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The Law's Delays

Every law student learns that "justice delayed is justice denied". Every student of English history knows that, under Magna Carta, justice shall not be sold, denied or delayed ("*nulli vendemus, nulli negabimus aut differemus, rectum aut justitiam*"). And every student of human rights in Europe knows that, under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Many commentators on the legal processes leading from a complaint to the Commission or an action in a lower court of a Member State all the way to a final judgment by the Court of Justice of the European Communities are unhappy about the length of time which these processes take. Sometimes, the circumstances in which the case originated have changed completely by the time the case is concluded; sometimes the principal party has died or gone out of business. A classic instance was the *Magill* case, which lasted many years. By the time all the legal arguments had been weighed by the final court, about the rights and wrongs of permitting a publisher to make use of full and varied television programme listings, publications which did just that were freely available.

In this issue, a case is reported in which an aggrieved party claimed that the very length of the Communities' legal processes in dealing with a competition case had not only vitiated the processes themselves but resulted in a fine which, in the circumstances, was manifestly unfair. The Court acknowledged that the general principle of Community law that everyone was entitled to fair legal process, inspired by the fundamental rights of the European Convention, and in particular the right to legal process within a legal period, was applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law.

However, the Court has long held (since the *Pioneer* case in 1980) that the proceedings before the Commission are not covered by the Convention, as they are executive acts and not acts of a tribunal; and in the *Baustahlgewebe* case, reported in this issue, the Court held that, while the plea alleging excessive duration of the proceedings was well founded for the purpose of reviewing the fine imposed on the appellant, that plea could not, in the absence of any indication that the length of the proceedings affected their outcome in any way, result in the contested judgment being set aside in its entirety. On a similar plea, based on a breach of the principle of promptitude, the Court said, rather weakly, that there were no actual time-limits in the rules of procedure or the statute of the Court. The Commission had said that the principle did not exist in Community law; but the Court did not rule specifically on this point.

For the appellant, the minor reduction in the fine was a Pyrrhic vistory; but the case should be treated by the Court as a reminder of the paramount need to minimise the "law's delays". □

PROCEDURE (ALL INDUSTRIES): COMMISSION REGULATIONS

Subject: Procedure

Industry: All industries

Source: Commission Statement IP/98/1177, dated 23 December 1998

(Note. Any simplification of procedures is to be welcomed, though this does seem rather small beer. It is reported mainly for readers to note that old friends, like Regulation 99/63, are no longer with us.)

The Commission has adopted two Regulations which are intended to modernise, simplify and make more user-friendly its competition procedures. The first Regulation sets out how the Commission will ensure the right of the different parties involved in competition cases to be heard. The second Regulation sets out how to lodge applications and notifications in competition cases relating to the transport sector. This second Regulation covers all transport sectors (that is, inland transport, maritime transport and air transport). Both Regulations will come into force on I February 1999 and replace five existing Commission Regulations. (Commission Regulations (EEC) No 99/63, (EEC) No 1629/69, (EEC) No 1630/69, (EEC) No 4260/88 and (EEC) No 4261/88 will be repealed.)

Commission Regulation on the hearing of parties in competition proceedings

As part of the process of improving the procedures under which it examines competition cases, the Commission has now simplified and brought up-to-date Commission Regulation (EEC) No 99/63, which relates to hearings. The new Regulation takes account of developments in the ways in which the Commission protects the procedural rights of parties in competition cases, such as the role of the Hearing Officer and access to the file. A new rule provides that statements made at hearings will be recorded so that a tape recording will replace the written minutes. The new Regulation applies to all anti-trust cases including transport cases. it therefore replaces several existing regulations with a single Regulation.

Commission Regulation on applications and notifications in the transport sector

In 1994 the Commission modernised the rules for notifying restrictive agreements in sectors other than transport by adopting Regulation (EC) No 3395/94 and Form A/B. The new Regulation and the new Form TR introduce similar modem rules for companies which wish to notify restrictive agreements in the transport sector. They replace three separate Regulations and Forms (Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87) which previously contained the rules for notifying agreements in the inland transport, maritime transport, and air transport sectors, respectively.

The new Regulation introduces to the transport sector rules which the Commission already adopted for other sectors in 1994, including the following:

- the language used for an application is the language of the proceeding for the party or parties making the application;
- form TR requires companies to provide more information than was previously the case, thus enabling the Commission to examine agreements without having to request further information. (However if some of the information requested on form TR is not necessary for a particular case, the Commisssion can waive the requirement to provide this information. This avoids unnecessary costs and regulatory burdens for companies.);
- the rules on the effective date of submission of an application are spelt out more fully, establishing clearly the principle that applications must be complete in order to be deemed valid.

Form TR is not a form to be complete: it merely specifies the information which must be provided by companies when notifying their agreements. In this respect it resembles Form A/B, which is used for notifying restrictive agreements in sectors other than transport, and Form CO, which is used for notifying mergers. □

PATENT LICENSING (VIDEO SIGNALS): THE CTV CASE

Subject: Patent licensing
Cooperation agreements
Standardisation
Comfort letters

Industry: Video signals

Parties: Cable Television Laboratories Inc
Fujitsu Limited
Matsushita Electric Industrial Co., Ltd.
Mitsubishi Electric Corporation
NextLevel Systems, Inc.(now called General Instrument, Inc.)
Philips Electronics N.V.
Scientiric-Atlanta, Inc.
Sony Corporation
The Trustees of Columbia University in the City of New York

Source: Commission Statement IP/98/1155, dated 18th December 1998

(Note. Patent pools of the kind involved in this case are not automatically exempted under the block exemption regulation for technology transfer licences: Article 5 excludes from the scope of the regulation horizontal agreements, whether for the purposes of research and development, standardisation or joint investment in new technology, or not. Consequently, these arrangements have to be individually notified. However,

given their general objectives, they are usually treated sympathetically by the Commission.)

The Commission has approved a programme concerning licences under patents essential to implementing an ISO standard for transmitting and storing video signals called MPEG-2 (Moving Pictures Expert Group). The programme provides for the creation of a patent portfolio licence that gives access to essential patents on MPEG-2 technology. This patent pool is considered to help promoting technical and economic progress and thus to be compatible with competition law.

MPEG-2 is a flexible and open standard which provides a technique for eliminating redundant information from a video signal to save transmission resources and storage space on storage media such as optical discs. Certain holders of essential patents have agreed to license their patents through a single non-exclusive and non-discriminatory license programme to be administered by MPEG-LA, of Denver, Colorado, USA. The MPEG-2 Licensing programme defines a Patent Portfolio License which gives access to the patents through a single licence which is available from MPEG-LA.

The Commission has found that this patent pool helps to promote technical and economic progress by allowing quick and efficient introduction of the MPEG-2 technology. It therefore considers that the pool has beneficial effects for the consumer and does not contain unnecessary or excessive restrictions on competition. An administrative ("comfort") letter has cleared the programme.

Further details of the MPEG-2 Licensing Programme were published as part of the original notification in the Official Journal of the European Communities on 22 July 1998 (OJ No 98/C 229/06 of 22.7.98) □

JOINT VENTURES (MOBILE PHONES): THE MOTOROLA / SYMBIAN CASE

Subject: Joint ventures

Industry: Mobile phones; telecommunications
(Some implications for many industries)

Parties: Motorola
Symbian
Ericsson
Nokia
Psion

Source: Commission Statement IP/98/1181, dated 23rd December 1998

(Note. Much of the interest in this case lies in the fact that the joint venture in question

was notified in accordance with the procedure provided under the Merger Regulation, but was found not to be a "concentration". It therefore has to be dealt with under the procedures for examining cases falling within the scope of Article 85 or Article 86, or both. Although many of the problems of differentiating "concentrative" and "cooperative" joint ventures have been reduced by the changes in the Merger Regulation rules last year, there are still cases which begin under the regulation and end up under the Treaty Articles.)

The Commission has decided that the proposed joint venture between US mobile phone manufacturer Motorola and Symbian company does not constitute a concentration within the meaning of the Merger Regulation. Symbian's other shareholders are the mobile phone manufacturers Ericsson and Nokia and the handheld computer and operating system manufacturer Psion. Symbian is developing Psion's EPOC operating system for use in wireless information devices (WIDS) which combine in one handset the features found in handheld computers with the communications possibilities of a mobile phone. The Symbian operating system will be competing with others currently being used and developed for use in WIDs and handheld computers, for example by Wireless Knowledge (Microsoft & Qualcomm), 3Com(r), GeoWorks, Sun Microsystems, and Sharp.

The creation of the initial joint venture (Symbian 1) was cleared by the Commission under the Merger Regulation in August, 1998. With Motorola's entry into Symbian, a structural change has been brought about within the company. While the original shareholders of Symbian I jointly controlled the company, under the new constellation there is no longer such joint control, so that the transaction does not constitute a concentration under the Merger Regulation.

At the request of the parties, the transaction will now be dealt with pursuant to the provisions of Regulation 17 (the implementing regulation for the application of Articles 85 and 86 of the EC Treaty). In dealing with this case under Articles 85 and 86, the Commission will take into account the criteria underlying its positive decision regarding Symbian 1, in particular the dynamic nature of the emerging market for operating systems to be used in WIDS, the presence of several competitors on that market, and the commitment by Symbian to licence the operating system it develops to non-shareholders producing WIDs on an open and non-discriminatory basis. □

Readers interested in taking part free of charge in a Conference on the Internet on "The Impact of Competition Rules on Intellectual Property Rights", are invited to look at the following web-site: www.ipconference.com

The cases reported in this issue are taken from the Court's web-site. They are not definitive texts and may be subject to linguistic and other amendments. They are freely available for public use.

PROCEDURE (WELDED STEEL MESH): THE BAUSTAHLGEWEBE CASE

Subject: Procedure
Delays
Fines

Industry: Welded steel mesh
(Some implications for most industries)

Parties: Baustahlgewebe GmbH
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities in Case C-185/95P (*Baustahlgewebe GmbH v Commission of the European Communities*), of 17 December 1998

(Note. This case raises a large number of different issues. In our view, three of these issues are important and of general interest and are therefore reported in extenso. They concern, respectively, the excessive duration of the proceedings (paragraphs 15 to 54), infringement of the applicant's right to consult certain documents (paragraphs 79 to 95) and the extent to which the Court may review the fines imposed by the Commission (paragraphs 121 to 143). In the event, the appellant won a modest victory on the level of the fine imposed by the Commission; whether it sufficed to cover the costs of the appeal is another matter.)

Background

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 GmbH v Commission* (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, hereinaftet "the Decision"), fixed the amount of the fine imposed by the Commission at 3m ECUs, 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...

[Paragraphs 2 to 14 refer to the facts and pleas; the following paragraphs relate to the delays in the hearing of the case.]

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...

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-19/95P *(San Marco v Commission)*, 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, paragraph 33, and judgment in Case C-299/95 *(Kremzow)*, 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. Vvhen 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-53/92P *(Hilti v Commission)*, 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-283/90P *(Vidranyi v Commission)*, paragraph 29; Case C-188/96P *(Commission v V)*, paragraph 24, and Case C-401/96P *(Somaco v Commission)*, paragraph 53).

The pleas alleging procedural irregularities

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(l) 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 (a bar to proceeding with the case) justifying the setting aside of the contestedjudgment 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 Rights in the cases of *Erkner and Hofauer* of 23 April 1987, *Kemmache* of 27 November 1991; *Phocas v France* of 23 April 1996, and *Garyfallou* AEBE *v Greece* of 27 September 1997).

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 4.5m ECUs 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 fumished 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 30(2) of those rules, to publish judgments in the languages refeffed 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.

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 I I 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 3m ECUs.

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 oratity 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.

55-78 *[These paragraphs are rather circumstantial and not of such general interest: the appellant's claims under this head were all 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 II 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 Federal Cartel Office 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 Federal Cartel Office 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 Commission, 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, tfie 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 documents at its disposal, it was unable to that it had adduced no evidence to show 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*), paragraph 7; Case 85/76 (*Hoffmann-La Roche v Commission*), paragraphs 9 and 11; and Case C-310/93P (*BPB Industries and British Gypsum v Commission*), 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 sufficiently 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.

[Articles 96 to 120 are of less general interest; all the pleas were 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 infringements. 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-219/95P (*Ferriere Nord v Commission)*, 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 particularly, 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 Moller 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 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 Tr6filunion - 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 Francaise and Others v Commission*, 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 Francaise 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 50,000 ECUs 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 2.95m ECUs.

143 For the rest, the appeal is dismissed.

[The Court annulled the contested judgment in respect of the fine, re-set the fine and ordered the appellant to pay his own and 75% of the Commission's costs.] □

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