JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-248/98 P,

NV Koninklijke KNP BT, established in Amsterdam, Netherlands, represented by T.R. Ottervanger, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Loeff, Claeys and Verbeke, 56-58 Rue Charles Martel,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 14 May 1998 in Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by R. Lyal and W. Wils, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: Dutch.

defendant at first instance,

THE COURT (Fifth Chamber),

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

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 9 July 1998, NV Koninklijke KNP BT brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007 (hereinafter 'the contested

judgment'), in which the Court of First Instance annulled part of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1, hereinafter 'the Decision') and dismissed the remainder of the application.

Facts

2 In the Decision the Commission imposed fines on 19 producers supplying cartonboard in the Community on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

3 According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the Fédération Française du Cartonnage, and investigations which Commission officials, acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

4 The evidence obtained from those investigations and following requests for information and documents led the Commission to conclude that from mid-1986 until at least (in most cases) April 1991 the undertakings concerned had participated in an infringement of Article 85(1) of the Treaty. The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty and, by letter of 21 December 1992, served a statement of objections on each of the undertakings concerned, all of which submitted written replies. Nine undertakings requested an oral hearing.

5 At the end of that procedure the Commission adopted the Decision, which includes the following provisions:

'*Article 1*

Buchmann GmbH, Cascades SA, Enso-Gutzeit Oy, Europa Carton AG, Finnboard — the Finnish Board Mills Association, Fiskeby Board AB, Gruber & Weber GmbH & Co KG, Kartonfabriek "de Eendracht" NV (trading as BPB de Eendracht NV), NV Koninklijke KNP BT NV (formerly Koninklijke Nederlandse Papierfabrieken NV), Laakmann Karton GmbH & Co KG, Mo Och Domsjö AB (MoDo), Mayr-Melnhof Gesellschaft mbH, Papeteries de Lancey SA, Rena Kartonfabrik A/S, Sarrió SpA, SCA Holding Ltd (formerly Reed Paper & Board (UK) Ltd), Stora Kopparbergs Bergslags AB, Enso Española SA (formerly Tampella Española SA) and Moritz J. Weig GmbH & Co KG have infringed Article 85(1) of the EC Treaty by participating,

— in the case of Buchmann and Rena from about March 1988 until at least the end of 1990,

— in the case of Enso Española, from at least March 1988 until at least the end of April 1991,

— in the case of Gruber & Weber from at least 1988 until late 1990,

— in the other cases, from mid-1986 until at least April 1991,

in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the Community

— met regularly in a series of secret and institutionalised meetings to discuss and agree a common industry plan to restrict competition,

— agreed regular price increases for each grade of the product in each national currency,

— planned and implemented simultaneous and uniform price increases throughout the Community,

— reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time,

— increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the said concerted price rises,

— exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures.

...

Article 3

The following fines are hereby imposed on the undertakings named herein in respect of the infringement found in Article 1:

...

(ix) NV Koninklijke KNP BT NV, a fine of ECU 3 000 000;

...'

6 The contested judgment also sets out the following facts:

'9 According to the Decision, the infringement took place within a body known as the "Product Group Paperboard" (hereinafter "the PG Paperboard"), which comprised several groups or committees.

10 In mid-1986 a group entitled the "Presidents Working Group" (hereinafter "the PWG") was established within that body. This group brought together

senior representatives of the main suppliers of cartonboard in the Community (some eight suppliers).

11 The PWG's activities consisted, in particular, in discussion and collaboration regarding markets, market shares, prices and capacities. In particular, it took broad decisions on the timing and level of price increases to be introduced by producers.

12 The PWG reported to the "President Conference" (hereinafter "the PC"), in which almost all the managing directors of the undertakings in question participated (more or less regularly). The PC met twice each year during the period in question.

13 In late 1987 the Joint Marketing Committee (hereinafter "the JMC") was set up. Its main task was, on the one hand, to determine whether, and if so how, price increases could be put into effect and, on the other, to prescribe the methods of implementation for the price initiatives decided by the PWG, country-by-country and for the major customers, in order to achieve a system of equivalent prices in Europe.

14 Lastly, the Economic Committee discussed, *inter alia*, price movements in national markets and order backlogs, and reported its findings to the JMC or, until the end of 1987, to the Marketing Committee, the predecessor of the JMC. The Economic Committee was made up of marketing managers of most of the undertakings in question and met several times a year.

15 According to the Decision, the Commission also took the view that the activities of the PG Paperboard were supported by an information exchange

organised by Fides, a secretarial company, whose registered office is in Zurich, Switzerland. The Decision states that most of the members of the PG Paperboard sent periodic reports on orders, production, sales and capacity utilisation to Fides. Under the Fides system, those reports were collated and the aggregated data were sent to the participants.

16 The applicant, NV Koninklijke KNP BT ("KNP") exercised 100% control over KNP Vouwkarton BV Eerbeek ("KNP Vouwkarton") until 1 January 1990, when the latter company was sold to Mayr-Melnhof. According to the Decision, KNP Vouwkarton, which was a division in KNP's Packaging Group, participated in meetings of the PWG (until mid-1988), the JMC, the PC and the Economic Committee. During the period of its participation in PWG meetings, KNP Vouwkarton's representative, the head of the applicant's Packaging Group and a member of its management board, presided over meetings of the PWG and of the PC. The infringement by KNP Vouwkarton over the period from mid-1986 until 1 January 1990 was attributed to the applicant.

17 With effect from 31 December 1986, KNP also acquired the German packaging producer Herzberger Papierfabrik Ludwig Osthushenrich GmbH und Co KG, whose production unit, Badische Kartonfabrik ("Badische"), participated in meetings of the PC, the JMC and the Economic Committee. Badische last participated in the JMC in May 1989 and officially withdrew from the PG Paperboard at the end of that year. However, because Badische increased its prices after it had left the PG Paperboard, the Commission considered that it had continued to participate on the fringe of the cartel until April 1991. Badische's participation in the cartel was attributed to the applicant.'

7 Sixteen of the eighteen other undertakings held to be responsible for the infringement and four Finnish undertakings, members of the trade association Finnboard, and as such held jointly and severally liable for payment of the fine imposed on Finnboard, also brought actions against the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-310/94, T-311/94, T-317/94,

T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94, and Joined Cases T-339/94 to T-342/94).

The contested judgment

8 The Court of First Instance reduced the amount of the fine imposed on the applicant from ECU 3 000 000 to ECU 2 700 000 and dismissed the remainder of the application, which sought the annulment in whole or in part of the Decision.

9 Four pleas in law had been raised by the appellant before the Court of First Instance in support of its application for cancellation or reduction of the fine. They alleged inadequate statement of reasons in the Decision as regards the fixing of the amount of the fine; misclassification of the appellant as a 'ringleader' of the cartel; infringement of the obligation to state reasons in that regard; and lastly, errors in calculating the fine imposed on the appellant.

The plea that the Decision contains an inadequate statement of reasons as to the fixing of the amount of the fine

10 The applicant claimed that, despite the relatively high general level of the fines, the Decision did not disclose how the Commission had actually fixed the fine imposed on it.

11 The Court of First Instance stated as follows:

'67 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

68 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (Order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

69 Moreover, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose (see, to the same effect, the judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

70 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines,

the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as "ringleaders" of the cartel, whereas the other undertakings were regarded as "ordinary members". Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings, including the applicant, were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

71 In its written pleas to the Court and in its reply to a written question put by the Court, the Commission explained that the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision. Fines of a basic level of 9 or 7.5% of that individual turnover were then imposed, respectively, on the undertakings considered to be the cartel "ringleaders" and on the other undertakings. Finally, the Commission took into account any cooperation by undertakings during the procedure before it. Two undertakings received a reduction of two thirds of the amount of their fines on that basis, while other undertakings received a reduction of one third.

72 Moreover, it is apparent from a table produced by the Commission containing information as to the fixing of the amount of each individual fine that, although those fines were not determined by applying the abovementioned figures alone in a strictly mathematical way, those figures were, nevertheless, systematically taken into account for the purposes of calculating the fines.

73 However, the Decision does not state that the fines were calculated on the basis of the turnover of each undertaking on the Community cartonboard market in 1990. Furthermore, the basic rates of 9 and 7.5% applied to

calculate the fines imposed on the undertakings considered to be "ring-leaders" and those considered to be "ordinary members" do not appear in the Decision. Nor does it set out the rates of reduction granted to Rena and Stora, on the one hand, and to eight other undertakings, including the applicant, on the other.

74 In the present case, first, points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 264).

75 Second, where, as in the present case, the amount of each fine is determined on the basis of the systematic application of certain precise figures, the indication in the decision of each of those factors would permit undertakings better to assess whether the Commission erred when fixing the amount of the individual fine and also whether the amount of each individual fine is justified by reference to the general criteria applied. In the present case, the indication in the Decision of the factors in question, namely the reference turnover, the reference year, the basic rates adopted, and the rates of reduction in the amount of fines, would not have involved any implicit disclosure of the specific turnover of the addressee undertakings, a disclosure which might have constituted an infringement of Article 214 of the Treaty. As the Commission has itself stated, the final amount of each individual fine is not the result of a strictly mathematical application of those factors.

76 The Commission also accepted at the hearing that nothing prevented it from indicating in the Decision the factors which had been systematically taken into account and which had been divulged at a press conference held by the Member of the Commission responsible for competition policy on the day on which that decision was adopted. In that regard, it is settled law that the

reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and, to the same effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136).

77 Despite those findings, the reasons explaining the setting of the amount of fines stated in points 167 to 172 of the Decision are at least as detailed as those provided in the Commission's previous decisions on similar infringements. Although a plea alleging insufficient reasons concerns a matter of public interest, there had been no criticism by the Community judicature, at the moment when the decision was adopted, as regards the Commission's practice concerning the statement of reasons for fines imposed. It was only in the judgment of 6 April 1995 in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 142, and in two other judgments given on the same day (T-147/89 *Société Métallurgique de Normandie* v *Commission* [1995] ECR II-1057, summary publication, and T-151/89 *Société des Treillis et Panneaux Soudés* v *Commission* [1995] ECR II-1191, summary publication), that this Court stressed for the first time that it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

78 It follows that, when it finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees of the decision to verify that the level of the fine is correct and to assess whether there has been any discrimination.

79 In the specific circumstances set out in paragraph 77 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed.

80 This plea cannot therefore be upheld.'

The pleas that the applicant was wrongly classified as one of the 'ringleaders' of the cartel and that there is an inadequate statement of reasons in that regard

12 The appellant complained that the Commission had considered it to be one of the 'ringleaders' of the cartel, it having wrongly assumed that the PWG and the PC had agreed to have the appellant's representative as their president because of the strength of the KNP group.

13 Furthermore, the appellant submitted that the Decision contained an inadequate statement of reasons because it did not expressly indicate whether account had been taken of the shortness of the applicant's presidency of the PWG.

14 The Court of First Instance held as follows in that regard:

'88 According to point 170, first paragraph, of the Decision, "the 'ringleaders', namely the major producers of cartonboard which took part in the PWG (Cascades, Finnboard, [Mayr-Melnhof], MoDo, Sarrió and Stora), must bear a special responsibility. They clearly constituted the main decision-makers and were the prime movers of the cartel."

89 According to the second paragraph of point 170, the applicant must "also therefore be considered as a ringleader of the cartel during the period of its membership of the PWG", that is to say until mid-1988 (point 36, second paragraph). The Decision states that the applicant's representative presided over the PC and the PWG "at a critical time".

90 Furthermore, it amply describes the central role of the PWG in the cartel (in particular, points 36 to 38 and 130 to 132 of the Decision).

91 The Decision therefore clearly contains an adequate statement of the reasons for the Commission's view that the applicant was a "ringleader".

92 As to the correctness of those reasons, the Court points out that the applicant does not dispute that it participated in the PWG meetings, nor that it provided the president for it during the first two years of the cartel. Nor does it dispute that the object of the PWG was in fact essentially anti-competitive or that the conduct found by the Commission was in fact anti-competitive.

93 The applicant was therefore correctly characterised as a "ringleader" for the purpose of calculating the fine. Its actual conduct in the PWG and its reasons for assuming the presidency of that body do not vitiate the Commission's finding.

94 However, having regard to the above considerations, the applicant could have been characterised as a "ringleader", and therefore fined on that basis, only in respect of the period from mid-1986 until mid-1988. The Court will examine the implications of that conclusion in the context of its unlimited jurisdiction in regard to fines when it considers the plea alleging errors in the calculation of the fine imposed on the applicant (paragraph 104 et seq. below).

