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

14 May 1998 *

In Case T-310/94,

Gruber + Weber GmbH & Co. KG, a company incorporated under German law, established at Gernsbach-Obertsrot (Germany), represented by Holger-Friedrich Wissel and Joachim Schütze, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11, rue Goethe,

applicant,

v

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

defendant,

* Language of the case: German.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

(...)

Article 3

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

(...)

(vii) Gruber & Weber, a fine of ECU 1 000 000;

(...)'

13 According to the Decision, the infringement took place within a body known as the 'Product Group Paperboard' (hereinafter 'the PG Paperboard'), which comprised several groups or committees.

14 In mid-1986 a group entitled the 'Presidents Working Group' (hereinafter 'the PWG') was established within that body. This group brought together senior representatives of the main suppliers of cartonboard in the Community (some eight suppliers).

15 The PWG's activities consisted, in particular, in discussion and collaboration regarding markets, market shares, prices and capacities. In particular, it took broad decisions on the timing and level of price increases to be introduced by producers.

16 The PWG reported to the 'President Conference' (hereinafter 'the PC'), in which almost all the managing directors of the undertakings in question participated (more or less regularly). The PC met twice each year during the period in question.

17 In late 1987 the Joint Marketing Committee (hereinafter 'the JMC') was set up. Its main task was, on the one hand, to determine whether, and if so how, price increases could be put into effect and, on the other, to prescribe the methods of implementation for the price initiatives decided by the PWG, country-by-country and for the major customers, in order to achieve a system of equivalent prices in Europe.

18 Lastly, the Economic Committee discussed, *inter alia*, price movements in national markets and order backlogs, and reported its findings to the JMC or, until the end of 1987, to the Marketing Committee, the predecessor of the JMC. The Economic Committee was made up of marketing managers of most of the undertakings in question and met several times a year.

19 According to the Decision, the Commission also took the view that the activities of the PG Paperboard were supported by an information exchange organised by Fides, a secretarial company, whose registered office is in Zurich, Switzerland. The Decision states that most of the members of the PG Paperboard sent periodic reports on orders, production, sales and capacity utilisation to Fides. Under the Fides system, those reports were collated and the aggregated data were sent to the participants.

20 The applicant, Gruber + Weber GmbH&Co. KG ('Gruber + Weber'), is a producer of GD cartonboard and, according to the Decision, took part in some JMC meetings. Article 1 of the Decision states that it participated in the infringement from at least 1988 until late 1990 (see also point 162 of the Decision).

Procedure

21 The applicant brought this action by application lodged at the Registry of the Court on 7 October 1994.

22 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-309/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

23 The applicant in Case T-301/94, Laakmann Karton GmbH, withdrew its action by letter lodged at the Registry of this Court on 10 June 1996 and the case was removed from the Register by order of 18 July 1996 (Case T-301/94 *Laakmann Karton GmbH* v *Commission*, not published in the ECR).

24 Four Finnish undertakings, members of the trade association Finnboard, and as such held jointly and severally liable for payment of the fine imposed on Finnboard, have also brought actions against the Decision (Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94).

25 Lastly, an action was also brought by an association, CEPI-Cartonboard, which was not an addressee of the Decision. However, it withdrew its action by letter lodged at the Registry of the Court on 8 January 1997 and the case was removed from the Register of the Court by order of 6 March 1997 (Case T-312/94 *CEPI-Cartonboard* v *Commission*, not published in the ECR).

26 By letter of 5 February 1997 the Court requested the parties to take part in an informal meeting with a view, in particular, to their presenting observations on a

possible joinder of Cases T-295/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94 for the purposes of the oral procedure. At that meeting, which took place on 29 April 1997, the parties agreed to such a joinder.

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

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

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

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

Forms of order sought

31 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, if the Decision should be upheld, substantially reduce the amount of the fine imposed on it;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment of Article 1 of the Decision

The plea alleging infringement of the obligation to state reasons and failure to observe requirements relating to the burden of proof

Arguments of the parties

33 The applicant submits that in a case such as the present the Commission must not only prove the existence of the cartel, but also the nature, extent and duration of

the participation by each of the undertakings concerned. However, despite the detailed explanations supplied by the applicant during the administrative procedure before the Commission, the Decision does not even refer to any participation by it in collusion. Instead, the Decision generally and implicitly assumes that it participated in it.

34 It must, however, be proved that individual undertakings participated, actively or passively, in the activities of a cartel, because such activities have a direct influence on the amount of any fines.

35 The arguments submitted by the applicant appear only in point 109, first paragraph, of the Decision, in which it is stated that 'Gruber + Weber for its part admitted that the prices for large customers had been discussed in meetings but claimed the subject was of no interest to it since it only had small customers'. The Decision does not contain any appraisal of that explanation. However, such an appraisal is indispensable, because, according to the Decision, a principal objective of the cartel was to maintain the market shares of the major producers (point 2 of the Decision) and the JMC's main task was to work out the details of the price initiatives for the major customers of the cartel 'ringleaders' (point 44). In those circumstances, having regard to the applicant's insignificant market share and the fact that its customer base differed from that of the other producers, it is obvious that it had no interest in participating in the alleged cartel.

36 Its own participation in any cartel has not been adequately proved and the facts and the grounds on which the Decision is based in regard to it have not been adequately set out (see the Opinion of Advocate General Sir Gordon Slynn in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, at p. 913, and Opinion of Advocate General Darmon in 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, at p. I-1445).

37 The Commission contends that points 108 to 115 of the Decision reply to the producers' principal arguments. When stating the reasons for its decision, the Commission is not required to discuss all the issues of fact and of law raised during the proceedings, because it suffices to mention the factual and legal elements which led it to adopt the decision (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 318).

38 Moreover, it did not rely on general assumptions and incorrect assertions.

39 The Commission's submissions in response to the other matters raised in this plea are set out in the context of its reply to the applicant's other pleas in support of its application for annulment of Article 1 of the Decision.

Findings of the Court

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

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

42 The applicant's argument is therefore irrelevant in the present context in so far as it seeks to challenge the correctness of the grounds of the Decision. The same holds for the applicant's argument that the Commission disregarded the requirements relating to proof, since that argument also seeks to contest the correctness of the Decision.

43 Moreover, although pursuant to Article 190 of the Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, *inter alia*, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 66).

44 In the present case, the Decision refers directly to the applicant in the context of its description of the concerted price increases (points 78 and 79 of the Decision). Moreover, the points of the Decision describing the discussions with an anti-competitive object in the JMC (in particular, points 44 to 46, 58, 71, 73, 84, 85 and 87 of the Decision) necessarily relate to the applicant, which does not dispute having participated in meetings of that body. Lastly, the Decision clearly sets out the reasoning followed by the Commission in reaching its conclusion that the applicant participated in an overall cartel (points 116 to 119 of the Decision).

45 In those circumstances, the statement of reasons for the Decision gave the applicant an adequate indication of the essential elements of fact and of law supporting

the reasoning which led the Commission to hold it responsible for an infringement of Article 85(1) of the Treaty.

46 This plea must therefore be rejected as unfounded.

The plea that the applicant did not participate in secret and institutionalised meetings and regular agreements on prices

Arguments of the parties

47 The applicant submits that the Commission wrongly took the view that it had participated in secret and institutionalised meetings and regular agreements on prices.

48 As regards its participation in meetings of the bodies of the PG Paperboard, it is apparent from the Decision that the principal and decisive function in the cartel was performed by the decision-making bodies, namely the PWG and the PC (points 37, 38 and 41 of the Decision). However, the applicant never participated in meetings of those bodies and the assertion in point 42 of the Decision that all the undertaking to which the Decision was addressed were represented in the PC is incorrect. Nor did it ever take part in meetings of the Economic Committee.

