JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

14 May 1998 *

In Case T-304/94,

Europa Carton AG, a company incorporated under German law, established in Hamburg (Germany), represented by Gerhard Wiedemann and Wolfgang Kirchhoff, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Alex Bonn, 7 Val Sainte-Croix,

applicant,

v

Commission of the European Communities, represented initially by Bernd Langeheine and Richard Lyal, of its Legal Service, acting as Agents, subsequently by Richard Lyal, assisted by Dirk Schroeder, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

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

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

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing which took place from 25 June to 8 July 1997,

gives the following

Judgment

Facts

1 This case concerns Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard, OJ 1994 L 243, p. 1), as corrected prior to its publication by a Commission

decision of 26 July 1994 (C(94) 2135 final) (hereinafter 'the Decision'). The Decision imposed fines on 19 producers supplying cartonboard in the Community on the ground that they had infringed Article 85(1) of the Treaty.

2 The product with which the Decision is concerned is cartonboard. The Decision refers to three types of cartonboard, designated as 'GC', 'GD' and 'SBS' grades.

3 GD grade cartonboard (hereinafter 'GD cartonboard') is white-lined chipboard (recycled paper) which is normally used for the packaging of non-food products.

4 GC grade cartonboard (hereinafter 'GC cartonboard') is cartonboard with a white top layer and is normally used for the packaging of food products. GC cartonboard is of higher quality than GD cartonboard. During the period covered by the Decision there was normally a price differential of approximately 30% between those two products. High quality GC cartonboard is also used, but to a lesser extent, for graphic purposes.

5 SBS is the abbreviation used to refer to cartonboard which is white throughout (hereinafter 'SBS cartonboard'). The price of this cartonboard is approximately 20% higher than that of GC cartonboard. It is used for the packaging of foods, cosmetics, medicines and cigarettes, but is designated primarily for graphic uses.

6 By letter of 22 November 1990, the British Printing Industries Federation ('BPIF'), a trade organisation representing the majority of printed carton producers in the United Kingdom, lodged an informal complaint with the Commission. It claimed

that the producers of cartonboard supplying the United Kingdom had introduced a series of simultaneous and uniform price increases and it requested the Commission to investigate whether there had been an infringement of the Community competition rules. In order to ensure that its initiative received publicity, the BPIF issued a press release. The content of that press release was reported in the specialised trade press in December 1990.

7 On 12 December 1990, the Fédération Française du Cartonnage also lodged an informal complaint with the Commission, making allegations relating to the French cartonboard market which were similar to those made in the BPIF complaint.

8 On 23 and 24 April 1991, 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, hereinafter 'Regulation No 17'), carried out simultaneous investigations without prior notice at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

9 Following those investigations, the Commission sent requests for both information and documents to all the addressees of the Decision pursuant to Article 11 of Regulation No 17.

10 The evidence obtained from those investigations and 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.

11 The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty. By letter of 21 December 1992 it served a statement of objections on each of the undertakings concerned. All the addressees submitted written replies. Nine undertakings requested an oral hearing. A hearing was held on 7, 8 and 9 June 1993.

12 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:

(...)

(iv) Europa Carton AG, a fine of ECU 2 000 000;

(...)'

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 The applicant, Europa Carton AG ('Europa Carton'), not only produces cartonboard but is also the largest converter (manufacturer of folding boxes) in Germany. According to the Decision, the applicant infringed Article 85(1) of the Treaty by

participating in an agreement and concerted practice from mid-1986 until at least April 1991. It took part in some meetings of the PC and of the JMC.

Procedure

21 The applicant brought this action by application lodged at the Registry of the Court on 14 October 1994.

22 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-308/94, T-309/94, T-310/94, 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-348/94, T-352/94 and T-354/94).

23 The applicant in Case T-301/94, Laakmann Karton GmbH, withdrew its action by letter lodged at the Registry of this Court on 10 June 1996 and the case was removed from the Register by order of 18 July 1996 (Case T-301/94 *Laakmann Karton GmbH* v *Commission*, not published in the ECR). Sarrió was considered to be responsible for the involvement of Prat Carton in the cartel for the whole of the period of its participation (point 154 of the Decision).

24 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, have also brought actions against the Decision (Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94).

25 Lastly, an action was also brought by an association, CEPI-Cartonboard, which was not an addressee of the Decision. However, it withdrew its action by letter

lodged at the Registry of the Court on 8 January 1997 and the case was removed from the Register of the Court by order of 6 March 1997 (Case T-312/94 *CEPI-Cartonboard* v *Commission*, not published in the ECR).

26 By letter of 5 February 1997 the Court requested the parties to take part in an informal meeting with a view, in particular, to their presenting observations on a possible joinder of Cases T-295/94, T-304/94, T-308/94, T-309/94, T-310/94, 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-348/94, T-352/94 and T-354/94 for the purposes of the oral procedure. At that meeting, which took place on 29 April 1997, the parties agreed to such a joinder.

27 By order of 4 June 1997 the President of the Third Chamber, Extended Composition, of the Court, in view of the connection between the abovementioned cases, joined them for the purposes of the oral procedure in accordance with Article 50 of the Rules of Procedure and allowed an application for confidential treatment submitted by the applicant in Case T-334/94.

28 By order of 20 June 1997 he allowed an application for confidential treatment submitted by the applicant in Case T-337/94 which related to a document produced in response to a written question from the Court.

29 Upon hearing the report of the Judge Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure and adopted measures of organisation of procedure in which it requested the parties to reply to certain written questions and to produce certain documents. The parties complied with those requests.

30 The parties in the cases referred to in paragraph 26 above presented oral argument and gave replies to the Court's questions at the hearing which took place from 25 June to 8 July 1997.

Forms of order sought

31 The applicant claims that the Court should:

— annul, as regards the applicant, the eighth and ninth indents of Article 1 of the Decision;

— reduce the amount of the fine imposed on it by Article 3 of the Decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment in part of Article 1 of the decision

Arguments of the parties

33 The applicant contends that the complaint that it colluded on market shares and on capacities is unfounded.

34 It is one of the smallest producers of cartonboard for folding cartons in the Community, has only one machine and is the largest converter (manufacturer of folding cartons) in Germany. It therefore had a small market share, located mainly in Germany, and was the main customer of its own cartonboard mill. The latter fact induced it to play a purely passive role in the committees of the PG Paperboard; its participation in seven (out of a total of 32) JMC meetings does not call this into question.

35 It did not participate in agreements or concerted practices to maintain the market shares of the major manufacturers at constant levels, or in concerted measures to control supply on the Community market.

36 As regards the objection that it colluded on market shares, it states that it was never a member of the PWG and was never part of the large groups of producers. However, according to the Decision (points 36, 37, 52, 56 and 130), the arrangements on market shares were agreed between the participants in the PWG, that is to say, by agreement between the large groups of manufacturers. The Commission even accepts that the agreements to allocate markets, in particular the freezing of market shares, by their very nature principally concerned the large producers. The Commission also explicitly acknowledges that the small producers did not participate (point 57 of the Decision) and that they were merely informed of the need to adapt their own conduct to the price before tonnage policy of the large producers (point 58 of the Decision).

37 As regards the complaint that it colluded on capacities, the applicant, referring to the Decision (points 69, 70. 71, 130 and 131), submits that only members of the PWG took part in the concerted practice whereby downtime was coordinated.

38 It disputes that it cooperated in an overall plan in which collusion on prices and volume control were inextricably linked (see point 116 of the Decision).

39 It also disputes the Commission's assertion (point 116 of the Decision) that there is no indication that the undertakings were able to select the aspects of the cartel in which they wished to participate and that they could decline to participate in others.

40 The Commission states that the infringement cannot be divided into several independent infringements. The applicant was involved in a single infringement which consisted, in essence, in the association of producers over several years in an unlawful plan to pursue a common objective (point 116 et seq. of the Decision). Each addressee undertaking of the Decision therefore committed the infringement as a whole, even if it did not participate or is not proved to have participated in all the elements of the cartel.

41 The collusion on prices and the control of volumes were inextricably linked to the same overall plan. The Commission does not submit that collusion on prices can take place only in conjunction with agreements on market shares and capacities. As a general rule, a price cartel is ineffective from an economic point of view if it is accompanied by an increase in supply. The Commission concludes from this that it is incorrect to distinguish between the agreements on prices and the agreements on volumes, there being no dispute that both of those elements existed in the present case. The fact that the agreements on market shares and on volume control principally concerned the large producers does not alter its assessment in any way, because by their actions all the participants in the cartel ensured that there was no significant increase in supply. In other words, because of the interdependence of prices and volumes all the undertakings were aware that the success of the cartel also depended on volume control.

42 The applicant's argument that it did not play an active role in the cartel is therefore without foundation. By participating regularly and on numerous occasions (seven of which are proved) in the JMC meetings, a description of whose activities is set out in point 44 of the Decision and has not been contested, the applicant took part in the drawing up of strategies whereby a common, uniform price increase was to be imposed throughout the sector. The discussions in the JMC must therefore also have dealt with questions of volume control and market sharing. The applicant's regular participation in those meetings in itself therefore justifies the objection raised against it and, as no evidence to the contrary has been produced, it must be held that it subscribed to the agreements adopted there (judgment in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraphs 56 and 66 et seq).

43 Through its participation in the JMC meetings and in the various price initiatives, the applicant clearly showed that it supported the objectives of the cartel. Even assuming passive conduct on its part, that conduct in any event facilitated the performance of the infringement (Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 18 and Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 49 et seq.).

44 The fact that the applicant may not have participated in all the volume control measures does not alter that situation. Those measures, which essentially concerned the large manufacturers, were to the benefit of all the participants in the cartel because they could not be separated from the elements of the infringement relating to price fixing and the participation of all the manufacturers in the price initiatives ensured their success (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 267, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 272).

Findings of the Court

45 According to Article 1 of the Decision, the undertakings referred to in that provision infringed Article 85(1) of the Treaty by participating, in the case of the applicant from about 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, *inter alia*, 'agreed regular price increases for each grade of the product in each national currency' and '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', and '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'.

46 It therefore follows that, according to the Decision, each of the undertakings referred to in Article 1 thereof infringed Article 85(1) of the Treaty by participating in a single infringement which consisted of collusion on three matters which were different but which pursued a common objective. Those three types of collusion must be regarded as the constituent elements of the overall cartel.

47 The applicant does not dispute that it participated in collusion on prices or that the period of the infringement it was found to have committed is correct. Furthermore, it admits that it participated in seven JMC meetings between 13 January and April 1991. It also accepts that it took part in some meetings of the PC.

48 In the light of those circumstances, it is necessary to verify whether the Commission has shown that the applicant took part in the two other constituent elements of the overall cartel, that is to say, collusion on downtime and market shares.

— The applicant's participation in collusion on downtime

49 According to the Decision, the undertakings present at PWG meetings participated, from the end of 1987, in collusion on downtime and downtime was actually taken as from 1990.

50 It is apparent from point 37, third paragraph, of the Decision that the true purpose of the PWG, as described by Stora, 'included "discussions and concertation on markets, market shares, prices, price increases and capacity"'. Moreover, referring to 'the agreement reached in the PWG during 1987' (point 52, first paragraph, of the Decision), the Commission states that that agreement aimed in particular to maintain 'constant levels of supply' (point 58, first paragraph, of the Decision).

51 As to the role played by the PWG in the collusion on the control of supply, which was a feature of the consideration of machine downtime, the Decision states that the PWG played a decisive role in implementing downtime when, from 1990, production capacity increased and demand fell: 'From the beginning of 1990 ... the industry leaders ... considered it necessary to concert on the need for taking downtime in the forum of the PWG. The major producers recognised that they could not increase demand by lowering prices and that maintaining full production would simply bring prices down. In theory, the amount of downtime required to bring supply and demand back into balance could be calculated from the capacity reports' (point 70 of the Decision).

52 It is also observed: 'However, the PWG did not formally allocate the "downtime" to be taken by each producer. According to Stora, there were practical difficulties

in reaching a coordinated plan on downtime to cover all the producers. Stora says that for these reasons only "a loose system of encouragement existed"' (point 71 of the Decision).

53 Furthermore, in its second statement (appendix 39 to the statement of objections, point 24), Stora gives the following explanation: 'With adoption by the PWG of the policy of price before tonnage and the gradual implementation of an equivalent price system from 1988, members of the PWG recognised that downtime would have to be taken to maintain those prices in the face of a reduced growth in demand. Without taking downtime the producers would have been unable to maintain agreed price levels in the face of an increasing excess of capacity'.

54 In point 25 of its statement, Stora adds: 'In 1988 and 1989 the industry was able to run at near full capacity. Downtime in addition to normal closure for repairs and holidays became necessary from 1990. ... Ultimately downtime had to be taken when the order flow ceased in order to maintain the price before tonnage policy. The amount of downtime required to be taken by producers (to maintain the balance between production and consumption) could be calculated from the capacity reports. No formal allocation of downtime was made by the PWG, although a loose system of encouragement existed ...'.

55 The Commission also bases its conclusions on Appendix 73 to the Statement of Objections, a confidential note dated 28 December 1988 sent by the marketing director of the Mayr-Melnhof Group in Germany (Mr Katzner) to the General Manager of Mayr-Melnhof in Austria (Mr Gröller) concerning the market situation.

56 According to that document, cited in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided on in

1987 had produced 'winners' and 'losers'. The expression 'Presidents' grouping' was interpreted by Mayr-Melnhof as a general reference to both the PWG and the PC, that is to say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a). It is unnecessary to consider that interpretation in the present context.

57 The reasons adduced by the author of the note in order to explain why he considered Mayr-Melnhof to be a 'loser' at the time when the note was written are significant evidence of the existence of collusion on downtime between the participants in the meetings of the PWG.

58 The author states:

'(4) It is at this point that there begins to be a difference in opinion between the parties involved as to what is desired.

[...]

(c) All sales representatives and European agents were released from their quantity budgets and a pricing policy followed which admitted of practically no exceptions (our employees often did not understand our changed attitude to the market — in the past they were just required to go for tonnage and now the sole objective is price discipline with the danger of having to stop machines).'

59 Mayr-Melnhof states (appendix 75 to the statement of objections) that the passage reproduced above refers to its own internal situation. However, when considered in the light of the more general background to the note, that passage reflects the

implementation, at the level of sales personnel, of a rigorous policy adopted within the 'Presidents' grouping'. The document must therefore be construed as meaning that the participants in the 1987 agreement, that is to say, the participants in the meetings of the PWG at least, undoubtedly weighed up the consequences the agreed policy would have if it were to be applied rigorously.'

60 On the basis of the foregoing, the Commission has proved that there was collusion on downtime between the participants in the meetings of the PWG.

61 According to the Decision, the undertakings which participated in the meetings of the JMC, which included the applicant, also took part in that collusion.

62 In that regard the Commission states, *inter alia*: 'Besides the Fides procedure which gave globalised figures, it was regular practice for each individual producer to disclose its own order backlog to competitors in JMC meetings.

This information on the number of days' orders in hand was relevant for two purposes:

— deciding whether conditions were right for introducing a concerted price increase,

— determining the downtime necessary to maintain the supply-demand balance ...' (point 69, third and fourth paragraphs, of the Decision).

63 The Commission also observes as follows:

'The unofficial notes made of two JMC meetings, one in January 1990 (see recital 84), the other in September 1990 (recital 87), as well as other documents (recitals 94 and 95) confirm, however, that the major producers kept their smaller competitors closely and continuously informed in the PG Paperboard of their plans to take additional downtime as an alternative to decreasing prices' (point 71, third paragraph, of the Decision).

64 The documentary evidence relating to the JMC meetings (appendices 109, 117 and 118 to the statement of objections) confirm that discussions on downtime took place in the context of the preparation of concerted price increases. In particular, Appendix 118 to the statement of objections, a note emanating from Rena dated 6 September 1990, refers to the amounts of price increases in several countries, the dates for the future announcements of those increases and the state of the order backlogs expressed in working days for several manufacturers. The author of the document notes that certain manufacturers were providing for downtime, which he illustrates as follows:

'Kopparfors 5-15 days
5/9 will stop for five days'.

65 Moreover, although appendices 109 and 117 to the statement of objections do not contain information relating directly to the downtime envisaged, they show that the state of order backlogs and order entries were discussed at the JMC meetings of 6 September 1989 and 16 October 1989.

66 Those documents, read in conjunction with Stora's statements, constitute sufficient proof of participation in collusion on downtime by the producers represented at the JMC meetings. The undertakings participating in collusion on prices were necessarily aware that the object of examining the state of order backlogs and order entries and discussions on possible downtime was not merely to determine whether the market conditions were favourable to a concerted price increase but also to determine whether downtime was necessary in order to avoid the agreed price level being jeopardised by an excess of supply. In particular, it is apparent from appendix 118 to the statement of objections that the participants in the JMC meeting of 6 September 1990 agreed on the announcement of an imminent price increase, even though several producers had stated that they were preparing to stop production. Consequently, the market conditions were such that the effective application of a future price increase was going to require, in all probability, that (additional) downtime be taken, and this is therefore a consequence which was accepted, at least implicitly, by the producers.

67 On that basis, and without the need to consider the other evidence on which the Commission relies in the Decision (appendices 102, 113, 130 and 131 to the statement of objections), the Court finds that the Commission has proved that the undertakings participating in the meetings of the JMC and in the collusion on prices took part in collusion on downtime.

68 The applicant must therefore be considered to have participated in collusion on downtime.

— The applicant's participation in collusion on market shares

69 The applicant disputes that it participated in collusion on market shares, but does not challenge the assertion in the Decision that the producers which participated in the PWG meetings concluded an agreement which provided for 'the "freezing" of the west European market shares of the major producers at existing levels, with no attempts to be made to win new customers or extend existing business through aggressive pricing' (point 52, first paragraph, of the Decision).

70 In those circumstances, the Court points out that the Commission states as follows in the Decision in regard to the undertakings which did not participate in the meetings of the PWG:

'While the smaller cartonboard producers attending meetings of the JMC were not privy to the detailed discussions on market shares in the PWG, they were, as part of the "price before tonnage" policy to which they all subscribed, well aware of the general understanding between the major producers to maintain "constant levels of supply" and no doubt of the need to adapt their own conduct to it' (point 58, first paragraph, of the Decision).

71 Although it does not emerge expressly from the Decision, the Commission is in this respect confirming Stora's statements according to which:

'Other producers who did not participate in the PWG were not generally informed of the detail of the market share discussions. Nevertheless, as part of the price before tonnage policy in which they participated, they would have been

aware of the understanding by the major producers not to undermine prices by maintaining constant levels of supply.

As regards the supply of GC grades, in any event, the shares of the producers who did not participate in the PWG were of such an insignificant level that their participation or non-participation in the market share understandings had virtually no impact one way or the other' (appendix 43 to the statement of objections, point 1.2).

72 The Commission, like Stora, is therefore proceeding from the assumption that, even in the absence of direct evidence, the undertakings which did not participate in meetings of the PWG but which have been proved to have subscribed to the other constituent elements of the infringement set out in Article 1 of the Decision must have been aware of the existence of collusion on market shares.

73 Such a line of reasoning cannot be accepted. First, the Commission does not rely on any evidence to show that the undertakings which were not present at the meetings of the PWG subscribed to a general agreement providing, in particular, for the freezing of the market shares of the main producers. Appendix 73 to the statement of objections is corroborative evidence of Stora's statements relating to the existence of collusion on market shares between the undertakings allowed to participate in the 'Presidents' grouping' and of collusion on downtime between those same undertakings (see paragraphs 49 et seq above). However, there is no other evidence to show that the object of the PC was, *inter alia*, to discuss collusion on market shares and control of production volume. Consequently, the expression 'Presidents' grouping' ('Präsidentenkreis') used in appendix 73 to the statement of objections cannot, despite the explanation supplied by Mayr-Melnhof, be construed as referring to bodies other than the PWG. The applicant cannot therefore be regarded as having subscribed to the general agreement by virtue of its participation in meetings of the PC.

74 Second, the mere fact that those undertakings participated in collusion on prices and collusion on downtime does not demonstrate that they also participated in collusion on market shares. Contrary to the Commission's apparent claim, the collusion on market shares was not intrinsically linked to collusion on prices and/or collusion on downtime. It suffices to point out that the aim of the collusion on market shares by the main producers who met in the PWG was, according to the Decision (point 52 et seq.), to maintain market shares at constant levels, with occasional amendments, even during periods in which market conditions, and in particular the balance between supply and demand, were such that it was unnecessary to control production in order to guarantee the effective implementation of the agreed price increases. It follows that any participation in collusion on prices and/or collusion on downtime does not show that the undertakings which were not present at the meetings of the PWG participated directly in collusion on market shares, or that they were, or necessarily should have been, aware of it.

75 Third, in the second and third paragraphs of point 58 of the Decision, the Commission relies, as additional evidence to support the assertion in question, on appendix 102 to the statement of objections setting out a note obtained from Rena which, according to the Decision, relates to a special meeting of the Nordic Paperboard Institute ('NPI') held on 3 October 1988. It suffices to state that the applicant was not a member of the NPI and that the reference in that document to a possible necessity to take downtime cannot, for the reasons already stated, constitute evidence of collusion on market shares.

76 In order to be entitled to hold each addressee of a decision, such as the present decision, responsible for an overall cartel during a given period, the Commission must demonstrate that each undertaking concerned either consented to the adoption of an overall plan comprising the constituent elements of the cartel or that it participated directly in all those elements during that period. An undertaking may also be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it

participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel. Where that is the case, the fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 85(1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed.

77 In the present case, the Court finds that the Commission has not proved that the applicant knew, or must have known, that its own unlawful conduct was part of an overall plan which included, over and above the collusion on prices and the collusion on downtime in which it actually participated, also collusion on the market shares of the major producers.

78 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', should therefore be annulled as regards the applicant.

The application for reduction of the amount of the fine

The plea alleging infringement of the principle of equal treatment as regards the general level of the fines

Arguments of the parties

79 According to the applicant, the amount of the fine is inappropriate. In adopting a much higher basic level than in other cases, the Commission

disregarded the principle of equal treatment which applies to its policy on fines.

80 Even though the Court of Justice has already accepted the principle that the policy in regard to fines may be made more severe (judgment in Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 108), any increase in the level of fines should be justified by a general change in the Commission's policy. In support, the applicant refers to the basic percentage of turnover in the cartonboard sector of the undertakings concerned which was adopted in order to calculate the fine. That percentage was 7.5%, a rate over 50% higher than in previous cases (see, in particular, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 174). However, in Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322-Cement) (OJ 1994 L 343, p. 1) the Commission adopted a rate of 4% of turnover by the relevant undertakings in the cement sector in the Community, even though it had found that there had been a most serious infringement of the competition rules which justified significant fines and the infringement had taken place over a period of approximately ten years. The Commission's policy on fixing fines is therefore incoherent and incompatible with the Community law principle of equal treatment.

81 In any event, the Decision should set out objective reasons justifying the different treatment of undertakings in different sectors.

82 In reply, the Commission states that it is not required to announce a general modification in its fines policy when it raises the level of fines (*Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 109).

83 In the present case, having regard to the seriousness of the infringement, a percentage of approximately 7.5% of the relevant part of turnover of the relevant undertakings is a wholly reasonable amount (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 386). When imposing fines for infringements of Article 85 of the Treaty, the Commission is not always required to apply the same rates.

84 Furthermore, at the time when the statement of objections was served, the applicant was aware of the Commission's intention, announced in its XXIst *Report on Competition Policy* (paragraph 139), to strengthen the deterrent effect of fines. Similarly, the applicant and the other companies concerned should have been fully aware of the fact that they would receive significant fines, because Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149-Polypropylene) (OJ 1986 L 230, p. 1, hereinafter 'the Polypropylene decision') had been published prior to the beginning of the period taken into account in order to calculate the fines under the contested decision. The Commission observes in that regard that the Court found that the general level of fines imposed on the undertakings addressed by the Polypropylene decision was amply justified in the circumstances of that case (*Rhône-Poulenc* v *Commission*, cited above, paragraph 164).

85 Lastly, the Commission considers that the reference to the total amount of fines imposed is irrelevant, because that amount depends on the number of undertakings concerned and their respective turnover figures.

Findings of the Court

86 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines ranging from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business

year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement. As is apparent from the case-law of the Court of Justice, 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 the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

87 In the present case, the Commission determined the general level of fines by taking into account the duration of the infringement (point 167 of the Decision) and the following considerations (point 168):

'— collusion on pricing and market sharing are by their very nature serious restrictions on competition,

— the cartel covered virtually the whole territory of the Community,

— the Community market for cartonboard is an important industrial sector worth some ECU 2 500 million each year,

— the undertakings participating in the infringement account for virtually the whole of the market,

— the cartel was operated in the form of a system of regular institutionalised meetings which set out to regulate in explicit detail the market for cartonboard in the Community,

— elaborate steps were taken to conceal the true nature and extent of the collusion (absence of any official minutes or documentation for the PWG and JMC; discouraging the taking of notes; stage-managing the timing and order in which price increases were announced so as to be able to claim they were "following", etc.),

— the cartel was largely successful in achieving its objectives.'

88 Furthermore, there is no dispute as to the fact that fines of a basic level of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision were imposed depending on whether the undertaking was regarded as a 'ringleader' of the cartel or an 'ordinary member'.

89 It should be pointed out, first, that when assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy (see, *inter alia*, the cases cited above, *Musique Diffusion Française and Others* v *Commission*, paragraphs 105 to 108, and *ICI* v *Commission*, paragraph 385).

90 Second, the Commission rightly argues that, on account of the specific circumstances of the present case, no direct comparison could be made between the general level of fines adopted in the present decision and those adopted in the Commission's previous decisions, in particular in the *Polypropylene* decision, which the Commission itself considered to be the most similar to the decision in the present case. Unlike in the *Polypropylene* case, no general mitigating circumstance was taken into account in the present case when determining the general level of fines. Moreover, the adoption of measures to conceal the existence of the collusion shows that the undertakings concerned were fully aware that their conduct was unlawful. The Commission was therefore entitled to take those measures into account when it assessed the gravity of the infringement because they were a particularly serious aspect of it which differentiated it from infringements previously found by the Commission (see paragraphs 150 to 154 below).

91 Third, the Court notes the lengthy duration and obviousness of the infringement of Article 85(1) of the Treaty which was committed despite the warning which the Commission's previous decisions, in particular the *Polypropylene* decision, should have provided.

92 On the basis of those factors, the criteria set out in point 168 of the Decision justify the general level of fines set by the Commission.

93 Finally, in setting the general level of fines in the present case, the Commission did not so depart from its previous line of decisions as to oblige it to give a more detailed account of the reasons for its assessment of the gravity of the infringement (see, *inter alia*, Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31).

94 Consequently, this plea must be rejected.

The plea that there is, at least in part, no basis for the fine

Arguments of the parties

95 The applicant considers that in order to fix the amount of its fine it is necessary to take into account the fact that it did not participate in collusion on downtime or market shares (see paragraphs 33 to 39 above).

96 Moreover, the incorrectness of the Commission's assertion that the cartel was largely successful on the market must be taken into account. In fact, that assertion is contradicted by the Commission itself, since it states that complaints were made to some members of the PWG (point 59 of the Decision) and that the large manufacturers increased their market shares despite the alleged collusion on quotas (point 60 of the Decision). The fact that the Commission considers the complaints made against certain PWG members to be sanctions cannot, however, alter the fact that the manufacturers concerned were acting largely in their own personal interest and that, for that reason, the cartel did not function.

97 The Commission refers to its arguments (see paragraphs 40 to 44 above) as regards the applicant's full participation in all the aspects of the single infringement.

98 As regards the success of the cartel, it considers that, if there had not been any collusive agreements, prices and market shares would have developed in a fundamentally different way. The Court should therefore reject the applicant's assertion that the cartel only functioned imperfectly; the existence of sanctions and the increase in the market shares of certain large producers do not preclude it from doing so.

Findings of the Court

99 It has already been held (see paragraph 77 above) that the Commission has not proved that the applicant participated in collusion on market shares.

100 The Court considers, however, in the exercise of its unlimited jurisdiction, that the gravity of the infringement of Article 85(1) of the Treaty which the applicant is found to have committed, namely its participation in the collusion on prices and on downtime, is still such that the amount of the fine should not be reduced.

101 In that regard, the Court observes that the applicant did not participate in the PWG meetings and fines were not therefore imposed upon it as a cartel 'ring-leader'. Because, as the Commission itself states, the applicant was not a 'prime mover' of the cartel (point 170, first paragraph, of the Decision), the level of fine adopted in regard to it was 7.5% of its turnover on the Community cartonboard market in 1990. That general level of the fines is justified (see paragraph 86 et seq. above).

102 Furthermore, even though the Commission wrongly considered that producers which were not represented in the PWG were 'well aware' of the collusion on market shares (point 58, first paragraph, of the Decision), it is nevertheless clear from the Decision itself that it was the undertakings meeting in the PWG which took concerted action on the 'freezing' of market shares (in particular point 52 of the Decision) and that there was no discussion of the market shares held by the producers which were not represented in it. Moreover, as the Commission stated in point 116, second paragraph, of the Decision, 'by their very nature the market sharing arrangements (particularly the freezing of shares described in recitals 56 and 57) involved primarily the major producers'. The collusion on market shares wrongly attributed to the applicant was therefore, in the Commission's own view, merely a secondary aspect of collusion on prices.

103 The applicant's claim that the cartel did not achieve a broad measure of success on the market challenges the Commission's finding that the cartel 'was largely successful in achieving its objectives' (point 168, seventh indent, of the Decision). It is common ground that this refers to the effects on the market of the infringement found in Article 1 of the Decision.

104 However, the applicant's argument must be understood in the sense that it is not disputing the Commission's assessment of the effects of the collusion on prices. Indeed, the applicant submits that, as a purchaser of cartonboard, it suffered the effects of the concerted price increases (see paragraph 132 et. seq. below). Moreover, the arguments and evidence on which it relies in support of this plea relate solely to the effects of the collusion on market shares.

105 The applicant's argument must therefore be understood as a submission that the collusion on market shares did not largely succeed in achieving its objectives.

106 It is apparent from the Decision that the finding concerning the large measure of success in achieving objectives is essentially based on the effects of collusion on prices. While those effects are considered in points 100 to 102, 115, and 135 to 137 of the Decision, the question whether the collusion on market shares and collusion on downtime affected the market was, by contrast, not specifically examined in it.

107 Moreover, as regards collusion on market shares, the Commission does not submit that the objective of the undertakings which participated in the meetings of the PWG was an absolute freezing of their market shares. According to the second paragraph of point 60 of the Decision, the agreement on market shares was not static 'but was subject to periodic adjustment and re-negotiation'.

108 It follows that there is no basis for the applicant's objection.

109 The plea must therefore be rejected.

The plea alleging that an incorrect turnover figure was taken into account

Arguments of the parties

110 The applicant states that in order to assess the fine to be imposed on each undertaking the Commission took into account each undertaking's situation in the sector (size, product range, market share, group turnover and turnover in cartonboard) (point 169, first paragraph, third indent, of the Decision).

111 In the applicant's case, the individual particulars annexed to the statement of objections show that its turnover and market share (calculated on the basis of its turnover) were assessed by including 'internal sales', namely its own requirements. In its reply to a request for information dated 8 October 1993, the applicant supplied only the turnover figure relating to transactions with third parties in the cartonboard sector (DM 63 860 000 in 1991) because only that figure was the appropriate figure for the purposes of commercial law. Despite that reply, the Commission required details from it of the value of supplies to its folding carton factories (which amounted to DM 14 100 000 in 1991).

112 The inclusion of internal supplies when fixing the amount of the fine is contrary to Article 85 of the Treaty and Article 15 of Regulation No 17.

113 Internal supplies do not form part of turnover from external sources and should not therefore be taken into account. Turnover is generated from internal supplies only when the folding cartons manufactured by the applicant's factories are delivered to third parties, at which point it is regarded as part of overall turnover.

114 The applicant adds, in reply to the assertion that it benefited from the increases in the price of cartonboard, that the Commission did not assess whether intra-group turnover was relevant for the purposes of cartel law. The use by an undertaking of products which it manufactures for its own needs or the use of services between legally dependent parts of an undertaking (businesses, plants, services, sales offices etc) which have no legal and economic autonomy to make their own decisions are not subject to Article 85 of the Treaty, however they may be included in the in the accounting system. The applicant's delivery of cartonboard to its folding carton factories for their own needs was therefore irrelevant and should not have been taken into consideration.

115 The distinction between external and internal supplies is consistent with the Commission's well-established practice in the context of concentrations (Commission Decision of 23 September 1991 in *Mannesmann/Boge* (IV/M.134), point 19 and Commission Decision of 30 September 1992 declaring the compatibility of a concentration with the common market (Case No IV/M214 - *Du Pont/ICI*) (OJ 1993 L 007, p. 13, point 31)) and the Commission may not depart from that practice when applying Article 85 of the Treaty or Article 15 of Regulation No 17. Furthermore, Article 5(1), second sentence, and Article 5(5) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) show that receipts from internal transactions are not to be included when turnover is calculated.

116 In its judgment in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549 the Court indirectly confirmed that there is such a distinction in holding that when establishing turnover in order to calculate the amount of the fine, it is possible to take account both of the undertaking's overall turnover and the turnover from the goods to which the infringement relates. In that judgment the Court was referring only to turnover from sales to third parties.

117 The Commission states that the applicant sold folding cartons manufactured from the products covered by the Decision. It therefore benefited from an unlawful competitive advantage; it cannot seriously argue that intra-group transactions were invoiced by it at the excessive prices applied by the cartel. It therefore benefited in one form or another from the sale of products which had been the subject of the collusive arrangements. Consequently, it would be wrong to take no account of 'internal' turnover. To accept the applicant's point of view would grant an unjustified advantage to integrated producers.

118 It is, moreover, incorrect to state that there was no turnover from the cartonboard products in question; they were used in order to produce folding cartons which were then sold on the market.

119 The Commission does not accept that the delivery of cartonboard to the applicant's factories with a view to further processing constitutes own consumption and so falls outside the scope of Article 85 of the Treaty. Reference cannot be made to the Commission's practice in the area of merger control because, when calculating turnover under Article 1 and 5 of Regulation No 1064/89 in merger control cases, it is necessary to determine whether the undertakings concerned have sufficient economic power to justify the use of the Community merger control machinery.

Finding of the Court

120 There is no dispute as to the fact that fines of a basic level of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision were imposed depending on whether the undertaking was regarded as a 'ringleader' of the cartel or an 'ordinary member'. The applicant was considered to fall within the latter category.

121 It is apparent from the documents before the Court that the figure taken as a basis for calculating the fine imposed on the applicant was the sum of the turnover from sales of cartonboard to third parties and the value of internal deliveries of cartonboard to the folding carton factories which are owned by the applicant and do not therefore have separate legal personality from it.

122 The Commission rightly took the turnover figure calculated on that basis in order to determine the amount of the fine.

123 No provision states that internal supplies within one company may not be taken into account in order to determine the amount of the fine.

124 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines ranging from ECU 1 000 to 1 000 000 or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty.

125 The upper limit for a fine exceeding ECU 1 000 000 is fixed by express reference to the undertaking's turnover. As the Court of Justice has held, that limit seeks to prevent fines from being disproportionate in relation to the size of the undertaking and, since only total turnover can effectively give an approximate indication of that size, that percentage must be understood as referring to the total turnover (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 118 and 119).

126 In determining, as it did in regard to the undertakings referred to in Article 3 of the Decision, the amount of the fines on the basis of turnover solely from sales of the product concerned by the infringement, the Commission based its calculation on the part of the undertakings' total turnover which best reflected the benefit derived from the cartel.

127 The applicant's assertion that it did not derive any benefit from the cartel when it supplied its cartonboard to its own factories cannot be upheld. It has not adduced any evidence as to the value of those internal deliveries, even though the Commission asserted in its defence that they were not affected by the unlawfully agreed increases in the price of cartonboard. The applicant's folding carton factories, which is to say, the applicant itself, therefore benefited from the cartel by using cartonboard from its own production as a raw material. Unlike competing converters, the applicant did not have to bear the cost increases caused by the concerted price increases.

128 To ignore the value of the applicant's internal cartonboard deliveries would inevitably give an unjustified advantage to vertically integrated companies. In such a case the benefit derived from the cartel might not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates.

129 Finally, since the scope of the application *ratione materiae* of Article 85 of the Treaty is not in issue in this case, the applicant's proposed analogy with the treatment of intragroup agreements (see paragraph 114 above) is of no relevance.

130 Similarly, the applicant's argument based on the rules applicable to concentrations between undertakings is ineffective. It suffices to find in that regard that the exclusion of any 'internal sales' when calculating the overall turnover figure for undertakings in the context of concentrations, as provided for in Article 5 of Regulation No 4064/89, is explained by the fact that if such transactions were included the same turnover would be counted twice. In the present case, however, turnover from sales of folding boxes was not taken into account in order to calculate the amount of the applicant's fine.

131 In the light of the foregoing, the plea must be rejected.

The plea that there were mitigating circumstances because, as purchaser of cartonboard, the applicant was affected by the concerted measures

Argument of the parties

132 According to the applicant, the Commission failed to take into account the fact that it is the largest German converter of cartonboard for folding boxes; the economic value of its converting activities is three times greater than that of its cartonboard production. The increases in the price of cartonboard therefore had disadvantageous economic consequences for it because they increased the cost prices of its folding-box factories.

133 This argument should have been accepted, especially in view of the fact that the converters were unable to pass on cost increases to their customers. The price increases therefore hit the converters, including the applicant, as is shown by the complaint lodged by the BPIF.

134 The Commission incorrectly claims that the applicant did not suffer any adverse effects because cartonboard was supplied by it to its converting plants at favourable prices. That reasoning is economically artificial because, in an integrated undertaking, whatever is allowed in the accounts by one of its branches to another must ultimately be 'recovered' on the market if the undertaking is to achieve profitability. Moreover, the Commission failed to take into account the fact that the applicant's cartonboard mills covered only approximately 20% of its conversion plants' cartonboard requirements. In other words, the Commission did not take into account supplies by third parties which had been invoiced at the cartel price.

135 In support of its argument, the applicant refers to Commission decisions in which it was accepted that the significance of the economic consequences, in particular the fact that an undertaking was acting under pressure, against its will or contrary to its own economic interests, may be taken into account in order to assess its role in the infringement. It also relies on the judgment in *Parker Pen* v *Commission*, cited above, in which it is clear that the Commission imposed fines of ECU 40 000 on the distributor involved and of ECU 700 000 on the supplier.

136 The Commission considers that this plea should be rejected.

137 There is no reason to believe that the applicant invoiced cartonboard for folding boxes at the prices artificially fixed by the cartel and that it therefore suffered the economic consequences of the price increases in the same way as other manufac-

turers of folding boxes. Moreover, the applicant has not shown that cartonboard delivered by other producers to its conversion plants was paid for at the prices agreed by the cartel.

138 In the light of the documents before the Court, the applicant cannot allege that it acted under pressure from its partners, against its will, or contrary to its economic interest.

Findings of the Court

139 As has already been pointed out, 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 the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 54).

140 The applicant has not disputed that it participated in the price collusion found in Article 1 of the Decision.

141 The fact that an undertaking which has participated in collusion on prices with its competitors may have acted against its own economic interests and, as a result, may have suffered the effects of that collusion does not automatically have to be taken into account as a mitigating factor when the amount of the fine to be imposed on it is determined. An undertaking which continues to collude on prices with its competitors despite the alleged harm which it is suffering, cannot be considered to have committed a less serious infringement than the other undertakings also involved in the collusion.

142 In certain circumstances the position may be different if that undertaking proves that it was compelled to act unlawfully. In the present case, however, the applicant has not even submitted that it was compelled to collude on prices with its competitors.

143 Nor has it proved that it derived no benefit from the concerted price increases in regard to the supply from its own cartonboard mill to its folding carton factories.

144 Finally, as regards supplies to its folding carton factories by competing cartonboard producers, it merely submits, without any supporting evidence, that it suffered economic harm because those supplies were invoiced to it at the unlawfully agreed prices.

145 In those circumstances, the Commission did not commit any error of law. Accordingly, the plea must be rejected.

The plea that the alleged concealment of the cartel is not an aggravating factor

Arguments of the parties

146 The applicant states that the Commission found that the collusion on pricing and market sharing were by their very nature serious restrictions on competition (point 168, first indent, of the Decision) and that elaborate steps were taken to conceal the true nature and extent of the collusion (point 168, sixth indent, of the Decision). Those alleged attempts to disguise the existence of the cartel were one

of its most serious aspects (point 167). When determining the general level of the fines, the Commission therefore found that the concealment was a particularly grave aspect of the infringement which increased its seriousness. The same factor was therefore taken into account twice.

147 Nor can the Commission complain that the applicant did not openly commit the acts which constituted infringements. As a matter of course, acts of that kind — serious restrictions of competition liable to lead to the imposition of fines — had to be concealed.

148 The Commission accepts that restrictions of competition decided upon in a cartel are generally not committed openly. It considers, however, that intentional commission of such infringements is not necessarily accompanied by the measure of secrecy adopted in the this case. It refers to the transcript of the oral hearing (p. 46, from which it is apparent that the members of the cartel had been instructed not to take notes at meetings) and to point 73 of the Decision.

149 Finally, it states that the measures taken to conceal the cartel were not assessed in isolation; they were merely one of the aspects taken into consideration in order to assess the gravity of the infringement.

Findings of the Court

150 According to the third paragraph of point 167 of the Decision, 'a particularly grave aspect of the infringement is that in an attempt to disguise the existence of the cartel the undertakings went so far as to orchestrate in advance the date and

sequence of the announcement of each major producer of the new price increases'. The Decision also states as follows: 'the producers could as a result of this elaborate scheme of deception have attributed the series of uniform, regular and industry-wide price increases in the cartonboard sector to the phenomenon of "oligopoly behaviour"' (point 73, third paragraph). Finally, according to the sixth indent of point 168, the Commission, in determining the general level of fines, took into account the fact that 'elaborate steps were taken to conceal the true nature and extent of the collusion (absence of any official minutes or documentation for the PWG and JMC; discouraging the taking of notes; stage-managing the timing and order in which price increases were announced so as to be able to claim they were "following", etc.)'.

151 The applicant does not contest the Commission's assertion that the undertakings planned the dates and order of dispatch of letters announcing the price increases. Furthermore, as regards the Commission's conclusion that the purpose of fixing the dates and order of those letters was to disguise the existence of price collusion, the applicant has not explained what purpose, other than that found by the Commission, could have been served by the collusion on the dates and order of letters announcing price increases.

152 The lack of official minutes and the almost total absence of internal notes relating to the meetings of the PWG and of the JMC constitute, having regard to the number of such meetings, to the length of time for which they continued and to the nature of the discussions in question, sufficient proof of the Commission's allegation that the participants were discouraged from taking notes.

153 It follows from the foregoing that the undertakings which participated in the meetings of those bodies were not only aware of the unlawfulness of their conduct but also took steps to conceal the collusion. Accordingly, the Commission was fully

entitled to hold those steps to be aggravating circumstances when it assessed the gravity of the infringement.

154 This plea must therefore be rejected.

The plea of infringement of the principle of equal treatment when the fines imposed on the various cartonboard producers were determined

Arguments of the parties

155 The applicant contends that Article 3 infringes the principle of equal treatment in the way in which it determines the amounts of the fines imposed on the various producers (*Dunlop Slazenger* v *Commission*, paragraph 173 et seq.). There is a difference of only ECU 1 000 000 between the amount of its fine and that of an undertaking which had participated in the PWG and had twice its production capacity. If regard is had to the matters to be taken into consideration, namely an undertaking's role and economic power, there is also a discrepancy between the fines imposed on Stora and on it, even if Stora's cooperation with the Commission is taken into account.

156 In any event, the Commission's distinction between the cartel's ringleaders and its other members is too sweeping; the role of undertakings which merely 'followed' the others was not therefore correctly assessed.

157 The Commission states that it made a twofold distinction: first, between undertakings which were the ringleaders of the cartel and those which were not, and second, between those which cooperated with it and those which did not (points 170

to 172 of the Decision). Consequently, any difference between the fines is explained by the combination of those factors with the turnover figure taken into account for each undertaking. That does not infringe the principle of equal treatment. Despite Stora's cooperation, the fine imposed on it is almost six times greater than that imposed on the applicant.

158 Lastly, it correctly assessed the role and participation of all the undertakings which were party to the cartel. The applicant's suggested category of undertakings which merely 'followed' is irrelevant.

Findings of the Court

159 As has already been observed, fines of a basic level of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision were imposed, respectively, on the undertakings considered to be the cartel 'ringleaders' and on the other undertakings. There is no dispute that Rena and Stora received a reduction of two-thirds of the amount of their fines on account of their active cooperation with the Commission from the beginning, while other undertakings, including the applicant, received a reduction of one-third, because in their replies to the statement of objections they had not contested the essential allegations of fact relied on by the Commission against them (see points 171 and 172 of the Decision).

160 The fine on the applicant thus corresponds, in accordance with the above criteria, to 7.5% of the turnover figure taken by the Commission, that rate then being reduced by one third on the ground that in its reply to the statement of objections

the applicant had not contested the essential allegations of fact relied on by the Commission against it.

161 Finally, it is apparent from a table produced by the Commission, containing information as to the calculation of each individual fine, that those fines were determined by taking into account, in addition to the above criteria, the duration of each undertaking's participation in the infringement. It follows from this that the basic rates generally applied, namely 7.5 or 9%, depending on the particular case, were then reduced pro rata temporis to reflect the period during which the undertaking in question had infringed Article 85(1) of the Treaty.

162 Since the amount of each fine was therefore the result of a combination of factors specific to the situation of the undertaking in question, there is no foundation to the applicant's argument based on a comparison between the amount of its fine, expressed as an absolute figure, and those, also expressed as absolute figures, of other undertakings to which the Decision was addressed.

163 As regards, more specifically, the comparison between the amount of the applicant's fine and that imposed on Stora, the Court points out that Stora's size and economic strength in the cartonboard sector were automatically taken into account when the amount of its fine was determined, because in order to do so the Commission took into account turnover achieved from sales of cartonboard. It is apparent from Article 3 of the Decision that even though the fine imposed on Stora was reduced by two-thirds, it amounts to ECU 11 250 000, while that of the applicant, which was reduced by one-third, is ECU 2 000 000. That difference is explained in particular by the size and economic strength of each undertaking and the extent of each undertaking's cooperation with the Commission which was taken into account. The applicant's argument is therefore ineffective.

164 As regards the question whether the basic rates adopted against undertakings regarded as 'ringleaders' and as 'ordinary members' take sufficient account of the role actually played by each undertaking in the cartel, the Court finds that the Commission rightly considered that the undertakings which took part in the meetings of the PWG had to bear a special responsibility for the infringement (point 170 of the Decision).

165 Moreover, the Commission correctly assessed the gravity of the infringement committed by the cartel's 'ringleaders' and by its 'ordinary members' by applying basic rates of 9 and 7.5% of relevant turnover to those two categories of undertakings respectively.

166 It follows that this plea must be rejected.

The plea concerning a subject dealt with in the course of common oral argument

167 At the informal meeting on 29 April 1997 the undertakings which had brought actions to contest the Decision were requested to consider whether they wished to present common oral argument in the event that the cases were joined for the purposes of the oral procedure. It was stressed that oral argument could be presented in common only by applicants which had actually relied on pleas in their applications which corresponded to the subjects to be dealt with in common argument.

168 By fax of 14 May 1997, lodged in the name of all the applicants, those applicants informed the Court of their decision to deal with six subjects in common oral argument, including the statement of reasons in regard to the fines.

169 The applicant's application did not contain any plea or argument concerning that subject. The applicant nevertheless stated at the hearing that it adopted the common oral argument in question.

170 The Court points out that under the first subparagraph of Article 48(2) of the Rules of Procedure no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure. In the present case, the applicant has not relied on any matter of law or of fact which has come to light in the course of the proceedings such as to justify the submission of the new plea in question.

171 That plea, on which the applicant relied for the first time at the hearing, is therefore inadmissible.

172 It follows from the whole of the foregoing that the eighth indent of Article 1 of the Decision must be annulled as regards the applicant, and that the remainder of the application must be dismissed.

Costs

173 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. As the applicant has been largely unsuccessful, it must be ordered to pay the costs, as sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

1) Annuls, as regards the applicant, the eighth indent of 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);

2) Dismisses the application as regards the remaining claims;

3) Orders the applicant to pay the costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary