JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-283/98 P,

Mo och Domsjö AB, established at Örnsköldsvik, Sweden, represented by A. Woodgate and M. Smith, Solicitors, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 14 May 1998 in Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by R. Lyal, of its Legal Service, acting as Agent, assisted by J. Flynn, Barrister, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant at first instance

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 24 July 1998, Mo och Domsjö AB brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled part 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, hereinafter 'the Decision') and dismissed the remainder of the application.

Facts

2 In the Decision the Commission imposed fines on 19 producers supplying cartonboard in the Community on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

3 According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the Fédération Française du Cartonnage, and investigations which 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) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

4 The evidence obtained from those investigations and following 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. The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty and, by letter of 21 December 1992, served a statement of objections on each of the undertakings concerned, all of which submitted written replies. Nine undertakings requested an oral hearing.

5 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 2

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.

Article 3

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

...

(xii) Mo Och Domsjö AB, a fine of ECU 22 750 000;

...'

6 The contested judgment also sets out the following facts:

'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 Decision sets out the reasons why that decision was addressed to the applicant, Mo och Domsjö AB (hereinafter "MoDo") (point 151 et seq.). According to the Decision, Thames Board Ltd (hereinafter "TBM"), a manufacturer of GC grade cartonboard with a cartonboard mill in Workington, United Kingdom, took part from mid-1986 in meetings of the bodies of the PG Paperboard, including PWG meetings. With effect from 1 January 1988, the whole of TBM was acquired by AB Iggesunds Bruk (hereinafter "Iggesunds Bruk"), an associated company of MoDo, in which MoDo held 49.9% of the voting rights. TBM was then renamed Iggesund Paperboard (Workington) Ltd.

21 Until the acquisition of TBM, Iggesunds Bruk had produced mainly SBS cartonboard; it had also produced GC grade cartonboard to a lesser extent. MoDo acquired 100% control of Iggesunds Bruk at the beginning of 1989 and made it a division of the MoDo group, known as Iggesund Paperboard AB (hereinafter "Iggesund Paperboard"). Representatives of that division attended meetings of the PWG and of the JMC. Managers and employees from Workington also attended the JMC meetings.'

7 Sixteen of the eighteen other undertakings held to be responsible for the infringement and 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, also brought actions against the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94 to 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 and T-354/94, and Joined Cases T-339/94 to T-342/94).

The contested judgment

8 As regards the application for annulment of the Decision, the Court of First Instance annulled, as regards the appellant, only the first to fourth paragraphs of Article 2 of the Decision, save and except for 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.'

9 The application was dismissed as regards the remaining claims.

10 Before the Court of First Instance, the appellant also put forward eight pleas in law concerning the fixing of the fine. The appeal relates specifically to the grounds of the contested judgment bearing on the fixing of that fine. Having regard to the pleas put forward by the appellant in support of its appeal, only the passages of the contested judgment relevant to the complaints of infringement of the obligation to state reasons regarding the calculation of the fines, error in assessing the report of London Economics ('the LE Report'), and the disproportionate level of the fine will be set out below.

The plea alleging infringement of the obligation to state reasons regarding the calculation of the fine

11 The appellant claimed, essentially, that the Commission had failed to set out in the Decision the basis on which the fines were calculated.

12 In that regard the Court of First Instance replied:

'266 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*, T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

267 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

268 Furthermore, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise

mathematical formula for that purpose (see, to the same effect, Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

269 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.

270 In its written pleas to the Court and in its reply to a written question put by the Court, the Commission explained that the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision. Fines of a basic level of 9 or 7.5% of that individual turnover were then imposed respectively on the undertakings considered to be the cartel "ringleaders" and on the other undertakings. Finally, the Commission took into account any cooperation by undertakings during the procedure before it. Two undertakings received a reduction of two-thirds of the amount of their fines on that basis, while other undertakings received a reduction of one-third.

271 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.

272 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.

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

274 Second, when assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must ensure that its action has a deterrent effect, given that Community law imposes a duty on it to pursue a general policy designed to guide the conduct of undertakings in the light of the principles laid down by the Treaty (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 and 106). Accordingly, the deterrent character of its action is inherent in the exercise of its power to impose fines and the Commission was not obliged to refer specifically to that objective in the Decision.

275 Third, 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.

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

277 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 (Case 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 the 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.

278 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.

279 In the specific circumstances set out in paragraph 277 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed. Finally, the applicant has not shown that it was prevented from properly asserting its rights of defence.

280 Consequently, this plea cannot be upheld.'

The plea that there was an error in assessing the LE Report

13 The appellant denied that the cartel was 'largely successful in achieving its objectives' (point 168, seventh indent, of the Decision). It claimed, essentially, that the only evidence which the Commission had in regard to the effects of the price increase announcements on transaction prices was the LE Report, which took into account all the factors liable to influence transaction prices in a competitive market, such as demand characteristics and production costs. The LE Report concluded that transaction prices did not differ from those which would have resulted from the free play of competition. The Commission had focused on the price increase announcements, without taking into account the real factors which explained the increases in transaction prices, and had not sufficiently taken into account individual negotiations with customers. Furthermore, the appellant claimed that the Decision contained errors in the description of changes in transaction prices.

14 In that regard the Court of First Instance held:

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

293 In order to review the Commission's appraisal of the effects of the infringement, the Court considers that it suffices to consider the appraisal of the effects of the collusion on prices. As the applicant itself emphasises, consideration of the effects of the collusion on prices makes it possible, in

general terms, to assess the success of the cartel, because the purpose of collusion on downtime and on market shares was to ensure the success of the concerted price initiatives.

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

295 Likewise, the Commission cannot be criticised in those circumstances for not having considered specifically the effects of collusion on the prices for SBS cartonboard, as sales of that type of cartonboard made up less than 10% of total sales of the three types of cartonboard with which the Decision is concerned (see point 5, fifth paragraph, of the Decision).

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

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

market while accepting that those prices were taken into account for the purpose of negotiating transaction prices with customers.

298 The second type of effect consisted in the fact that changes in transaction prices followed those in announced prices. The Commission states that "the producers not only announced the agreed price increases but also with few exceptions took firm steps to ensure that they were imposed on the customers" (point 101, first paragraph, of the Decision). It accepts that customers sometimes obtained concessions in regard to the date of entry into force of the increases or rebates or individual reductions, particularly on large orders, and that "the average net increase achieved after all discounts, rebates and other concessions would always be less than the full amount of the announced increase" (point 102, last paragraph, of the Decision). However, referring to graphs in the LE Report, the Commission claims that during the period covered by the Decision there was "a close linear relationship" between changes in announced prices and those in transaction prices expressed in national currencies or converted to ecus. It concludes from this that: "the net price increases achieved closely tracked the price announcements albeit with some time lag. The author of the report himself acknowledged during the oral hearing that this was the case for 1988 and 1989" (point 115, second paragraph, of the Decision).

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

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

301 However, that report only partially confirms, in temporal terms, the existence of a "close linear relationship". Examination of the period 1987 to 1991 reveals three distinct sub-periods. At the oral hearing before the Commission the author of the LE Report summarised his conclusion as follows: "There is no close relationship, even with a lag, between announced price increase and market prices in the early part of the period, in 1987 through 1988. There is such a relationship in 1988/89, and then the relationship breaks down and behaves rather oddly over the period 1990/91" (transcript of the oral hearing, p. 28). He also observed that those temporal variations were closely linked to variations in demand (see, in particular, transcript of the oral hearing, p. 20).

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

303 At the hearing the Commission stated that it had also taken into account a third type of effect of the price collusion, namely the fact that the level of transaction prices was higher than that which would have been achieved in the absence of any collusion. Pointing out that the dates and order of the price increase announcements had been planned by the PWG, the Commission takes the view in the Decision that "it is inconceivable in such circumstances that the concerted price announcements had no effect

upon actual price levels" (point 136, third paragraph, of the Decision). However, the LE Report (section 3) drew up a model which enabled a forecast to be made of the price level resulting from objective market conditions. According to that report, the level of prices determined by objective economic factors in the period 1975 to 1991 would have evolved, with minor variations, in an identical manner to the level of transaction prices applied, including those during the period covered by the Decision.

304 Despite those conclusions, the analysis in the report does not justify a finding that the concerted price initiatives did not enable the producers to achieve a level of transaction prices above that which would have resulted from the free play of competition. As the Commission pointed out at the hearing, it is possible that the factors taken into account in that analysis were influenced by the existence of collusion. So, the Commission rightly argued that the collusive conduct might, for example, have limited the incentive for undertakings to reduce their costs. However, the Commission has not argued that there is a direct error in the analysis in the LE Report nor submitted its own economic analysis of the hypothetical changes in transaction prices had there been no collusion. In those circumstances, its assertion that the level of transaction prices would have been lower if there had been no collusion between the producers cannot be upheld.

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

306 The above findings are in no way altered by the producers' subjective appraisal, on which the Commission relied in reaching the view that the cartel was largely successful in achieving its objectives. In that regard, the Commission referred to a list of documents which it produced at the hearing. However, even supposing that it could base its appraisal of the success of the price initiatives on documents showing the subjective opinions of certain producers, it must be observed that several under-

takings, including the applicant, rightly referred at the hearing to a number of other documents in the file showing the problems encountered by the producers in implementing the agreed price increases. In those circumstances, the Commission's reference to the statements of the producers themselves is insufficient for a conclusion that the cartel was largely successful in achieving its objectives.

307 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of its exercise of its unlimited powers in regard to fines, when it assesses the seriousness of the infringement found in the present case (see paragraph 358 below).'

The plea alleging that the level of the fine is disproportionate

15 The appellant emphasised that the Member of the Commission responsible for competition policy had stated at his press conference on 13 July 1994 that the fines were close to the ceiling fixed by Article 15(2) of Regulation No 17. However, neither the gravity of the alleged infringement nor its duration warranted such a high level.

16 The Court of First Instance held in that regard:

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

participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement. As has already been observed, according to the case-law of the Court of Justice the gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

353 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".

354 Furthermore, it is common ground that the fines of a basic level of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision were imposed on the undertakings regarded as the "ringleaders" of the cartel and on its "ordinary members" respectively.

355 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 Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 385).

356 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 case of 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 illegality of their conduct. Accordingly, the Commission was entitled to take those measures into account when assessing the gravity of the infringement, since they constituted a particularly serious aspect of it which differentiated it from infringements previously found by the Commission.

357 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. There is no basis for concluding that in order to determine the level of the fines the Commission, contrary to the indications given in point 167 of the Decision, took into account a lengthier duration of the infringement than that stated in Article 1 of the Decision.

358 On the basis of those factors, the criteria set out in point 168 of the Decision justify the general level of fines set by the Commission. Admittedly, the Court has already held that the effects of the collusion on prices, which the Commission took into account when determining the general level of fines, are proved only in part. However, in the light of the foregoing considerations, that conclusion cannot materially affect the assessment of the gravity of the infringement found. The fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition. Accordingly, in the exercise of its unlimited jurisdiction, the Court considers that the

findings relating to the effects of the infringement do not justify any reduction in the general level of fines set by the Commission.

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

360 Consequently, this plea must be rejected.'

17 In conclusion, the Court of First Instance held that, as none of the pleas relied on in support of the application for annulment or reduction of the fine had been upheld, the fine imposed on the applicant should not be reduced.

The appeal

18 In its appeal the appellant submits that the Court should set aside, 'at least in part', the contested judgment and annul the Decision, and cancel or at least reduce the fine imposed on it.

19 The appellant relies on two pleas in law in support of its appeal. It submits that the Court of First Instance erred in law, first, in holding that the Commission's failure to set out in the Decision the factors which it had systematically taken into

account when fixing the appellant's fine was not an infringement of the duty to state reasons that warranted annulment in whole or in part of the fine and, second, in holding that its own conclusion that the Commission had failed to prove in full the alleged effects of the infringement could not materially affect its assessment of the gravity of the infringement and thus could not lead to a reduction in the fine.

Admissibility

20 The Commission argues that the appeal is inadmissible on two grounds.

21 First, it submits that the appeal should be dismissed as inadmissible in that it seeks to have the contested judgment set aside in its entirety, whereas the appellant, in its appeal, is contesting only the paragraphs of the contested judgment relating to the level of the fine.

22 Although it is true that the appellant's arguments relate only to the level of the fine, it is clear from the appeal that the appellant has sought to have the contested judgment set aside 'at least in part'. In those circumstances, it cannot be concluded that the appeal seeks to have the contested judgment set aside in its entirety.

23 Second, the Commission disputes the admissibility of the appellant's second plea, namely that the Court of First Instance erred in law in not reducing the amount of the fine after it had found that the Commission had not fully proved the effects of the infringement. According to the Commission, it is clear from the case-law of the Court of Justice that, in the context of an appeal, it is not for the Court of Justice to review the assessment by the Court of First Instance, in the exercise of its unlimited jurisdiction, of the appropriate level of a fine.

24 In that regard, it is sufficient to observe that although it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34), the Court of Justice does nevertheless have jurisdiction to consider whether the Court of First Instance has responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31).

25 The second ground of inadmissibility pleaded by the Commission must therefore also be rejected.

The first plea

26 In its first plea, the appellant complains that the Court of First Instance erred in law in that it did not find that the Decision contained an inadequate statement of reasons and did not annul it on that ground, despite having found in paragraph 272 of the contested judgment that the Commission had failed to set out in the Decision the factors which it had systematically taken into account in order to set the amount of the fines.

27 The appellant adds that such information should, in accordance with the settled case-law referred to by the Court of First Instance in paragraph 276 of the contested judgment, have been set out in the actual body of the Decision and that, save in exceptional circumstances, explanations given by the Commission to the press or during the proceedings before the Court of First Instance cannot be taken into account. Indeed, the Court of First Instance had specifically found in paragraph 276 of the contested judgment that the Commission had accepted at the hearing that nothing had prevented it from indicating those matters in the

Decision. In those circumstances, the Court of First Instance could not take account of the fact that the 'Commission [had] showed itself to be willing to supply any relevant information relating to the method of calculating the fines' (paragraph 279 of the contested judgment).

28 The appellant also complains that the Court of First Instance limited the temporal scope of the interpretation, in regard to the fixing of fines, which it gave as to the requirements of Article 190 of the EC Treaty (now Article 253 EC) in its judgments in *Tréfilunion* v *Commission*, *Société Métallurgique de Normandie* v *Commission* and *Société des Treillis et Panneaux Soudés* v *Commission*, cited above (hereinafter 'the Welded Steel Mesh judgments'), referred to in paragraph 277 of the contested judgment, despite the fact that the Court of Justice has always held that the interpretation which it gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force, save where it is provided to the contrary in the judgment giving that interpretation.

29 Lastly, the appellant submits that the statement by the Court of First Instance, at the end of paragraph 279 of the contested judgment, that the appellant 'has not shown that it was prevented from properly asserting its rights of defence' is irrelevant, since the duty to state reasons is an essential procedural requirement directly imposed by Article 190 of the Treaty. The appellant did not therefore have to prove that the failure to state reasons was directly detrimental to it.

30 The Commission observes that the Court of First Instance held in paragraph 273 of the contested judgment that points 169 to 172 of the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and the duration of the infringement committed by each of the undertakings in question'.

31 Paragraphs 274 to 279 of the contested judgment are, according to the Commission, superfluous in that they refer to the need for the level of fines to have a deterrent effect (paragraph 274) and to the consequences of the Welded

Steel Mesh judgments (paragraphs 275 to 279). The Commission contends, moreover, that the appellant's reading of those judgments is incorrect. In those judgments the Court of First Instance found, as it did in the contested judgment, that the statement of reasons for the Commission's decision was adequate, while expressing the wish that there should be greater transparency as to the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of transparency as amounting to a failure to state adequate reasons for the Decision. At most, the position adopted by the Court of First Instance reflects the principle of good administrative practice, in the sense that addressees of decisions should not be forced to bring proceedings before the Court of First Instance in order to ascertain all the details of the method of calculation used by the Commission. However, such considerations could not in themselves constitute a ground of annulment.

32 It is necessary, first, to set out the various stages in the reasoning adopted by the Court of First Instance in response to the plea alleging infringement of the duty to state reasons in regard to the calculation of the fines.

33 The Court of First Instance first of all referred, in paragraph 266 of the contested judgment, to the settled case-law to the effect 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 being dependent on the nature of the act in question and on the context in which it was adopted (see, in particular, besides the case-law cited by the Court of First Instance, Case C-22/94 *Irish Farmers Association and Others* v *Ministry for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809, paragraph 39).

34 The Court of First Instance then explained in paragraph 267 of the contested judgment that 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 the infringements depends on 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).

35 In that regard, the Court of First Instance held in paragraph 273 of the contested judgment that:

'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'.

36 However, in paragraphs 275 to 279 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 273.

37 According to paragraphs 275 and 276 of the contested judgment, the Decision does not indicate the precise figures systematically taken into account by the Commission in fixing the amount of the fines, albeit it could have disclosed them and this would have enabled the undertakings better to assess whether the Commission had erred when fixing the amount of each individual fine and whether that amount was justified by reference to the general criteria applied. The Court added, in paragraph 277, that according to the Welded Steel Mesh judgments 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.

38 It concluded, in paragraph 279 of the contested judgment, that there had been an 'absence of specific grounds in the Decision regarding the method of calculation

of the fines', which was justified in the specific circumstances of the case, namely the disclosure of the method of calculating the fines during the proceedings before the Court of First Instance and the novelty of the interpretation of Article 190 of the Treaty given in the Welded Steel Mesh judgments.

39 Before examining, in the light of the arguments submitted by the appellant, the correctness of the findings by the Court of First Instance regarding the consequences which disclosure of calculations during the proceedings before it and the novelty of the Welded Steel Mesh judgments may have in regard to fulfilment of the obligation to state reasons, it is necessary to determine whether fulfilment of the duty to state reasons laid down in Article 190 of the Treaty required the Commission to set out in the Decision, not only the factors which enabled it to determine the gravity and duration of the infringement, but also a more detailed explanation of the method of calculating the fines.

40 The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules.

41 First, under Article 173 of the Treaty (now, after amendment, Article 230 EC) it has the task of reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 190 of the Treaty, infringement of which renders a decision liable to annulment.

42 Second, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 172 of the Treaty (now Article 229 EC) and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons under Article 190 of the Treaty, to be set out in the decision.

43 As regards review of compliance with the duty to state reasons, the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

44 In those circumstances, in the light of the case-law referred to in paragraphs 266 and 267 of the contested judgment, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.

45 The Court of First Instance correctly held in paragraph 273 of the contested judgment that the Commission had satisfied that requirement. It must be observed, as the Court of First Instance observed, that points 167 to 172 of the Decision set out the criteria used by the Commission in order to calculate the fines. First, point 167 concerns in particular the duration of the infringement. It also sets out, as does point 168, the considerations on which the Commission relied in assessing the gravity of the infringement and the general level of the fines. Point 169 contains the factors taken into account by the Commission in determining the amount to be imposed on each undertaking. Point 170 identifies the undertakings which were to be regarded as 'ringleaders' of the cartel, and which should accordingly bear special responsibility in comparison with the other undertakings. Lastly, points 171 and 172 of the Decision set out the effect on the amount of the fines of the cooperation by various manufacturers with the Commission during its investigations in order to establish the facts or when they replied to the statement of objections.

46 The fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the proceedings before the Court of First Instance, is not such as to call in question the finding in paragraph 273 of the contested judgment. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to

state reasons has been complied with, though it may serve a useful purpose in relation to review by the Community court of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision.

47 Admittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 44 of this judgment, in particular by indicating the figures which, especially in regard to the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement.

48 It may indeed be desirable for the Commission to make use of that possibility in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed. However, as the Commission has submitted, the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons.

49 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 278 of the contested judgment, that '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'. Nor, without contradicting itself in the grounds of its judgment, could it, after finding in paragraph 273 of the contested judgment that the Decision contained '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', then refer, as it did in paragraph 279 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

50 However, the error of law so committed by the Court of First Instance is not such as to cause the contested judgment to be set aside, since, having regard to the considerations, set out above, the Court of First Instance validly rejected, notwithstanding paragraphs 275 to 279 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

51 As there was no obligation on the Commission, as part of its duty to state reasons, to indicate in the Decision the figures relating to the method of calculating the fines, there is no need to examine the various objections raised by the applicant which are based on that erroneous premiss.

52 The first plea must therefore be rejected.

The second plea

53 By its second plea, the appellant complains that the Court of First Instance did not reduce the fine imposed by the Commission after the Court had found that the Commission had not proved all the alleged effects of the infringement.

54 According to the appellant, the Court of First Instance wrongly held that the absence of any negative effect on the level of transaction prices could not materially affect the assessment of the gravity of the infringement and, accordingly, result in a reduction of the fine (paragraph 358 of the contested judgment). The effects of an infringement and, in particular, an actual increase in prices which causes direct harm to consumers, are, however, of the utmost importance in establishing the gravity of the infringement and therefore in determining the amount of the fine.

55 The appellant submits that to impose the same penalty for a less serious infringement than that found by the Commission infringes the provisions of Regulation No 17 and the principles of proportionality and equal treatment. The appellant adds that in the present case the Court of First Instance chose to take upon itself the Commission's policy role in assessing the amount of the fines, without indicating why it considered that it had to take such an exceptional step.

56 The Commission contends, on the other hand, that the Court of First Instance was entitled, in the exercise of its unlimited jurisdiction, to reach its own view on the appropriate amount of the fine. It states that in the present case an infringement was found and proved and that its gravity depends not solely on the effects which it produced, but also on the participants' intention to control markets and maintain prices at a high level, in the sure knowledge that the measures which they were taking were unlawful and that they were running the risk of incurring heavy fines.

57 In the contested judgment the Court of First Instance first set out, in paragraph 352, the Commission's powers under Article 15 of Regulation No 17, the obligation to take into consideration, when determining the amount of the fine, both the gravity and duration of the infringement, as well as the case-law of the Court of Justice which establishes 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 and that 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).

58 The Court of First Instance then set out, in paragraph 353, and reviewed the considerations listed in the Decision in regard to the gravity of the infringement.

59 It held that the Commission was entitled to raise the general level of fines above that in its previous decisions in order to strengthen their deterrent effect (paragraph 355 of the contested judgment) and to take account of the fact that the undertakings concerned took steps to conceal the existence of the collusion, which constitutes 'a particularly serious aspect of [the infringement] which differentiated it from infringements previously found' (paragraph 356 of the contested judgment). It also stressed the lengthy duration and the flagrant nature of the infringement of Article 85(1) of the Treaty (paragraph 357 of the contested judgment).

60 It concluded, in paragraph 358 of the contested judgment, that in the light of the foregoing considerations, the fact that the Commission had only partially proved the effect of the collusion on prices could not 'materially affect the assessment of the gravity of the infringement found'. It observed in that regard that 'the fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition'.

61 The Court of First Instance found, finally, in paragraph 359, that:

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

62 It follows from the foregoing that the Court of First Instance considered, in the exercise of its unlimited jurisdiction, that its findings regarding the effects of the infringement were not such as to alter the Commission's own assessment of the gravity of the infringement, or, more precisely, as to diminish the gravity of the infringement so assessed. It considered, in the light of the specific circumstances of the case and the context in which the infringement took place,

as taken into account by the Commission's Decision and set out in paragraphs 57 and 58 of this judgment, and in the light of the deterrent effect of the fines imposed, all being factors which could be applied, in accordance with the case-law of the Court of Justice, in assessing the gravity of the infringement (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 106; order in *SPO and Others* v *Commission*, cited above, paragraph 54, and *Ferriere Nord* v *Commission*, cited above, paragraph 33), that it was not appropriate to reduce the level of the fine.

63 As the premiss underlying the second plea, namely that the Court of First Instance increased the fine, is erroneous, that plea must be rejected.

64 It follows that the appeal must be rejected in its entirety.

Costs

65 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has asked for costs to be awarded against the appellant and the latter has been unsuccessful in all its pleas, the appellant must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Mo och Domsjö AB to pay the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber