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

14 May 1998 *

In Case T-327/94,

SCA Holding Ltd, a company incorporated under the laws of England and Wales, with its registered office at Aylesford, United Kingdom, represented by Guiseppe Scasselati-Sforzolini, of the Bologna Bar, and Laurent Garzaniti, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Preussen, 15 Côte d'Eich,

applicant,

v

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

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision 94/601/EC 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 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:

...

(xvi) SCA Holding Ltd, a fine of ECU 2 200 000;

...'

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 Throughout the period of the infringement Reed Paper & Board Ltd ('Reed P&B') owned Colthrop Mill ('Colthrop').

21 Until July 1988 Reed P&B was a subsidiary of Reed International plc. In July 1988, a management buy-out of several companies of the Reed International group resulted in the formation of Reedpack Ltd ('Reedpack') and the acquisition of Reed P&B by Reedpack.

22 In July 1990, the Swedish group, Svenska Cellulosa Aktiebolag ('SCA') acquired Reedpack and, consequently, Reed P&B and several factories, including Colthrop. Reed P&B first changed its name on 1 February 1991 to SCA Aylesford Ltd ('SCA Aylesford') and then on 4 February 1992 to SCA Holding Ltd ('SCA Holding').

23 In May 1991 Colthrop was sold to the Field Group Ltd, which resold it in October 1991 to Mayr-Melnhof AG. At the date of the latter transaction, Colthrop had already been incorporated as a limited company under the name Colthrop Board Mill Ltd.

24 According to the Decision, Reed P&B participated in the infringement in question, in particular by participating in certain meetings of the JMC and of the PC. Moreover, as SCA Holding is merely another name for SCA Aylesford and Reed P&B and they are therefore merely one and the same entity, the Commission considered that the Decision should be addressed to SCA Holding (point 155 et seq. of the Decision).

Procedure

25 The applicant brought this action by application lodged at the Registry of the Court on 12 October 1994.

26 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

27 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* v *Commission*, not published in the ECR).

28 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).

29 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).

30 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.

31 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.

32 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.

33 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.

34 The parties in the cases referred to in paragraph 30 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

35 The applicant claims that the Court should:

— annul Article 1 and/or Article 3 of the Decision in so far as it concerns the applicant;

— in the alternative, substantially reduce the fine imposed on it in Article 3;

— order the Commission to pay the costs.

36 The Commission contends that the Court should:

— reject the application as unfounded;

— order the applicant to pay the costs.

Admissibility of certain pleas

37 At an 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.

38 By fax of 14 May 1997, lodged in the name of all the undertakings in question, those undertakings 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 concept of 'single infringement' and the standard of proof required; and

(c) the allegation that there was collusion on volume control.

39 By fax received by the Court Registry on 23 June 1997 the applicant stated that it would participate in all the common argument. In that fax it acknowledged that it had not submitted pleas concerning the three subjects set out above, but it argued that this should not prevent it from adopting the common argument in question. It argued, repeating that line of argument at the hearing, that in its application it had been unable to dispute either the very existence of the various aspects of the infringement found in Article 1 of the Decision or the Commission's assessment of the effects of that infringement, because the persons that were deemed to have represented it in the alleged cartel were no longer employed by it. It was therefore only when it became aware of the content of the common argument in question that it became aware of the matters of fact which allowed it to submit the relevant pleas.

40 That argument cannot be upheld.

41 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 Court finds that the applicant was not prevented from challenging the allegations of law and of fact in the Decision in its application and that it has not referred to any specific matter of fact or of law which has come to light in the course of the procedure which could justify the introduction of new pleas.

42 The pleas on which the applicant relied for the first time in its fax of 23 June 1997 must therefore be declared inadmissible.

Substance

The application for annulment of Articles 1 and 3 of the Decision

A — *The plea that SCA Holding is not the correct addressee of the Decision*

Arguments of the parties

43 The applicant contends that it should not be held responsible for Colthrop's conduct and that it is not therefore the correct addressee of the Decision.

44 First, it states that, after Colthrop had been sold in May 1991 and after Reed P&B had changed its name to SCA Aylesford and then to SCA Holding, the SCA group's business in the United Kingdom was restructured, with the result that SCA Holding, the applicant, became a holding company.

45 Second, Colthrop should be regarded as the 'undertaking concerned' by the proceeding. It was, and still is, 'a separately identifiable economic entity' forming a

'separate profit centre' and concerned by the infringement (see points 97 to 102 of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene decision') or an 'organised assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis' (Commission Notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ 1990 C 203, p. 10).

46 In order to show that Colthrop held an autonomous position rendering it capable of infringing competition law, the applicant puts forward a series of very detailed arguments to show, in substance, that (a) Colthrop was the only entity operating in the cartonboard sector in each of the groups to which it belonged during the period in question; (b) Colthrop's organisational structure underlined its autonomy; and (c) Colthrop presented itself to third parties as a separate entity. The applicant adds that Colthrop subsequently became a limited company, Colthrop Board Mill Ltd, with the same assets, the same personnel and the same manager (Mr Dalgleish). Lastly, it submits that the operational links between Colthrop and Reed P&B were never as close as the Commission alleges.

47 Colthrop's autonomy was not affected in any way by the acquisition of Reedpack by the SCA group. A number of Reedpack's assets, including Colthrop, were of no interest to SCA, which explains the sale of Colthrop in May 1991. SCA did not participate in Colthrop's management during the period in which it owned Colthrop.

48 Third, since Colthrop should be regarded as the undertaking concerned, the Decision should have been addressed to Colthrop Board Mill Ltd as successor to that undertaking. The applicant observes that as a matter of substantive Community competition law the concept of 'undertaking' is determinative and legal personality should be important only in so far as, for practical reasons of ease of

enforceability, the statement of objections and the Decision are addressed to, and the fine imposed on, an entity with legal personality. Even though the applicant accepts that as Colthrop was not incorporated at the material time the Commission had the option of identifying a legal entity which could be held responsible for the infringement for the purpose of enforcing the Decision, it nevertheless states that the present case poses a problem of succession, because the undertaking concerned, Colthrop, was incorporated as a company with its own legal personality after the infringement but before the statement of objections was served and that company is Colthrop's economic and functional successor.

49 In such a situation, if it has not been proved that the former owner directly participated in the infringement, the question of succession should be resolved by tracing the undertaking concerned through the various transfers and reorganisations which it may have undergone. That approach is implicit in the judgment in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 55, and in the Polypropylene decision (as regards the imposition of a fine on Statoil), that is to say, that the undertaking which actually participated in the cartel should not escape being fined.

50 Fourth, even if Colthrop is not the undertaking concerned by the infringement, the Decision should not have been addressed to the applicant. In Commission Decision 84/388/EEC of 23 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries, OJ 1984 L 212, p. 13) it was considered that a parent company which had acquired two undertakings had not had time to assume full control of them between the date of their acquisition and the cessation of the infringement (five months). For the same reasons, the Commission should not have addressed the Decision to the applicant.

51 In the alternative the applicant submits that the Commission erred in considering that the undertaking was Reed P&B, because that company was reorganised after its acquisition by SCA and was no more than an intermediate company with no autonomy in regard to its business strategy and no control over its assets. The

Commission should therefore have investigated whether responsibility for Colthrop's activities rested with the ultimate parent company, which changed on several occasions. The applicant concludes that the Commission should in any event have apportioned liability between Reed International plc, Reedpack and SCA, but, as regards SCA, only for the period from July to November 1990.

52 Lastly, the Commission erroneously considers that Reed P&B and SCA Holding are the same undertaking, because, given the fact that SCA Holding exercises only indirect control (through the intermediary of a subsidiary) over one of the six papermills originally owned by Reed P&B, SCA Holding cannot be considered to be the same undertaking as Reed P&B. The only evidence on which the Commission relies in finding that Reed P&B and SCA Holding are the same undertaking is their registered office and registration number. However, an undertaking cannot be identified on the basis of such purely formal factors.

53 The Commission considers that the applicant's arguments are without foundation, because the Decision was addressed to the undertaking and company which committed the infringement. Where an infringement of the Community competition rules has been found, it is necessary to identify the legal person which is responsible for it, because only legal persons can be the addressees of decisions imposing fines. In the present case, Reed P&B was the legal person responsible for the infringement and should therefore be liable for it.

54 Reed P&B, as the undertaking concerned, manufactured cartonboard in its Colthrop mill, Colthrop having been, throughout the period of the infringement and including the period after the acquisition of Reed P&B by the SCA group, merely an asset belonging to Reed P&B, then to SCA Aylesford and finally to SCA Holding.

55 In that context, the Commission states that two persons who attended discussions in the PC and the JMC participated in those discussions not as representatives of Colthrop but rather of Reed P&B.

56 Furthermore, after the acquisition by the SCA group of part of the Reedpack group, including Reed P&B, the latter company continued to manufacture the same product at the same place with the same staff, some SCA employees joining it at senior management and board level. Reed P&B then merely changed its name, so as to become, in February 1991, SCA Aylesford Ltd and then, on 4 February 1992, SCA Holding Ltd. However, it was always the same company, SCA Holding having the same address and the same registration number as Reed P&B and SCA Aylesford.

57 According to the Commission, the sale of the assets which constituted the Colthrop mill and its subsequent incorporation do not alter the fact that Reed P&B must be regarded as the undertaking and the company which committed the infringement. As indicated in point 156 of the Decision, it is necessary to distinguish between legal persons and mere assets, a distinction which was confirmed by the Court of First Instance in *Enichem Anic* v *Commission*, cited above (paragraphs 236 to 240).

58 The Commission concludes that, contrary to SCA Holding's contentions, this case does not raise any question of succession.

59 Furthermore, even if the Commission could have addressed its decision to the new owner of the mill, that would not mean that it could not choose to address that decision to Reed P&B, now SCA Holding. If Colthrop could be considered to be the undertaking concerned, that would mean solely that the Commission had a choice as to the addressee of the Decision (see Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, upheld by the judgment of the Court of Justice in Case C-310/93 P [1995] ECR I-865).

60 Lastly, SCA's assertions regarding Colthrop's autonomy are irrelevant, since they are not confirmed by the facts.

Findings of the Court

61 It is common ground that Colthrop was the factory at which cartonboard was manufactured and that throughout the full period of the infringement that factory was owned by Reed P&B, then by SCA Aylesford Ltd and lastly by SCA Holding.

62 Reed P&B, SCA Aylesford Ltd and SCA Holding (the applicant) are, however, the names successively adopted by one and the same legal person.

63 The circumstances of this case do not therefore give rise to any question of succession. The Court has held (in *Enichem Anic* v *Commission*, cited above, paragraphs 236 to 238) that an undertaking's infringement must be attributed to the legal person responsible for the operation of that undertaking when the infringement was committed. While that legal person exists, responsibility for the undertaking's infringement follows that legal person, even though the assets and personnel which contributed to the commission of the infringement have been transferred to third persons after the period of the infringement.

64 The Commission was therefore entitled to address the Decision to the legal person which was responsible for the unlawful conduct found during the period of the infringement and which still existed when the Decision was adopted.

65 Thus, even if Colthrop could be regarded as an undertaking within the meaning of Article 85 of the Treaty and on the day when the Decision was adopted it was owned by the legal person Colthrop Board Mill Ltd, the applicant's arguments would at the very most show only that the Commission had a choice as regards

the addressee of the Decision. In those circumstances, the Commission's choice cannot therefore be validly called into question.

66 Furthermore, Reed P&B appeared in the list of members of the PG Paperboard.

67 According to point 143 of the Decision, the Commission, in principle, addressed the Decision to the entity named in the membership list of the PG Paperboard, except that:

'1. where more than one company in a group participated in the infringement;

or

2. where there is express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel,

the proceedings have been addressed to the group (represented by the parent company)'.

68 Since the Commission did not consider that either of the two conditions for making an exception to the principle in point 143 was satisfied, it was entitled to decide not to address the Decision to the successive parent companies of Reed P&B/SCA Aylesford/SCA Holding.

69 This plea must therefore be rejected as unfounded.

B — *The plea alleging an inadequate or erroneous statement of reasons regarding the designation of Reed P&B as the undertaking concerned and SCA Holding as the addressee of the Decision*

Arguments of the parties

70 The applicant observes that in its judgment in Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 26, the Court held that a decision adopted under Articles 85 and 86 of the Treaty which is addressed to several addressees and raises a problem with regard to liability for the infringement must contain a clear statement of reasons with respect to each of the addressees and in particular towards those who are to incur fines.

71 The present case is analogous to the case which gave rise to that judgment, because the applicant has vigorously argued in the procedure before the Commission that it is not the proper addressee of the Decision. However, in the present case the Commission decided not to follow the assets employed in the commission of the infringement, but to attribute liability to the legal person which directly owned them at a particular time. That choice of addressee was based solely on considerations of expediency.

72 Moreover, in holding that Reed P&B was the undertaking concerned, the Commission merely found that it was mentioned in the list of the members of the PG Paperboard. Such reasoning does not, however, satisfy the requirements for an adequate statement of reasons.

73 As regards the analogy drawn by the Commission in point 155 of the Decision with the situation of MoDo/Iggesund, the applicant states that Colthrop is no longer part of the SCA group and had been part of it for only a few months, whereas Iggesund has been part of the MoDo group since 1989. Contrary to what is stated in the Decision, those two situations are not therefore in any way comparable.

74 The Decision also contains an inadequate statement of reasons in regard to the claim that SCA Holding is the economic successor to Reed P&B. In that regard, the Commission relies solely on the fact that SCA Holding currently owns the shares of the two companies to which part of Reed P&B's assets was transferred. Moreover, according to the judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, the relevant continuity is that between the undertaking concerned and its successor, which is Colthrop Board Mill Ltd in this case.

75 The applicant observes that in point 145 of the Decision it is stated that a parent company or group which is considered a party to the infringement and which transfers a subsidiary to another undertaking retains responsibility for that subsidiary in respect of the period up to the date of transfer. However, the Decision does not explain why it was not addressed, in accordance with that line of reasoning, to Reed International, the ultimate owner of Colthrop until July 1988.

76 Finally, the applicant observes that according to point 143 of the Decision, the Commission decided to address the Decision to the entities cited in the list of members of the PG Paperboard save 'were there [was] express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel', in which case the Decision was to be addressed to the parent company. However, even though the Commission did not initiate proceedings against SCA, it continues to claim, without specific proof, that SCA was involved in Colthrop's management. If the Commission considers that SCA had participated in

Colthrop's management, it should have considered that question in more detail in the Decision in order to determine precisely which was the undertaking concerned.

77 The Commission considers that in points 155 to 157 of the Decision it amply set out the reasons for which SCA Holding was the correct addressee of the Decision. It states that the essence of the reasoning in the Decision is that SCA Holding is merely the new name of Reed P&B.

Findings of the Court

78 It is settled law that the statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal validity to be carried out and must provide the person concerned with information sufficient to allow him to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed according to 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 receiving explanations. In order to fulfil those purposes, 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. Where, as in the present case, a decision taken in application of Articles 85 or 86 of the Treaty relates to several addressees and raises a problem of attribution of liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for that infringement (see, in particular, *AWS Benelux* v *Commission*, cited above, paragraph 26).

79 In the present case, it is not disputed that in the course of the administrative procedure before the Commission the applicant put forward several grounds on which it considered that the alleged infringement could not be attributed to it.

80 Consequently, in order to contain an adequate statement of reasons in regard to the applicant, the Decision had to contain a detailed statement of reasons for attributing the infringement to the applicant.

81 Since the applicant's complaints concern more specifically points 155 to 157 of the Decision, it must be considered whether those points contain an adequate statement of reasons.

82 In the first paragraph of point 155 it is stated that: 'The acquisition by the Swedish forest products group SCA of Reedpack plc, the ultimate owner of the Colthrop Board Mill, presents no particular problem under the approach described in recital 143' (see paragraph 67 above).

83 In the second paragraph of point 155 the Commission observes that Reed P&B is named in the list of members of the PG Paperboard.

84 It then states in the first paragraph of point 156:

'... There is a clear continuity between Reed Paper & Board (UK) Ltd, SCA Aylesford Ltd, and SCA Holding Ltd; they are one and the same corporate entity known by different names. The fact that the Colthrop mill was sold off in May 1991 still left SCA Holding Ltd in existence. Responsibility for its involvement does not pass with the Colthrop mill which was simply one of its assets ...'.

85 In support of its assertion it refers (*ibidem*) to the judgment in *Enichem Anic* v *Commission*, cited above, (paragraphs 236 to 240). That reference makes the Commission's approach unambiguous.

86 In the light of those explanations in the Decision, the Court finds that the Commission adequately explained the reasons which led it to address the Decision to the applicant.

87 Points 155 to 157 of the Decision also set out, first, the applicant's main arguments regarding the identity of the undertaking which should bear the liability for the infringement and, second, the Commission's replies to those arguments.

88 Those points clearly show that the Commission considered and assessed the arguments submitted by the applicant during the administrative procedure.

89 The adequacy of the statement of reasons in regard to those arguments cannot therefore be called into question.

90 Finally, in as much as the applicant's arguments set out in paragraphs 73 to 76 above solely seek to challenge the validity of the reasons which led the Commission to address the Decision to it, those reasons fall outside the scope of the review to be carried out by the Court in the context of this plea. It follows that those arguments are irrelevant.

91 This plea must therefore be rejected.

C — *The plea that there is an error regarding the duration of the infringement*

Arguments of the parties

92 The applicant submits that any participation by Colthrop in the meetings of the various committees of the PG Paperboard and in its activities ceased at the end of November 1990 when SCA became aware of the possible infringement of Community competition law within that body (see also point 157, last sentence, of the Decision). It is therefore for the Commission to prove its assertion that the infringement continued to produce its effects after that date (*Enichem Anic* v *Commission*, cited above, paragraphs 90 to 100). The Commission has not adduced the slightest proof of that assertion and is merely speculating in that regard.

93 More particularly, the applicant disputes the Commission's assertion that Colthrop applied a price increase which was decided in October 1990 and was to be applied between January and April 1991. It submits that Colthrop's actual prices at the beginning of 1991 did not follow the amount or the timing of that increase. At the end of October 1990 Colthrop announced a price increase of UKL 40 per tonne, which was to become effective at the end of January 1991. In fact, the increase was delayed until 1 March or 1 April 1991 for the largest customers. Colthrop therefore unilaterally and independently changed the date on which the price increase came into effect. Furthermore, that increase was justified by an increase in costs and by an improvement in the product.

94 The Commission considers that, when determining the duration of the infringement, it correctly held that the infringement continued to produce effects until the cartel had ceased in its entirety.

Findings of the Court

95 The system of competition rules established by Article 85 et seq. of the Treaty is concerned with the economic effects of agreements or of any comparable form of concerted practice or coordination rather than with their legal form. Consequently, with regard to cartels which are no longer in force, it is sufficient, for Article 85 to be applicable, that they continue to produce their effects after they have formally ceased to be in force (see, for example, Case 243/83 *Binon* v *AMP* [1985] ECR 2015, paragraph 17).

96 In this case, the applicant does not dispute that it participated in the cartel in October 1990, the date on which the last concerted price increase was announced by it and others (see table 4 annexed to the Decision).

97 As regards the actual implementation of that increase, which was to enter into force with effect from January 1991, the applicant sent the following information to the legal service of the parent company of the SCA group in its letter of 23 January 1991:

'We have announced a £40/tonne price increase from the end of January 1991. This received strong resistance and we were concerned that it would be substantially delayed or reduced. We now know that the majority of our customers will pay the increase from due date, some large customers will delay until 1st March/1st April. However, this is better than recently anticipated.'

98 It is thus clear that it strived to ensure the actual implementation on the agreed date of the concerted price increase announced in October 1990. Since the applicant acted on the market in accordance with the agreed behaviour, the cartel therefore continued to produce its effects, as regards the applicant, beyond November 1990, the date when the applicant ceased to participate in meetings of bodies of the PG Paperboard.

99 Since the level of list prices agreed between the undertakings was still in force in April 1991, the month in which the Commission's agents carried out investigations at the premises of several undertakings in accordance with Article 14 of Regulation No 17, the Commission rightly took April 1991 as the date when the infringement committed by the applicant ceased.

100 In the light of the foregoing, this plea must be rejected.

The application for annulment or reduction of the fine

A — *The plea that the Commission wrongly failed to take into consideration several special circumstances*

101 The applicant relies on a series of circumstances which, in its submission, should have been taken into consideration as mitigating circumstances when the amount of the fine imposed on it was assessed. The Court will consider each of those circumstances separately.

Colthrop made up only a tiny part of the Reedpack businesses acquired by the SCA group and was not actually integrated into the SCA group

102 The applicant submits that Colthrop represented only a tiny part of the Reedpack businesses acquired by the SCA group, as its sales represented only 2.3% of Reedpack's turnover. Moreover, the SCA group's intention was to resell Colthrop and it actually did so in 1991. No representative of the group even visited Colthrop before the acquisition of Reedpack. Lastly, because of Colthrop's poor results, it was difficult to sell it at a reasonable price.

103 Those factors are relevant to illustrate two criteria which the Commission, in point 169 of the Decision, claims to have taken into account, namely the importance of the undertaking concerned and the role played by each undertaking. They demonstrate Colthrop's small size, the lack of interest of SCA and the applicant in the cartonboard business and their lack of involvement in it.

104 The Court observes, however, that the infringement found was correctly attributed to the applicant.

105 As regards Colthrop's small size, the fine imposed was calculated on the basis of the applicant's turnover on the Community cartonboard market in 1990 through the Colthrop mill. When fixing the amount of the fine, the Commission therefore took into account the applicant's economic strength on the relevant market.

106 As regards the argument that the cartonboard sector and the Colthrop mill in particular were of no interest to the SCA group, it suffices to state that the Commission has actually established the existence of a deliberate infringement by the applicant of Article 85(1) of the Treaty. As regards the remainder of its submissions, since the SCA group was not the addressee of the Decision and there was no complaint that it was involved in the infringement in its capacity as parent company of the applicant, the question whether or not the cartonboard sector was of interest to the SCA group is irrelevant.

107 The applicant's objection cannot therefore be upheld.

The SCA group's lack of involvement in the management of Colthrop and in the alleged infringements

108 The applicant repeats the arguments submitted by it in the context of the first plea to show that SCA was not involved in the management of Colthrop in any way. The parent company's lack of involvement should have been taken into account, because it bears the burden of the fine, the applicant merely being a holding company.

109 That argument cannot be upheld. Since the infringement was rightly attributed to the applicant, the question whether the SCA group was involved in the management of Colthrop and whether the ultimate parent company of the group was aware of the infringement is irrelevant for the purpose of determining the amount of the fine.

110 This objection must therefore be rejected.

The infringement committed by Colthrop ceased in November 1990

111 The applicant repeats its assertion that Colthrop's participation in the meetings of the various committees of the PG Paperboard ceased in November 1990 (see paragraph 92 et seq. above). Colthrop did not therefore have to 'dissociate itself' from the price increase announced by the cartel at the beginning of 1991 because at that date it was not associated with it.

112 In that regard, it suffices for the Court to observe that the applicant was correctly considered to have participated in the infringement until April 1991 (see paragraph 95 et seq. above).

113 This objection must therefore be rejected.

The SCA group applies a strict policy of avoiding infringements of competition law

114 The applicant submits that since 1988 it has pursued a strict policy of avoiding infringements of competition law. Several presentations have been held at the most important of the group's locations in Europe in order to explain that policy to its staff. In those circumstances, the applicant cannot be held responsible for conduct alleged against another undertaking which is clearly at variance with SCA's efforts to comply with the Community competition rules.

115 The Commission states, *inter alia*, that the compliance programme in question proved ineffective, because nothing was done to prevent the continuation of the infringement.

116 In accordance with the case-law of the Court of Justice, the gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54). Amongst the factors which may be taken into account in mitigation is the implementation of a compliance programme (see T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 93).

117 In the present case, although the applicant asserts that it ceased to participate in meetings of the PG Paperboard as soon as it became aware, following the BPIF complaint, of a possible infringement of the Community competition rules (see point 163, second paragraph, of the Decision), the Commission nevertheless correctly found that the infringement continued until April 1991 (see paragraph 95 et seq. above).

118 The compliance programme on which the applicant relies thus proved ineffective and, accordingly, the Commission did not have to take it into consideration as a mitigating factor.

119 The applicant's complaint must therefore be rejected.

The complaint that no account was taken of the fact that Colthrop was only a very minor member of the PG Paperboard

— Arguments of the parties

120 The applicant submits the following arguments:

— Colthrop was not one of the ringleaders and was too small to be considered important by them;

— Colthrop was a small producer manufacturing only GD cartonboard and the Commission accepts that the collusion was less successful for that grade;

— Colthrop never participated in PWG meetings;

— Colthrop is referred to very infrequently in the documents on which the Commission relies;

— Colthrop was not a member of the Paper Agents Association, which is said to have carried out the infringements at national level (points 94 to 99 of the Decision);

— unlike the other producers, Colthrop did not attend any meeting of the PG Paperboard after the complaint lodged was made public at the end of November 1990;

— Colthrop is not one of the undertakings accused of having participated in the volume-control scheme.

121 The applicant adds that the Commission decided not to address the Decision to a number of undertakings larger (in terms of cartonboard sales in the Community) than Colthrop and which are possibly no less important than Colthrop in the cartel. In those circumstances one cannot exclude the possibility that the Commission was influenced by the fact that when the infringement was discovered Colthrop was owned by the SCA group.

122 Lastly, the applicant states that it has never denied that Colthrop participated in a common industry plan which infringed Article 85 of the Treaty. It merely asks that the Commission should apply the criteria which it had itself laid down for determining the amount of the fine.

123 The Commission points out that it found that all the addressees of the Decision participated in a single infringement consisting of a common industry plan to restrict competition, involving agreed price increases, an understanding on market shares, concerted measures to control supply and an exchange of commercial information to support those policies (see points 116 et seq. of the Decision). All addressees of the Decision committed that infringement in its entirety, and that justified the fines imposed. The applicant cannot request a reduction in its fine on the ground that it did not take measures to restrict its own production. The Commission accepts that only the major producers attending the meetings of the PWG restricted production in that way. However, they did so for the benefit of all the undertakings participating in the infringement. The applicant cannot therefore request a reduction of the fine on the ground that it was a 'participant on the fringe' of the cartel.

124 Furthermore, Reed P&B frequently took part in the meetings of the cartel. However, the Commission never claimed that it attended meetings of the PWG. Since it attended meetings of the JMC in particular and applied the prices agreed, it cannot be regarded as a fringe participant and thus have its fine reduced. There were no fringe participants, merely ordinary participants and ringleaders.

— Findings of the Court

125 In order to determine the amount of the fine imposed on each addressee of the Decision the Commission took into account, *inter alia*, the role played by each in the collusive arrangements (first indent of the first paragraph of point 169 of the Decision). It explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as 'ringleaders' of the cartel, whereas the other undertakings were regarded as 'ordinary members'. In its written pleas to the Court and in its reply to a written question put by the Court, the Commission explained that the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision, and that fines of a basic level of 9 and 7.5% of that turnover were then applied respectively to calculate the fines imposed on the cartel 'ringleaders' and on its 'ordinary members'.

126 That approach was confirmed by a table as to the calculation of the amount of the fines which the Commission produced in reply to a written question from this Court.

127 The applicant states that it does not deny that Colthrop participated in the common plan to restrict competition described in Article 1 of the Decision. Likewise, it does not dispute the description in the Decision of the role of each body of the PG Paperboard.

128 According to the Decision, the PWG was the body in which the principal decisions with an anti-competitive object were adopted. Moreover, although the Commission considers that all the undertakings referred to in Article 1 of the Decision must be considered to have participated in all of the constituent elements of the infringement set out in that article, it is apparent from the Decision that the collusion on maintaining the market shares of the main producers at constant levels,

subject to occasional amendments, concerned only the market shares of the undertakings which participated in the PWG meetings (points 51 to 60 of the Decision). Lastly, the Commission accepts that, as regards collusion on downtime, 'it seems again that it was the main producers who took upon themselves the burden of reducing output so as to maintain price levels' (point 71, second paragraph, of the Decision).

129 Having regard to those factors, the applicant's complaint that the Commission did not correctly assess its role in the cartel cannot be upheld.

130 First, the applicant was not considered to be one of the 'ringleaders' of the cartel. The Commission therefore took account of the applicant's non-participation in the PWG meetings. Moreover, it correctly assessed the gravity of the infringement committed by the cartel 'ringleaders' and by its 'ordinary members' respectively, in adopting, for the purpose of calculating the fines imposed on those two categories of undertaking, basic rates of 9 and 7.5% of relevant turnover.

131 Second, the Decision explains that the undertakings which did not participate in the PWG meetings were informed at meetings of the JMC of decisions adopted by the PWG and that the JMC was the main centre for both the preparation of decisions adopted by the PWG and for detailed discussions concerning the implementation of those decisions (see, in particular, points 44 to 48 of the Decision). In those circumstances, as the applicant does not dispute either the Decision's description of the JMC's functions or Colthrop's participation in the various constituent elements of the infringement, and as the applicant was one of the most regular participants in the JMC meetings (see table 4 annexed to the Decision), it cannot legitimately argue that the Commission should have taken the view that it played a less important role in the cartel than that of the other undertakings considered to be 'ordinary members'.

132 The fact that the applicant did not participate in meetings of the various bodies of the PG Paperboard after November 1990 in no way affects that finding, because the infringement continued until April 1991 (see paragraph 95 et seq. above).

133 Third, the importance of each undertaking in the cartonboard sector was necessarily taken into consideration, because the turnover in that sector was taken as the reference turnover for the purposes of determining the amount of the fine imposed on each addressee of the Decision. The applicant is therefore wrong in asserting that the Commission did not take Colthrop's small size and minor importance in the sector into consideration.

134 As regards the fact that Colthrop produced only GD cartonboard, the applicant does not dispute that the infringement concerned GC, SBS and GD cartonboard and that its own behaviour did not serve to alleviate the anti-competitive effects of the infringement (see also paragraph 143 et seq. below). In those circumstances the Commission rightly did not take the fact that the collusion may have been less successful in respect of the only grade of cartonboard manufactured by Colthrop to be a mitigating factor.

135 On the basis of the foregoing considerations, this complaint must be rejected.

The complaint that no account was taken of the fact that Colthrop's prices did not correspond to the cartel's announced prices

— Arguments of the parties

136 The applicant contends that in its reply to the statement of objections (pages 15 to 20) it showed that Colthrop's pricing policy was generally unrelated to the

apparent prices of the cartel. It demonstrated, by a representative sample of eight customers, that, for three of them, prices rose by only about 10 to 15%, whereas Colthrop's average list price increased by almost 30% and the average price of the cartel rose by more than 35%. Moreover, prices charged to one of the customers even fell. Lastly, for the remaining four customers, the prices followed neither Colthrop's list prices nor the prices announced by the cartel.

137 Even the prices announced by Colthrop do not seem to have followed the prices announced by the cartel. Some of the cartel's price increases were not followed by Colthrop, because they did not concern the GD grade or the United Kingdom market. Nor did Colthrop's price increases coincide with the timing or level of the other producers' increases. Lastly, they were justified by increases in actual costs.

138 The applicant states that it does not deny that it participated in an infringement of Article 85 of the Treaty. However, it contends that the Commission should have taken into account the fact that Colthrop did not implement the cartel's pricing decisions. That shows that Colthrop's conduct did not adversely affect competition or customers. In that regard, the applicant observes in its reply that the Commission justifies the fact that the fine is higher than in comparison with the Polypropylene decision by arguing that the cartel was largely successful in achieving its objectives. However, that argument is invalid as regards Colthrop, whose infringement was less serious.

139 The Commission considers that the applicant is merely showing that there was a difference between its list price and the price actually charged and states that the cartel was concerned with list prices. Moreover, it refers to points 89, 101 and 102 of the Decision.

140 The applicant's price increase announcements corresponded to the prices agreed on various occasions (see the table annexed to the Decision concerning price increase initiatives). The applicant's arguments do not rebut the fact that the basis for the prices applied to customers was the list price, which was the agreed price. Lastly, no other producer complained that the applicant was not applying the agreed price, whereas there are some indications in that regard for at least one other member of the cartel (point 59 of the Decision).

— Findings of the Court

141 The applicant does not deny that Colthrop participated in the collusion on prices, as found in Article 1 of the Decision. The infringement was correctly attributed to it. Likewise, the applicant does not dispute the Commission's assessment of the general effects of that collusion on the market (see, in particular, points 100 to 102, 115, and 135 to 137 of the Decision).

142 That fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.

143 In this case, the evidence adduced by the applicant does not show that its actual conduct on the market was likely to defeat the anti-competitive effects of the infringement found. In particular, in support of the present objection the applicant has produced graphs comparing Stora's announced prices, the applicant's announced prices and its transaction prices. However, the graphs relating to the applicant's transaction prices relate to only eight customers, selected by it, without any indication of the tonnage delivered to each customer. Moreover, for each

customer in question they show very large fluctuations in transaction prices, those prices being sometimes even higher than the prices announced by the applicant and by Stora. Lastly, in the Decision the Commission accepts that transaction prices were not always identical to announced prices. It states in particular: 'Even if all the producers stayed resolute on introducing the full increase, the possibilities for customers of switching to a cheaper quality or grade meant that a supplying producer might have to make some concessions to its traditional customers as regards timing or give additional incentives in the form of tonnage rebates or large order discounts in order for the customer to accept the full basic-price increase. A price increase would therefore inevitably take some time before it worked through' (point 101, sixth paragraph, of the Decision).

144 The graphs on which the applicant relies do not therefore show that its transaction prices differed significantly from those of the other participants in the infringement.

145 Furthermore, the applicant does not claim that it was pressured by the other undertakings participating in the cartel. Nor does it claim that it publicly distanced itself from the decisions on price increases adopted at the meetings in which it participated.

146 In those circumstances, the Commission was entitled to consider that the applicant's conduct on the market, allegedly different from that agreed in the PG Paperboard, did not constitute a mitigating factor.

147 The applicant's complaint must therefore be rejected.

B — *The plea that the Commission did not apply to SCA Holding/Colthrop the criteria adopted for calculating the fines, or that it did so in a discriminatory manner*

Arguments of the parties

148 The applicant observes that it appears from the explanations given at a press conference on 13 July 1994 by the Commissioner responsible for competition policy that the Commission awarded a one-third reduction in the fine imposed on undertakings which did not contest the essential factual allegations relied upon by the Commission against them in the statement of objections.

149 The plea is then set out in two parts.

150 In the first part the applicant claims that it has not received a reduction in the fine, even though the essential factual allegations on which the Commission relied as against Colthrop (see point 172 of the Decision) were not contested by it in its reply to the statement of objections. That discriminatory treatment of it is all the more unjustifiable because it had no knowledge of the infringement and no basis on which to challenge the Commission's factual allegations.

151 The fact that it contested that it was, as a matter of law, the correct addressee of the Decision does not alter the fact that it did not contest the essential factual allegations relied upon by the Commission. That attitude undoubtedly enabled the Commission to save time, which was apparently the main criterion for granting a reduction in fines.

152 In the second part of the plea the applicant submits that the Commission claims to have taken the view that certain undertakings, even though already members of the PG Paperboard, did not play an active role in it before the creation of the JMC in late 1987 or early 1988. Since Colthrop never played an active role in the PG Paperboard, the Commission should have included it amongst those undertakings.

153 The Commission maintains, as regards the first part of the plea, that the applicant did not admit anything and just contested its liability, an attitude which did not amount to assistance. An allowance was merited only for assistance in making out its case, admission of unlawful conduct and the saving of time. Consequently, no allowance should be made for a denial that one is the correct addressee. That is illustrated by the fact that in points 154 to 157 of the Decision the Commission had to explain at length why the applicant was the correct addressee.

154 The Commission does not reply to the second part of the plea.

Findings of the Court

155 As regards the first part of the plea, the Court observes that in its reply to the statement of objections the applicant states as follows:

'SCA Holding is handicapped in its defence because no one at SCA has any knowledge of the activities of PG Paperboard or of the conduct outlined in the Statement [of objections]. Moreover, SCA has never been in the cartonboard business and has no knowledge of the industry. SCA Holding therefore cannot and does not take a position as to the existence or scope of the alleged infringement.'

156 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 Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 393).

157 An undertaking which expressly states that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having furthered the Commission's task of finding infringements of the Community competition rules and bringing them to an end. In its decisions finding infringements of those rules, the Commission is entitled to take the view that such conduct constitutes an acknowledgement of the factual allegations and thus proves that those allegations are correct. Such conduct may therefore justify a reduction in the fine.

158 The situation is different where the essential allegations made by the Commission in its statement of objections are contested by an undertaking in its reply to that statement, or where the undertaking does not reply or merely states, as the applicant did, that it is not expressing any view on the Commission's factual allegations. By adopting such an attitude during the administrative procedure the undertaking does not further the Commission's task of finding infringements of the Community competition rules and bringing them to an end.

159 Consequently, when the Commission states in the first paragraph of point 172 of the Decision that it has awarded reductions in the fines to be imposed on undertakings which did not contest the essential factual allegations upon which it relied against them, those reductions can be considered to be lawful only in so far as the undertakings concerned have expressly stated that they are not contesting those allegations.

160 Even if the Commission applied an unlawful criterion by reducing the fines imposed on undertakings which had not expressly stated that they were not contesting the factual allegations, it is necessary that respect for the principle of equal treatment be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, for example, Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14). For that reason, as the applicant's argument is directed specifically at establishing its right to an unlawful reduction in the fine, the first part of the plea cannot be upheld.

161 As regards the second part of the plea, it is apparent from point 162 of the Decision that the Commission considered that some producers of cartonboard, although already members of the PG Paperboard, apparently did not play an active role in it before the JMC was set up in late 1987 or early 1988 and that those producers should therefore be considered to have participated in the infringement only at a later stage.

162 According to Article 1 of the Decision, the applicant participated in the infringement from mid-1986. As it does not dispute that starting point, the fact that Colthrop did not play an active role in the PG Paperboard before the JMC was set up in late 1987/early 1988 does not justify treating the applicant in the same way as producers who were considered to have begun to participate in the infringement at a later stage.

163 Consequently, the second part of the plea cannot be upheld either.

164 The plea must therefore be rejected in its entirety.

C — *The plea that the fine imposed on the applicant is unreasonably high in absolute terms and disproportionate in relation to the applicant's innocence and to the objectives of Article 15(2) of Regulation No 17*

Arguments of the parties

165 This plea is in three parts.

166 In the first part of the plea the applicant submits that the level of the fine imposed — 7.5% of Colthrop's total turnover on the relevant market and 9% if intercompany sales are deducted — is considerably higher than the level of fines imposed in comparable cases, bearing in mind the company, the size of its operations, and the degree of its involvement in the infringement. It contends that the average level of fines imposed by the Polypropylene decision was 4% of sales of the relevant product in western Europe by the undertakings concerned.

167 In the second part, the applicant observes that in *Parker Pen* v *Commission*, cited above, paragraph 94, the Court held that the amount of the fine must be calculated by reference to the total turnover of the undertaking, which gives an indication of its size and economic strength, and to the turnover on the relevant market, which gives an indication of the scale of the infringement. Since the fine imposed was calculated without regard to Colthrop's total turnover, the Commission failed to take into account the fact that during the reference year Colthrop had no turnover outside the relevant market. Consequently, it failed to take account of Colthrop's small size and strength. The fine is therefore disproportionately high in comparison with those imposed on undertakings with an appreciable turnover outside the relevant market. That result is contrary to the requirements laid down by the Court in its judgment in *Parker Pen* v *Commission*.

168 In the third part of the plea the applicant observes that the general purpose of fines is to ensure the implementation of Community competition policy and to prevent any recurrence of infringements (Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, at p. 805, and Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825). Referring to the arguments which it submitted in support of its plea to the effect that it is not the correct addressee of the Decision, it states that in the present case the fine was imposed on an innocent bystander and the Commission is not therefore achieving any of the objectives of Article 15(2) of Regulation No 17.

169 The Commission states that if there are no individual mitigating circumstances the fine must be assessed by reference to criteria applicable to the infringement as a whole (points 167 to 169 of the Decision). Those criteria are relevant and adequately explained in the Decision. In particular they are similar, or even identical, to criteria already upheld in many cases by the Court of Justice and by the Court of First Instance (judgments of the Court of First Instance relating to the Polypropylene decision, in particular in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867). The criteria adopted for the infringement as a whole should be applied to the turnover of each addressee.

170 The gravity and duration of the infringement committed in this case justified a high general level of fines. The Commission compares the Decision with the Polypropylene decision, in which the average level of fines was about 4%, with standard fines from 4 to 5%. The slightly higher level of fines in the present case is justified because, unlike the situation in the Polypropylene decision, the infringement occurred at a time when the whole of the sector was profitable and because the cartel largely secured its objectives. The Commission adds that this Court seems to have taken the view that the fines imposed in the Polypropylene decision could have been even higher because it stated that they were amply justified in view of the seriousness of the infringement (Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 226).

171 It states that the addressees of the Decision did not conclude from the Polypropylene decision, which was published in August 1986, that they had an obligation to obey the law. On the contrary, those undertakings took steps to disguise their activities and concocted alternative explanations for what happened on the market.

172 The applicant was fined because it was Reed P&B, the author of the infringement, and because that infringement continued even after the SCA group came onto the scene. It cannot, therefore, be regarded as an innocent bystander.

173 Lastly, the Commission observes that if an undertaking is small its fine is small in absolute terms.

Findings of the Court

174 The first and second parts of the plea should be considered together.

175 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines ranging from ECU 1 000 to ECU 1 000 000, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement. As is apparent from the case-law of the Court of Justice, the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the

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

176 The criteria for assessing the gravity of the infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance which is disproportionate in relation to the other factors and that the fixing of an appropriate fine might not be the result of a simple calculation based on total turnover (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 120 and 121).

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

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

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

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

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

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

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

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

178 Furthermore, basic levels of 9 or 7.5% were applied in order to determine the amount of the fine to be imposed on the 'ringleaders' of the cartel and on its 'ordinary members' respectively (see paragraph 125 above).

179 It should be pointed out, first, that when assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to

ensure the implementation of Community competition policy (see, *inter alia*, *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 105 to 108, and *ICI* v *Commission*, cited above, paragraph 385).

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

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

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

183 In that context, the Court must also reject the applicant's argument that no account could have been taken of Colthrop's size and economic power because

its total turnover in 1990 was the same as its turnover on the Community cartonboard market in that same year.

184 First, the Commission took account of the abovementioned criteria for assessing the gravity of the infringement. Second, when it assesses the gravity of an infringement, the Commission is not obliged to take into account the relationship between the total turnover of an undertaking and the turnover produced by the goods which are the subject-matter of the infringement (judgment in *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 121, and order in *SPO and Others* v *Commission*, cited above, paragraph 54).

185 Furthermore, since the turnover of the undertakings implicated in the same infringement must be taken as a basis for determining the relationship between the fines to be imposed, the Commission rightly calculated the fines for each of those undertakings by applying the relevant percentage rate of the fine to an identical reference turnover for the undertakings concerned, so that the figures obtained would be as comparable as possible.

186 The first and second parts of the plea must therefore be rejected as unfounded.

187 The third part of the plea, which is based on the proposition that the applicant is an 'innocent bystander', must also be rejected. It suffices to point out that the Court has found that the Commission was entitled to address the Decision to the applicant.

188 This plea must therefore be rejected in its entirety.

D — *The plea that the imposition of a fine on the applicant infringes Article 15(2) of Regulation No 17, Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, and the fundamental principle of fairness*

189 The applicant submits that the imposition of a fine on it by the Commission infringed Article 15(2) of Regulation No 17, Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the fundamental principle of fairness. In support of its argument it refers in essence to the arguments which it submitted in the plea that it was not the correct addressee of the Decision. It concludes that a fine was imposed on it even though there had been no fault on its part.

190 The Court points out, first, that the Decision was correctly addressed to the applicant and, second, that the applicant does not deny the occurrence of the infringing conduct attributed to it. The applicant cannot therefore validly claim that a fine has been imposed on it even though there was no fault on its part.

191 This plea must therefore also be rejected.

E — *The plea that the obligation to state reasons for the fines was infringed*

Arguments of the parties

192 The applicant observes that it became aware of certain key aspects of the reasoning and criteria applied by the Commission for the purpose of calculating the fines

only through a recording of the press conference given by the Commissioner responsible for competition policy on the day on which the Decision was adopted. Although the case-law does not require the Commission to disclose the exact calculations of the fines imposed on each of the companies, that does not mean that its reasoning does not have to be transparent.

193 Since the calculations performed and the 'discount policy' applied in this case were disclosed to the press, they should also have been set out in the Decision. The applicant would not have been able to submit arguments regarding the discrimination which it had suffered, had it not learnt through unofficial channels of the existence of a recording of the press conference.

194 The Commission observes that the reasoning in the present decision is as detailed in relation to the fines as the reasoning upheld in other cases, in particular in the 'Polypropylene' cases (see, for example, *Rhône-Poulenc* v *Commission*, cited above). As the applicant itself concedes, the Commission is not obliged to use a mathematical formula for the purpose of calculating the fines, because such an approach would allow undertakings to calculate in advance whether it was worth committing the infringement (see Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439).

Findings of the Court

195 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the

nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

196 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

197 Moreover, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered to be obliged to apply a precise mathematical formula for that purpose (see, to the same effect, the judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

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

199 As has already been observed, in the proceedings before this Court the Commission has supplied additional evidence relating to the method of calculating the fines which it applied in this case (see paragraph 125 above). It explained that it had taken account of the cooperative attitude of some undertakings during the procedure before it and that on that basis two of them had been awarded a reduction of two-thirds in the amount of their fines, whilst others had received a reduction of one-third.

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

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

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

203 Second, where, as in the present case, the amount of each fine is determined on the basis of the systematic application of certain precise figures, the indication in the Decision of each of those factors would permit undertakings better to assess whether the Commission erred when fixing the amount of the individual fine and also whether the amount of each individual fine is justified by reference to the general criteria applied. In the present case, the indication in the Decision of the factors in question, namely the reference turnover, the reference year, the basic rates adopted, and the rates of reduction in the amount of fines would not have involved any implicit disclosure of the specific turnover of the addressee undertakings, a disclosure which might have constituted an infringement of Article 214 of the Treaty. As the Commission has itself stated, the final amount of each individual fine is not the result of a strictly mathematical application of those factors.

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

205 Despite those findings, the reasons explaining the setting of the amount of fines stated in points 167 to 172 of the Decision are at least as detailed as those provided in the Commission's previous decisions on similar infringements. Although a plea alleging insufficient reasons concerns a matter of public interest, there had been no criticism by the Community judicature, at the moment when the Decision was adopted, as regards the Commission's practice concerning the statement of reasons for fines imposed. It was only in the judgment of 6 April 1995 in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 142, and in two other judgments given on the same day (T-147/89 *Société Métallurgique de Normandie* v *Commission* [1995] ECR II-1057, summary publication, and Case T-151/89 *Société des Treillis et Panneaux Soudés* v *Commission* [1995] ECR II-1191, summary

publication) that this Court stressed for the first time that it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

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

207 In the specific circumstances set out in paragraph 205 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed.

208 This plea cannot therefore be upheld.

209 Having regard to all of the foregoing, the application must be dismissed.

Costs

210 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its submissions, it must be ordered to pay the costs, as sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary