# JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-282/98 P,

**Enso Española SA,** established in Castellbisbal, Spain, represented by A. Creus Carreras, of the Barcelona Bar, and E. Contreras Ynzenga, of the Madrid Bar, with an address for service in Brussels at the Chambers of Cuatrecasas, Avenue d'Auderghem, 78, 1040 Brussels,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 14 May 1998 in Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, seeking to have that judgment set aside,

the other party to the proceedings being:

**Commission of the European Communities,** represented by R. Lyal and E. Gippini Fournier, of its Legal Service, acting as agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

* Language of the case: Spanish.

defendant at first instance,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L Sevón, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

## Judgment

1 By application lodged at the Registry of the Court of Justice on 23 July 1998, Enso Española SA brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875 (hereinafter 'the contested

judgment'), in which the Court of First Instance annulled part 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, hereinafter 'the Decision') and dismissed the remainder of the application.

## Facts

2 In the Decision the Commission 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).

3 According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the Fédération Française du Cartonnage, and investigations which Commission officials, acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

4 The evidence obtained from those investigations and following requests for information and documents led the Commission to conclude that from mid-1986 until at least (in most cases) April 1991 the undertakings concerned had participated in an infringement of Article 85(1) of the Treaty. The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty and, by letter of 21 December 1992, served a statement of objections on each of the

undertakings concerned, all of which submitted written replies. Nine undertakings requested an oral hearing.

5 At the end of that procedure the Commission adopted the Decision, which includes the following provisions:

'*Article 1*

Buchmann GmbH, Cascades SA, Enso-Gutzeit Oy, Europa Carton AG, Finnboard — the Finnish Board Mills Association, Fiskeby Board AB, Gruber & Weber GmbH & Co. KG, Kartonfabriek "de Eendracht" NV (trading as BPB de Eendracht NV), NV Koninklijke KNP BT NV (formerly Koninklijke Nederlandse Papierfabrieken NV), Laakmann Karton GmbH & Co. KG, Mo Och Domsjö AB (MoDo), Mayr-Melnhof Gesellschaft mbH, Papeteries de Lancey SA, Rena Kartonfabrik A/S, Sarrió SpA, SCA Holding Ltd (formerly Reed Paper & Board (UK) Ltd), Stora Kopparbergs Bergslags AB, Enso Española SA (formerly Tampella Española SA) and Moritz J. Weig GmbH & Co. KG have infringed Article 85(1) of the EC Treaty by participating,

— in the case of Buchmann and Rena from about March 1988 until at least the end of 1990,

— in the case of Enso Española, from at least March 1988 until at least the end of April 1991,

— in the case of Gruber & Weber from at least 1988 until late 1990,

— in the other cases, from mid-1986 until at least April 1991,

in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the Community

— met regularly in a series of secret and institutionalised meetings to discuss and agree a common industry plan to restrict competition,

— agreed regular price increases for each grade of the product in each national currency,

— planned and implemented simultaneous and uniform price increases throughout the Community,

— reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time,

— increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the said concerted price rises,

— exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures.

...

*Article 3*

The following fines are hereby imposed on the undertakings named herein in respect of the infringement found in Article 1:

...

(xviii) Enso Española SA, a fine of ECU 1 750 000;

...'

6 The contested judgment also sets out the following facts:

'13 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.

14 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).

15 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.

16 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.

17 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.

18 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.

19 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.

20 According to the Decision, the applicant, Enso Española SA (formerly Tampella Española SA), participated in certain meetings of the JMC (between February 1989 and April 1991), of the PC (from May 1988 to May 1989), and of the Economic Committee (from February 1987 to May 1989).'

7 Sixteen of the eighteen other undertakings held to be responsible for the infringement and four Finnish undertakings, members of the trade association Finnboard, and as such held jointly and severally liable for payment of the fine imposed on Finnboard, also brought actions against the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94 to T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-352/94 and T-354/94, and Joined Cases T-339/94 to T-342/94).

## The contested judgment

8 As regards the application for annulment of the Decision, the Court of First Instance annulled, in regard to the appellant, Article 1 of the Decision in so far as it found that it had participated in an infringement of Article 85(1) of the Treaty from March 1988 until February 1989, and the eighth indent of Article 1 of the Decision, according to which the object of the agreement and concerted practice in which it participated was to 'maintain the market shares of the major producers at constant levels, subject to modification from time to time' during the period from March 1989 until April 1991.

9 The application was dismissed as regards the remaining claims.

10 Before the Court of First Instance, the appellant also put forward six pleas in law concerning the fixing of the fine. The appeal relates specifically to the grounds of the contested judgment bearing on the fixing of that fine. Having regard to the pleas put forward by the appellant in support of its appeal, only the passages of the contested judgment relevant to the complaints of infringement of Article 190 of the EC Treaty (now Article 253 EC) and of the principle of equal treatment, in particular the failure to take into account the devaluation of the Spanish peseta, will be set out below.

### *The plea of infringement of Article 190 of the Treaty*

11 The appellant complained, in essence, that the Commission had not indicated either the reference year adopted for the purpose of applying the percentage of turnover, or the percentage of turnover adopted as a basic rate before mitigating and aggravating factors were taken into account, or even the relevant turnover figure. A mere list of the circumstances which the Commission allegedly took into

account in order to determine the amount of the fines did not constitute an adequate statement of reasons.

12 In response the Court of First Instance stated as follows:

'109 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51). Although pursuant to Article 190 of the Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, *inter alia*, *Van Landewyck and Others* v *Commission*, cited above, paragraph 66).

...

244 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no

binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

245 Moreover, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose (see, to the same effect, the judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

246 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines, the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as "ringleaders" of the cartel, whereas the other undertakings were regarded as "ordinary members". Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings, including the applicant, were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

247 In its written pleas to the Court and in its reply to a written question put by the Court, the Commission explained that the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision. Fines of a basic level of 9 or 7.5% of that individual turnover were then imposed, respectively, on the undertakings considered to be the cartel "ringleaders" and on the other undertakings. Finally, the Commission took into account any

cooperation by undertakings during the procedure before it. Two undertakings received a reduction of two thirds of the amount of their fines on that basis, while other undertakings received a reduction of one third.

248 Moreover, it is apparent from a table produced by the Commission containing information as to the fixing of the amount of each individual fine that, although those fines were not determined by applying the abovementioned figures alone in a strictly mathematical way, those figures were, nevertheless, systematically taken into account for the purposes of calculating the fines.

249 However, the Decision does not state that the fines were calculated on the basis of the turnover of each undertaking on the Community cartonboard market in 1990. Furthermore, the basic rates of 9 and 7.5% applied to calculate the fines imposed on the undertakings considered to be "ringleaders" and those considered to be "ordinary members" do not appear in the Decision. Nor does it set out the rates of reduction granted to Rena and Stora, on the one hand, and to eight other undertakings, on the other.

250 In the present case, first, points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, point 264). Similarly, point 168 of the Decision, which must be read in the light of the general criteria concerning the fines in point 167, contains an adequate statement of the criteria taken into account in order to determine the general level of the fines.

251 Second, where, as in the present case, the amount of each fine is determined on the basis of the systematic application of certain precise figures, the indication in the decision of each of those factors would permit undertakings better to assess whether the Commission erred when fixing the amount of the individual fine and also whether the amount of each individual fine is justified by reference to the general criteria applied. In the present case, the indication in the Decision of the factors in question, namely the reference turnover, the reference year, the basic rates adopted, and the rates of reduction in the amount of fines would not have involved any implicit disclosure of the specific turnover of the addressee undertakings, a disclosure which might have constituted an infringement of Article 214 of the Treaty. As the Commission has itself stated, the final amount of each individual fine is not the result of a strictly mathematical application of those factors.

