# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. By application lodged on 9 July 1998, NV Koninklijke KNP BT (hereinafter 'KNP') brought an appeal against the judgment of the Court of First Instance of 14 May 1998 in *KNP BT* v *Commission* [1] (hereinafter 'the contested judgment').

2. By that judgment the Court upheld the application in part, reducing the fine imposed on the appellant from ECU 3 000 000 to ECU 2 700 000, but dismissed the remainder. The action had been brought by KNP against 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) [2] (hereinafter 'the Decision'), in which the Commission imposed fines on 19 manufacturers supplying cartonboard on the Community market on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

3. In that action KNP asked the Court of First Instance to annul the Decision in whole or in part, to annul or at least reduce the fine imposed, and to adopt any measures it considered necessary.

4. For a full statement of the complaints raised against the Decision and the grounds on which the Court considered it should uphold them in part only, I refer you to the contested judgment.

5. In its appeal KNP claims that the Court of Justice should:

(1) set aside the contested judgment;

(2) annul the Decision and annul or reduce the fine imposed on the appellant, in accordance with its application of 7 October 1994, or, in the alternative, refer the case back to the Court of First Instance for a ruling on the (partial) annulment of the aforementioned Decision;

* Original language: French.

1 — Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007.

2 — OJ 1994 L 243, p. 1.

(3) order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

6. The Commission, the respondent in the appeal and defendant at first instance, contends that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs of the appeal;

7. In support of the form of order sought, KNP puts forward four pleas:

— the first plea, described as the main plea: inadequacy of the statement of reasons of the Decision as regards the fixing of the fine imposed on the appellant;

— the second plea: failure to take into account, when fixing the fine, the appellant's withdrawal from the cartel from the end of 1989 or at least the peripheral nature of its participation from 1990 onwards;

— the third plea: inclusion, when establishing the turnover on which the fine was fixed, of sales within the group composed by the appellant and its subsidiaries;

— the fourth plea: the fixing of the middle of 1986 as the starting-point of the period of infringement for Badische Kartonfabrik (hereinafter 'Badische'), one of the companies in its group.

8. In order to avoid unnecessary repetition, I shall describe the pleas in detail as I consider them.

**The first plea: inadequate statement of reasons of the Decision as regards the fixing of the fine**

9. The appellant claims that the Court of First Instance should have annulled the Decision since its statement of reasons was largely inadequate as regards the fixing of the fine.

10. According to the appellant, there is no indication of the method used by the Commission to fix a fine that was propor-

tionate to the turnover of the different undertakings for which KNP was considered to be responsible or to the duration and gravity of the infringement committed by each of them.

11. Since this criticism is the same as that made by Mo och Domsjö AB in Case C-283/98 P, I refer, for a summary of the grounds for rejection of this plea, to the Opinion which I am delivering today in that matter.

**The second plea: for the purposes of fixing the fine, KNP was considered to have been involved in the cartel after 1989**

12. The appellant maintains that the Court of First Instance 'should have analysed, in its judgment, the appellant's argument that the Commission unreasonably imposed a fine in respect of the period after the end of 1989 or, in the alternative, that it should have imposed only a very moderate fine given the peripheral nature of the participation'.

13. It claims, therefore, that one of its arguments was not dealt with in the contested judgment. That is patently untrue, since paragraphs 55 to 59 of the judgment are specifically devoted to a rebuttal of that argument.

14. It must therefore be held that, in so far as it refers to the Court's failure to state its view, the plea is unfounded. However, perhaps it should be taken to have a different meaning, namely that the appellant is complaining not that the Court did not express a view but that it did not find that the argument submitted to it was well founded.

15. However, if KNP's plea should be taken to have that meaning, it must inevitably be rejected as inadmissible, as the Commission suggests, since it does not contain a substantiated criticism of the Court of First Instance's reasoning, which alone could protect it from the objection that it was merely a repetition of the argument put forward before that Court.

16. Under the same plea, the appellant criticises the fact that, for the period after the end of 1989, the Court, when amending the amount of the fine imposed by the Commission, applies to the undertaking's turnover a rate of 7.5%, which is inappropriate in the light of the purely peripheral nature of its participation in the cartel, which the Commission itself acknowledges in its Decision.

17. As the Commission points out, this criticism cannot be upheld in an appeal since it invites the Court of Justice to censure the exercise by the Court of First Instance of its power of unlimited jurisdic-

tion, without giving any indication of the reasons justifying such censure *in law*.

18. The mere fact that the appellant may not agree with an assessment made by the Court of First Instance of the appropriate amount of the fine does not constitute a ground of appeal.

19. This finding leads me to propose that the second plea should be rejected, either as partly unfounded and partly inadmissible, or as wholly inadmissible.

**The third plea: inclusion, for the purpose of determining the amount of the fine, of that part of the turnover relating to intra-group sales**

20. The appellant claims that the Court of First Instance is wrong and in breach of Community law when it states, in paragraph 112 of the contested judgment, that, 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'.

21. The arguments put forward by KNP in this plea reveal that, in fact, several allegations are made against the Court of First Instance.

22. Firstly, the appellant complains that the Court stated that it had not adduced 'any evidence' when it is apparent from its lawyer's notes that it argued at the hearing that the turnover on internal sales was irrelevant.

23. It therefore considers that the above formulation, used by the Court to reject its claim, shows that, on this point, the Court has not fulfilled its obligation to state reasons.

24. Lastly, the appellant maintains that the inclusion of intra-group sales in the turnover on the basis of which the amount of the fine was to be fixed constitutes an infringement of 'general legal principles, particularly the principles of equal treatment and proportionality', and also of 'Article 190 of the EC Treaty and Article 15 of Regulation No 17'.

25. The first of these complaints, as well as being serious, raises, in my view, a very delicate issue, having regard to the circumstances in which the various addressees of

the Decision were able to bring their actions.

26. I shall merely point out here that, as regards the determination of the amount of the fines, the Decision contains only a brief, though adequate, statement of reasons, and that it was only during the proceedings before the Court of First Instance, in reply to a question put by the Court, that the Commission gave a list of factors which it had taken into account to determine the amount of the fines.

27. It was therefore during the oral procedure that the companies which had been fined were able to dispute this point.

28. It cannot therefore be concluded, after examining the application and the reply submitted by KNP to the Court of First Instance, that the statement made in paragraph 112 of the contested judgment is clearly wholly founded.

29. What criterion can we then take as a basis for deciding whether KNP's criticism is well-founded?

30. The first unquestionable fact is that, during the administrative procedure, Badische, in response to a request from the Commission for its turnover figures, produced a table, which the Commission appended to its reply in these proceedings, distinguishing between overall turnover and extra-group sales turnover and argued that, 'The quantities destined for internal processing into finished products neither were nor are available on the cartonboard market. Therefore, they cannot be taken into account in determining this undertaking's market share.'

31. The second is that nothing in the Decision enabled KNP to know whether that point of view had been accepted by the Commission.

32. The third is that, even when it was in possession of the facts provided by the Commission at the request of the Court, KNP could not be sure on this point, since it was only at the hearing that the Commission revealed that, with regard to KNP, it had not taken into account the 1990 turnover, as it had for the other undertakings fined but, for reasons which it explained but which did not convince the Court, the 1989 turnover.

33. It was therefore only during the oral procedure that the appellant was able to establish that it was Badische's overall turnover which had been taken into account.

34. In the circumstances, it was certainly not easy for the appellant, once it knew the true position, to formulate specific oral pleadings. Did it nevertheless put forward an argument that it was entitled to expect the Court to take into account, whether it accepted or rejected it?

35. It certainly raised the matter, since the Court itself points out, in paragraph 98 of the contested judgment, that KNP claimed that the Commission 'had wrongly included intra-group sales.'

36. It is all a matter of knowing, therefore, whether KNP merely made an assertion or actually presented an argument. In the former case, the Court was, in fact, right to state 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', even though, in my view, it was not required to provide evidence, the distribution between intra-group and extra-group sales having been disclosed to the Commission during the administrative procedure, but *legal* reasons. In the latter case, the first and second complaints forming part of the third plea would be well-founded and annulment would have to be contemplated.

37. I tend to think that the appellant did not actually present an argument, since it is difficult to understand why, if it had been presented, the Court would have omitted to refute it, which it could easily have done because it had already done so in its judgment, pronounced on the same day, in the case of *Europa Carton* v *Commission*,[3] in which the applicant had also disputed the inclusion of internal sales.

38. However, I cannot say that I am certain, in spite of the fact that Commission states that, as its agents recall, 'the appellant's counsel gave no explanation as to *why* sales to a sister company should be deducted'.

39. In such circumstances, it seems to me that these doubts ought to benefit KNP, especially considering the fact that it was placed, in order to put forward its arguments, in a position which, as I have pointed out above, was anything but ideal. However, before proposing that the judgment be set aside, I must consider whether it is justified, given that the Court of Justice has held that 'if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well-founded on other legal grounds, the appeal must be dismissed.'[4]

40. That is why I believe I should examine the third complaint made by the appellant,

3 — Case T-304/94 *Europa Carton* v *Commission* [1998] ECR I-869, paragraphs 120 to 131.

4 — Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28.

which is a substantive point, namely the determination of the turnover taken into account to fix the amount of the fine.

41. I think, however, that the Court of First Instance was right not to criticise the Commission for taking into account Badische's total turnover in the cartonboard sector.

42. Indeed, as the Court held in its judgment in *Europa Carton* v *Commission*:

'To ignore the value of... internal cartonboard deliveries would inevitably give an unjustified advantage to vertically integrated companies.

In such a case the benefit derived from the cartel might not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates.'

43. I therefore consider that the third plea should be rejected as unfounded.

**The fourth plea: the fixing of the starting point of the infringement for one of the companies in the group**

44. The appellant claims that, by holding it responsible, when fixing the amount of the fine, for the unlawful actions of Badische from mid-1986, even though it did not acquire that company until 1 January 1987, the Commission infringed the principle of equal treatment, the principle of proportionality, Article 190 of the EC Treaty (now Article 253 EC) and Article 15 of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty, [5] and that the Court of First Instance, by endorsing that approach without giving any explanation, even though the applicant had contested it, itself infringed Community law, in particular the obligation to state reasons.

45. Again, as in the case of the previous plea, the Commission disputes the appellant's assertions. It states that it could not discern 'any trace of such a plea or argument relating to the fixing of the amount of the fine, either in the application or in the reply. Furthermore, the Commission's agents do not recall that the point was raised at the hearing.' It therefore concludes that the plea is inadmissible.

5 — OJ, English Special Edition (1959-1962), p. 87.

46. Before considering whether that is the case, let us start by noting that, indeed, as KNP maintains, at no point does the contested judgment tackle the issue of the exact moment from which KNP could be held responsible for Badische's participation in the cartel, even though the end of Badische's participation in the cartel is examined in paragraphs 55 to 60 of the judgment.

47. Does this silence merely reflect the fact that KNP never raised the matter? If KNP had told us that it was only at the hearing that it drew the Court's attention to this questionable aspect of the Decision, we would be faced with the same dilemma as presented by the first plea. But this, may I say, is not the case.

48. Indeed, we need only examine the documents submitted by KNP to the Court of First Instance to see that, even though the appellant did not know in detail the way in which the fine had been calculated, it had in the light of paragraph 149 of the Decision in which it is stated that 'KNP was also at all relevant times the owner (95%) of the German board producer Herzberger Papierfabrik, which included Badische Kartonfabrik', pointed out that Badische had joined the group only on 1 January 1987 and had invited the Court to draw the appropriate conclusions.

49. The arguments which KNP puts forward in this connection are contained in points 7 and 8 and 12 to 14 of the application, and there is a reference to the date on which it acquired Badische in point 7 of the reply.

50. It is therefore wrong to say, as the Commission does, that in its fourth plea KNP is complaining that the Court of First Instance did not reply to an argument which, in fact, had not been presented to it. The fourth plea must therefore be declared admissible.

51. However, is it such as to lead to a declaration that the contested judgment is unlawful?

52. In its comments on this plea, the Commission states as follows: 'The Commission reiterates, merely in the alternative, that the Court of First Instance fixed the amount of the fine at ECU 2 700 000 in the judgment which is the subject of the appeal, thus exercising its unlimited jurisdiction (paragraph 114). Since it is unable to have direct knowledge of the facts... the Court of

Justice cannot exercise that unlimited jurisdiction in the context of an appeal'.

53. I consider these statements to be the result of a regrettable confusion. The fact that the Court of First Instance exercised its unlimited jurisdiction to fix the amount of the fine does not mean in any way that the fine so fixed cannot be set aside by the Court of Justice on appeal.

54. The power of unlimited jurisdiction is not an arbitrary power. Admittedly, the Court of First Instance is at liberty to decide the level at which the fine must be fixed, but it must reach that decision lawfully, in particular on the basis of precise data.

55. This is quite apparent from the judgment in *Ferriere Nord* v *Commission*,[6] according to which:

'As regards the allegedly unjust nature of the fine, it is important to point out that it is not for this Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34). In contrast, the Court of Justice does have jurisdiction to consider whether the Court of First Instance has responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine abolished or reduced.

It should first be pointed out (see the order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611) that, on the one hand, the first subparagraph of Article 15(2) of Regulation No 17 lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions); those conditions include the intentional or negligent nature of the infringement. On the other hand, the second subparagraph of that provision governs determination of the amount of the fine, which depends on the gravity and duration of the infringement.'

56. It is obvious, in the present case, that the Court of First Instance exercised its unlimited jurisdiction when it held that responsibility for Badische's conduct from mid-1986 was rightly attributed to KNP. We need only refer to paragraphs 96 to 114

6 — Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 31 and 32.

of the contested judgment to establish that the Court completely disregarded KNP's objection that it acquired Badische on 1 January 1987 and at no time sought to question the validity of the Commission's assertion that the applicant had to bear the responsibility for Badische's unlawful conduct for 60/60th of the duration of the infringement, that is to say, from mid-1986 to April 1991.

57. Such exercise of unlimited jurisdiction clearly constitutes a misuse of powers, because the power to assess may be exercised lawfully only after precise factual information has been taken into account. I therefore have no alternative but to propose that the Court of Justice should set aside the contested judgment in so far as it fixed at ECU 2 700 000 the amount of the fine imposed on KNP, which it held responsible for the infringement committed by Badische from mid-1986.

58. However, in my view the setting aside of the judgment should not be accompanied by a referral of the case back to the Court of First Instance. Indeed, in order to draw the proper conclusions, there is no need, where the validity of the assessments made by the Court of First Instance in respect of the general level of the fines is not being called in question, to consider the facts and to give the parties the opportunity to submit arguments on them.

59. It is enough to draw the appropriate conclusions from the fact that, in respect of Badische, the Court of First Instance attributed too long a period of infringement, and to reduce the amount of the fine accordingly.

60. I therefore propose that the Court of Justice should hold that the state of the proceedings permits final judgment, should itself exercise the power of unlimited jurisdiction conferred on the Community judicature by Regulation No 17 and, in the exercise of that jurisdiction, reduce the amount of the fine imposed on KNP to EUR 2 600 000.

## Costs

61. It is clear that the setting aside of the contested judgment, even if only on one point, must be reflected in the costs. In its judgment, the Court of First Instance ordered the applicant to bear its own costs and to pay half the Commission's costs, the other half to be borne by the Commission itself.

62. I suggest that this distribution should be modified in such a way that the appellant pays, in addition to its own costs, only two fifths of the Commission's costs. As regards the appeal costs, I consider that, in view of the fact that the appellant has failed in most of its pleas, it is appropriate that it should bear its own costs and pay two thirds of the Commission's costs.

## Conclusion

63. In the light of the foregoing considerations, I propose that the Court should:

— set aside the judgment of the Court of First Instance of 14 May 1998 in Case T-309/94 *KNP BT* v *Commission* in so far as it has fixed the amount of the fine imposed on the appellant at ECU 2 700 000 and in so far as it has ordered the appellant to bear its own costs and to pay half of the costs of the Commission of the European Communities and has ordered the Commission of the European Communities to bear half of its own costs;

— set the fine at EUR 2 600 000;

— order the appellant to pay, in respect of the proceedings before the Court of First Instance, in addition to its own costs, two fifths of the costs incurred by the Commission of the European Communities, and, in respect of the proceedings before the Court of Justice, in addition to its own costs, two thirds of the costs incurred by the Commission of the European Communities;

— order the Commission of the European Communities to bear, in respect of the proceedings before the Court of First Instance, three fifths of its own costs and,in respect of the proceedings before the Court of Justice, one third of its own costs.

— dismiss the remainder of the appeal.