JUDGMENT OF THE COURT (Second Chamber)

8 February 2007 *

In Case C-3/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 3 January 2006,

Groupe Danone, a limited company established in Paris (France), represented by A. Winckler and S. Sorinas Jimeno, avocats,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by A. Bouquet and W. Wils, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Klučka, R. Silva de Lapuerta (Rapporteur), J. Makarczyk and L. Bay Larsen, Judges,

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2006,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2006,

gives the following

Judgment

1 By its appeal, Group Danone seeks to have set aside the judgment of the Court of First Instance of the European Communities of 25 October 2005 in Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407 ('the judgment under appeal'), in that, by that judgment, the Court of First Instance dismissed in part its action for

annulment of Commission Decision 2003/569/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case IV/37.614/F3 PO/Interbrew and Alken-Maes) (OJ 2003 L 200, p. 1) and also for a reduction in the fine imposed on it by Article 2 of that decision.

Legal background

2 Article 15 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

'1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

...

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5), ...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each

of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) or Article [82] of the Treaty, ...

...

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

3 Article 17 of Regulation No 17 provides:

'The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.'

4 The Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3) ('the Guidelines') states in its preamble:

'The principles outlined ... should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice

alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

5 According to Section 1 of the Guidelines, '[that] basic amount of the fine will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'. Under Section 2 of the Guidelines, the basic amount may be increased where there are aggravating circumstances such as, for example, repeated infringement of the same type by the same undertaking or undertakings. According to Section 3 of the Guidelines, the basic amount may be reduced where there are specific attenuating circumstances.

6 The Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice') sets out the conditions under which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them.

7 Section D of the Leniency Notice is worded as follows:

'D. Significant reduction in a fine

1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

Facts

8 In the judgment under appeal, the Court of First Instance summarised the facts of the action before it as follows:

'...

5 At the time when the facts took place, Interbrew NV ("Interbrew") and Brouwerijen Alken-Maes NV ("Alken-Maes") were the largest and the second-largest suppliers on the Belgian beer market. Alken-Maes was a subsidiary of Group Danone ..., which also operated on the French beer market through another subsidiary, Brasseries Kronenbourg SA ("Kronenbourg"). In 2000, [Groupe Danone] ceased its activities on the beer market.

6 In 1999, the Commission initiated an investigation under Case IV/37.614/F3 into possible infringements of the Community competition rules in the Belgian brewing sector.

7 On 29 September 2000, in the context of that investigation, the Commission initiated the procedure and adopted a statement of objections against [Groupe Danone] and also Interbrew, Alken-Maes, NV Brouwerij Haacht ("Haacht") and NV Brouwerij Martens ("Martens"). The procedure initiated against [Groupe Danone] and the statement of objections addressed to it related solely to its alleged involvement in the cartel referred to as "Interbrew/Alken-Maes" concerning the Belgian beer market.

8 On 5 December 2001, the Commission adopted the contested decision, addressed to [Groupe Danone] and also to Interbrew, Alken-Maes, Haacht and Martens ... .

9 The contested decision finds two separate infringements of the competition rules, namely, first, a complex set of agreements and/or concerted practices in respect of beer sold in Belgium ("the Interbrew/Alken-Maes Cartel") and, secondly, concerted practices in respect of private-label beer. The contested decision finds that [Groupe Danone], Interbrew and Alken-Maes participated in the first infringement, while Interbrew, Alken-Maes, Haacht and Martens participated in the second.

10 Although [Groupe Danone] was, at the material time, the parent company of Alken-Maes, the contested decision makes only one finding of infringement on its part. In the light of its active involvement in the Interbrew/Alken-Maes Cartel, [Groupe Danone] was held responsible both for its own involvement in the cartel and for that of Alken-Maes. By contrast, the Commission considered that there was no reason to attribute responsibility to [Groupe Danone] for the participation of its subsidiary in the concerted practice relating to private-label beer, since [it] was not itself involved in that cartel.

11 The infringement found to have been committed by [Groupe Danone] consists in its participation, both directly and through its subsidiary Alken-Maes, in a complex set of agreements and/or concerted practices relating to a general non-aggression pact, prices and promotions in the off-trade, customer sharing in the on-trade, including "national" customers, the restriction of investment and advertising in the on-trade, a new pricing structure for the on-trade and the off-trade, and the exchange of information about sales in both the on-trade and the off-trade.

12 The contested decision finds that the infringement took place over the period from 28 January 1993 to 28 January 1998.

13 Being of the view that a series of factors enabled it to conclude that the infringement had ceased, the Commission did not deem it necessary to require the undertakings concerned to bring the infringement to an end pursuant to Article 3 of Regulation No 17.

14 However, the Commission considered it appropriate, pursuant to Article 15(2) of Regulation No 17, to impose a fine on Interbrew and [Groupe Danone] for their participation in the Interbrew/Alken-Maes Cartel.

15 In that regard, the Commission held in the contested decision that all the participants in the Interbrew/Alken-Maes Cartel had committed the infringement intentionally.

16 For the purpose of setting the fines to be imposed, the Commission applied in the contested decision the method laid down in the Guidelines and the Leniency Notice.

17 The operative part of the contested decision is worded as follows:

"*Article 1*

[Interbrew], [Alken-Maes] and [Groupe Danone] have infringed Article 81(1) [EC] by taking part in a complex set of agreements and/or concerted practices relating to a general non-aggression pact, prices and promotions in the off-trade, customer sharing in the on-trade (both the 'traditional' sector and national customers), the restriction of investment and advertising in the on-trade, a new pricing structure for the on-trade and the off-trade, and the exchange of information about sales in both the on-trade and the off-trade during the period from 28 January 1993 to 28 January 1998.

Article 2

The following fines are hereby imposed ... in respect of the infringements found in Article 1:

...

(b) on [Groupe Danone]: a fine of EUR 44.043 million.

...'"

Procedure before the Court of First Instance and the judgment under appeal

9 By application lodged at the Registry of the Court of First Instance on 22 February 2002, Groupe Danone brought an action for annulment of the contested decision. In the alternative, it requested the Court of First Instance to reduce the fine imposed on it by Article 2 of that decision.

10 By the judgment under appeal, the Court of First Instance rejected all the pleas put forward by Groupe Danone with the exception of the fifth plea. In its assessment of that plea, the Court of First Instance held, at paragraphs 284 to 290 of the judgment under appeal, that a threat had been made by Groupe Danone and, at paragraphs 291 to 294 of that judgment, that cooperation had been extended, observing, at

paragraphs 295 to 310 of the judgment, that the threat in question had not been the decisive cause of the extension of the cartel. Consequently, the Court of First Instance considered, at paragraph 311 of the judgment under appeal, that the aggravating circumstance established in that regard in the contested decision could not be accepted. Thus, at paragraphs 313 and 519 of the judgment, the Court of First Instance reduced the increase in the fine for aggravating circumstances from 50 to 40%.

11 As regards the calculation of the final amount of the fine, the Court of First Instance observed, at paragraph 520 of the judgment under appeal, that in calculating the fine imposed on Groupe Danone the Commission had departed from the method laid down in the Guidelines. The Court of First Instance therefore considered it appropriate, in the exercise of its unlimited jurisdiction, to apply the increase of 40% for the aggravating circumstance of repeated infringement to the basic amount of the fine imposed on Groupe Danone.

12 The Court of First Instance therefore calculated, at paragraph 525 of the judgment under appeal, the amount of the fine imposed on Groupe Danone as follows:

'[T]he basic amount of the fine (EUR 36.25 million) must first be increased by 40% of that basic amount (EUR 14.5 million) and then reduced by 10% of that amount (EUR 3.625 million), which gives an amount of EUR 47.125 million. Next, that figure is reduced by 10% for cooperation, which gives a final amount of the fine of EUR 42.4125 million'.

13 By the judgment under appeal, the Court of First Instance:

'1 [Set] the amount of the fine imposed on [Groupe Danone] at EUR 42.4125 million;

2 Dismisse[d] the remainder of the application;

3 Order[ed] [Groupe Danone] to bear its own costs and to pay three quarters of those incurred by the Commission and the Commission to bear one quarter of its own costs.'

Forms of order sought by the parties in the appeal

14 Groupe Danone claims that the Court should:

— set aside in part the judgment under appeal, in so far as it rejects the plea alleging that there was no basis on which to take the aggravating circumstance consisting in repeated infringement into account as against the appellant and in so far as it amends the method of calculating the fine used by the Commission;

— grant the form of order sought at first instance, in support of which the appellant submitted that there was no basis on which to take into account the aggravating circumstance consisting in repeated infringement, and reduce accordingly the fine imposed by the Commission;

— reduce the amount of the fine in proportion to the decrease in the reduction for attenuating circumstances decided on by the Court of First Instance; and

— order the Commission to pay the costs.

15 Groupe Danone requests the Court to give final judgment in the case, exercising its unlimited jurisdiction in relation to fines, and reduce by EUR 1.3025 million the final amount of the fine set by the Court of First Instance.

16 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellant to pay the costs.

The appeal

17 In support of its claim that the judgment under appeal should be set aside in part, Groupe Danone raises four main pleas and a fifth, alternative plea. Those pleas relate, essentially, to the Court of First Instance's interpretation of the concept of repeated infringement and to its application of the method of calculating the amount of the fine.

First plea, alleging breach of the principle that offences and penalties must be defined by law, owing to the fact that repeated infringement was taken into account as an aggravating circumstance (nulla poena sine lege)

Arguments of the parties

18 Groupe Danone maintains that a system which takes account of repeated infringement, without any legal basis, cannot be applied in the context of Articles

81 EC and 82 EC. Consequently, the Court of First Instance's assessment of the legality of the application of the aggravating circumstance consisting in repeated infringement is contrary to the principle that offences and penalties must be defined by law and the principle of non-retroactivity of criminal laws.

19 Groupe Danone asserts that the possibility for the Commission to increase the amount of the fine where there has been a repeated infringement is not expressly provided for in Regulation No 17 and is found only in the Guidelines. However, the Guidelines are merely indicative of the methodology to be applied and lack sufficient legal force to introduce such a basis for increasing a penalty.

20 Groupe Danone submits that, even if the Court should take the view that a norm of legislative force was not necessary in order for repeated infringement to be capable of being taken into consideration in competition law, the Guidelines had not yet been adopted when the last infringement was committed, so that the aggravating circumstance consisting in repeated infringement had no basis in Community law.

21 The Commission observes that Article 15 of Regulation No 17 provides that the setting of fines is to take into consideration the gravity and duration of the infringement, which means that the role and the size of each of the undertakings, and also the various aggravating and attenuating circumstances, may be taken into account without there being any need for a specific legal basis relating to those circumstances.

22 The Commission contends that the possibility of taking repeated infringement into account as an aggravating circumstance comes within its discretion when setting the amount of the fine.

Findings of the Court

23 It must be borne in mind at the outset that while it is true that the Court has held that the Guidelines do not constitute the legal basis of fining decisions adopted by the Commission (see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 209, and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 207), the Court has also held that the Guidelines ensure legal certainty on the part of the undertakings since they determine the method which the Commission has bound itself to use for the purposes of setting fines (see *Dansk Rørindustri and Others* v *Commission*, paragraph 213, and *JCB Service* v *Commission*, paragraph 209).

24 It is Article 15(2) of Regulation No 17 that constitutes the relevant legal basis on which the Commission may impose fines on undertakings and associations of undertakings for infringements of Articles 81 EC and 82 EC. Under that provision, in determining the amount of the fine, the duration and the gravity of the infringement in question must be taken into consideration.

25 As regards gravity, the Court has held that, whereas the basic amount of the fine is set according to the infringement, its gravity is determined by reference to numerous other factors, in respect of which the Commission has a wide discretion. According to the Court, to take into account aggravating circumstances when setting the fine is consistent with the Commission's task of ensuring compliance with the competition rules (see Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 71).

26 Furthermore, in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 91, the Court made clear that any repeated infringement was among the factors to be taken into consideration in the analysis of the gravity of the infringement in question.

27 In those circumstances, Groupe Danone's contention that before the entry into force of the Guidelines the Commission's practice in setting fines lacked clarity and foreseeability misconstrues the legal relationship between Article 15(2) of Regulation No 17, which constitutes the legal basis of the contested decision, and the Guidelines.

28 The Guidelines do not constitute the legal basis for setting the amount of the fine but merely clarify the application of Article 15(2) of Regulation No 17 (see also *Dansk Rørindustri and Others* v *Commission*, paragraphs 211, 213 and 214). In that context, as the Advocate General observed at point 24 of his Opinion, even in the absence of the Guidelines the applicant was still able to foresee the legal consequences of its conduct.

29 Accordingly, the Commission, in the exercise of its discretion, was entitled to regard the element associated with the repeated infringement as relating to the gravity of the infringement committed by Groupe Danone.

30 It follows that, by upholding, at paragraph 351 of the judgment under appeal, the Commission's finding that there had been a repeated infringement by Groupe Danone and the characterisation of that repeated infringement as an aggravating circumstance, the Court of First Instance did not breach the principle *nulla poena sine lege.*

31 Groupe Danone's first plea must therefore be rejected.

Second plea, alleging breach of the principle of legal certainty

Arguments of the parties

32 Groupe Danone submits that, even in the absence of specific provisions establishing a limitation period, the aggravating circumstance consisting in repeated infringement, resulting from conduct on two previous occasions, breaches the principle of legal certainty, since the Commission's earlier decisions had been issued in different contexts.

33 Groupe Danone claims that a 'perpetual' threat of repeated infringement being taken into account as an aggravating circumstance is contrary to the general principles common to the laws of the Member States.

34 The Commission asserts that this plea is based in part on a misreading of the judgment under appeal, as the Court of First Instance held that repeated infringement was sufficiently established on the basis of a finding of facts dating from 1984, that is to say, less then 10 years before the beginning of the infringement in issue, which was committed in 1993. Furthermore, the absence of a statutory limitation period for taking a repeated infringement into account does not mean that there is no limit beyond which the Commission would take a repeated infringement into account.

35 In the present case, moreover, the aggravating circumstance consisting in repeated infringement was applied in a very restrained manner.

Findings of the Court

36 At paragraph 353 of the judgment under appeal, the Court of First Instance held that there was no infringement of the principle of legal certainty based on the fact that neither Regulation No 17 nor the Guidelines specify a maximum period in relation to the finding of repeated infringement.

37 That appraisal by the Court of First Instance is consistent with the law. In accordance with settled case-law, the Commission has a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account (see, inter alia, order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and judgment in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

38 It must be emphasised that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and that the Commission cannot be bound by any limitation period when making such a finding.

39 As the Advocate General observed at point 30 of his Opinion, repeated infringement is an important factor which the Commission must appraise, since the purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including, for example, the time that has elapsed between the infringements in question.

40 In that regard, the Court of First Instance established, at paragraphs 354 and 355 of the judgment under appeal, the history of the infringements of the competition rules found against Groupe Danone and stated that on each occasion a relatively short time, namely less than 10 years, had elapsed between infringements. In those circumstances, the Court of First Instance was entitled to conclude that the repetition of unlawful conduct by Groupe Danone showed a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed those rules.

41 Furthermore, in regard to the characteristics of the appellant's previous conduct, the Court of First Instance correctly noted, at paragraph 363 of the judgment under appeal, that the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement of Community competition law has been made in the past.

42 Groupe Danone's second plea cannot therefore be upheld.

Third plea, alleging breach of the obligation to state reasons

Arguments of the parties

43 Groupe Danone maintains that, in response to its plea alleging infringement of Regulation No 17, the Court of First Instance linked the concept of deterrence with that of repeated infringement. It submits that the Court of First Instance justified the merits of recourse to the concept of repeated infringement by the need to ensure a deterrent effect. Since, according to the Court of First Instance, for the purpose of assessing the gravity of the infringement, the concept of deterrence must be distinguished from that of repeated infringement, the judgment is vitiated by contradictory reasoning.

44 The Commission contends that, by this plea, Groupe Danone is confusing the different stages of the assessment of the gravity of the infringement. In practice, the elements applicable to all the undertakings which participated in the cartel and also the individual elements of that assessment form part of the assessment. The purpose of setting fines according to the gravity of the infringement is always to attain effective deterrence.

Findings of the Court

45 It must be borne in mind at the outset that the question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a point of law which is amenable, as such, to judicial review on appeal (see Case C-401/96 P *Somaco* v *Commission* [1998] ER I-2587, paragraph 53, and Case C-446/00 P *Cubero Vermurie* v *Commission* [2001] ECR I-10315, paragraph 20).

46 As regards the obligation to state reasons, it is settled case-law that the Court of First Instance is not thereby required to provide an account that follows exhaustively and point by point all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review (see, in particular, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Electrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 72).

47 As regards the substance of the grounds of the judgment under appeal pertaining to the assessment of the aggravating circumstances, the Court of First Instance was correct to hold, at paragraphs 348 to 350, that for the purpose of taking such circumstances into account, the repeated infringement was not only a relevant factor

but also a particularly important factor and a very significant indication of the gravity of the infringement for the purpose of assessing the amount of the fine in the context of effective deterrence. The Court of First Instance emphasised in that regard that the repeated infringement is evidence that the sanction previously imposed on Groupe Danone had not had sufficiently deterrent effects.

48 It follows that the judgment of the Court of First Instance is not vitiated by contradictory reasoning.

49 The third plea put forward by Groupe Danone must therefore be rejected.

Fourth plea, alleging misuse of judicial powers

First part of the plea, alleging failure by the Court of First Instance to observe the limits of its jurisdiction

Arguments of the parties

50 Groupe Danone claims that, by amending the contested decision, the Court of First Instance exceeded its jurisdiction. In drawing the consequences from the illegality of the decision, in fact of the method of calculating the fine, on the basis of its unlimited jurisdiction, the Court of First Instance acted *ultra vires*.

51 Groupe Danone maintains that the Court of First Instance, after establishing that the Commission had departed from the Guidelines, undertook to determine the amount of the fine by substituting its own method for the Commission's.

52 The Commission observes that Groupe Danone does not challenge the merits of the calculation method used by the Court of First Instance but merely makes an objection of a procedural nature. In contrast, by its appeal it requests the Court of Justice to substitute its assessment and its calculation of the fine for the analysis carried out by the Court of First Instance.

Findings of the Court

53 It should be observed that, in setting the new amount of the fine, the Court of First Instance acted not within the framework of Article 230 EC but in the exercise of its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17.

54 Consequently, Groupe Danone's argument that by amending the method of calculating the fine the Court of First Instance ignored the limits of the jurisdiction which it derives from Article 230 EC is ineffective.

55 The first part of the fourth plea cannot therefore be upheld.

Second part of the plea, alleging that the Court of First Instance altered the method used in applying the weighting for attenuating circumstances when it had not been requested to do so

Arguments of the parties

56 Groupe Danone submits that the Court of First Instance is not empowered to adjudicate *ultra petita*, irrespective of the proceedings before it. That is a fundamental judicial principle which ensures that the parties are in control of the dispute between them. It maintains that the same applies to the exercise by the Court of First Instance of its unlimited jurisdiction.

57 Groupe Danone contends that the lawfulness of the application to the amount of the fine of the weighting designed to take attenuating circumstances into account had not been raised at first instance. By altering the method used in applying that weighting and increasing the amount of the fine, in order that it might be calculated on the basis of the methodology used by the Commission, the Court of First Instance adjudicated *ultra petita*.

58 The Commission contends that it was not on the basis of a partial annulment of the contested decision that the Court of First Instance adopted its method of calculating the fine. On the contrary, in the exercise of its unlimited jurisdiction, the Court of First Instance correctly based its assessment of the relevant attenuating circumstance on findings of fact.

59 The Commission observes that in the exercise of that jurisdiction the Court of First Instance has a wide discretion which enables it to appraise whether the fine is appropriate; that is to say, even where it does not annul the decision, it may increase the fine, reduce it or uphold it, possibly taking additional factors into account.

Findings of the Court

60 It must be borne in mind that, in accordance with Article 229 EC, regulations adopted jointly by the European Parliament and the Council of the European Union, pursuant to the provisions of the Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations.

61 Such jurisdiction was conferred on the Community judicature by Article 17 of Regulation No 17. The Community judicature is therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 692).

62 It follows that the Community judicature is empowered to exercise its unlimited jurisdiction where the question of the amount of the fine is before it and that that jurisdiction may be exercised to reduce that amount as well as to increase it.

63 The exercise of that jurisdiction by the Court of First Instance in the judgment under appeal was therefore consistent with the law.

64 The second part of the fourth plea is therefore unfounded.

Fifth plea, submitted in the alternative and alleging breach of the rights of the defence and also of the principle of non-retroactivity of more severe punitive provisions

First part of the plea, alleging breach of the rights of the defence

Arguments of the parties

65 Groupe Danone maintains that, even on the assumption that the Court of First Instance was entitled to amend the method of calculating the fine and to decrease the amount of the reduction for attenuating circumstances, it ought to have given the parties the opportunity to comment on its intention to do so. By depriving the appellant of the possibility of commenting on the proposed amendment, the Court of First Instance breached the rights of the defence.

66 The Commission observes that the Court of First Instance did not increase the fine, but reduced it, and that in its assessment of the appropriateness of the amount of the fine, the Court of First Instance applied its calculation method in relation to the reduction for attenuating circumstances.

67 Furthermore, in the Commission's opinion, by submitting its application to the Court of First Instance for annulment of and reduction in the fine, Groupe Danone requested the latter not only to examine the lawfulness of the decision but also to appraise the appropriateness of the amount of the fine. It therefore took the conscious risk that the Court of First Instance would increase the amount of the fine imposed.

Findings of the Court

68 It should be recalled at the outset that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of Community law which has been emphasised on numerous occasions in the case-law of the Court (see, inter alia, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 30).

69 On 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 Articles 81 EC and 82 EC and Article 15 of Regulation No 17 and, second, to ascertain whether the Court of First Instance responded to the requisite legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, in particular, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 128).

70 Without its being necessary to adjudicate on the question whether the Court of First Instance was required, before exercising its unlimited jurisdiction, to invite Groupe Danone to comment on the possible amendment of the calculation method, it must be pointed out that Groupe Danone did have the opportunity to express its views as regards the setting of the amount of the fine.

71 That follows, in the first place, from the arguments which Groupe Danone presented to the Court of First Instance; in the second place, from the inter partes argument before the Court of First Instance; and, in the third place, from the considerations set out in the judgment under appeal.

72 In the first place, it must be observed that six of the eight pleas formulated by Groupe Danone before the Court of First Instance sought a reduction in the amount of the fine. As is apparent from paragraph 25 of the judgment under appeal, those pleas related, in particular, to observance of the principle of proportionality and also to the Commission's assessment of the aggravating and attenuating circumstances.

73 In the context of those pleas, the appellant had requested the Court of First Instance to examine whether the Commission had properly applied the method recommended in the Guidelines (see, in particular, paragraphs 46 to 49 of the judgment under appeal) and, consequently, whether the amount of the fine was appropriate.

74 In the second place, it should be observed that, as is apparent from paragraph 74 of the Commission's response, which was not contradicted by Groupe Danone, at the hearing the Court of First Instance had put to the Commission a question concerning the way in which attenuating circumstances were taken into account in the method used to calculate the fine.

75 In answer to that question, the Commission had stated that the method applied in the contested decision was not consistent with the Guidelines but that the consequence of that circumstance had been more favourable for Groupe Danone.

76 In those circumstances, it was open to Groupe Danone to express its views effectively.

77 In the third place, in the judgment under appeal, the Court of First Instance, taking into account all the arguments exchanged before it, carried out a detailed examination of the factors relating to the setting of the fine.

78 Thus, the Court of First Instance first of all stated, at paragraph 521 of the judgment, that, in accordance with the wording of the Guidelines, the percentages corresponding to increases or reductions applied to reflect aggravating or attenuating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement, and not to the figure resulting from any initial increase or reduction to reflect an aggravating or attenuating circumstance.

79 The Court of First Instance then observed, at paragraph 522 of the judgment under appeal, that while the Commission had adjusted the amount of the fine to take account of two aggravating circumstances and then of one attenuating circumstance, the final amount of the fine imposed showed that the Commission had applied one of those two adjustments to the amount which resulted from the application of an initial increase or reduction. The Court of First Instance therefore noted that such a calculation method had the consequence that the final amount of the fine was altered by reference to the amount which would have resulted from the application of the method laid down in the Guidelines.

80 The Court of First Instance therefore concluded at paragraph 523 of the judgment under appeal that the Commission, without providing any justification for doing so, had departed from the Guidelines with regard to the method of calculating the final amount of the fine.

81 Consequently, and as stated at paragraph 524 of the judgment, the Court of First Instance, in the exercise of its unlimited jurisdiction, applied the increase of 40% for the aggravating circumstance of repeated infringement to the basic amount of the fine imposed on Groupe Danone.

82 Thus, in the exercise of its unlimited jurisdiction, the Court of First Instance relied exclusively on the provisions of the Guidelines and applied no other factors, circumstances or criteria which Groupe Danone could not foresee would be taken into account.

83 It follows that the complaint alleging breach of the rights of the defence by the Court of First Instance is unfounded.

84 The first part of the fifth plea cannot therefore be upheld.

Second part of the plea, alleging breach of the principle of non-retroactivity of more severe punitive provisions

Arguments of the parties

85 Groupe Danone maintains that, by amending the method of calculating the fine imposed on the applicant, the Court of First Instance based its reasoning on a clarification of the Guidelines which it had itself provided in judgments delivered after the adoption of the contested decision.

86 The Commission disputes the fact that Groupe Danone could be in any doubt as to the detailed procedure for taking attenuating circumstances into account that might be applied in calculating the amount of the fine. As the Court of First Instance held, it follows from the Guidelines that the reduction for attenuating circumstances is calculated on the basic amount. Although it is not bound by the Guidelines, the Court of First Instance chose to apply that method in making its own assessment of the appropriateness of the amount of the fine.

Findings of the Court

87 It must be borne in mind, first of all, that the principle that penal provisions may not have retroactive effect is one that is common to all the legal orders of the Member States and forms an integral part of the general principles of law whose observance is ensured by the Community judicature (see Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22).

88 In particular, Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which enshrines in particular the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), may preclude the retroactive application of a new interpretation of a rule establishing an offence (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 217).

89 That is particularly true of a judicial interpretation which produces a result which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (see *Dansk Rørindustri and Others* v *Commission*, paragraph 218).

90 However, it follows from the case-law of the Court that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy, but that, on the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (see *Dansk Rørindustri and Others* v *Commission*, paragraph 227).

91 Undertakings involved in an administrative procedure in which fines may be imposed cannot therefore acquire a legitimate expectation that a particular method of calculating the fines will be used (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 228).

92 It follows that a method of calculating fines, such as that applied by the Court of First Instance in the judgment under appeal, was reasonably foreseeable for an undertaking such as Groupe Danone at the time when the infringements concerned were committed (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 231).

93 Accordingly, the Court of First Instance did not breach the principle of non-retroactivity.

94 The second part of the fifth plea is therefore unfounded.

95 It follows from the foregoing considerations that Groupe Danone's appeal must be dismissed in its entirety.

Costs

96 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against Groupe Danone and Groupe Danone has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Groupe Danone to pay the costs.

[Signatures]