# JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
28 April 1994 *

In Case T-38/92,

**All Weather Sports Benelux BV,** a company established under Netherlands law whose registered office is at Zoetermeer (Netherlands), represented by Paul Glazener, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

**Commission of the European Communities,** represented by Berend-Jan Drijber, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 92/261/EEC of 18 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.290 — Newitt/Dunlop Slazenger International and Others, Official

* Language of the case: Dutch.

Journal 1992 L 131, p. 32), in so far as it holds the applicant liable for an infringement of Article 85(1) of the EEC Treaty and imposes a fine on it,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, C. P. Briët, A. Kalogeropoulos, D. P. M. Barrington and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 15 December 1993,

gives the following

## Judgment

### Facts and procedure

1 The applicant company, All Weather Sports Benelux BV, a company incorporated under Netherlands law whose registered office is at Zoetermeer (Netherlands), was formed on 17 April 1989. It specializes in the marketing of sports goods.

2 Also on 17 April 1989 the applicant concluded an agreement, with retroactive effect as from 1 January 1989, by which it took over the activities relating to the import and wholesale of sports goods, together with the relevant assets, of All Weather Sports BV (hereinafter 'AWS'), a company incorporated under Netherlands law whose registered office was also at Zoetermeer and which belonged to the Bührmann-Tetterode Nederland BV group (hereinafter 'Bührmann-Tetterode'), a company incorporated under Netherlands law whose registered office was at Amsterdam. The assets thus acquired by the applicant included *inter alia* an exclusive distribution agreement, originally covering the Netherlands and subsequently extended to the whole of Benelux, for products of the Dunlop brand from the British company Dunlop-Slazenger International Ltd (hereinafter 'DSIL'). DSIL gave notice to terminate the distribution agreement on 18 September 1988 and it ended on 30 April 1989. The assets acquired also included rights relating to the distribution of the products of a sports brand belonging to All Weather Sports International BV (hereinafter 'AWS International'), a company incorporated under Netherlands law engaging in commercial activities relating to sports goods, working closely together with AWS, having its registered office at Zoetermeer, like AWS, and also belonging to the Bührmann-Tetterode Group.

3 Following the transfer of assets on 17 April 1989, AWS and AWS International ceased their commercial activities and, after transferring their registered offices to Amsterdam and changing their names to BT Sports BV and BT Sports International BV respectively, continued to exist for tax reasons, although they no longer carried on any commercial activities.

4 On 29 May 1990 the Commission, after carrying out investigations at the offices of DSIL's exclusive distributors in the Netherlands, including an investigation at AWS on 3 November 1988, sent that company, under its former name of All Weather Sports BV and at its former registered office at Zoetermeer, a statement of objections relating to an infringement of Article 85(1) of the EEC Treaty. That statement of objections was drawn up as part of an infringement proceeding initiated by the Commission following a complaint by Newitt & Co. Ltd, a company incorporated under British law, a wholesaler and retailer of sports goods and a customer of DSIL, against DSIL for obstructing exports of its products from the United Kingdom to other Member States. The objections sent to AWS related to a

number of concerted practices by it and DSIL with the aim of eliminating parallel exports of DSIL products to the Benelux countries, so as to ensure that its exclusive distributors, including AWS, had complete territorial protection.

5 The statement of objections was responded to by a written reply filed on 31 July 1990 on behalf of the applicant and the three companies BT Sports (formerly AWS), BT Sports International (formerly AWS International) and AWS Nederland BV, the applicant's Netherlands subsidiary.

6 At the hearing before the Commission on 5 October 1990 the applicant and the three other companies submitted a common defence.

7 Both in their written reply to the objections and at the hearing on 5 October 1990, the four companies explained that because of the name used for the company to which the statement of objections had been notified, in other words AWS, the identity of the company addressed by the Commission was not clear, and for that reason their replies and observations on the objections were made 'on behalf of all the companies to the extent that they must be addressees or are to be regarded as addressees of the statement of objections' (written observations of 31 July 1990, paragraph 2.1.3).

8 With respect to identification of the company to which the statement of objections was addressed, and consequently the question of which company was to be held liable for the alleged infringement, each of the companies argued before the Commission that it could not be held liable for the infringement and that, since the undertaking carried on by AWS at the time of the alleged infringement no longer existed, the infringement proceedings had become devoid of purpose.

9 On this point it was stated to the Commission that the Zoetermeer address to which the statement of objections had been sent was no longer that of AWS, but that of the applicant and its Netherlands subsidiary, AWS Nederland BV, that AWS now had its registered office at Amsterdam under its new name of BT Sports, that since the transfer of its assets on 17 April 1989 it no longer carried on any commercial activity, and that consequently it had ceased to exist as an undertaking within the meaning of Article 85 of the Treaty, as had BT Sports International (formerly AWS International). It was also stated that BT Sports and BT Sports International continued to exist as legal persons solely for tax reasons, that the Bührmann-Tetterode group of which AWS and AWS International were subsidiaries could not be regarded as liable for the infringement, in view of the fact that when AWS carried on its activities, it enjoyed considerable autonomy in its commercial management.

10 With respect more particularly to the applicant company, that company essentially argued before the Commission that the mere fact that it had taken over the assets of the previous companies AWS and AWS International, a takeover which had moreover related to elements which were not necessary for carrying on its own commercial activities, was not sufficient for it to be identified with those two companies. It maintained in this respect that it was an entirely new company which did not carry on the activities formerly carried on by AWS in the economic sector in question, that the persons who had worked for AWS at the material time no longer worked in the undertaking, and that in any event the alleged infringements had ceased after the transfer of assets on 17 April 1989, given that the exclusive distribution agreement between AWS and DSIL had been rescinded by that date and had actually ended on 30 April 1989. Finally, the applicant stated to the Commission that while the agreement of 17 April 1989 provided for the assignment to the applicant of the contracts between AWS and DSIL, that was solely to ensure that during the period remaining before their expiry, which had nearly come to an end at the time of conclusion of the agreement for the transfer of assets, orders in progress would be carried out.

11 On being requested by the applicant and the other companies concerned in the infringement proceedings to clarify which undertaking was in fact the addressee of

the statement of objections, the Commission, at the hearing of 5 October 1990, during which that question was again raised, postponed examination of it to a later stage.

12 On 21 December 1990 the applicant, in a letter from its lawyer to the Commission, again drew the Commission's attention to the question of liability for the infringement of which AWS was accused. That letter requested the Commission to reach a decision on that point before adopting any decision concluding the infringement proceedings.

13 In a letter of 7 August 1991 the Commission sent the applicant, in accordance with Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), a request for information on the turnover of AWS in 1988 and the turnover of Dunlop products by that company. On 18 March 1992 it adopted Decision 92/261/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.290 — Newitt/Dunlop Slazenger International and Others) (Official Journal 1992 L 131, p. 32). That decision states, in point 3 of its statement of reasons, that in 1989 'AWS was purchased by its management from the group Bührmann-Tetterode Nederland BV, which controlled it, and took the name All Weather Sports Benelux BV'. The operative provisions are as follows:

'Article 1

Dunlop Slazenger International Ltd has infringed Article 85(1) of the EEC Treaty by applying in its business relations with its customers a general ban on exporting its products, designed to protect its exclusive distribution network, and by implementing, in respect of some of its products (tennis-balls, squash-balls, tennis-rackets and golfing equipment), various measures — refusal to supply, dissuasive pricing measures, marking and follow-up of exported products, buy-back of exported products and the discriminatory use of official labels — in order to ensure enforcement of the export ban.

All Weather Sports International BV has infringed Article 85(1) by urging and participating in the implementation of such measures in the Netherlands in respect of Dunlop products.

...

Article 2

A fine of ECU 5 000 000 is hereby imposed on Dunlop Slazenger International Ltd and a fine of ECU 150 000 on All Weather Sports Benelux BV (which has taken over the assets of All Weather Sports BV) in respect of the infringements referred to in Article 1. (...)'

14 In those circumstances the applicant brought the present application, which was received at the Registry of the Court of First Instance on 22 May 1992, against the Commission's decision.

