JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, extended composition)
14 July 1995 *

In Case T-275/94,

Groupement des Cartes Bancaires 'CB', an economic interest grouping established under French law, having its registered office in Paris (France), represented by Alain Georges and Hugues Calvet, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Enrico Traversa, of the Legal Service, and Géraud de Bergues, a national official on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's letters of 7 June 1994 and 15 July 1994 in which the Commission required, for the period from 30 June 1992 to

* Language of the case: French.

the date of actual settlement, payment of default interest on the amount of the fine imposed on the applicant by Commission Decision 92/212/EEC of 25 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque: Helsinki Agreement, OJ 1992 L 95, p. 50), that amount having been set at ECU 2 000 000 by the judgment delivered by the Court of First Instance on 23 February 1994 in Joined Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires 'CB' and Europay International SA* v *Commission* [1994] ECR II-49, and in which it applied the ECU 2 000 000 paid by the applicant first against the interest and then against the principal sum of the fine plus default interest,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber, extended composition),

composed of: K. Lenaerts, President, R. Schintgen, R. García-Valdecasas, P. Lindh and J. Azizi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 29 March 1995,

gives the following

Judgment

Facts and procedure

1 On 25 March 1992, the Commission adopted Decision 92/212/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque:

Helsinki Agreement, OJ 1992 L 95, p. 50) (hereafter 'the decision' or 'the decision of 25 March 1992'), Article 1 of which declared the agreement concluded at the Eurocheque Assembly, held in Helsinki on 19 and 20 May 1983, between the French financial institutions and the Eurocheque Assembly on the acceptance by traders in France of Eurocheques drawn on foreign financial institutions (hereafter 'the Helsinki Agreement'), and which was in force from 1 December 1983 to 27 May 1991, to be an infringement of Article 85(1) of the EEC Treaty (now the EC Treaty, hereafter 'the Treaty').

2 In Article 2 of the decision, the request that the agreement referred to in Article 1 be exempted pursuant to Article 85(3) of the Treaty for the period from 16 July 1990, the date of its notification, to 27 May 1991, the date of its abolition, was rejected.

3 Article 3 of the decision imposed a fine of ECU 5 000 000 on the Groupement des Cartes Bancaires 'CB' (hereafter 'the Groupement') by reason of the infringement referred to in Article 1 and provided that this amount was to be paid to the Commission within three months of the date of notification of the decision. It stated that interest was to be automatically payable on expiry of that period at the rate charged by the European Monetary Cooperation Fund (hereafter 'the EMCF') on its ecu operations on the first working day of the month in which the decision was adopted and published in the *Official Journal of the European Communities* (OJ 1992 C 56 of 3 March 1992, p. 1), plus 3.5 percentage points, that is 13.75%.

4 The Commission notified the Groupement of the decision by letter of 25 March 1992, which meant that the applicant had to pay the fine by 30 June 1992, the date from which the Commission was entitled to seek enforcement of the fine under the second paragraph of Article 192 of the Treaty. In that letter, however, the Com-

mission informed the Groupement that, in accordance with its usual practice, it would, in the event that the Groupement should bring proceedings before the Court of First Instance, refrain from taking enforcement measures while the case was pending before the Court, provided that interest accrued on the sum owed as from 30 June 1992, such interest to be calculated on the basis of the interest rate applied by the EMCF, plus 1.5 percentage points, that is 11.75%, and that a bank guarantee covering both the principal sum owed and interest or surcharges was furnished by that date.

5 By application lodged at the Registry of the Court of First Instance on 25 May 1992, the Groupement brought an action for annulment of the decision of 25 March 1992 on the ground, in substance, that the agreement objected to did not constitute a restrictive arrangement and that the amount of the fine, even assuming that an infringement was proved, was entirely disproportionate to its gravity.

6 On 24 June 1992 the applicant's bank furnished, on its instructions and behalf, a bank guarantee, complying with the model annexed to the Commission's letter of 25 March 1992, for both the fine of ECU 5 000 000 imposed on the Groupement by the decision of 25 March 1992 and the interest, calculated on the basis of the EMCF rate, plus 1.5 percentage points, which was to accrue on that sum as from 30 June 1992 until the actual payment of the fine.

7 In its judgment delivered on 23 February 1994 in Joined Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires 'CB' and Europay International SA* v *Commission* [1994] ECR II-49, the Court held, with regard to the Groupement, that the Helsinki Agreement could not be regarded as an agreement fixing an identical price to be observed in contracts with third parties, but that it did constitute an agreement on the principle of charging a commission, contrary, as such, to Article 85(1)(a) of the Treaty, and set the fine imposed on the Groupement by Article 3 of the contested decision at ECU 2 000 000. The remainder of the application was dismissed and the Commission was ordered to pay one half of the costs incurred by the Groupement.

8 By letter addressed to the Commission on 5 May 1994, the Groupement informed the Commission that, since the period for appealing against the judgment of the Court of First Instance of 23 February 1994 had expired on 4 May 1994, it had, by bank transfer of 5 May 1994, paid the fine of ECU 2 000 000 set by the Court of First Instance. As it took the view that it had complied in full with the judgment of the Court of First Instance, the Groupement maintained, in response to a telephone request from the Commission's financial services, that the obligation to pay interest, as was clear from the judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 139 and 143, was based on the aim of preventing the bringing of manifestly unfounded actions for the sole purpose of delaying payment of fines, and that it did not apply in the case of actions which were well founded in whole or in part. That was confirmed by the fact that the rate of interest applied by the Commission was higher than the statutory rate in force in France and on the market in ecu transactions, thus entailing an additional penalty for persons bringing an action. The Groupement added that, in any event, the fine imposed by the judgment could not bear interest from the date on which the fine imposed by the Commission decision became payable, since the first fine was legally different from the second. It pointed out that the operative part of the judgment made it clear that the Court of First Instance 'set' a new fine and did not 'reduce' the fine set by the Commission in its original decision. In calculating the amount of the fine on the basis of the unlawful profits derived from commissions improperly levied on the encashment of foreign eurocheques, the Commission had penalized solely the agreement on the amount of those commissions, and not the agreement on the principle of levying a commission, which is merely a condition of the former. In striking down only the agreement on the principle of charging a commission, the Court of First Instance imposed a fine for an infringement which had not been penalized as such by the Commission.

9 On 27 May 1994, the Groupement requested partial release of the bank guarantee.

10 By letter of 7 June 1994, the Commission replied that it regarded the transfer of ECU 2 000 000 as partial payment, on 6 May 1994, of the total sum owed, cover-

ing the interest accrued on that date, amounting to ECU 433 301.37, as well as part of the principal sum, interest continuing to accrue on the remainder of the principal as from 6 May 1994 until the date of actual payment. The Commission pointed out in this regard that the practice which it had been following since 1981 with regard to suspension of the payment of fines where proceedings are brought against decisions imposing pecuniary penalties, and which was to require payment of interest and provision of a bank guarantee as security for payment of the fine plus interest, had been approved by the Court of Justice (see the judgment in *AEG* v *Commission*, cited above, and the orders in Case 86/82 R *Hasselblad* v *Commission* [1982] ECR 1555, Case 263/82 R *Klöckner-Werke* v *Commission* [1982] ECR 3995 and Case 392/85 R *Finsider* v *Commission* [1986] ECR 959) and that, in this case, the Groupement had agreed to pay interest by lodging the bank guarantee on 24 June 1992. The Commission then stated that the charging of interest was not an inevitable consequence of exercising the right to bring an action, since the Groupement was at liberty to pay the fine when it became payable and thereby avoid having to pay interest. As to the question of the fine set by the Court and that set by the Commission being legally different, the latter took the view that the Groupement misconceived the unlimited jurisdiction conferred on the Court of First Instance by Article 17 of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereafter 'Regulation No 17'), which provides that the Court of First Instance can only cancel, reduce or increase the fine imposed, and cannot set a new fine distinct from that imposed by the Commission.

11 On 16 June 1994, the Groupement contested the position taken by the Commission in its letter of 7 June 1994 regarding the imposition on the Groupement of default interest on the fine of ECU 2 000 000 with effect from 30 June 1992 and the application of the payment of ECU 2 000 000 against that interest, and it reserved the right to apply to the Court of First Instance for an interpretation of its judgment of 23 February 1994.

12 By letter of 15 July 1994, the Commission gave the Groupement formal notice to pay the balance of its debt before 31 July 1994 and stated that if this was not done

it would seek enforcement of the bank guarantee. The Commission informed the guarantor bank on the same day that it agreed that the amount guaranteed could be reduced by the amount of the part payment which had been made.

13 By letter of 20 July 1994, the Groupement, still in disagreement with the Commission's position regarding the question of default interest, informed the Commission that, in view of the enforceable nature of the Commission decision, which left it with no alternative, it had instructed its bank to transfer the sum of ECU 443 902.61 to the Commission.

14 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 4 August 1994, the Groupement brought the present action.

15 Upon hearing the Report of the Judge-Rapporteur, the Court (Fourth Chamber, extended composition) decided to open the oral procedure without any preparatory inquiry.

16 The parties presented oral argument and replied to the Court's questions at the hearing on 29 March 1995.

Forms of order sought by the parties

17 The applicant claims that the Court of First Instance should:

— annul the Commission's decision contained in its letters of 7 June and 15 July 1994 demanding payment of default interest on the fine of ECU 2 000 000 set

by the Court of First Instance in its judgment of 23 February 1994, in respect of the period from 30 June 1992 until the date of actual payment of the fine, and accordingly declare that the sum of ECU 433 902.61 paid by the Groupement was not due and must be repaid together with interest, calculated at the rate applied by the EMCF, in respect of the period from 20 July 1994 until the date of actual payment;

— alternatively, should the Court of First Instance not uphold the application set out under (1) above, annul the Commission's decision in so far as it misapplies the payments made by the Groupement and accordingly declare that the sum of ECU 10 601.24 paid by the Groupement in that respect was not due and must be repaid together with interest, calculated at the rate applied by the EMCF, in respect of the period from 20 July 1994 until the date of actual repayment;

— order the Commission to pay the entire costs incurred by the Groupement in the present proceedings for annulment.

18 The defendant contends that the Court of First Instance should:

— dismiss the application as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

19 Relying on consistent case-law of the Court of Justice (judgment in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16), the Commission contends that the action for annulment of the letters of 7 June 1994 and 15 July 1994 is inadmissible on the ground that those letters merely confirm the Commission decision of 25 March 1992 and the letter of notification of the same date. The Commission points out that, in its decision of 25 March 1992, it imposed on the Groupement a fine of ECU 5 000 000 payable within three months, at the expiry of which period the fine would automatically bear interest at the EMCF rate plus 3.5 percentage points. The Commission also points out that, in its letter of notification of 25 March 1992, it informed the Groupement that, if the latter were to bring proceedings before the Court of First Instance, no steps would be taken to recover the fine while the case was pending before that Court, provided that interest accrued on the sum owed as from 30 June 1992 and that a bank guarantee, acceptable to the Commission and covering both the principal sum owed and interest or surcharges, was furnished by that date.

20 According to the Commission, by providing the bank guarantee requested and failing to challenge the conditions laid down in relation to the provision of that guarantee at the time when it brought its action against the decision of 25 March 1992, the applicant agreed to those conditions and accepted that the amount which it would ultimately be required to pay would be increased by interest. Consequently, it may no longer challenge payment of that interest.

21 The Commission here rejects the applicant's contention that the interest referred to in the decision of 25 March 1992 and in the letter of notification relates only to the fine of ECU 5 000 000 and not to the fine of ECU 2 000 000 subsequently set

by the Court of First Instance. The Commission takes the view that, in so far as a bank guarantee is designed to ensure full payment of the principal sum owed to it, plus any interest thereon, it covers the interest calculated on the actual amount of the fine, even where the Community judicature does not uphold the full amount of the fine.

22 The Commission also questions the admissibility of the applicant's alternative claim for annulment of the letters of 7 June 1994 and 15 July 1994 on the ground that they misapply the payment made by the Groupement on 5 May 1994. At the hearing, however, the Commission's representative accepted that the way in which payment was to be applied could not be inferred from either the decision of 25 March 1992 or the letter of notification of the same date. He left it to the Court to assess whether the applicant's claim was admissible in that regard.

23 The applicant maintains that, taken together, the Commission's letters of 7 June 1994 and 15 July 1994 constitute a decision capable of being contested under Article 173 of the Treaty. It points out that, according to the case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 173 (judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

24 It claims that, by requiring it to pay the sum of ECU 433 301.37, the letters of 7 June and 15 July 1994 seriously affect its financial interests and bring about a distinct change in its legal situation compared with that created by the decision of 25 March 1992 and the letter of notification of the same date. The binding nature of the obligation to pay the sum of ECU 433 301.37 as default interest on the payment of the fine of ECU 2 000 000 does not, in its view, follow from the decision

of 25 March 1992, from the letter notifying that decision, or from the judgment of the Court of First Instance of 23 February 1994. Thus, by providing in its decision of 25 March 1992 that 'a fine of ECU 5 000 000 is hereby imposed on the Groupement' and that 'on expiry of that period [three months from the date of notification of the decision], interest shall automatically be payable', the Commission decided to apply default interest to the fine of ECU 5 000 000 imposed by that decision, but not also to the fine subsequently set in an action for annulment by the Court of First Instance exercising its unlimited jurisdiction.

25 The applicant adds that it was only when the Commission sought to recover the fine finally set by the Court of First Instance that the first reference was made, during a telephone conversation confirmed by the letters of 7 June and 15 July 1994, to the possibility of an automatic adaptation of the fine through interest accruing even before the Court of First Instance had delivered its judgment. It observes that the Commission, by itself describing its letter of 7 June 1994 as 'the taking of a position by the Commission', implicitly accepts that this letter constitutes a measure against which an action for annulment may be brought.

26 With regard to its alternative claim, the applicant argues that, by contesting its admissibility, the Commission is seeking to withdraw from review by the Community judicature a substantive issue concerning the question of the conformity of the decision with Community law.

Findings of the Court

27 It follows from the settled case-law of the Court of Justice and the Court of First Instance that actions brought against decisions which merely confirm earlier decisions which have not been contested within the time-limits set are inadmissible (judgments of the Court of Justice in *Irish Cement* v *Commission*, cited above,

paragraph 16, and in Case C-199/91 *Foyer Culturel du Sart-Tilman* v *Commission* [1993] ECR I-2667, paragraphs 23 and 24, and the judgment of the Court of First Instance of 15 March 1995 in Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 44).

28 It is accordingly necessary in this case to determine whether the Commission, by seeking payment of default interest from 30 June 1992 on the amount of the fine set by the Court of First Instance on 23 February 1994, introduced a new factor capable of having mandatory legal effects such as to affect the applicant's interests by bringing about a distinct change in its legal position (judgment of the Court of First Instance in *Cobrecaf and Others* v *Commission*, cited above, paragraph 45) or whether it merely confirmed the situation resulting from the decision of 25 March 1992, the letter of notification of the same date and the applicant's provision of the bank guarantee.

29 In replying in its letter of 7 June 1994 to the applicant's argument that the obligation arising from the judgment in *AEG* v *Commission*, cited above, to pay interest on fines is limited to only those cases in which the Community judicature dismisses the application as being manifestly unfounded and confirms the fine imposed by the Commission, the Commission was arguing that an application which is partially founded cannot constitute an exceptional circumstance capable of 'exempting an undertaking from compliance with the conditions imposed on suspension of payment of the fine'. It also submitted that those conditions had been approved by the Court of Justice in its orders in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, and in *Hasselblad* v *Commission*, *Klöckner-Werke* v *Commission* and *Finsider* v *Commission*, cited above, and that the applicant had accepted those conditions by providing the bank guarantee.

30 Following the applicant's expression of disagreement, the Commission replied in its letter of 15 July 1994 that 'there is nothing to justify the interpretation of the

AEG judgment as meaning that the Court of Justice intended to limit the charging of interest to actions which were manifestly unfounded' and that it expressed surprise at the fact that, assuming that such an interpretation was well founded, the Court of Justice, in confirming the practice which the Commission had adopted, had made no reference to the drastic limits which it would be necessary to attach to it.

31 It thus appears that it was only on reading together the letters of 7 June 1994 and 15 July 1994, reproducing the interpretation of the judgment in Case 107/82 R *AEG* v *Commission* espoused by the Commission, that the applicant realized that the Commission took the view that the obligation to pay default interest from the date on which the fine which it had imposed became payable also extended to the case in which the Community judicature has subsequently reduced the amount of the fine by upholding in part the application for annulment brought against such a decision.

32 The Court accordingly finds that the contested letters do not merely confirm the conditions which the Commission, in its letter notifying the decision of 25 March 1992, attached to the suspension of payment of the fine during the legal proceedings, but also contain a new element in so far as they reveal a position taken by the Commission which neither the decision of 25 March 1992 nor the letter of notification of the same date had indicated clearly and explicitly.

33 It follows that the main claim for annulment of the letters of 7 June and 15 July 1994 is admissible.

34 Consequently, the alternative claim, concerning the application of the payment made by the Groupement on 5 May 1994, which is very closely connected to the main claim, must also be regarded as admissible. In any event, the Groupement could not have been aware of the way in which the Commission had applied its payment until it read the letter of 7 June 1994.

35 It follows from all the foregoing that the application is admissible.

Substance

The main claim for annulment of the letters of 7 June 1994 and 15 July 1994

36 The applicant relies essentially on three pleas in law in support of its application. The first plea is that there is no legal basis for the imposition of default interest on the fine set by the Community judicature, the second that the authors and signatories of the contested letters lacked competence, and the third that the imposition of default interest on the fine set by the Community judicature is a dissuasion to exercise of the right to bring an action.

First plea in law: absence of a legal basis

Arguments of the parties

37 The applicant submits that the obligation to pay default interest on a fine does not follow from any provision of Community law and can, according to the case-law of the Court of Justice (judgment in *AEG* v *Commission*, cited above), be justified only with reference to the need to prevent the bringing of manifestly unfounded actions whose sole purpose is to delay payment of a fine. That cannot be the position in the present case, since, by setting the fine imposed on the Groupement at 40% of that imposed by the Commission and ordering the Commission to pay half

of the costs incurred by the Groupement, the Court of First Instance upheld in a very large measure the Groupement's application.

38 As regards the orders in *Hasselblad* v *Commission*, *Klöckner-Werke* v *Commission* and *Finsider* v *Commission*, cited above, on which the Commission relied in support of its request for payment of interest, the applicant first points out that they relate only to the power, which the Commission is recognized as having, to require a bank guarantee in the case where payment of a fine is suspended, and not to the application of default interest to the fine set by the Community judicature. Referring to the order in Case 78/83 R *Usinor* v *Commission* [1983] ECR 2183, the applicant goes on to argue that, by making suspension of payment of part of the fine subject 'to the condition that the applicant first provides a bank guarantee designed to ensure payment of the fine specified in that decision and any default interest', the Court of Justice was referring exclusively to the interest applicable to the fine imposed by the Commission decision and not to that set by the Community judicature in the exercise of its unlimited jurisdiction.

39 The applicant argues in this connection that the fine set in this case by the judgment of the Court of First Instance of 23 February 1994 is distinct in law from that imposed by the Commission decision of 25 March 1992. The applicant first points out that paragraph 147 and the operative part of that judgment use the word 'set', and not the word 'reduce', in connection with the fine. It goes on to refer to paragraph 147 of the judgment, where the Court of First Instance found that 'the fine of ECU 5 000 000 imposed on the Groupement is not appropriate in relation to the nature and intrinsic gravity of the infringement', and also points out that the Court of First Instance did not accept the aggravating circumstances found by the Commission. Finally, the applicant notes that the Commission itself acknowledges that the increase in a fine which the Court of First Instance, where appropriate, has the power to impose generates interest only from the date of judgment.

40 The applicant takes the view that, by arguing that the Court of First Instance cannot set aside a fine imposed by the Commission in order to 'replace it with its own',

the Commission misconceives the unlimited jurisdiction conferred on the Community judicature as well as the scope of Article 172 of the Treaty and Article 17 of Regulation No 17. It refers in this connection to the Opinion of Advocate General Warner in Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, at p. 2494, in which he stated that 'the powers conferred on the Court by Article 17 of Regulation No 17 are in the widest terms and are, in my opinion, sufficient to enable the Court to do in every case whatever it considers that justice requires.'

41 The Commission first of all points out that the decisions which it adopts become effective on notification and that, by virtue of Article 185 of the Treaty, actions brought before the Community judicature do not have suspensory effect. The Commission is therefore entitled, once a decision imposing fines has been notified, to recover those fines and it is a matter for the parties, where appropriate, to seek suspension of operation of the contested measure in accordance with Article 107(2) of the Rules of Procedure of the Court of First Instance.

42 The Commission goes on to point out that, with regard to actions brought against decisions imposing fines, in 1981 it modified its original attitude, which was to defer payment of the fine until judgment was given by the Court, by imposing two conditions for such deferment, which were that default interest had to be paid and a bank guarantee, covering the amount of the fine plus interest, furnished (see the Twelfth Competition Report, point 60). It adds that, in its abovementioned orders in *AEG* v *Commission*, *Hasselblad* v *Commission*, *Klöckner-Werke* v *Commission* and *Finsider* v *Commission*, the Court of Justice accepted that this new line of general conduct was justified save in exceptional circumstances.

43 In this connection, the Commission rejects the applicant's interpretation of the case-law of the Court of Justice and points out that the orders cited relate as much to the obligation to pay default interest as to the obligation to provide a bank guarantee for securing payment of the fine and interest on it. Moreover, according to

the Commission, the judgment in *AEG* v *Commission*, cited above, cannot be understood as limiting the charging of default interest to those cases in which the application is declared to be manifestly unfounded. The Opinion of Advocate General Reischl, which the Court of Justice followed in its judgment, makes no reference to any such limitation.

44 As regards the question of the separate nature of the fine imposed by the Commission and that set by the Community judicature in the exercise of its unlimited jurisdiction, the Commission points out that the unlimited jurisdiction referred to in Article 172 confers on the Community judicature, according to the actual words of Article 17 of Regulation No 17, the power to 'cancel, reduce or increase the fine or periodic penalty payment imposed', but still does not allow it to replace the fine imposed by the Commission with its own, legally distinct fine. Contrary to the applicant's contention that an increase in the fine proves that the fine imposed by the Commission and that imposed by the Community judicature are distinct, an increase in the fine necessarily implies that the increase decided on by the Community judicature relates to the fine imposed by the Commission.

45 The Commission adds that, despite the use by the Court of First Instance of the word 'set' in connection with the fine, the operative part and paragraph 147 of the judgment of 23 February 1994 must be read in the light of paragraph 142 of the judgment, in which the Court held that: 'That being so, it falls to the Court to consider, in the exercise of its unlimited jurisdiction, whether the fine imposed on the Groupement should be reduced'.

Findings of the Court

46 It should be noted at the outset that, under Article 15(2) of Regulation No 17, the Commission has the power to impose fines on undertakings which, whether intentionally or negligently, infringe Article 85(1) or Article 86 of the Treaty, or commit

a breach of any obligation imposed by a decision applying Article 85(3) of the Treaty.

47 The power conferred on the Commission in this regard covers the power to determine the date on which the fine is payable and that on which default interest begins to accrue, the power to set the rate of such interest and to determine the detailed arrangements for implementing its decision by requiring, where appropriate, the provision of a bank guarantee covering the principal amount of the fine imposed plus interest.

48 If the Commission had no such power, the advantage which undertakings might be able to derive from late payment of fines would weaken the effect of penalties imposed by the Commission when carrying out its task under Article 89 of the Treaty of ensuring that the rules on competition are applied. Thus, the charging of default interest on fines is justified by the need to ensure that the Treaty is not rendered ineffective by practices applied unilaterally by undertakings which delay paying fines imposed on them.

49 Furthermore, if the Commission did not have the power to charge default interest on fines, undertakings which delayed paying their fines would enjoy an advantage over those which paid their fines within the period laid down.

50 Commission decisions which impose a pecuniary obligation on persons other than States are enforceable under Article 192 of the Treaty.

51 Pursuant to Article 185 of the Treaty, actions brought before the Community judicature do not have suspensory effect.

52 It follows that Commission decisions are enforceable once they have been notified and that the fines which they impose are payable on expiry of the period set by the Commission in its decision. The Commission was therefore entitled in law to impose default interest in the event of non-payment of the fine within the period set for that purpose in its decision of 25 March 1992, which was adopted in accordance with Article 15(2) of Regulation No 17.

53 The Commission is also entitled in law, in those cases where undertakings bring an action against decisions imposing fines on them, to require, in accordance with its general practice followed since 1981, the provision of a bank guarantee as security for payment of the fine, plus default interest where due (see the orders of the Court of Justice in *AEG* v *Commission*, *Hasselblad* v *Commission*, *Klöckner-Werke* v *Commission* and *Finsider* v *Commission*, cited above).

54 It follows that an undertaking which brings an action against a Commission decision imposing a fine on it has a choice: it can pay the fine on its becoming payable, together with default interest, should any such interest have accrued, at the rate set by the Commission in its decision (in the present case, the EMCF rate plus 3.5 percentage points); or it can apply for suspension of operation of the decision pursuant to the second sentence of Article 185 of the Treaty and Article 104 of the Rules of Procedure of the Court of First Instance; or, finally, if the Commission so allows, it can provide a bank guarantee as security for payment of the fine and default interest, in accordance with the conditions laid down by the Commission (in the present case, the rate applicable to default interest was the EMCF rate plus 1.5 percentage points).

55 It is common ground in the present case that the applicant, after bringing its action in Case T-39/92 against the Commission decision of 25 March 1992, elected to provide a bank guarantee as security for payment of the fine and default interest.

56 The applicant argues, however, that the provision of the bank guarantee took effect only in relation to the fine imposed by the Commission in its decision of 25 March 1992 and not in relation to the fine set by the Court of First Instance in its judgment of 23 February 1994.

57 It is therefore necessary to consider whether, as the applicant contends, the fine imposed by the Commission is different, as a matter of law, from that set by the Community judicature in the exercise of its unlimited jurisdiction, and whether any such distinction will restrict the effects of the bank guarantee provided by the applicant.

58 It is clear from the actual wording of Article 17 of Regulation No 17 that the unlimited jurisdiction conferred on the Community judicature in the application of the rules on competition, which allows it to cancel, reduce or increase fines imposed by the Commission, relates to, and is limited to, the fine originally imposed by the Commission.

59 In matters of competition law, the Community judicature does not have power to impose a fine; it has unlimited jurisdiction solely to rule on fines set by decisions of the Commission. The applicant's argument that, if a fine is increased, interest begins to accrue on the amount of the increase in the fine only from the date of the judgment cannot sustain the proposition which it seeks to establish. Since the amount of the increase in the fine is itself payable only from the date on which the judgment is delivered, the interest relating thereto can, in accordance with the principle of *accessorium sequitur principale*, begin to accrue only from that date.

60 The Court accordingly concludes that the Community judicature is not competent, when exercising the powers conferred on it by Article 172 of the Treaty and Article 17 of Regulation No 17, to replace the fine imposed by the Commission by a new, legally distinct fine.

61 Neither the use of the word 'set' in paragraph 147 and in the operative part of the judgment of the Court nor the fact that the Community judicature can take account of matters arising subsequent to the decision when it decides to reduce a fine imposed by the Commission can invalidate that conclusion.

62 With regard to the use of the word 'set', it should be pointed out that the Court of Justice has consistently held (judgment in Joined Cases 97, 193, 99 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27) that the operative part of a judgment must be read in the light of the grounds which have led to it and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what was held in the operative part.

63 At paragraph 142 of its judgment of 23 February 1994, the Court of First Instance clearly stated that, since, contrary to what the Commission had found, it found the Groupement responsible for only one prohibited agreement, it had to consider, in the exercise of its unlimited jurisdiction, whether the fine imposed on the Groupement ought to be reduced. In taking account, when deciding on a lower amount for the fine, of the less serious nature of the infringement finally found to have been proved against the Groupement, the Court of First Instance made it clear in its reasoning on the question of the fines that its judgment was reducing the fine orig-

inally imposed by the Commission and not replacing it with a new, different fine. Consequently, the word 'set' cannot have the meaning which the applicant attaches to it.

64 The fact that it is open to the Community judicature to take account of matters arising subsequent to the Commission decision, in particular conduct of a fined party adopted after the decision, in deciding that a fine should be less than that imposed by the Commission cannot render the fine set by the Court of First Instance legally different from that imposed by the Commission. It is sufficient to point out here that, in its judgment in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, on which the applicant relies in support of its case, the Court of Justice specifically 'reduced' the fine imposed by the Commission in taking account of the attitude adopted by the fined party after the decision.

65 It follows from all the foregoing that the fine set by the Court of First Instance in the present case is not a new fine different in law from that which the Commission imposed in its decision of 25 March 1992 and that it cannot limit the scope of the cover provided by the bank guarantee furnished by the applicant. The Commission is therefore entitled to require payment, as from the due date specified in its decision, of default interest calculated on the amount of the fine set by the Court of First Instance in its judgment of 23 February 1994.

66 The plea of lack of legal basis must therefore be rejected.

Second plea in law: lack of competence of the signatories of the letters of 7 June 1994 and 15 July 1994

Arguments of the parties

67 The applicant claims that the contested decision, as it results from the letters of 7 June 1994 and 15 July 1994, cannot be regarded as only a measure of administration or management capable of being adopted under a delegation of authority. In its view, it is a decision of principle (see the judgment of the Court of Justice in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraphs 29 and 34 to 39) in that it shows that the Commission was actually taking a position which not only has no legal basis but also dissuades individuals from exercising their right to bring an action. It therefore considers that the contested decision was adopted unlawfully in that it was taken by a member of the legal service and by the Commission's accountant, neither of whom was authorized to engage the Commission in the taking of a decision.

68 The Commission states in reply that the contested letters merely remind the applicant of the obligation to pay default interest which it assumed in providing the bank guarantee following the letter notifying it of the Commission's decision of 25 March 1992 and that they do not amount to a decision within the meaning of Article 189 of the Treaty. At the hearing, the Commission explained, in reply to a question put by the Court, that, even assuming that the contested letters could be regarded as constituting a decision against which an action could be brought, such a decision would, in any event, be only a management or administrative measure capable of being adopted under a delegation of authority.

Findings of the Court

69 Article 11 of the Commission's Rules of Procedure of 17 February 1993 (OJ 1993 L 230, p. 15) provides that the Commission may empower one or more of its members to take, on its behalf and under its responsibility, clearly defined management or administrative measures, provided that the principle of collective responsibility is fully respected. Delegation of signing authority within an institution is in fact a measure relating to the internal organization of the services of the Community administration, in accordance with Article 11 of the Commission's Rules of Procedure of 17 February 1993 (see, for example, the judgments in Case 48/69 *ICI* v *Commission* [1972] ECR 619 and in Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977) and officials may be authorized to take management or administrative measures on behalf and under the supervision of the Commission.

70 According to the case-law of the Court of Justice and Court of First Instance (judgment of the Court of Justice in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 64 and 65, and judgment of the Court of First Instance in Joined Cases T-79/89, T-84 to 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, paragraph 59), measures which create rights and obligations for individuals amount to decisions which must be deliberated upon by the members of the Commission together, whereas measures which merely ratify those decisions constitute accessory measures of management which may be taken pursuant to a delegation of authority (judgment in *AKZO Chemie* v *Commission*, cited above, paragraph 38).

71 Contrary to the applicant's contention, a decision by which the Commission requires default interest to be paid following a judgment of the Court of First Instance upholding in part a decision imposing a fine subject to accrual of default interest must, in so far as it is a measure giving effect to the original decision setting the fine and the rate of interest, be regarded as no more than a management and administrative measure.

72 Nor has the applicant provided any evidence to suggest that in delegating to its legal and accounting service the task of recovering the fines the Community administration failed to comply with the rules governing the matter.

73 It follows that the plea of lack of competence of the signatories of the letters of 7 June 1994 and 15 July 1994 must be rejected.

Third plea in law: dissuasive effect on the exercise of the right to bring an action

Arguments of the parties

74 The applicant submits that the Commission's increasing of the interest has a dissuasive effect as regards the exercise of the right to bring an action in that it penalizes a trader simply because he has brought an action for annulment, which the Court of First Instance has none the less held to be in large measure well founded, and actually constitutes a penalty on top of the fine. It points out that, the amount

of interest being in proportion to the duration of the proceedings before the Court of First Instance, it represents an additional penalty although the duration of the proceedings is not of the making of the party which is exercising its right to bring an action.

75 The applicant denies that it could have avoided paying the interest by paying the fine as soon as it fell due: since paying the fine immediately would have frozen ECU 3 000 000 without any yield, it would have incurred a financial loss, which it puts at ECU 450 000, owing to the fact that the Commission refuses to assume responsibility for interest relating to fines which have been unduly paid. The applicant submits that, as a result, the cost savings arising from the freezing of the amounts unduly required by the Commission are the only advantage which it obtained from providing a bank guarantee.

76 The applicant objects to the Commission's comparing, for the purpose of justifying the application of a reduced rate of interest to the first fine, an undertaking which brings an action and elects to provide a bank guarantee and an undertaking which does not bring an action and refuses to meet its obligation to pay the fine. In its view, it is pointless to compare the case of an undertaking whose action, as here, has been upheld in large measure by the Court of First Instance with that of an undertaking which refuses in bad faith to pay a fine without, however, mounting an action against it.

77 Finally, the applicant submits that it is for the Court of First Instance to decide whether or not to impose default interest when setting fines in the exercise of its unlimited jurisdiction, and the Commission is not authorized to attenuate judgments unfavourable to it by systematically readjusting fines set by the Court.

78 The Commission observes first of all that the distinction to be drawn is not between undertakings which bring proceedings and those which do not, but between undertakings which pay fines imposed on them when they are due and those which do not pay them. Undertakings which elect to provide a bank guarantee will have the advantage of a more favourable interest rate than that which will be imposed on undertakings which refuse to pay the fine imposed. The bank charges relating to the provision of a bank guarantee will not destroy that advantage.

79 The Commission points out that in its action in Case T-39/92 the Groupement did not challenge the 'highly punitive' nature of the interest rate which it applies. In any event, the applicant could have avoided paying interest at the rate imposed by the Commission by borrowing the sum at a lower rate and paying the fine as soon as it was due.

80 The Commission adds that the applicant's contention that the Commission may charge default interest only in those cases in which the action is dismissed in its entirety would mean favouring those undertakings whose action is upheld, even to a very small extent, over those which pay their fine late, since the former would be released from all obligation to pay interest despite the late payment of part of the fine. It would also deprive the principle set out in Article 185 of the Treaty of its substance.

Findings of the Court

81 The Commission's power, under Article 15(2) of Regulation No 17, to impose fines entails the power to require payment of default interest in the event that fines are not paid.

82 Thus, by allowing an undertaking which brings an action against a decision imposing a fine on it to avoid paying the fine immediately by lodging a bank guarantee as security for payment of the fine and interest thereon, the Commission is granting the undertaking a privilege for which neither the Treaty nor Regulation No 17 provides.

83 Furthermore, the interest rate imposed by the Commission where a bank guarantee is provided is lower than that required in the event of non-payment of the fine (11.75%) and a penalized undertaking has the option of paying its fine as soon as it falls due, thus avoiding having to pay default interest.

84 The applicant maintains, however, that the penalty incurred by an undertaking whose fine is reduced by the Community judicature is harsher than that incurred by an undertaking which decides not to bring an action or whose action is dismissed.

85 It must be pointed out in this regard that an undertaking whose action is dismissed has to bear interest at the reduced rate on the total amount of the fine and that an undertaking which does not bring an action bears interest at the full rate on the same amount. On the other hand, where the Community judicature reduces the amount of the fine imposed by the Commission by upholding the action in part, the interest charge calculated at the reduced rate borne by the undertaking is reduced in proportion to the amount of the fine thus set.

86 It must be added that both the fact that a fine is not legally different when revised by the Community judicature and the principle that actions do not have a suspen-

sory effect preclude the Commission from releasing an undertaking whose action has been upheld in part from its obligation to pay, as from the date on which the fine imposed by the Commission is due, interest on the amount of the fine set by the Community judicature, and from annulling the effects of the bank guarantee provided by the penalized undertaking.

87 It follows that the plea that the obligation to pay default interest on the amount of the fine set by the Community judicature dissuades individuals from exercising their right to bring an action must be dismissed.

88 It follows from all the foregoing that the main claim for annulment of the letters of 7 June 1994 and 15 July 1994 must be dismissed.

The alternative claim relating to the way in which payments made by the Groupement have been applied

Arguments of the parties

89 The applicant objects to the Commission's having applied the payment of the fine of ECU 2 000 000 made by it on 5 May 1994 first against interest and then against principal, thereby obliging it to pay interest on the remainder of the sum. In its view, such a step has no legal basis whatever in Community law. Moreover, even assuming that it took guidance in this matter from French law, in particular Article

1254 of the French Civil Code, the Commission should not have applied to fines a provision governing civil-law obligations. When a debtor declares that a payment is being made in respect of the principal sum, the creditor receiving that declaration may no longer contest that application of the payment. In the applicant's view, the position is the same where any act of the creditor shows that the latter agrees to have the money paid applied against the principal sum owed. In this case, the Groupement made it clear that it was paying off principal, since in its letter of 5 May 1994 it pointed out that the sum of ECU 2 000 000 was not to bear interest.

90 Finally, the applicant further argues that, by considering the method used to be in conformity with a principle of sound financial management, the Commission is confusing its administrative and managerial functions with those it performs as a market-regulating authority, which confer on it powers of enforcement which cannot be exercised pursuant to principles of financial management.

91 The Commission states that the way in which it applied the money paid followed a universally recognized general practice, the principle of which is laid down, in particular, in French civil law. Being generally accepted in financial matters, it does not require any other legal basis in Community law. The rule also follows from the provisions governing the Commission's internal procedure relating to the recovery of fines and periodic penalty payments, and it has never been challenged in any way. The applicant puts forward no pleas of a legal or practical nature capable of calling in question, in Community law, the method which the Commission has applied.

92 As regards the applicant's argument that in its letter of 5 May 1994 it stated that it was paying off principal, the Commission points out that it is only where the creditor agrees to have principal paid off first that this can be the case. In the present case, the Commission never agreed to have the sum of ECU 2 000 000 applied first against the principal sum owed.

Findings of the Court

93 It is common ground that the payment of ECU 2 000 000 made by the Groupement on 5 May 1994 was applied against interest first and then against principal. This method of applying payments is, the Court finds, generally accepted in national legal systems.

94 The Commission, which has the power to make the obligation to pay the fines which it imposes subject to payment of interest where those fines are not paid, also has the power to decide how payments made in relation to those fines are to be applied, provided that it does not infringe general rules or principles of Community law.

95 The applicant in this case has adduced no evidence that, in referring to rules generally accepted in most national legal systems when applying payments received, the Commission acted in breach of a rule of Community law or a general principle of law.

96 However, the applicant asserts, in substance, that the undertaking had the option, in paying the principal sum of the fine, to consolidate the amount of the default interest on the ground that the Commission decision of 25 March 1992 does not provide that part payments must first be applied against default interest. It must be held that, if this were so, the Commission's power under Article 15(2) of Regulation No 17 to require payment of default interest would be rendered entirely

ineffective. Since such a result cannot have been intended by the Community legislature, the applicant's argument must be rejected.

97 Finally, with regard to the applicant's contention that the Commission agreed to let its payment of ECU 2 000 000 be applied against principal first and then against interest, the Court finds that this argument is a mere assertion which is not borne out by any of the documents before it.

98 It follows that the alternative claim must also be dismissed as unfounded.

99 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

100 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 has been unsuccessful and the Commission has applied for costs to be awarded against it, it must be ordered to bear the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, extended composition)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear the costs.

Lenaerts Schintgen García-Valdecasas

Lindh Azizi

Delivered in open court in Luxembourg on 14 July 1995.

H. Jung K. Lenaerts

Registrar President