95 Consequently, this plea cannot be upheld.'

The plea that errors were made in calculating the fine imposed on the appellant

15 The appellant submitted that when the Commission calculated the amount of the fine it should have taken into account Badische's insignificant market share and its peripheral participation in the infringement from the end of 1989, that participation being limited to the United Kingdom. It claimed that the fine imposed wrongly took into account participation in the cartel by its two subsidiaries throughout the period of the infringement, namely from mid-1986 until April 1991.

16 Moreover, according to the appellant, one of the figures applied in order to calculate the fine did not correspond to Badische's actual turnover.

17 As regards the assessment of the duration of the appellant's participation in the cartel, the Court of First Instance held as follows:

'55 It has already been held... that the Commission was entitled to attribute Badische's unlawful conduct to the applicant.

56 The applicant accepts that after it withdrew from the committees of the PG Paperboard at the end of 1989 it nevertheless continued to receive information on the price initiatives.

57 Nor does the applicant dispute that Tables F and G annexed to the Decision show that in April 1990 and January 1991 it increased its prices for GD cartonboard in Germany and the United Kingdom to the same level as those applied by the undertakings which participated in the committees of the PG Paperboard until April 1991.

58 As it could not have been unaware that the information which it used was the product of collusion, it is therefore clear that it deliberately continued to profit from conduct that infringed Article 85(1) of the Treaty.

59 The Commission therefore correctly found in the sixth paragraph of point 162 of the Decision, that the applicant had to be "held a party to the infringement up to the date of the investigation", that is to say, 23 and 24 April 1991.

60 The plea must therefore be rejected.'

18 As regards the other plea, the Court stated as follows:

'104 As the Court has already found..., the Commission rightly held the applicant to be responsible for the unlawful conduct of KNP Vouwkarton and Badische. The Commission also rightly took the view that the applicant had participated in the cartel from mid-1986 until April 1991...

105 The applicant's arguments alleging that its participation in the cartel was incorrectly assessed must therefore be rejected.

106 The Court must also reject the argument based on the fact that Article 1 of the Dutch-language version of the Decision erroneously states that the applicant participated "in an agreement and concerted practice originating in mid-1988". The operative part of the Decision must be understood in the light of the statement of reasons for it (see, for example Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 122 to 124), and it is clear from that statement of reasons that the Commission's intention was to find that the applicant had participated in an agreement and concerted practice originating in mid-1986. Furthermore, it is clear from the applicant's application (point 8, in which reference is made to point 162 of the Decision) that it also understood the Decision in that sense.

107 As the Court has already noted, the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 achieved by each of the addressees of the Decision and basic rates of 9 and 7.5% of that turnover were then applied in order to determine the fine to be

imposed on the "ringleaders" of the cartel and on the other undertakings respectively. During the procedure before the Court and, in particular, in a reply to a written question put by the Court the Commission confirmed that those basic rates were in fact applied.

108 The argument based on Badische's insignificant market share cannot be upheld in the applicant's case. As it did in the case of the other undertakings, the Commission took into account turnover on the Community cartonboard market. In so doing, it assessed Badische's true size and economic power on that market. However, since it took Badische's turnover in 1989 and not, as the principle of equal treatment required, its lower turnover in 1990..., the applicant's fine must be reduced. Moreover, the Commission cannot depart in a particular case from the criteria it has applied generally in calculating the amount of fines, unless its reasons for that departure are set out in the decision. It is settled law that the reasons for a decision must appear in the actual body of the decision. Save in exceptional circumstances the decision cannot be explained for the first time *ex post facto* before the Community judicature (see, *inter alia*, *Dansk Pelsdyravlerforening* v *Commission*, cited above, paragraph 131). There are no such circumstances here.

109 The written explanations regarding the calculation of the amount of the fine imposed on the applicant, submitted in writing at the request of the Court, also show that a rate of 9% was applied to KNP Vouwkarton's 1989 turnover, in respect of the entire period during which it was owned by KNP, that is to say, until 1 January 1990, despite the fact that KNP was not represented in PWG meetings after mid-1988.

110 However, in its written reply to the Court's questions and at the hearing, the Commission proposed a different method of calculating the fine. Under that method, the fine would be calculated by applying a basic rate of 9% to the turnover of KNP Vouwkarton and Badische for the period

during which the applicant had been one of the cartel ringleaders and a basic rate of 7.5% for the remainder of the period of its infringement.

111 The Court finds that only that second method is in accordance with the second paragraph of point 170 of the Decision, in which it is stated that the applicant must be considered "as a ringleader of the cartel during the period of its membership of the PWG". The Court will therefore take this finding into account when it fixes the amount of the fine.

112 Lastly, as regards intra-group sales of cartonboard, the Court finds that the applicant has not adduced any evidence to show that the Commission should not have taken them into account when it calculated the fine.

113 It follows from all of the foregoing that the amount of the fine imposed on the applicant must be reduced.

114 Since the only plea by the applicant which justifies a reduction in the fine is that alleging errors in its calculation, the Court, exercising its unlimited jurisdiction, sets the amount of that fine at ECU 2 700 000.'

The appeal

19 In its appeal the appellant submits that the Court should set aside the contested judgment and annul the Decision and cancel, or at least reduce, the fine imposed on it. In the alternative, it requests that the case be referred back to the Court of First Instance.

20 The appellant relies on four pleas in law in support of its appeal.

The first plea

21 By its first plea the appellant complains that the Court of First Instance did not annul the Decision on the ground that it contained an inadequate statement of reasons and itself failed to observe the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC) because it did not give reasons for its refusal to annul the Decision.

22 According to the appellant, the Decision does not contain sufficient information regarding the method of fixing the fine and the extent of the participation by the appellant's two subsidiaries (KNP Vouwkarton and Badische), either in terms of turnover or the duration and gravity of the infringement. It was not until one month before the hearing, or at the hearing, that the Commission provided clarification in that respect.

23 According to the appellant, it is settled law that the Commission must indicate, in the decision itself, how the fine was fixed. That is *a fortiori* the case where, as in the present case, the conduct of several undertakings has been attributed to the appellant.

24 The appellant adds that, contrary to the case-law of the Court of Justice, the Court of First Instance held, in paragraph 79 of the contested judgment, that the Commission's obligation to state reasons could be moderated in the present case because of the existence of 'specific circumstances', even though the Commission, which had applied a mathematical formula, could have set out that formula in the Decision, as the Court of First Instance in fact pointed out in paragraph 78 of the contested judgment.

25 It is irrelevant that the extent of that obligation to state reasons was clarified by the Court of First Instance only in its judgments in *Tréfilunion* v *Commission*, *Société Métallurgique de Normandie* v *Commission* and *Société des Treillis et Panneaux Soudés* v *Commission*, cited above (hereinafter 'the Welded Steel Mesh judgments'), referred to in paragraph 77 of the contested judgment, since the obligation to state reasons stems from Article 190 of the Treaty and not from the case-law of the Court of First Instance.

26 The Commission contends, in the light of the case-law of the Court of Justice (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 32, et seq., and the order in *SPO and Others* v *Commission*, cited above, paragraph 54), that both the Commission and the Court of First Instance, where the latter amends the amount of a fine in a specific case in the exercise of its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, have a margin of discretion when they determine the amount of the fine. The existence of that discretion implies that it is not absolutely necessary for the statement of reasons to set out in minute detail the method by which the amount of the fine was calculated.

27 The Commission observes that the Court of First Instance held in paragraph 74 of the contested judgment that points 169 to 172 of the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and the duration of the infringement committed by each of the undertakings in question'.

28 Paragraphs 75 to 79 of the contested judgment are, according to the Commission, superfluous. The Commission contends, moreover, that the appellant's reading of the Welded Steel Mesh judgments is incorrect. In those judgments the Court of First Instance found, as it did in the contested judgment, that the statement of reasons for the Commission's decision was adequate, while expressing the wish that there should be greater transparency as to the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of transparency as amounting to a failure to state adequate reasons for the Decision. At most, the position adopted by the Court of First Instance reflects the principle of good administrative practice, in the sense that addressees of decisions should not be forced to bring proceedings before the Court of First Instance in order to ascertain all the details of the method of calculation used by the Commission. However, such considerations could not in themselves constitute a ground of annulment of the Decision.

29 Last, the Commission states that those implications of the Welded Steel Mesh judgments have recently been confirmed by the Court of First Instance. It has held that the information which it is desirable that the Commission should communicate to the addressee of a Decision must not be regarded as an additional statement of reasons, but solely as the translation into figures of criteria set out in the Decision in so far as they are capable of being quantified (see, in particular, the judgments in Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraphs 627 and 628, and in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 1180 to 1184).

30 It is necessary, first, to set out the various stages in the reasoning adopted by the Court of First Instance in response to the plea alleging infringement of the duty to state reasons in regard to the calculation of the fines.

31 The Court of First Instance first of all referred, in paragraph 67 of the contested judgment, to the settled case-law to the effect that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may

be vitiated by some defect enabling its validity to be challenged, the scope of that obligation being dependent on the nature of the act in question and on the context in which it was adopted (see, in particular, besides the case-law cited by the Court of First Instance, Case C-22/94 *Irish Farmers Association and Others* v *Ministry for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809, paragraph 39).

32 The Court of First Instance then explained in paragraph 68 of the contested judgment that as regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of the infringements depends on numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

33 In that regard, the Court of First Instance held in paragraph 74 of the contested judgment that:

'points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 264)'.

34 However, in paragraphs 75 to 79 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 74.

35 According to paragraphs 75 and 76 of the contested judgment, the Decision does not indicate the precise figures systematically taken into account by the Commission in fixing the amount of the fines, albeit it could have disclosed them and this would have enabled the undertakings better to assess whether the Commission had erred when fixing the amount of each individual fine and whether that amount was justified by reference to the general criteria applied. The Court added, in paragraph 77, that according to the Welded Steel Mesh judgments it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

36 It concluded, in paragraph 79 of the contested judgment, that there had been an 'absence of specific grounds in the Decision regarding the method of calculation of the fines', which was justified in the specific circumstances of the case, namely the disclosure of the method of calculating the fines during the proceedings before the Court of First Instance and the novelty of the interpretation of Article 190 of the Treaty given in the Welded Steel Mesh judgments.

37 Before examining, in the light of the arguments submitted by the appellant, the correctness of the findings by the Court of First Instance regarding the consequences which disclosure of calculations during the proceedings before it and the novelty of the Welded Steel Mesh judgments may have in regard to fulfilment of the obligation to state reasons, it is necessary to determine whether fulfilment of the duty to state reasons laid down in Article 190 of the Treaty required the Commission to set out in the Decision, not only the factors which enabled it to determine the gravity and duration of the infringement, but also a more detailed explanation of the method of calculating the fines.

38 The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules.

39 First, under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) it has the task of reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 190 of the Treaty, infringement of which renders a decision liable to annulment.

40 Second, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 172 of the Treaty and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons under Article 190 of the Treaty, to be set out in the decision.

41 As regards review of compliance with the duty to state reasons, the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

42 In those circumstances, in the light of the case-law referred to in paragraphs 67 and 68 of the contested judgment, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.

43 The Court of First Instance correctly held in paragraph 74 of the contested judgment that the Commission had satisfied that requirement. It must be observed, as the Court of First Instance observed, that points 167 to 172 of the Decision set out the criteria used by the Commission in order to calculate the fines. First, point 167 concerns in particular the duration of the infringement. It also sets out, as does point 168, the considerations on which the Commission relied in assessing the gravity of the infringement and the general level of the fines. Point 169 contains the factors taken into account by the Commission in

determining the amount to be imposed on each undertaking. Point 170 identifies the undertakings which were to be regarded as 'ringleaders' of the cartel, and which should accordingly bear special responsibility in comparison with the other undertakings. Lastly, points 171 and 172 of the Decision set out the effect on the amount of the fines of the cooperation by various manufacturers with the Commission during its investigations in order to establish the facts or when they replied to the statement of objections.

44 The fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the proceedings before the Court of First Instance, is not such as to call in question the finding in paragraph 74 of the contested judgment. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in relation to review by the Community court of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision.

45 Admittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 42 of this judgment, in particular by indicating the figures which, especially in regard to the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement.

46 It may indeed be desirable for the Commission to make use of that possibility in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed. However, as the Commission has submitted, the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons.

47 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 78 of the contested judgment, that 'the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision'. Nor, without contradicting itself in the grounds of its judgment, could it, after finding in paragraph 74 of the contested judgment that the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question', then refer, as it did in paragraph 79 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

48 However, the error of law so committed by the Court of First Instance is not such as to cause the contested judgment to be set aside, since, having regard to the considerations, set out above, the Court of First Instance validly rejected, notwithstanding paragraphs 75 to 79 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

49 As there was no obligation on the Commission, as part of its duty to state reasons, to indicate in the Decision the figures relating to the method of calculating the fines, there is no need to examine the various objections raised by the applicant which are based on that erroneous premiss.

50 The first plea must therefore be rejected.

The second plea

51 By its second plea the appellant complains, first, that the Court of First Instance did not deal with its argument that the Commission had abused its powers in ordering it to pay a fine in respect of the period after the end of 1989 or, in the

alternative, should have imposed on it only a very low fine, having regard to the marginal nature of its participation in the cartel. In failing to take account of those special circumstances, the Court of First Instance infringed Article 190 of the Treaty.

52 Second, the appellant complains that the Court of First Instance applied the rate of 7.5% to its turnover for the period in question, which is inappropriate in view of the purely marginal nature of its participation in the cartel.

53 As regards the first part of this plea, it must be held that, as the Commission has stated, it is clear from paragraphs 55 to 59 of the contested judgment that the Court of First Instance replied to the appellant's argument in order to refute it. The complaint that there was an inadequate statement of reasons must therefore be rejected.

54 As to the second part of this plea, it should be observed that the Court of First Instance has unlimited jurisdiction when it rules on the amount of fines imposed on undertakings for infringements of Community law and 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 in the matter (*Ferriere Nord* v *Commission*, cited above, paragraph 31).

55 In the present case, the appellant merely contests the assessment by the Court of First Instance of the appropriate amount of the fine but does not state why, as a matter of law, it should be declared unlawful by the Court of Justice. The second part of the plea must therefore be rejected as inadmissible.

56 The second plea must therefore be rejected.

The third plea

57 By its third plea the appellant submits that the Court of First Instance wrongly held in paragraph 112 of the contested judgment that, as regards intra-group sales of cartonboard, 'the appellant has not adduced any evidence to show that the Commission should not have taken them into account when it calculated the fine'.

58 It states that, so far as concerns Badische, it became apparent only at the hearing that the Commission had included internal sales of the product concerned (to a sister company which converted it into cartons) in the turnover used as a basis for calculating the fine. The appellant then pleaded that such transactions had had no influence on the Community market and could not be taken into account in order to determine the fine.

59 In those circumstances, by asserting that the appellant had not supplied 'any evidence' in that regard, the Court of First Instance infringed its rights of defence, the duty to state reasons, the principles of equal treatment and proportionality, and Article 15 of Regulation No 17.

60 According to the Commission, contrary to the appellant's claims, the appellant had long known that its group turnover had been taken into account in order to determine its market shares. Although it is true that this point was raised by the appellant during the hearing, it did not explain why sales to a sister company should have been deducted. Consequently, the conclusion reached by the Court of First Instance at paragraph 112 of the contested judgment is correct.

61 The plea here under consideration is inoperative. Even if the appellant had in fact adduced the necessary evidence at the hearing before the Court of First Instance to support its argument that the Commission had wrongly taken into account intra-group sales of cartonboard in order to fix the fine, that argument could not be upheld in the light of Article 15(2) of Regulation No 17 which aims to ensure that the penalty is proportionate to the undertaking's size on the product market in respect of which the infringement was committed (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 119).

62 As the Court of First Instance itself rightly held in its judgment in Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 128: 'To ignore the value of the applicant's internal cartonboard deliveries would inevitably give an unjustified advantage to vertically integrated companies. In such a case the benefit derived from the cartel might not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates.'

63 The third plea must therefore be rejected.

The fourth plea

64 By its fourth plea the appellant submits that the Commission, when fixing the fine, wrongly attributed to it responsibility for the infringement committed by Badische with effect from mid-1986, it having acquired that company only on 1 January 1987, and complains that the Court of First Instance endorsed that attribution of responsibility without explanation, even though the appellant had

contested it. When assessing the fine the Court of First Instance thus infringed the duty to state reasons, the principles of equal treatment and of proportionality and Article 15 of Regulation No 17.

65 The Commission contends that this plea is inadmissible because neither in the written procedure nor in the hearing before the Court of First Instance did the appellant contest the attribution to it of the infringement by Badische.

66 Although in fact according to paragraph 17 of the contested judgment, with effect from 31 December 1986 'KNP... acquired the German packaging producer Herzberger Papierfabrik Ludwig Osthushenrich GmbH und Co. KG, whose production unit, Badische Cartonfabrik... participated in meetings of the PC, the JMC and the Economic Committee', the Court of First Instance nevertheless held in paragraph 55 that the Commission was 'entitled to attribute Badische's unlawful conduct to the applicant' and, in paragraph 104, 'rightly took the view that the applicant had participated in the cartel from mid-1986 until April 1991'. However, nowhere in the contested judgment has the Court of First Instance given reasons for the attribution of responsibility to KNP for Badische's participation in the cartel over the period prior to its acquisition.

67 As the Advocate General has observed in points 48 and 50 of his Opinion, and contrary to the Commission's contentions, the appellant, in its written pleadings, expressly requested the Court of First Instance to draw the appropriate conclusion from the fact that Badische had become part of its group with effect only from 1 January 1987.

68 Consequently, by failing to deal with the appellant's argument that it should in any event be liable for Badische's infringements only with effect from its acquisition, the Court of First Instance infringed the duty to state reasons.

69 For that reason, paragraph 1 of the operative part of the contested judgment must be annulled.

70 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, the Court of Justice is to set aside the decision of the Court of First Instance if the appeal is well founded. It may either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. Since the state of the proceedings so permits, final judgment must be given on the amount of the fine to be imposed on the appellant.

The action for annulment

71 As regards the duration of the period of the infringement to be attributed to the appellant and, in particular, the attribution to it of Badische's infringement over the period prior to its acquisition by the appellant, it should be noted that it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking.

72 In the present case it is undisputed that Badische participated in the cartel from mid-1986 until 1 January 1987 when it was the production unit of the German packaging producer Herzberger Papierfabrik Ludwig Osthushenrich GmbH und Co. KG. The latter entity was acquired, without loss of legal personality, by the

appellant only on 31 December 1986, which, according to the second paragraph of point 149 of the Decision, became its '95% owner' throughout the period of the infringement in question.

73 For the reasons given in paragraphs 46 to 50 of the contested judgment, the appellant must be held responsible for the infringement committed by Badische over the period from January 1987 to April 1991. As the Court of First Instance observed:

'46 First, the applicant does not contend that it was unable to exert a decisive influence on the commercial policy of KNP Vouwkarton and Badische.

47 Moreover, it is not disputed that a member of the applicant's management board participated in, and even presided over, the meetings of the PWG until 1988. According to the Decision, the main discussions with an anti-competitive object took place in the PWG and that finding is not disputed by the applicant.

48 In those circumstances, the Commission has proved that through the involvement of the member of its management board the applicant was actively implicated in the anti-competitive conduct of KNP Vouwkarton. In involving itself in that way in the participation of one of its subsidiaries in the cartel, the applicant was aware, and must also have approved of, Badische's participation in the infringement in which KNP Vouwkarton took part.

49 The applicant's responsibility is not affected by the fact that the attendance of the member of its management board at meetings of the bodies of the PG Paperboard ceased in 1988. It was for the applicant, as parent company, to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of an infringement of which it was aware. Furthermore, the applicant has not disputed that it did not even attempt to prevent the continuation of the infringement.

50 It also follows that the sale of KNP Vouwkarton to Mayr-Melnhof with effect from 1 January 1990 did not affect the applicant's responsibility for Badische's continuing anti-competitive conduct.'

74 Having regard to the reasons given in the contested judgment, as supplemented by the foregoing considerations, the fine imposed on the appellant will be fixed at EUR 2 600 000.

Costs

75 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings 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.

76 As the appellant has been unsuccessful in the majority of its pleas in the appeal, it will be ordered to bear its own costs and to pay two thirds of the Commission's costs relating to the proceedings before the Court of Justice.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Sets aside paragraph 1 of the operative part of the judgment of the Court of First Instance of 14 May 1998 in Case T-309/94 *KNP BT* v *Commission*;

2. Sets the amount of the fine imposed on NV Koninklijke KNP BT by Article 3 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) at EUR 2 600 000;

3. Dismisses the remainder of the appeal;

4. Orders NV Koninklijke KNP BT to bear its own costs and to pay two thirds of the costs of the Commission of the European Communities relating to the proceedings before the Court of Justice;

5. Orders the Commission of the European Communities to bear one third of its own costs relating to the proceedings before the Court of Justice.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber