JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
14 May 1998 *

In Case T-311/94,

BPB de Eendracht NV (formerly Kartonfabriek de Eendracht NV), a company incorporated under Dutch law, with its registered office in Appingedam, Netherlands, represented by Alexandre Vandencasteele, of the Brussels Bar, and Gordon Boyd Buchanan Jeffrey, Solicitor, Liverpool, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented initially by Richard Lyal, of its Legal Service, and Rosemary Caudwell, a national official seconded to the Commission, acting as Agents, subsequently by Richard Lyal and James Flynn, Barrister, of the Bar of England and Wales, 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: English.

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

THE COURT OF FIRST INSTANCEOF 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 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 to 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:

(...)

(viii) Kartonfabriek "De Eendracht" NV (trading as "BPB De Eendracht NV"), a fine of ECU 1 750 000;

(...)'

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, BPB de Eendracht NV (formerly Kartonfabriek de Eendracht NV), produces GD cartonboard. According to the Commission, the applicant participated in meetings of the PC, the JMC and the Economic Committee from mid-1986 until April 1991.

Procedure

21 The applicant brought this action by application lodged at the Registry of the Court on 7 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-304/94, T-308/94, T-309/94, T-310/94, 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).

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 In reply to a written question from the Court, the Commission stated in a fax of 20 May 1997 that documents concerning the Association of Cartonboard Manufacturers ('ACBM') which had not been sent to the applicant during the administrative procedure before the Commission could be disclosed to it. By letter of 21 May 1997 the Court's Registry informed the applicant that it was possible to consult those documents.

28 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.

29 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.

30 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.

31 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

32 The applicant claims that the Court should:

— annul the decision;

— in the alternative, annul Article 2 of the Decision;

— in the alternative, declare that the period of the alleged infringement was not from mid 1986 until April 1991;

— in the alternative, declare that the geographical area of the alleged infringement was not correctly identified;

— in the alternative, reduce the amount of the fine imposed;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment of the Decision

34 The applicant relies on four pleas supporting its application for annulment. The first plea alleges infringement of the rights of the defence in that the Commission failed to identify the behaviour of individual producers in the statement of objections and in the Decision. The second plea also alleges infringement of the rights of the defence in that the Commission did not disclose all of the documents. The third plea is based on infringement of Article 190 of the Treaty. The fourth plea alleges that the Commission committed a manifest error of assessment in fact and in law, thereby infringing Article 85 of the Treaty.

35 The Court will begin by considering the first and third pleas. It will then consider the fourth plea before dealing with the second plea.

A — *The plea of infringement of the rights of the defence in that the Commission did not identify the behaviour of individual producers in the statement of objections and in the Decision*

Arguments of the parties

36 The applicant does not dispute that the Commission can demonstrate that each of the addressees of the Decision participated in the infringement if it demonstrates

the existence, operation and salient features of the cartel as a whole, and then shows, on the one hand, the existence of credible and persuasive proof to link each individual producer to the common scheme and, on the other, the period during which each producer participated (points 116 and 117 of the Decision).

37 However, the Commission did not correctly identify the scheme in question, because it failed to define its exact scope and extent. It is erroneous to assume that any producer who was a member of the PG Paperboard and sat in its various committees was a participant in the cartel (point 119, first paragraph, of the Decision). Likewise, it is incorrect to take the view that the activities of the Economic Committee formed part of the illegal scheme (*ibidem*, second paragraph). Furthermore, the Commission's conclusion that all the committees of the PG Paperboard had a predominantly unlawful purpose fails to take into account the role of the PC or that of the Economic Committee. As regards the JMC, the applicant considers that only five of the 29 meetings held during the relevant period could have been concerned with price fixing.

38 Second, the applicant asserts that the Commission must prove that the Decision permits each addressee to obtain a clear picture of the complaints made against it (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 276). However, that requirement was not satisfied in regard to the applicant. Contrary to the Commission's assertion in point 118 of the Decision, there is no direct evidence to show that it participated in the infringement.

39 The applicant rejects the Commission's assertion that '[t]here is no indication ... that individuals could select the aspects of the cartel in which they wished to join and opt out of others' (point 116, second paragraph, of the Decision). In order to

draw such a conclusion, the Commission should have established that an undertaking could not participate in one element of that scheme without participating in all elements. The Commission itself acknowledged that some of the more important elements of the alleged scheme were reserved to the large producers (points 36, 51 and 71 of the Decision).

40 Moreover, contrary to the principles of the presumption of innocence, the Commission presumes that undertakings are guilty (point 116, last paragraph, of the Decision) where there is no documentary evidence in regard to them.

41 As regards the applicant, the only valid objections are those set out in the individual particulars annexed to the statement of objections, namely concerning its participation in concerted price increases in the United Kingdom in April 1989, April 1990 and January 1991.

42 The applicant asserts that in the statement of objections it was not accused of participating in the concerted price increase in the United Kingdom in 1987. The Commission could not remedy that position by merely referring, in a letter of 4 May 1993, to a technical appendix to the documents relating to the price initiatives.

43 The Commission reiterates its approach, as set out in points 116 and 117 of the Decision.

44 It does not have to compartmentalise the continuous conduct of the undertakings into a number of separate infringements and the participation of the individual producers on a particular occasion or in a particular manifestation of the cartel

is not disproved solely because they are not implicated by direct evidence (Cast T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 126).

45 In any event, in reply to the applicant's arguments, the Commission asserts that the exact scope and extent of the common scheme were correctly defined (point 119 of the Decision).

46 The objections raised against the applicant were also adequately identified in the statement of objections and in the Decision.

47 Lastly, the applicant's participation in the cartel is proved by the fact that it was a member of the PG Paperboard and regularly participated in meetings of the PC, the JMC and the Economic Committee during the period in question.

48 As regards the applicant's assertion that the only objections validly identified as against it are those specified in the individual particulars, namely its participation in the concerted price increases in the United Kingdom in 1989, 1990 and 1991, the Commission contends that the applicant deliberately failed to read the statement of objections in conjunction with the individual particulars, despite the express warning in the box of the individual particulars, page 75 of the statement of objections, and the Commission's letter of 4 May 1993. The applicant's allegations concerning the concerted price increase in 1987 are therefore unfounded.

Findings of the Court

49 The Court cannot uphold the applicant's argument that its rights of defence were infringed because the Commission failed to identify the conduct of individual producers in the Decision.

50 That argument, in so far as it seeks to show that the objections made against the applicant are not set out sufficiently clearly in the Decision, must be considered in the context of the plea alleging infringement of the obligation to state reasons for that decision. Furthermore, the Court finds that, in so far as the applicant disputes that the Decision contains any evidence of its participation in the cartel, that argument should be considered in the context of the substance of the Decision, and that it is therefore irrelevant in the present context.

51 Nor can the Court uphold the applicant's argument that the only objections validly made against it are those set out in the individual particulars annexed to the statement of objections.

52 It suffices to find in that regard that it is expressly stated in a preliminary note to the individual particulars addressed to the applicant that 'these individual particulars must be read in conjunction with the main statement of objections'.

53 Furthermore, according to the individual particulars:

'The matters referred to under the heading "Principal evidence linking [the undertaking] with the cartel" are not intended as an exhaustive catalogue of all the respects in which your undertaking has infringed Article 85. Full details of the

suspected infringement in which your undertaking participated are set out in the Main Statement of Objections. The matters specified here are the principal items of direct and/or indirect evidence showing that your undertaking participated in the cartel.'

54 Lastly, in the statement of objections (pages 75 to 78) the Commission sets out its reasons for alleging that all the undertakings to which that document is addressed participated in all the alleged infringements. That explanation is similar to that in points 116 to 119 of the Decision.

55 Thus, it is stated (page 76) that in a case such as the present:

'... once the existence and operation of the cartel is demonstrated, it is sufficient to link each participant into the common venture by credible and persuasive proof and to establish the duration of its adherence to the scheme'.

56 In those circumstances, the objection that the applicant participated in the alleged cartel as a whole was set out in the statement of objections in terms that were sufficiently clear to enable the applicant properly to identify that objection. On that point, the statement of objections therefore fulfilled its function of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (see, *inter alia*, 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 Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42).

57 Finally, the Court rejects the applicant's allegation that its rights of defence were infringed because no complaint was made in the statement of objections that it took part in the collusion on the price increase in the United Kingdom in January 1987. It suffices to find that after receiving the applicant's reply to the statement of objections the Commission stated in its letter of 4 May 1993 that the applicant was

alleged to have participated in the January 1987 price increase in the United Kingdom. It is unnecessary to consider whether that objection was set out sufficiently clearly in the body of the statement of objections itself.

58 In the above letter it is stated:

'Secondly, even in relation to the alleged "price initiatives" themselves, it is simply not correct to say (point 52 of your reply) that "the Commission does not suggest that KDE was involved in a concerted price initiative in the UK in January 1987", still less (at point 64) that "the Commission has not alleged that the January 1987 increase resulted from consultation between the producers". These comments are repeated at point 150 of your reply.

The Commission does indeed allege that the 1987 price initiative was a collusive arrangement and that your clients took part in it.

I simply need refer you in this connection to Schedule A of the "Price Initiative" documents, and in particular to the third paragraph on page 3 and the whole of page 4.'

59 Since the letter of 4 May 1993 expressly offered the applicant an opportunity to make known its views, during the administrative procedure and within a period of three weeks, on the objection relating to its participation in the collusion on the January 1987 price increase in the United Kingdom, the Commission did not prevent the applicant from putting forward its view on that objection at the appropriate time (see, to the same effect, the judgments in Case 85/76 *Hoffmann-La Roche*

v *Commission* [1979] ECR 461, paragraph 11, and Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 27).

60 The plea must therefore be rejected.

B — *The plea of infringement of Article 190 of the Treaty*

Arguments of the parties

61 The applicant states that it set out in its reply to the statement of objections the reasons for its view that none of the documents capable of being taken into account by the Commission supported the allegations made by the Commission. In particular, the Commission had been expressly invited to provide greater details of its objections. However, the Commission did not reply to the applicant's arguments.

62 The Commission considers that it identified its objections in the statement of objections. Moreover, under Article 190 of the Treaty the Commission is merely required to present the evidence and the legal and economic arguments justifying its decision. It has done so in this case by identifying and showing the evidence establishing the applicant's participation in the single infringement, by giving details in the Decision of Stora's statements and the documentary evidence proving the nature of the PG Paperboard's committees, and also by identifying the meetings in which the applicant had participated and the price increases which it had implemented in accordance with the cartel's decisions.

63 In any event, the applicant ignores the detailed examination of its principal arguments and, with the exception of the allegation concerning the 1987 price increase,

has been unable to specify any point where the Commission failed precisely to identify the objections against it.

Findings of the Court

64 The applicant's arguments must be understood as a submission that the Decision contains an inadequate statement of reasons in regard to its participation in the infringement.

65 In that regard, it is settled law (Case 24/62 *Germany* v *Commission* [1963] ECR 63, at page 69, Joined Cases 43/82 and 63/82 *VBVB and VBVB* v *Commission* [1984] ECR 19, paragraph 22, and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42) that the statement of the reasons on which a decision adversely affecting a person is based must be such as to enable the Community judicature to exercise its power of review as to the legality of the decision and to enable the person concerned to ascertain the matters justifying the measure adopted, so that he can defend his rights and verify whether the decision is well founded.

66 It follows that a claim that there is no, or only an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the Decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision.

67 In the present case, the Decision refers directly to the applicant in the context of its description of the concerted price increases (point 79 of, and Tables A, D, F and G annexed to, the Decision). Moreover, the points of the Decision describing the discussions with an anti-competitive object in the JMC (in particular, points 44 to 46, 58, 71, 73, 84, 85 and 87 of the Decision) necessarily relate to the applicant, which does not dispute having participated in two meetings of that body. Lastly,

the Decision clearly sets out the reasoning followed by the Commission in reaching its conclusion that the applicant participated in an overall cartel (points 116 to 119 of the Decision).

68 In those circumstances, the statement of reasons in the Decision gave the applicant an adequate indication of the essential elements of facts and of law supporting the reasoning which led the Commission to hold it responsible for an infringement of Article 85(1) of the Treaty.

69 It follows that the plea that the Decision contains an inadequate statement of reasons must be rejected as unfounded.

C — *The plea of infringement of Article 85 of the Treaty in that the Commission committed a manifest error of appraisal in fact and in law*

Arguments of the parties

The committees of the PG Paperboard

— The functions of the PC and the applicant's participation

70 The applicant claims that between mid 1986 and April 1991 it was present at two of the nine PC meetings to which the Commission refers, those of 4 December

1987 and 17 November 1988. It did not participate in the PC meeting of 20 May 1987, contrary to what is stated in Table 3 annexed to the Decision.

71 The applicant disputes that the PC's function was to relay to producers the prices allegedly agreed in the PWG. The assertion that the PC received reports from the PWG and that its members were informed of the price to be applied presupposes that such communication took place when one PC immediately followed a PWG meeting at which a price increase had been decided. However, not only was the applicant's participation in PC meetings sporadic, but the timing of its attendances shows that it was unaware of the alleged price initiatives.

72 The applicant also argues that the description of the method by which PWG decisions were communicated to the PC (point 38 of the Decision) is based on the contradictory statements of Stora and of Mr Roos, a former manager in Feldmühle, of the Stora group (see paragraph 127 below).

73 It disputes that the internal note discovered at Mayr-Melnhof's United Kingdom sales agent regarding a meeting of 10 November 1986 (point 41 of the Decision, appendix 61 to the statement of objections) contains evidence of the existence of a collusive policy to fix prices in the PC. It is not proved that this note emanates from a meeting of the PWG or of the PC, rather than some other separate private meeting. Nor does it support the Commission's conclusion that the members of the PC were informed of the price to be applied.

74 Lastly, the Commission's assertion that the role of the PC was also to supervise the implementation of the price initiatives is not set out in the Decision and is without foundation. Stora never stated that the PC had such a purpose.

75 More generally, the applicant disputes that the PC took part in discussions on a common industry plan to restrict competition (Article 1 of the Decision).

76 The Commission concedes in its rejoinder that the applicant did not participate in the PC of 20 May 1987, the statement in Table 3 annexed to the Decision having been included in error. However, the applicant took part in the meetings of the PC on 26 June 1986 and 17 November 1988. It has not been proved that the applicant participated in those meetings in a spirit which was different from that of the cartel (Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraphs 53 and 54) or that it withdrew from the common venture.

77 The Commission considers that the argument based on the timing of the applicant's attendance, to the effect that the price initiatives could not have been the object of discussions at the meetings of the PC, is fallacious for two reasons. In the first place, the applicant has not fully disclosed the number and dates of all the meetings which it attended. In the second place, the function of the PC was sufficiently described by Stora (appendix 39 to the statement of objections, pages 4 and 5) and it is quite clear that the PC meetings had a predominately unlawful purpose. In any event, the timing of the applicant's attendance at the PC meetings coincides with the known price initiatives.

78 Lastly, the Commission does not accept the applicant's assertion that there is no proof that the note contained in appendix 61 to the statement of objections concerns a PC meeting (that of 10 November 1986). The Commission states that Weig began to attend the PWG only in 1988, whereas the note refers to a representative of that manufacturer. In any event, that note underlines the relationship between the PWG and the PC, as described by Stora. It must therefore be concluded that the note does in fact concern a meeting of the PC.

— The functions of the JMC and the applicant's participation

79 The applicant states, first of all, that it was present at only two meetings of the JMC, on 4 April 1989 and 20 November 1990, out of the 29 identified by the Commission in respect of the period from mid 1986 until April 1991.

80 Second, it contests the Commission's conclusions regarding the functions of the JMC. Having regard to the timing of the meetings in which it took part, the applicant contests the description in point 44 of the Decision of the JMC's principal purpose. In particular, it disputes that the purpose of the JMC meeting on 4 April 1989 could have been either to determine whether a price increase could be put into effect, or to work out details of the alleged price initiative of March-April 1989 decided by the PWG, because it was at the end of 1988 (point 79 of the Decision) when the producers agreed upon a price increase which was to take effect in March 1989 and that price initiative was announced by the producers in January 1989. It also disputes that the purpose of the JMC meeting in November 1990 could have been to put the alleged January 1991 price initiative into effect and to work out details of it. According to the Commission, that price initiative was agreed in June 1990 and announced in September-October 1990, and therefore before the JMC meeting in November. Furthermore, according to points 87 and 88 of the Decision, the details of the increase had been worked out at the JMC meeting of 6 September 1990.

81 More generally, the applicant disputes that the JMC took part in discussions on a common industry plan to restrict competition (Article 1 of the Decision).

82 The applicant accepts that the Commission has proved that appendix 117 to the statement of objections, handwritten notes taken by Rena's sales director, and Appendix 109, a confidential report by Mayr-Melnhof's marketing director to Mr Katzner (the commercial director responsible for the Mayr-Melnhof group's sales in Germany), are documents which concern JMC meetings. However, those meetings dealt with GC cartonboard grades, which the applicant does not produce.

Moreover, appendix 117 to the statement of objections contains various information, only part of which was obtained at a JMC meeting (see Rena's covering letter, appendix 116 to the statement of objections).

83 There is no proof that the other documents on which the Commission relies concern the JMC. Thus, it has not been established that appendix 111 to the statement of objections, a typewritten price list in Swedish obtained from Rena 'showing the date and the amount of the increases to be applied for each grade in each national currency' (point 80 of the Decision) relates to a JMC meeting, or even to a meeting of one of the bodies of the PG Paperboard.

84 The applicant observes that according to the Commission, the note dated 11 January 1990 written by the sales manager of FS-Karton (appendix 113 to the statement of objections) and referred to in point 84 of the Decision concerns a meeting of the JMC in the context of the implementation of the March-April 1990 initiative. The applicant points out, however, that Mayr-Melnhof stated that it was a note for internal use drawn up for a meeting and that there is no other evidence in that regard.

85 Furthermore, the detailed series of handwritten notes obtained from Rena relating to the JMC meeting of 6 September 1990 (appendix 118 to the statement of objections) and referred to in point 87 of the Decision were, according to Rena, merely 'preparation for a budget meeting'. In so far as the note refers to GD grades, its author incorrectly concluded that all the producers would announce a price increase by 8 October. The applicant states that it notified its price increase only on 31 October and disputes that it was party to the agreement which was allegedly intended to increase the prices of GD grades.

86 The applicant also rejects the Commission's conclusion that, although all the notes relating to the JMC meetings obtained by the Commission concern GC grades, they may, in the absence of any other written record, be taken to be typical of

meetings held in regard to GD grades, as well as of the subject-matter of JMC meetings in general (point 113 of the Decision). The applicant submits that in the statements to which the Commission refers in its defence Stora made no distinction between the meetings attended by producers of GC cartonboard and those in which producers of GD cartonboard participated.

87 According to the applicant, the Commission has identified 29 meetings of the JMC during the relevant period, but only five price initiatives. The applicant concludes from this that the JMC could have pursued its allegedly unlawful functions at only a small number of those meetings, namely those immediately following the alleged price initiatives of the PWG.

88 Lastly, the applicant considers that there is no evidence for the assertion that 'on the basis of the preparatory work done in the JMC, the PWG took the decisions in principle on the timing and the amount of the increase' (point 72 of the Decision).

89 The Commission observes that the applicant participated in the JMC meetings of 3/4 April 1989 and of 19/20 November 1990. Moreover, as it acknowledges, the applicant had discussions on specific points with other producers regarding meetings which it had not attended. The evidence (appendices 109, 113, 117 and 118 to the statement of objections) refutes the applicant's claims, since it shows that the purpose of the JMC was, first, to determine whether, and if so how, price increases could be put into effect and to report its conclusions to the PWG and, second, to prescribe the methods of implementing 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 (point 44 of the Decision). Lastly, according to Stora's second statement (appendix 39 to the statement of objections, p. 9), the role of the JMC was also to discuss the difficulty of implementing those increases for both GC and GD grades.

90 In particular, as regards the April 1989 price increase, the applicant participated in the meeting of the PC on 17 November 1988, at which the increase was decided upon in principle. The increase applied by the applicant, namely UKL 25 in the United Kingdom, was notified to its customers on 16 February and implemented on 10 May 1989. Two documents show that the applicant's conduct was the result of the cartel, namely an undated price list obtained from Finnboard (UK) Ltd headed 'Price increase second quarter 1989', which gives the price increases for each national market, including the United Kingdom as regards GD grades, and a Fiskeby document dated 14 February 1989 (document D-G-1) confirming that information. In that context, the Commission points to the applicant's participation in a JMC meeting on 3/4 April 1989 and to the fact that on 4 April 1989 the applicant's United Kingdom agent took part in a meeting of the Paper Agents Association ('PAA') for the purpose of discussing the implementation of the agreement concluded in the cartel.

91 As regards the January 1991 increase, it is clear from the documents relating to the JMC meeting of 6 September 1990 (Rena notes) that it was to be announced for all grades, amounted to UKL 40 in the United Kingdom and would take effect on 31 January 1991. The Commission does not know whether the applicant took part in that meeting but states that it was represented at the PAA meeting on 18 September 1990, at which that increase was discussed, as is clear from a note obtained from Iggesund Board Sales (appendix 132 to the statement of objections). The JMC meeting of 19 and 20 November 1990 was, according to the Commission, concerned with monitoring progress in implementing the increase, which had been announced by the applicant on 31 October 1990. The applicant increased its prices by UKL 40 with effect from 28 January 1991.

92 The Commission rejects the applicant's assertion that the JMC meetings concerned GC cartonboard alone. The Rena note relating to the JMC meeting of 6 September 1990 (appendix 118 to the statement of objections) concerns a price increase for all grades, a fact which supports Stora's statements on that point (appendix 39 to the statement of objections, pages 6 and 8).

93 Lastly, the Rena note concerning the JMC meeting of 6 September 1989 (appendix 117 to the statement of objections) discloses details of the price increases which had been announced in each national currency and assesses customer reactions and progress already made towards implementation in each national market.

— The functions of the Economic Committee and the applicant's participation

94 The applicant, which states that it attended seven meetings during the period to which the Decision relates, submits that the Economic Committee discussed matters of legitimate interest to the industry.

95 It disputes that the central theme of its discussions was an analysis and assessment of the cartonboard market in the various countries (point 50 of the Decision).

96 The Commission has not proved its allegation that 'the discussions on market conditions were not unfocused; talks on the state of each national market must be seen in the context of the planned price initiatives, including the perceived need for temporary plant shutdowns to support price increases' (point 50 of the Decision). The note drafted by the FS-Karton representative (appendix 70 to the statement of objections), which, according to the Commission, concerns the 'highlights' of the Economic Committee meeting on 3 October 1989, in fact shows that the Economic Committee carried out a general review of market conditions, country-by-country, in particular in regard to the state of order backlogs. The only reference to an allegedly concerted price increase concerns the French market and the note merely indicates the policy to be followed by the undertaking from which the note originates.

97 The applicant contests the Commission's assertion in point 119 of the Decision that it is not credible that those who attended the Economic Committee could have been unaware of the illicit purpose for which the information they knowingly provided to the JMC was to be used. According to the applicant, the Commission confuses fact with opinion and that assertion is not supported by any evidence.

98 The Commission states, first, that the behaviour of the Economic Committee has to be understood in the context of the infringement as a whole and of the functions of the JMC, at whose meetings the applicant was represented and to which the Economic Committee reported. The topics dealt with in the Economic Committee have been described by Stora. The fact that the Economic Committee was not concerned with a simple exchange of statistics on an aggregate basis is demonstrated by a note made by a representative of FS-Karton concerning the Economic Committee meeting of 3 October 1989 (see paragraph 115 above), which recounts discussions on the order backlogs of the GC and GD producers, including individual positions.

99 Lastly, the Commission rejects the applicant's assertion that the exchange of information in the Economic Committee is capable of innocent explanation. Not only is that assertion inconsistent with the discussions recorded in the note concerning the meeting on 3 October 1989 but also with the discussions at the JMC meeting on the following 16 October, the latter discussions showing that the state of order backlogs had been a decisive factor for the entry into force of a price increase.

The price initiatives

100 The applicant submits that its decision whether or not to align its prices on those of the dominant undertakings on the market was taken completely independently.

101 Its normal practice was to review its prices in the United Kingdom every six months, usually in April and October.

102 As regards the April 1989 price increase, the applicant states that on 16 February 1989 it notified a price increase in the United Kingdom of UKL 25, which entered into force on 10 May 1989, in order to align its prices on those of the dominant undertakings on the market, after having considered the following factors:

— the state of the United Kingdom economy;

— the strength of demand at the end of 1988;

— indications that raw material prices were hardening;

— information disclosed on 1 February 1989 by a specialised publication 'EUWID Pulp & Paper' (appendix G to its reply to the statement of objections) according to which German price increases had been announced, with GD grades increasing by DM 8 to 10 on 1 May 1989;

— notification by Mayr-Melnhof of a price increase in the United Kingdom on 6 February 1989 to take effect from April 1989 and, two days later, notification by SCA Colthrop of a similar increase which was also to take effect in April.

103 The applicant observes that, according to the documents upon which the Commission relies, the agreement to increase prices in the United Kingdom for GD grades provided for the increase to enter into force on 1 May. However, the applicant increased its prices only on 10 May.

104 Furthermore, its presence at the JMC meeting on 4 April 1989 cannot alter that circumstance, since the object of that meeting could not have been to determine whether a price increase could be applied (the increase was decided at the end of 1988) or to work out the details of the alleged price initiative decided by the PWG. Nor could the purpose of that meeting have been to supervise the actual implementation of the increase after its entry into force, because it had not yet been implemented on the market.

105 Lastly, the Commission cannot be allowed to hold against the applicant in its defence the fact that its agent was present at meetings of the PAA, because its agent is wholly independent.

106 As to the April 1990 price increase, several issues of the specialist journal EUWID Pulp & Paper disclosed that a price increase was imminent. In particular it announced that an 8% price increase was planned for March, but that it would be higher in the United Kingdom owing to the weakness of the pound sterling (issue of 20 December 1989). In its 17 January edition it indicated that Mayr-Melnhof had sent a circular to customers in order to notify a price increase. The following issue confirmed that price increases of 8% were planned for March. The applicant subsequently obtained confirmation from the market of the price increase in the United Kingdom notified by Mayr-Melnhof and to take effect in March.

107 Having regard to the fall in exchange rates towards the end of 1989 and the fall in market prices, the applicant considered that it had to follow the price leaders.

108 As regards the January 1991 price increase, the applicant asserts that it was aware that its operating costs for 1991 would increase substantially owing, first of all, to a rise in gas prices and an increase in employees.

109 In that context, it alleges that it had learned from trade publications, especially EUWID Pulp & Paper, that a price increase was envisaged by producers from the beginning of 1991. That had been indicated as early as the beginning of August and confirmed in the 12 September 1990 issue. According to the 25 September 1990 issue of EUWID Pulp & Paper, Mayr-Melnhof was to increase its prices from 7 January by UKL 40 per ton. The 24 October 1990 issue confirmed that Feldmühle had also announced similar increases. Market intelligence reports obtained by the applicant from its customers and other sources confirmed that SCA Colthrop had announced a price increase on 29 October. In those circumstances, the applicant decided on 31 October 1990 to increase its prices by a similar amount on the United Kingdom market in order to align them on those of its competitors.

110 Second, the applicant asserts that the Commission has no direct evidence of collusion on its part.

111 Since the Commission has not proved that the applicant regularly participated in meetings of the PG Paperboard or in meetings at which anti-competitive practices were discussed, it cannot rely on the case-law of the Court of First Instance, according to which, when such circumstances are proved, it is for the undertaking to show that it did not subscribe to the initiative agreed at those meetings.

112 The Commission states, first of all, that it rejects the applicant's attempt to compartmentalise the infringement. It considers that it is fallacious for the applicant to argue that it is accused of anti-competitive practices in the United Kingdom alone, when the scheme was to fix concerted prices throughout the Community and to implement them in each market.

113 It disputes that the applicant aligned its prices wholly independently on those of its competitors. It points to the fact that the applicant's agent took part in meetings in which the implementation of the cartel at national level was discussed, and that the applicant was aware of this, because the agents acted on the instructions of their principals. The Commission also points out that the applicant regularly participated in meetings of the committees of the PG Paperboard at which the price initiatives were discussed; that it admits having had telephone contacts with other producers regarding meetings at which it was not present; that it has not shown that it did not subscribe to the consensus reached between the participants in the cartel; and that it continued to participate in meetings even after the Commission's investigations.

114 According to the Commission, once it has shown that an undertaking has regularly participated in meetings which dealt, for example, with price initiatives, it is for that undertaking to prove that it did not subscribe to the initiative agreed at those meetings and, in order to do so, it must prove that its competitors were aware that it dissociated itself from the consensus reached at those meetings (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, *Atochem* v *Commission*, cited above, Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021).

The 'price before tonnage' policy

115 The applicant disputes that it participated in an understanding on 'maintaining the market shares of the major producers at constant levels, subject to modification from time to time' (Article 1, eighth indent) and that it 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' (Article 1, ninth indent).

116 The Commission's evidence is insufficient to conclude that the smaller cartonboard producers had subscribed to the alleged 'price before tonnage' policy. It is pure

supposition on the Commission's part to state that, in view of the general understanding between the major producers, the smaller producers were aware of the need to adapt their conduct.

117 On the contrary, the applicant was operating at full capacity throughout the majority of the period in question. The utilisation rates of the machines show a reduction in downtime between 1987 and 1990.

118 As to the note from Rena regarding an extraordinary meeting of the Nordic Paperboard Institute ('the NPI') (appendix 102 to the statement of objections), a document on which the Commission relies, the applicant states that it is not a member of the NPI, that the meeting in question was not a meeting of the PG Paperboard and that consequently that note does not support the Commission's conclusion that all the smaller producers had subscribed to the price before tonnage policy.

119 The applicant also denies that it was a party to the alleged understanding on maintaining market shares and states that its market share declined during the period covered by the Decision.

120 Lastly, it contests the Commission's allegation (see point 53 of the Decision) that the documents found at FS-Karton confirm that 'at the end of 1987 agreement had been reached in the two Presidents' groups on the linked issues of volume control and price discipline'. It submits that the note on which the Commission relies (appendix 73 to the statement of objections) does not refer to the two 'Presidents' groups' ('the President Conference' and the PWG) but to the 'Presidents grouping'. The Commission is thus most likely referring to the PWG and not the President Conference and nothing indicates that this reference is to more than 'one group'. The applicant was not a member of the PWG.

121 The Commission considers that the applicant is misrepresenting its arguments. The allegation against the applicant is that it was a participant in a common design, two manifestations of which were the control of supply of the product in the Community in order to ensure implementation of the concerted price increases, and the exchange of information, *inter alia*, on downtime, order backlogs and machine utilisation rates. The applicant took part in the meetings of the JMC, during which, as part of the price before tonnage policy to which all producers subscribed, the smaller producers were aware of the understanding between the major producers to keep supply at constant levels and also of the need to adapt their own conduct as a result.

122 The fact that the applicant was not a member of the NPI does not deprive the Rena note concerning the extraordinary meeting of the NPI at Arlanda airport (see paragraph 118 above) of its probative value. That note not only provides further evidence of the scheme to control production but also supports Stora's statement that the producers who were not members of the PWG were made aware of the general understanding between the major producers to maintain constant levels of supply. Such an interpretation does not mean that the applicant was directly implicated by that note.

The methods of circulating information

123 The applicant considers that Stora's statements are unreliable.

124 First, since Stora has admitted that its subsidiaries, Feldmühle, Kopparfors and CBC, engaged in certain policies and practices that were likely to constitute infringements of the competition rules (point 34 of the Decision), it is in Stora's interest to link as many cartonboard producers as possible with the alleged cartel, in particular the smaller producers, in order to play down its own role.

125 Second, Stora's statements are contradictory as regards the methods of communicating decisions of the PWG to the PC.

126 In its second statement Stora stated that the role of the PWG was to 'assess and explain to the President Conference the precise state of supply and demand on the market and the measures to be taken to bring order to the market' (point 38 of the Decision), whereas in a subsequent statement (letter of 17 September 1991, appendix 38 to the statement of objections), it gave details of how the outcome of PWG meetings was communicated on an individual basis through individual contacts between a number of undertakings. In regard to that latter point, the applicant considers that Stora is referring to the channels for communicating the information in Germany, France and Scandinavia, but not to such a system in the Netherlands, or any system involving the applicant.

127 The two statements also contradict the statement of Mr Roos, a former member of Feldmühle's management. The latter statement is not very clear because it states that the PWG discussions were brought to the attention of the PC and the JMC, in particular through persons who had participated in the workings of both groups.

128 The Commission considers that the applicant's argument relating to the alleged self-serving nature of Stora's declarations is spurious, because other producers had also identified the applicant as a participant in the JMC.

129 It disputes that the statements concerning the channels of communication between the PWG and the JMC are contradictory. Mr Roos does not contradict himself in stating that there were no formal channels of communication and that information was circulated informally between individuals, including those who attended the meetings of both groups. The Commission points out that Mr Roos was the president of the JMC.

130 Moreover, the PWG met before each scheduled PC. Since the same person presided over both meetings, there is no doubt that it was he who communicated the outcome of the PWG to the producers who had not attended it. If there was no PC immediately after the PWG meeting, the participants would inform the smaller producers of their national grouping of what had been decided. In that case too, those channels of communication were not formalised.

The duration of the applicant's participation

131 The applicant considers that the Commission is unable to prove that it participated in the cartel otherwise than in the periods of its participation in the price initiatives of April 1989, April 1990 and January 1991. It denies any participation in the 1987 price increase. Moreover, there is no proof of its participation in that increase. It must therefore be accepted that its participation in the alleged infringement began only in 1989.

132 The Commission rejects the applicant's approach. The January 1987 price increase was already planned in late 1986. The applicant participated in meetings of the committees of the PG Paperboard throughout the duration of the infringement and participated in a meeting of the PC on 29 May 1986.

Findings of the Court

133 The Court will examine first the question whether the Commission has proved that the applicant participated in an infringement of Article 85(1) of the Treaty as regards the period from mid-1986 until April 1989, the date from which the applicant admits that it participated in meetings of the JMC. Second, the Court will examine the question whether the Commission has proved the applicant's partici-

pation in an infringement of Article 85(1) of the Treaty as regards the remaining period, namely April 1989 to April 1991.

1. Period from mid-1986 to April 1989

134 In order to prove the applicant's participation in an infringement of the Community competition rules during the period in question, the Commission relies on that undertaking's participation in several meetings of the PC (table 3 annexed to the Decision) and of the Economic Committee (table 6 annexed to the Decision) and on its actual pricing behaviour.

135 It is necessary to consider each item of evidence in the abovementioned order.

(a) Applicant's participation in certain meetings of the PC

136 The Commission accepts that the indication in table 3 annexed to the Decision to the effect that the applicant participated in the PC meeting of 20 May 1987 is an error.

137 Furthermore, in reply to a written question from the Court, the Commission stated that the reference in its pleadings to the applicant's alleged participation in a PC meeting of 26 June 1986 must be understood as a reference to its participation in the PC meeting of 29 May 1986.

138 Consequently, according to the Commission, the applicant participated in three specific meetings of the PC during the period under consideration, namely those of 29 May 1986, 4 December 1987 and 17 November 1988. The Commission does not rely on any evidence as to the object of those three meetings. When it refers to that participation as evidence of the undertaking's participation in an infringement of Article 85(1) of the Treaty, the Commission therefore necessarily bases its assertion on the general description in the Decision of the object of the meetings of that body and on the evidence put forward in the Decision in order to support that description.

139 In that regard, the Decision states: 'As Stora has explained one of the PWG's functions included explaining to the President Conference the measures which were necessary to bring order to the market ... In this way, the managing directors attending the President Conferences were informed of the decisions taken by the PWG and of the instructions to be given to their sales departments to implement the agreed price initiatives' (point 41, first paragraph, of the Decision). It also observes: 'The PWG invariably met before each scheduled President Conference, and since the same person was in the chair at both meetings, it was no doubt he who communicated the result of the PWG deliberations to others among the so-called "Presidents" who were not members of the inner circle' (point 38, second paragraph, of the Decision).

140 Stora has indicated that the participants in PC meetings were informed of decisions adopted by the PWG (appendix 39 to the statement of objections, point 8). However, the correctness of that assertion is contested by several of the undertakings which took part in PC meetings, including the applicant. Consequently, Stora's statements relating to the PC's role cannot, unless supported by other evidence, be considered sufficient evidence of the object of the meetings of that body.

141 Admittedly, there is a document in the file, a statement of 22 March 1993 by a former member of the management of Feldmühle (Mr Roos), which at first sight corroborates Stora's assertions. Mr Roos indicates, *inter alia*, as follows: 'The content of the discussions in the PWG was communicated to the undertakings not represented in that group at the immediately following Presidents' Conference, or,

if there was no immediate Presidents Conference, at the JMC'. However, even though there is no express reliance on that document in the Decision in support of the Commission's assertions as to the object of the PC meetings, it cannot, on any view, be considered to constitute evidence supplementing Stora's statements. As those statements are a synthesis of the replies submitted by each of the three undertakings, including Feldmühle, owned by Stora during the period of the infringement, the former member of the management of Feldmühle necessarily constitutes one of the sources for the statements by Stora itself.

142 The Commission submits in the Decision that appendix 61 to the statement of objections, a note found at the United Kingdom Sales Agent of Mayr-Melnhof which refers to a meeting held in Vienna on 12 and 13 December 1986, '[corroborates] Stora's admission that the President Conference did in fact discuss collusive pricing' (points 41, third paragraph, and 75, second paragraph, of the Decision). That document contains the following:

'UK pricing

Recent Fides meeting included the representative of Weig stating that they thought 9% too high for the United Kingdom and were settling at 7%! Great disappointment as it signals a "negotiating" level for everybody else. UK pricing policy will be left to RHU with the support of [Mayr-Melnhof] even if it means a *temporary* reduction in tonnes while we attempt (and be seen to attempt) to pursue 9%. [Mayr-Melnhof/FS] maintain a growth policy for UK but reduced returns are serious and we have to fight to regain control on pricing. [Mayr-Melnhof] accept that it doesn't help that they are known to have increased their tonnes in Germany by 6 000!'

143 According to Mayr-Melnhof (reply to a request for information, appendix 62 to the statement of objections), the Fides meeting referred to at the beginning of the passage quoted is probably the PC meeting of 10 November 1986. According to table 3 annexed to the Decision, the applicant was not present at that meeting.

144 The document in question shows that Weig reacted to an initial level of price increase by indicating its future pricing policy in the United Kingdom.

145 It cannot, however, be considered to prove that Weig reacted in relation to a particular level of price increase agreed between the undertakings within the PG Paperboard before 10 November 1986.

146 The Commission does not rely on any other evidence to that effect. Moreover, Weig's reference to a price increase of '9%' may be explained by the price increase in the United Kingdom announced by Thames Board Ltd on 5 November 1986 (annex A-12-1). That announcement was made public shortly afterwards, as is clear from a press cutting (annex A-12-3). Lastly, the Commission has not produced any other document capable of constituting direct evidence that discussions on price increases took place at meetings of the PC. In those circumstances, it cannot be ruled out that Weig's remarks, as related in appendix 61 to the statement of objections, were made on the fringe of the meeting of the PC on 10 November 1986, as Weig repeatedly submitted at the hearing.

147 The Commission also states in the Decision that '[d]ocumentation found by the Commission at FS-Karton (part of the M-M group) confirms that at the end of 1987 agreement had been reached in the two Presidents' groups on the linked issues of volume control and price discipline' (point 53, first paragraph of the

Decision). It refers in that regard to 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.

148 The author of the document refers by way of introduction to the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis'). That expression 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).

149 Although it is not disputed in the present case that appendix 73 to the statement of objections is corroborative evidence of Stora's statements concerning 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, the Commission has not, however, adduced any other evidence to confirm 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.

150 Having regard to the foregoing, the Commission has not proved that the meetings of the PC had an anti-competitive function alongside its lawful activities. It follows that it was not entitled to infer from the evidence relied upon that the undertakings which participated in meetings of the PC had taken part in an infringement of Article 85(1) of the Treaty.

151 As a consequence the Court must find that the applicant's participation in an infringement of the competition rules during the period from mid-1986 until April 1989 has not been proved by reliance on its participation in the meetings of the PC.

(b) Applicant's participation in three meetings of the Economic Committee

152 It is not disputed that during the period from mid-1986 until April 1989 the applicant particpated in three meetings of the Economic Committee, namely those of 15 October 1986, 4 February 1987 and 3 February 1989. Since the Commission has not relied on any evidence relating to those meetings, it is necessary to consider more generally whether the meetings of the Economic Committee had an anti-competitive object.

153 The Decision states that 'the "central theme" of the discussions of the Economic Committee was the analysis and assessment of the cartonboard market in the various countries' (point 50, first paragraph, of the Decision). The Economic Committee 'discussed *inter alia* price movements in national markets and order backlogs and reported its findings to the JMC (or its predecessor the Marketing Committee before the end of 1987)' (point 49, first paragraph, of the Decision).

154 According to the Commission, '[t]he discussions on market conditions were not unfocused; talks on the state of each national market must be seen in the context of the planned price initiatives, including the perceived need for temporary plant shutdowns to support price increases' (point 50, first paragraph, of the Decision). Furthermore, the Commission considers that: '[t]he Economic Committee may have been less directly concerned with price fixing as such but it is not credible that those who attended were unaware of the illicit purpose for which the

information they knowingly provided to the JMC was to be used' (point 119, second paragraph, of the Decision).

155 To support its contention that the discussions held in the Economic Committee had an anti-competitive object, the Commission refers to a single document, a confidential note by a representative of FS-Karton (of the Mayr-Melnhof Group) concerning the essential points of the Economic Committee's meeting of 3 October 1989 (appendix 70 to the statement of objections).

156 In the Decision the Commission summarises the content of that document as follows:

'... in addition to a detailed survey of demand, production and orders in hand in each national market, the meeting was concerned with:

— perceived strong customer resistance to the last GC price increase, effective on 1 October,

— the respective state of the order backlog of the GC and GD producers, including individual positions,

— reports on downtime taken and planned,

— the particular problems of implementing the price increase in the United Kingdom and its effect on the necessary price differential between GC and GD grades,

— the comparison against budget of incoming orders for each national grouping' (point 50, second paragraph, of the Decision).

157 That description of the content of the document is, in essence, correct. However, the Commission does not rely on any evidence to support its assertion that appendix 70 to the statement of objections may be regarded 'as indicative of the real nature of the deliberations of that body' (point 113, last paragraph, of the Decision).

158 Furthermore, the scope of Stora's statements, to the extent that they relate to the Economic Committee, is very limited. Stora states: 'Prior to 1987 the Economic Committee combined the functions of the JMC and the Statistical Committee. Meetings were attended by marketing/sales managers. Among other things, discussions took place on price movements in the national markets, small quantity surcharges, sheet counting, invoicing terms and raw materials. Examination of statistical reports also took place' (appendix 39 to the statement of objections, point 12). As is stated, this assertion relates only to the period prior to 1987. Moreover, although Stora indicates that discussions took place on price movements in the national markets at meetings of the Economic Committee, the content of those discussions is not specified. It cannot therefore be concluded that those discussions had an anti-competitive object.

159 As regards the period commencing at the beginning of 1988, Stora states: 'The JMC was set up at the end of 1987 and held its first meeting in early 1988 taking over part of the functions of the Economic Committee from that time. The other functions of the Economic Committee were taken over by the Statistical Committee' (appendix 39 to the statement of objections, point 13).

160 Stora's statements do not therefore contain any evidence supporting the Commission's assertion concerning the allegedly anti-competitive object of that body's discussions in the period after the beginning of 1987.

161 Nor, lastly, does the Commission refer to any evidence to support the view that the participants in the meetings of the Economic Committee were informed of the precise nature of the meetings of the JMC, the body to which the Economic Committee reported. It follows that it cannot be ruled out that some participants in the Economic Committee's meeting who did not also participate in the JMC meetings were not aware of the precise use to which the reports prepared by the Economic Committee were put by the JMC.

162 Consequently, appendix 70 to the statement of objections cannot be regarded as demonstrating the true nature of the discussions which took place at the meetings of the Economic Committee.

163 Moreover, the Commission itself appears to take the view that participation in meetings of the Economic Committee did not constitute adequate proof of any infringement, because Enso Española, an undertaking which had taken part in meetings of the Economic Committee in 1987 (table 6 annexed to the Decision), was not considered to have committed an infringement of the competition rules before March 1988 (Article 1 of the Decision).

164 In the light of the foregoing, the fact that the applicant took part in three meetings of the Economic Committee during the period in question does not prove its participation in an infringement of Article 85(1) of the Treaty.

(c) The applicant's actual pricing behaviour

165 As regards the period under consideration, it is apparent from table A annexed to the Decision that according to the Commission the applicant announced an increase of 8% in its prices in the United Kingdom on 14 November 1987 and implemented it on 12 January 1988.

166 On the other hand, according to tables B and C annexed to the Decision, the Commission does not have any information as to price increases for the applicant's cartonboard on the occasion of the March/April 1988 and October 1988 price increase initiatives.

167 In those circumstances, the Court considers that the applicant's actual pricing behaviour as established by the Commission, that is to say, one price increase initiative in the United Kingdom which appears to be in conformity with those implemented by the other producers, does not adequately support the Commission's assertion that the applicant participated in an infringement of Article 85(1) of the Treaty during the period in question.

(d) Conclusion regarding the period in question

168 Having regard to all the foregoing considerations, the evidence on which the Commission relies, even taken as a whole, does not prove the applicant's participation in an infringement of Article 85(1) of the Treaty during the period from mid-1986 until April 1989.

2. Period from April 1989 to April 1991

169 According to Article 1 of the Decision, the undertakings to which that provision refers infringed Article 85(1) of the Treaty by participating, in the case of the applicant 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 *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'.

170 It follows that, according to the Decision, each of the undertakings mentioned in Article 1 infringed Article 85(1) of the Treaty by participating in a single infringement consisting 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.

171 In those circumstances, the Court must consider separately whether the applicant participated in each type of collusion in question during the period from April 1989 to April 1991.

(a) The applicant's participation in collusion on prices

— The applicant's participation in two meetings of the JMC

172 It is not disputed that the applicant participated in two JMC meetings, namely those of 4 April 1989 and 20 November 1990.

173 According to the Commission, the main purpose of the JMC was, from the outset:

'— to determine whether, and if so how, price increases could be put into effect and to report its conclusions to the PWG,

— to work out the details of the price initiatives decided by the PWG on a country-by-country basis and for the major customers with the aim of achieving an equivalent (i. e. uniform) price system in Europe ...' (point 44, last paragraph, of the Decision).

174 More specifically, the Commission maintains in the first and second paragraphs of point 45 of the Decision that:

'This committee discussed market-by-market how the price increases agreed by the PWG were to be implemented by each producer. The practicalities of bringing proposed price increases into effect were addressed in "round table" discussions, with each participant having the chance to comment on the suggested increase.

Difficulties in the implementation of price increases decided by the PWG, or the occasional refusal to cooperate, were reported back to the PWG, which then (as Stora put it) "sought to achieve the level of cooperation considered necessary". Separate reports were made by the JMC for GC and GD grades. If the PWG modified a pricing decision on the basis of the reports it had received back from the JMC, the steps necessary to implement it would be discussed at the next meeting of the JMC'.

175 The Court finds that the Commission was entitled to refer to Stora's statements (appendices 35 and 39 to the statement of objections) as support for those findings as to the object of the meetings of the JMC.

176 Moreover, even if the Commission does not possess any official minutes of a meeting of the JMC, it obtained from Mayr-Melnhof and Rena certain internal notes, dated 6 September 1989, 16 October 1989 and 6 September 1990 respectively (appendices 117, 109 and 118 to the statement of objections). The Court considers that those notes, the tenor of which is given in points 80, 82 and 87 of the Decision, do in fact set forth the discussions held during JMC meetings.

177 The applicant does not dispute that appendices 117 and 109 concern the JMC meetings of 6 September 1989 and 16 October 1989 respectively. Furthermore, the Court rejects, in this context, the applicant's argument that it has not been proved that appendix 118 to the statement of objections, a note dated 6 September 1990 obtained from Rena, concerns a JMC meeting. That document is drawn up on headed notepaper of the 'Schweizerischer Bankverein' ('Société de Banque Suisse') and is dated 6 September 1990, namely that of a JMC meeting held in Zurich. It clearly sets out discussions with an anti-competitive object between the producers in it. It is therefore proven that it concerns the JMC meeting held on the date in question.

178 Consequently, appendices 117, 109 and 118 constitute evidence which clearly corroborates Stora's description of the functions of the JMC.

179 In that regard, reference should be made by way of example to appendix 118 to the statement of objections, in which it is stated, *inter alia*:

'Price increase will be announced *next week in September*.

F	FF 40
NL	NLG 14
D	DM 12
I	LIT 80
B	BF 2.50
CH	SF 9
GB	£ 40
IRL	£ 45

All grades should be increased equally GD, UD, GT, GC etc.

Only 1 price increase a year.
For deliveries from 7 Jan.
Not later than 31st January.
14 of September letter with price increase (Mayr Melnhof).
19 Sept. Feldmühle sending its letter.
Cascades before end of Sept.
All must have sent out their letters before 8 October.'

180 As the Commission explains in points 88 to 90 of the Decision, it was also able to obtain internal documents supporting the conclusion that the undertakings, and in

particular those named in appendix 118 to the statement of objections, actually announced and implemented the agreed price increases.

181 As regards appendix 117 to the statement of objections, a document obtained from Rena, the Commission submits that it contains a set of notes taken at a meeting of the JMC held on 6 September 1989 and that it proves collusion on the October 1989 price increase initiative. It states in particular that this document 'shows details of the price increases which had been announced in each currency and assesses customer reaction and the progress already made towards implementation in each national market' (point 80, fifth paragraph, of the Decision). The applicant, which did not participate in the JMC meeting in question (table 4 annexed to the Decision), does not dispute that appendix 117 refers to that meeting. It maintains, however, that only some of the information contained in the appendix was obtained at the JMC meeting, as Rena stated when it sent to the Commission (Rena letter, appendix 116 to the statement of objections) the documents subsequently referred to as appendices 117 and 118 to the statement of objections.

182 However, the Court finds that appendix 117 contains a range of information on the prices and the price increases of the cartonboard producers. In view of the identical nature of the subject-matter of the information and the fact that the actual exchange of such information at JMC meetings is confirmed in particular by Stora's statements and by appendix 118 to the statement of objections, the Court considers that the Commission correctly concluded that all the information contained in appendix 117 to the statement of objections had been obtained at the JMC meeting of 6 September 1989.

183 As regards the Commission's contention that the undertakings mentioned in Article 1 of the Decision monitored the implementation of the price increases (point 82 of the Decision), the Commission refers to appendix 109 to the statement of objections, which concerns the JMC meeting held on 16 October 1989. The applicant does not dispute the description given in the Decision of the content of that document.

184 Even though the documents on which the Commission relies concern only a small number of the JMC's meetings held during the period covered by the Decision, all the available documentary evidence corroborates Stora's statement indicating that the main object of the JMC was to determine and plan the implementation of concerted price increases and to monitor their actual implementation. The almost total absence of minutes, whether official or internal, of the meetings of the JMC must be regarded as sufficient proof of the Commission's assertion that the undertakings which participated in the meetings attempted to hide the true nature of the discussions in that body (see, in particular, point 45 of the Decision). In those circumstances, the burden of proof has been reversed and it was for the addressees of the Decision who participated in the meetings of that body to prove that it had a lawful object. Since such proof was not adduced by those undertakings, the Commission was entitled to consider that the discussions by the undertakings in the meetings of that body had a primarily anti-competitive object.

185 As regards the applicant's assertion that the documents used by the Commission in order to prove the existence of discussions with an anti-competitive object in the JMC do not relate to GD cartonboard, the Court points out, first, that appendix 117 to the statement of objections, which concerns the JMC meeting of 6 September 1989, states (pp. 3 and 4): 'France wants price increase for GD from 1/1-90' and '[the] difference in price GC-GD is close to 40%'.

186 Second, appendix 118 to the statement of objections, which has been proved to refer to the JMC meeting of 6 September 1990, contains detailed information relating to GD cartonboard.

187 Third, that evidence corroborates Stora's assertion that the object of the JMC 'included comparative pricing for certain major customers and the working out of details for the implementation on a country-by-country basis of the pricing decisions of the PWG for both GC and GD grades' (appendix 39 to the statement of objections, point 13). That disclosure must be understood in the light of the explanation that 'as far as the Stora producers are aware, the Joint Marketing Com-

mittee initially met 5 or 6 times per year to consider both GC and GD grades. Subsequently, separate meetings were held for GC and GD grades, consequently roughly doubling the number of meetings' (appendix 35 to the statement of objections, p. 16).

188 The Commission was therefore entitled to deduce from the documents in the file that the discussions on the concerted price increases held in the JMC concerned both GC and GD grade cartonboard.

189 As regards the applicant's own situation, its participation in two JMC meetings must, in the light of the foregoing, be regarded at the very least as sound evidence of its participation in collusion on prices.

190 In that context, given the object of the JMC meetings described above, the Court points out that in a letter of 28 August 1991 sent to the Commission in reply to a letter under Article 11 of Regulation No 17 the applicant acknowledged that it did not attend the majority of the JMC meetings but that 'occasionally there was a telephone call with the colleagues about the meeting'.

— The applicant's participation in the Economic Committee meeting on 3 October 1989

191 Appendix 70 to the statement of objections, a confidential note by a representative of FS-Karton (of the Mayr-Melnhof group) concerning the highlights of the Economic Committee meeting of 3 October 1989 cannot, in the absence of documents confirming its content, be considered to prove the true nature of discussions during meetings of the Economic Committee (see point 152 above). Although the

Court has already held that the description of that document's content was in essence correct, the question whether that document proves that discussions with an anti-competitive object took place during the meeting of 3 October 1989 has not, however, been considered. The Court must therefore consider whether the applicant's participation in that meeting constitutes adequate proof of its participation in collusion on prices.

192 In that regard, the discussions on prices which took place at that meeting concerned the reactions of customers to the increase in prices of GC cartonboard applied by the majority of producers of that cartonboard with effect from 1 October 1989, after its announcement on the market some months previously. According to the Commission, that price increase also concerned SBS cartonboard, but not GD cartonboard. As to the discussions during the meeting in question, the Court considers that they went beyond what is permitted by the Community competition rules, in particular in that it was stated that it would be 'a mistake to depart from the presently established important GC price level ...'. By so expressing the common intention firmly to apply the new price level for GC cartonboard, the producers did not independently determine the policy which they intended to pursue on the market and thus undermined the concept inherent in the provisions of the Treaty relating to competition (see, *inter alia*, judgment of the Court of 16 December 1975 in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 173).

193 However, although it is common ground, first, that the applicant does not manufacture GC cartonboard and, second, that the October 1989 price increase did not concern GD cartonboard (see table E annexed to the Decision and point 80, second paragraph, of the Decision), it is not credible that the applicant's representative(s) at the meeting of 3 October 1989 were mistaken as to the object, nature and consequences of the discussions which took place between the competing undertakings. At the date of that meeting the applicant had already taken part in a JMC meeting (paragraph 172 above).

194 Having regard to the foregoing, the Court considers that the applicant's participation in the Economic Committee meeting of 3 October 1989 is additional evidence of its participation in collusion on prices, which will have to be taken into account in the overall assessment of the evidence on which the Commission relies.

— The applicant's actual pricing behaviour

195 In the circumstances of this case, it is appropriate to examine the applicant's actual behaviour in order to assess whether it constitutes additional evidence of its participation in collusion on prices.

196 As regards, first, the applicant's actual behaviour in the United Kingdom, the Court must examine the price increases in April 1989, April 1990 and January 1991 (tables D, F and G annexed to the Decision). The October 1989 price increase is not concerned, because, as is apparent from table E annexed to the Decision, that increase concerned cartonboard grades not produced by the applicant.

197 The Court finds that the amounts of the price increases concerned are in accordance with those indicated in the documents on which the Commission relies in support of its allegations. The amount of the April 1989 price increase announced by the applicant, namely UKL 25 per tonne, exactly corresponds to that indicated in a price list found at the premises of Finnboard UK Ltd (point 79, second paragraph, of the Decision). Likewise, the price increase of UKL 45 per tonne, notified by the applicant at the beginning of 1990, is in accordance with the information in appendix 110 to the statement of objections, a price list obtained from Rena and described by the Commission in point 83 of the Decision. Lastly, the increase of UKL 40 per tonne in January 1991 is identical to that agreed between the undertakings which met in Zurich on 6 September 1990 (appendix 118 to the statement of objections, point 87 of the Decision).

198 However, the applicant has explained that the identical nature of the price increases is due to market transparency, the role of its independent agent in the United Kingdom and the very detailed information supplied in the specialised trade journal, EUWID Pulp & Paper. Having regard to the fact that the applicant did not announce an increase in its prices before the other undertakings on the occasion of the three initiatives in question, its explanation makes it plausible, prima facie, that it merely aligned its actual conduct on the United Kingdom market on that of the other undertakings. Since the Commission has not submitted any arguments to cast doubt on that assessment, the applicant's actual behaviour on the United Kingdom market cannot be taken to be additional evidence of its participation in the collusion on prices. It must, however, be pointed out that the applicant's actual behaviour does not diverge from that agreed at least between the other undertakings participating in the JMC meetings.

199 As regards the applicant's actual behaviour in continental Europe, the Commission does not dispute that its prices were increased annually on 1 January and/or 1 July, during the period in question, namely on different dates from those mentioned in the Decision.

200 The Court therefore considers that the applicant's actual pricing behaviour does not support the Commission's conclusions regarding its participation in collusion on prices.

— Conclusion regarding the applicant's participation in collusion on prices

201 The items of evidence on which the Commission relies in a decision in order to prove the existence of an infringement of Article 85(1) of the Treaty by an undertaking must not be assessed separately, but as a whole (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 68).

202 Following its examination, the Court considers that the applicant's participation in two JMC meetings, whose anti-competitive purpose has been proved, and in the Economic Committee meeting of 3 October 1989, which it found to be additional evidence of its participation in price collusion, adequately prove that the applicant participated in collusion on prices during the period from April 1989 until April 1991.

203 In reply to the applicant's argument that its actual behaviour on the market is irreconcilable with the Commission's assertions regarding its participation in collusion on prices, the Court points out that it is settled law that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose does not relieve it of full responsibility for its participation in the cartel, if it has not publicly distanced itself from what was agreed in the meetings (see, for example, the judgment in Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 85).

204 The fact that the cartonboard prices charged by the applicant on the national markets of continental Europe were not increased on dates close to those referred to in the tables annexed to the Decision is not contested by the Commission and the Commission even acknowledged at the hearing that it had not previously considered that point. That aspect will be taken into account by the Court when it assesses, in the exercise of its unlimited jurisdiction in regard to fines, the gravity of the infringement found on the part of the applicant (see paragraph 343 et seq. below).

(b) The applicant's participation in collusion on downtime

205 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.

206 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).

207 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).

208 The Decision also observes: '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).

209 In 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'.

210 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 ...'.

211 The Commission also bases its conclusions on appendix 73 to the statement of objections (see paragraph 147 above).

212 According to that document, cited in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided on in 1988 had produced 'winners' and 'losers'.

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

214 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).'

215 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.

216 Having regard to the foregoing, the Court finds that the Commission has proved the existence of collusion on downtime by the participants in the PWG meetings.

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

218 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).

219 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).

220 The documentary evidence concerning the JMC meetings (appendices 109, 117 and 118 to the statement of objections) confirms 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 Rena note dated 6 September 1990 (see also paragraph 179 above), mentions the amounts of price increases in several countries, the dates of the future announcements of those increases and the state of order backlogs expressed in working days for several producers. 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'.

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

222 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.

223 Having regard to the fact that the applicant participated in only two JMC meetings during the period under consideration, the Court must consider appendix 70 to the statement of objections (see paragraph 155 et seq. above), which describes the events of the Economic Committee meeting of 3 October 1989, in which the applicant accepts having participated.

224 There is no passage in this appendix which establishes the real nature of the discussions which led to the programmed plan to collude on plant downtime for the future. All the references which it makes to specific periods of downtime in fact concern past data. However, the document contains a passage relating to the future use of plant: 'If the poor entry of orders and poor loading of machines continues, it is clear that it will necessary to consider stopping production according to demand' [Bei anhaltend schlechtem Auftragseingang und schlechter Belegung ist es naheliegend, entsprechend dem Marktbedarf ein Abstellen zu überlegen]. As it has been proved to the requisite legal standard that the applicant participated in collusion on prices, that document constitutes additional evidence of its participation in collusion on downtime.

225 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 applicant, by participating in two meetings of the JMC and the meeting of the Economic Committee on 3 October 1989 and in the collusion on prices, took part in collusion on downtime.

226 In that context, the Court rejects the applicant's argument that its non-participation in collusion on downtime is shown by the fact that it never took downtime.

227 First, the Commission accepts in the Decision that it was the main producers who took upon themselves the burden of reducing output so as to maintain price levels (point 71, second paragraph, of the Decision).

228 Second, even assuming that it were proved that the applicant used its production capacity to the maximum and that such use was not in accordance with what it had agreed in the JMC with its competitors, that is not of such a nature as to disprove its participation in collusion on downtime (see, in particular, Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 165).

229 The applicant must therefore be considered to have participated, from April 1989 until April 1991, in collusion on downtime.

(c) The applicant's participation in collusion on market shares

230 The applicant disputes that it participated in collusion on market shares, but does not dispute the assertion in the Decision that the producers which participated in PWG meetings reached an agreement which included '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).

231 In those circumstances, the Court points out that, as regards the undertakings which did not participate in the meetings of the PWG, the Commission states as follows:

'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).

232 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 [cartonboard], 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.).

233 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.

234 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.

235 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 (see point 52 et seq. of the Decision), 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.

236 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, a note obtained from Rena which, according to the Decision, relates to a special meeting of the 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 need to take downtime cannot, for the reasons already stated, constitute evidence of collusion on market shares.

237 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.

238 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.

239 Having regard to the foregoing, the Commission has not proved that the applicant participated in collusion on market shares in regard to the period from April 1989 until April 1991.

(d) Conclusion regarding the applicant's participation in an infringement of Article 85(1) of the Treaty during the period from April 1989 to April 1991

240 After considering the evidence before it, the Court finds that the Commission has proved that the applicant participated in collusion on prices and collusion on downtime during the period in question. However, it has not proved that the applicant participated in collusion on market shares during that same period.

3. General conclusion regarding the plea

241 On the basis of the foregoing, the Court finds that the Commission has not proved that the applicant participated in any infringement of Article 85(1) of the Treaty before April 1989 and that it has not proved that it participated in collusion on market shares during the period from April 1989 to April 1991.

242 Article 1 of the Decision should therefore be annulled, as regards the applicant, in so far as the date of the beginning of the infringement alleged against it has been fixed at a date prior to April 1989.

243 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 be also be annulled as regards the applicant.

244 The remainder of the plea must be rejected as unfounded.

D — *The plea of infringement of the rights of defence in that the Commission did not disclose all relevant documents*

Arguments of the parties

245 The applicant observes that during the administrative procedure it requested access to the Commission's complete file of papers concerning the ACBM and that the Commission refused to grant it access to part of those documents.

246 The Commission's approach infringed the applicant's rights of defence, because the right to be heard extends to exculpatory documents (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54) and Article 20(2) of Regulation No 17 does not prejudice that right. The obligation of confidentiality imposed by the latter provision does not justify the refusal to allow access to documents which may contain exculpatory evidence.

247 At the hearing, after having been granted access to the documents in question (see paragraph 27 above), the applicant maintained this plea and relied on two arguments in that regard.

248 First, the applicant claimed that a handwritten note concerning the ACBM meeting of 11 December 1985 (document 20 339) could have supported its defence during the administrative procedure. It is apparent from that document that the agents who met in the PAA were in fact independent of the cartonboard producers. That

document therefore confirms its argument that the Commission should not have relied on documents relating to meetings of the PAA as evidence against the applicant (see points 94 to 98 of the Decision).

249 Second, there is no basis for concluding that the documents to which it has been given access constitute the whole of the Commission's file concerning the ACBM.

250 The Commission considers that the ACBM documents were not necessary to ensure the applicant's right to be heard and that, because of its obligation under Article 20(2) of Regulation No 17 to observe business secrets, it was obliged to refuse to disclose the documents in question to the applicant.

251 At the hearing the Commission also challenged the applicant's argument that the handwritten note concerning the ACBM meeting of 11 December 1985 could have supported the applicant's defence during the administrative procedure.

Findings of the Court

252 The Court points out that there has been no submission by the applicant, after it obtained access to all the documents concerning the ACBM, to the effect that those documents contain information which could prove that it did not participate in the alleged infringement.

253 The applicant merely states that the handwritten note concerning the ACBM meeting of 11 December 1985 (document 20 339) confirms that the appendices to

the statement of objections relating to the PAA could not be used as evidence of its participation in an infringement of Article 85(1) of the Treaty.

254 It is apparent from the foregoing (see paragraphs 131 to 168 above) that Article 1 of the Decision must be annulled in so far as the Commission considered that the applicant had participated in an infringement of Article 85(1) of the Treaty during the period from mid-1986 until April 1989.

255 Furthermore, as regards the period from April 1989 until April 1991, the Court has found that the Commission has not proved that the applicant participated in collusion on market shares. On the other hand, as follows from the above findings, the Commission, by relying on evidence other than the documents concerning the PAA meetings, has proved that the applicant participated during the period in question in collusion on prices and collusion on downtime.

256 Consequently, even assuming that the Commission was not entitled to rely, as against the applicant, on the documents concerning the PAA meetings as evidence of its participation in an infringement of Article 85(1) of the Treaty, that fact could not, in itself, affect the validity of the Decision to the extent that it finds that the applicant participated in collusion on prices and collusion on downtime during the period from April 1989 until April 1991, because that finding was not based on the documents in question alone (see, to the same effect, Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 30).

257 The Court rejects the applicant's argument that it is impossible to know whether the file relating to the ACBM to which it has been given access contains all the documents in the Commission's possession because the applicant has not put forward any evidence in support of that allegation.

258 Having regard to the foregoing, the plea must be rejected.

The application for annulment of Article 2 of the Decision

Arguments of the parties

259 The applicant submits that Article 2 of the Decision is worded so vaguely that, as regards future exchanges of information, it is difficult to distinguish between exchanges of information which are prohibited and those which are permitted.

260 The applicant relies on the Seventh Report on competition policy (paragraph 7(1)) to support its argument that there is no precedent indicating that the exchange of information on 'the present state of the order inflow and backlog' is a breach of Article 85(1) of the Treaty. Moreover, if there is no exchange of information on order inflow and backlog, undertakings operating in the industry, in particular the smaller undertakings, would be unable to adapt to changes in the market.

261 Information on order backlog can be collected from customers and an exchange of statistical information concerning the weekly order backlog would not therefore result in any great increase in market transparency.

262 Furthermore, the Commission did not assert in the Decision that the exchange of aggregated data on order backlogs was illegal *per se* (see point 134 of the Decision).

263 In any event, the Commission should not have prohibited the exchanges without having expressed a view on the notification made by CEPI-Cartonboard for negative clearance or exemption under Article 85(3) of the Treaty in regard to a new information exchange system.

264 The Commission submits that it is entitled to include in its decision a direction prohibiting the continuation of the infringement, a practice which the Court has confirmed, even when the order was less detailed than in the present case (see, *inter alia*, *Rhône-Poulenc* v *Commission*, cited above and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 219 to 223). Moreover, in so far as a direction of this type prohibits the addressees from engaging in the future in a system with the same or similar object or effect, it merely sets out in a particular context the general prohibition laid down in Article 85(1) of the Treaty (Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 39).

265 It was found that the price initiatives and the 'price before volume' principle were backed up by a sophisticated and comprehensive information exchange system. That system provided the cartel members with the information necessary for their concerted measures and enabled them to monitor the implementation of those measures (points 65 to 71 and 134 of the Decision).

266 The information exchange system as modified following the Commission's investigation (see points 105 and 106 of the Decision) was also considered to be contrary to Article 85(1) of the Treaty because the exchange of certain information, even in aggregated form, was still capable of being used to coordinate the commercial behaviour of the participant undertakings. The assessment of the amended information exchange system was necessarily influenced by the past existence of the cartel.

267 The direction in Article 2 of the Decision, of necessity expressed in general terms as it is intended to cover a range of future behaviour, cannot, however, be regarded

as an absolute prohibition of any exchange of information. It prohibits the addressees from exchanging certain sensitive business information of the various producers, information promoting, facilitating or encouraging concerted business conduct, or information enabling them to monitor compliance with restrictive agreements.

268 Such a prohibition does not preclude the grant of an exemption or negative clearance for any scheme notified. The Decision does not prejudge any subsequent decision which the Commission is required to take in relation to the information exchange system notified by CEPI-Cartonboard on 6 December 1993.

Findings of the Court

269 It will be recalled that Article 2 of the Decision provides as follows:

'The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall henceforth refrain in relation to their cartonboard activities from any agreement or concerted practice which may have the same or a similar object or effect, including any exchange of commercial information:

(a) by which the participants are directly or indirectly informed of the production, sales, order backlog, machine utilisation rates, selling prices, costs or marketing plans of other individual producers; or

(b) by which, even if no individual information is disclosed, a common industry response to economic conditions as regards price or the control of production is promoted, facilitated or encouraged;

or

(c) by which they might be able to monitor adherence to or compliance with any express or tacit agreement regarding prices or market sharing in the Community.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude not only any information from which the behaviour of individual producers can be identified but also any data concerning the present state of the order inflow and backlog, the forecast utilisation rate of production capacity (in both cases, even if aggregated) or the production capacity of each machine.

Any such exchange system shall be limited to the collection and dissemination in aggregated form of production and sales statistics which cannot be used to promote or facilitate common industry behaviour.

The undertakings are also required to abstain from any exchange of information of competitive significance in addition to such permitted exchange and from any meetings or other contact in order to discuss the significance of the information exchanged or the possible or likely reaction of the industry or of individual producers to that information.

A period of three months from the date of the communication of this Decision shall be allowed for the necessary modifications to be made to any system of information exchange.'

270 As is apparent from point 165 of the Decision, Article 2 was adopted in accordance with Article 3(1) of Regulation No 17. By virtue of that provision, where the Commission finds that there is an infringement, *inter alia*, of Article 85 of the Treaty, it may require the undertakings concerned to bring the infringement to an end.

271 It is settled law that Article 3(1) of Regulation No 17 may be applied so as to include an order directed at bringing an end to certain acts, practices or situations which have been found to be unlawful (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 90), and also at prohibiting the adoption of similar conduct in the future (*Tetra Pak* v *Commission*, cited above, paragraph 220).

272 Moreover, since Article 3(1) of Regulation No 17 is to be applied according to the nature of the infringement found, the Commission has the power to specify the extent of the obligations on the undertakings concerned in order to bring an infringement to an end. Such obligations on the part of the undertakings may not, however, exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the rules infringed (judgment in *RTE and ITP* v *Commission*, cited above, paragraph 93; to the same effect, see Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 209, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 163).

273 As regards, first, the applicant's argument that the Commission committed an error of law in adopting Article 2 of the Decision without having first expressed its view on the compatibility with Article 85 of the information exchange system

notified by CEPI-Cartonboard, the Court observes that the notification made by that association on 6 December 1993 related to a new information exchange system, separate from that considered by the Commission in the Decision. When adopting Article 2 of the contested decision, the Commission could not therefore assess the legality of the new system in the context of that decision. When adopting that article, it was therefore entitled simply to examine and express a view on the old information exchange system.

274 In order to verify whether, as the applicant claims, the scope of the direction in Article 2 of the Decision is too wide, it is necessary to consider the extent of the various prohibitions it places on the undertakings.

275 The prohibition in the second sentence of the first paragraph of Article 2, requiring the undertakings to refrain in future from any agreement or concerted practice which may have an effect which is the same as, or similar to, those of the infringements found in Article 1 of the Decision, is aimed solely at preventing the undertakings from repeating the behaviour found to be unlawful. Consequently, in adopting such directions, the Commission has not exceeded the powers conferred on it by Article 3 of Regulation No 17.

276 The provisions of subparagraphs (a), (b) and (c) of the first paragraph of Article 2 are directed more specifically at prohibiting future exchange of commercial information.

277 The direction in subparagraph (a) of the first paragraph of Article 2, which prohibits any future exchange of commercial information by which the participants directly or indirectly obtain individual information on competitors, presupposes a finding by the Commission in the Decision that an information exchange of such a nature is unlawful under Article 85(1) of the Treaty.

278 It should be noted that Article 1 of the Decision does not state that the exchange of individual commercial information in itself constitutes an infringement of Article 85(1) of the Treaty.

279 It states more generally that the undertakings infringed that article of the Treaty by participating in an agreement and concerted practice whereby the undertakings, *inter alia*, 'exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures'.

280 However, since the operative part of a decision must be interpreted in the light of the statement of reasons for it (*Suiker Unie and Others* v *Commission*, cited above, paragraph 122), it should be noted that the second paragraph of point 134 of the Decision provides:

'The exchanging by producers of normally confidential and sensitive individual commercial information in meetings of the PG Paperboard (mainly the JMC) on order backlog, machine closures and production rates was patently anti-competitive, being intended to ensure that the conditions for implementing agreed price initiatives were as propitious as possible. ...'.

281 Consequently, as the Commission duly found in the Decision that the exchange of individual commercial information in itself constituted an infringement of Article 85(1) of the Treaty, the future prohibition of such an exchange of information satisfies the conditions for the application of Article 3(1) of Regulation No 17.

282 The prohibitions relating to the exchanges of commercial information referred to in subparagraphs (b) and (c) of the first paragraph of Article 2 of the Decision

must be considered in the light of the second, third and fourth paragraphs of that article, which support what is expressed in those subparagraphs. It is in this context that it is necessary to determine whether, and if so to what extent, the Commission considered the exchanges in question to be illegal, since the extent of the obligations on the undertakings must be restricted to that which is necessary in order to bring their conduct into line with what is lawful under Article 85(1) of the Treaty.

283 The Decision must be interpreted as meaning that the Commission considered the Fides system to be contrary to Article 85(1) of the Treaty in that it underpinned the cartel (point 134, third paragraph, of the Decision). Such an interpretation is borne out by the wording of Article 1 of the Decision, from which it is apparent that the commercial information was exchanged between the undertakings 'in support of the ... measures' considered to be contrary to Article 85(1) of the Treaty.

284 The scope of the future prohibitions set out in subparagraphs (b) and (c) of the first paragraph of Article 2 of the Decision must be assessed in the light of that interpretation by the Commission of the compatibility, in the present case, of the Fides system with Article 85 of the Treaty.

285 In that regard, first, the prohibitions in question are not restricted to exchanges of individual commercial information, but relate also to certain aggregated statistical data (Article 2, first paragraph, (b), and second paragraph, of the Decision). Second, subparagraphs (b) and (c) of the first paragraph of Article 2 prohibit the exchange of certain statistical information in order to prevent the establishment of a possible support for future anti-competitive conduct.

286 Such a prohibition exceeds what is necessary in order to bring the conduct in question into line with what is lawful because it seeks to prevent the exchange of purely statistical information which is not in, or capable of being put into, the form of individual information on the ground that the information exchanged might be used for anti-competitive purposes. First, it is not apparent from the

Decision that the Commission considered the exchange of statistical data to be in itself an infringement of Article 85(1) of the Treaty. Second, the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article 85(1) of the Treaty, since in such circumstances it is necessary to establish its actual anti-competitive effect. It follows that the Commission's argument that Article 2 of the Decision is purely declaratory in nature (paragraph 264 above) is unfounded.

287 Consequently, the first to fourth paragraphs of Article 2 of the Decision must be annulled, save and except as regards the following passages:

'The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall henceforth refrain in relation to their cartonboard activities from any agreement or concerted practice which may have the same or a similar object or effect, including any exchange of commercial information:

(a) by which the participants are directly or indirectly informed of the production, sales, order backlog, machine utilisation rates, selling prices, costs or marketing plans of other individual producers.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified.'

The application for annulment or reduction of the fine

1. *The pleas concerning matters dealt with in the course of common argument*

288 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.

289 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 following:

(a) the description of the market and the cartel's lack of effects;

and

(b) the statement of reasons relating to the fines.

290 The applicant has not submitted any plea or argument concerning those subjects in its application. It nevertheless stated at the hearing that it adopted the common oral argument in question.

291 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 during the procedure such as to justify the submission of the new pleas in question.

292 Those pleas, on which the applicant relied for the first time at the hearing, are therefore inadmissible.

2. *The plea of infringement of the principle of proportionality*

Arguments of the parties

293 The applicant contends, first, that a reduction in the fine may be justified where the supply of evidence to the Commission enables it to put an end to the alleged infringement more quickly (*ICI* v *Commission*, cited above, paragraph 393). However, such a reduction must be proportionate to the cooperation.

294 In the present case, the reduction given to Stora and Rena on account of their cooperation with the Commission is totally disproportionate, because that cooperation was given at a late stage (nine months after the filing of the complaint and four months after the Commission's investigations) and it is doubtful that it led to the termination of the infringement. That lack of proportion between the fines imposed discriminates between the undertakings fined.

295 Second, the level of the fine adopted in regard to the smaller producers is excessively high, since those undertakings did not participate either in price fixing or in the drawing up or implementation of measures to restrict production.

296 The applicant and the other smaller producers have been victims of the Commission's attempt to achieve two contradictory objectives. On the one hand, the Commission wanted to impose a high fine on Stora to reflect the fact that it was one of the 'ringleaders' of the alleged cartel. On the other hand, the reduction granted to that undertaking was large in order to create a precedent which would induce undertakings to refrain from defending themselves.

297 Those two objectives could be achieved only by imposing a high level of fine on all the producers. Such considerations should not have been taken into account when calculating the fine.

298 The Commission denies the applicant's allegation that the level of the fines was artificially very high so as to enable Stora to be granted an unfairly large reduction.

299 Moreover, the cooperation of Stora and Rena was timely and contributed greatly to the conclusion of the proceedings.

Findings of the Court

300 The applicant's line of argument is based on the premiss that the Commission set an abnormally high general level of fines. The Court must therefore consider

whether the Commission committed a manifest error of assessment when it set that level.

301 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.'

302 Moreover, according to the Commission's reply to a written question from the Court, fines of a basic level of 9 or 7.5% of the turnover of each undertaking addressed by the decision on the Community cartonboard market in 1990 were imposed on the undertakings regarded as the 'ringleaders' of the cartel and on the other undertakings respectively.

303 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*, Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 108, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 385).

304 Second, it is apparent from the Decision that 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 of the unlawfulness of

their conduct. Consequently, the Commission was entitled to take into account those measures when assessing the gravity of the infringement, because they constitute a particularly serious aspect of the infringement.

305 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 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), should have provided.

306 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. There is therefore nothing to support the conclusion that the Commission took extraneous considerations into account when determining the amount of the fines.

307 As regards the question whether the basic rates adopted as against undertakings considered to be 'ringleaders' and 'ordinary members' respectively sufficiently take into account the role actually played by each of the undertakings in the cartel, the Court finds, first, that the Commission correctly considered that the undertakings which participated in the PWG meetings had to bear a special responsibility for the infringement (point 170 of the Decision).

308 Furthermore, it correctly assessed the gravity of the infringement committed by the cartel 'ringleaders' and by its 'ordinary members' in adopting, for the purpose of calculating the fines imposed on those two categories of undertakings, basic rates of 9 and 7.5% of relevant turnover respectively.

309 Lastly, in so far as the applicant submits that it has been the subject of discrimination in comparison with Stora and Rena, the Court points out that, in accordance with settled law, the principle of equal treatment, a general principle of Community law, is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25; to the same effect Case T-100/92 *La Pietra* v *Commission* [1994] ECR-SC II-275, paragraph 50).

310 In the present case Stora supplied the Commission with statements containing a very detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard and the participation in the infringement of various producers. By those statements, Stora supplied information going well beyond that which may be required by the Commission pursuant to Article 11 of Regulation No 17. Although the Commission states in the Decision that it obtained evidence corroborating the information contained in Stora's statements (points 112 and 113 of the Decision), it is clearly apparent that Stora's statements constituted for the Commission the principal evidence of the existence of the infringement. It must therefore be concluded that without Stora's statements it would at the very least have been much more difficult for the Commission to find and, where necessary, put an end to the infringement with which the Decision is concerned.

311 In those circumstances, and even though Stora cooperated only after the Commission had initiated investigations at the undertakings pursuant to Article 14(3) of Regulation No 17, the Commission, by reducing by two-thirds the fine imposed on Stora, did not overstep the limits of its discretion when determining the amount of fines.

312 As regards the reduction in Rena's fine, it suffices to hold that the applicant has not disputed the statement in the second paragraph of point 171 of the Decision

that Rena 'provided important documentary evidence to the Commission on a voluntary basis'.

313 On the other hand, in its reply to the statement of objections the applicant denied any participation in an infringement of Article 85(1) of the Treaty. In those circumstances, the applicant cannot validly claim to have suffered discrimination in comparison with Stora and Rena.

314 Having regard to the foregoing considerations, the plea must be rejected.

3. *The plea alleging infringement of the principle against self-incrimination*

Arguments of the parties

315 The applicant observes, first, that a reduction of two-thirds of the fine was granted to Rena and Stora on account of their active cooperation with the Commission and, second, that a reduction of one-third of the fine was granted to the undertakings which, in their replies to the statement of objections, did not contest the essential factual allegations on which the Commission based its objections (points 171 and 172 of the Decision).

316 However, where the Commission imposes fines, it is not authorised to distinguish between undertakings which have contested its allegations and those which have not done so. Referring to the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 35, the applicant considers that when an undertaking is the subject of an investigation, it must be able to decide freely upon its system of defence. However, such freedom would cease to exist if the Commission could impose a heavier fine on an undertaking which defends itself.

317 The Commission's decision is also contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the 'ECHR'), a provision which is applicable to competition authorities (opinion of the European Commission of Human Rights in *Stenuit* v *France*, No 11598/85, report of 30 May 1991, series A, No 232-A).

318 The fine imposed on the applicant should therefore be reduced to the level of that imposed on undertakings which did not contest that they had participated in the infringement.

319 With regard more particularly to the reductions granted by the Commission to Stora and Rena, the statements of those two undertakings consisted mainly of explanatory statements, not documents or factual information. The supply of such information has been held by the Court of Justice to be self-incriminating (*Orkem* v *Commission*, cited above). The right to refuse to give evidence against oneself would be meaningless if the Commission were authorised to impose higher fines on undertakings which rely on that right than on undertakings which do not. No reduction in the fine should therefore be granted for a form of cooperation which undertakings have the right not to provide.

320 The Commission considers that it is within its discretion to grant reductions in fines to undertakings which have cooperated with it during its investigations. The judgment in *Orkem* v *Commission*, cited above, does not in any way limit that discretion. The fact that the Commission may not compel an undertaking to admit the evidence of an infringement does not prohibit it from granting a reduction in a fine in recognition of cooperation shown by an undertaking during its investigations.

321 Lastly, the cooperation by Stora and Rena was given at an early stage and contributed significantly to the conclusion of the proceedings.

Findings of the Court

322 As is apparent from the table produced by the Commission in reply to a written question from the Court, the fine imposed on the applicant was set at 7.5% of its turnover on the Community cartonboard market in 1990. That fine has not been reduced.

323 Given that the Court has found the general level of fines adopted by the Commission to be justified in the light of the criteria set out in the Decision, the Court finds that the Commission, as it indicated in the Decision, in fact reduced the amount of the fines imposed on undertakings where they had adopted a cooperative attitude during the administrative procedure. The applicant's argument that the Commission increased the amount of the fines imposed on the undertakings which had availed themselves of their rights of defence cannot therefore be upheld.

324 Consequently, the Commission, by reducing the amount of the fines on account of cooperation, did not compel the applicant to provide answers which might involve an admission on its part of the existence of an infringement (see *Orkem* v *Commission*, cited above, paragraph 35).

325 Moreover, in that context, the Court finds that a decision not to reply to the statement of objections or not to express a view in such a reply on the Commission's factual allegations in the statement of objections, together with a decision to challenge all or most of those allegations in a reply — all of which are ways of exercising rights of the defence during the administrative procedure before the Commission — cannot justify a reduction in the fine on grounds of cooperation during the administrative procedure. A reduction on those grounds is justified only if the conduct made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (see the judgment in *ICI* v *Commission*, cited above, paragraph 393). In those circumstances, an undertaking which expressly states that it is not contesting the factual allegations on which the Commission

bases its objections may be regarded as having facilitated the Commission's task of finding and bringing to an end infringements of the Community competition rules.

326 In this case, in its reply to the statement of objections the applicant denied any participation in an infringement of Article 85(1) of the Treaty. Its behaviour was not therefore such as to justify a reduction in the fine on grounds of cooperation during the administrative procedure.

327 Lastly, as regards Article 6 of the ECHR, it suffices to find that the applicant has not adduced any evidence to support that argument.

328 The plea must therefore be rejected.

4. *Incorrect assessment of the criteria for determining the fine*

Arguments of the parties

329 The applicant considers, first, that, since the Commission erroneously assessed its alleged participation in the cartel, it has not correctly taken into account the criteria for determining the fine as set out in point 169 of the Decision.

330 As to the role played by each undertaking in the collusive agreements (point 169, first paragraph, of the Decision), it is apparent from the Decision (point 170) that the only distinction considered was that between the cartel 'ringleaders' and its 'ordinary members', and that no other factor relating to individual behaviour was taken into account by the Commission. The Commission therefore made an overall assessment of participation in the alleged cartel and failed to assess the role of each individual producer.

331 As regards the importance of each undertaking in the industry (point 169, third paragraph), it should have been evident to the Commission that the applicant was a small producer. It is clear from the press conference of 13 July 1984 held by the Member of the Commission responsible for competition policy that the real size of the undertakings was not taken into account.

332 The Commission submits that, as is clear from point 169 of the Decision, it took into account the factors to which the applicant refers when it determined the amount of the fine imposed on the applicant.

333 The Commission points out that it found the existence of a single infringement and states that the fines were imposed on that basis. Consequently, since all the addressees of the Decision committed the whole of that infringement, the fine was imposed on the applicant not only for the price initiatives which it implemented but also for the other elements of the infringement referred to in Article 1 of the Decision.

334 Lastly, the size of each producer was necessarily taken into account, since the fines were calculated on the basis of turnover.

Findings of the Court

335 It is common ground that the fines imposed were calculated on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision. Fines of a basic level of 9 or 7.5% of that individual turnover were then imposed on the undertakings considered to be the cartel 'ring-leaders' and on the other undertakings respectively.

336 The fine imposed on the applicant corresponds to 7.5% of its turnover on the Community cartonboard market in 1990. The Commission, in taking that turnover as a basis, took into account the applicant's importance in the industry.

337 It has already been found that the applicant cannot be held responsible for collusion on market shares.

338 Despite that finding, the Court considers, 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.

339 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 331 et seq. above).

340 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.

341 As regards the applicant's argument that, when determining the amount of the fine, the Commission failed to take into account the role which it played in the cartel (see point 169, first paragraph, of the Decision), the Court points out that the Commission has accepted in its written pleadings that it did not consider that the applicant had played a less significant role in the cartel than the other 'ordinary members' of it, namely the undertakings which were not represented in the PWG.

342 In that regard, the Decision explains that the undertakings which did not participate in the PWG meetings were informed at JMC meetings of the decisions adopted by the PWG and that the JMC constituted the principal centre both for the preparation of decisions adopted by the PWG and for detailed discussions concerning the implementation of those decisions (see, in particular, points 44 to 48 of the Decision). In those circumstances, the Commission correctly assessed the gravity of the infringement committed by the cartel 'ringleaders' and by its 'ordinary members' respectively, in adopting, for the purpose of calculating the fines imposed on those two categories of undertakings, basic rates of 9 and 7.5% of relevant turnover.

343 However, the applicant's participation in the meetings of the JMC is proven only in regard to two of the 17 meetings of that body held during the period in which it is proved that the applicant committed an infringement of Article 85(1) of the Treaty, namely the period from April 1989 until April 1991. As is apparent from Table 4 annexed to the Decision, the applicant's participation in the meetings of that body was significantly more sporadic than that of the other undertakings regarded as 'ordinary members' of the cartel.

344 Furthermore, as has already been pointed out, the Commission does not dispute that the applicant's prices in continental Europe were increased annually during the period in question on 1 January and/or 1 July, that is to say on different dates from those agreed in the PG Paperboard.

345 Having regard to those factors, the applicant should have been regarded as having played a less significant role in the alleged cartel than that of the other undertakings considered to be 'ordinary members' of it.

346 Likewise, regard must be had to the fact that the Commission has not proved that the applicant participated in an infringement of Article 85(1) of the Treaty from mid 1986 until March 1989.

347 Taking those factors into account, the Court, exercising its unlimited jurisdiction, will reduce the amount of the fine.

348 It follows from the whole of the foregoing that Article 1 of the Decision must be annulled in regard to the applicant in so far as the date of the beginning of the infringement alleged against it has been stated to be prior to April 1989. The eighth indent of Article 1 of the Decision must also be annulled as regards the applicant. Finally, Article 2 of the Decision must be annulled in part as regards the applicant.

349 The amount of the fine imposed on the applicant by Article 3 of the Decision will be set at ECU 750 000.

350 The remainder of the application must be rejected.

Costs

351 Under Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been only partially successful, the Court considers it fair in the circumstances of the case to order the Commission to bear its own costs and to pay one-half of the applicant's costs and to order the applicant to bear the other half of its own costs.

On those grounds,

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

hereby:

1. Annuls, as regards the applicant, Article 1 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) in so far as the date of the beginning of the infringement alleged against it is stated to be prior to April 1989;

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

3. Annuls, as regards the applicant, the first to fourth paragraphs of Article 2 of Decision 94/601 save and except the following passages:

'The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall henceforth refrain in relation to their cartonboard activities from any agreement or concerted practice which may have the same or a similar object or effect, including any exchange of commercial information:

(a) by which the participants are directly or indirectly informed of the production, sales, order backlog, machine utilisation rates, selling prices, costs or marketing plans of other individual producers.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified.';

4. Sets the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 750 000;

5. Dismisses the application as regards the remaining claims;

6. Orders the Commission to bear its costs and to pay one-half of the applicant's costs;

7. Orders the applicant to bear one-half of its own costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary

Facts ..... II - 1135

Procedure ..... II - 1142

Forms of order sought ..... II - 1144

The application for annulment of the Decision ..... II - 1145

A — The plea of infringement of the rights of the defence in that the Commission did not identify the behaviour of individual producers in the statement of objections and in the Decision ..... II - 1145

Arguments of the parties ..... II - 1145

Findings of the Court ..... II - 1149

B — The plea of infringement of Article 190 of the Treaty ..... II - 1152

Arguments of the parties ..... II - 1152

Findings of the Court ..... II - 1153

C — The plea of infringement of Article 85 of the Treaty in that the Commission committed a manifest error of appraisal in fact and in law ..... II - 1154

Arguments of the parties ..... II - 1154

The committees of the PG Paperboard ..... II - 1154

— The functions of the PC and the applicant's participation ..... II - 1154

— The functions of the JMC and the applicant's participation ..... II - 1157

— The functions of the Economic Committee and the applicant's participation ..... II - 1161

The price initiatives ..... II - 1162

The 'price before tonnage' policy ..... II - 1166

The methods of circulating information ..... II - 1168

The duration of the applicant's participation ..... II - 1170

Findings of the Court ..... II - 1170

1. Period from mid-1986 to April 1989 ..... II - 1171

(a) Applicant's participation in certain meetings of the PC ..... II - 1171

(b) Applicant's participation in three meetings of the Economic Committee II - 1176

(c) The applicant's actual pricing behaviour ..... II - 1180

(d) Conclusion regarding the period in question ..... II - 1180

2. Period from April 1989 to April 1991 ..... II - 1181

(a) The applicant's participation in collusion on prices ..... II - 1181

— The applicant's participation in two meetings of the JMC ..... II - 1181

— The applicant's participation in the Economic Committee meeting on 3 October 1989 ..... II - 1187

— The applicant's actual pricing behaviour ..... II - 1189

— Conclusion regarding the applicant's participation in collusion on prices ..... II - 1190

(b) The applicant's participation in collusion on downtime ..... II - 1191

(c) The applicant's participation in collusion on market shares ..... II - 1198

(d) Conclusion regarding the applicant's participation in an infringement of Article 85(1) of the Treaty during the period from April 1989 to April 1991 ..... II - 1202

3. General conclusion regarding the plea ..... II - 1202

D — The plea of infringement of the rights of defence in that the Commission did not disclose all relevant documents ..... II - 1203

Arguments of the parties ..... II - 1203

Findings of the Court ..... II - 1204

The application for annulment of Article 2 of the Decision ..... II - 1206

Arguments of the parties ..... II - 1206

Findings of the Court ..... II - 1208

The application for annulment or reduction of the fine ..... II - 1215

1. The pleas concerning matters dealt with in the course of common argument II - 1215

2. The plea of infringement of the principle of proportionality ..... II - 1216

Arguments of the parties ..... II - 1216

Findings of the Court ..... II - 1217

3. The plea alleging infringement of the principle against self-incrimination ..... II - 1222

Arguments of the parties ..... II - 1222

Findings of the Court ..... II - 1224

4. Incorrect assessment of the criteria for determining the fine ..... II - 1225

Arguments of the parties ..... II - 1225

Findings of the Court ..... II - 1227

Costs ..... II - 1230