JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

14 May 1998 *

In Case T-309/94,

NV Koninklijke KNP BT, a company incorporated under Netherlands law, established in Amsterdam, represented by Tom Otervanger and Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 56-58 Rue Charles Martel,

applicant,

v

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

defendant,

* Language of the case: Dutch.

APPLICATION for annulment of Commission Decision 94/601/EC relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard, OJ 1994 L 243, p. 1),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing which took place from 25 June to 8 July 1997,

gives the following

Judgment

Facts

1 This case concerns 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), as corrected prior to its publication by a Commission

decision of 26 July 1994 (C(94) 2135 final) (hereinafter 'the Decision'). The Decision imposed fines on 19 producers supplying cartonboard in the Community on the ground that they had infringed Article 85(1) of the Treaty.

2 By letter of 22 November 1990, the British Printing Industries Federation ('BPIF'), a trade organisation representing the majority of printed carton producers in the United Kingdom, lodged an informal complaint with the Commission. It claimed that the producers of cartonboard supplying the United Kingdom had introduced a series of simultaneous and uniform price increases and it requested the Commission to investigate whether there had been an infringement of the Community competition rules. In order to ensure that its initiative received publicity, the BPIF issued a press release. The content of that press release was reported in the specialised trade press in December 1990.

3 On 12 December 1990, the Fédération Française du Cartonnage also lodged an informal complaint with the Commission, making allegations relating to the French cartonboard market which were similar to those made in the BPIF complaint.

4 On 23 and 24 April 1991, 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, hereinafter 'Regulation No 17'), carried out simultaneous investigations without prior notice at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

5 Following those investigations, the Commission sent requests for both information and documents to all the addressees of the Decision pursuant to Article 11 of Regulation No 17.

6 The evidence obtained from those investigations and 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.

7 The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty. By letter of 21 December 1992 it served a statement of objections on each of the undertakings concerned. All the addressees submitted written replies. Nine undertakings requested an oral hearing. A hearing was held on 7, 8 and 9 June 1993.

8 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;

(...)'

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.

18 The applicant brought this action by application lodged at the Registry of the Court on 14 October 1994.

19 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest 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-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

20 The applicant in Case T-301/94, Laakmann Karton GmbH, withdrew its action by letter lodged at the Registry of this Court on 10 June 1996 and the case was removed from the Register by order of 18 July 1996 (Case T-301/94 Laakmann Karton v Commission, not published in the ECR).

21 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, have also brought actions against the Decision (Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94).

22 Lastly, an action was also brought by an association, CEPI-Cartonboard, which was not an addressee of the Decision. However, it withdrew its action by letter lodged at the Registry of the Court on 8 January 1997 and the case was removed from the Register of the Court by order of 6 March 1997 (Case T-312/94 CEPI-Cartonboard v Commission, not published in the ECR).

23 By letter of 5 February 1997 the Court requested the parties to take part in an informal meeting with a view, in particular, to their presenting observations on a possible joinder of Cases T-295/94, T-304/94, T-308/94, T-309/94, 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 for the purposes of the oral procedure. At that meeting, which took place on 29 April 1997, the parties agreed to such a joinder.

24 By order of 4 June 1997 the President of the Third Chamber, Extended Composition, of the Court, in view of the connection between the abovementioned cases, joined them for the purposes of the oral procedure in accordance with Article 50 of the Rules of Procedure and allowed an application for confidential treatment submitted by the applicant in Case T-334/94.

25 By order of 20 June 1997 he allowed an application for confidential treatment submitted by the applicant in Case T-337/94 which related to a document produced in response to a written question from the Court.

26 Upon hearing the report of the Judge Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure and adopted measures of organisation of procedure in which it requested the parties to reply to certain written questions and to produce certain documents. The parties complied with those requests.

27 The parties in the cases referred to in paragraph 23 above presented oral argument and gave replies to the Court's questions at the hearing which took place from 25 June to 8 July 1997.

Forms of order sought

28 The applicant claims that the Court should:

— annul the Decision in whole or in part;

— annul, or at least reduce, the fine imposed;

— adopt the measures which the Court considers necessary;

— order the applicant to pay the costs.

29 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment of the Decision

The pleas alleging error of assessment and infringement of Article 190 of the Treaty in regard to the attribution to the applicant of the conduct of KNP Vouwkarton and Badische

Arguments of the parties

30 The applicant submits that the Decision does not satisfy the requirements of Article 190 of the Treaty in that it fails to state the reasons for the attribution to the applicant of responsibility for the participation of KNP Vouwkarton and Badische in the cartel.

31 Point 143 of the Decision indicates that a subsidiary's conduct was to be attributable to the group, represented by the parent company, where more than one company in the group participated in the infringement or where there was concrete evidence implicating the parent company in the participation of the subsidiary in the cartel. The Decision does not, however, make clear which criterion was applied by the Commission in attributing to the applicant the conduct of KNP Vouwkarton and Badische.

32 To the extent that the Commission applied the second of those two criteria, namely the existence of concrete evidence implicating the applicant in the subsidiaries' participation in the cartel, the evidence showing that the applicant was actively and directly involved in their participation in the cartel should have been set out in the Decision. In the absence of such evidence, the applicant cannot be considered to have participated intentionally in the cartel.

33 The applicant considers, moreover, that the Commission committed an error of assessment in attributing the conduct of KNP Vouwkarton and Badische to it.

34 As regards KNP Vouwkarton's participation in the cartel, the applicant states that the member of its board of management who was (indirectly) a co-director of KNP Vouwkarton and took part, in that capacity, in meetings of the PWG and of the PC did not attend any meeting of bodies of the PG Paperboard after November 1988 (May 1988 as regards the PWG). There was no 'personal link' thereafter between the applicant and the cartel.

35 In any event, any active and direct participation by the applicant in the cartel ceased upon the acquisition of KNP Vouwkarton by the Mayr-Melnhof group with effect from 1 January 1990.

36 The applicant was not actively and directly involved in Badische's participation in the cartel. In particular, there is no basis for the conclusion that the applicant's board member participated in meetings of the PWG and of the PC also as a representative of Badische.

37 Badische acted independently on the market and never participated in the cartel at the applicant's instructions. There is therefore no justification for attributing its participation to the applicant (see Case 48/69 *ICI* v *Commission* [1972] ECR 619, Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 24, and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865).

38 In reply to the plea alleging infringement of Article 190 of the Treaty, the Commission contends that point 149 of the Decision expressly states the reasons for attributing to the applicant responsibility for the conduct of KNP Vouwkarton and Badische. The participation by the head of the applicant's Packaging Group in the meetings of the PWG and of the PC is concrete evidence of a 'personal link' between it and the cartel.

39 As to the plea alleging an error of assessment, the Commission considers that, as regards KNP Vouwkarton, the participation of a member of the applicant's board of directors in the meetings of the PWG and of the PC shows that the applicant was aware of the cartel, that there was a very direct relationship between it and its subsidiaries, and that it contributed actively to its subsidiaries' participation in the cartel. In those circumstances, the mere fact that the board member did not preside over meetings of the PWG and of the PC after 1988 does not affect the existence of the 'personal link' between the applicant and the cartel.

40 The Commission also submits that the participation of the applicant's board member in PWG and PC meetings also constitutes a direct link between it and Badische's participation in the cartel.

Findings of the Court

41 According to the first paragraph of point 149 of the Decision, KNP Vouwkarton was represented in the PC and PWG by a member of the board of management of

KNP who was also the head of KNP's Packaging Group. It is stated (*ibidem*) that 'given the proven link between the cartel and KNP itself, [it is appropriate] to address the decision to the whole KNP group in respect of the period up to the acquisition by [Mayr-Melnhof] of KNP Vouwkarton as of 1 January 1990. (For the period after the transfer, [Mayr-Melnhof] is responsible for KNP Vouwkarton's continuing participation).'

42 According to point 149, third paragraph, the applicant 'was also at all relevant times the (95%) owner of the German board producer Herzberger Papierfabrik, which included Badische Kartonfabrik'. The Commission concludes from this that: 'As regards the participation in the cartel of Badische, this Decision will therefore be addressed to KNP'.

43 The Decision therefore makes it sufficiently clear that it was addressed to the applicant on the basis of the criterion that the Decision would be addressed to a group, represented by the parent company, where there was concrete evidence implicating the parent company in the subsidiary's participation in the cartel (point 143(2) of the Decision). By referring to the fact that a member of the applicant's board, who was also head of its Packaging Group, participated in PWG and PC meetings as representative of KNP Vouwkarton, the Decision adequately sets out the evidence on which the Commission based its conclusion that the applicant was implicated in its subsidiary's participation in the cartel.

44 The plea alleging that the statement of reasons in the Decision is inadequate must therefore be rejected.

45 As regards the second plea, the Court finds that Commission was entitled to attribute responsibility to the applicant for the unlawful actions of KNP Vouwkarton and Badische.

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.

51 The plea alleging that there was error of assessment by the Commission must therefore also be rejected.

The plea alleging error of assessment as to the duration of Badische's participation in the cartel

Arguments of the parties

52 The applicant states that Badische's participation in the cartel ceased at the end of 1989. Although the Commission accepts that Badische did not participate in meetings of the PG Paperboard after that date, it nevertheless considered that the applicant was responsible for Badische's participation in the cartel until April 1991.

53 The mere fact that Badische occasionally received, from an independent commercial agent, unsolicited information on price initiatives on the United Kingdom market is an insufficient basis for the finding that it continued to participate actively in the cartel. Moreover, according to the ninth indent of Article 1 of the Decision, it was only from early 1990 that the cartonboard producers increasingly took concerted measures to control the supply of the product on the market.

54 The Commission refers to point 162 of the Decision, which states that Badische was still following the price initiatives at the time of the Commission's investigations. Badische must therefore be considered to have participated in the cartel even after its withdrawal from the PG Paperboard. The reference (*ibidem*) to the fact that it had probably obtained information on the planned initiatives in the United Kingdom through its English agent is therefore merely incidental.

Findings of the Court

55 It has already been held (see paragraphs 45 to 50 above) 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.

The application for annulment or reduction of the fine

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

Arguments of the parties

61 The applicant considers that despite the relatively high general level of the fines the Decision does not disclose how the Commission actually calculated the fine imposed on it. Moreover, if the Court were to find that the infringement has not been proven in regard to any particular aspect, that would affect the basis on which the fine was calculated.

62 In its reply the applicant states that the failure to identify the factors taken into account in order to calculate the fine made it impossible for it to substantiate this plea. The Commission cannot therefore put the admissibility of that plea in issue by arguing that it has not been adequately expounded in the application. Until the Commission provided information relating, *inter alia*, to the turnover taken into account in order to calculate the fine, the relevant period chosen, and the influence of any mitigating or aggravating factors, it was not in a position to submit more detailed observations.

63 The Commission contends that the plea alleging an inadequate statement of the reasons for the fine is inadmissible because the application does not contain a summary of that plea, as required by Article 44(1)(c) of the Rules of Procedure.

64 In the alternative, it argues that points 167 to 172 of the Decision contain a detailed statement of the factors taken into account in order to calculate the fines. In any event, it considers that it is not obliged to draw up a 'catalogue' of the fines.

Findings of the Court

65 This plea must be held admissible. In its application the applicant submitted, expressly though succinctly, that the Decision contains an inadequate statement of reasons as to the 'manner in which the Commission calculated the fine'. Furthermore, the Commission replied by referring to points 167 to 172 of the Decision.

66 The plea must therefore be examined.

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 par-

ticular, 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 *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] 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 'ringleaders' 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, point 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 considered to be one of the 'ringleaders' of the cartel and that there is an inadequate statement of reasons in that regard

Arguments of the parties

81 The applicant claims that the Commission wrongly considered it to be one of the ringleaders of the cartel (point 170 of the Decision).

82 The Commission assumed that the PWG and the PC agreed to have the applicant's representative as their president because of the strength of the KNP group. However, the applicant is only a small producer of cartonboard which 'supplied' a president for the PWG at the request of his colleagues and for a period limited to one year. Subsequently, at the request of his colleagues, his authority to act as president was extended by one year. Moreover, that person, who was also co-manager of KNP Vouwkarton, was chosen to carry out that task because of his 'neutrality' and his knowledge of languages. Moreover, he definitely presided over only four of the eight PWG meetings held during his presidency.

83 The position held by that member of its management board does not therefore prove that the applicant was a driving force behind the cartel.

84 Furthermore, the Decision contains an inadequate statement of reasons, because it does not expressly indicate whether account was taken of the shortness of the applicant's presidency of the PWG. The Commission states in its defence that in order to calculate the fine it took into account the fact that the applicant had to be regarded as one of the ringleaders even after 1988. That consideration is erroneous, because the Decision states (in point 170) that the applicant should be regarded as one of the ringleaders only 'during the period of its membership of the PWG'.

85 The Commission states that the applicant was considered to be one of the cartel ringleaders because it participated in, and indeed presided over, the PWG.

86 Its role as ringleader is confirmed by documents (in essence, the minutes originating from the PG Paperboard) annexed to the rejoinder, in which the name of the member of its management board appears.

87 Lastly the Commission was aware of the limited period of the applicant's participation in PWG meetings. However, it was unreasonable to take that fact into consideration when calculating the fine, given that the increased rate of fine applied to the applicant because it was a ringleader was imposed only in regard to KNP Vouwkarton's participation.

Findings of the Court

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 anticompetitive or that the conduct found by the Commission was in fact anticompetitive.

93 The applicant was therefore correctly characterized 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 characterized 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 applicant

Arguments of the parties

96 The applicant submits 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 (point 162 of the Decision), that participation being limited to the United Kingdom.

97 Moreover, the fine imposed is based incorrectly on the participation in the cartel by the applicant's two subsidiaries throughout the period of the infringement, namely from mid-1986 until April 1991. The Dutch-language version of Article 1 of the Decision indicates that it participated in an agreement and concerted practice originating in mid-1988, not mid-1986. It requests the Court to draw the appropriate conclusions from that obvious error.

98 At the hearing the applicant's representative stated that one of the figures applied in order to calculate the fine did not correspond to Badische's actual turnover. The Commission had taken into account Badische's turnover on the Community cartonboard market in 1989, whereas, in accordance with the general criteria adopted in order to calculate the fines, it should have taken into account the turnover on that market in 1990. Furthermore, it had wrongly included intra-group sales.

99 The Commission submits that, since the fines were calculated on the basis of the turnover of the undertakings concerned, Badische's small market share was taken into account when the fine was determined.

100 It states that the error in the Dutch version of the Decision concerning the beginning of the cartel was obvious to a careful reader. That is confirmed by the fact that the existence of that error was raised by the applicant only in its reply.

101 Finally, in reply to a written question put by the Court, the Commission produced a table setting out details of the calculation of the fines imposed on the undertakings addressed by the Decision. That document shows that, before it was reduced, the amount of the fine imposed on the applicant was made up of the sum of two figures, namely the figure obtained by applying a rate of 9% to the turnover of KNP Vouwkarton, multiplied by 42/60 — which corresponded to the duration of KNP Vouwkarton's participation in the infringement — and the figure obtained by applying a rate of 7.5% to the turnover of Badische, multiplied by 60/60 — corresponding to the duration of Badische's participation in the infringement. The total amount was then reduced by one-third.

102 At the hearing the Commission stated that it had calculated the amount of the fine on the basis of the turnover figures achieved by KNP Vouwkarton and Badische on the Community cartonboard market in 1989.

103 It explained that, as regards KNP Vouwkarton, it had not used 1990 as the reference year, so as to take account of the fact that it had been sold to Mayr-Melnhof during that year. It also stated that in order to calculate the amount of the fine it took into account Badische's 1989 turnover (ECU 19 000 000) and not that in 1990 (ECU 15 000 000) because one of Badische's plants had been taken permanently out of production in Autumn 1989.

Findings of the Court

104 As the Court has already found (paragraphs 45 to 50 above), 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 (paragraphs 55 to 60 above).

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 (paragraph 103 above), 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.

Costs

115 Under Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been only partially successful, the Court considers it fair in the circumstances of the case to order the applicant to bear its own costs and to pay one-half of the Commission's costs and to order the Commission to bear the other half of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. **Sets the amount of the fine imposed on the applicant 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 ECU 2 700 000;**

2. **Dismisses the application as regards the remaining claims;**

3. **Orders the applicant to bear its costs and to pay one-half of the Commission's costs;**

4. **Orders the Commission to bear one-half of its costs.**

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President