15 The written procedure was completed on 13 November 1992, as the reply was filed out of time. On application by the applicant of 18 November 1992, and with the consent of the Commission, given on 24 November 1992, the written procedure was reopened by an order of the Court of First Instance (Second Chamber) of 10 December 1992, and was completed on 8 March 1993. Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure; it asked the parties to reply to a number of questions and requested the applicant to produce certain documents. At the hearing on 15 December 1993 the parties presented oral argument and replied to the questions put by the Court.

## Forms of order sought

16 The applicant claims that the Court should:

(i) annul Article 2 of the Commission decision of 18 March 1992 (IV/32.290 — Newitt/Dunlop Slazenger International and Others), with respect to the applicant;

(ii) order the defendant to pay the costs.

17 The Commission contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs.

## Substance

18 The applicant company states in its application that its challenge is directed only against the correctness of the administrative procedure before the Commission and of the manner in which the contested decision was adopted, in so far as it held it liable for the alleged infringement and imposed a fine, and against the criteria used by the Commission in fixing the amount of that fine.

19 In support of its application, the applicant company argues firstly that there was a breach of paragraph 1 in conjunction with paragraph 3 of Article 2 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47). It submits that by imposing a fine on the company without having informed it directly of the objections, even though the statement of the objections raised in the procedure in question was notified after it had taken over the assets of AWS, and without having given it at least an opportunity to be heard on the question of liability for the infringement allegedly committed by AWS, the Commission infringed an essential procedural requirement. Secondly, the applicant contends that the Commission infringed Article 85(1) of the Treaty and Article 15(2) of Regulation No 17 in that the Commission held it liable for the alleged infringement and fined it on the basis of inappropriate grounds, or at least without having given it a proper statement of the reasons for the contested decision. Finally, the applicant argues, in the alternative, that the Commission infringed Article 15(2) of Regulation No 17 by applying incorrect criteria for determining the amount of the fine imposed.

20 The Court of First Instance considers that it should first examine the applicant company's plea that it was not given a sufficient statement of reasons for the contested decision and that the procedure whereby that decision was adopted was not proper.

*The plea in law alleging the lack of an adequate statement of reasons for the decision*

Summary of the pleas in law and main arguments of the parties

21 The applicant argues, firstly, that if a decision imposes a fine on an undertaking by reason of the conduct of another undertaking, the statement of reasons must demonstrate clearly to the undertaking in question why it is to be held liable for an infringement which is not its doing. It maintains that, contrary to the practice of

the Commission, which has always provided detailed reasons in similar decisions, the contested decision does not provide it with a sufficient statement of reasons.

22 The applicant considers that the mere mention of the fact that it took over the assets of AWS does not constitute a statement of reasons for the decision sufficient to hold it liable for the infringement, given that such a takeover does not mean that the applicant can automatically be identified with AWS for the purposes of the application of Article 85 of the Treaty. Furthermore, it points out that the reason which, in the Commission's opinion, justified the decision to hold it liable for the infringement is stated only in the actual operative part of the contested decision and not in the statement of reasons, which contains only a single sentence referring to it, that sentence being a mere statement of fact, which is moreover incorrect in that the Commission states that AWS was purchased by its management, whereas in fact only the assets of that company were taken over, and that by the applicant company itself, whose shares were merely held at the time by the AWS management.

23 Secondly, the applicant company argues that the identity of the undertaking which committed the infringement for which it was fined is not clear from the contested decision. It submits that in Article 1 of the operative part of the decision the Commission asserts that AWS International is liable for the infringement of Article 85(1) of the Treaty, although that company is not mentioned anywhere else in the decision, and that the Commission then fines the applicant in Article 2 of the operative part on the grounds that it took over the assets of AWS. In its opinion, if it is AWS International which is regarded by the Commission as having committed the infringement, the contested decision completely lacks reasons, both with respect to AWS International and with respect to the applicant, in that it is thus held liable for conduct which is not specified in the decision, simply because of its takeover of the assets of AWS. If, on the other hand, it is AWS which the Commission considers liable for the infringement, the reasons stated in the contested decision are in any event insufficient with respect to the applicant, since even if it

is admitted that the mere takeover of the assets of AWS could be a reason for identifying the applicant with that company from the economic and legal points of view, the Commission in any case does not state that it is for that reason that a fine is imposed on it.

24 The Commission argues that since the addressees of decisions relating to infringements of Article 85(1) of the Treaty are the economic entities constituted by undertakings, not companies as legal persons, and as in the present case, it shows by proper reasons that an undertaking has committed an infringement, it is not obliged in law to explain in its decision why that decision is addressed to a particular company within that undertaking. In the present case, the applicant company continued the activity of the undertaking which had previously been carried on by the two companies AWS and AWS International, following the takeover by the applicant of the assets of those companies under the agreement of 17 April 1989, that being a classic case of a transfer of an undertaking. It considers that in view of the fact that the takeover of assets and the ensuing transfer of an undertaking were neither wide-ranging nor complex, there was no need for a more detailed statement of reasons explaining why the applicant was liable for the infringement, in contrast to other cases in which it was obliged in its decisions to deal with detailed arguments on the liability for an infringement.

25 Finally, in answer to the Court's question relating to the fact that in Article 1 of the operative part of the decision AWS International is referred to as having committed the infringement, whereas in Article 2 of the operative part AWS is referred to, the Commission explained that this confusion resulted from an error, and both companies should correctly have been mentioned in Article 1 of the operative part on the same basis, as both having committed the infringement, liability for which was imputed to the applicant, which took over their assets and continued carrying on the undertaking which they had previously carried on together. However, according to the Commission, that error has no effect on the validity of Article 2 of the operative part of the decision. The fact that AWS is not mentioned in Article 1 of the operative part does not give rise to any doubts as to its having committed the infringement, given that, firstly, that company is mentioned throughout the decision and, secondly, that it is clearly referred to, both in paragraph 3 of the grounds and Article 2 of the operative part, as the company whose assets were taken over by the applicant.

Assessment by the Court

26 The Court notes to begin with, firstly, that the statement of the reasons on which a decision having adverse effect is based must make it possible to carry out an effective review of its legality and must provide the party concerned with details sufficient to allow that party to ascertain whether or not the decision is well founded, and, secondly, that the adequacy of such a statement of reasons must be assessed in the context of the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees, or other persons to whom the measure is of direct and individual concern, within the meaning of the second paragraph of Article 173 of the Treaty, may have in obtaining explanations (see the judgments of the Court of Justice in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, Case 41/83 *Italy* v *Commission* [1985] ECR 873, and Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831). It should also be noted that, in order to perform those functions, an adequate statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question (judgment of the Court of Justice in Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 26). In addition, where, as in the present case, a decision taken in application of Article 85 or 86 of the Treaty relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who according to the decision must bear the liability for the infringement.

27 In assessing, in the light of the requirements of the case-law mentioned above, whether adequate reasons were stated for the decision with respect to the applicant, it should be noted that it is established that during the administrative procedure before the Commission the applicant advanced several reasons why in its opinion it could not be held liable for the alleged infringement. It is also established that at that stage of the proceedings the Commission, despite thus being challenged, did not clarify its position on the question of liability for the alleged infringement. It follows that, in order for there to be an adequate statement of reasons with respect to the applicant, the contested decision must contain an even more detailed account of the grounds for holding the applicant liable for the infringement.

28 On this point, the Court finds that in this case the reasons given in the contested decision for the applicant's liability for the alleged infringement consist firstly of the statement in paragraph 3 of the account of facts that 'AWS was purchased by its management from the group Bührmann-Tetterode Nederland BV, which controlled it, and took the name All Weather Sports Benelux BV', and secondly of the reference, in Article 2 of the operative part, to the fact that the applicant 'has taken over the assets of All Weather Sports BV'. The Court considers that it is thus necessary to examine whether the reasons stated in the decision justify its operative part, and whether the operative part is appropriate with respect to the applicant.

29 Firstly, with respect to paragraph 3 of the grounds for the decision, the Court finds that as justification for holding the applicant liable for the infringement, the decision, as stated above, merely notes the purchase of AWS and the fact that AWS then adopted the name of the applicant company, 'All Weather Sports Benelux BV'. That statement of reasons thus ignores the two points raised by the applicant, namely that the companies AWS and AWS International continue to exist as legal persons under the new names BT Sports and BT Sports International and that they form part of the Bührmann-Tetterode group, as they did before the takeover of their assets.

30 The Court notes on this point that for a Commission decision, which in its statement of reasons merely identifies as the party committing an infringement the legal entity which existed prior to the date of the purchase of its assets, lawfully to be able to impute liability for that infringement to the purchaser of the undertaking, there must be no dispute as to the identity of the legal entity which is the legal successor of the party committing the infringement, or as to the reality of the continuance by that entity of the activity, carried on by the undertaking in question, which gave rise to the proceedings (see the judgment of the Court of Justice in Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 6 et seq.). That is not the case here, where the party which committed the infringement continues to exist as a legal person, as stated above, even though the economic activity which it carried on before the takeover of its assets is now carried on by a different legal entity.

31 In those circumstances the Court considers that, faced with a serious specific challenge by the applicant as to the identity of the undertaking to be held liable for the infringement, the Commission cannot argue that the facts and law of the case were simple, and there was consequently no need for a more detailed statement of reasons, to justify the inadequacy of the reasons given for the contested decision, as disclosed by an examination of paragraph 3 of the reasons for the decision. It follows that since the operative part of the contested decision must be read in the light of the grounds supporting it, in particular the said paragraph 3 of the decision, that paragraph is not in itself justification for holding the applicant liable for the infringement.

32 Secondly, assessing the appropriateness of the reasons stated with respect to the applicant in the actual operative part of the contested decision, the Court finds that, as the applicant submits, although the decision names AWS as the party which committed the infringement in its account of the facts, in Article 1 of the operative part, by contrast, it names AWS International as having committed the infringement, and in Article 2 of the operative part it holds the applicant liable for the infringements 'referred to in Article 1' on the grounds that the applicant has taken over the assets of AWS. However, Article 2 of the operative part cannot lawfully hold the applicant company liable for an infringement — which it is known not to have committed — as described in Article 1 of the operative part, solely on the ground that it has taken over the assets of a company which itself is not identified in Article 1 of the operative part as having committed the alleged infringement.

33 Thirdly, the Commission also argued during the oral procedure that the disparity between the identity of the companies referred to in Articles 1 and 2 of the operative part was due to an error and Article 1 should have referred to AWS as well as to AWS International, since both those two companies were involved in the alleged infringement and it was AWS which was named in the statement of reasons for the decision as having committed the infringement.

34 On this point, the Court considers that on the essential question of identifying the party committing the infringement or the addressees of the decision, even assuming that an alleged error can be accepted, the Commission must be able to establish

it with sufficient certainty. That is not the case here, since, firstly, as stated above, that argument was put forward for the first time only at the final stage of the procedure and, secondly, the Commission failed to notify a corrigendum to the applicant in the proper form. That is all the more so in the present case where the alleged error relates firstly to the actual operative part of the contested decision, in other words the part of the act which directly determines the extent of the obligations imposed or rights conferred by the act in question on those concerned and, secondly, the very identity of the addressees of the decision and hence the liability for the alleged infringement and the financial burden of the fine imposed, so that scrupulous observance of the principle of legal certainty is essential, that principle being a fundamental principle of the Community legal order (see, by analogy, the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315). The Commission's argument relating to an error affecting the contested decision can therefore not be accepted. In any event and in view of what has been stated above, that argument could not alter the Court's assessment of the statement of reasons for the challenged decision.

35 It follows that the plea in law alleging that the Commission did not state reasons for the contested decision with respect to the applicant is well founded and must be upheld.

36 Consequently, without it being necessary to consider the other pleas in law advanced in the application, Article 2 of the contested decision must be annulled in so far as it relates to the applicant company.

## Costs

37 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the applicant sought such an order, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Article 2 of the operative part of Commission Decision 92/261/EEC of 18 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.290 — Newitt/Dunlop Slazenger International and Others) in so far as it holds the applicant liable for the infringements referred to in Article 1 of the operative part and imposes a fine on it;**

2. **Orders the Commission to pay the costs.**

Cruz Vilaça Briët Kalogeropoulos

Barrington Biancarelli

Delivered in open court in Luxembourg on 28 April 1994.

H. Jung J. L. Cruz Vilaça

Registrar President