49 It is apparent from point 44 of the Decision, which describes the JMC's main tasks, that the JMC was merely of secondary importance in the cartel.

50 Furthermore, the applicant became a member of the JMC (in 1988) later than the other producers and withdrew from its meetings after a short period (in 1990). During that period it was only an occasional participant in JMC meetings. Even if the JMC played an important role in the alleged cartel, the applicant did not, and could not have, performed any function whatsoever in that body. Nor did it have any extensive knowledge of the alleged unlawful agreements.

51 The reference to the judgment in Case T-1/89 *Rhone-Poulenc* v *Commission* [1991] ECR II-867 is therefore irrelevant. Contrary to the facts found in the case which gave rise to that judgment, there is no evidence in this case that the applicant participated in meetings in which price initiatives or price increases were decided.

52 Furthermore, the Commission failed to take into account the applicant's reason for participating in some meetings of the JMC. It decided to participate in the Fides information exchange system solely in order to better assess future changes in the market, particularly in the German market for folding boxes, with a view to making a considerable investment in the modernisation of its production plant. It ceased to participate in the Fides system once the modernisation had been completed at the end of 1990.

53 Lastly, the applicant had no interest in participating in any unlawful cartel, because (a) its customers were medium-sized undertakings; (b) the typical volume ordered by its customers differed considerably from the volumes ordered by the customers of the leading cartonboard producers; and (c) most of its product range differed considerably from that of the leading folding-box manufacturers.

54 The Commission contends that, because the applicant participated in the Fides information exchange system and in JMC meetings, it participated in the infringement of Article 85 of the Treaty in its entirety. In that regard, it states that it was not a series of separate infringements but, on the contrary, the various elements of the cartel combined to achieve one and the same overall agreement. The measures and arrangements of the cartel must therefore be seen as a whole (*Rhône-Poulenc* v *Commission*, cited above, points 125 to 127).

55 The Commission accepts that the applicant participated only in meetings of the JMC. The statement in point 42 of the Decision that all the undertakings participated in the PC meetings is simply an error. Nevertheless, the JMC played an extremely important role in the cartel, as the Decision makes clear.

56 As regards the applicant's argument that its participation in the JMC meetings was sporadic, there is no evidence to show that discussions on price initiatives did not take place at the meetings at which it was present, in particular having regard to the fact that it admits that it increased its prices during the period in question. Furthermore, there were separate JMC meetings for each grade of cartonboard concerned. The Commission points out that the applicant produces only GD cartonboard.

57 Lastly, as to the reason for the applicant's participation in the meetings of the JMC and its alleged lack of interest in participating in an unlawful cartel, the Commission states that individual motives, even lack of interest, cannot justify participation in an unlawful cartel.

Findings of the Court

58 The applicant disputes that it participated in 'secret and institutionalised meetings', as found in the fifth indent of Article 1 of the Decision.

59 It also disputes that it participated in agreements on prices. The Court understands this to be a submission by the applicant that it did not participate in collusion on prices and, if such collusion were to be regarded as proved, that the Commission wrongly characterised it as an agreement.

60 The Court will examine the applicant's three arguments in turn.

— As to the applicant's participation in 'secret and institutionalised meetings'

61 There is no dispute that the applicant participated in some meetings of the JMC between 1988 and the end of 1990. In its letter of 10 January 1992 it gave the Commission details of meetings in 1990 alone. It stated that it had participated in the meeting of 6 and 7 February 1990, 14 May 1990 and 4 September 1990. In the same letter it stated that it was unable to establish whether it had participated in the meetings of 4 and 5 April 1990, 8 and 9 October 1990, and 19 and 20 November 1990. That information was duly taken into consideration by the Commission, as is apparent from Table 4 annexed to the Decision.

62 Nor is there any dispute that the applicant never participated in meetings of the three other bodies of the PG Paperboard, namely the PWG, the Economic Committee and the PC.

63 As regards more particularly the PC, it is clear, when the Decision is read as a whole, that the assertion in point 42, first paragraph, that 'all the undertakings to

which this Decision is addressed were represented in the President Conference', is, as the Commission accepted in its written pleadings to the Court, the result of an error. It suffices to find in that regard that the applicant is not included in Tables 3 and 7 amongst the undertakings which participated in PC meetings.

64 The Commission did not therefore take the view that the applicant had participated in more meetings of the bodies of the PG Paperboard than the applicant itself had admitted.

65 The Court finds that the applicant's participation in some meetings of the JMC entitled the Commission to conclude that the applicant participated in 'institutionalised' meetings. Such a conclusion did not require proof that the applicant participated in meetings of all the bodies of the PG Paperboard.

66 In any event, without prejudice to the question whether, and if so to what extent, the applicant participated in the infringement found in Article 1 of the Decision, the Court finds that the applicant was fully aware of the fact that the JMC meetings in which it participated were part of a broader institutional framework. It suffices to point out in that regard that in its letter of 10 January 1992 (see paragraph 61 above) the applicant supplied information relating to the dates of meetings of all the bodies of the PG Paperboard in 1989 and 1990.

67 As regards the secret nature of the meetings in question, the Court points out that there are no official minutes of JMC meetings. The absence of official minutes and the almost total absence of internal notes relating to those meetings constitute, having regard to the number of those meetings, the length of time for which they continued and the nature of the discussions in question, sufficient proof of the

Commission's allegation that the participants were discouraged from taking notes (see point 168, sixth indent, of the Decision).

68 The Commission therefore correctly found that the applicant had participated in 'secret and institutionalised meetings'.

— As to the applicant's participation in collusion on prices

69 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).

70 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'.

71 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.

72 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.

73 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.'

74 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.

75 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 not only of the secret nature of the meetings (see paragraph 67 above), but also 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 was reversed and it was 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.

76 As regards the applicant's own position, its participation in some meetings of the JMC from 1988 until the end of 1990, including at least three meetings in 1990, must, in the light of the foregoing and notwithstanding the lack of documentary evidence relating to the discussions which took place at the meetings in which the applicant's presence has been proved, be regarded as sufficient proof of its participation in collusion on prices during that period.

77 That finding is borne out by the documents, to which the Commission refers, relating to the applicant's actual conduct in regard to prices. The applicant does not dispute the correctness of the information in the tables annexed to the Decision, setting out the amounts of the price increases, the date of their announcement and the date of their entry into force. It is clear from those tables that, during the period of its alleged responsibility for the infringement, the applicant announced and implemented price increases on the German market which corresponded, in their amounts, date of announcement and date of implementation, to the decisions adopted in the PG Paperboard.

78 The applicant submits (see paragraph 89 et seq. below) that it did not participate in the October 1989 price increase and that despite its initial intentions did not implement the price increases planned for April 1990 and January 1991.

79 However, according to the Decision, the first of those three increases did not relate to GD cartonboard, the only grade of cartonboard manufactured by the applicant (see table E annexed to the Decision and Stora's statement, appendix 39 to the statement of objections, point 17).

80 As regards the second increase, planned for April 1990, the applicant announced in a letter of 13 December 1989 (document F-7-1) that it intended to increase its prices by 8% in March 1990. In that letter it expressly referred to the price increase announced by Mayr-Melnhof on 28 November 1989, which was identical to that announced by the applicant in terms of the amount and the date upon which it would take effect.

81 As the applicant announced its intention to implement the price increase concerned, the mere fact that it did not actually increase its prices at the planned date cannot alter the conclusion that its market behaviour confirms its participation in the price collusion. In the circumstances of the present case, the non-application of the increase shows at the very most that the applicant profited fully from the price collusion by charging prices lower than those agreed with its competitors.

82 The fact that the applicant did not participate in the third increase merely confirms the Commission's finding that the applicant ceased to participate in the infringement at the end of 1990.

83 Having regard to those matters, the Commission has proved the applicant's participation in collusion on prices from 1988 until late 1990. The applicant's contention that it participated in the JMC meetings solely in order that it might better assess future developments in the market and that it had no interest in participating in any cartel are therefore irrelevant.

— As to the characterisation in law of the infringement

84 According to the Decision, the undertakings referred to in Article 1 thereof had fixed 'by agreement ... the regular price increases to be applied in each national market'. The Commission also states that 'the working out of the plan via the twice-yearly price initiatives is not to be treated as involving a series of separate agreements or concerted practices but as part of one and the same continuing agreement' (point 131, second paragraph). In the applicant's case, it must therefore be ascertained whether the collusion on prices in which it participated with effect from 1988 (see paragraph 69 et seq. below) was correctly characterised by the Commission as an agreement.

85 It is settled law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see, *inter alia*, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and *Van Landewyck and Others* v *Commission*, cited above, paragraph 86, and Case T-7/89 *Hercules Chemicals* v *Commission*, [1991] ECR II-1711, paragraph 256).

86 The Court must therefore establish whether the addressees of the Decision expressed their joint intention to conduct themselves on the market in a specific way in regard to prices.

87 In that regard it suffices to refer to the evidence proving the applicant's participation in collusion on prices (see para 69 et seq below). Without there being any need to examine other evidence, it is clear that the Commission has proved that the undertakings which participated in the meetings of the JMC expressed their joint intention to carry out uniform and simultaneous price increases. The Commission was therefore entitled to find that the joint intention which had been formed

by the applicant and other cartonboard producers regarding price initiatives constituted an agreement.

88 On the basis of all the foregoing considerations, this plea must be rejected.

The plea that the applicant did not implement the price increases

Arguments of the parties

89 The applicant states that it increased its prices only in October 1988 and April 1989. In the case of the April 1990 and January 1991 price increase initiatives, in which the Decision states that it participated, it announced increases but did not put them into effect.

90 The fact that the applicant did not participate in the October 1989 price initiative clearly shows that it did not exercise any function in the alleged cartel. If it had had such a function, it would have been required to participate indefinitely in all the price initiatives so as not to prejudice the success of the agreements concluded.

91 Lastly, it did not consider itself to be bound by the agreements on prices. There is no dispute that, notwithstanding its original statements, it did not implement the April 1990 and January 1991 price increases.

92 The Commission contends that the applicant's behaviour fully confirms its participation in all the price initiatives. The applicant announced price increases for each initiative decided upon by the PG Paperboard during the period in question, with the sole exception of the October 1989 increase. The fact that some price increases could not be imposed might be explained by customer resistance. In view of the fact that price increases had been announced, it must be assumed that the applicant considered itself to be bound by the agreements on prices.

Findings of the Court

93 The Court has already pointed out that, according to the Decision, the October 1989 price increase did not concern GD cartonboard, the only grade of cartonboard manufactured by the applicant. It has also been found (see paragraph 82 above) that the non-implementation of the January 1991 price increase merely confirms that the applicant ceased to participate in the infringement at the end of 1990.

94 The fact that the applicant, after having announced its intention to increase prices in March 1990, did not in fact increase its prices at the planned date cannot affect the conclusion that it participated in collusion on prices. It is not alleged in the Decision that the applicant implemented the price increase in question. In table F annexed to the Decision the Commission in fact merely referred to the letter of 13 December 1989 (document F-7-1) in which the applicant announced its intention to increase prices in March 1990 (see paragraph 80 above).

95 As to the remainder of the increases, the Court finds that the applicant implemented the October 1988 and April 1989 concerted price increases (tables C and D annexed to the Decision).

96 The applicant's contention that it did not consider itself to be bound by its discussions with its competitors regarding cartonboard prices is irrelevant. It is not a condition for the application of Article 85(1) of the Treaty that the undertakings should consider themselves to be bound by the collusion in which they participate.

97 The plea cannot therefore be upheld.

The plea alleging that the applicant did not participate in collusion on market shares and on capacities

Arguments of the parties

98 The applicant submits that until 1990 it fully utilised its old cartonboard machine and that it was impossible for it to increase its production volume. The servicing, maintenance and breakdown of that machine necessitated a number of stoppages in production for technical reasons.

99 In 1989, in preparation for the fall in its production during the conversion of its cartonboard machine, the applicant produced for stock and the machine operated for 20.8 days longer than in a normal year. In order to achieve such excess production, it was necessary to dispense with downtime linked to the annual closure of the undertaking or to public holidays and to stop production only when required on technical grounds. Production in 1990 fell on account of the conversion work, but the remaining capacity was fully utilised. It did not therefore follow any 'price before tonnage' policy and the conversion work in its mill was clearly inconsistent with such a policy.

100 The Decision does not allege that the applicant participated in collusion on capacities or on the protection of market shares of the principal producers. It does not refer to any factual evidence to show that the applicant participated in the alleged collusion on the 'price before tonnage' policy. In particular, the note found at FS-Karton (appendix 115 to the statement of objections; see point 92 of the Decision) does not prove such participation. That note merely refers to the applicant's market share, allegedly 3%. However, its market share of GD grades was 2% at most even in 1988/1989, and still lower in 1990 on account of the conversion work which was carried out.

101 The applicant also disputes that its occasional participation in JMC meetings can be regarded as proof of its participation in a 'price before tonnage' policy. It is clear from Stora's second statement, on which the Commission relies, that this policy had been discussed in meetings of the PWG and of the PC, that is to say in bodies in which the applicant did not participate. Nor does the note concerning a meeting of the Economic Committee of 3 October 1989 (appendix 70 to the statement of objections; see point 82 of the Decision) constitute such proof, since it is accepted that the applicant never participated in its meetings.

102 The Commission refers to Stora's statements (appendices 39 and 43 to the statement of objections). They describe the measures adopted in regard to the control of quantities in order to maintain a balance between supply and demand and in regard to the limitation of market shares. Furthermore, it is apparent from those statements that the measures to control quantities and limit market shares were essential elements of the agreements concluded between the members of the PG Paperboard. Stora's statements are confirmed by a number of documents. The Commission refers, by way of example, to a confidential note of 28 December 1988 by the sales director of FS-Karton (appendix 73 to the statement of objections).

103 It submits that it correctly interpreted appendix 115 to the statement of objections. The information in that note — regarding percentage market shares, production quantities and capacity, order backlogs, prices and planned price increases — can, because of its detailed and exhaustive nature, have been obtained only on the basis of an exchange of individual information by the producers. As that note therefore confirms Stora's statements, it is irrelevant whether the information concerning the applicant came from it or whether its market share was in fact 3%. It is in any event necessary to take into consideration the fact that the note refers merely to the German market for GD and GT grades, of which the applicant's market share in 1990 was higher than the abovementioned figure of 3%.

104 Since the applicant participated in meetings of the JMC, whose objective was to lay down the necessary measures relating to the 'price before tonnage' policy (point 44 et seq. of the Decision), those aspects of the cartel must also be attributed to it. In the case of a complex system of agreements, it is not necessary that each member should itself adopt all the component parts of the cartel, where it is proved that the cartel as a whole adopted them (*ICI* v *Commission*, cited above, paragraphs 256 to 261 and 305, and *Hercules Chemicals* v *Commission*, cited above, paragraph 272). The fact that the applicant may have increased its market share is therefore irrelevant, because such individual conduct does not excuse participation in an unlawful arrangement. The fact that it may not have taken downtime and may have fully utilised its capacities is also irrelevant.

Findings of the Court

105 According to Article 1 of the Decision, the undertakings referred to therein infringed Article 85(1) of the Treaty by participating, in the case of the applicant from at least 1988 until late 1990, in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the Community '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', 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'.

106 It is not disputed that the applicant participated in certain meetings of the JMC from 1988 until late 1990. Moreover, the applicant's participation in collusion on prices during that same period has already been proved (see paragraph 69 et seq. above).

107 As the applicant disputes that it participated in collusion on downtime and on market shares, the allegations relating to each of those types of collusion must be examined separately.

— The applicant's participation in collusion on downtime

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

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

110 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).

111 The Decision also states: '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).

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

113 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 ...'.

114 The Commission also bases its conclusions on Appendix 73 to the statement of objections, a confidential note dated 28 December 1988 from 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.

115 According to that document, referred to in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided on in 1987 had produced 'winners' and 'losers'. The expression 'Presidents' grouping' was interpreted by Mayr-Melnhof as a general reference to both the PWG and the PC, that is to say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a). It is unnecessary to consider that interpretation in the present context.

116 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 PWG meetings.

117 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).'

118 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.

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

120 According to the Decision, the undertakings which participated in the meetings of the JMC, the applicant amongst them, also took part in that collusion.

121 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).

122 The Commission also observes as follows:

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

123 The documentary evidence relating to the JMC meetings (appendices 109, 117 and 118 to the statement of objections) confirm that discussions on downtime took place in the context of the preparation of concerted price increases. In particular, Appendix 118 to the statement of objections, a Rena note dated 6 September 1990 (see also paragraph 87 above), refers to the amounts of price increases in several countries, the dates for the future announcements of those increases and the state of the order backlogs expressed in working days for several manufacturers. The author of the document notes that certain manufacturers were providing for downtime, which he illustrates as follows:

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

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

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

application of a future price increase was going to require, in all probability, that (additional) downtime be taken, and this is therefore a consequence which was accepted, at least implicitly, by the producers.

126 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.

127 The applicant must therefore be considered to have participated from 1988 until late 1990 in collusion on downtime.

128 The Court does not accept the applicant's argument that its actual conduct is irreconcilable with the Commission's assertion that there was collusion on downtime.

129 It should be pointed out that 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).

130 Furthermore, 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, and in particular that,

as it contends, it made full use of its production capacity during 1990, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.

— The applicant's participation in collusion on market shares

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

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

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

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

'Other producers who did not participate in the PWG were not generally informed of the detail of the market share discussions. Nevertheless, as part of the price before tonnage policy in which they participated, they would have been aware of the understanding by the major producers not to undermine prices by maintaining constant levels of supply.

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

134 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.

135 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.

136 Second, the mere fact that those undertakings participated in collusion on prices and collusion on downtime does not demonstrate that they also participated in collusion on market shares. Contrary to the Commission's apparent claim, the

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

137 Third, the Commission relies on appendix 115 to the statement of objections, a note found at FS-Karton (of the Meyr-Melnhof group). According to point 92, first paragraph, of the Decision, that note 'dating from the beginning 1991 obviously records the outcome of a meeting with other producers, although this was denied by Meyr-Melnhof'. Furthermore, it 'show[s] the percentage market shares (in 1990) for the [Meyr-Melnhof] Group, Feldmühle, Buchmann, Weig, Europa Carton, Cascades, Laakmann, Saffa, Gruber & Weber and De Eendracht' (*ibidem*, second paragraph).

138 However, that appendix cannot be considered to prove that the applicant participated in collusion by producers in regard to market shares. Although it refers to percentage market shares held in Germany by several producers, including the applicant, it is not possible to identify the origin of the document or the date of the meeting to which it relates. In those circumstances, it cannot be ruled out that this document was prepared in the course of 1991 on the basis of information which had become public or been obtained from customers, for the purposes of an internal meeting of FS-Karton. In any event, even assuming that a discussion on market shares had in fact taken place between a number of producers, including some which did not participate in PWG meetings, it has not been proved that this discussion took place during the period of the applicant's alleged infringement, that is to say, from at least 1988 until late 1990.

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

140 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.

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

142 The eighth indent of Article 1 of the Decision, according to which the object of the infringement in which the applicant participated was to '[maintain] the market shares of the major producers at constant levels, subject to modification from time to time', should therefore be annulled as regards the applicant.

The plea alleging error of assessment regarding the applicant's participation in the Fides information exchange system

Arguments of the parties

143 The applicant submits that it participated in the Fides information exchange system with the sole objective of obtaining reliable information on future developments in the market for folding cartonboard boxes, with a view to making a considerable investment in new production plant. It ceased to participate in that system once that investment had been completed at the end of 1990. It therefore participated with a view to extending its own market position to the detriment of the other producers.

144 Furthermore, it believed that participation in the information exchange system was, in itself, lawful.

145 The Commission contends that the Fides information exchange system was used to facilitate the operation of a cartel which fell within the scope of Article 85 of the Treaty. In those circumstances, the information exchange system cannot be assessed separately from the anti-competitive objectives of the cartel. The applicant could not have been unaware of the illegality of the information exchange system which had been implemented. In any event, good faith on its part could have a bearing only on the amount of the fine.

Findings of the Court

146 According to Article 1 of the Decision, the undertakings referred to in that article infringed Article 85(1) 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', that is to say, collusion on prices, market shares and downtime.

147 In view of its operative part and the third paragraph of point 134, the Decision must be interpreted as meaning that the Commission considered the Fides information exchange system to be contrary to Article 85(1) of the Treaty because it supported the cartel.

148 The third paragraph of point 134 of the Decision explains that the Fides information exchange system 'was an essential aid to:

— monitoring market share development,

— monitoring conditions of supply and demand so as to maintain full capacity utilisation,

— deciding whether concerted price increases could be introduced,

— determining the necessary downtime'.

149 As the Fides information exchange system was considered contrary to Article 85(1) of the Treaty only because it supported the cartel found, the applicant's argument that it believed its participation in that system was, in itself, lawful is irrelevant.

150 Furthermore, the applicant does not assert that the statement in the Decision as to the use of the Fides statistics for anti-competitive purposes is incorrect.

151 In those circumstances, it has been proved that the applicant participated in an exchange of information in support of the anti-competitive acts in which it has been proved to have participated. The reasons it gives for its decision to participate in the Fides information exchange system are therefore also irrelevant.

152 The plea must therefore be rejected.

The application for annulment of Article 2 of the Decision

Arguments of the parties

153 The applicant claims that the wording of the prohibition laid down in Article 2 of the Decision is too imprecise. Its extremely vague statements make it impossible to distinguish a lawful from an unlawful information exchange system. Any

information exchange system, even of aggregate data, is liable to fall within the scope of that prohibition.

154 To the extent that Article 2 prohibits the exchange of data in aggregated form, the Decision is inconsistent with the Commission's Notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings (OJ 1968 C 75, as corrected in OJ C 84, p. 14 — hereinafter 'the notice concerning cooperation').

155 In its *Seventh Report on Competition Policy* (paragraph 7) the Commission confirmed that an information exchange system which does not allow identification of the data of individual undertakings does not infringe the competition rules.

156 In basing its objection in the Decision on the risk of the misuse of information which in itself may be lawfully collected, the Commission has unlawfully extended the scope of Article 85 of the Treaty.

157 The Commission does not accept that the prohibition on the future exchange of information is too vague. It suffices that the operative part and the grounds of the decision indicate the anticompetitive conduct which is to be brought to an end (judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 122 to 124). In the present case, Article 2(a) to (c) of the Decision themselves contain a detailed description of the nature of the information which may be exchanged. Furthermore, the findings of fact concerning the information exchanged were set out in detail in points 61 to 68, 105 and 106 of the Decision. In addition, the Decision contains a precise description of the restrictive effects which the information exchange had on the conditions of competition (points 134 and

166). The scope of the prohibition is therefore clear from Article 2 of the Decision, when read in conjunction with the statement of reasons for it.

158 The second and third subparagraphs of Article 2 of the Decision merely explain how a lawful information exchange may be created.

159 Nor does the Commission accept that the prohibition is too wide. The prohibition of the future exchange of information should be understood in the light of the findings in points 68 to 70 of the Decision. The prohibition of the exchange of aggregate data concerns only information on order entries, order backlogs and capacity utilisation. When the information exchange is assessed, it is necessary to take into account the high degree of concentration in the sector and the detailed knowledge of the structure and policy of the various undertakings as a result of their former cooperation in the PG Paperboard. On concentrated markets residual competition consists principally in the uncertainty and secrecy existing between the main suppliers with regard to market conditions. The exchange of information on order backlogs at frequent intervals gives the market such artificial transparency that the existing residual competition ultimately ceases to have any effect.

160 Furthermore, as a result of the weekly exchange of statistics on order entries, combined with capacity reports, capacity utilisation in the sector could be ascertained and downtime planned throughout the sector, thus enabling the producers to maintain a balance between supply and demand and to counteract any fall in prices in the event of a fall in demand. The existence of those effects does not depend upon whether the data is in the form of individual data or relates to orders which have already been placed. The Commission therefore correctly concluded that an exchange of information on the state of order entry and order backlog, even if aggregated, is contrary to Article 85(1) of the Treaty.

161 The Decision is not inconsistent with its notice concerning cooperation or with the *Seventh Report on Competition Policy*.

Findings of the Court

162 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.'

163 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.

164 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).

165 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).

166 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.

167 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.

168 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.

169 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.

170 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.

171 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'.

172 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. ...'.

173 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.

174 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.

175 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.

176 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.

177 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.

178 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.

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

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

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

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

The application for annulment or reduction of the amount of the fine

The pleas dealt with in the course of common oral argument

180 At the informal meeting on 29 April 1997 the undertakings which had brought actions to contest the Decision were requested to consider whether they wished to present common oral argument in the event that the cases were joined for the purposes of the oral procedure. It was stressed that oral argument could be presented

in common only by applicants which had actually relied on pleas in their applications which corresponded to the subjects to be dealt with in common argument.

181 By fax of 14 May 1997, lodged in the name of all the applicants, those applicants informed the Court of their decision to deal with six subjects in common oral argument, including the following:

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

(b) the general level of fines and the statement of reasons in that regard in the Decision;

and

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

182 In its application, the applicant has not submitted any plea or argument concerning those three matters. It nevertheless indicated at the hearing that it adopted the common oral argument in question.

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

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

The pleas that the Commission took an erroneous turnover figure into account and infringed the obligation to state reasons and the rights of the defence

Arguments of the parties

185 The applicant contends that it is clear from point 4 of the Decision that certain types of cartonboard, such as greyboard, which are not used for the manufacture of folding cartons are not the subject of the Decision and not covered by its definition of 'cartonboard', even though they may be manufactured on cartonboard machines. That is confirmed by point 3 of the Decision which states that cartonboard is used 'primarily for the manufacture of folding cartons'.

186 At the outset of its investigation the Commission requested the applicant to supply details of its total turnover in the sector and of its turnover relating to GD cartonboard. However, in the statement of objections the Commission gave it to be understood that the investigation concerned only cartonboard intended for production of folding cartons.

187 Three products manufactured by the applicant are not covered by the definition of 'cartonboard' in the statement of objections and in the Decision, namely, its Printa, Duplex KO and Silbergrau products.

188 Printa is a wood-based, lined duplex board, the inner liner and backing layer being composed entirely of wastepaper. Referring to a statement by the Papiertechnische Stiftung (Technical Institute for Paper - 'the PTS'), the applicant asserts that this grade cannot be included amongst GD cartonboard. Printa is a mixed grade, principally used for box board and only to a minor extent for the production of folding cartons. The applicant markets it under the heading 'pigmented UD' solely in order to indicate that this product is also suitable, at least partially, for the production of folding cartons.

189 Duplex KO is a simple white lined duplex chipboard with a liner and backing layer composed entirely of wastepaper. Referring to a statement of the PTS, the applicant asserts that this product cannot be included amongst the range of GD or UD2 cartonboard grades either. It is used almost exclusively for the production of box board and in terms of end use, quality and price, is not comparable to the grades used for the manufacture of folding cartons. It is marketed under the designation ED ('Einfach Duplex' — simple duplex).

190 Lastly, Silbergrau is a pure greyboard.

191 In view of the features of those products, the applicant stated in its reply to the statement of objections that it produced only Supra and Bona grades. That was confirmed at the oral hearing before the Commission. The applicant's representative explained that Printa did not fall within the UD or GD range of cartonboard and that that product had therefore been placed by the applicant under a separate heading in the information which it supplied to Fides. He expressly stated that it was inappropriate to use the term 'UD' for that product.

192 As there was no further discussion of the applicant's products, the applicant therefore believed that it had been agreed that the proceedings did not relate to Printa and Duplex KO. The Commission raised the matter again only in its letter of 24 May 1994 in which it asserted that Printa differed from GD2 cartonboard only because of its lower density — which is not true — and that the trade considered Duplex KO to be a UD product.

193 As the Decision does not state whether it concerns the products in question, its statement of reasons is defective. Although it is settled law that the Commission is not required to reply to arguments which it considers to be irrelevant (see *ICI* v *Commission*, cited above, paragraph 318), the definition of the products concerned by the Decision is a material point.

194 The inclusion of the products in question within the scope of the Decision infringes not only the obligation to state reasons, but also, having regard to the course of the proceedings, the applicant's rights of defence.

195 Lastly, the Commission could have correctly calculated the fine simply on the basis of the information supplied by the applicant in its letter of 13 May 1993. In any event, the necessary information was sent to it in the applicant's letter of 13 May 1994 and repeated in the letter of 1 July 1994.

196 The Commission submits that the fine imposed was well below the ceiling fixed by Article 15(2) of Regulation No 17. The applicant cannot therefore claim that part of its turnover should not be taken into account.

197 Following the applicant's complaint that certain of its products had been included, the Commission invited it, by letter of 24 May 1994, to show how the total turnover figure that it had already sent was broken down between its various products. In its letter it also explained why it considered that Printa and Duplex KO should be classified as GD cartonboard. However, the applicant's reply, in a letter of 1 July 1994, was sent well after the time-limit of 31 May 1994 fixed by the Commission and did not contain the breakdown of total turnover by reference to cartonboard grades produced by it. In those circumstances, the Commission was entitled to rely on the figure for total turnover in the cartonboard sector which the applicant had initially sent.

198 Furthermore, Printa and Duplex KO are covered by the definition of 'cartonboard' in the Decision. It is not a question of defining the relevant market but of determining which products are covered by the agreements between the participants in the cartel.

199 Point 4 of the Decision makes it clear that the Decision does not cover cartonboard intended for the manufacture of folding cartons alone. Certain cartonboard is, however, excluded, such as greyboard, which is made of waste paper. Moreover, the applicant itself acknowledged that Printa and Duplex KO are suitable for the manufacture of folding cartons. The applicant itself gave Printa the designation UD in its application. It is therefore clear that it is a GD cartonboard.

200 The applicant has also accepted that the details sent to Fides contained information relating to the products in question, which shows that the applicant itself considered that the cartel covered those grades. In addition, the price increases were applied to those products.

201 Furthermore, it is clear from the discussions at the hearing before the Commission that those products must be regarded as falling within the scope of the definition of cartonboard. The applicant's representative indicated that the Printa grade is 'something of a GD3'. The PG Paperboard uses the abbreviation GD3 in order to designate a type of 'white-lined chipboard' which differs from the GD1 or GD2 grades only in its lower density. As regards the Duplex KO product, the applicant's representative accepted that its competitors classified it as a UD cartonboard. Even though the applicant describes it as ED ('Einfach Duplex'), its very name indicates that it is a duplex cartonboard.

202 The products in question are also described as duplex cartonboard in the applicant's own advertising brochure, in which it is even stated that Printa is used in the folding box and products display sector. No probative value can be accorded in that regard to the statements obtained by the applicant from the PTS.

203 Points 168 and 169 of the Decision adequately indicate the criteria used to determine the amount of the fine. Since turnover in the cartonboard sector is one of those criteria, the Commission did not have to explain in detail why Printa and Duplex KO were included when the fine was calculated (Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 363).

204 Lastly, the Commission disputes that it altered its position in the course of the proceedings. Both the statement of objections and the Decision defined the subject-matter of the proceedings in a manner which covered the products in question.

Findings of the Court

205 It is common ground that the Commission fixed the amount of the fine imposed on the applicant on the basis of its turnover in 1990 from the sale of all its grades of cartonboard, including turnover from the sale of its Printa, Duplex KO and Silbergrau products.

206 Nor is it disputed that, when fixing the amount of each individual fine, the Commission systematically took into account the turnover of each addressee of the Decision on the Community cartonboard market in 1990. When doing so, it took into account solely turnover from sales of cartonboard as defined in the Decision.

207 The Commission does not dispute that Silbergrau is a greyboard which, as such, is not the subject of the infringement found. On the other hand, it submits that Printa and Duplex KO are covered by the definition of cartonboard in the Decision and that the infringement covered those products.

208 This plea must be assessed in the light of the abovementioned considerations. It is therefore necessary to examine, first, whether the Decision contains an adequate statement of reasons for the inclusion of Printa and Duplex KO within the definition of the relevant product and whether the applicant's rights of defence have been infringed in that context. The Court will then examine whether the Commission has shown that the infringement found in Article 1 of the Decision extended to Printa and Duplex KO products. Lastly, taking into account its conclusions in regard to the above matters, the Court will examine whether the Commission was entitled to fix the amount of the fine on the basis of the applicant's turnover in 1990 from sales of all its cartonboard grades.

— The arguments grounded on infringement of the obligation to state reasons and infringement of the applicant's rights of defence

209 It is settled law that the statement of the reasons on which a decision having adverse effect is based must make it possible to carry out an effective review of its legality and must provide the party concerned with sufficient details to allow that party to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed in the context of the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in obtaining explanations. In order to perform those functions, an adequate statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question (see, *inter alia*, Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 26).

210 Point 4 of the Decision states as follows:

'The main qualities of cartonboard produced in western Europe are:

— folding boxboard (FFB) manufactured with a top layer of whiteliner made from bleached chemical pulp, a middle layer of mechanical or semi-mechanical pulp and frequently a thin bottom layer of bleached chemical pulp. FBB is usually used for the packaging of food, cosmetics, cigarettes, pharmaceuticals, etc.,

— white-lined chipboard (WLC), also known in continental western Europe as Duplex, or Triplex, and based on secondary or recycled fibres. This product is produced with bleached chemical pulp on the topside and backlayers of waste-paper and is normally used for packaging of non-food products,

— solid bleached sulphate board (SBS), a multi-layered product made from bleached chemical pulp and white throughout. It is mainly used as a premium grade for the packaging of food, cosmetics, pharmaceuticals and cigarettes.

Certain other board products (e. g. "greyboard" which is made entirely from wastepaper) may also be produced on cartonboard machines but they do not fall within the definition of "cartonboard" as used by the producers themselves and are not the subject of the present proceedings.

The standard product designation and abbreviations used in Germany are commonly employed in the cartonboard industry throughout western Europe.

— The coated and uncoated FBB grades are designated "GC" and "UC" respectively.

— Coated and uncoated "duplex" grades of WLC are designated "GD" and "UD" while "triplex" are known as "GT" and "UT".

— Coated and uncoated SBS grades are designated "GZ" and "UZ" respectively.

Inside these categories there are further subdivisions: for instance, GC1 is distinguished from GC2 by virtue of the different backing layer used, GD1 from GD2 by their different specific volume, etc. For convenience, the whole of the virgin fibre sector is often referred to as "GC grades", and all recycled qualities as "GD grades". This usage will be adopted where appropriate in this Decision.'

211 It is apparent from that description of the products which are the subject of the Decision that the Commission took into account the fact that the term 'cartonboard' covers many products and does not therefore have a precise meaning. In particular, the Commission's statement that 'certain other board products' which can be produced on cartonboard machines are not covered by the Decision (point 4, second paragraph) clearly shows that the Commission considered that the products concerned by the Decision could not be determined by reference to the term 'cartonboard' alone.

212 Furthermore, since the Commission indicates that the statements in point 4 of the Decision relate to 'the main qualities of cartonboard produced in western Europe', they cannot be regarded as an exhaustive definition of the products covered by the Decision. Point 4 of the Decision must therefore be understood in the sense that it describes the main products concerned by the Decision by reference to their technical features (raw material, thickness, and end use). The fact that a particular product is not expressly mentioned or directly covered by the technical specifications in that point does not, in itself, mean that it is a type of cartonboard not covered by the Decision.

213 The Commission cannot be criticised for having given a non-exhaustive definition of the products to which the Decision relates.

214 First, in a case such as the present, the products concerned by the Decision may be determined according to their technical characteristics, taking into account the products which were the subject of the infringement found. If, therefore, a decision, read as a whole, shows that the alleged infringement related to a particular product and sets out the evidence supporting such a conclusion, the mere fact that that decision does not contain a precise, exhaustive list of the relevant products does not necessarily prevent effective review by the Community judicature of the lawfulness of that decision or necessarily mean that it does not provide the undertaking concerned with sufficient details to allow it to ascertain whether the decision is well founded.

215 Second, even though the Commission states (point 4, third paragraph, of the Decision) that the standard product designation and abbreviations used in Germany are commonly employed in the cartonboard industry, it is clear from the documents before the Court (as to the various classifications of cartonboard products, see appendices 1 to 4 to the statement of objections) that there is no standard classification used throughout the industry which would allow all types of cartonboard produced in western Europe to be defined precisely and exhaustively.

216 That finding is confirmed by the following comment regarding Printa made by the applicant's representative at the hearing before the Commission:

'The figures we gave to Fides were for GD2, and we made a special board which we called [Printa] which was not exactly defined — it didn't fit into these categories of UD and GD. It was something of a GD3 or something like that.' (Page 47 of the transcript of the hearing).

217 Third, the applicant does not submit that the statements in point 4 of the Decision are incorrect. The Court therefore holds that those statements are a correct and relevant description of the main types of cartonboard covered by the Decision.

218 In view of the foregoing, the Court considers that the statement of reasons in the Decision is sufficient to enable the products which are, in general, the subject of the infringement to be ascertained. However, since, in the administrative procedure before the Commission, the applicant disputed that Printa and Duplex KO could be considered to be the subject of that procedure, the Court must examine whether the Commission should have given specific reasons in that regard.

219 The Decision does not expressly state whether it covers Printa and Duplex KO.

220 It is clear from the evidence on which the Commission relies in the Decision that the discussions with an anti-competitive object which took place in some bodies of the PG Paperboard related, *inter alia*, to products which the producers themselves described as GD and UD (see, in particular, the price list obtained from Finnboard referred to in point 79 of the Decision, and appendix 118 to the statement of objections, document referred to in point 87 of the Decision).

221 Furthermore, the Commission's letter to the applicant of 24 May 1994 sets out the reasons which led it to conclude that the products in question were covered by those discussions.

222 In that letter the Commission states:

'As already explained in the statement of objections, in the Fides documents and at the hearing, the above proceedings, to the extent that they relate to grades produced from recyclable material, are not limited to GD1 and GD2 grades.

Your "Printa" cartonboard, whose GD3 classification is usual only in Germany, differs from GD2 grade only by virtue of its lower density (1.3 cm^3/g maximum instead of 1.4 cm^3/g; see appendix 4 to the statement of objections). Your "Duplex KO" or ED (Einfach Duplex) is considered by the trade — as you yourselves confirm — to be UD (Ungestrichenes Duplex [unlined duplex]), although you appear to equate it more to GK ("Silbergrau").'

223 Even though that explanation was not reproduced in the Decision, the applicant could not therefore have been unaware of the reasons which led the Commission to conclude that Printa and Duplex KO were covered by the alleged infringements. That finding is, moreover, confirmed by the fact that the arguments submitted by the applicant in its application show that it was fully aware of the Commission's reasoning.

224 Having regard to all the foregoing considerations, the Court finds that the Decision contains a statement of reasons that is adequate to enable an effective review of its legality to be carried out and to provide the applicant with the necessary details to ascertain whether or not it is well founded.

225 Since the Commission's reasoning was set out with sufficient clarity in its letter to the applicant of 24 May 1994, the applicant's allegation that its rights of defence were infringed must also be rejected. Furthermore, contrary to what the applicant appears to assert, there is no basis for concluding that the Commission altered its position during the administrative procedure, because the definition of cartonboard in the statement of objections is almost identical to that in point 4 of the Decision.

— The question whether the infringement related to Printa and Duplex

226 The Court has already pointed out that the discussions with an anti-competitive object related, *inter alia*, to products described by the producers themselves as GD and UD.

227 The explanation given by the applicant's representative at the hearing before the Commission, according to which Printa 'was something of a GD3 or something like that' is in itself weighty evidence that that product was the subject of the discussions. The same is true in regard to the fact that when marketing Printa the applicant described it as 'pigmented UD'.

228 The Court rejects as unfounded the applicant's assertion that when marketing Printa it used the description 'pigmented UD' solely in order to indicate that it could also be used for the manufacture of folding cartons.

229 The statement obtained by the applicant from the PTS, according to which that particular cartonboard cannot be classified as GD cartonboard, must also be rejected as of no probative value. The applicant has not supplied any information regarding the classification criteria applied by the PTS.

230 The Court finds that the documents relating to the price increases announced and implemented by the applicant do not contain any evidence that the price increases agreed within the PG Paperboard did not relate to Printa. On the other hand, it is apparent from the applicant's letter of 8 March 1989, announcing a price increase for the 1 May 1989 (document D-7-5), the only document to distinguish between the various products manufactured by the applicant, that the price increase announced for Printa (DM 9) was identical to that agreed in the PG Paperboard (see table D annexed to the Decision) and to that announced by the applicant for its Supra and Bona products, which were GD grade cartonboard.

231 In those circumstances, the Commission has proved that the infringement also extended to Printa.

232 As regards Duplex KO, the applicant asserts, and the Commission has not challenged that assertion, that it used the term ED to designate Duplex KO in the information which it sent to Fides. Furthermore, in the Fides statistics ED cartonboard was classified with GK1 cartonboard, a type of greyboard.

233 It is also clear from the applicant's letter of 8 March 1989 (document D-7-5 referred to above) that the price increase announced for Duplex KO (DM 7) was less than that agreed in the PG Paperboard (see table D annexed to the Decision) and that announced by the applicant for its Supra, Bona and Printa products. On the other hand, the price increase announced for Duplex KO was identical to that announced for Silbergrau (the greyboard produced by the applicant).

234 In those circumstances, the fact that the applicant's representative indicated at the hearing before the Commission that 'some of our competitors said [Duplex KO] could be put into the category of UD' does not adequately prove that the discussions with an anti-competitive object in some bodies of the PG Paperboard related to that product.

235 Having regard to the foregoing, the Commission has proved that the infringement found related to Printa but not that it also related to Duplex KO.

— The turnover used in order to determine the amount of the fine

236 There is no dispute that the amount of the fine imposed on the applicant was determined on the basis of the turnover from its sales of cartonboard in the Community in 1990. That figure, sent to the Commission by letter of 25 September 1991, includes all sales of cartonboard products produced by the applicant. However, it is clear from the foregoing considerations that the Silbergrau and Duplex KO are not the subject of the infringement found.

237 In those circumstances the Court cannot accept the Commission's argument that the amount of the fine is in any event well below the ceiling on fines laid down in Article 15(2) of Regulation No 17. In accordance with the principle of equal treatment, which requires that comparable situations should not be treated differently unless such treatment is objectively justified, the Commission should therefore have taken into account, as it did in regard to the other undertakings referred to in Article 1 of the Decision, the applicant's turnover in cartonboard in the Community in 1990 solely from sales of products to which the infringement related.

238 The fact that despite the Commission's request to that effect in its letter of 24 May 1994, the applicant did not provide a breakdown by product category of its total sales turnover from the cartonboard products produced by it is not an adequate justification.

239 In its letter of 24 May 1994 the Commission explained the reasons for its view that Printa and Duplex KO should be regarded as cartonboard for the purposes of the proceedings. It also requested the applicant to break down its turnover for the previous five years for all types of GD cartonboard, Duplex KO and greyboard, and requested that the information in question be send to it by 31 May 1994 at the latest.

240 The applicant replied to that letter only on 1 July 1994, repeating its view that Printa and Duplex KO should not be the subject of the proceedings, but not supplying, as it should have done, a breakdown of turnover as requested.

241 However, the Commission's letter of 24 May 1994 did not refer to Article 11 of Regulation No 17. The Commission could not have been unaware of the fact that the turnover taken into account included, in particular, turnover from sales of greyboard (Silbergrau) and was therefore too high, irrespective of whether the classification of Printa and Duplex KO was correct.

242 In those circumstances, it should have sent to the applicant a request for information under Article 11 of Regulation No 17 so as to obtain the information necessary to determine the correct amount of the fine. It cannot therefore validly claim that it is solely because of the applicant's own conduct during the administrative procedure that the amount of the fine was determined on the basis of a turnover figure that was too high.

243 In response to a written question from the Court, the applicant has supplied information from which it is possible to determine what percentage of sales of cartonboard products in the Community in 1990 relates to sales of products not covered by the infringement found. In the exercise of its unlimited jurisdiction in regard to fines, the Court will therefore reduce the fine to take into account the fact that the turnover from sales of Silbergrau and Duplex KO should not have been included when the amount of the fine was determined (see paragraph 278 below).

244 The remainder of the plea must be rejected.

The plea that the applicant's participation in the bodies of the PG Paperboard was limited and that there was no deliberate infringement

Arguments of the parties

245 The applicant refers in essence to the pleas submitted in support of its application for annulment of Article 1 of the Decision. It participated for only a short time in the Fides information exchange system and attended JMC meetings irregularly. Moreover, given the particular purpose of its participation, its clearly subordinate market position, and the fact that it did not participate in the alleged collusion on capacity or market shares, the Commission did not correctly apply the criteria set out in point 169 of the Decision. The applicant submits that it was treated less favourably than undertakings which had participated fully in the cartel, as the Commission apparently calculated the fine imposed on it at the standard rate of 7.5% of turnover.

246 Even if the applicant infringed Article 85 of the Treaty, it believed that its participation in the Fides information exchange system and its intermittent participation in isolated meetings of the JMC were lawful, particularly in view of the fact that the aim of its participation was clearly contrary to the interests of the other producers. It acknowledges that a reduction in the fine by 25/60 — the denominator corresponding to the total period of the infringement, in months, which the Commission took as its basis for calculating the amount of the individual fines — correctly takes account of the shortness of any participation in the unlawful cartel.

247 Furthermore, the Decision incorrectly states that the applicant's managing director admitted at the hearing before the Commission that there was a general rule that no compromising notes relating to JMC meetings should be kept.

248 The Commission submits that, by taking turnover relating to cartonboard as its basis, it took into account the applicant's relatively subordinate role in the sector. By reducing the fine by 25/60, it also correctly took account of the shorter period

of its participation in the cartel. Lastly, the fact that it did not consider the applicant to be one of the ringleaders shows that it had regard to its more limited participation in the cartel.

249 As to the applicant's submission that it did not deliberately commit any infringement, the Commission observes that for an infringement to be regarded as having been committed intentionally it suffices that the undertaking could not have been unaware that the contested conduct had as its object the restriction of competition (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41). Moreover, having regard to the gravity and obviousness of the infringement, which is of a type expressly referred to in Article 85(1) of the Treaty, the applicant cannot seriously dispute that it was aware of the cartel's anti-competitive object (*ICI* v *Commission*, cited above, paragraphs 344 and 353). The fact that the participants in the cartel attempted to keep their agreements secret proves that they were aware of the unlawfulness of their behaviour (*Belasco and Others* v *Commission*, cited above, paragraph 41, and Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 350).

250 Lastly, the Commission maintains that the Decision correctly reproduces the statements of the applicant's managing director relating to the steps taken in order to keep the cartel secret. In response to the question whether all participants knew that notes should not be taken, he stated: 'Well, maybe somebody said so. Yes, maybe yes'. Furthermore, the cartel members sought to disguise it to a far greater degree than is normal, for example by instituting a system of staggered price increases (point 73 of the Decision).

Findings of the Court

251 This plea is in two parts. First, the applicant contends that its limited participation in the bodies of the PG Paperboard was not correctly taken into account by the Commission when it determined the amount of the fine. Second, it disputes that it

deliberately infringed Article 85(1) of the Treaty. The Court will examine each part separately.

— The first part of the plea

252 The Commission has proved that, by participating in the JMC meetings, the applicant took part in collusion on prices and on downtime from 1988 until late 1990.

253 On the other hand, it has been accepted that the applicant could not be held responsible for collusion on market shares.

254 The implications which that fact may have for the amount of the fine will be considered by the Court when, exercising its unlimited jurisdiction in regard to fines, it assesses the gravity of the infringement (see paragraphs 274 to 277 below).

255 It is apparent from a table produced by the Commission in response to a written question from the Court that the percentage of turnover applied in order to calculate the fine imposed on the applicant was the same percentage as was applied to the undertakings which were not considered to be cartel 'ringleaders', that is to say, 7.5%. Moreover, it is clear that the Commission also took into account the limited duration of the applicant's participation in the cartel.

256 Having regard to those factors, the Commission correctly assessed the applicant's role in the cartel by imposing on it a fine which in fact corresponded to 4.4% of its turnover on the Community cartonboard market in 1990, that is to say, the rate of 7.5% applied to the period during which the applicant was held to have committed an infringement.

257 The first part of the plea must therefore be rejected.

— The second part of the plea

258 According to the second paragraph of point 167 of the Decision, 'the undertakings to which this Decision is addressed deliberately infringed Article 85'.

259 It is settled case-law that it is not necessary for an undertaking to have been aware that it was infringing Article 85 of the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market (*Belasco and Others* v *Commission*, cited above, paragraph 41, and Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157).

260 In the present case, it suffices to find that the applicant participated in the JMC meetings, whose anti-competitive object has been proved by the Commission, and also in the concerted price increases.

261 Furthermore, the infringement of Article 85(1) which the applicant was found to have committed was obvious.

262 Lastly, the applicant's submission that its representative at the oral hearing before the Commission did not admit that participants at JMC meetings were discouraged from taking notes is irrelevant.

263 As the Court has already pointed out (paragraph 67 above), the absence of official minutes and the almost total absence of internal notes relating to JMC meetings constitute, having regard to their number, the length of time for which they continued and the nature of the discussions in question, sufficient proof of the Commission's allegation that the participants were discouraged from taking notes.

264 Consequently, the second part of the plea is unfounded.

265 In the light of the foregoing, the whole of the plea must be rejected.

The plea alleging infringement of the principle of equal treatment

Arguments of the parties

266 The applicant submits that by failing to reduce the applicant's fine, despite its willingness to cooperate, the Commission infringed the principle of equal treatment. It spontaneously admitted its intermittent participation in JMC meetings and its participation in the Fides information exchange system. In particular, the Commission itself accepts that the applicant cooperated in regard to its participation in the JMC meetings. It therefore cooperated as far as it could, because it could not have admitted participation which did not exist.

267 Consequently, by reducing the fine imposed on Rena and Stora by two-thirds without granting a similar reduction to the applicant, the Commission treated it less favourably.

268 The applicant was also treated less favourably than undertakings which received a reduction of one-third in the amount of their fines because their replies to the statement of objections did not contest the allegations made against them.

269 The Commission contends that the applicant's cooperation did not contribute substantially to establishing the facts. It accepted that it participated in some JMC meetings, but always claimed that it did so only in order to obtain precise market information with a view to a proposed investment. It disputed that it participated in any way in unlawful collusion on prices and quantities.

Findings of the Court

270 In its reply to the statement of objections the applicant admitted that it had participated in the Fides information exchange system and in some JMC meetings. However, in that reply and again in its application, it disputed that it participated in collusion on prices and on downtime.

271 The Commission correctly considered that the applicant, by replying in that way, did not conduct itself in a manner which justified a reduction in the fine on grounds of cooperation during the administrative procedure. A reduction on that ground is justified only if the conduct enabled the Commission to establish an infringement more easily and, where relevant, to bring it to an end (see *ICI* v *Commission*, cited above, paragraph 393).

272 The plea must therefore be rejected as unfounded.

273 It follows from the whole of the foregoing that the eighth indent of Article 1 of the Decision must be annulled as regards the applicant and that Article 2 must be annulled in part as regards it.

274 As regards the fine imposed on the applicant by Article 3 of the Decision, the Court must first determine whether the fact that the infringement committed by the applicant cannot be considered to extend to collusion on market shares must lead to a reduction in that fine.

275 The Court considers, in the exercise of its unlimited jurisdiction, that the gravity of the infringement of Article 85(1) of the Treaty which the applicant is found to have committed is still such that the amount of the fine should not be reduced.

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

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

278 As regards the pleas for annulment or reduction of the fine, the Court has found that when the Commission determined the amount of that fine it wrongly took into account the applicant's turnover from sales of Duplex KO and Silbergrau in

1990. At the Court's written request the applicant has submitted a statement, certified by an accountant, containing a breakdown by cartonboard product of its 1990 turnover. In the light of that statement, the Court is able to determine what proportion of the applicant's turnover was wrongly taken into account by the Commission. As the other pleas have been rejected, the Court, exercising its unlimited jurisdiction, will set the amount of the fine imposed on the applicant by Article 3 of the Decision at ECU 730 000.

Costs

279 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 each party to bear its own costs.

On those grounds,

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

hereby:

1) Annuls, as regards the applicant, the eighth indent of Article 1 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard);

2) 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.';

3) Sets the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 730 000;

4) Dismisses the application as regards the remaining claims;

5) Orders each party to bear its own costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary