# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
11 December 1996 *

In Case T-49/95,

**Van Megen Sports Group BV,** formerly Van Megen Tennis BV, a company incorporated under Netherlands law, established in Eindhoven (Netherlands), represented by Antonius Wouters Willems, Advocaat, Eindhoven, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

**Commission of the European Communities,** represented by Francisco Enrique González Díaz and Wouter Wils, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 94/987/EC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/32.948 — IV/34.590: Tretorn and others) (OJ 1994 L 378, p. 45),

* Language of the case: Dutch.

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 22 October 1996,

gives the following

## Judgment

### The facts of the case

1 The applicant, Van Megen Sports Group BV (whose name at the material time was Van Megen Tennis BV), a company incorporated under Netherlands law and established in Eindhoven (the Netherlands), is the exclusive distributor in the Netherlands of Tretorn Sports Ltd (hereinafter 'Tretorn'), a company incorporated under Irish law. Tretorn is a subsidiary of Tretorn AB, a company incorporated under Swedish law, which manufactures tennis balls.

*The administrative procedure before the Commission*

2 On 14 May 1993 the Commission, after carrying out an investigation at Tretorn's premises in July 1989, decided to initiate proceedings for infringement of Article 85(1) of the EEC Treaty; it subsequently sent a statement of objections to the applicant.

3 On 13 August 1993 the applicant submitted written observations to the Commission on the statement of objections; it made oral observations at the hearing which took place on 16 November 1993.

*The contested decision*

4 Following the administrative procedure the Commission adopted Decision 94/987/EC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/32.948 — IV/34.590: Tretorn and others) (OJ 1994 L 378, p. 45, hereinafter 'the Decision' or 'the contested decision').

The Decision reads as follows:

'*Article 1*

Tretorn Sport Ltd and Tretorn AB have infringed Article 85(1) of the EC Treaty by applying a general export ban to their distributors of tennis balls, implemented through monitoring measures and sanctions, through the reporting and investigation of parallel imports of tennis balls, the marking of tennis balls, and the suspension of supplies in order to prevent parallel imports and exports of tennis balls.

Formula Sport International Ltd has infringed Article 85(1) by participating in the implementation in the United Kingdom of the export ban and suspension of supplies in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Fabra SPA has infringed Article 85(1) by participating in the implementation in Italy of the export ban and suspension of supplies through the reporting and investigation of parallel imports of tennis balls, the marking of tennis balls and the suspension of supplies in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Tenimport SA has infringed Article 85(1) by participating in the export ban and the suspension of supplies, through the reporting of parallel imports to Tretorn with the effect that Tretorn and its Italian exclusive distributor took measures with a view to eliminating those imports.

Zürcher AG has infringed Article 85(1) by participating in the implementation in Switzerland of the export ban and suspension of supplies, through the reporting and investigation of parallel imports of tennis balls and the marking of tennis balls in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Van Megen Tennis BV has infringed Article 85(1) by participating in the implementation in the Netherlands of the reporting and investigation of parallel imports in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

*Article 2*

A fine of ECU 600 000 is hereby imposed on Tretorn Sport Limited and Tretorn AB jointly and severally and fines of ECU 10 000 each on Formula Sport International Ltd; on Fabra SPA; on Zürcher AG; and on Van Megen Tennis BV, in respect of the infringements referred to in Article 1.

...

*Article 3*

Tretorn Sport Ltd, Tretorn AB, Fabra SPA, Tenimport SA, Zürcher AG and Van Megen Tennis BV shall, in so far as they have not already done so, terminate the infringements referred to in Article 1. They shall refrain from adopting any other measures having equivalent effect.'

5 In the Decision the Commission found that since 1987 at least Tretorn had, in concertation with its exclusive distributors, introduced an export ban in its exclusive distribution system and had set up a series of mechanisms aimed at implementing and reinforcing that ban. Those mechanisms consisted of systematic reporting and investigation of instances of parallel imports, marking of products to identify the origin of parallel imports, and suspension of supplies to specific markets to prevent actual or potential parallel imports (points 13 and 14 of the Decision).

6 With respect to the reporting and investigating of parallel imports, the Commission found that Tretorn itself or Tretorn's distribution network had reported parallel imports wherever there was evidence of such imports (point 22 of the Decision). A fax from Tretorn to Tretorn AB of 16 July 1987 showed that in July 1987 the applicant had informed Tretorn that Tretorn tennis balls were 'again turning up' in the Netherlands. Tretorn asked the applicant to forward the code number to it to allow it to find out 'which country [had] shipped' (point 24). In an internal Tretorn memorandum of 20 June 1988 it was stated that the applicant had found parallel imports from two sources and hoped to obtain the date codes (point 25).

7 With respect to the marking of products, the Commission found that the evidence in its possession indicated that Tretorn marked its tennis balls with date codes which would allow the origin of parallel imports to be traced. Numerous references to those codes and their use could be found in Tretorn's correspondence (point 35 of the Decision).

8 During the procedure before the Commission, the applicant explained that its object in reporting date codes to Tretorn was not to prevent parallel imports but to check whether Tretorn was not supplying directly in its territory, and stated that it itself supplied companies which it knew to be parallel exporters. The Commission considered that 'even if the interpretation given by Van Megen were correct, the fact remain[ed] that the information [had been] given in the context of a ban on parallel exports of which Van Megen was well aware and it [had] actively participated in identifying the source of the parallel imports with a view to suppressing it ...' (point 70 of the Decision).

9 As to the imposition of fines on Tretorn's distributors, the Commission stated (point 78 of the Decision):

'In determining whether to impose fines and at what level the Commission has taken into account the fact that some of Tretorn's distributors have taken a particularly active part in preventing parallel imports; but also that such participation was in other cases of a limited nature and has to be set in the context of Tretorn's general policy of prohibiting any export of its products. Moreover, the part played by Tenimport was of a less substantial nature and it is therefore justified in refraining from imposing a fine on that undertaking.'

10 Finally, according to point 77 of the contested decision, 'during the course of the procedure, Tenimport ... confirm[ed] the existence of an unwritten but actual prohibition on exports. It considered that the recent cancellation of its distribution agreement with Tretorn could only be understood as meaning that Tenimport had not complied with that prohibition.'

## Procedure

11 By application lodged with the Registry of the Court of First Instance on 21 February 1995, the applicant brought the present action.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory measures of inquiry. The Court did, however, by letter of 4 October 1996, request the Commission to produce certain documents. The Commission did so, by letter lodged at the Registry on 9 October 1996.

13 The parties presented oral argument and their replies to the Court's questions at the hearing on 22 October 1996.

## Forms of order sought by the parties

14 The applicant, Van Megen Sports Group BV, claims that the Court should annul the Commission's decision.

15 The defendant Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

## The claim for annulment of the contested decision

16 Article 1 of the Decision charges the applicant with having participated in the implementation in the Netherlands in the reporting and investigation of parallel imports of tennis balls in order to enforce Tretorn's policy of preventing parallel imports and exports. The pleas in law put forward by the applicant, which essentially seek annulment of Article 1 of the Decision and consequently also of Article 2, in so far as those articles concern the applicant, should be examined with respect to that charge.

*Arguments of the parties*

17 The applicant submits in effect that in so far as it finds that the applicant participated in the reporting and investigating of parallel imports of tennis balls, the Decision is not based on sufficient evidence and lacks an adequate statement of reasons.

18 It observes that since about 1985 it has had a monopoly of sales in the Netherlands of tennis balls manufactured in Ireland by Tretorn, but there is no written agreement confirming that exclusive right. Tretorn never imposed a ban on exports.

Since the start of commercial relations between them, the applicant reported to Tretorn on two occasions only, in 1987 and 1988, that Tretorn tennis balls not supplied by the applicant were being offered for sale to its customers. It submits that it made those reports, by telephone, for two reasons. First, it wished to check whether the balls had not been supplied directly by Tretorn to customers in the Netherlands, since at that stage of their commercial relations it was afraid that Tretorn might not respect its obligation not itself to supply the applicant's customers in the applicant's territory. That obligation was consistent with Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1). Secondly, given that the applicant's customers could buy Tretorn tennis balls at prices considerably lower than those at which it could offer them, it had tried, by making those reports, to strengthen its position in negotiations with Tretorn, so as to obtain a better price.

19 As to the fax of 16 July 1987, the applicant had been informed by telephone by some of its customers that Scapino BV (hereinafter 'Scapino'), a chain of shoe and clothes shops based in Assen (Netherlands), was selling tennis balls to consumers at a lower price than that applied by the applicant. Its customers had asked how that was possible and whether it was invoicing different prices to Scapino and to them. It had therefore contacted Tretorn to find out whether Tretorn did sometimes supply the Netherlands; this Tretorn denied. The fact that that does not appear in the fax is of no importance, since the fax was neither sent by nor addressed to the applicant, so that it could not have been aware of its content at the time. The wording of the fax should therefore not be given the importance attached to it by the Commission. The applicant states that it was asked to forward the date codes but was unable to find them. In any case, those codes would not have made it possible to determine from which country the tennis balls had been sent, since neither the manufacturer nor the importers have a tracking system. The code numbers on the packaging of the balls gave only the date of manufacture or shipment. Whether the balls were supplied to Germany, France or another country, all the balls manufactured during a given week were packaged in packaging

bearing the same code. The codes were not mentioned on the invoices or packaging forms. Even if it could be ascertained that tennis balls came from a particular country, that would not make it possible to find out who had shipped the consignment in question. In the present case, it was easy to find out, for example, that the tennis balls purchased by Scapino came from France, because in France the packaging has to have text in French, something which the applicant pointed out in its telephone conversation with Tretorn. In any event, it was a matter of indifference to the applicant who had supplied Scapino with the balls. What mattered was to be able to pay for the balls the same price as the other distributors. The applicant found that Tretorn sold its tennis balls in France at a lower price than in the Netherlands. It discussed that with Tretorn and was eventually able to obtain better terms.

20 The same happened in mid-1988. The applicant points out that the memorandum of 20 June 1988, like the fax of 16 July 1987, was not sent by it and that it was not aware of its content at the time.

21 The applicant then states that it was not informed of any agreements or concerted practices between Tretorn and/or other distributors and that it never acted in concert with the latter with respect to stopping supplies to parallel importers and/or exporters. On the contrary, it supplied tennis balls to Scapino, knowing that Scapino was selling Tretorn tennis balls in the Netherlands obtained by parallel imports from France. Scapino was the only undertaking which engaged in the parallel importation of Tretorn balls into the Netherlands. The applicant did nothing to obstruct those activities. In this respect, it cites a letter from Scapino as evidence. Scapino's statements in that letter show that the applicant's communications to Tretorn did not constitute acts incompatible with Community competition law.

22 In this connection, the two reports referred to in paragraph 18 above, the only evidence relied on by the Commission, do not show or do not sufficiently show that the applicant actively participated in obstructing parallel imports of Tretorn tennis balls within the Community. Since the applicant was not aware of the other

agreements, practices or actions of Tretorn and/or the other distributors, those agreements, practices or actions cannot be imputed to it, and consequently cannot be used in argument against it. In the applicant's opinion, it is striking that in point 46 of the Decision the Commission mentions an internal Tretorn memorandum dated 23 August 1988 recommending stopping supplies to the United States market because tennis balls shipped there were turning up in the Netherlands as parallel imports, without asserting or establishing that that information came from the applicant.

23 Moreover, the applicant observes that according to point 70 of the Decision it was well aware that the information given to Tretorn was given in the context of a ban on parallel imports, so that it 'actively participated in identifying the source of the parallel imports with a view to suppressing it'. It submits that that reasoning is wrong and does not follow from the facts. It asserts that two telephone reports in 10 years, in which it attempted to find out whether Tretorn was exporting directly to the Netherlands and to obtain better prices, cannot be regarded as 'active participation'. In the absence of other arguments by the Commission, the statement of reasons must consequently be considered inadequate.

24 The Commission contends to begin with that the evidence it has to show that Tretorn infringed Article 85(1) of the Treaty is particularly solid and justifies the conclusion that Tretorn's conduct was not unilateral but was part of an agreement or concerted practice between it and its distributors. The Commission refers to points 16 to 50 of the Decision, and in particular point 15, where it quotes a passage from a fax of 6 June 1989 from Tretorn AB to Zürcher AG, which says that '... our policy is to protect each and every distributor from grey market imports. We have also ... implemented many controls, designed new packages, refused several orders, etc., in order to keep this grey market business at a minimum.'

25 It then asserts that it has sufficient evidence of the infringement committed by the applicant. The two pieces of evidence summarized in points 24 and 25 of the Decision, namely the fax of 16 July 1987 and the internal memorandum of 20 June 1988, fully warrant the conclusion that the applicant actively participated in the Netherlands in reporting and investigating parallel imports in order to implement Tretorn's policy.

26 On this point, the fax of 16 July 1987 shows that it was the applicant who telephoned Tretorn to inform it that Tretorn tennis balls not coming from the applicant had 'again' turned up on the Netherlands market. Tretorn thereupon asked the applicant to inform it of the code number, to enable it to find out 'which country [had] shipped' those products. The remainder of the text of the fax shows that Tretorn already had suspicions ('while I of course suspect our friends') as to the origin of the goods, namely the United Kingdom ('if it is the UK'), and that the request to the applicant to forward the code number was intended to obtain proof of those suspicions ('we must wait for proof').

27 The Commission considers that the reasons given by the applicant to explain its reports to Tretorn are unconvincing. First, the word 'again' leaves some doubt as to the applicant's assertion that its report was an isolated occurrence. Secondly, the fax makes no mention whatever of the applicant's being suspicious that Tretorn was itself supplying the Netherlands. Nor does it refer to attempts by the applicant to obtain a better price. It refers solely to an instance of parallel imports reported by the applicant and looked into by Tretorn and the applicant jointly. In particular, the sentence mentioning that the applicant had been asked to forward the code number in order to determine the country of origin leaves no doubt as to the applicant's actual participation in reporting and investigating cases of parallel imports.

28 The same conclusion follows from the internal memorandum of 20 June 1988. That memorandum shows that the applicant had reported that there were parallel imports from two sources and was evidently in the course of investigating the code numbers in order to identify those sources. The final sentence of the memorandum shows that the applicant hoped to find out the date codes within a few days.

29 The Commission rejects the applicant's argument that the fax and the internal memorandum have no evidential value. It observes that these are internal Tretorn documents, written by someone who was well-informed, in which certain practices of the applicant are reported, outside the context of any defence or justification before the Commission or the Court of First Instance. The fact that the documents come from a well-informed person who had no reason to falsify his description of the applicant's practices only confirms their probative force.

30 As to the applicant's argument relating to point 46 of the Decision (see paragraph 22 above), the Commission explains that, with regard to the applicant, it did not rely on the fact mentioned in point 46, but only on the two items of evidence referred to in points 24 and 25 of the Decision. It was thus unnecessary to refer to the applicant by name in point 46. Nevertheless, Tretorn could not have been informed except by the applicant that tennis balls supplied to the United States were appearing on the Netherlands market.

31 The Commission submits that the letter from Scapino does not contradict its evidence in any way. Rather, it follows from that letter that the applicant played a double game. The Commission notes that the letter was written recently in the context of the applicant's defence to the Commission's findings. There is no proof that it really was Scapino which benefited from parallel imports in 1987 and 1988,

nor that it was the only parallel importer. Nor has it been established that Scapino was aware of the general context of the applicant's practices, in particular its contacts with Tretorn.

32 The Commission disputes the applicant's assertion that it is not possible to determine from the date codes from which country the tennis balls have been shipped. There is no doubt that the Tretorn manager knew what information could be deduced from the codes. The fact that he asked the applicant for the date codes in order to find out from them the country of origin of the tennis balls shows that the codes could indeed be used for that purpose.

33 The Commission submits, finally, that contrary to the applicant's assertion, the Decision contains a sufficient statement of reasons. It refers on this point to its observations (see above).

*Findings of the Court*

34 The applicant does not deny that Tretorn operated a system of exclusive distribution coupled with a prohibition of exports and with mechanisms intended to ensure that that prohibition was applied as effectively as possible. It acknowledges that it has been Tretorn's exclusive distributor in the Netherlands since 1985. It denies, on the other hand, that Tretorn imposed an export ban on *it* and that *it* participated in the reporting and investigating of parallel imports. Until the Commission initiated the infringement procedure, it had not even been aware of the ban on parallel exports.

35 According to the case-law of the Court of Justice and the Court of First Instance, the provisions of Article 85(1) of the Treaty may not be declared inapplicable to an exclusive distribution contract which does not in itself include a prohibition of

re-exports of the products which are the subject of the contract, where the contracting parties are engaged in a concerted practice aimed at restricting parallel imports intended for an unauthorized dealer (see Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883 and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 88).

36 In the present case, the Commission had relied on the following two documents, described in points 24 and 25 of the Decision, as proof that the applicant had taken part in the Netherlands in the reporting and investigating of parallel imports:

— a fax of 16 July 1987 from Mr M. of Tretorn to Mr A. of Tretorn AB:

'I just had a phone call from Will Van Megen to advise that XL boxes of 4 again turning up in a major shoe chain in Holland.

I have asked Will to forward the Code No. to [Mr O.] so that he can advise which country has shipped.

While I of course suspect our friends, we must wait for the proof.

If it is the UK, then obviously the shipment has been made to Holland in the past few weeks.'

— a Tretorn internal memorandum of 20 June 1988 from Mr M. to Mr O.:

'Please ring Will Van Megen. He has parallel from 2 different sources.

1 Box of 4, made in Ireland, no date code yet.

2 Box of 4, USTA approved, no date code yet.

He hopes to have date codes in a few days.'

37 Those two documents from Tretorn have probative force. As the Commission rightly observed, they were written by a well-informed third party who had no reason to give false information. Moreover, they were written outside the context of any procedure for defence or justification before the Commission or this Court.

38 Those two pieces of evidence clearly establish that the applicant participated in the reporting and investigating of parallel imports of tennis balls, for the purposes of applying Tretorn's policy. It is clear from the fax of 16 July 1987 that the applicant informed Tretorn of the existence of parallel imports of Tretorn tennis balls in the Netherlands, that it was not the first time that it gave Tretorn such information, and that it had been asked to provide the date codes which might enable Tretorn to determine the country from which the balls came. As to the internal memorandum of 20 June 1988, that document shows that the applicant again informed Tretorn of the existence of parallel imports of Tretorn tennis balls in the Netherlands, that it had identified two different sources of those imports, and that it was investigating to obtain the date codes.

39 With respect to the Tretorn internal memorandum of 23 August 1988, mentioned at point 46 of the Decision, recommending the stopping of deliveries to the American market because tennis balls delivered there were reappearing in the Netherlands via parallel imports, it is sufficient to observe that the Commission did not rely on that document with regard to the applicant. Point 46 of the Decision comes under the heading 'Suspension of supplies to prevent parallel imports', under which the Commission mentions the measures adopted by Tretorn to deal with those imports. That document is thus relied on as against Tretorn, and not the

applicant, in whose case the Commission rightly considered that it had sufficient evidence.

40 As to the date codes, the fax of 16 July 1987, the internal memorandum of 20 June 1988 and the other evidence relied on by the Commission in the Decision (see points 36 to 38 and 40) show beyond doubt that Tretorn could identify the origin of parallel imports from the date codes. That can be seen in particular from a fax of 17 April 1987 from Tretorn to Formula Sport International Ltd (see point 37), in which Mr M. of Tretorn stated: 'The date codes are all from the shipment to Formula.' It can also be seen from a fax of 15 May 1987, also from Tretorn to Formula Sport International Ltd, in which Mr M. states: 'We are sure of our facts/date codes and the balls shipped to Formula ended up in Switzerland. ... Formula is guilty so let's not have any more discussion.'

41 As for the letter from Scapino, that document does not in any way contradict the Commission's evidence. The applicant could not itself prevent the parallel imports by Scapino. Had it wished to prevent them, it would have had to contact Tretorn, so that that company might take the necessary measures for that purpose. Moreover, it was naturally in the applicant's interest to sell as many Tretorn tennis balls as possible, to Scapino amongst others. It should also be noted that Tretorn's policy was to prohibit exports. There is nothing before the Court to suggest that Scapino would have exported the Tretorn tennis balls supplied by the applicant. The applicant therefore did not infringe Tretorn's policy by selling the balls to

Scapino, which, like the applicant, is a Netherlands undertaking. Tretorn thus had no interest either in asking the applicant to refuse to supply Scapino, even assuming that it had been informed of those sales.

42 The reasons given by the applicant to explain why it made reports to Tretorn cannot be accepted. If the applicant had wished to make those reports solely in order to find out whether Tretorn was making direct supplies to customers in the Netherlands and to strengthen its position in negotiations with Tretorn and thereby obtain a better price, it would not have needed to try to obtain the date codes of the tennis balls imported in parallel. It is thus apparent that it was in fact aware of Tretorn's policy of prohibiting parallel imports. It follows that the Commission was correct in finding, in point 70 of the Decision, that even if the interpretation given by the applicant was correct, 'the fact remains that the information was given in the context of a ban on parallel exports of which Van Megen was well aware and it actively participated in identifying the source of the parallel imports'.

43 The applicant cannot, finally, argue that its two telephone conversations with Tretorn cannot be described as active participation, since it was the applicant which took the initiative in contacting Tretorn, not vice versa. Moreover, it can be seen from paragraph 38 above that the applicant made inquiries to obtain the date codes of the parallel imports. It follows that the applicant actively participated in Tretorn's policy.

44 It follows from the foregoing that the pleas in law alleging that the Commission did not adduce sufficient evidence and did not give an adequate statement of reasons for its decision must be rejected.

## The claim for annulment of the fine

*Arguments of the parties*

45 The applicant submits, first, that the reasons stated for the amount of the fine, set out in point 78 of the Decision (see paragraph 9 above), are insufficient. It observes that the Commission does not indicate the degree to which each distributor participated in Tretorn's policy or the evidence it relied on to establish that participation. It points out that the same fine was imposed on four of the five distributors even though, in its opinion, the documents in the case made it clear enough that the 'contribution', whether conscious or not, of the various distributors varied greatly.

46 It states, secondly, that during the administrative procedure it argued that, assuming that it had infringed Article 85(1) of the Treaty, which it denied, a penalty should not be imposed on it, since its two telephone reports were isolated occurrences of secondary importance. The Commission failed to take account of that argument, although it expressly refrained from imposing a fine on Tenimport. The applicant had, however, put forward a comparable defence and its situation had been almost the same as Tenimport's. That the applicant never maintained that there was a ban on exports was attributable to the fact that such a ban had never been imposed on it.

47 The applicant does not accept the Commission's argument that it had doubts as to whether an infringement of the Treaty was imputable to Tenimport. The applicant considers that the remission of a fine for an infringement regarded as proven cannot depend on the extent of the doubts subsisting in the Commission's assessment.

48 The Commission considers that it gave sufficient reasons for the amount of the fine imposed on the applicant. As to the part played by the applicant in the infringement, that was determined in points 24, 25, 70 and 76 of the Decision. As regards the level of each fine imposed in relation to the others, the Commission took into account, in fixing them, as indicated in point 78 of the Decision, the degree to which each distributor had participated in the infringement. It also considered the part played by the various distributors 'in the context of Tretorn's general policy of prohibiting any export of its products'. Those considerations led it to impose a substantial fine, as a proportion of its turnover, on Tretorn alone. By contrast, it imposed on the distributors only a flat-rate fine of a small amount. The underlying idea of that decision was that Tretorn had been principally responsible, while the distributors' responsibility consisted merely in cooperating in the functioning of the system operated by Tretorn. The Commission states that since what was involved was cooperation in the functioning of one and the same system and the fines envisaged were moreover to be flat-rate fines of small amounts, it did not think it necessary to draw a distinction between the distributors.

49 However, an exception was made for the Belgian distributor, Tenimport, because the Commission considered that it did not have such strong evidence of its participation in implementing Tretorn's policy. The only document it had was a fax of 27 February 1989 from Tenimport to Tretorn. In that fax Tenimport complained of the 'incredible' price of the Tretorn tennis balls which transited through Belgium to Italy and asked how such prices could be applied. The Commission concluded that the explanation given by Tenimport, namely that it was doing no more than negotiating prices with Tretorn, did not seem altogether improbable. On the other hand, the fax of 16 July 1987 and the internal memorandum of 20 June 1988 concerning the applicant made no mention of prices, but only of the appearance on the Netherlands market of tennis balls which did not come from the applicant and of cooperation between Tretorn and the applicant to find the source of those parallel imports. Those documents were thus quite different in content from the fax from Tenimport.

50 The Commission rejects the applicant's argument that it put forward the same defence as Tenimport. As point 77 of the Decision shows, Tenimport confirmed at

the hearing the existence of the infringement committed by Tretorn. Tenimport also cooperated with the Commission's investigations after that. Furthermore, it can be seen from point 77 that Tenimport had been penalized by Tretorn, which terminated the distribution agreement because Tenimport had refused to cooperate in the context of its system of export bans. In any event, it is not for the applicant to defend Tenimport, which has not lodged a complaint against the contested decision.

*Findings of the Court*

51 It is settled case-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-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 19). Moreover, since a decision constitutes a single whole, each of its parts must be read in the light of the others (see Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 66).

52 In the present case, the Commission clearly indicated in the Decision the degree to which each distributor participated in Tretorn's policy and the evidence on which it relied to establish that participation. As regards, more specifically, the applicant, the degree of its participation may be seen in particular from points 24, 25, 57, 70 and 76 to 78 and from the sixth paragraph of Article 1 of the Decision. The analysis as set out in paragraphs 36 to 44 above shows that the Commission provided

adequate substantiation and reasons for its decision, in that it found that the applicant had participated in the reporting and investigating of parallel imports of Tretorn tennis balls in order to enforce Tretorn's policy.

53 As to the amount of the fine, it should be pointed out that, according to the case-law, since fines constitute an instrument of the Commission's competition policy, that institution must be allowed a margin of discretion when fixing their amount, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see *Martinelli*, cited above, paragraph 59).

54 As may be seen from the first paragraph of Article 2 of the Decision, the Commission imposed flat-rate fines of small amounts on Tretorn's distributors. It should also be noted that the distributors all cooperated in the functioning of the same system. In such a situation the Commission is not obliged to distinguish between the various distributors or state reasons peculiar to each distributor for the amount of the fine imposed. Consequently, the Commission did not exceed the limits of its margin of discretion.

55 With reference to the applicant's argument that a penalty should not have been imposed on it because the two telephone reports were isolated occurrences of secondary importance, it follows from paragraph 43 above that the applicant's participation in Tretorn's policy had to be regarded as active. The Commission was therefore correct in taking no account of that argument. On this point, it should also be noted that, according to settled case-law, although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based and to mention the factual and legal elements which provide the legal basis for the measure and the considerations which have led to its adoption, it is not

required to discuss all the issues of fact and law raised by every party during the administrative procedure (see, *inter alia*, Case T-149/89 *Sotralentz* v *Commission* [1995] ECR II-1127, paragraph 73).

56 Finally, the applicant's reliance on the fact that no fine was imposed on Tenimport can be of no assistance to its case. An applicant may not argue from such a circumstance in order himself to escape a penalty imposed for breach of Article 85 of the Treaty when the other undertaking's circumstances are not even the subject of proceedings before the Community judicature (see Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307, paragraph 197, and *Dunlop Slazenger*, cited above, paragraph 176).

57 The claim for annulment of the fine must consequently be rejected.

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

## Costs

59 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has asked for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

**1. Dismisses the application;**

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

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 11 December 1996.

H. Jung K. Lenaerts

Registrar President