252 The Commission also accepted at the hearing that nothing prevented it from indicating in the Decision the factors which had been systematically taken into account and which had been divulged at a press conference held on the day on which that decision was adopted. In that regard, it is settled law that the reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and, to the same effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136).

253 Despite those findings, the reasons explaining the setting of the amount of fines stated in points 167 to 172 of the Decision are at least as detailed as those provided in the Commission's previous decisions on similar infringements. Although a plea alleging insufficient reasons concerns a matter of public interest, there had been no criticism by the Community judicature, at the moment when the decision was adopted, as regards the Commission's practice concerning the statement of reasons for fines imposed. It was only in the judgment of 6 April 1995 in *Tréfilunion* v *Commission*, cited above, paragraph 142, and in two other judgments given on the same day (T-147/89 *Société Métallurgique de Normandie* v

*Commission* [1995] ECR II-1057, summary publication, and T-151/89 *Société des Treillis et Panneaux Soudés* v *Commission* [1995] ECR II-1191, summary publication), that this Court stressed for the first time that it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

254 It follows that, when it finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees of the decision to verify that the level of the fine is correct and to assess whether there has been any discrimination.

255 In the specific circumstances set out in paragraph 253 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed.

256 This plea cannot therefore be upheld.'

*The plea alleging a failure to take into account the devaluation of the Spanish peseta*

13 The appellant submitted that the failure, when expressing the fines in ecus, to take into account the effects of the fall in value of certain European currencies, in its case the Spanish peseta, from January 1991 to July 1994 treated persons in the same situation differently.

14 The Court of First Instance held as follows in that regard:

'334 Article 4 of the Decision states that the fines are to be payable in ecus.

335 Nothing precludes the Commission from expressing the amount of the fine in ecus, a monetary unit which is convertible into national currency. That also allows the undertakings more easily to compare the amounts of the fines imposed. Moreover, the possibility of converting the ecu into national currency distinguishes that monetary unit from the "unit of account" referred to in Article 15(2) of Regulation No 17, in regard to which the Court expressly held that, since it was not a currency in which payment was made, it necessarily meant that the amount of the fine had to be determined in national currency (*Société Anonyme Générale Sucrière and Others* v *Commission*, cited above, paragraph 15).

336 The Court cannot uphold the applicant's criticism in regard to the legality of the Commission's method of converting into ecus the undertakings' reference turnover at the average exchange rate for that same year (1990).

337 First of all, the Commission should ordinarily use one and the same method of calculating the fines imposed on the undertakings penalised for having participated in the same infringement (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 122).

338 Second, in order to be able to compare the different turnover figures sent to it, which are expressed in the respective national currencies of the undertakings concerned, the Commission must convert those figures into a single monetary unit. As the value of the ecu is determined in accordance with the value of each national currency of the Member States, the Commission rightly converted the turnover figure of each of the undertakings into ecus.

339 The Commission also acted correctly in taking the turnover in the reference year (1990) and converting that figure into ecus on the basis of the average exchange rates for that same year. In the first case, the taking into account of the turnover achieved by each undertaking during the reference year, that is to say, the last complete year of the period of infringement found, enabled the Commission to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those aspects being relevant for an assessment of the gravity of the infringement committed by each undertaking (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 120 and 121). In the second place, taking into account, in order to convert the turnover figures in question into ecus, the average exchange rates for the reference year adopted, enabled the Commission to prevent any monetary fluctuations occurring after the cessation of the infringement from affecting the assessment of the undertakings' relative size and economic power and the scale of the infringement committed by each of them and, accordingly, its assessment of the gravity of that infringement. The assessment of the gravity of an infringement must have regard to the economic reality as revealed at the time when that infringement was committed.

340 Thus, the argument that the turnover figure for the reference year should have been converted into ecus on the basis of the rate of exchange at the

date of adoption of the Decision cannot be upheld. The method of calculating the fine by using the average rate of exchange for the reference year makes it possible to avoid the uncertain effects of changes in the real value of the national currencies which may, and in this case actually did, arise between the reference year and the year in which the Decision was adopted. Although this method may mean that a given undertaking must pay an amount, expressed in national currency, which is in nominal terms greater or less than that which it would have had to pay if the rate of exchange at the date of adoption of the Decision had been applied, that is merely the logical consequence of fluctuations in the real values of the various national currencies.

341 In addition, several of the addressee undertakings of the Decision own cartonboard mills in more than one country (see points 7, 8 and 11 of the Decision). Moreover, the addressees of the Decision generally carry out their activities in more than one Member State through the intermediary of local representatives. As a result, they operate in several national currencies. The applicant itself achieves more than one third its turnover on export markets. Where a decision like the decision at issue penalises infringements of Article 85(1) of the Treaty and where the addressees of the decision generally pursue their activities in several Member States, the turnover for the reference year converted into ecus at the average exchange rate used during that same year is made up of the sum of the turnovers achieved in each country in which the undertaking operates. It therefore takes perfect account of the actual economic situation of the undertakings concerned during the reference year.'

15 The Court of First Instance therefore rejected the plea.

16 Lastly, the appellant sought an order by the Court of First Instance that the Commission should pay the costs, including the expenses and interest associated with the provision of a bank guarantee or payment of the fine.

17 However, the Court of First Instance held, in paragraph 370 of the contested judgment, that in the light of the settled case-law 'expenses incurred in providing a bank guarantee in order to avoid the enforcement of a decision are not expenses incurred for the purpose of the proceedings within the meaning of Article 91(b) of the Rules of Procedure (see the order of 20 November 1987 in Case 183/83 *Krupp* v *Commission* [1987] ECR 4611, paragraph 10, and Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 101). The same holds for expenses incurred in payment of the fine'.

18 In conclusion, the Court of First Instance:

'1. [Annulled], as regards the applicant, Article 1 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) in so far as the date of the beginning of the infringement alleged against it is stated to be prior to February 1989;

2. [Annulled], as regards the applicant, the eighth indent of Article 1 of Decision 94/601;

3. [Set] the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 1 200 000;

4. [Dismissed] the application as regards the remaining claims;

5. [Ordered] each party to bear its own costs.'

## The appeal

19 In its appeal the appellant submits that the Court should set aside the contested judgment and annul the Decision, and cancel or at least reduce the fine imposed on it.

20 In support of its appeal the appellant relies on three pleas in law alleging misapplication and misinterpretation of Article 190 of the Treaty, infringement of the principle of non-discrimination, and an inconsistent statement of reasons.

### *The first plea*

21 In its first plea, the appellant complains that the Court of First Instance erred in law in that it did not find that the Decision contained an inadequate statement of reasons and did not annul it on that ground, despite having found in paragraph 249 of the contested judgment that the Commission had failed to set out in the Decision the factors which it had systematically taken into account in order to set the amount of the fines.

22 The appellant adds that such information should, in accordance with the settled case-law referred to by the Court of First Instance in paragraph 252 of the contested judgment, have been set out in the actual body of the Decision and that, save in exceptional circumstances, explanations given by the Commission to the press or during the proceedings before the Court of First Instance cannot be taken into account. Indeed, the Court of First Instance had specifically found in paragraph 252 of the contested judgment that the Commission had accepted at the hearing that nothing had prevented it from indicating those matters in the Decision.

23 In those circumstances, the Court of First Instance could not take account of the fact that the 'Commission [had] showed itself to be willing to supply any relevant information relating to the method of calculating the fines' (paragraph 255 of the contested judgment). Moreover, the fact that the Court of First Instance had to request the Commission to explain how the fine was calculated proves that the statement of reasons in the Decision was inadequate, since it did not allow the Court of First Instance to exercise its power of review. It was only when it received the Commission's explanations that the appellant was able to identify the existence of an error in the duration of the infringement imputed to it, an error of which it could not have been aware if it had not brought an action.

24 The appellant also complains that the Court of First Instance relied on the fact that the statement of reasons for the Decision was similar to that contained in other decisions previously taken by the Commission in regard to similar infringements which, until the judgments in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, *Société Métallurgique de Normandie* v *Commission* and *Société des Treillis et Panneaux Soudés* v *Commission*, cited above (hereinafter 'the Welded Steel Mesh Judgments') had not been the subject of criticism by the Court of First Instance (see paragraph 253 of the contested judgment). According to the appellant, the coherence and adequacy of the statement of reasons for a measure must be verified objectively by examining in each specific case whether it enabled the parties to ascertain the reasons for its adoption and allowed the Court of First Instance to exercise its power to review the legality of that measure. In the present case, the Court of First Instance could not therefore, after finding that the statement of reasons was inadequate, give the Commission a period of grace in which it could alter its future practice, and do so to the detriment of undertakings on which fines have been imposed.

25 Lastly, the appellant stresses the fact that the duty to state reasons is a question of public policy, whose importance is even greater in regard to measures in respect of which the institutions have a broad margin of discretion, such as in the field of competition law, where undertakings may be ordered to pay heavy fines.

26 The Commission submits, as a preliminary point, that the fixing of fines involves the exercise of discretion not merely by the Commission, when it determines the amount of the fine according to the gravity and duration of the infringement, but also by the Court of First Instance when, in the exercise of its unlimited jurisdiction, it fixes the amount which it considers appropriate (Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17). The Commission adds, in regard to the role of the Court of Justice in appeal proceedings, that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law. On the other hand, the Court of Justice does have jurisdiction to consider whether the Court of First Instance has responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34) and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31).

27 The Commission observes that the Court of First Instance held in paragraph 250 of the contested judgment that points 169 to 172 of the Decision did in fact contain 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and the duration of the infringement committed by each of the undertakings in question'.

28 Paragraphs 251 to 255 of the contested judgment are, according to the Commission, superfluous in that they refer to the consequences of the Welded Steel Mesh judgments. The Commission contends, moreover, that the appellant's reading of those judgments is incorrect. In those judgments the Court of First Instance found, as it did in the contested judgment, that the statement of reasons for the Commission's decision was adequate, while expressing the wish that there should be greater transparency as to the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of transparency as amounting to a failure to state adequate reasons for the Decision. At most, the position adopted by the Court of First Instance reflects the principle of good administrative practice, in the sense that addressees of decisions should not be forced to bring proceedings before the Court of First Instance in order to

ascertain all the details of the method of calculation used by the Commission. However, such considerations could not in themselves constitute a ground of annulment of the Decision.

29 It is necessary, first, to set out the various stages in the reasoning adopted by the Court of First Instance in response to the plea alleging infringement of the duty to state reasons in regard to the calculation of the fines.

30 The Court of First Instance first of all referred, in paragraph 109 of the contested judgment, to the settled case-law to the effect that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged, the scope of that obligation being dependent on the nature of the act in question and on the context in which it was adopted (see, in particular, besides the case-law cited by the Court of First Instance, Case C-22/94 *Irish Farmers Association and Others* v *Ministry for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809, paragraph 39).

31 The Court of First Instance then explained in paragraph 244 of the contested judgment that as regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of the infringements depends on numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

32 In that regard, the Court of First Instance held in paragraph 250 of the contested judgment that:

'points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, point 264). Similarly, point 168 of the Decision, which must be read in the light of the general criteria concerning the fines in point 167, contains an adequate statement of the criteria taken into account in order to determine the general level of the fines.'

33 However, in paragraphs 251 to 255 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 250.

34 According to paragraphs 251 and 252 of the contested judgment, the Decision does not indicate the precise figures systematically taken into account by the Commission in fixing the amount of the fines, albeit it could have disclosed them and this would have enabled the undertakings better to assess whether the Commission had erred when fixing the amount of each individual fine and whether that amount was justified by reference to the general criteria applied. The Court added, in paragraph 253, that according to the Welded Steel Mesh judgments it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

35 It concluded, in paragraph 255 of the contested judgment, that there had been an 'absence of specific grounds in the Decision regarding the method of calculation of the fines', which was justified in the specific circumstances of the case, namely the disclosure of the method of calculating the fines during the proceedings before the Court of First Instance and the novelty of the interpretation of Article 190 of the Treaty given in the Welded Steel Mesh judgments.

36 Before examining, in the light of the arguments submitted by the appellant, the correctness of the findings by the Court of First Instance regarding the consequences which disclosure of calculations during the proceedings before it and the novelty of the Welded Steel Mesh judgments may have in regard to fulfilment of the obligation to state reasons, it is necessary to determine whether fulfilment of the duty to state reasons laid down in Article 190 of the Treaty required the Commission to set out in the Decision, not only the factors which enabled it to determine the gravity and duration of the infringement, but also a more detailed explanation of the method of calculating the fines.

37 The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules.

38 First, under Article 173 of the Treaty (now, after amendment, Article 230 EC) it has the task of reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 190 of the Treaty, infringement of which renders a decision liable to annulment.

39 Second, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 172 of the Treaty and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons under Article 190 of the Treaty, to be set out in the decision.

40 As regards review of compliance with the duty to state reasons, the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

41 In those circumstances, in the light of the case-law referred to in paragraphs 109 and 244 of the contested judgment, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.

42 The Court of First Instance correctly held in paragraph 250 of the contested judgment that the Commission had satisfied that requirement. It must be observed, as the Court of First Instance observed, that points 167 to 172 of the Decision set out the criteria used by the Commission in order to calculate the fines. First, point 167 concerns in particular the duration of the infringement. It also sets out, as does point 168, the considerations on which the Commission relied in assessing the gravity of the infringement and the general level of the fines. Point 169 contains the factors taken into account by the Commission in determining the amount to be imposed on each undertaking. Point 170 identifies the undertakings which were to be regarded as 'ringleaders' of the cartel, and which should accordingly bear special responsibility in comparison with the other undertakings. Lastly, points 171 and 172 of the Decision set out the effect on the amount of the fines of the cooperation by various manufacturers with the Commission during its investigations in order to establish the facts or when they replied to the statement of objections.

43 The fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the proceedings before the Court of First Instance, is not such as to call in question the finding in paragraph 250 of the contested judgment. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in relation to review by the Community court of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision.

44 Admittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 41 of this judgment, *inter alia*, by indicating the figures which, especially in regard to the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement.

45 It may indeed be desirable for the Commission to make use of that possibility in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed. However, as the Commission has submitted, the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons.

46 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 254 of the contested judgment, that 'the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision'. Nor, without contradicting itself in the grounds of its judgment, could it, after finding in paragraph 250 of the contested judgment that the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question', then refer, as it did in paragraph 255 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

47 However, the error of law so committed by the Court of First Instance is not such as to cause the contested judgment to be set aside, since, having regard to the considerations, set out above, the Court of First Instance validly rejected, notwithstanding paragraphs 251 to 255 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

48 As there was no obligation on the Commission, as part of its duty to state reasons, to indicate in the Decision the figures relating to the method of calculating the fines, there is no need to examine the various objections raised by the applicant which are based on that erroneous premiss.

49 The first plea must therefore be rejected.

*The second plea*

50 By its second plea, the appellant complains that the Court of First Instance did not uphold the plea alleging infringement by the Commission of the principle of equal treatment on the ground that the Commission had not taken account of the effects of the devaluation of the peseta when fixing the fine imposed on it.

51 First, the appellant submits that the Court of First Instance was wrong to assert that the use of the ecu allows undertakings more easily to compare the amounts of the fines imposed and the various turnover figures disclosed (see paragraphs 335 and 338 of the contested judgment), when the only relevant comparison is that between the percentages applied to the turnover figures.

52 Second, owing to the use of the exchange rate for 1990, the reference year adopted being the last full year of the period of the infringement, the appellant considers that, because of the devaluation in the peseta between 1990 and 1994, it was treated less favourably than other undertakings involved in the infringement.

53 Third, the appellant rejects the argument by the Court of First Instance that it achieved more than one third of its turnover on export markets, so that the turnover figure for the reference year, converted into ecus at the average exchange rate used during that same year, is made up of the sum of the turnovers achieved in each country in which the undertaking operated and, consequently, takes perfect account of the actual economic situation of the undertakings concerned during the reference year (see paragraph 341 of the contested judgment).

54 According to the appellant, that method of calculation meant that it had to pay a higher fine because it used assets in a devalued currency and the turnover figure was lower than that which it had had prior to the successive devaluations, which leads to a result that is incompatible with the principle of equal treatment. In any event, even supposing that the Court of First Instance was entitled to take into account the one third of turnover achieved on export markets, it should have applied a corrective mechanism to the other two thirds in order to avoid an effect on the fine of the devaluations.

55 The Commission submits that the complaints made by the appellant with regard to the reasoning of the Court of First Instance are based on considerations of fairness rather than of law. That being so, the expression of turnover and fines in the same monetary unit offers undisputed advantages in terms of transparency and comparability, in particular as regards the economic size of the undertakings concerned, and it is hard to see how a reference point other than the ecu could be used for that purpose.

56 The Commission refers to paragraph 340 of the contested judgment which contains all the reasons necessary to reject the plea alleging infringement of the principle of equality. The other considerations in paragraphs 335 to 341 of the contested judgment, however interesting they may be, are superfluous.

57 It must be held in that regard that in paragraphs 335 to 341 of the contested judgment the Court of First Instance gave sufficient reasons in law to substantiate its conclusion that it was necessary to reject the appellant's criticisms both of the use of the ecu to fix the amount of the fines and the method of converting the reference turnover of the undertakings into ecus at the average exchange rate for that same year, and in particular the objection alleging infringement of the principle of equal treatment.

58 The Commission cannot therefore be criticised for having used one and the same method of calculating the fines imposed on undertakings for having participated in the same infringement, a method which enabled it to assess the size and economic power of each undertaking and the scope of the infringement committed, in light of the economic reality as it appeared at the time the infringement was committed.

59 Lastly, as regards monetary fluctuations, they are an element of chance which may produce advantages and disadvantages which the undertakings have to deal with regularly in the course of their business activities and whose very existence is not such as to render inappropriate the amount of a fine lawfully fixed by reference to the gravity of the infringement and the turnover achieved during the reference year. In any event, the maximum amount of the fine, determined by virtue of Article 15(2) of Regulation No 17 by reference to turnover in the business year preceding the adoption of the Decision, limits the possible harmful consequences of monetary fluctuations.

60 The seond plea must therefore be rejected.

*The third plea*

61 By its third plea, the appellant complains that the Court of First Instance did not order the Commission to pay the costs and interest associated with the provision of a bank guarantee or payment of the fine, nor hold that interest began to run only with effect from delivery of the contested judgment.

62 As the Commission has submitted, this plea is inadmissible on two grounds. First, it does not satisfy the requirements of Article 112(1)(c) of the Rules of Procedure of the Court of Justice because it does not refer to the provisions or principles of Community law alleged to have been infringed by the Court of First Instance. Second, it must be regarded as a new application which cannot be presented for the first time in an appeal. Before the Court of First Instance the appellant sought an order that the Commission pay the costs, and included under the heading of costs certain sums which the Court of First Instance rightly held did not fall under that heading (see paragraph 370 of the contested judgment). In its appeal, the appellant seeks an order that the Commission pay those same sums, even though they are not classified as expenses within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance.

63 It follows that the appeal must be rejected in its entirety.

Costs

64 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has asked for costs to be awarded against the appellant and the latter has been unsuccessful in all its pleas, the appellant must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Orders Enso Española SA to pay the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber