JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
28 February 2002 *

In Case T-354/94,

Stora Kopparbergs Bergslags AB, established in Falun (Sweden), represented by S. Lehr and A. Riesenkampff, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by J. Curall and R. Lyal, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1),

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

composed of: B. Vesterdorf, President, K. Lenaerts, J. Pirrung, M. Vilaras and N.J. Forwood, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2001,

gives the following

Judgment

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 EC Treaty (now Article 81(1) EC).

2 The operative part of the Decision is worded as follows:

'*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:

...

(xvii) Stora Kopparbergs Bergslags AB, a fine of ECU 11 250 000;

...'

3 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.

4 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).

5 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.

6 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.

7 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.

8 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.

9 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.

10 The applicant, Stora Kopparbergs Bergslags AB ('Stora'), a European cartonboard producer, acquired Kopparfors with effect from 1 January 1987 (table 8 annexed to the Decision). In 1990, it acquired the German paper group Feldmühle-Nobel ('the FeNo group') via the latter's parent company, Feldmühle-Nobel AG ('FeNo'). At the time of acquisition, the FeNo group included the company Feldmühle, which already owned Papeteries Béghin-Corbehem ('CBC').

11 According to the Decision, Kopparfors, Feldmühle and CBC participated in the cartel throughout the period covered by the Decision. Feldmühle and CBC also took part in the PWG meetings.

12 The Decision also states that '[t]he former "Kopparfors" and "Feldmühle" cartonboard operations have now been integrated to form the Billerud Division of the Stora Group' (point 11).

13 According to point 158 of the Decision, 'Stora accepts that it is responsible for the involvement in the infringement of its subsidiary companies Feldmühle, Kopparfors and CBC both before and after their acquisition by the group'. Moreover, the Commission considered that, because of the participation of Feldmühle and CBC in the PWG meetings, the applicant was one of the 'ringleaders' and as such had to bear special responsibility.

14 By application lodged at the Registry of the Court on 24 October 1994, the applicant brought an action for annulment of the Decision in so far as it concerned the applicant and, in the alternative, annulment or reduction of the fine.

15 By judgment of 14 May 1998 in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-1211 ('the judgment of the Court of First Instance'), the Court of First Instance partially annulled Article 2 of the operative part of the Decision and dismissed the remainder of the application.

16 By application lodged at the Registry of the Court of Justice on 27 July 1998, the applicant brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance.

17 In support of its appeal, the applicant raised three pleas in law.

18 The first plea in law alleged infringement of Article 85 of the EC Treaty and Article 15(2) 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), and also of general principles of Community law. In the first part of that plea, Stora submitted that the Court of First Instance had erred in law

in holding that the infringements of Article 85 of the EC Treaty committed by its subsidiary Kopparfors had to be attributed to Stora without having taken into consideration the Commission's inability to establish whether Stora had actually exercised an influence on Kopparfors's commercial policy. In the second part of the plea, Stora maintained that the error of law consisted in the Court of First Instance's having held that the infringements committed by Feldmühle and CBC before and after their acquisition by Stora had to be attributed to Stora because Stora could not have been unaware of their participation in the infringement and did not adopt the appropriate measures to prevent the continuation of the infringement (paragraph 83 of the judgment of the Court of First Instance).

19 The second plea in law alleged failure to state reasons in regard to the calculation of the amount of the fine.

20 The third plea in law alleged that the Court of First Instance had erred in law in holding that the assessment of the gravity of the infringement could not be affected by the absence of any of the alleged effects on prices.

21 In its judgment of 16 November 2000 in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('the judgment of the Court of Justice'), the Court of Justice dismissed the second and third pleas in law and the first part of the first plea in law.

22 However, it upheld the second part of the first plea in law. In that regard, the Court held:

'35 According to paragraph 81 of [the judgment of the Court of First Instance] it was only in April 1990 that the applicant "concluded contracts for the acquisition of approximately 75% of shares in the FeNo Group, which

included Feldmühle, although the actual transfer of those shares took place only in September 1990" and that the applicant "has stated that it acquired the shares of small shareholders at the end of 1990, so that it held 97.84% of shares in FeNo".

36 The Court of First Instance attributed to the appellant the infringements committed by Feldmühle and CBC in the period prior to September 1990.

37 It should be noted that it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking.

38 In the present case there is no dispute that Feldmühle and CBC continued to exist after control of them had been acquired by the appellant in September 1990, so that responsibility for their actions had to be attributed to the legal person that directed the operation of their businesses in the period preceding their acquisition by the appellant.

39 The fact that the appellant could not have been unaware during that period that Feldmühle and CBC were participating in the cartel, because it had itself been participating in it since January 1987 through its subsidiary Kopparfors, cannot, as the Advocate General correctly observes at point 80 of his Opinion, suffice to impute to it responsibility for the infringements committed by those companies prior to their acquisition.

40 The first plea must therefore be upheld on this point and the contested judgment set aside on that ground.'

23 In paragraph 79 of the judgment, the Court of Justice held: '[s]ince the documents before the Court do not indicate the portion of the appellant's 1990 turnover accounted for by the activities of Feldmühle and CBC, the case must be referred back to the Court of First Instance for fresh review of the amount of the fine, taking into account the considerations set out in paragraphs 37 to 40 of this judgment. Costs must be reserved.'

24 Consequently, the Court of Justice partially set aside the judgment of the Court of First Instance 'in so far as it attributes to Stora Kopparbergs Bergslags AB responsibility for the infringements committed by Feldmühle and Papeteries Beghin-Corbehem prior to September 1990' (paragraph 1 of the operative part), dismissed the remainder of the appeal, referred the case back to the Court of First Instance and reserved the costs.

25 The case was assigned to the First Chamber, Extended Composition, of the Court of First Instance.

26 Pursuant to Article 119 of the Rules of Procedure, the applicant and the defendant lodged written observations.

27 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure. In the context of measures of organisation of procedure, it requested the applicant to answer a number of questions in writing, which the applicant did within the prescribed period.

28 The parties presented oral argument and answered the questions put by the Court at the hearing on 2 October 2001.

29 At the hearing, the applicant produced a document which, after being communicated to the Commission, was placed in the file.

Forms of order sought by the parties in the proceedings following referral of the case

30 The applicant claims that the Court should reduce the amount of the fine imposed on it under Article 3 of the Decision but makes no application as to costs.

31 Although it does not expressly seek any form of order, the Commission submits that Stora must be held liable for Feldmühle's and CBC's conduct before September 1990, so that the amount of the fine must remain unaltered, and, in the alternative, that the amount of the fine should be fixed at an appropriate level. It makes no submission as to costs.

Law

Arguments of the parties

32 Stora submits that, according to the judgment of the Court of Justice (in particular, paragraph 79), the Court of First Instance must review the amount of

the fine imposed on the applicant under Article 3 of the Decision, taking into consideration the fact that responsibility for the infringements committed by Feldmühle and CBC prior to their acquisition in September 1990 cannot be imputed to it.

33 First, it observes that the fine, in the amount of ECU 11 250 000, was calculated on the basis of the applicant's turnover on the Community cartonboard market in 1990 (ECU 375.5 million), that the basic level of the fine was set at 9% of that turnover, that the applicant was taken to have participated in the infringement for 60 months and that it was granted a reduction of two thirds of the fine for its cooperation.

34 Next, relying on paragraphs 37 to 40 of the judgment of the Court of Justice, Stora states that it could not be held responsible for the participation of Feldmühle and CBC in the cartel during the period prior to their acquisition in September 1990. Having regard to paragraph 79 of the judgment, where it is stated that the Court is not in a position to make a definitive finding since it is not aware of the portion of the applicant's turnover on the Community cartonboard market achieved by Feldmühle and CBC before September 1990, it follows that that portion of its turnover must not be taken into consideration in calculating the fine.

35 Of the applicant's total turnover on the Community cartonboard market in 1990, namely ECU 375.5 million, on which the fine imposed by the Commission was calculated, the portion attributed to Kopparfors was ECU 162 667 810 (at the exchange rate published by Eurostat for 1990). The remainder of the reference turnover, ECU 212 832 190, was achieved by Feldmühle and CBC.

36 It follows from the judgment of the Court of Justice that the period before September 1990 may not be taken into account in determining the duration of the

infringements committed by Feldmühle and CBC for which the applicant may be held responsible. The applicant can therefore only be held responsible for the infringements committed by Feldmühle and CBC during the nine-month period September 1990 to May 1991.

37 Furthermore, the basic level of the fine imposed upon the applicant was set at 9% because Stora was regarded as one of the 'ringleaders' of the cartel on the ground that it had attended the PWG meetings. However, only Feldmühle's representatives attended those meetings and Kopparfors' representatives never participated in them. Since Stora cannot therefore be regarded as having been a 'ringleader' during the period before September 1990, the infringements committed by Kopparfors before that date should attract a fine calculated on the basis of 7.5% of the reference turnover. The rate of 9% is therefore applicable only from September 1990.

38 In the light of the foregoing, the formula which the Commission used to calculate the fine imposed on the applicant should be applied as follows:

Period	Under-taking	Turnover (Million ECU)	Rate (%)	Duration	Result (Million ECU)	Reduction	Fine (Millon ECU)
6/86 - 8/90	KF	162.667	7.5	51/60	10.37	- 2/3	3.46
9/90 - 5/91	KF, FM/CBC	375.500	9.0	9/60	5.07	- 2/3	1.69
Total							5.15

39 The fine should therefore be EUR 5.15 million.

40 At the hearing, the applicant requested that, when determining the amount of the fine, the Court of First Instance take into consideration the fact that Kopparfors had been acquired only at the beginning of 1987.

41 The Commission interprets the judgment of the Court of Justice differently from the applicant. Paragraph 79 of the judgment of the Court of Justice does not say that the Court of First Instance must review (which to Stora clearly means 'reduce') the fine, but that the case must be referred back to the Court of First Instance for the purpose of a review of the amount of the fine. The Court of Justice therefore does not say what the result of that review must be. Furthermore, paragraph 39 of the judgment of the Court of Justice says that the fact that Stora must have been aware of Feldmühle's and CBC's conduct owing to Kopparfors's involvement does not suffice to fix Stora with liability; it does not say that the responsibility for those undertakings' conduct before September 1990 could not be imputed to Stora.

42 The Commission therefore submits that the Court of First Instance must determine whether the Court of Justice considered that Stora was not liable for Feldmühle and CBC before their acquisition, and if that is so, whether the amount of the fine imposed on the applicant must be reduced. It goes on to adduce further argument in support of each of these two points.

43 First, the Commission contends that the Court of Justice did not find that Stora was not liable for Feldmühle and CBC before September 1990. Admittedly, it set aside the judgment of the Court of First Instance on that precise point, but it did not annul the Commission's decision. In that regard, the parties are once again in a similar position to that which they occupied before the Court of First Instance delivered its judgment; and the Court of First Instance may still decide, in the light of the two judgments already delivered in the case, that Stora was liable for Feldmühle and CBC. The findings of the Court of First Instance must therefore be based on grounds other than those disapproved by the Court of Justice.

44 The Commission observes, with reference to paragraphs 37 to 40 and 79 of the judgment of the Court of Justice, that in paragraph 38 the Court did not hold that the legal person that directed the operation of an undertaking which has committed an infringement always remains liable for the infringement if it still

exists when the decision is adopted: it held that that person remained liable 'in principle' (paragraph 37 of the judgment of the Court of Justice). Furthermore, if paragraph 38 was stating an invariable rule, the Court of Justice would have annulled the Decision on that point.

45 Since the finding made in the Decision that Stora was liable for the conduct of Feldmühle and CBC before 1990 was not annulled by the Court of First Instance, the Decision still stands on that point. In order to have it annulled, Stora must show that the Decision is unlawful. The only consequence of the judgment of the Court of Justice is that it is impossible to rely on one of the arguments disapproved by that Court.

46 In order to determine what was disapproved by the Court of Justice, the Commission refers to paragraph 39 of the judgment of the Court of Justice. That paragraph refers to paragraph 82 of the judgment of the Court of First Instance, where it pointed out that Stora necessarily knew that Feldmühle and CBC were taking part in the cartel because Kopparfors, for which Stora was liable, was taking part in it too. That finding by the Court of First Instance was disapproved because, even though the Court of Justice accepted that Stora was liable for Kopparfors, it did not consider that that factor was a sufficient basis for Stora to be held liable for the conduct of Feldmühle and CBC as well.

47 However, in this case the Court of First Instance did not rely solely on Stora's knowledge of the participation of Feldmühle and CBC before September 1990 to hold Stora liable for their conduct; it took into consideration a number of factors set out in paragraphs 84 and 85 of its judgment. The finding that Stora was liable for Feldmühle and CBC before September 1990 is still supported by Stora's reply to the statement of objections, which confirmed that it considered itself liable for those undertakings for the whole infringement, and by the fact that the lawfulness of point 143 of the Decision, which states that where several companies in a group took part in the infringement the Commission would address the parent company, was not called in question by the Court of First Instance and its failure to do so was not disapproved by the Court of Justice.

48 In an appendix to its observations, the Commission sets out the matters in the file which support the conclusion that Stora is liable for the activities of Feldmühle and CBC before September 1990. In that appendix, the Commission, relying on the wording of the judgment of the Court of First Instance, takes issue with the statement in paragraph 38 of the judgment of the Court of Justice that '[i]n the present case there is no dispute that Feldmühle and CBC continued to exist after control of them had been acquired by the appellant in September 1990'. The Commission refers to the parties' original pleadings before the Court of First Instance in order to show that it has not been proved that Feldmühle and CBC continued to exist as distinct legal persons after control of them had been acquired by the applicant and that, consequently, the premiss of the reasoning of the Court of Justice is factually incorrect.

49 The Commission further claims in that appendix that, in any event, there is no legal person outside the Stora group who could be the addressee of the Decision. It is pointless to address the Decision to one or more undertakings with legal personality within the Stora group, when the fine must be borne by the Stora group, represented by a parent company with legal personality.

50 The Commission concludes that, notwithstanding the judgment of the Court of Justice, the Decision must be upheld in so far as it declares Stora liable for Feldmühle's and CBC's conduct before September 1990 and that the amount of the fine should remain unaltered.

51 Second, but in the alternative, even if Stora's interpretation of the judgment of the Court of Justice, to the effect that Stora is not liable for Feldmühle's and CBC's conduct before September 1990, were correct, the amount of the fine cannot be reduced in the proportion proposed.

52 The Commission points out that the amount of the fine imposed on Stora was reduced by two thirds because of the evidence of the existence of the cartel which it had given to the Commission and because it did not dispute the essential facts (points 171 and 172 of the Decision); the fine was thus reduced from ECU 33 795 000 to ECU 11 250 000. Thus, while facilitating the Commission's task, the applicant exposed itself to the risk of a fine for the entire infringement period, in respect of all its subsidiaries.

53 An undertaking which cooperates with the Commission and which, in so doing, exposes itself to the risk of a very high fine is in a very different position from one which does not take such a risk. At the time of the administrative procedure, Stora appeared to the Commission to be taking that risk. However, its present line of argument necessarily implies that it did not after all take the risk, since it claims that the main part of its turnover for the period before 1990 should be excluded from the calculation of the amount of the fine.

54 It may be concluded that the fact that Stora is now acting as though it had never taken most of the risk it had appeared to assume (or had not cooperated as much as the Commission had thought in making out the infringement as against itself) largely reduces the mitigating circumstances, at least in proportion to the perceived risk.

55 The Commission draws a distinction between the help which Stora provided in convicting itself by not disputing the existence of the cartel or its own involvement and its cooperation in showing that other undertakings had participated in the cartel. It considers that only the latter form of cooperation (point 171 of the Decision) still justifies a reduction of one third of the amount of the fine. However, the reduction by a further third is no longer justified.

56 Having regard to those factors, the final amount of the fine would come to EUR 10 700 000, or a reduction of EUR 550 000 compared with the amount stated in Article 3 of the Decision.

Findings of the Court

57 First of all, it should be observed that the Court of Justice held that the Court of First Instance erred in law in holding Stora liable for the infringements committed by Feldmühle and CBC before their acquisition and set aside the judgment of the Court of First Instance on that ground. However, the Court of Justice did not annul the Decision, even though the applicant had sought its annulment in its appeal (paragraph 19 of the judgment).

58 Next, since the documents before it did not indicate the portion of the appellant's 1990 turnover accounted for by the activities of Feldmühle and CBC, the Court of Justice decided that 'the case must be referred back to the Court of First Instance for fresh review of the amount of the fine, taking into account the considerations set out in paragraphs 37 to 40 of this judgment [and that] [c]osts must be reserved' (paragraph 79 of the judgment).

59 However, in the proceedings following referral of the case the parties do not agree on the consequences to be drawn from the judgment of the Court of Justice. Whereas Stora maintains that the amount of the fine must be determined in the light of the fact that liability for the infringements committed by Feldmühle and CBC before September 1990 cannot be attributed to it, the Commission contends that the question of the attribution of the infringements by Feldmühle and CBC was not settled by the Court of Justice. In that regard, the Commission submits, first, that the Decision was not annulled on that point and, second, that the attribution of the infringements of Feldmühle and CBC before their acquisition is still justified by the grounds of the judgment of the Court of First Instance and also by the evidence in the file.

60 In that regard, it follows from a reading of paragraphs 37 to 39 of the judgment of the Court of Justice (set out in paragraph 22 above) that the fact that an acquirer is aware that the undertakings acquired participated in an infringement before their acquisition does not suffice to impute to it the unlawful conduct prior to that acquisition. That circumstance, namely that the acquirer was not unaware of the infringements of the undertakings acquired, is not in itself such as to render inapplicable the rule that 'it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the Decision finding the infringement, another person had assumed responsibility for operating the undertaking'.

61 The Commission contends that in the present case there are elements of law and of fact, other than Stora's awareness of the conduct of Feldmühle and CBC before their acquisition, that justify that conduct being imputed to Stora.

62 First, the Commission points out that it falls only 'in principle' to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement and that that does not apply in the present case. The non-application of that rule to the facts of the present case is confirmed by the fact that the Court of Justice did not annul the Decision.

63 That first objection cannot be upheld. Apart from the fact that the expression 'in principle' is to be found in all the other judgments of the Court of Justice delivered in appeals against the judgments of the Court of First Instance of 14 May 1998, in which the Court of Justice formulated that rule of law (judgments in Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78, and Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27), the fact that the Court of Justice did not annul the Decision on that point is not decisive.

64 Thus, in its judgment of 16 November 2000 in *Cascades* v *Commission*, cited above, the Court of Justice, ruling on a similar question in the appeal in the case in which judgment is delivered today (Case T-308/94 *Cascades* v *Commission* [2002] ECR II-813), did not annul the Decision but merely referred the case back to the Court of First Instance for a review of the amount of the fine. Furthermore, in one of the other cases in which annulment of the Decision was sought, the Court of Justice, giving final judgment in the case, reduced the amount of the fine without having first annulled the Decision (*KNP BT* v *Commission*, cited above). After it had annulled paragraph 1 of the operative part of the judgment of the Court of First Instance in Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007 on the ground that the Court of First Instance had failed to answer the applicant's argument that it should in any event bear responsibility for an undertaking (Badische) only after its acquisition, the Court of Justice decided to rule on the action for annulment of the Decision. Although it found that KNP BT was not responsible for the infringement committed by Badische for the period between mid-1986 and 1 January 1987, the Court of Justice did not annul the Decision on that ground, but reduced the amount of the fine imposed on the applicant.

65 Second, the Commission contends that the matters taken into consideration by the Court of First Instance in paragraphs 84 and 85 of its judgment remain valid. Paragraphs 84 and 85 of the judgment of the Court of First Instance are worded as follows:

'84 That conclusion is not undermined by the applicant's argument that it had no power under German law to exert a decisive influence on the commercial policy of Feldmühle and, therefore, of CBC. The applicant has not even argued that it attempted to bring the infringement in question to an end, by for example simply making a request to that effect to the Feldmühle management board.

85 In the light of the foregoing considerations, the Commission was entitled to impute the conduct of the companies in question to the applicant. That finding is also supported by the applicant's conduct during the administrative

procedure, in which it presented itself as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question (see, by analogy, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 6). Finally, the choice of the applicant as addressee of the Decision is in conformity with the general criteria adopted by the Commission in point 143 of the Decision (see paragraph 58 above), since several companies in the Stora Group participated in the infringement in question.'

66 However, paragraph 84 of the judgment of the Court of First Instance is of no assistance to the Commission, since the assessment made therein relates to the fact that it was impossible to exert a decisive influence on the commercial policy of Feldmühle and, therefore, of CBC after the acquisition of FeNo shares by Stora.

67 Nor does it avail the Commission to rely on paragraph 85 of the judgment, which contains two separate and complementary assessments.

68 The first assessment (second sentence of paragraph 85) is intended to support a finding and cannot therefore be regarded as decisive as regards the imputability of the unlawful conduct before the acquisition. The main reason that led the Court of First Instance to impute that conduct to the applicant is set out in paragraph 82 of the judgment of the Court of First Instance, which states that '[s]ince Kopparfors' conduct must be imputed to the applicant, the Commission justifiably stated in the individual particulars annexed to the statement of objections... that the applicant could not have been unaware of the anti-competitive conduct of Feldmühle and CBC.' The fact that the applicant presented itself during the administrative procedure as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question is therefore merely subsidiary to that principal ground.

69 As regards the second assessment (third sentence of paragraph 85), concerning the proper addressee of the Decision, it is valid only in relation to the situation prevailing on the date on which the Decision was adopted.

70 Consequently, having regard to the facts of the case, the judgment of the Court of Justice must be taken to mean that it falls, in principle, to the 'legal person' managing the undertakings in question, namely Feldmühle and CBC, before their acquisition by the applicant to answer for the infringement which they committed during that period. It follows that the existence on the date on which the Decision was adopted, 13 July 1994, of the legal person which managed the operations of Feldmühle and CBC before September 1990 is sufficient for responsibility for their action not to be imputable to Stora. In that regard, the assertion of the Court of Justice that 'there is no dispute that Feldmühle and CBC continued to exist after control of them had been acquired by the appellant in September 1990' (paragraph 38 of the judgment) cannot be regarded as decisive, since what matters for the application of the rule set out in paragraph 37 of the judgment is the existence, on the date of adoption of the Decision, of the legal person responsible for their operation during the period prior to their acquisition by the applicant.

71 In order to satisfy itself that that legal person still existed on 13 July 1994, the Court of First Instance put a number of written questions to the applicant. In its replies, the applicant stated that the parent company of Feldmühle, and of its subsidiary CBC, was FeNo and that FeNo existed on the date of adoption of the Decision under the registered name FBP Holding AG. The applicant also asserted that Feldmühle and CBC continued to exist as legal persons until the date of adoption of the Decision.

72 In those circumstances, the onus reverted to the Commission to prove that on the date on which the Decision was adopted there was no legal person to whom the offending conduct of Feldmühle and CBC prior to their acquisition by Stora could be imputed. Such proof was not adduced by the Commission and it has not

demonstrated that either FeNo, Feldmühle or CBC was dissolved before the date of adoption of the Decision.

73 The Court of First Instance must therefore reassess the amount of the fine imposed on the applicant, which under Article 3 of the Decision comes to ECU 11 250 000, and take account of the fact that responsibility for the infringements committed by Feldmühle and CBC before September 1990 cannot be imputed to it.

74 Since the unlawful conduct of Feldmühle and CBC before September 1990 is not imputable to Stora, Stora must answer, as regards the period prior to their acquisition, only for the conduct of Kopparfors. As table 8 in the Decision shows, Kopparfors was acquired by Stora with effect from 1 January 1987. According to Article 1 of the Decision, Stora participated in the infringement from mid-1986. It follows that, in accordance with the approach approved by the Court of Justice, responsibility for the conduct of Kopparfors during the period June 1986 to 1 January 1987 cannot be imputed to Stora, because Kopparfors continued to exist as a legal person on the date on which the Decision was adopted, as the applicant has confirmed without being contradicted by the Commission.

75 In the exercise of the unlimited jurisdiction conferred on it by Article 229 EC and Article 17 of Regulation No 17, the Court of First Instance may assess whether the amount of a fine is appropriate. In the present case, in doing so it must take into consideration the fact that responsibility for the infringements committed by Kopparfors before 1 January 1987 cannot be imputed to Stora.

76 As regards the procedure for determining the amount of the fine, it should first of all be observed that the judgment of the Court of Justice does not indicate any method for determining the amount of the fine imposed on the applicant.

77 Next, although the parties disagree as to the extent of the reduction justified by cooperation during the administrative procedure, they are agreed on the method of calculating the amount of the fine.

78 Last, in accordance with the principle of equal treatment, it is necessary to determine the amount of the fines imposed on undertakings which have participated in an agreement or concerted practice contrary to Article 85(1) of the Treaty according to the same method, unless objective justification for not following that method is advanced (see, to that effect, Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraphs 63 to 68). In the present case, the Court considers that there is no such objective justification, so that the amount of the fine imposed on Stora must be determined by following, in principle, the method which the Commission applied to all the undertakings given fines referred to in Article 3 of the Decision and on which the parties are agreed.

79 According to the detailed information which it provided in 1997 in answer to a written question put by the Court of First Instance, fines of a basic level of 9% or 7.5% of the turnover achieved on the Community cartonboard market in 1990 by each of the undertakings to which the Decision was addressed were imposed on the undertakings regarded as 'ringleaders' of the cartel, including Stora, and on the other undertakings respectively. The duration of the infringement found in Stora's case was 60 months (from June 1986 until the end of May 1991). Stora was given a reduction of two thirds of the amount of its fine for cooperating with the Commission during the administrative procedure (point 171 of the Decision). The amount of the fine imposed on the applicant following that operation was ECU 11 250 000 (Article 3 of the Decision).

80 Consequently, the fine imposed on the applicant will be calculated by taking into account, for the period prior to the acquisition of Feldmühle and of CBC, namely between January 1987 and 1 September 1990, only the turnover achieved on the Community cartonboard market in 1990 by Kopparfors, i.e. ECU 162 667 000,

and, for the period during which the applicant is held responsible for the participation in the cartel of Feldmühle and CBC, namely between 1 September 1990 and the end of May 1991, Stora's total turnover on that market in 1990, i.e. ECU 375 500 000.

81 The rate applicable to the turnover figures in question depends on whether the applicant is classified as a 'ringleader' of the cartel. On that point, the Commission does not dispute that only the representatives of Feldmühle attended the PWG and that the representatives of Kopparfors never participated in that group. The applicant cannot therefore be considered to have been a 'ringleader' during the period before the acquisition of Feldmühle and CBC. The rate of 9% is therefore applicable only from the date of acquisition of Feldmühle and CBC and the fine in respect of the infringements committed by Kopparfors between 1 January 1987 and 1 September 1990 will be calculated on the basis of 7.5% of that undertaking's turnover.

82 In its observations, the Commission requests the Court to grant a reduction not exceeding one third of the amount of the fine, for the reasons set out in paragraphs 53 to 55 above. That request cannot be granted.

83 First, the distinction between the effects of Stora's cooperation which the Commission draws in its observations is not apparent from points 171 and 172 of the Decision. The applicant is not among the undertakings expressly referred to in point 172.

84 Next, since the documents before it did not indicate the portion of Stora's 1990 turnover accounted for by the activities of Feldmühle and CBC, the Court of Justice referred the case back to the Court of First Instance for fresh review of the amount of the fine, 'taking into account the considerations set out in paragraphs 37 to 40 of [the] judgment' of the Court of Justice (paragraph 79 of the

judgment). The extent of Stora's cooperation with the Commission during the administrative procedure, which justified a reduction of two thirds of the amount of the fine imposed on it, is not addressed in the paragraphs referred to.

85 Last, the Court considers, under its unlimited jurisdiction, that there is no need in the present proceedings to reconsider the extent of the reduction which the Commission granted for cooperation during the administrative procedure. The risk that an undertaking which has been granted a reduction in its fine in exchange for its cooperation will subsequently seek annulment of the decision finding the infringement of the competition rules and imposing a penalty on the undertaking responsible for the infringement, and will succeed before the Court of First Instance or before the Court of Justice on appeal, is a normal consequence of the exercise of the remedies provided for in the Treaty and the Statute. Accordingly, the mere fact that an undertaking which has cooperated with the Commission and which for that reason has been given a reduction in the amount of its fine has successfully challenged the Decision before the Community judicature cannot justify a fresh review of the size of the reduction granted to it.

86 In the light of all the criteria used to determine the amount of the fine imposed on the applicant, the Court, in the exercise of its unlimited jurisdiction, fixes that amount at EUR 4 670 000.

Costs

87 In its judgment, the Court of Justice reserved the costs. It is therefore for the Court of First Instance to determine, in the present judgment, all the costs relating to the various proceedings, in accordance with Article 121 of the Rules of Procedure.

88 Under Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. In the present case, the applicant was only partly successful before the Court of Justice on appeal, but the form of order which it sought has been granted in the proceedings following referral of the case back to this Court.

89 The Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear two thirds of its own costs and of the Commission's costs, and the Commission to bear one third of the applicant's costs and of its own costs, incurred before the Court of Justice and the Court of First Instance.

On those grounds,

THE COURT OF FIRST INSTANCE
(First 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 EUR 4 670 000;

2. **Orders the applicant to bear two thirds of its costs and of the Commission's costs, incurred before the Court of Justice and the Court of First Instance;**

3. **Orders the Commission to bear one third of the applicant's costs and of its own costs, incurred before the Court of Justice and the Court of First Instance.**

Vesterdorf Lenaerts Pirrung

Vilaras Forwood

Delivered in open court in Luxembourg on 28 February 2002.

H. Jung — Registrar

B. Vesterdorf — President