comply with the conditions for applying Regulation No 67/67.

17 Finally, the applicant claims that, in imposing the fines, the Court of First Instance infringed Article 15 of Regulation No 17.

18 It must first be observed that, as far as possible procedural irregularities are concerned, pursuant to Article 168a of the EC Treaty and the first paragraph of Article 51 of the EC Statute of the Court of Justice, appeals are limited to points of law. According to the latter provision, an appeal may lie on grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affected the interests of the appellant as well as the infringement of Community law by the Court of First Instance.

19 Thus, the Court of Justice has jurisdiction to verify whether a breach of procedure adversely affecting the appellant's interests was committed before the Court of First Instance and must satisfy itself that the general principles of Community law and the Rules of Procedure applicable to the burden of proof and the taking of evidence have been complied with (see, in particular, the order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 40).

20 It should be noted that Article 6(1) of the EHRC provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

21 The general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (see in particular Opinion 2/94 [1996] ECR I-1759, paragraph 33, and judgment in Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14), and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law.

22 It is thus for the Court of Justice, in an appeal, to consider pleas on such matters concerning the proceedings before the Court of First Instance.

23 As regards, next, an allegedly incorrect examination of the facts, it is clear from Article 168a of the Treaty and the first paragraph of Article 51 of the EC Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the Treaty to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, in particular, the order in *San Marco* v *Commission*, cited above, paragraph 39).

24 The Court of Justice thus has no jurisdiction to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see, in particular, the order in *San Marco* v *Commission*, cited above, paragraph 40). That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42).

25 However, the question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal (see, in particular, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 29; Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 24, and Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53).

The pleas alleging procedural irregularities

Breach of the principle that proceedings must be disposed of within a reasonable time

26 The appellant maintains that the time taken by the Court of First Instance to give judgment is excessive, with the result that Article 6(1) of the ECHR was infringed. The time taken for the proceedings was in no way attributable to the circumstances of the case but should, on the contrary, be imputed to the Court of First Instance. Such a delay constitutes a *Prozeßhindernis* (a bar to proceeding with the case) justifying the setting aside of the contested judgment and the annulment of the Decision, and closure of the proceedings. In the alternative, the appellant claims that the excessive duration of the administrative, then the judicial, procedure in itself constitutes a mitigating factor and a reason for reducing the amount of the fine by virtue of the principle of the reduction of penalties recognised both in the legal orders of the Member States and by the case-law of the Court of First Instance.

27 The Commission denies that the procedure was of excessive duration and considers that, even though the procedure before the Court of First Instance might have appeared protracted, it cannot constitute a bar to proceeding with the case.

28 First, it must be noted that the proceedings being considered by the Court of Justice in this case, in order to determine whether a procedural irregularity was committed to the detriment of the appellant's interests, commenced on 20 October 1989, the date on which the application for annulment was lodged, and closed on 6 April 1995, the date on which the contested judgment was delivered. Consequently, the duration of the proceedings now being considered by the Court of Justice was about five years and six months.

29 It must first be stated that such a duration is, at first sight, considerable. However, the reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, by analogy, the judgments of the European Court of Human Rights in the cases of *Erkner and Hofauer* of 23 April 1987, Series A No 117, § 66; *Kemmache* of 27 November 1991, Series A No 218, § 60; *Phocas* v *France* of 23 April 1996, *Recueil des arrêts et décisions* 1996-II, p. 546, § 71, and *Garyfallou AEBE* v *Greece* of 27 September 1997, *Recueil des arrêts et décisions* 1997-V, p. 1821, § 39).

30 As regards the importance of the proceedings to the appellant, it must be emphasised that its economic survival was not directly endangered by the proceedings. The fact nevertheless remains that, in the case of proceedings concerning infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant himself and his competitors but also for third parties in view of the large number of persons concerned and the financial interests involved.

31 The appellant was exposed to the risk, under Article 15(2) of Regulation No 17, of a fine of up to 10% of its turnover in the preceding business year. In this case, under Articles 3 and 4 of the Decision, the Commission imposed on the applicant a fine of ECU 4.5 million payable within a period of three months following its notification, together with default interest at the rate of 12.5% per annum after that period.

32 In that connection, Article 192 of the EC Treaty provides, in particular, that Commission decisions which impose a pecuniary obligation on persons other than States are to be enforceable and that enforcement is to be governed by the rules of civil procedure in the State in the territory of which it is carried out. Under the combined provisions of Articles 185, 186 and 192 of the EC Treaty and Article 4 of Decision 88/591, applications to the Court of First Instance do not have suspensory effect; the Court of First Instance may, if it considers that the circumstances so

require, order that application of the contested act be suspended, prescribe any interim measures which may be necessary and, if appropriate, suspend enforcement.

33 In this case, it is clear from documents before the Court that no measure to recover the fine was taken in the course of the Court proceedings because the appellant furnished a bank guarantee, as required by the Commission. Such a fact cannot, however, deprive the appellant of its right to fair legal process within a reasonable period and in particular to a decision on the merits of the allegations of infringement of competition law made against it by the Commission and of the fines imposed on it in that regard.

34 In view of all those circumstances, it must be held that the procedure before the Court of First Instance was of genuine importance to the appellant.

35 As regards the complexity of the case, it must be borne in mind that, in its decision, the Commission concluded that 14 manufacturers of welded steel mesh had infringed Article 85 of the Treaty by a series of agreements or concerted practices concerning delivery quotas and the prices of that product. The appellant's application was one of 11, submitted in three different languages, which were formally joined for the purposes of the oral procedure.

36 In that regard, it is clear from the documents before the Court and from the contested judgment that the procedure concerning the appellant called for a detailed examination of relatively voluminous documents and points of fact and law of some complexity.

37 As regards the conduct of the appellant before the Court of First Instance, it appears from the file that the time-limit for submitting a rejoinder was, at its request, extended by about one month.

38 In that connection, the Commission's argument that the procedure before the Court of First Instance was delayed because the appellant's lawyer did not initially take part in the administrative procedure before the Commission and that he then focused the major part of his arguments, ill-advisedly, on the fine which the Commission had imposed on it for participating in the structural crisis cartel cannot be upheld.

39 An undertaking which is the subject of a Commission decision finding infringements of competition law and imposing fines on it must be able to contest by all means which it considers appropriate the merits of the charges made against it.

40 It has not thus been established that the appellant contributed, in any significant way, to the protraction of the proceedings.

41 As regards the conduct of the competent authorities, it must be borne in mind that the purpose of attaching the Court of First Instance to the Court of Justice and of introducing two levels of jurisdiction was, first, to improve the judicial protection of individual interests, in particular in proceedings necessitating close examination of complex facts, and, second, to maintain the quality and effectiveness of judicial review in the Community legal order, by enabling the Court of Justice to concentrate on its essential task, namely to ensure that in the interpretation and application of Community law the law is observed.

42 That is why the structure of the Community judicial system justifies, in certain respects, the Court of First Instance, which is responsible for establishing the facts and undertaking a substantive examination of the dispute, being allowed a relatively longer period to investigate actions calling for a close examination of complex facts. However, that task does not relieve the Community court established especially for that purpose from the obligation of observing reasonable time-limits in dealing with cases before it.

43 Account must also be taken of the constraints inherent in proceedings before the Community judicature, associated in particular with the use of languages provided for in Article 35 of the Rules of Procedure of the Court of First Instance, and of the obligation, laid down in Article 36(2) of those rules, to publish judgments in the languages referred to in Article 1 of Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition Series I (1952-1958), p. 59).

44 However, it must be held that the circumstances of this case are not such as to indicate that constraints of that kind can provide justification for the time which the proceedings took before the Court of First Instance.

45 It must be emphasised, as far as the principle of a reasonable time is concerned, that two periods are of significance with respect to the proceedings before the Court of First Instance. Thus, about 32 months elapsed between the end of the written procedure and the decision to open the oral procedure. Admittedly, it was decided by order of 13 October 1992 to join the 11 cases for the purposes of the oral procedure. It must be pointed out, however, that, in that period, no other measure of organisation of procedure or of inquiry was adopted. In addition, 22 months elapsed between the close of the oral procedure and the delivery of the judgment of the Court of First Instance.

46 Even if account is taken of the constraints inherent in proceedings before the Community judicature, investigation and deliberations of such a duration can be justified only by exceptional circumstances. Since there was no stay of the proceedings before the Court of First Instance, under Articles 77 and 78 of its Rules of Procedure or otherwise, it must be concluded that no such circumstances exist in this case.

47 In the light of the foregoing considerations, it must be held, notwithstanding the relative complexity of the case, that the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time.

48 For reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, it must be held that the plea alleging excessive duration of the proceedings is well founded for the purposes of setting aside the contested judgment in so far as it set the amount of the fine imposed on the appellant at ECU 3 million.

49 However, in the absence of any indication that the length of the proceedings affected their outcome in any way, that plea cannot result in the contested judgment being set aside in its entirety.

Breach of the principle of promptitude

50 The appellant submits that the Court of First Instance infringed the general principle of Community law requiring prompt determination of judicial proceedings by giving judgment 22 months after the close of the oral procedure, the delay involved being such that the usefulness of that procedure was negated by the loss of any recollection of it on the part of the Judges. It submits essentially, that the principle of orality of proceedings calls for promptness in the conduct of the proceedings. This, in line with the codes of civil and criminal procedure in a majority of the Member States, involves an obligation on the part of the Court of First Instance to deliberate immediately after the hearing of a case and to deliver its judgments shortly after the hearing.

51 The Commission contends that the principle of prompt conduct of proceedings, as interpreted by the appellant, does not exist in Community law, with the result that this plea must be rejected.

52 It must be noted, first, that, contrary to the appellant's submission at the hearing, neither Article 55(1) of the Rules of Procedure of the Court of First Instance nor any other provision of those rules or of the EC Statute of the Court of Justice provides that the judgments of the Court of First Instance must be delivered within a specified period after the oral procedure.

53 Also, it must be emphasised that the appellant has not established that the duration of the deliberations had any impact on the outcome of the proceedings before the Court of First Instance, in particular as far as any impairment of evidence is concerned.

54 In those circumstances, this plea must be rejected as unfounded.

Breach of the principles applicable in the taking of evidence

55 The appellant claims that the Court of First Instance, first, used an incorrect criterion in appraising the evidence in that it merely verified whether the Commission had established the appellant's participation in the restrictive agreements, without taking account of the appellant's submissions, and then infringed the rules concerning time-limits by rejecting as out of time offers to adduce oral evidence. By merely examining the Commission's submissions and by refusing to examine the evidence offered by the appellant, the Court of First Instance failed to comply with its duty to investigate and infringed the right to fair legal process as well as the principles of unfettered appraisal of evidence and of the benefit of the doubt.

56 As regards the first point, the appellant essentially criticises the Court of First Instance for having failed to verify whether the facts presented by the Commission could be accounted for otherwise than by the existence of a restrictive agreement, even though the appellant submitted another plausible and coherent explanation.

57 The Commission contends that this complaint in fact constitutes a request for re-examination of the facts.

58 In so far as this complaint does not relate to the findings of fact made by the Court of First Instance, it must be pointed out that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.

59 However, there is no ground for finding that the Court of First Instance failed to consider evidence submitted by the appellant when examining that submitted by the Commission. It is clear, first, from paragraphs 64 to 67 of the contested judgment that, with regard to the agreement between the appellant and Tréfilunion, the Court of First Instance, on the basis of an analysis of the memoranda produced by the Commission, concluded that the Commission had established to the requisite legal standard only two of the three alleged instances of concertation. Next, paragraphs 90 to 92 of the contested judgment, concerning agreements on quotas and prices with the Benelux producers, paragraphs 115 to 118 relating to the agreement between the appellant and Tréfilarbed and paragraphs 131 to 136 concerning price and quota agreements on the Benelux market show that the Court of First Instance, in taking account of the appellant's arguments, undertook an examination of the facts presented by the Commission and concluded that the Commission had established to the requisite legal standard that the appellant had participated in the agreements in question.

60 As regards the second point, the appellant complains that the Court of First Instance misinterpreted its Rules of Procedure when rejecting the evidence offered by it as being out of time. The appellant does not deny that its offers of evidence were made for the first time in its reply. On the other hand, it claims that the evidence produced at the stage of the reply was neither new nor out of time for the purposes of Article 48(1) of the Rules of Procedure of the Court of First Instance since it proposed in its reply that witnesses be heard and that it should make a personal appearance in order to contradict the evidence relied on by the Commission in its defence.

61 The appellant also maintains that the duty to investigate and the principles governing *inter partes* proceedings and that of fair legal process require the Court of First Instance to accede to offers of evidence, except in certain limited circumstances

whose existence has not been demonstrated in this case. It contends that the rejection of its offer to provide oral testimony and make a personal appearance meant that the evidence was appraised prematurely and adds that, even if no evidence had been offered, the inquisitorial principle requires the Court of First Instance, particularly in proceedings which may lead to fines, to take the initiative to extend its investigation to all forms of evidence available to it and to endeavour to obtain the best possible evidence.

62 The Commission contends that the Court of First Instance acted in accordance with its settled case-law in considering that the offers of evidence which were made for the first time in the reply were submitted belatedly and that reasons had therefore to be given for the delay.

63 It must first be borne in mind that, to provide evidence in support of its assertions, the appellant requested, in its application to the Court of First Instance, that its legal adviser, Mr Pillmann, should be heard as a witness and, in its reply, that the appellant itself should appear in the person of a person legally entitled to represent it, Mr Müller, and that Mr Broekman, the former president of the Benelux producers, should be heard as a witness.

64 It is clear from the documents before the Court that, at its meeting held on 18 and 24 March 1993, the Court of First Instance decided to put questions to the parties. Having regard to the appellant's request to be heard and having regard to four telex messages of 15 December 1983, 11 January, 4 March and 4 April 1984, the appellant was invited to 'indicate the precise and factual reasons which [prompted it] to contradict the apparent content of the documents mentioned, as well as generally rejecting it in its pleadings'.

65 At its meeting held on 13 and 17 May 1993, the Court of First Instance decided to obtain the observations of the parties as to the possible hearing of Messrs Müller and Broekman as witnesses and as to the personal appearance at the hearing of the applicants Boël, Steelinter and Tréfilunion in the person of representatives apprised of the contacts which had taken place at the material time.

66 By letter of 19 May 1993, the Commission opposed the hearing of the abovementioned witnesses on the ground that they were, in any event, the representatives of the undertakings concerned by the Decision. On 26 May 1993 the Court of First Instance decided to reserve its decision as to a hearing of witnesses.

67 In paragraph 68 of the contested judgment, the Court of First Instance found that there was no need to hear witnesses or order a personal appearance of the appellant. In paragraphs 94, 120 and 138 of the same judgment, the Court of First Instance, pursuant to Article 48(1) of its Rules of Procedure, rejected the offers of oral evidence from witnesses and of appearance by the appellant on the ground that those offers of evidence, put forward in the reply, were out of time and the appellant had not pleaded any circumstances that had prevented it from submitting them in its application.

68 Having regard to the circumstances, the determination made by the Court of First Instance of the relevance of hearing evidence from Messrs Pillmann and Müller regarding the agreement between Baustahlgewebe and Tréfilunion cannot be called in question.

69 As regards the refusal by the Court of First Instance to hear Messrs Müller and Broekman on the ground that the offer of evidence was out of time, it must be observed that Article 68(1) of the Rules of Procedure of the Court of First Instance provides that the latter may, either of its own motion or on application by a party, and after hearing the parties, order that certain facts be proved by witnesses. An application by a party for the examination of a witness must state precisely about what facts and for what reasons the witness should be examined. Article 44(1)(e) of the Rules of Procedure of the Court of First Instance provides that the application must state, where appropriate, the nature of any evidence offered.

70 Where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it then falls to the Court of First Instance to assess the relevance of the application to the subject-matter of the dispute and the need to examine the witnesses named.

71 Pursuant to Article 48(1) of the Rules of Procedure of the Court of First Instance, the parties may offer further evidence in support of their arguments in reply or rejoinder. They must give reasons for the delay in offering it.

72 Thus, evidence in rebuttal and the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in his defence are not covered by the time-bar laid down in Article 48(1) of the Rules of Procedure. That provision concerns offers of fresh evidence and must be read in the light of Article 66(2), which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified.

73 However, as regards the offers in this case of oral testimony from Mr Broekman and appearance by the appellant itself, it need only be pointed out that it is clear from the documents before the Court that the evidence relied on by the Commission in its defence had already been mentioned in the Decision and in the statement of objections or annexes thereto and had been produced by the appellant itself in Annex 3 to its application to the Court of First Instance. Similarly, as regards the statements by Mr Müller at the hearing before the Commission on 24 November 1987, to which the Court of First Instance referred in paragraphs 92 and 135 of the contested judgment, it is established that they appeared in the minutes of that meeting which had also been produced by the appellant itself as Annex 9 to its application to the Court of First Instance.

74 Consequently, it must be held that the requests for Mr Broekman to be examined as a witness and for the appellant to be allowed to appear itself in the person of the officer legally entitled to represent it, Mr Müller, cannot be regarded as offers of evidence in rebuttal and that the applicant was in a position to make those requests in its application to the Court of First Instance.

75 In those circumstances, the Court of First Instance was right in considering that the offers of evidence submitted in the reply were out of time and in refusing them on the ground that the appellant had not given reasons for the delay in submitting them.

76 Furthermore, the appellant's argument that the Court of First Instance was in breach of a duty of investigation incumbent upon it must be rejected, since it is common ground that it adopted measures of organisation of procedure to facilitate the taking of evidence and to clarify the arguments of the parties, in accordance with Article 64(2) of its Rules of Procedure.

77 Finally, it must be emphasised that the Court of First Instance cannot be required to call witnesses of its own motion, since Article 66(1) of its Rules of Procedure makes clear that it is to prescribe such measures of inquiry as it considers appropriate by means of an order setting out the facts to be proved.

78 Consequently, the plea that the Court of First Instance infringed the rules of evidence must be rejected.

Infringement of the right to consult certain documents

79 The appellant claims that the Court of First Instance infringed the rights of the defence by refusing to accede to its request that all the documents in the administrative procedure be produced, even though the right of access to the file derives from a fundamental principle of Community law which must be observed in all circumstances. Thus, the Commission is under an obligation to grant to undertakings involved in a proceeding under Article 85(1) of the Treaty access to all documents, whether favourable or unfavourable to them, gathered in the course of the investigation. Those principles also apply in proceedings before the Court of First Instance where documents which might be relevant to the applicant's case were not disclosed to it in the administrative procedure. In any event, the appellant considers that the Court of First Instance was not entitled to reject its request for production of documents on the ground that it had put forward nothing to show that those documents were relevant to its case. A party and its advisers cannot appraise the

importance of a document to that party's case until they are aware of its existence and content.

80 Moreover, the appellant maintains that the Court of First Instance infringed the right to a fair hearing by refusing to order the production of documents concerning the German structural crisis cartel.

81 The Commission states that, as regards the request for access to all the procedural documents, the Court of First Instance was right to hold that the appellant had submitted nothing to show that those documents were relevant to its case. As regards the documents relating to the structural crisis cartel, a procedural irregularity of that kind cannot form the subject of an appeal since it is not such as to impair the appellant's interests and involves widening the subject-matter of the dispute submitted to the Court of First Instance, and is therefore inadmissible in an appeal.

82 First, as regards the objection of inadmissibility raised by the Commission, it need merely be stated that, first, the question whether the existence of the German structural crisis cartel influenced the Decision was argued before the Court of First Instance and, second, the appellant alleges before this Court that the crisis cartel influenced at least the amount of the fines imposed. Accordingly, on this point, there is no question of a widening of the subject-matter of the dispute referred to the Court of First Instance. The plea based on entitlement to consult the documents concerning the crisis cartel is therefore admissible.

83 Next, as far as access to the documents is concerned, it is clear from paragraph 23 of the contested judgment that the Commission, in the course of the administrative procedure, disclosed to the appellant the documents which were of direct or indirect concern to it, apart from those which were confidential, at the same time reminding the appellant that, for the preparation of its observations, it was entitled, subject to authorisation, to examine other documents held by the Commission.

84 It is clear from paragraph 28 of the contested judgment and from the documents before the Court that the appellant's newly appointed lawyer maintained before the Commission that he was still entitled to consult the file after adoption of the Decision. Correspondence exchanged between the parties shows that the Commission reminded the appellant that it had forwarded to it, as an annex to the statement of objections, the documents on which the latter was based. By fax of 11 October 1989, the Commission submitted a list of all the documents in the file which related to the appellant and offered to send it a copy of them. Following that offer, the appellant, by fax of 16 October 1989 requested, first, that it be sent the report and the file concerning the inspection carried out on 6 and 7 November 1985 at its offices and the one relating to the inspection carried out on the same dates at the offices of the Fachverband Betonstahlmatten, and, second, that it also be authorised to consult the minutes and other documents by which the Bundeskartellamt had informed the Commission of the existence in Germany of a structural crisis cartel. The Commission did not, however, react to that request until the application was lodged.

85 In its application, the appellant therefore asked the Court of First Instance to order the Commission to allow it to consult (a) all the procedural documents of concern to it, (b) all the documents, correspondence, minutes and memoranda relating to the Bundeskartellamt's report to the Commission on the existence of the structural crisis cartel and (c) all the documents, papers, minutes and memoranda concerning the trilateral negotiations between the Commission, the Bundeskartellamt and the representatives of the members of the German structural crisis cartel.

86 The Court of First Instance considered, as stated in paragraph 33 of the contested judgment, that the appellant was to be deemed to be requesting a measure of organisation of procedure, as provided for in Article 64(3)(d) of its Rules of Procedure.

87 In paragraph 34 of the contested judgment, the Court of First Instance rejected the request for access to the Commission's file on the ground that the appellant had not denied receiving, in the course of the administrative procedure before the Com-

mission, all the documents from the file that were of direct or indirect concern to it and on which the statement of objections was based and that it had not produced any evidence to show that other documents were relevant to its defence. Accordingly, it considered that the appellant had been given the opportunity to put forward, as it wished, its views on all the objections made by the Commission against it in the statement of objections which was addressed to it and on the evidence supporting those objections, mentioned by the Commission in the statement of objections or in the annexes thereto, and that, accordingly, the rights of the defence had been safeguarded. The Court of First Instance concluded that, both in preparing the application and in the proceedings before the Court of First Instance, the appellant's lawyers had an opportunity to examine the legality of the Decision in full knowledge of the circumstances and fully to provide for the appellant's defence.

88 In paragraph 35 of the contested judgment the Court of First Instance also rejected the request for production of documents concerning the German structural crisis cartel on the ground that the appellant had not claimed that, through not having such documents at its disposal, it was unable to defend itself against the objections raised against it and that it had adduced no evidence to show how such documents might contribute to determination of the dispute. The Court of First Instance added that, in any event, the evidence was unconnected with the subject-matter of the proceedings.

89 In that regard, it must be observed that access to the file in competition cases is intended in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file so that they can express their views effectively on the basis of that evidence on the conclusions reached by the Commission in its statement of objections (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7; Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11; and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21).

90 However, contrary to the appellant's assertion, the general principles of Community law governing the right of access to the Commission's file do not apply, as such, to court proceedings, the latter being governed by the EC Statute of the Court of Justice and by the Rules of Procedure of the Court of First Instance.

91 Under Article 21 of the EC Statute of the Court of Justice, the Court of Justice may require the parties to produce all documents and supply all information which it considers desirable. Article 64(1) of the Rules of Procedure of the Court of First Instance provides 'the purpose of measures of organisation of procedure shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions'.

92 Under Article 64(2)(a) and (b) of the Rules of Procedure of the Court of First Instance, the purpose of measures of organisation of procedure is in particular to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence, and also to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and (4), those measures may be proposed by the parties at any stage of the procedure and may consist in requesting the production of documents or any papers relating to the case.

93 It follows that the appellant was entitled to ask the Court of First Instance to order the opposite party to produce documents which were in its possession. Nevertheless, to enable the Court of First Instance to determine whether it was conducive to proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings.

94 It must be held that it is clear from the contested judgment and from the documents before the Court of First Instance that, although the Commission submitted to it a list of all the documents in the file concerning it, the appellant did not suf-

ficiently identify, in its request to the Court of First Instance, the documents in the file of which it sought production. As regards the documents concerning the German structural crisis cartel, although the appellant criticised the Commission for deciding that its participation in the cartel was an aggravating factor, it nevertheless did not give any information as to how the documents asked for might be useful to it.

95 The Court of First Instance was therefore right, in paragraphs 34 and 35 of the contested judgment, to reject the request for the production of documents. Accordingly, this plea must be rejected as unfounded.

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

Delimitation of the market

96 The appellant submits that the Court of First Instance did not give an adequate statement of reasons in the part of the judgment dealing with definition of the relevant market. It claims in particular that, contrary to what the Court of First Instance stated in paragraphs 38 and 40 of the contested judgment, it never asserted at the hearing that it could manufacture standard mesh on its machines or that the catalogue mesh and standard mesh were interchangeable. In those circumstances, the market could not be defined as including both types of mesh.

97 The Commission considers that, by this plea, the appellant is seeking to obtain from the Court of Justice a review of the finding of facts made by the Court of First Instance.

98 It must be pointed out that, in so far as this plea alleges an inadequate statement of reasons in the contested judgment, it is admissible in an appeal.

99 In that connection, it need merely be stated that the Court of First Instance, in defining the relevant market, observed in paragraph 39 of the contested judgment that the prices of standard mesh and of *Listenmatten* were not far removed from each other. It also found, in paragraph 40 of the contested judgment, that it became clear at the hearing that the use of standard mesh on certain sites where tailor-made mesh was normally to be used was in fact possible where the price of standard mesh was so low that the prime contractor could be assured of a significant saving, covering the additional costs and compensating for the technical disadvantages arising from the change of material, and that such a situation existed for part of the period covered by the agreements.

100 The Court of First Instance therefore explained, to the requisite legal standard, the reasons for which circumstances associated with price levels might encourage economic operators to use standard mesh instead of catalogue mesh, thus defining a market common to both products.

101 The plea alleging an inadequate statement of the reasons relating to definition of the market must therefore be rejected as unfounded.

The agreements between the appellant and Tréfilunion

102 The appellant maintains that the contested judgment does not disclose the reasons for which the agreements concluded with Tréfilunion constituted an infringement of Article 85(1) of the Treaty and criticises the Court of First Instance for not characterising the facts in the light of the conditions laid down by that provision.

103 In support of this plea, the appellant claims that the Court of First Instance, first, failed to examine the argument that Tréfilunion's commitment not to complain to the Commission about the German structural crisis cartel did not constitute a restriction of competition and, second, did not rule whether the appellant's commitment not to export catalogue mesh to France for two or three months was capable of producing such a restriction or of appreciably affecting trade between Member States.

104 The Commission considers that the Court of First Instance properly characterised the facts concerned by considering them in the light of the applicable rule.

105 In that connection, it should be noted that, in paragraph 63 of the contested judgment, the Court of First Instance found that the Decision held that the applicant had engaged 'in general concertation with Tréfilunion to limit mutual penetration of their products in Germany and France'. That concertation was manifested in three ways: (1) Tréfilunion would not lodge a complaint with the Commission against the German structural crisis cartel; (2) the appellant's works in Gelsenkirchen would not export catalogue mesh to France for a period of two to three months; (3) the two parties agreed to make their future exports subject to quotas.

106 On the basis of an analysis of two internal memoranda drawn up on 16 July 1985 by Mr Marie and on 27 August 1985 by Mr Müller, the Court of First Instance concluded that the Commission had established to the requisite legal standard Tréfilunion's commitment not to lodge a complaint against the German structural crisis cartel and the appellant's undertaking not to export catalogue mesh to France for a period of two to three months. On the other hand, the Court of First Instance held that the Commission had not established to the requisite legal standard the existence of an agreement intended to make their future exports subject to quotas.

107 It must be emphasised that the Court of First Instance took the view, in paragraph 64 of the contested judgment, that Mr Marie's commitment not to lodge a complaint against the German structural crisis cartel should be seen as a course of conduct towards a competitor that was followed in exchange for concessions from that competitor, forming part of an arrangement in breach of Article 85(1) of the Treaty.

108 By holding that that commitment, and the appellant's agreement not to export catalogue mesh to France for two to three months, formed part of a general concertation regarding reciprocal penetration of their products in Germany and in France, the Court of First Instance was entitled to conclude that the Commission committed no error in considering that the applicant had taken part in a restrictive arrangement contrary to Article 85(1) of the Treaty.

109 In the absence of any evidence to show a manifest error of assessment on the part of the Court of First Instance, this plea must be rejected as unfounded.

The agreements on quotas and prices on the Benelux market and, with the Benelux producers, on the German market

110 The appellant maintains that the Court of First Instance misapplied Article 85(1) of the Treaty by failing to take account of important evidence put before it and asserts that the Court of First Instance ignored the fact that its staff had taken part in producers' meetings only as representatives of the companies involved in the structural crisis cartel or the Fachverband Betonstahlmatten, and not as representatives of the appellant. It adds, with regard to the Benelux market, that the reasons given in the judgment are contradictory since mere participation in a meeting at which other undertakings concluded a price agreement cannot constitute an infringement of Article 85 where the undertaking does not itself distribute the products covered by the agreement.

111 The Commission considers that the complaints made by the appellant seek to challenge the appraisal made by the Court of First Instance of the evidence put before it, which does not, unless the sense of such evidence has been distorted, constitute a point of law reviewable by the Court of Justice. It adds that no such distortion has been proved. Finally, it contends that the reasons given in the judgment of the Court of First Instance are not contradictory.

112 In that connection, it must be pointed out, as indicated by the Advocate General in points 200 and 246 of his Opinion, that the appellant essentially does no more than reproduce long passages from the answers which it gave to the questions put to it by the Court of First Instance, thereafter concluding, as it did before the Court of First Instance, that the documents at issue show that Mr Müller acted as a representative of the Fachverband Betonstahlmatten and of the supervisory board of the German structural crisis cartel and not as chairman of the appellant's board of directors.

113 It must be pointed out that it is clear from Articles 168a of the Treaty, 51 of the EC Statute of the Court of Justice and 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by it. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (order in *San Marco* v *Commission*, cited above, paragraphs 36 to 38).

114 Even where the appeal does not thus repeat or reproduce earlier pleas and arguments, it is in fact intended to secure a re-examination of the appraisal of the facts by the Court of First Instance.

115 It follows that these pleas must be declared inadmissible.

Non-application of Regulation No 67/67 to the exclusive distribution contracts

116 According to the appellant, the Court of First Instance did not show that the exclusive distribution contracts concluded between, on the one hand, the appellant and, on the other, Bouwstaal Roermond BV and Arbed SA afdeling Nederland involved any prohibition of parallel imports and did not express any view on the Commission's tolerance of those contracts which had been submitted to it when the Luxembourg and Saarland steel industry was reorganised.

117 The Commission contends that the argument as to the absence of any prohibition of parallel imports is concerned with findings of fact by the Court of First Instance and the argument concerning tolerance shown by the Commission regarding the contracts at issue constitutes a new plea.

118 The appellant's argument that it was not demonstrated that the contracts which it concluded with Bouwstaal Roermond BV and Arbed SA afdeling Nederland involved a prohibition of parallel imports must be rejected since, as indicated by the Advocate General in points 210 to 223 of his Opinion, it seeks to call in question the findings of fact made by the Court of First Instance.

119 As regards the appellant's argument that the Court of First Instance failed to express a view on the Commission's tolerance of the contracts at issue, it must be stated, as pointed out by the Advocate General in points 228 to 232 of his Opinion, that the arguments put to the Court of First Instance on that point were no more than imprecise assertions which were not substantiated in any way. The Court of First Instance cannot therefore be criticised for failing to express a view on them.

120 This plea must therefore be rejected.

The pleas alleging infringement of Article 15 of Regulation No 17

121 The possibility of imposing fines for infringements of Article 85(1) of the Treaty is expressly provided for in Article 15(2) of Regulation No 17, according to which:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 million units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the previous business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article 85(1) ...

(b) ...

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

122 First, the appellant complains that the Court of First Instance erred in law in its assessment of the mitigating and aggravating circumstances surrounding the infringe-

ments. In its submission, the Court of First Instance wrongly considered that the Commission had carried out an individual assessment of the criteria for determining the gravity of the infringements. The appellant claims in particular that both the Commission and the Court of First Instance treated its participation in the structural crisis cartel as an aggravating circumstance for the purpose of fixing the fine. Moreover, the fine imposed on the appellant is disproportionate since certain mitigating circumstances were not taken into consideration.

123 The Commission replies that that complaint is inadmissible, in so far as it involves repeating arguments relied on by the appellant before the Court of First Instance. As regards the German structural crisis cartel, the Commission considers that the Court of First Instance gave reasons why the choice made in the Decision not to treat its existence as a mitigating factor in the appellant's case was justified.

124 Secondly, the appellant claims that no account was taken of its ignorance of the illegality of the German structural crisis cartel and of the action taken to protect it.

125 On this point, the Commission considers that complaint to be inadmissible since it is made for the first time in the appeal.

126 Finally, the appellant seeks, in the alternative, reduction of the fine to a reasonable amount.

127 The Commission contends that it is not for the Court of Justice to substitute its assessment, on grounds of fairness, for that of the Court of First Instance.

128 In the first place, it must be borne in mind that the Court of First Instance alone has jurisdiction to examine how in each particular case the Commission appraised the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 85 of the Treaty and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, on the latter point, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31).

129 As regards the allegedly disproportionate nature of the fine, it must be borne in mind that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (*BPB Industries and British Gypsum* v *Commission*, cited above, paragraph 34, and *Ferriere Nord* v *Commission*, cited above, paragraph 31). This complaint must therefore be declared inadmissible in so far as it seeks a general re-examination of the fines or, in the alternative, to have the fine reduced to a reasonable amount. The same applies to the complaint, not made by the appellant before the Court of First Instance, concerning its alleged ignorance of the illicit nature of the conduct designed to defend the German structural crisis cartel, as pointed out by the Advocate General in point 286 of his Opinion.

130 As regards the question of failure to take account of the mitigating and aggravating circumstances, it need only be pointed out, first, that the contested judgment summarises the infringements committed by the appellant and particularises its conduct and its role in the establishment or operation of each of the agreements.

131 The Court of First Instance then considered, in paragraph 146 of the contested judgment, that the Decision, read as a whole, had provided the appellant with the information necessary for it to identify the different infringements with which it was charged, together with the specific features of its conduct and, more particu-

larly, information concerning the duration of its participation in the various infringements. The Court of First Instance also found that, in its legal assessment in the Decision, the Commission set out the various criteria by which it measured the gravity of the infringements imputed to the appellant and the various circumstances which had mitigated the economic consequences of the infringements.

132 Moreover, as regards the aggravating circumstances imputed to the appellant, the Court of First Instance found, in paragraph 149 of the contested judgment, that the appellant had not in any way countered the evidence produced by the Commission as to its active role in the agreements. As the Advocate General points out in point 268 of his Opinion, the Court of First Instance referred to specific passages of the Decision describing conduct on the part of the appellant which justified greater severity in determining the penalty imposed. In those detailed explanations, the Commission laid emphasis both on the fact that the appellant was a driving force in the commission of the infringements and on the involvement of Mr Müller in his three-fold capacity as director of the appellant undertaking, a person legally entitled to represent the German structural crisis cartel and president of the Fachverband Betonstahlmatten. In point 207 of the Decision, the Commission stated that the highest fines should be imposed on the undertakings whose management occupied senior posts in the trade associations such as the Fachverband Betonstahlmatten.

133 As regards the finding that the appellant participated in the structural crisis cartel, it need merely be stated that, since the appellant was penalised because of agreements which were not inseparably linked with constitution of the cartel and were intended to protect the German market against uncontrolled imports from other Member States, the Court of First Instance was fully entitled, in law, to conclude that the existence of that authorised cartel could not be regarded as a general mitigating circumstance in relation to that action by the appellant, which had assumed particular responsibility in that connection by reason of the functions exercised by its director.

134 Finally, as regards, more specifically, the existence of mitigating circumstances, the appellant maintains that the Court of First Instance failed to take account of various

circumstances of that kind. Thus, it criticises the Commission and the Court of First Instance for basing the fine imposed on it on its total turnover rather than by reference to the turnover deriving from the agreements. The appellant also alleges infringement of the principle of equal treatment, by reason of the abnormally high level of the fine imposed on it, by comparison with the other fines. It also objects to the fact that the Court of First Instance took account of its market share on the German market in determining the amount of the fine, on the ground that the financial resources of an undertaking are not necessarily proportional to its position on the market.

135 In that connection, it must be pointed out that the Court of First Instance noted, in paragraph 158 of the contested judgment, that the Commission did not take account of the total turnover achieved by the appellant but only of the turnover in welded steel mesh in the Community of six Member States and did not exceed the 10% ceiling; accordingly, in view of the gravity and duration of the infringement, the Court of First Instance took the view that the Commission had not infringed Article 15 of Regulation No 17.

136 The Court of First Instance took the view, in paragraph 160 of the contested judgment, with regard to determination of the amount of the fine as 3.15% of turnover, that in the case of the appellant, in respect of which no general mitigating circumstance existed, on the other hand, there had been found to be an aggravating circumstance — as in the case of Tréfilunion — resulting from the number and extent of the infringements found against it.

137 It is appropriate, next, to consider whether the Court of First Instance took account, in a manner that was correct in law, of the appellant's market share on the German market when it found, in paragraph 147 of the contested judgment, that the Commission properly refused to treat as a mitigating circumstance, in the appellant's case, the fact that it did not belong to a powerful economic entity, on the ground that it was the undertaking which held by far the largest share of the German market.

138 In that connection, it must be pointed out that the factors on the basis of which the gravity of an infringement may be assessed may include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120).

139 It follows that it is permissible, for the purpose of determining the fine, to have regard both to the total turnover of the undertaking, which constitutes an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (*Musique Diffusion française and Others* v *Commission*, cited above, paragraph 121). Although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market.

140 Accordingly, this complaint must be rejected.

The consequences of annulment of the contested judgment to the extent to which it determines the amount of the fine

141 Having regard to all the circumstances of the case, the Court considers that a sum of ECU 50 000 constitutes reasonable satisfaction for the excessive duration of the proceedings.

142 Consequently, since the contested judgment is to be annulled to the extent to which it determined the fine (see paragraph 48 of this judgment), the Court of Justice, giving final judgment, in accordance with Article 54 of its Statute, sets that fine at ECU 2 950 000.

143 For the rest, the appeal is dismissed.

Costs

144 Pursuant to Article 122 of the Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, it is to give a decision on the costs. Under Article 69(2), which is applicable to appeals by virtue of Article 118, 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 69(3), the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared. Since the Commission has failed on one head and the appellant has failed on the others, the appellant must be ordered to bear its own costs and three quarters of those of the Commission.

On those grounds,

THE COURT

hereby:

1. **Annuls paragraph 2 of the operative part of the judgment of the Court of First Instance of 6 April 1995 in Case T-145/89 *Baustahlgewebe* v *Commission* in so far as it sets the amount of the fine imposed on the appellant at ECU 3 million;**

2. Sets the amount of the fine imposed on the appellant at ECU 2 950 000;

3. For the rest, dismisses the appeal;

4. Orders the appellant to bear its own costs and three quarters of the Commission's costs.

Rodríguez Iglesias Puissochet Hirsch

Mancini Moitinho de Almeida Edward

Ragnemalm Sevón Wathelet

Schintgen Ioannou

Delivered in open court in Luxembourg on 17 December 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President