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

14 May 1998 *

In Case T-334/94,

Sarrió SA, a company incorporated under Spanish law, established at Pamplona, Spain, represented by Antonio Creus Carreras, of the Barcelona Bar, Alberto Mazzoni, of the Milan Bar, Antonio Tizzano and Gian Michele Roberti, of the Naples Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert 1er,

applicant,

v

Commission of the European Communities, represented by Richard Lyal, of its Legal Service, acting as Agent, and by Alberto Dal Ferro, of the Vicenza Bar, 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: Italian.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Facts

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

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

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

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

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

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

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

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

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

8 On 23 and 24 April 1991, Commission officials acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), carried out simultaneous investigations without prior notice at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

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

10 The evidence obtained from those investigations and requests for information and documents led the Commission to conclude that from mid-1986 until at least (in most cases) April 1991 the undertakings concerned had participated in an infringement of Article 85(1) of the Treaty.

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

...

Article 3

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

...

(xv) Sarrió SpA, a fine of ECU 15 500 000;

...'

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, Sarrió SA (Sarrió), is the result of a merger in 1990 between the cartonboard division of the largest Italian producer, Saffa, and the Spanish producer Sarrió (point 11 of the Decision). In 1991 Sarrió also acquired the Spanish producer Prat Carton (*ibidem*).

21 Sarrió was considered to be responsible for the involvement of Prat Carton in the cartel for the whole of the period of its participation (point 154 of the Decision).

22 Sarrió manufactures principally GD grade cartonboard, but also produces GC grade.

Procedure

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

24 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-311/94, T-317/94, T-319/94, T-327/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

25 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).

26 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).

27 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).

28 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.

29 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 the present case.

30 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.

31 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.

32 The parties in the cases referred to in paragraph 28 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

33 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, annul Article 2 of the Decision, and also Article 3 thereof in so far as it imposes on the applicant a fine of ECU 15 500 000;

— in the further alternative, reduce the amount of that fine;

— order the defendant to pay the costs.

34 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment of the Decision

A — *The plea relating to procedure and requirements of form, grounded upon infringement of the rights of the defence*

Arguments of the parties

35 The applicant claims that its rights of defence were infringed when the Commission (in point 79 of the Decision) took into account, as evidence of the infringement, a document discovered at Finnboard (UK) Ltd during investigations carried out in April 1991 (hereinafter 'the Finnboard price list'). It observes that this document was sent to it only on 28 April 1994, that is to say, well after the date on which it lodged its reply to the statement of objections and after the hearing before the Commission. That unjustified delay deprived it of the opportunity to express its views on the actual significance of the document, the context in which it was drawn up and the conclusions drawn by the Commission from it (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). Furthermore, the communication of the document on 28 April 1994 has not remedied that infringement.

36 The Commission counters by stating that the document in question was sent to Sarrió with a covering letter of 28 April 1994 fully explaining the tenor of the document and the conclusions drawn by the Commission. Since the letter of 28 April 1994 also offered the applicant an opportunity to submit any observations in writing, it was able to put forward at the appropriate time its view of the probative value of the document in question (see Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 36).

Findings of the Court

37 The Finnboard price list was obtained by the Commission during its investigations at the offices of Finnboard (UK) Ltd in April 1991 and was communicated to the applicant with a covering letter 16 months after the despatch of the statement of objections.

38 According to the case-law of this Court, it follows from Article 19(1) of Regulation No 17, read in conjunction with Articles 2 and 4 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), that the Commission must communicate the objections which it raises against the undertakings and associations concerned and may adopt in its decisions only objections on which those undertakings and associations have had the opportunity to make known their views (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 47).

39 Similarly, due observance of the rights of the defence in a proceeding in which sanctions such as those in question may be imposed requires that the undertakings and associations of undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views effectively on the truth and relevance of the facts and circumstances alleged and objections raised by the Commission (*Hoffmann-La Roche* v *Commission*, cited above, paragraph 11, and Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 39).

40 In the present case, no new objection over and above those appearing in the statement of objections was raised by the sending of the document concerned. It is clear from the letter sent with the Finnboard price list that the list merely constituted additional evidence of a common plan to fix prices, an objection which had already been fully explained in the statement of objections.

41 In any event, the applicant was expressly offered an opportunity in the letter sent with that document to make known its views on that evidence, during the administrative procedure and within a period of ten days. In those circumstances, the Commission did not prevent the applicant from putting forward at the appropriate time its view of the probative value of the document sent (*Hoffmann-La Roche* v *Commission*, paragraph 11, and Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 27).

42 It follows that this plea must be rejected as unfounded.

B — *Substance*

The plea as to the absence of collusion on transaction prices and infringement of the obligation to state reasons

Arguments of the parties

43 The applicant acknowledges that it took part in concerted action relating to announced prices but disputes that this action related to transaction prices. Apart from the documents submitted with its pleadings, which show that transaction prices did not follow announced prices, it points, in support of its assertion, to each customer's power of negotiation, to changes in demand and in production costs and to the characteristics peculiar to the cartonboard market, particularly the regularity with which price increases were announced and the high degree of market transparency.

44 It considers that the Commission has not explained clearly whether it was alleging that there had been collusion not only on announced prices but also on transaction prices. On account of their different effects, the distinction between those two types of collusion is, contrary to the Commission's claims, of major importance (see Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307). In its reply the applicant submits that the uncertainty regarding the subject-matter of the collusion constitutes in itself a breach of the obligation to give and explain the reasons for decisions which find that there has been an infringement of the competition rules. Consequently, that breach seriously affects the legitimate rights of the defence.

45 The Commission states that it does not understand how the applicant can at one and the same time claim that it took part in concerted action on prices and submit that the price increases applied were not the result of that collusion. It points out that the Decision (in particular points 72 to 102) refers both to documents showing consultation in regard to each increase announced in the context of the cartel and to the documents by which each producer actually announced the increase in question.

46 It also contends that the distinction between collusion on announced prices and on transaction prices is not relevant in the present case. The collusion in the PWG and the JMC did not solely concern announced prices but also the adoption of decisions relating to periodical price increases for each type of product and the application of those simultaneous increases throughout the Community (see the documentary evidence referred to in points 74 to 90, 92 and 94 to 96 of the Decision).

47 Moreover, having regard to the evidence of collusion within the committees in which the applicant participated, it is impossible to claim that the price announcements did not eliminate each undertaking's uncertainty about its competitors' conduct and that the applicant made the price increases without reference to the

collusion (see Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraphs 122 and 123).

Findings of the Court

48 According to Article 1 of the Decision, the addressees of that decision infringed Article 85(1) of the Treaty by participating, during the relevant period, in an agreement and concerted practice 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'.

49 The applicant acknowledges that it participated in the four bodies of the PG Paperboard and has not disputed, either in its pleadings or its replies to the questions put by the Court at the hearing, that it took part in concerted action on announced prices with effect from 1988.

50 Before dealing with the applicant's submission that the collusion did not relate to transaction prices, it is necessary to determine whether the Commission actually asserted in the Decision that the collusion related to those prices.

51 In that regard, first, Article 1 of the Decision does not specify the price which was the subject-matter of the concerted increases.

52 Second, it is not apparent from the Decision that the Commission had maintained that the producers had fixed, or even intended to fix, uniform transaction prices. In particular, points 101 and 102 of the Decision, dealing with 'the effect of the concerted price initiatives on price levels', show that the Commission considered that the price initiatives concerned list prices and aimed to bring about an increase in transaction prices. It is stated in particular as follows: 'Even if all the producers stayed resolute on introducing the full increase, the possibilities for customers of switching to a cheaper quality or grade meant that a supplying producer might have to make some concessions to its traditional customers as regards timing or give additional incentives in the form of tonnage rebates or large order discounts in order for the customer to accept the full basic-price increase. A price increase would therefore inevitably take some time before it worked through' (point 101, sixth paragraph, of the Decision).

53 It is also apparent from the Decision that the Commission considered that the purpose of the collusion between the producers in regard to prices was that the announced concerted price increases should lead to an increase in transaction prices. According to the first paragraph of point 101 of the Decision, 'the producers not only announced the agreed price increases but also with few exceptions took firm steps to ensure that they were imposed on the customers'. The situation in the present case is therefore different from that before the Court of Justice in *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, since, unlike the decision with which that judgment was concerned, the Commission does not assert in the Decision that the undertakings took concerted action directly on transaction prices.

54 That analysis of the Decision is confirmed by the documents produced by the Commission.

55 In particular, appendix 109 to the statement of objections contains the minutes of a meeting of the JMC of 16 October 1989 in which it is stated, *inter alia*, as follows:

'd) Holland

...

Big problems with the major purchasers, particularly Imca, to which Cascades and Van Duffel are still offering crazy prices and making life hard for both KNP and the Finns.

...

f) Belgium

Similar situation to that in Holland. Finnboard had already succeeded with the price increase at Van Genechten but, owing to concessions from Belgium (Cascades), had to have a further discussion. A tough line will continue and this is also expected from Beghin, Cascades and KNP.

...

h) Italy

Saffa has very great problems with the import prices charged by Kopparfors, Finnboard and also Cascades.

There has been a heavy fall in Saffa's deliveries, imports have greatly increased.

Saffa calls on importers to keep absolutely to the price guidelines that have been issued.'

56 That document clearly shows that although the producers accepted in general terms that each of them should negotiate its transaction prices with its customers, each of the producers, and in particular the applicant, which is expressly referred to in the abovementioned appendix, expected that its competitors would apply transaction prices conforming to the agreed prices, at least in the sense that individual negotiations were not to deprive the agreed increases in list prices of their effect.

57 Furthermore, the applicant acknowledged at the hearing that announced prices served as a preliminary basis for negotiations with customers on transaction prices, which confirms that the ultimate aim was to increase transaction prices. In that regard, it suffices to state that the fixing of uniform list prices agreed by the producers would have been rendered absolutely irrelevant if those prices had not actually had any effect on transaction prices.

58 As regards the applicant's claim that the uncertainty regarding the subject-matter of the collusion is in itself a breach of the obligation to furnish reasons, it must be pointed out that Article 1 of the Decision does not identify the specific price on which the collusion took place.

59 In such circumstances, it is settled law that the operative part of the decision must be considered in the light of its statement of reasons (see, for example, the judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 122 to 124).

60 In the present case, it follows from the foregoing that the Commission adequately explained in the grounds of the Decision that the concerted action related to list prices and aimed to bring about an increase in transaction prices.

61 Consequently, the plea must be rejected as unfounded.

Non-participation by the applicant in an agreement to freeze market shares and control supply

Arguments of the parties

62 This plea is in three parts.

63 In the first part of the plea the applicant claims that the Commission has no evidence of the existence of concerted action to freeze market shares or to control supply. Even assuming that those concerted actions had been proved to the standard required by law, the Commission would not have proved that the applicant participated in those concerted actions. In particular, the applicant disputes the probative value of several appendices to the statement of objections on which the Commission based its findings in the Decision.

64 First, appendix 73, an internal Mayr-Melnhof note, could only prove collusion on prices, explain the consequences of a rigorous pricing policy and show that there was no pressure by the applicant on Mayr-Melnhof to cause the latter to refrain from increasing its market shares through a reduction in its prices. In that regard, the applicant relies on the explanation given by Mayr-Melnhof in its letter of 23 September 1991 (appendix 75 to the statement of objections).

65 Second, appendix 102, a note by Rena, relates to a meeting of the Nordic Paperboard Institute ('NPI'), an association of which the applicant was not a member.

66 Third, Stora's statements cannot in themselves constitute adequate evidence. Moreover, Stora repeatedly stressed the relative autonomy enjoyed by the various undertakings as regards, in particular, production volumes and the time when they chose to stop production (see points 57, 59, 60, 69, 70 and 71 of the Decision). Stora's statements also confirm that no system for the monitoring of any understanding on quantities had been established. The absence of a system for monitoring quantity changes clearly refutes the existence of any understanding on that subject. Moreover, Stora's statements merely express its own opinion regarding the importance of adopting measures to monitor production quantities and sales.

67 In the second part of the plea the applicant claims that the changes in the market shares of various undertakings show that no concerted action to freeze market shares took place or, even if it were assumed that concerted action had taken place between some undertakings, that the applicant had not in any event taken part in it.

68 As regards the general changes in market shares, it maintains that some producers, in particular Iggesund (MoDo) and Mayr-Melnhof, brought significant new capacity into service during the period in question.

69 The applicant also observes that its own overall share of the Community market fell from 14.3% in 1987 to 11.7% in 1990. It claims that such a fall is incompatible with the Commission's assertion that it took part in an agreement to freeze the market shares of the various producers. As regards Prat Carton, the reduction, from 1987 to 1990, of approximately 9% of its overall share of the Community market also demonstrates the complete absence of participation in any concerted action to freeze market shares.

70 In the third part of the plea the applicant submits that its behaviour in regard to production stoppages and exports to markets outside Europe is also incompatible with the Commission's assertions.

71 As to the first part of the plea, the Commission considers that the evidence on which it relied, in particular Stora's statements (appendices 39 and 43 to the statement of objections) and appendices 73 and 102 to the statement of objections, amply demonstrate the existence of an agreement to freeze market shares and to control supply, and also the applicant's participation in those aspects of the cartel.

72 As regards the second part of the plea, it observes that it based itself on documentary evidence of an understanding on freezing market shares and it submits that the applicant's argument relating to the change in market shares of various undertakings is therefore irrelevant to the question whether such an understanding existed. Moreover, it is expressly accepted in the Decision that the market shares of certain undertakings did creep up, market shares being renegotiated each year (points 60 and 131 of the Decision). In any event, Article 85 prohibits agreements, decisions or concerted practices which have as their object or effect the restriction of competition, irrespective of the extent to which they succeed.

73 As regards, more particularly, the applicant's arguments relying on changes in its own market shares, the Commission observes that the infringement concerned the whole of the Community market. The applicant was a member of the PWG, in which the discussions on market shares took place. In 1989 Saffa's managing director was even appointed vice-president of the PG Paperboard.

74 The Commission observes, lastly, that there is no evidence to support the applicant's contention that it always behaved independently. Moreover, even assuming that the applicant did not abide by the understanding, that in no way alters the infringement committed (*Rhône-Poulenc* v *Commission*, cited above).

75 Lastly, as to the third part of the plea, the Commission contends that Stora confirmed in appendix 39 to the statement of objections that the PWG had planned and established a scheme for achieving a balance and controlling production in such a way as to maintain prices at a constant level. Consequently, the fact that as a result of the market situation or the proper working of the cartel the applicant was not, as it claims, required to have recourse to concerted production stoppages is irrelevant to its responsibility or its participation in the agreement to control market shares and quantities.

Findings of the Court

1. Existence of concerted action to freeze market shares and to control supply

76 As regards the first part of the plea, it should be observed that, according to Article 1 of the Decision, the undertakings referred to in that article infringed Article 85(1) of the Treaty by participating, during the relevant period, in an agreement and concerted practice whereby the suppliers of cartonboard in 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'.

77 According to the Commission, those two types of collusion, dealt with in the Decision under the heading 'volume control', were initiated during the reference period by the participants in the PWG meetings. It is apparent from the third paragraph of point 37 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"'.

78 As to the PWG's role in relation to the collusion on market shares, the Decision (point 37, fifth paragraph) states as follows: 'In connection with the moves to increase prices, the PWG held detailed discussions on the market shares in western Europe of the national groupings and of individual producer groups. As a result, certain "understandings" were reached between the participants as to their respective market shares, the object being to ensure that the concerted price initiatives were not jeopardised by excess of supply over demand. The large producer groups

in effect agreed to maintain their market shares at the levels disclosed for each year by the annual production and sales figures and available in definitive form through Fides in March of the following year. Market share developments were analysed in each meeting of the PWG on the basis of the monthly Fides returns and if significant fluctuations emerged, explanations would be sought from the undertaking presumed responsible.'

79 According to point 52 of the Decision: 'The agreement reached in the PWG during 1987 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'.

80 The first paragraph of point 56 states: 'The basic understanding between the major producers on maintaining their respective market shares continued throughout the period covered by this Decision'. According to point 57: '"Market share development" was analysed at each meeting of the PWG on the basis of provisional statistics'. Finally, the last paragraph of point 56 states: 'The undertakings which took part in these discussions on market shares were those represented in the PWG, namely Cascades, Finnboard, KNP (until 1988), [Mayr-Melnhof], MoDo, Sarrió, the two Stora group producers CBC and Feldmühle, and (from 1988) Weig'.

81 The Court therefore considers that the Commission correctly established the existence of collusion on market shares between the participants in the meetings of the PWG.

82 The Commission's analysis is in essence based on Stora's statements (appendices 39 and 43 to the statement of objections) and is confirmed by appendix 73 to the statement of objections.

83 In appendix 39 to the statement of objections, Stora states: 'The PWG met from 1986 to assist in the introduction of discipline in the market. ... Among other (legitimate) activities, its purpose included discussion and concertation on markets, market shares, prices, price increases, demand and capacity. Its role included assessing and explaining to the President Conference the precise state of supply and demand on the market and the measures to be taken to attempt to bring order to the market.'

84 As regards more specifically the collusion on market shares, Stora indicates that 'the shares taken by national groups of EC, EFTA and other countries supplied by members of the PG Paperboard were considered in the PWG' and that the PWG 'discussed the possibility of holding market shares at the previous year's level' (appendix 39 to the statement of objections, point 19). It also states (same document, point 6) that '[d]iscussions about producers' European market shares also took place during this period, the first reference period being 1987 levels'.

85 In a reply to a request by the Commission of 23 December 1991, sent on 14 February 1992 (appendix 43 to the statement of objections), Stora also states: 'The understandings on market share levels reached by the PWG members related to Europe as a whole. The understandings were based on the previous total year figures, usually definitively available by the following March' (point 1.1).

86 That assertion is confirmed in the same document as follows: '... the discussions led to understandings usually in March of each year between members of the PWG to maintain their market shares at the previous year's level' (point 1.4). Stora reveals that 'no measures were taken to ensure respect for the understandings' and that the participants in the meetings of the PWG 'were aware that if they took exceptional positions in certain markets supplied by others, those others could retaliate in other markets' (*ibidem*).

87 Lastly, it states that Saffa took part in the discussions concerning market shares (point 1.2).

88 Stora's assertions concerning collusion on market shares are supported by appendix 73 to the statement of objections. That document, found at FS-Karton, is 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.

89 According to that document, cited in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided on in 1987 had produced 'winners' and 'losers'. The author of the note considers Mayr-Melnhof to be amongst the losers for various reasons, including the following:

'(2) An agreement could only be reached by our being "punished" — we were asked to make "sacrifices".

(3) Market shares had to be "frozen" at 1987 levels, existing contacts maintained and no new activities or grades obtained via pricing (the result will be apparent in January 1989 — if all are honest)'.

90 Those sentences must be read in the more general context of the note.

91 In that regard, the author of the note refers by way of introduction to the closer cooperation within the 'Presidents' grouping'. 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). It is unnecessary to consider that interpretation in the present context.

92 The author goes on to indicate that this cooperation had led to 'price discipline' which had produced 'winners' and 'losers'.

93 It is necessary, therefore, to understand the phrase relating to the market shares which were to be frozen at 1987 levels against the background of that discipline decided upon by the 'Presidents' grouping'.

94 Moreover, the reference to 1987 as reference year is consistent with Stora's second statement (appendix 39 to the statement of objections; see paragraph 84 above).

95 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).

96 It is also observed: 'However, the PWG did not formally allocate the "downtime" to be taken by each producer. According to Stora, there were practical difficulties in reaching a coordinated plan on downtime to cover all the producers. Stora says that for these reasons only "a loose system of encouragement existed"' (point 71 of the Decision).

97 The Court finds that the Commission adequately established the existence of collusion on downtime between the participants in the meetings of the PWG.

98 The documents it produces support its analysis.

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

100 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 ...'.

101 As to appendix 73 to the statement of objections, the reasons adduced by the author of the note in order to explain why he considered Mayr-Melnhof to be a 'loser' at the time when the note was written are significant evidence of the existence of collusion on downtime between the participants in the meetings of the PWG.

102 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).'

103 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.

104 The fact that discussions relating to consideration of downtime took place between the manufacturers when they prepared price increases is corroborated, in particular, by a Rena note dated 6 September 1990 (appendix 118 to the statement of objections), which refers to the amounts of price increases in several countries, the dates for the future announcements of those increases and the state of the order backlogs expressed in working days for several manufacturers.

105 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'.

106 On the basis of the foregoing, the Commission has proved to the requisite legal standard that there was collusion on market shares between the participants in the meetings of the PWG and that there was collusion on downtime between those same undertakings. Since it is not disputed that Sarrió took part in the meetings of the PWG and that that undertaking is expressly referred to in the main inculpatory evidence (Stora's statements and appendix 73 to the statement of objections), the Commission was fully entitled to hold the applicant liable for its participation in those two types of collusion.

107 The applicant's criticism of Stora's statements to the Commission and appendix 73 to the statement of objections, by which it disputes the probative value of those documents, does not weaken that finding.

108 As regards, first of all, Stora's successive statements to the Commission, it is not disputed that they are made by one of the undertakings regarded as having partici-

pated in the alleged infringement and that they contain a detailed description of the nature of the discussions held in the bodies of the PG Paperboard, of the objective pursued by the undertakings which met within it, and of the participation of those undertakings in the meetings of its various bodies. Since this central evidence is corroborated by other documents, it constitutes a sound basis for the Commission's assertions.

109 Second, as regards appendix 73 to the statement of objections, the applicant argues that this annex demonstrates only concerted action on prices, because the variations in the sales referred to therein are simply regarded as the consequence of the pricing policy. It relies in that regard on Mayr-Melnhof's interpretation of that document (appendix 75 to the statement of objections).

110 However, that construction by the applicant does not accord with an interpretation of the document in its context and Mayr-Melnhof's interpretation of that document is of no avail.

111 According to appendix 75 to the statement of objections, appendix 73 'is a general description of the situation drawn up by the sales director of FS-Karton for the group management which is nothing more than an attempt to give reasons to the group management for the stagnation in turnover of FS-Karton by relying essentially on the new policy, which obliged the subsidiaries to observe absolute price discipline, even at the cost of losing turnover'. Moreover, according to Mayr-Melnhof: '"the freezing of market shares" meant that in order to achieve a higher price level within the Mayr-Melnhof Group there should be no attempt to try to obtain greater market shares by selling additional quantities to new customers or new types of products at unprofitable prices. The objective was, in contrast, to maintain existing relationships with customers despite the increase in prices.'

112 Those general considerations are not reconcilable with the reference made at the beginning of the document to the 'Presidents' grouping' and the whole of the document must be understood in the light of that reference.

113 Since the indications in appendix 73 relating to the 'freezing' of market shares and to the regulation of supply correspond to those in Stora's statements, the Commission justifiably considered that those documents, read together, show the existence of a joint intention which went beyond collusion on prices alone.

114 Since the Commission has proved the existence of the two types of collusion in question, it is unnecessary to consider the applicant's criticism of appendix 102 to the statement of objections.

2. The applicant's actual conduct

115 Nor is it possible to uphold the second and third parts of the plea, according to which the undertakings' actual conduct is irreconcilable with the Commission's assertions concerning the existence of the two disputed types of collusion.

116 First, the existence of collusion between the members of the PWG on the two aspects of the 'price before tonnage policy' should not be confused with their implementation. The probative value of the proof adduced by the Commission is such that information as to the applicant's actual conduct on the market cannot affect the Commission's conclusions concerning the fact of the existence of collusion on the two aspects of the policy at issue. At the very most, the applicant's contentions might tend to show that its conduct did not follow that agreed by the undertakings which met in the PWG.

117 Second, the Commission's conclusions are not contradicted by the information supplied by the applicant. It must be emphasised that the Commission expressly accepts that the collusion on market shares involved 'no formal machinery of penalties or compensation to reinforce the understanding on market shares' and that the market shares of some large producers did creep up from year to year (see, in particular, points 59 and 60 of the Decision). Moreover, the Commission acknowledges that since the industry had operated at full capacity until the beginning of 1990, practically no downtime was required until that date (point 70 of the Decision).

118 Third, 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 is not such as to relieve it of full responsibility for the fact that it participated 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 Sales* v *Commission* [1995] ECR II-791, paragraph 85). Even assuming that the applicant's conduct on the market was not in conformity with the conduct agreed, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.

Error by the Commission regarding the duration of concertation on prices

Arguments of the parties

119 The applicant claims that concertation on announced prices took place, at least as concerns the applicant, only with effect from 1988. The January 1987 price increase in the United Kingdom was merely a natural reaction by producers in the face of the weakness of the pound sterling in relation to other European currencies and the uniform nature of that increase was the result of market transparency. Economic operators are not prohibited from adapting their conduct to the perceived or

expected conduct of their competitors (*Suiker Unie and Others* v *Commission*, cited above). Moreover, neither appendices 44 and 61 to the statement of objections nor document A-17-2 prove concertation on prices between undertakings. In any event, they do not concern the applicant.

120 As to the question when concertation on prices ended, the Commission wrongly found the date to be April 1991, the last concerted price increase having been announced in September/October 1990.

121 The Commission observes that the applicant took part in the meetings of the PWG and of the JMC from their establishment and was still a member in 1991. It states that, although documents found at the premises of one of the undertakings involved show that at the end of 1987 an agreement had been concluded on the linked issues of volume control and price discipline (point 53 of the Decision), that is not inconsistent with the fact that the producers in question held a series of secret meetings before that date in order to discuss a plan intended to eliminate competition (see, in particular, point 161 of the Decision). Appendices 35 and 43 to the statement of objections confirm that assertion. The Commission adds that the correctness of its deductions concerning the duration of the infringement is also borne out by the price increases made by the producers since 1987.

Findings of the Court

122 According to Article 1 of the Decision, the applicant infringed Article 85(1) of the Treaty by participating, from mid-1986 until at least April 1991, in an agreement and concerted practice whereby the suppliers of cartonboard in the Community, *inter alia*, agreed price increases for cartonboard and planned and implemented simultaneous and uniform price increases throughout the Community. Point 74 of the Decision explains that the first concerted price initiative in which the applicant

participated (annex A to the Decision) was in the United Kingdom at the end of 1986 'while the new mechanism of the PG Paperboard was still being set up'.

123 The second paragraph of point 161 of the Decision states moreover that the majority of the addressees of the Decision participated in the infringement from June 1986 onward, the date when 'the PWG was set up and the collusion between the producers intensified and started to be more effective'.

124 In support of its claims concerning the beginning of price concertation, the applicant disputes the probative value of appendices 61 and 44 to the statement of objections and of document A-17-2.

125 Appendix 61 to the statement of objections is a note found at the United Kingdom sales agent of Mayr-Melnhof. The Commission considers that it is an 'internal note made at a President Conference [corroborating] Stora's admission that the President Conference did in fact discuss collusive pricing' (third paragraph of point 41 and second paragraph of point 75 of the Decision).

126 That document, which relates to a meeting held in Vienna on 12 and 13 December 1986, 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 disappoint-

ment 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!'

127 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.

128 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.

129 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.

130 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.

131 The minutes of a Feldmühle (UK) Ltd board meeting of 7 November 1986 (annex A-17-2), on which the Commission relies in the Decision (third paragraph of point 74), merely confirm that this United Kingdom subsidiary of Feldmühle was aware prior to 10 November 1986 of Thames Board Ltd's announcement of a price increase of approximately 9%:

'TBM and the Fins (*sic*) have announced price increases of approximately 9% to be effective from February 1987 and it would appear that most other mills will be looking for the same sort of increase' [annex A-17-2 cited by the Commission in point 74 of the Decision].

132 As regards appendix 44 to the statement of objections, which consists of a handwritten note in the desk diary of a Feldmühle employee on the pages for 15 to 17 January 1987, the Commission considers that this constitutes 'further evidence of concertation' (third paragraph of point 75 of the Decision).

133 However, that note does not have the probative value accorded it by the defendant. There is no identification of the meeting of which it is an account, so that the possibility cannot be ruled out that it concerns an internal Feldmühle meeting. Moreover, since the note probably dates from mid-January 1987, it does not prove that the application of the price increase 'TBM included' was the result of concertation, it being possible that the note was only an observation.

134 Some indications in the note are even such as to contradict the Commission's claim that the note confirms the existence of collusion in regard to the decision to increase prices in the United Kingdom. In particular, the statement that the

director of Feldmühle had declared that he was 'sceptical' of Kopparfors and had regarded Mayr-Melnhof as 'irresponsible' (ohne Verantwortung) cannot be regarded as supporting the Commission's contention. The position is the same in regard to the statement: 'Finnboard: Preisautonomie auch f. Tako' ['Finnboard: price autonomy also for Tako'].

135 It follows from the foregoing that the Commission has not proved that the undertakings agreed to increase prices in the United Kingdom in January 1987 nor, *a fortiori*, that the applicant was involved in discussions to that end.

136 Nevertheless, in its capacity as an undertaking which, as it has admitted, had participated in the meetings of the PWG since that body of the GP Paperboard was created towards the middle of 1986, the applicant must be held liable for collusion on prices from that date.

137 The PWG was set up by certain undertakings, including the applicant, for an essentially anti-competitive purpose. As Stora stated (appendix 39 to the statement of objections, point 8), it 'met from 1986 to assist in the introduction of discipline to the market' and its purpose included 'discussion and concertation on markets, market shares, prices, price increases and capacity' (appendix 35 to the statement of objections, point 5(iii)).

138 The role played by the undertakings meeting in that body in regard to collusion on market shares and on downtime has been described in the previous plea (see paragraphs 78 to 106 above). The undertakings which met in that body also discussed price initiatives. According to Stora (appendix 39 to the statement of objections, point 10), '[f]rom 1987 the PWG reached an agreement and took broad decisions on both the timing ... and level of price increases to be introduced by cartonboard producers.'

139 Consequently, the fact that they had agreed to set up and participate in meetings of a body whose anti-competitive object, in particular the discussion of future price increases, was known to and accepted by the undertakings which originally established it, constitutes a sufficient ground for considering that the applicant is liable for collusion on prices with effect from mid-1986, the date from which the applicant accepts that it participated in the PWG.

140 As regards the date when collusion on prices ceased, the Commission rightly took this date to be April 1991, the month in which the Commission's agents carried out investigations at the premises of several undertakings in accordance with Article 14 of Regulation No 17. The last concerted price increase, announced in October 1990 by the applicant, was applied from January 1991 and the level of list prices agreed between the undertakings was still in force in April 1991.

141 This plea must therefore be rejected.

Error of the Commission regarding the duration of the understanding on the freezing of market shares and on controlling supply

Arguments of the parties

142 The applicant submits that, even assuming that an understanding on the freezing of market shares and on controlling supply were to be taken as proved, the Commission committed an error of assessment as regards its duration, because the evidence upon which it relies demonstrates that there was no understanding before the end of 1988. In its reply, it adds that appendix 102 to the statement of objections, a Rena note concerning an NPI meeting of 3 October 1988, shows that there was no

such understanding at the point when that note was written, the author referring in it only to the possibility of considering regulation of supply should difficulties be met in the matter of prices.

143 The Commission refers to the arguments which it submitted in the context of the plea alleging an error in regard to the duration of the concertation on prices (see paragraph 121 above).

Findings of the Court

144 The Court has already found (see paragraphs 78 to 106 above) that the Commission has proved that the undertakings meeting in the PWG participated in collusion on market shares and in collusion on downtime.

145 It is apparent from the Decision that the 'freezing' of market shares and the consideration of downtime began to be specifically discussed by the participants in the meetings of the PWG from the end of 1987 so as to ensure the success of the price initiatives taken with effect from 1988 (see, in particular, points 51 to 60 of the Decision). In that regard, the Decision states: 'All members of the PWG were concerned that the relaunched price initiatives should not be undermined by substantial increases in the volume sold. This was referred to by Stora as a "price before tonnage" policy' (first paragraph of point 51 of the Decision). The Commission also observes that the main features of the 'price before tonnage policy', which characterised the PG Paperboard from the end of 1987 until April 1991, were the '"freezing" of the market shares of the major producers originally on the basis of their 1987 positions' and 'the coordination of "downtime" by the major producers instead of reduction in prices (mainly from 1990)' (second paragraph of point 130 of the Decision).

146 Those assertions of the Commission are based essentially on appendices 39 and 73 to the statement of objections.

147 In the document constituting appendix 39 (point 5) Stora states: 'Linked with the pricing initiative from 1987 was the need to maintain a near balance between production and consumption (price before tonnage policy)'.

148 As regards the beginning of collusion on market shares, it follows from appendix 73 to the statement of objections (see paragraph 89 above) that the 'Presidents' grouping' ('Präsidentenkreis') had decided to cooperate more closely from October or November 1987. The result of that cooperation was collusion on market shares with effect from that date.

149 As regards the beginning of collusion on downtime, Stora states: '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' (appendix 39, point 24).

150 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' (appendix 39, point 25).

151 In view of that evidence, the Commission has proved that the undertakings which participated in the meetings of the PWG adopted a so-called 'price before tonnage' policy at the end of 1987 and that one aspect of that policy, namely collusion on market shares, was applied with immediate effect, whereas the aspect relating to downtime fell to be applied in fact only from 1990.

152 It follows from the foregoing that this plea must be rejected as unfounded.

Error of assessment by the Commission as regards the Fides information exchange system

153 In its reply, the applicant submits that the Fides information exchange system was not capable of promoting collusive conduct and that it was therefore not incompatible with Article 85 of the Treaty. It claims that there are significant differences between the facts of the present case and those underlying Commission Decision 87/1/EEC of 2 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.128 — *Fatty Acids*, OJ 1987 L 3, p. 17), on which the Commission relies in point 134 of the Decision.

154 In its rejoinder, the Commission sets out its reasons for referring to the '*Fatty Acids*' decision. It contends that in the present case the information exchange system had, at least, the effect of facilitating the cartel.

155 In response to this plea the Court observes that, by virtue of 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 come to light in the course of the procedure.

156 The plea alleging an error of appraisal by the Commission in regard to the Fides information exchange system was raised by the applicant for the first time only in its reply and is not based on matters of fact or of law which have come to light in the course of the procedure.

157 This plea is accordingly inadmissible.

Error committed by the Commission in considering that there was one overall infringement and that Sarrió was responsible for it as a whole

Arguments of the parties

158 The applicant contests the Commission's conclusion that there was one single infringement and that the applicant was responsible for it in full.

159 First, it maintains that the Commission's approach is essentially based on an 'accusatory principle', since it has no direct evidence of a fully-fledged cartel. It is, however, for the Commission to prove whether and, if so, to what extent the applicant participated in each of the elements of a single infringement. Where infringements of Community competition law are concerned, the principle of strictly individual responsibility must be applied, because the notion of collective responsibility is incompatible with the quasi-criminal nature of the penalties which may be imposed for such infringements. Consequently, the Commission is wrong in arguing that it is unnecessary to prove that the applicant actively participated in each element of the infringement. On the contrary, it is necessary both to determine the precise nature of the infringement committed and to investigate any individual

participation by each undertaking in order to be able correctly to determine individual responsibility and, in consequence, the appropriate individual penalty.

160 Second, the applicant argues that it is also contrary to the fundamental principles of Community law, and particularly the principle governing the burden of proof, to base an undertaking's individual responsibility for an infringement solely on its membership of an association whose activities were, at least in part, lawful.

161 Third, the applicant claims that the Commission did not give due consideration to its specific position on the market and within the PG Paperboard. In particular, the purpose of its request in 1986 to participate in the meetings of the PG Paperboard was to compete more effectively with its competitors.

162 The Commission contends that it has proved the existence of the cartel and the applicant's active participation as ringleader in it. It therefore based its analysis on specific, well-established facts and the applicant's arguments regarding a kind of 'collective responsibility' or an 'accusatory principle' are without foundation.

163 It claims, moreover, that it did not base the applicant's responsibility solely on its membership of the PG Paperboard. It had in fact taken into account the applicant's active participation in the meetings of the various committees of the PG Paperboard which had an anti-competitive object and also the fact that the applicant subsequently adopted the conduct agreed at those meetings.

Findings of the Court

164 First of all, the Commission found that the applicant had infringed Article 85(1) of the Treaty by participating, from mid-1986 until at least April 1991, in an

agreement and a concerted practice which started in mid-1986 and which consisted of several separate constituent elements.

165 According to the second paragraph of point 116 of the Decision, the 'whole gravamen of the infringement lies in the combination of the producers over several years in a joint unlawful enterprise pursuant to a common design'. That view of the infringement is also expressed in point 128 of the Decision: 'It would however be artificial to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete infringements (see again judgment of the Court of First Instance in Case T-13/89, *Imperial Chemical Industries* v *Commission*, at point 260)'.

166 Consequently, even though the Commission did not expressly use the concept of a 'single infringement' in the Decision, it implicitly referred to that concept, as is shown by the reference to paragraph 260 of the judgment of this Court in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021.

167 Furthermore, the Commission's repeated use of the word 'cartel' to cover the various kinds of anti-competitive conduct which it found expresses a comprehensive view of the infringements of Article 85(1) of the Treaty. As is clear, in fact, from point 117 of the Decision, the Commission's view is as follows: 'The proper approach in a case such as the present one is to demonstrate the existence, operation and salient features of the cartel as a whole and then to determine (a) whether there is credible and persuasive proof to link each individual producer to the common scheme and (b) for what period each producer participated'. It adds (*ibidem*): 'The Commission ... is not required to compartimentalise the various constituent elements of the infringement by identifying each separate occasion during the duration of the cartel on which a consensus was reached on one or another matter or each individual example of collusive behaviour and the[n] exonerating from

involvement on that occasion or in that particular manifestation of the cartel any producer not implicated on that occasion by direct evidence'. It also states (in point 118): 'There is ample direct evidence to prove the adherence of each suspected participant to the infringement', without distinguishing between the constituent elements of the overall infringement.

168 Thus, the single infringement, as conceived by the Commission, is bound up with 'the cartel as a whole' or 'the overall cartel' and is characterised by a continuous course of action adopted by a number of undertakings pursuing a common unlawful objective. That view of a single infringement gives rise to the system of proof set out in point 117 of the Decision and to unitary responsibility, in the sense that any undertaking 'linked' to the overall cartel is held responsible for it whatever the constituent elements in which it is proved to have participated.

169 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.

170 In the present case, it is apparent from the Decision that the infringement found in Article 1 consisted of collusion on three matters which were different but which

pursued a common objective. Those three types of collusion must be regarded as the constituent elements of the overall cartel. According to that article, each of the undertakings mentioned infringed Article 85(1) of the Treaty by participating in an agreement and concerted practice by which the undertakings (a) agreed regular price increases for each grade of the product in each national currency and planned and implemented those increases; (b) reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time; and (c) 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 concerted price rises.

171 Despite its view that there was a 'single' infringement, the Commission explains in the Decision that '[t]he "core" documents which prove the existence of the overall cartel or individual manifestations thereof often identify participants by name, and there is also a vast body of further documentary evidence showing the role of each producer in the cartel and the extent of its involvement' (point 118, first paragraph, of the Decision).

172 The Court must therefore consider, in the light of the foregoing considerations, whether the Commission has proved the applicant's participation in the cartel, as found in Article 1 of the Decision.

173 As has already been held (see paragraph 48 et seq. and paragraph 76 et seq. above), the Commission has proved that, as an undertaking which took part in the meetings of the PWG from its establishment, the applicant participated, from mid-1986, in collusion on prices and, from the end of 1987, in collusion on market shares and in collusion on downtime, that is to say, in the three constituent elements of the infringement found in Article 1 of the Decision. It was therefore fully entitled to decide to hold the applicant responsible for an infringement consisting of those three types of collusion pursuing the same objective.

174 So the Commission did not place on the applicant responsibility for the conduct of other producers and did not hold it responsible on the sole basis of its participation in the PG Paperboard.

175 This plea must therefore be rejected and it is not necessary to consider the other arguments raised by the applicant.

Failure of the Commission to take the Spanish market situation into consideration

176 In its reply, the applicant contends that the Commission did not define precisely the geographic market on which the alleged infringement took place and that, in particular, it did not adequately analyse the situation on the Spanish market and the conduct on that market of the undertakings concerned. It states that it has already pointed out in its application that the only reference in the Decision to the Spanish market consists of two footnotes in tables E and G annexed thereto.

177 The Commission contends that this plea, raised for the first time in the reply, should be barred.

178 The Court observes that, according to the first paragraph 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 come to light in the course of the procedure.

179 The plea that the Commission failed to take the situation of the Spanish market into consideration was raised for the first time by the applicant in its reply. The only argument in the application relating to the Spanish market is raised in support of the plea that Prat Carton did not participate in the infringement in question. Apart from the title of this plea, the supporting argument merely states that table G annexed to the Decision, mentioning the announcements of price increases on the Spanish market in January 1991 by producers operating on it, makes no reference to Prat Carton. It cannot therefore be construed as a complaint that the Spanish market was not taken into consideration.

180 In those circumstances, since this plea was raised for the first time in the reply and is not based on matters of law or of fact which came to light in the course of the procedure, it must be declared inadmissible.

Non-participation of Prat Carton in the infringement

Arguments of the parties

181 The applicant contends that the Commission has not demonstrated Prat Carton's participation in any infringement. In particular, the footnote to table G of the Decision (relating to a price increase in January 1991 on the Spanish market) makes no reference to Prat Carton.

182 It asserts that Prat Carton participated only very sporadically in the meetings of some committees of the PG Paperboard. Moreover, it participated in the JMC only from June 1990 to March 1991. Furthermore, the mere fact that Stora stated that it thought that the Spanish producers were generally informed of the results of the

meetings by Saffa or by Finnboard (appendix 38 to the statement of objections) does not constitute evidence of Prat Carton's participation in the alleged infringement.

183 The applicant disputes that documents F-15-9, G-15-7 and G-15-8 (annexed to the statement of objections), on which the Commission relies, show Prat Carton's participation in concerted price increase initiatives in April 1990. In its reply to a written question put by this Court it states that document F-15-9 dates from February 1991 and not, as the Commission claimed, February 1990. Document G-15-7 is solely evidence of the practice in the sector of applying annual increases in April and of Prat Carton's uncertainty as to the level of the increase and the date of its entry into force.

184 The Commission contends that Prat Carton participated in the cartel from the outset as is shown by the documents supplied with the statement of objections (the 'individual particulars'). It observes, first, that Prat Carton was present at numerous meetings of the PC between 29 March 1986 and 28 November 1989, at three meetings of the Economic Committee between October 1988 and October 1989, and at various meetings of the JMC between June 1990 and 5 March 1991 (see tables 3 to 7 annexed to the Decision). Since it therefore participated directly in meetings during which decisions were taken relating to the cartel, Prat Carton is responsible for it (see *Rhône-Poulenc* v *Commission*, cited above). Moreover, there is no official record of the participation of the various undertakings in the JMC meetings before the Commission's investigations or in the PWG meetings before February 1990. The mere fact that the documents supplied by the undertakings give no specific indication of Prat Carton's presence at the various meetings does not therefore prove that it did not take part in them.

185 Second, the Commission observes that, as Stora stated (appendix 38 to the statement of objections), Prat Carton was informed of the outcome of the PWG meetings.

186 Third, Prat Carton applied the price initiatives agreed in the various bodies of the PG Paperboard during the period concerned. Slight differences in the timing or in the amounts of the increases made by Prat Carton and by the other producers do not show that Prat Carton did not participate in the cartel. However, the Commission accepts that document F-15-9 dates from February 1991 and not from February 1990 and that it does not therefore have evidence capable of proving Prat Carton's actual participation in price increase initiatives prior to January 1991. As regards the price increase initiative of January 1991, the Commission refers in particular to document G-15-8, dated 26 September 1990, in which Prat Carton expressly states that it is planning to increase prices in all countries in January 1991.

Findings of the Court

187 The Court observes first of all that the applicant acquired a 100% interest in Prat Carton in February 1991 and that it does not dispute its responsibility for any participation by Prat Carton in an infringement of Article 85(1) of the Treaty. In point 154 of the Decision it is stated that, on account of the acquisition of Prat Carton, the applicant 'became responsible for the involvement of this Spanish producer in the cartel for the whole of the period of its participation'. Moreover, Article 1 of the Decision merely holds the applicant responsible for the infringement objected to including its alleged commission by Prat Carton, and the Decision is addressed to the applicant without mention of Prat Carton (Article 5 of the Decision).

188 In those circumstances, and inasmuch as it has already been held that the Commission has demonstrated that the applicant itself participated in the infringement described in Article 1 of the Decision, this plea, if it were to be upheld, could not justify total or partial annulment of that article. However, since Prat Carton was acquired by the applicant only in February 1991, which was two months before the end of the period of infringement found by the Decision, a reduction in the fine would be justified if it were to be concluded that Prat Carton's individual

participation in the constituent elements of the cartel before February 1991 has not been demonstrated by the Commission. Moreover, the fines imposed under Article 3 of the Decision were calculated on the basis, *inter alia*, of the turnover of each of the undertakings in 1990, a year in which Prat Carton was not yet part of the applicant's group. Consequently, it is appropriate to consider here the arguments relied on in the context of this plea.

189 The Court will examine first the question whether the Commission has proved that Prat Carton participated in an infringement of Article 85(1) of the Treaty as regards the period from mid-1986 until June 1990, the date from which Prat Carton admits that it began to participate in the meetings of the JMC. Second, the Court will examine the question whether the Commission has proved the participation of Prat Carton in an infringement of Article 85(1) of the Treaty as regards the remaining period, namely from June 1990 to February 1991, the date on which Prat Carton was acquired by the applicant.

1. Period from mid-1986 to June 1990

190 In order to prove Prat Carton's participation in an infringement of the Community competition rules during the period in question the Commission relies on that undertaking's participation in the meetings of the PC on 29 May 1986, 25 May 1988, 17 November 1988 and 28 November 1989 and in the meetings of the Economic Committee of 20 September 1988, 8 May 1989 and 3 October 1989. Moreover, it relies on a statement by Stora (appendix 38 to the statement of objections). Lastly, the Commission claims that the mere fact that the documents supplied by the undertakings do not give precise information regarding Prat Carton's presence at the meetings of the JMC does not prove that it did not take part in those meetings.

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

(a) Participation of Prat Carton in meetings of the PC

192 As regards Prat Carton's participation in four specific meetings of the PC, the Commission does not advance any evidence as to the object of those meetings. Consequently, when it refers to that participation as evidence of the undertakings's participation in an infringement of Article 85(1) of the Treaty, it necessarily bases its assertion on the general description, set out 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.

193 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). The Commission 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).

194 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.

195 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.

196 As to the other evidence relied on in order to establish the object of the PC meetings, the Commission considers in the Decision that appendix 61 to the statement of objections (referred to in paragraphs 125 and 126 above) is an internal note, made at a meeting of the PC, which corroborates Stora's admission that the PC in fact discussed collusive pricing (point 41, third paragraph, of the Decision). However, as already stated (see paragraphs 125 to 135 above), that note does not constitute evidence of collusion in regard to the January 1987 price initiative in the United Kingdom. Moreover, contrary to the Commission's claim, Stora never accepted that the PC in fact discussed collusive price fixing. According to Stora, the meetings of the PC were merely the occasion for the undertakings meeting in the PWG to communicate the adopted decisions to the undertakings not represented in that body.

197 Lastly, the Commission states 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 (see paragraph 88 above). As has already been observed (paragraph 91 above), the author of that document refers, by way of introduction, to the closer cooperation at European level within the 'Presidents' grouping' ('Präsidentenkreis'), an expression interpreted by Mayr-Melnhof as referring both to the PWG and the PC in a general context, that is to

say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a).

198 It is true 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 (see paragraphs 84 to 114, and in particular paragraph 110, above). However, there is no other evidence to confirm the Commission's claim 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.

199 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.

200 As a consequence the Court must find that Prat Carton's participation in an infringement of the competition rules during the period from mid-1986 until June 1990 has not been proved by reliance on its participation in four meetings of the PC.

(b) Participation of Prat Carton in certain meetings of the Economic Committee

201 It is not disputed that Prat Carton participated in three meetings of the Economic Committee on 20 September 1988, 8 May 1989 and 3 October 1989. Moreover, a document reproduces the tenor of the meeting of 3 October 1989 (appendix 70 to the statement of objections). The first matter to be considered, therefore, is whether the Economic Committee's meetings had an anti-competitive object and then whether it may be inferred from appendix 70 to the statement of objections that Prat Carton participated in discussions having an anti-competitive object.

(i) Object of the Economic Committee's meetings in general

202 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).

203 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).

204 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 concerning the essential points of the Economic Committee's meeting of 3 October 1989 (appendix 70 to the statement of objections), a meeting in which Prat Carton took part.

205 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).

206 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). Furthermore, Stora states: '[T]he 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). At least as regards the period which commenced at the beginning of 1988, the only period in which Prat Carton participated in meetings of the Economic Committee, 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. 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. Consequently, it cannot be ruled out that some participants in the Economic Committee's meetings who did not also participate in the meetings of the JMC were not aware of the precise use to which the reports prepared by the Economic Committee were put by the JMC.

207 Consequently, appendix 70 to the statement of objections does not demonstrate the true nature of the discussions which took place at meetings of the Economic Committee.

(ii) Meeting of the Economic Committee of 3 October 1989

208 The subject-matter of the Economic Committee's meeting of 3 October 1989 is given by appendix 70 to the statement of objections. The question arises as to whether Prat Carton's participation in that meeting constitutes sufficient evidence of its participation in an infringement of Article 85(1) of the Treaty.

209 First, 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*, *Suiker Unie and Others* v *Commission*, cited above, paragraph 173).

210 However, there is nothing to suggest that Prat Carton participated in collusion on the October 1989 price increase before it was implemented and, moreover, that it actually increased its prices for GC cartonboard at that time. It is apparent from the applicant's replies to the written questions put by the Court that Prat Carton's production in 1989 was made up as to more than 80% of GD cartonboard, which was not concerned by the price increase in question. Moreover, the meeting of the Economic Committee of October 1989 was held approximately eight months before Prat Carton's first proven participation in a meeting of the JMC, the body which, according to the Decision, constituted, together with the PWG, the place where the main discussions with an anti-competitive object took place.

211 In the light of those factors, the possibility cannot be ruled out that Prat Carton's representative(s) at the meeting of the Economic Committee of 3 October 1989 might not have been aware of the context in which the discussions on prices took place. Moreover, in the absence of evidence as to its conduct on the market as regards prices during the relevant period, it is possible that Prat Carton might have considered that the discussions did not concern its own individual situation. Consequently, in so far as the discussion at the meeting of the Economic Committee on 3 October 1989 might have been exceptional in nature for Prat Carton, that

undertaking cannot be criticised for not having publicly distanced itself from the outcome of the discussions at that meeting.

212 Second, there is no passage in appendix 70 to the statement of objections 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. It is true that 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 be 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']. However, as Prat Carton's participation in the Economic Committee meeting in question does not demonstrate its participation in collusion on prices for the reasons given above, it does not constitute sufficient evidence of its participation in collusion on downtime either. Mere reference to a possible necessity to take downtime in future cannot be regarded as an infringement of the Community competition rules because, at least for undertakings which did not participate in collusion on prices, it may simply reflect on objective observation on prevailing market conditions.

213 In the light of the foregoing, Prat Carton's participation in the Economic Committee meeting of 3 October 1989 does not constitute sufficient evidence of its participation in an infringement of Article 85(1) of the Treaty.

(c) Stora's statement concerning the transmission of information to undertakings not present at the meetings

214 In the statement on which the Commission relies (annex 38 to the statement of objections, p. 2), Stora provides information concerning the producers which were informed of the outcome of the meetings of the PWG: 'The Stora Producers believe that the Spanish producers were generally informed by Saffa or by

Finnboard. The other Spanish producers who are members of the PG Paperboard are: Papelera del Centra SA, Prat Carton SA, Romani Esteve SA, Sarrió SA and Tampella Espanola SA'.

215 As is clearly apparent from the wording of that statement, Stora is merely indicating its belief that Prat Carton was informed of the outcome of the meetings of the PWG. The basis for that belief is not in fact indicated. In those circumstances, that statement cannot constitute proof of Prat Carton's participation in an infringement of Article 85(1) of the Treaty. That conclusion is all the more necessary in view of the fact that Stora's assertions implicate several other member undertakings of the PG Paperboard which were not considered in the Decision to have participated in any infringement.

(d) Participation of Prat Carton in meetings of the JMC

216 The Commission submits that there is no proof that Prat Carton did not participate in the meetings of the JMC before June 1989 because there is no official record of the participation of the various undertakings in those meetings prior to the Commission's investigations.

217 However, the onus of proving that Prat Carton infringed Article 85(1) of the Treaty is on the Commission. Consequently, its mere allegations concerning Prat Carton's possible participation in meetings of the JMC during the period in question are without foundation.

(e) Conclusion as regards the period in question

218 In view of the whole of the foregoing, the evidence on which the Commission relies, even considered as a whole, does not prove Prat Carton's parti-

cipation in an infringement of Article 85(1) of the Treaty from mid-1986 until June 1990.

2. Period from June 1990 to February 1991

219 It is not disputed that Prat Carton participated in three meetings of the JMC during the period under consideration, namely those of 27 to 28 June 1990, 4 September 1990 and 8 to 9 October 1990. As regards Prat Carton's actual conduct on the market, the Commission considers that it has evidence which shows that that undertaking took part in the concerted price increase of January 1991, the only concerted price increase implemented during that period.

220 Having regard to those matters, it is necessary to consider whether Prat Carton's participation in the three constituent elements of the infringement during that period is sufficiently proved by the Commission.

(a) Participation of Prat Carton in collusion on prices

221 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).

222 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'.

223 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.

224 Moreover, even if the Commission does not possess any official minutes of a meeting of the JMC, it obtained from Mayr-Melnhof and Rena some internal notes relating to the meetings of 6 September 1989, 16 October 1989 and 6 September 1990 (appendices 117, 109 and 118 to the statement of objections). Those notes, the

tenor of which is given in points 80, 82 and 87 of the Decision, set forth the detailed discussions held during those meetings relating to concerted price initiatives. They therefore constitute evidence which clearly corroborates the description of the JMC's functions given by Stora.

225 In that regard, it suffices to refer by way of example to the note obtained from Rena regarding the JMC meeting of 6 September 1990 (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.'

226 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.

227 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. 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 is for the addressees of the Decision which 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 which the undertakings held in the meetings of that body had a principally anti-competitive object.

228 As regards the individual position of Prat Carton, its participation in three meetings of the JMC during a period of approximately eight months must, in the light of the foregoing and notwithstanding the lack of documentary evidence relating to the discussions which took place at those three meetings, be regarded as constituting sufficient proof of its participation in collusion on prices during that period.

229 That finding is borne out by the documents referred to by the Commission relating to Prat Carton's actual conduct in regard to prices. A price increase for all grades of cartonboard was decided on at the beginning of September 1990 and announced by the various undertakings in September/October 1990, as is apparent

from appendix 118 to the statement of objections. That increase was to enter into force, in all countries concerned, in January 1991.

230 In a telefax from Prat Carton dated 26 September 1990 (document G-15-8) it is stated, *inter alia*, as follows:

'We are planning to increase prices in all countries in January 1991.

For France we think in [*sic*] an increase of FF 400/T for all qualities'.

231 Even though that telefax mentions the precise amount of the envisaged price increase for one country only, it proves that Prat Carton announced price increases in conformity with the decisions adopted, according to appendix 118 to the statement of objections, in the JMC. In that context, the increases referred to in appendix 118 to the statement of objections do not refer to the same sales volumes for all the countries in question and the increase referred to for France, of FF 40, corresponds to a price increase per 100 kg. Moreover, although there is no dispute that documents F-15-9 and G-15-7, consisting of telefaxes exchanged between Prat Carton and a British undertaking at the end of February/beginning of March 1991, show that Prat Carton ultimately increased its prices in the United Kingdom only in April 1991, such a postponement of the implementation date of the price increase in one of the countries concerned is not such as to affect the conclusivity of document G-15-8 as regards Prat Carton's participation in the January 1991 concerted price increase. That reasoning applies all the more since, according to document F-15-9, the price increase implemented by Prat Carton on the British market amounted to UKL 35 to 45 per tonne, approaching that of UKL 40 indicated in appendix 118 to the statement of objections.

232 In the light of the foregoing, the Court considers that the Commission has proved that Prat Carton participated in collusion on prices from June 1990 to February 1991.

(b) Participation of Prat Carton in collusion on downtime

233 It has already been accepted that the Commission proved that the undertakings present at the meetings of the PWG participated, with effect from the end of 1987, in collusion on plant downtime and that downtime was actually taken as from 1990.

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

235 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).

236 The Commission also observes as follows:

'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" (second Stora statement, p. 15).

It seems again that it was the main producers who took upon themselves the burden of reducing output so as to maintain price levels.

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 of the Decision).

237 The Court finds that the Commission is justified in referring to Stora's second statement (appendix 39 to the statement of objections, point 25) to support its assertion that, although the PWG did not formally indicate the downtime to be taken by each producer, a 'loose system of encouragement' existed to that effect.

238 As regards the undertakings which participated in the meetings of the JMC, the documentary evidence relating to those meetings (appendices 109, 117 and 118 to the statement of objections, cited above) confirm that discussions on downtime took place in the context of the preparation of concerted price increases. As has already been observed (see paragraph 104 above), appendix 118 to the statement of objections refers to order backlogs for several manufacturers and notes that certain manufacturers were contemplating downtime. Moreover, although appendices 109 and 117 to the statement of objections do not contain information relating directly to the downtime envisaged, they show that the state of order backlogs and order entries were discussed at the meetings in question.

239 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. Since the aim of collusion on announced prices was to increase transaction prices (see paragraphs 48 to 61 above), 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.

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

241 Prat Carton must therefore be considered to have participated, from June 1990 to February 1991, in collusion on downtime.

(c) Participation of Prat Carton in collusion on market shares

242 It has already been accepted that the Commission has proved that the undertakings present at the meetings of the PWG participated, from the end of 1987, in collusion on market shares (see paragraphs 84 to 114 above).

243 In support of its claim that the undertakings which did not participate in the meetings of the PWG also took part in collusion in that regard, the Commission states in the Decision:

'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).

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

'Other producers who did not participate in the PWG were not generally informed of the detail of the market share discussions. Nevertheless, as part of the

price before tonnage policy in which they participated, they would have been aware of the understanding by the major producers not to undermine prices by maintaining constant levels of supply.

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

245 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.

246 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.

247 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 paragraphs 78 to 80 above), 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.

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

249 In the light of the foregoing, the Commission has not proved that Prat Carton participated in collusion on market shares in respect of the period from June 1990 to February 1991.

3. Conclusions relating to participation of Prat Carton in an infringement of Article 85(1) of the Treaty before its acquisition by the applicant in February 1991

250 On the basis of all the foregoing considerations, the Court holds that the Commission has proved that Prat Carton participated, from June 1990 to February 1991, in collusion on prices and collusion on downtime. However, Prat Carton's participation in collusion on market shares during that same period is not sufficiently proven. Finally, as regards the preceding period, namely from mid-1986 to June 1990, the Commission has not shown that Prat Carton participated in the constituent elements of the infringement.

The application for annulment of Article 2 of the Decision

Arguments of the parties

251 The applicant puts forward a plea alleging that the prohibition of future exchanges of information is unlawful. It observes that neither Article 1 nor Article 2 of the Decision concern the first information exchange system of the trade association CEPI-Cartonboard (hereinafter 'CEPI'), referred to in points 105, 106 and 166 of the Decision. The prohibition of future exchanges of information would preclude both the future establishment by CEPI and its members, including the applicant, of new information exchange systems and also the specific system notified by CEPI to the Commission at the end of 1993, a system which is, moreover, not mentioned in the Decision.

252 Furthermore, information exchange systems which do not seek to achieve prohibited results, such as price fixing or collusion on production volumes, were never considered, in the Commission's previous practice, to be unlawful if they did not include the exchange of individual, confidential data. The applicant states that in its *Seventh Report on Competition Policy* the Commission explained that it had no fundamental objections to the exchange of statistical information through trade associations or specialised reporting agencies, even where the latter provided a breakdown of the data, if the information exchanged did not permit identification of individual data.

253 The plea is then set out in two parts. In the first part, the applicant claims that the terms of the prohibition in Article 2 of the Decision are essentially too vague and general. In particular, it does not specify the circumstances in which an information exchange system unrelated to individual data will be considered to be liable to promote collusion on prices or on production or to control the implementation of an agreement on prices or market sharing.

254 Furthermore, Article 2 of the Decision does not specify the characteristics which the system must display in order to satisfy the requirements that it should exclude (a) data in aggregated form from which 'the behaviour of individual producers can be identified' (second paragraph), (b) production and sales statistics in aggregated form which could be used 'to promote or facilitate common industry behaviour' (third paragraph), and (c) 'any exchange of information of competitive significance' and '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' (fourth paragraph).

255 According to the applicant, prohibitions of such a vague and general kind seem to be incapable of implementation and, in any event, are contrary to the principle of legal certainty.

256 In the second part of the plea, the applicant disputes the legality of the prohibition of information exchanges (even if aggregated) on the state of order inflows and backlogs contained in the second paragraph of Article 2 of the Decision.

257 First, such data provide mere indications of the general trend of general demand and do not enable any producer or country to be identified.

258 Second, the exchange of data in question is particularly useful, if not indeed necessary, in the cartonboard sector.

259 Third, the Commission has never forbidden the exchange of the information in question. By contrast, it has considered exchange of information on stock levels, present and historic market prices, consumption, transformation capacity and even

price trends to be neutral from the point of view of competition (see, in particular, Commission Notice 87/C 339/07 pursuant to Article 19(3) of Council Regulation No 17/62 concerning a request for a negative clearance or an exemption under Article 85(3) of the EEC Treaty — Case No IV/32.076 — *European Wastepaper Information Service* (OJ 1987 C 339, p. 7, hereinafter 'the *EWIS* notice') and the *Seventh Report on Competition Policy*, points 5 to 8).

260 The Commission observes that Article 2 of the Decision does not affect the information exchange system notified by CEPI which was being considered by the competent Commission department when the action was brought.

261 It also contends that the directions set out in Article 2 of the Decision are normal, given that it has not obtained evidence of the cessation of the infringement and the scope of such directions depends upon the behaviour of the undertakings. Since those directions prohibit participation in a system with an object or effect identical or similar to that in question, they merely apply the general prohibition under Article 85 of the Treaty (Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905). They are also based on Article 3(1) of Regulation No 17 and are in conformity with previous decisions approved by the Court of First Instance.

262 In the present case, the information exchange system was considered to be essential by the members of the cartel and it enabled the anti-competitive initiatives to be monitored and implemented (points 61 to 71 and 134 of the Decision). Moreover, it was still susceptible of encouraging the producers to adopt anti-competitive conduct, even after the amendments to the system in 1991 (point 166 of the Decision). It is necessary to take account of those factors, the particular features of the cartonboard market and the situation characterised by the existence of an almost absolute cartel on the European market when assessing the scope of the directions set out in Article 2 of the Decision. In the light of those considerations, the Court should reject the applicant's argument that the information prohibited from being exchanged is general and that Article 2 of the Decision infringes

the principle of legal certainty. The prohibition of an information exchange, in particular as regards the information referred to in subparagraphs (a), (b) and (c) of the first paragraph of Article 2, is not general, but concerns solely information intended to facilitate or promote anti-competitive conduct.

263 Lastly, the *EWIS* notice concerned an economic context that was wholly different from that of cartonboard (point 3 of the notice), in particular because EWIS could supply only aggregate data of a sufficient number of members to ensure that the competitive behaviour of any individual member could not be identified (point 7 of the notice).

Findings of the Court

264 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.'

265 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.

266 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, Case 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 (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 220).

267 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).

268 In the present case, 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.

269 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.

270 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.

271 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.

272 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.

273 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'.

274 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 states:

'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. ...'.

275 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.

276 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.

277 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.

278 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.

279 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.

280 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 261 above) is unfounded.

281 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 claim for annulment or reduction of the amount of the fine

A — *Need to reduce the fine on account of an erroneous definition of the subject-matter and duration of the infringement*

282 The applicant, referring to the foregoing pleas and arguments, claims that the infringement was quite different in terms of its actual extent, its duration much shorter and its seriousness much less than the Commission maintains, and that the amount of the fine should therefore be radically reduced.

283 It is apparent from the Court's findings in relation to the preceding pleas that the Commission has correctly established, in regard to the applicant, the existence and duration of the infringement set out in Article 1 of the Decision.

284 It follows that this plea must be rejected.

B — *Error of appraisal by the Commission in that it considered that the cartel 'was largely successful in achieving its objectives' and infringement of the obligation to state reasons in that regard*

Arguments of the parties

285 The applicant claims that, when fixing the amount of the fine, the Commission committed an error of appraisal in finding that the cartel was 'largely successful in achieving its objectives' (point 168 of the Decision). The Commission did not take account of the evidence adduced by the addressee undertakings and, more specifically, by the applicant.

286 The arrangements for price announcements are normal in the sector and a degree of uniformity and simultaneity in price increase announcements by the different producers is due to market conditions and particularly the transparency of the market. The Commission did not take account of the following factors: (a) transaction prices were always well below announced prices; (b) there were always considerable differences between the prices applied to each customer, so that there was no single price; (c) economic cycles had an effect on price developments and (d) the difference between the prices applied to each customer increased during the period in question, thus demonstrating increased price individualisation.

287 The development of transaction prices was determined solely by the market conditions prevailing during the period in question and in particular by the relatively sustained demand, satisfactory and sometimes optimal capacity utilisation (see points 13 to 15 of the Decision), the considerable increases in costs (see points 16 to 19) and, lastly, the existence of a wholly normal average rate of profitability throughout the period. In those circumstances, the Commission should have concluded that the price increases were normal (see also point 135 of the Decision) and that the increases in transaction prices that could be established were in accordance with fundamental economic variables. It should therefore also have concluded that the alleged cartel had no effect on actual changes in transaction prices.

288 According to the applicant, transaction prices always followed changes in costs. The fall in the cost of raw materials in the second half of 1989 was accompanied by a considerable increase in labour and energy costs, which make up approximately 35% of total costs for cartonboard producers. Nor does the fact that there was a fall in demand in 1991 mean that factors other than market conditions influenced price changes, since the producers had already announced the single price increase in 1991 (January increase) in Autumn 1990 and planned it even earlier.

289 Moreover, the Commission's assertion regarding the effects of the cartel is incorrect as regards the alleged collusion on market shares, since there was never any such collusion or system for monitoring changes in the market shares of the different producers. Furthermore, Sarrió's market shares varied considerably over the period concerned.

290 Lastly, the applicant claims that the statement of reasons is defective in that there is a contradiction between the conclusions as to the cartel's effects on the market and the findings of fact in the Decision itself.

291 The Commission observes that during the period in question prices were always increased at regular intervals and applied in conformity with the collusion of the producers in the committees of the PG Paperboard; that a system to monitor compliance with the decisions imposed by the cartel was established by means of the detailed information exchanged, and that the market shares of the different producers were always maintained more or less at the same level. In those circumstances, and having regard in particular to the abundant documentary evidence of the cartel, the applicant's contention that the cartel did not substantially alter market trends is indefensible.

292 As to changes in prices, the Commission observes that the success of the cartel must be appraised as a whole. The success achieved is in no way belied by the — unproven — fact that the applicant derived less benefit from it than others.

293 As to market shares, the modest changes in market shares of the various producers confirms that the cartel was also highly successful in that regard.

294 Lastly, on the basis of the foregoing arguments, the Commission disputes that the statement of grounds of the Decision is defective as regards the cartel's effect on the market. It refers in particular to the analysis of the conditions of and changes in the market in points 16, 21 and 137 of the Decision and submits that, if the attempt to isolate an assertion from its context is resisted, there is no contradiction in the statement of grounds for the Decision.

Findings of the Court

295 According to the seventh indent of point 168 of the Decision, the Commission determined the general level of fines by taking into account, *inter alia*, the fact that the cartel 'was largely successful in achieving its objectives'. It is common ground that this consideration refers to the effects on the market of the infringement found in Article 1 of the Decision.

296 In order to review the Commission's appraisal of the effects of the infringement, the Court considers that it suffices to consider the appraisal of the effects of the collusion on prices. First, it is apparent from the Decision that the finding concerning the large measure of success in achieving objectives is essentially based on the effects of collusion on prices. While those effects are considered in points 100 to 102, 115, and 135 to 137 of the Decision, the question whether the collusion on market shares and collusion on downtime affected the market was, by contrast, not specifically examined in it.

297 Second, consideration of the effects of the collusion on prices also makes it possible, in any event, to assess whether the objective of the collusion on downtime was achieved, as the aim of that collusion was to prevent the concerted price initiatives from being undermined by an excess of supply.

298 Third, as regards collusion on market shares, the Commission does not submit that the objective of the undertakings which participated in the meetings of the PWG was an absolute freezing of their market shares. According to the second paragraph of point 60 of the Decision, the agreement on market shares was not static 'but was subject to periodic adjustment and re-negotiation'. In view of that point, the fact that the Commission took the view that the cartel was largely successful in achieving its objectives without specifically examining in the Decision the success of that collusion on market shares is not therefore open to objection.

299 As regards collusion on prices, the Commission appraised the general effects of this collusion. Consequently, even assuming that the individual data supplied by the applicant show, as it claims, that the effects of collusion on prices were, in its case, less significant than those found on the European cartonboard market taken as a whole, such individual data cannot in themselves suffice to call into question the Commission's assessment.

300 It is apparent from the Decision, as the Commission confirmed at the hearing, that a distinction was drawn between three types of effects. Moreover, the Commission relied on the fact that the price initiatives were considered by the producers themselves to have been an overall success.

301 The first type of effect taken into account by the Commission, and not contested by the applicant, consisted in the fact that the agreed price increases were actually announced to customers. The new prices thus served as a reference point in individual negotiations on transaction prices with customers (see, *inter alia*, points 100 and 101, fifth and sixth paragraphs, of the Decision).

302 The second type of effect consisted in the fact that changes in transaction prices followed those in announced prices. The Commission states that 'the producers not only announced the agreed price increases but also with few exceptions took firm steps to ensure that they were imposed on the customers' (point 101, first paragraph, of the Decision). It accepts that customers sometimes obtained concessions in regard to the date of entry into force of the increases or rebates or individual reductions, particularly on large orders, and that 'the average net increase achieved after all discounts, rebates and other concessions would always be less than the full amount of the announced increase' (point 102, last paragraph, of the Decision). However, referring to graphs in an economic study produced on behalf of several addressee undertakings of the Decision for the purposes of the procedure before the Commission (hereinafter the 'LE report'), the Commission claims that during the period covered by the Decision there was 'a close linear

relationship' between changes in announced prices and those in transaction prices expressed in national currencies or converted to ecus. It concludes from this that: 'the net price increases achieved closely tracked the price announcements albeit with some time lag. The author of the report himself acknowledged during the oral hearing that this was the case for 1988 and 1989' (point 115, second paragraph, of the Decision).

303 When appraising this second type of effect the Commission could properly take the view that the existence of a linear relationship between changes in announced prices and changes in transaction prices was proof of an effect by the price initiatives on transaction prices in accordance with the objective pursued by the producers. There is, in fact, no dispute that on the relevant market the practice of holding individual negotiations with customers means that, in general, transaction prices are not identical to announced prices. It cannot therefore be expected that increases in transaction prices will be identical to announced price increases.

304 As regards the very existence of a relationship between announced price increases and transaction price increases, the Commission was right in referring to the LE report, which consists of an analysis of changes in the price of cartonboard during the period to which the Decision relates, based on information supplied by several producers, including the applicant itself.

305 However, that report only partially confirms, in temporal terms, the existence of a 'close linear relationship'. Examination of the period 1987 to 1991 reveals three distinct sub-periods. At the oral hearing before the Commission the author of the LE report summarised his conclusion as follows: 'There is no close relationship, even with a lag, between announced price increase and market prices in the early part of the period, in 1987 through 1988. There is such a relationship in 1988/1989, and then the relationship breaks down and behaves rather oddly over the period 1990/1991' (transcript of the oral hearing, p. 28). He also observed that those

temporal variations were closely linked to variations in demand (see, in particular, transcript of the oral hearing, p. 20).

306 Those conclusions expressed by the author at the hearing are in accordance with the analysis set out in his report, and in particular with the graphs comparing changes in announced prices and changes in transaction prices (LE report, graphs 10 and 11, p. 29). The Commission has therefore only partially proved the existence of the 'close linear relationship' on which it relies.

307 At the hearing the Commission stated that it had also taken into account a third type of effect of the price collusion, namely the fact that the level of transaction prices was higher than that which would have been achieved in the absence of any collusion. Pointing out that the dates and order of the price increase announcements had been planned by the PWG, the Commission takes the view in the Decision that 'it is inconceivable in such circumstances that the concerted price announcements had no effect upon actual price levels' (point 136, third paragraph, of the Decision). However, the LE report (section 3) drew up a model which enabled a forecast to be made of the price level resulting from objective market conditions. According to that report, the level of prices determined by objective economic factors in the period 1975 to 1991 would have evolved, with minor variations, in an identical manner to the level of transaction prices applied, including those during the period covered by the Decision.

308 Despite those conclusions, the analysis in the report does not justify a finding that the concerted price initiatives did not enable the producers to achieve a level of transaction prices above that which would have resulted from the free play of competition. As the Commission pointed out at the hearing, it is possible that the factors taken into account in that analysis were influenced by the existence of collusion. So, the Commission rightly argued that the collusive conduct might, for example, have limited the incentive for undertakings to reduce their costs. However, the Commission has not argued that there is a direct error in the analysis in the LE report nor submitted its own economic analysis of the hypothetical

changes in transaction prices had there been no collusion. In those circumstances, its assertion that the level of transaction prices would have been lower if there had been no collusion between the producers cannot be upheld.

309 It follows that the existence of that third type of effect of collusion on prices has not been proved.

310 The above findings are in no way altered by the producers' subjective appraisal, on which the Commission relied in reaching the view that the cartel was largely successful in achieving its objectives. In that regard, the Commission referred to a list of documents which it produced at the hearing. However, even supposing that it could base its appraisal of the success of the price initiatives on documents showing the subjective opinions of certain producers, it must be observed that several undertakings, including the applicant, rightly referred at the hearing to a number of other documents in the file showing the problems encountered by the producers in implementing the agreed price increases. In those circumstances, the Commission's reference to the statements of the producers themselves is insufficient for a conclusion that the cartel was largely successful in achieving its objectives.

311 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of its exercise of its unlimited powers in regard to fines, when it assesses the seriousness of the infringement found in the present case (see paragraph 334 below).

312 Finally, the applicant's contention that the statement of grounds of the Decision is defective in regard to the effects of the infringement is without foundation. As follows from the above examination, the Decision contains a detailed and consistent statement of grounds relating to the effects of the infringement found.

C — *Error of law by the Commission in holding that concealment of the cartel was an aggravating factor and defective statement of reasons in that regard*

Arguments of the parties

313 The applicant submits that if it is accepted — quod non — that a certain staggering in price increase announcements was the result of collusion, the Commission could not hold that circumstance to be a specific aggravating circumstance, since the 'disguising' of a cartel is inherent in the infringement itself.

314 The applicant adds that the fact that the Commission was unable to find documentary proof of its allegations relating to the existence of an infringement does not mean that measures were taken to disguise its existence.

315 Lastly, it claims that the grounds of the Decision are defective in that the Decision does not explain the reasons for which the concealment of a cartel should be regarded as an aggravating circumstance.

316 The Commission contends that the concealment of the existence of a cartel constitutes a factor which should be taken into account when assessing the seriousness of the infringement (judgment in *BASF* v *Commission*, cited above, paragraph 273).

Findings of the Court

317 According to the third paragraph of point 167 of the Decision, 'a particularly grave aspect of the infringement is that in an attempt to disguise the existence of the

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

318 The Commission rightly inferred from the evidence obtained that the undertakings pre-arranged the dates and order of letters announcing price increases in an attempt to disguise the existence of the concertation on prices. This pre-arrangement is clear in particular from Stora's statements (appendix 39 to the statement of objections, point 30): '[t]here was no standard procedure for who would announce a price increase first and who would follow. The PWG would discuss and agree on who would announce each price increase first and the dates of announcements of the other main producers. The pattern was not the same each time.' Its existence is also confirmed by the Rena note concerning the JMC meeting of 6 September 1990 (appendix 118 to the statement of objections). That document contains precise indications regarding the dates for the announcement of the January 1991 price increases for certain member undertakings of the PWG (Mayr-Melnhof, Feldmühle and Cascades), dates which correspond exactly to the dates on which those undertakings actually sent their announcement letters (see points 87 and 88 of the Decision).

319 The absence of official minutes and the almost total absence of internal notes relating to the meetings of the PWG and of the JMC constitute, having regard to the

number of such meetings, to the length of time for which they continued and to the nature of the discussions in question, sufficient proof of the Commission's allegation that the participants were discouraged from taking notes.

320 It follows from the foregoing that the undertakings which participated in the meetings of those bodies were not only aware of the unlawfulness of their conduct but also took steps to conceal the collusion. Accordingly, the Commission was fully entitled to hold those steps to be aggravating circumstances when assessing the gravity of the infringement.

321 Finally, given that it explained in the Decision precisely what conduct of the undertakings was held to constitute aggravating circumstances, the Commission gave a sufficient statement of reasons for its appraisal in that regard.

322 This plea must therefore be rejected.

D — *Infringement of the principle of equal treatment in that the Commission imposed, without objective reasons, much higher fines than in its previous practice*

Arguments of the parties

323 The applicant claims that the increase in the level of the fine imposed in comparison with those adopted in the Commission's previous decisions constitutes an unjustified difference in treatment.

324 Similar cartels have been punished much less severely (see, for example, Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene*, OJ 1986 L 230, p. 1, hereinafter 'the *Polypropylene* decision').

325 Likewise, the general level of fines appears unjustified in relation to Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31.043 — *Tetra Pak II*, OJ 1992 L 72, p. 1).

326 The error in assessing the gravity of the infringement is also confirmed by a comparison with the level of fines adopted in Commission Decision 94/815/EEC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — *Cement*, OJ 1994 L 343, p. 1).

327 According to the Commission, each infringement has its own special features. Since the principle of equal treatment presupposes that similar situations be treated in the same way, it is impossible to compare the amount of fines imposed in the present case with those imposed for infringements committed in different ways and at different times. The Commission adds that it is in any event entitled to raise the level of fines if that is necessary in order to ensure the implementation of Community competition policy (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907).

Findings of the Court

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

year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement. As is apparent from the case-law of the Court of Justice, the gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case, and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

329 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.'

330 Furthermore, 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 on the Community cartonboard market in 1990 of each undertaking addressed by the Decision were imposed on the undertakings regarded as the 'ringleaders' of the cartel and on the other undertakings respectively.

331 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 *ICI* v *Commission*, cited above, paragraph 385).

332 Second, the Commission rightly argues that, on account of the specific circumstances of the present case, no direct comparison could be made between the general level of fines adopted in the present decision and those adopted in the

Commission's previous decisions, in particular in the *Polypropylene* decision, which the Commission itself considered to be the most similar to the decision in the present case. Unlike in the *Polypropylene* case, no general mitigating circumstance was taken into account in the present case when determining the general level of fines. Moreover, as the Court has already held, the intricate steps taken by the undertakings to conceal the existence of the infringement constitute a particularly serious aspect of it which differentiates it from the infringements previously found by the Commission.

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

334 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. Admittedly, the Court has already held that the effects of the collusion on prices, which the Commission took into account when determining the general level of fines, are proved only in part. However, in the light of the foregoing considerations, that conclusion cannot materially affect the assessment of the gravity of the infringement found. The fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition. Accordingly, in the exercise of its unlimited jurisdiction, the Court considers that the findings relating to the effects of the infringement do not justify any reduction in the general level of fines set by the Commission.

335 Finally, in setting the general level of fines in the present case, the Commission did not so depart from its previous line of decisions as to oblige it to give a more detailed account of the reasons for its assessment of the gravity of the infringement

(see, *inter alia*, Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31).

336 Consequently, this plea must be rejected.

E — *Insufficient statement of reasons and infringement of the rights of the defence as regards calculation of the fine*

Arguments of the parties

337 The applicant contends that, in order to assess whether the Commission remained within the limits imposed by Article 15(2) of Regulation No 17 and whether its discretion in regard to fines was exercised correctly and objectively, it is necessary to establish whether the Decision sets out the criteria applied by the Commission. The applicant claims that the Decision does not satisfy those requirements, since it indicates neither the financial year taken into consideration in order to determine fines nor the (percentage) rate applied in order to calculate each fine. It is therefore impossible for the applicant to conduct a proper review of the legality of the Decision, which constitutes a manifest breach of its rights of defence.

338 The Commission points out that Article 15(2) of Regulation No 17 does not refer, either expressly or impliedly, to an obligation on the part of the Commission to indicate the method of calculation adopted. Moreover, the statement of reasons in the Decision relating to the factors which determined the general level of fines and the level of fine imposed upon each undertaking is wholly comparable to the statement of reasons given in similar decisions. Furthermore, no previous case has ever placed it under an obligation to indicate the more detailed criteria used to calculate the fines.

339 The Commission submits that it is not required to fix the amount of the fines on the basis of a precise mathematical formula. Such an approach might lead undertakings to calculate in advance the benefit which they would derive from participating in an unlawful cartel. It considers that it enjoys a margin of discretion when fixing the amount of fines, since fines constitute an instrument of its competition policy (Case T-150/89 *Martinelli* v *Commission* [1995] II-1165, paragraph 59).

340 Lastly, it contends that the fact that certain additional details regarding the fines were supplied by a member of the Commission, purely by way of guidance, at a press conference cannot have an impact on the Decision, nor does such guidance mean that the statement of reasons for the Decision was inadequate.

Findings of the Court

341 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

342 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent

character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

343 Moreover, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose (see, to the same effect, the judgment in *Martinelli* v *Commission*, cited above, paragraph 59).

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

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

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

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

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

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

349 Second, where, as in the present case, the amount of each fine is determined on the basis of the systematic application of certain precise figures, the indication in the decision of each of those factors would permit undertakings better to assess whether the Commission erred when fixing the amount of the individual fine and also whether the amount of each individual fine is justified by reference to the

general criteria applied. In the present case, the indication in the Decision of the factors in question, namely the reference turnover, the reference year, the basic rates adopted, and the rates of reduction in the amount of fines would not have involved any implicit disclosure of the specific turnover of the addressee undertakings, a disclosure which might have constituted an infringement of Article 214 of the Treaty. As the Commission has itself stated, the final amount of each individual fine is not the result of a strictly mathematical application of those factors.

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

351 Despite those findings, the reasons explaining the setting of the amount of fines stated in points 167 to 172 of the Decision are at least as detailed as those provided in the Commission's previous decisions on similar infringements. Although a plea alleging insufficient reasons concerns a matter of public interest, there had been no criticism by the Community judicature, at the moment when the decision was adopted, as regards the Commission's practice concerning the statement of reasons for fines imposed. It was only in the judgment of 6 April 1995 in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 142, and in two other judgments given on the same day (T-147/89 *Société Métallurgique de Normandie* v *Commission* [1995] ECR II-1057, summary publication, and T-151/89 *Société des Treillis et Panneaux Soudés* v *Commission* [1995] ECR II-1191, summary publication), that this Court stressed for the first time that it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

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

353 In the specific circumstances set out in paragraph 351 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed. Finally, the applicant has not shown that it was prevented from properly asserting its rights of defence.

354 Consequently, this plea cannot be upheld.

F — *Error of appraisal by the Commission in not taking due account of the role played by Sarrió in the cartel and its actual conduct on the market and failure by the Commission to state reasons in that regard*

Arguments of the parties

355 The applicant claims that the Commission did not take due account of its particular position on the market and in the PG Paperboard. It gives a detailed description of its position on the market and explains that, from the point of view of production capacity, it was only the fifth and fourth producer in Western Europe in 1990 and 1991 respectively (see the studies referred to in point 9 of the

Decision) and that its market share was half of that of the market leader. Moreover, owing to its specialisation in GD grades it did not have the flexibility of those producers with significant production in both the GD grade and GC grade sectors. It was, and is still, exposed to the high degree of aggressiveness of Scandinavian producers, who benefit from direct and integrated access to virgin fibres, and of German and Austrian producers, who benefit from national recycling rules. It was in order to face up to its competitors' dynamism that in 1986 it asked to be allowed to participate in the meetings of the PG Paperboard, with the intention of monitoring its main competitors' conduct.

356 The Commission has not adduced any proof relating to the applicant's actual conduct or put forward any argument to refute its assertion that: (a) its transaction prices were determined autonomously and in accordance with market conditions; (b) there were considerable discrepancies between announced prices and transaction prices; (c) its market shares had fluctuated considerably throughout the period under consideration and (d) in alignment with market conditions, it had never taken downtime. The applicant states that it never took initiatives intended to restrict its competitors' freedom of action. The only evidence of such conduct is a private note from one manager of a competitor to that of another. However, that note is in general terms and the conduct referred to in it is merely attributed to the applicant (appendix 109 to the statement of objections).

357 The applicant claims that an examination of its actual conduct showed that it did not correspond to that of the alleged cartel, and this should have led the Commission to assess the applicant's position much more favourably when determining the amount of the fine. The note discovered at FS Carton, on which the Commission relies as evidence of the actual implementation of the cartel by the applicant, does not in any way relate to its actual conduct on the market, but merely shows its participation in concerted action on announced prices.

358 Lastly, the Decision is vitiated by an inadequate statement of reasons in that, without giving any grounds, the Commission failed to assess the essential evidence adduced by the applicant in regard to its role within the PG Paperboard and its conduct on the market.

359 The Commission contends that in point 169 of the Decision it took account both of the role played by each undertaking in the collusive agreements and the applicant's actual conduct. The Decision contains a correct statement of reasons in that regard.

Findings of the Court

360 It follows from the Court's findings relating to the applicant's pleas in support of its application for annulment in whole or in part of Article 1 of the Decision that the nature of the PWG's functions, as set out in the Decision, has been demonstrated by the Commission.

361 In those circumstances, the Commission was fully entitled to conclude that the undertakings, including the applicant, which participated in the meetings of that body had to be regarded as 'ringleaders' of the infringement found and that accordingly they had to bear special responsibility (see point 170, first paragraph, of the Decision). The applicant's explanation that it participated in the meetings of the PWG only in order to obtain information which would permit it to monitor the behaviour of its principal competitors merely confirms the essentially anti-competitive purpose of its participation.

362 Moreover, the applicant has not in any way proved that it played an essentially passive role in the bodies of the PG Paperboard and that its actual conduct on the market was always determined independently.

363 It is not disputed that the applicant actually took part in the concerted price initiatives by announcing the agreed price increases on the market. Furthermore, as the Commission has correctly claimed, it is clear from appendix 109 to the statement of objections (see paragraph 55 above) that the applicant asked other producers to abide by the agreed price increases. Lastly, as to the applicant's actual behaviour in regard to prices, there is nothing to support the conclusion that its transaction prices were significantly lower than those of the other producers participating in the collusion on prices.

364 As to the applicant's arguments based on the fluctuations in its market shares during the period of the infringement found by the Decision, it suffices to state that the applicant argues that those fluctuations are explained by the fact that several producers had increased their production capacities in order to meet the strong growth in demand found until 1990. In those circumstances, although it is true that the applicant did not carry out any increase in its production capacities before the acquisition of Prat Carton in February 1991, the fluctuations in its market shares cannot constitute a factor mitigating its responsibility for its unlawful conduct.

365 Furthermore, it was only in 1990 that market conditions were such that the undertakings considered that it was necessary to take actual downtime and, according to the Decision itself, there was merely a 'loose system of encouragement' in that regard (see paragraphs 96 and 151 above). Consequently, since the applicant took part in meetings at which the question of downtime was dealt with, but did not publicly distance itself from the discussions which took place, the Court considers

that, even assuming that the applicant did not take downtime during the period covered by the Decision, that fact cannot prove that its own conduct might have helped to counter the anti-competitive effects of the infringement found.

366 In short, in the light of its grounds as a whole, the Decision adequately explains the Commission's appraisal of the applicant's role in the infringement found and of its conduct on the market.

367 Consequently, this plea must also be rejected.

G — *The Commission ought to have taken certain mitigating circumstances into account*

Arguments of the parties

368 The applicant claims that, even assuming that the cartel must be considered, in general, to have affected market conditions, the Commission, when appraising the applicant's situation, should have recognised, as mitigating circumstances, a series of factors which show that the cartel had no, or only insignificant, effect on the segment of the relevant market.

369 According to the applicant, the Commission should have taken into account, first, the fact that between 1986 and 1992 the transaction prices secured by the applicant on the Italian market, the main outlet for its products, had always followed changes in the industrial prices index. Second, it should have taken into account the ease with which other types of products, such as all those derived from plastic,

may be substituted for cartonboard, which, it claims, means that any form of 'exploitation' of the market is precluded or extremely limited. Third and last, the Commission should have taken account of the fact that during the period in question GD grade had lost a large part of its market share to GC grade. Having regard also to the erosion of the applicant's market share and to the level of increases of Italian prices, which was lower than the level of price increases on the other European markets, it should therefore be concluded that the cartel was not successful for the applicant.

370 The Commission observes that it is necessary to assess the cartel's impact on the market as a whole and that, from that point of view, the cartel was in fact very successful. In any event, none of the factors invoked by the applicant can be regarded as a mitigating circumstance justifying a reduction of the fine.

Findings of the Court

371 The Court has already considered the question whether the Commission had correctly assessed the effects of the infringement on the market (see paragraph 295 et seq. above) and whether the applicant's conduct on the market should have been taken into account as a mitigating circumstance when the amount of the fine was set (see paragraph 360 et seq. above).

372 Having regard to those findings of the Court, the arguments on which the applicant relies in support of the present plea cannot be upheld.

373 Since the collusion on prices concerned both GC cartonboard and GD cartonboard and there is nothing to support the view that the applicant's own conduct

helped to counter the anti-competitive effects of the infringement, the Commission was fully entitled not to take into account, when determining the amount of the fine imposed on the applicant, the loss of market share from GD cartonboard to GC cartonboard. Furthermore, the applicant has not shown that there is a link between the infringement and changes in the market shares of the various grades of cartonboard.

374 Furthermore, even assuming that the increases in transaction prices found on the Italian market, the applicant's main outlet, were lower than those found on the other Community markets, it suffices to observe that the collusion on prices in which the applicant participated concerned almost the whole of the territory of the Community and that the applicant announced the agreed price increases on all the principal European markets (see tables B to G annexed to the Decision).

375 Finally, any high degree of interchangeability between cartonboard and other products cannot affect the findings already made by the Court regarding the effects of collusion on prices (see paragraph 295 et seq. above).

376 Consequently, this plea must be rejected.

H — *Material error in the calculation of the fine imposed on Sarrió*

Arguments of the parties

377 The applicant submits that the Commission committed a material error when it calculated the fine. The Commission took the turnover figure for 1990, which was sent to it in August 1991 in reply to a request for information under Article 11 of

Regulation No 17, whereas it should have calculated the fine by reference to the corrected and certified turnover figure sent in 1993 as an annex to the reply to the statement of objections.

378 In those circumstances, the Commission not only committed a material error in calculating the fine imposed on Sarrió but it also infringed the principle of equal treatment, because the fines imposed on the other addressees of the Decision were calculated on a correct basis. In calculating the fine on the basis of a turnover figure furnished before Sarrió could have foreseen the imposition of a fine and in ignoring the certified figures provided subsequently, the Commission also infringed Sarrió's rights of defence.

379 The Commission counters by stating that it is precisely in order to avoid any dispute that it used the turnover figure supplied in reply to a request for information under Article 11 of Regulation No 17 and that it does not see why the figure sent before the statement of objections is incorrect while the figure sent after it is correct.

Findings of the Court

380 Having regard to the documents before the Court, the Commission did not commit any error in adopting as its basis for calculating the fine the 1990 turnover figure sent by the applicant in August 1991 and not the corrected figure sent in May 1993. An undertaking which, during the administrative procedure before the Commission, corrects a figure, such as a turnover figure, previously sent to the Commission in reply to one of its requests for information, must set out in detail the reasons for which the figure initially sent should no longer be adopted for the remainder of the procedure.

381 The applicant did not do so in the present case. In its reply to the statement of objections the applicant merely stated that the 1990 turnover figure had been corrected by subtracting amounts relating to internal group operations, to sales of products falling outside the scope of the Commission's investigation (boxes and raw cartonboard), complaints, quantity rebates, unsold goods and discounts allowed to customers, but without supporting that rectification by means of a detailed breakdown in figures. Moreover, the rectified turnover figure was not certified by an accountant, and the applicant confirmed at the hearing that its claim in that regard was incorrect. In the result, the Commission acted correctly in rejecting the rectified turnover figure and in calculating the fine on the basis of the turnover figure originally submitted.

382 The plea must therefore be rejected.

I — *Error in the method of calculating the fine*

Arguments of the parties

383 The applicant states that in arriving at the amount of the fine the Commission first converted the turnover for the relevant financial year, namely 1990, into ecus, applying the average rate applicable for that year, and then determined the amount of the fine by applying the previously established percentage, namely 6% in its case. In so doing, the Commission failed to take account of the effects of monetary fluctuations, since both the Spanish peseta and the Italian lira had undergone a substantial devaluation as against the ecu and the other European currencies since 1990. The applicant claims that today, in national currency, it will have to pay approximately PTA 2 452 million in order to discharge the fine. On the basis of the certified turnover figure (PTA 27 256 million) relating to cartonboard sales within the Community in 1990, a fine of 6% of that amount would have been approximately PTA 1 635 million. The fine actually imposed therefore represents an additional financial charge of PTA 817 million. According to the applicant, if the exchange rate applicable at the moment when the Decision was published is

used, the amount of the fine in fact corresponds to approximately 9% of its 1990 turnover. It must therefore be concluded that either the Commission did not take account of the one-third reduction which it had nevertheless allowed, or that, before that reduction, the fine corresponds to approximately 13.4% of the relevant turnover figure, thereby exceeding the legal limit of 10% of turnover laid down in Article 15(2) of Regulation No 17.

384 The applicant submits, next, that the purpose of the (percentage) rate of the fine is to express the conclusion reached by the Commission as regards the amount, and therefore the impact, which the fine should represent in relation to the turnover of the undertaking concerned. Consequently, the amount of the fine must be determined on the basis of the assessment of the gravity of the infringement and, by contrast, factors such as monetary fluctuations, which are unrelated to the infringement to be punished and which are not imputable to the person responsible for that infringement, must not therefore affect the amount of the fine. The applicant refers to the Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française and Others* v *Commission*, cited above, (at p. 1914), according to which, when fixing the amount of fines, it is necessary to take account of the most recent turnover figure, which then best reflects the undertaking's real position.

385 It considers that its contention that the amount of the fine should not be affected by exchange rate fluctuations is confirmed by the judgment of the Court of Justice in Joined Cases 41/73, 43/73 and 44/73 — interpretation — *Société Anonyme Générale Sucrière and Others* v *Commission* [1977] ECR 445, paragraphs 12 to 17). As regards that judgment, the applicant in its reply contests the Commission's contention that it confirms that if the unit of account ('u. a.') relevant at that time had been a currency of payment, its conversion into national currency would have been unnecessary.

386 The applicant claims that the Decision also leads to unjustified differences in treatment, because the monetary fluctuations completely alter the relationship between the various fines imposed. It states that between 1990 and 1994 the peseta was

devalued by 22% as against the ecu, whereas during the same period, the Dutch, German and Austrian currencies were revalued by approximately 7.5% as against the ecu. Consequently, without any objective grounds, the applicant received a fine which entailed for it a cost approximately 30% more than the cost of fines imposed on other undertakings, and particularly the German undertakings.

387 The applicant concludes that nothing requires the Commission to express the amount of the fine in ecus and that it should therefore have expressed that amount in national currency in order to avoid unjustified differences in treatment. Even assuming that the Commission has the power to express the amount of the fine in ecus, it should at least have used an exchange rate which ensures equal treatment, namely the exchange rate at the time when the fine was imposed (the day of the publication or of notification of the Decision).

388 The Commission observes that Article 15(2) of Regulation No 17 allows it to impose fines 'not exceeding 10% of the turnover in the preceding business year' of each of the undertakings participating in the infringement. That rate of 10% applied to overall turnover constitutes the upper limit of the fine (Case C-279/87 *Tipp-Ex* v *Commission,* summary publication, [1990] ECR I-261, paragraph 38 et seq.). Thus, since the Commission determined the fine by reference to the 1990 financial year, the last complete year during which the cartel operated, and converted all the turnover figures into ecus on the basis of the average exchange rate for that year, it kept within the limits laid down by Regulation No 17.

389 The conversion into ecus on the basis of the exchange rate in the reference year provides the actual turnover expressed in ecus, precisely in order to avoid any discrimination between the addressee undertakings resulting from fluctuations in the national currencies of the various Member States. The judgment in *Société Anonyme Générale Sucrière and Others* v *Commission*, cited above, does not

support the applicant's contention. It is clear from that judgment that it deals only with the question of whether or not it is necessary to express the fine in national currency owing to the fact that the u. a. was not a currency of payment.

390 As to the allegedly discriminatory effects of the method applied, the Commission states that the risk of monetary fluctuations is inherent in commerce and international trade. It is a factor which is impossible to eliminate and which will in any event affect the amount of the fine at the moment of payment. However, it is precisely by the conversion of the turnover figures into ecus that any discrimination is best eliminated. By that method, the fine is calculated in 'real' terms. The imposition of the fine in national currency would ultimately render it wholly nominal, to the benefit, as the applicant's calculations prove, of undertakings whose turnover is expressed in a weak currency. It should be noted that the value of the ecu is determined on the basis of the value of each national currency and that, since the addressee undertakings of the Decision operate in various Member States and in various national currencies, conversion into ecus is an effective application of the principle of equal treatment.

391 As to the applicant's argument that the Commission should at the very least have used the exchange rate prevailing at the time when the fine was imposed, the Commission counters by stating that the turnover figure for the reference year had a real value at the rate in force at that moment and not at the subsequent rate in force at the moment when the Decision was adopted.

Findings of the Court

392 Article 4 of the Decision provides that the fines imposed are to be payable in ecus.

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

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

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

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

397 The Commission also acted correctly in taking the turnover in the reference year (1990) and converting that figure into ecus on the basis of the average exchange rates for that same year. In the first case, the taking into account of the turnover achieved by each undertaking during the reference year, that is to say, the last complete year of the period of infringement found, enabled the Commission to assess

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

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

399 In addition, several of the addressee undertakings of the Decision own cartonboard mills in more than one country (see points 7, 8 and 11 of the Decision). Moreover, the addressees of the Decision generally carry out their activities in more than one Member State through the intermediary of local representatives. As a result, they operate in several national currencies. The applicant itself achieves a considerable part of its turnover on export markets. Where a decision like the decision at issue penalises infringements of Article 85(1) of the Treaty and where the addressees of the decision generally pursue their activities in several Member States, the turnover for the reference year converted into ecus at the average

exchange rate used during that same year is made up of the sum of the turnovers achieved in each country in which the undertaking operates. It therefore takes perfect account of the actual economic situation of the undertakings concerned during the reference year.

400 Lastly, it is necesary to determine whether, as the applicant claims, the ceiling set by Article 15(2) of Regulation No 17, namely '10% of the turnover in the preceding business year', was exceeded by reason of the monetary fluctuations which occurred after the reference year.

401 According to the case-law of the Court of Justice, the percentage referred to in that provision refers to the total turnover of the undertaking in question (*Musique Diffusion Française and Others* v *Commission*, paragraph 119).

402 For the purposes of Article 15(2) of Regulation No 17, 'preceding business year' is the one which precedes the date of the decision, namely, in the present case, the last full business year of each of the undertakings concerned as at 13 July 1994.

403 In the light of those considerations, the Court holds, on the basis of the information supplied by the applicant in reply to a written question put by this Court, that the amount of the fine converted into national currency at the rate of exchange prevailing at the time when the Decision was published does not exceed 10% of the applicant's total turnover in 1993.

404 Having regard to the foregoing, this plea must be rejected.

J — *Erroneous calculation of the part of the fine corresponding to the infringement imputed to Prat Carton and infringement of the obligation to state reasons in that regard*

Arguments of the parties

405 The applicant claims that the Commission wrongly calculated the part of the fine corresponding to the infringement allegedly committed by Prat Carton in that it adopted the same percentage of turnover as that selected for the applicant, namely 9%, reduced by one-third on account of its cooperation during the investigation of the case. However, the limited participation of Prat Carton in the meetings of the JMC from June 1990 to March 1991 and the fact that it was not a 'ringleader' were grounds for reducing the amount of the fine.

406 Lastly, the applicant complains of a total lack of transparency and absence of reasons for the calculation of the part of the fine corresponding to the infringement imputed to Prat Carton.

407 The Commission observes that, as it explained in point 154 of the Decision, the applicant, which acquired Prat Carton in February 1991, is responsible for the latter's anti-competitive conduct for the whole of the period of its membership of the cartel. Since the Decision imposed a single fine on the applicant, which was calculated on the basis of its total turnover for cartonboard, and thus included the turnover of Prat Carton, the conduct of the latter undertaking did not give rise to the imposition of a separate fine. According to the Commission, the applicant's argument is therefore at variance with the fact that a fine was imposed on the applicant alone.

408 In those circumstances, any claim of a lack of transparency or incoherency in the statement of reasons of the Decision in that connection is also to be rejected.

Findings of the Court

409 According to the Commission's explanations, the fine imposed on the applicant corresponds to 6% of the turnover achieved in 1990 by the applicant and Prat Carton together (a rate of 9% adopted against 'ringleaders', reduced by one-third on account of the applicant's cooperative attitude). Even though in such a case it is desirable that the Decision should contain a fuller explanation of the calculation method applied, for the reasons already stated (see paragraphs 351 to 353 above) the applicant's claim that there has been an infringement of Article 190 of the Treaty must be rejected.

410 Next, it should be observed (see paragraph 250 above) that the Commission has demonstrated Prat Carton's participation in collusion on prices and collusion on downtime between June 1990 and February 1991. On the other hand, it has been held that the Commission has not adequately proved Prat Carton's participation in collusion on market shares during the same period nor its participation from mid-1986 until June 1990 in one of the constituent elements of the infringement set out in Article 1 of the Decision.

411 Because Prat Carton participated in some only of the constituent elements of the infringement and for a much lesser period than that found by the Commission, the amount of the fine imposed on the applicant must be reduced.

412 In the present case, as none of the other pleas on which the applicant relies justifies reducing the fine, the Court, exercising its unlimited jurisdiction, sets the amount of that fine at ECU 14 million.

Costs

413 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 applicant to bear its own costs and to pay one-half of the Commission's costs and to order the Commission 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, the first to fourth paragraphs of Article 2 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) 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.';

2. Sets the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 14 million;

3. Dismisses the application as regards the remaining claims;

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

5. Orders the Commission to bear one-half of its costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary