JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-286/98 P,

Stora Kopparbergs Bergslags AB, established in Falun (Sweden), represented by A. Riesenkampff and S. Lehr, Rechtsanwälte, Frankfurt am Main, with an address for service in Luxembourg at the Chambers of R. Faltz, 6 Rue Heinrich Heine,

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-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall and R. Lyal, of its Legal Service, acting as Agents, with an address for service at the office of C. Gómez de la Cruz, of its Legal 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 27 July 1998, Stora Kopparbergs Bergslags 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-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111 (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:

...

(xvii) Stora Kopparbergs Bergslags AB, a fine of ECU 11 250 000;

...'

6 The contested judgment also sets out the following facts:

'9 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.

10 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).

11 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.

12 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.

13 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.

14 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.

15 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.

16 The applicant, Stora Kopparbergs Bergslags AB ("Stora"), was already owner of Kopparfors, one of the major European cartonboard producers, when in 1990 it acquired the German paper group Feldmühle-Nobel ("FeNo"), which included the Feldmühle cartonboard operation (point 11 of the Decision). At that date Feldmühle already owned Papeteries Béghin-Corbehem ("CBC").

17 According to the Decision, Feldmühle, Kopparfors and CBC participated in the cartel throughout the period covered by the Decision. Feldmühle and CBC also took part in the PWG meetings.

18 The former Kopparfors and Feldmühle cartonboard operations were subsequently integrated and now form the Billerud Division of the Stora Group.

19 According to point 158 of the Decision, "Stora accepts that it is responsible for the involvement in the infringement of its subsidiary companies Feldmühle, Kopparfors and CBC both before and after their acquisition by the group". Moreover, the Commission considered that, because of the participation of Feldmühle and CBC in the PWG meetings, the applicant was one of the "ringleaders" and as such had to bear special responsibility.'

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-352/94, and Joined Cases T-339/94 to T-342/94).

The contested judgment

The application for annulment of the Decision

8 In support of its application for annulment of the Decision the appellant put forward before the Court of First Instance a single plea alleging that it was not the correct addressee of the Decision. It submitted in particular that the infringement could not be attributed to it because:

— first, responsibility for the infringement in question was not imputable to it as a legal successor to the companies which had committed the infringement, since those companies were still in existence;

— second, in view of the Commission's previous practice and the case-law, the conditions for attributing to the appellant responsibility for infringements committed within the group were not satisfied. During the period covered by the Decision Stora had no effective control over the commercial policy of the three companies concerned (Koppafors, Feldmühle and CBC). Stora also disputed the Commission's contention that a parent company may be held responsible for a subsidiary's anti-competitive conduct on the sole ground that the subsidiary is wholly owned by it.

9 The Court of First Instance stated as follows in that regard:

'78 As this Court has already held, it is necessary to refer to the individual particulars annexed to the statement of objections in order to assess the reasons which led the Commission to address the Decision to the applicant. It

is apparent from those particulars that the conduct of Kopparfors, Feldmühle and CBC was imputed to the applicant in its capacity as parent company of the Stora Group.

79 It is settled law that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, in particular, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133).

80 In the present case, since the applicant has not disputed that it was in a position to exert a decisive influence on Kopparfors' commercial policy, it is, according to the case-law of the Court of Justice, unnecessary to establish whether it actually exercised that power. Since Kopparfors has been a wholly-owned subsidiary of the applicant since 1 January 1987, it has necessarily followed a policy laid down by the bodies which determine the parent company's policy under its statutes (see Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 50). In any event, the applicant has not submitted any evidence to support its assertion that Kopparfors carried on its business on the cartonboard market as an autonomous legal entity which determined its commercial policy largely on its own and had its own board of directors with external representatives.

81 As regards Feldmühle and CBC, it is notable that in the course of 1988 and 1989 Feldmühle acquired all the shares in CBC, which thereby became a wholly-owned subsidiary of Feldmühle. It is also undisputed that in April 1990 the applicant concluded contracts for the acquisition of approximately 75% of shares in the FeNo Group, which included Feldmühle, although the actual transfer of those shares took place only in September 1990. Lastly, the applicant itself has stated that it acquired the shares of small shareholders at the end of 1990, so that it held 97.84% of shares in FeNo.

82 Furthermore, the applicant does not dispute that at the date when it acquired the majority of shares in the FeNo Group two companies in that group, Feldmühle and CBC, were participating in an infringement in which Kopparfors, the applicant's wholly-owned subsidiary, was also participating. Since Kopparfors' conduct must be imputed to the applicant, the Commission justifiably stated in the individual particulars annexed to the statement of objections... that the applicant could not have been unaware of the anti-competitive conduct of Feldmühle and CBC.

83 In those circumstances, the Commission was entitled to attribute to the applicant the conduct of Feldmühle and of CBC in respect of the period before and the period after their acquisition by the applicant. It was for the applicant, as parent company, to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of the infringement of which it was not unaware.

84 That conclusion is not undermined by the applicant's argument that it had no power under German law to exert a decisive influence on the commercial policy of Feldmühle and, therefore, of CBC. The applicant has not even argued that it attempted to bring the infringement in question to an end, by for example simply making a request to that effect to the Feldmühle management board.

85 In the light of the foregoing considerations, the Commission was entitled to impute the conduct of the companies in question to the applicant. That finding is also supported by the applicant's conduct during the administrative procedure, in which it presented itself as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question (see, by analogy, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 6). Finally, the choice of the applicant as addressee of the Decision is in conformity with the general criteria adopted by the Commission in point 143 of the Decision..., since several companies in the Stora Group participated in the infringement in question.

86 The second part of this plea cannot therefore be upheld and the whole of the plea must therefore be rejected.'

10 The Court of First Instance did not uphold the prohibitions contained in Article 2, first paragraph, (b) and (c) of the Decision because they sought to prevent the exchange of purely statistical information which was not in, nor capable of being put into, the form of individual information and thus went beyond what was necessary in order to bring the conduct in question into line with what is lawful. The Court therefore annulled the first to fourth paragraphs of Article 2 of the Decision, save in regard to the following passages:

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

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

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

The application for annulment or reduction of the fine

11 In support of its application for annulment or reduction of the fine imposed on it, the appellant relied, before the Court of First Instance, on a plea of infringement of Article 15 of Regulation No 17. That plea was in five parts, alleging, respectively, that the Commission had infringed the obligation to state reasons for the amount of the fine; that the appellant should not have been regarded as one of the 'ringleaders' of the cartel; that the Commission had committed an error of appraisal as to the effects of the cartel; that the Commission should have taken into consideration, as a mitigating circumstance, the compliance programme implemented by the appellant; and that the Commission relied on 'extraneous considerations' when determining the amount of the fine.

12 Those objections were rejected by the Court of First Instance. In view of the pleas submitted in the appeal, only the grounds of the contested judgment relating to the first, second and fifth parts of Stora's plea should be set out.

First part of the plea: infringement of the obligation to state reasons regarding the amount of the fines

13 The appellant maintained before the Court of First Instance that the Commission should have explained in the Decision how the amount of the fines imposed on the various undertakings had been determined.

14 In that regard the Court of First Instance stated as follows:

'117 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).

118 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 fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

119 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).

120 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 the applicant 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.

121 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.

122 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.

123 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 the applicant, on the one hand, and to eight other undertakings, on the other.

124 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).

125 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.

126 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 by the Commissioner

responsible for competition policy 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).

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

128 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.

129 In the specific circumstances set out in paragraph 127 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.

130 The first part of the plea cannot therefore be upheld.'

Second part of the plea: the applicant should not have been regarded as one of the 'ringleaders' of the cartel

15 Before the Court of First Instance, Stora complained that the Commission had taken the view that the cartel had been largely successful in attaining its objectives, even though its reply to the statement of objections gave a detailed explanation of the market conditions and the reasons for which the agreements on price increases had only had an extremely limited effect on the prices actually applied.

16 The response of the Court of First Instance to this was as follows:

'137 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.

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

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

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

141 As regards collusion on prices, the Commission appraised the general effects of this collusion.

142 It is apparent from the Decision, as the Commission confirmed at the hearing, that a distinction was drawn between three types of effects.

Moreover, the Commission relied on the fact that the price initiatives were considered by the producers themselves to have been an overall success.

143 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).

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

145 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.

146 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.

147 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).

148 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.

149 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.

150 Despite those conclusions, the analysis in the report does not allow 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 concertation. 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.

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

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

153 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 assessing the seriousness of the infringement found in the present case (see paragraph 170 below).'

The fifth part of the plea: the Commission took 'extraneous considerations' into consideration when determining the amount of the fine

17 Before the Court of First Instance, the appellant, after stating that the total amount of the fine was the highest ever imposed by the Commission, argued that in the absence of explanations in the Decision it could only be assumed that 'extraneous considerations' had been taken into account.

18 The response of the Court of First Instance in that regard was as follows:

'165 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".

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

167 It should be pointed out, first, that when assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy (see, *inter alia*, Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 108, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 385).

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

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

169 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.

170 On the basis of those factors, the criteria set out in point 168 of the Decision justify the general level of fines set by the Commission. There is therefore nothing to support the conclusion that the Commission took extraneous considerations into account when determining the amount of the fines. 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.

171 The fifth part of the plea cannot therefore be upheld.'

The appeal

19 In its appeal the appellant submits that the Court should set aside the contested judgment and annul the Decision in so far as it is concerned. In the alternative, it seeks cancellation or at least reduction of the fine imposed on it.

20 In support of its appeal the appellant relies on three pleas in law, alleging:

— infringement of Article 85 of the Treaty, Article 15(2) of Regulation No 17 and general principles of Community law;

— inadequate statement of reasons as regards the calculation of the fine;

— that the Court of First Instance erred in law in that it found that assessment of the gravity of the infringement could not be affected by the absence of the alleged effects on prices.

The first plea

21 The appellant submits that the Court of First Instance erred in law:

— in that it held that the infringement of Article 85 of the Treaty committed by its subsidiary Kopparfors had to be attributed to the appellant without having taken into consideration the Commission's inability to establish whether the appellant had actually exercised an influence on Kopparfors' commercial policy (paragraph 80 of the contested judgment);

— in that it held that the infringements committed by Feldmühle and CBC before and after their acquisition by the appellant had to be attributed to it because it could not have been unaware of their participation in the infringement and did not adopt the appropriate measures to prevent the continuation of the infringement (paragraph 83 of the contested judgment).

The attribution to the appellant of Kopparfors' conduct

22 The appellant complains that the Court of First Instance attributed Kopparfors' conduct to it solely on the ground that, as a wholly-owned subsidiary, Kopparfors must necessarily have followed a commercial policy laid down by the bodies which determined the parent company's policy under its statutes, but that the Court did not attempt to ascertain whether the parent company had in fact exercised an influence over its subsidiary (see paragraph 80 of the contested judgment).

23 That approach disregards the case-law of the Court of Justice to the effect that the imputation to the parent company of its subsidiary's conduct is always dependent on a finding that management power was actually exercised (see, to that effect,

the judgments in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 to 141; Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 24, and Case C-310/93 P *British Gypsum* v *Commission* [1995] ECR I-865, paragraph 11). A 100 per cent shareholding in the capital of the subsidiary cannot, in itself, be sufficient to prove the existence of such control by the parent company.

24 The appellant also complains that in paragraph 80 of the contested judgment, the Court of First Instance misread the judgment in Case 107/82 *AEG* v *Commission* [1983] ECR 3151 on which it relied as support for its finding.

25 In any event, the appellant contends that the Court of First Instance erred in law in finding, in paragraph 80 of the contested judgment, that it had not submitted any evidence to support its assertion that Kopparfors had carried on business as an autonomous legal entity which determined its commercial policy largely on its own and had its own board of directors. In so doing, the Court of First Instance wrongly presumed that the burden of proof was on the appellant in that regard.

26 It should remembered that, as the Court of Justice has held on several occasions, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, in particular, *ICI* v *Commission*, cited above, paragraphs 132 and 133); Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44, and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15).

27 In the present case, it is common knowledge, as the Court of First Instance found in paragraph 80 of the contested judgment, that the appellant had owned the entire share capital of Kopparfors since 1 January 1987. The Court of First

Instance added that the appellant had not disputed that it was 'in a position to exert a decisive influence on Kopparfors' commercial policy' and that it had not submitted 'any evidence to support its assertion that Kopparfors had behaved autonomously'.

28 Thus, contrary to the appellant's contention, the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary's commercial policy, or produced evidence to support its claim that the subsidiary was autonomous.

29 It is also incorrect to claim that the Court of First Instance thus placed on the appellant the burden of proving that its subsidiary had acted independently. As that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct, particularly since it had found, in paragraph 85 of the contested judgment, that during the administrative procedure 'the appellant had presented itself as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question'. In those circumstances, it was for the appellant to reverse that presumption by adducing sufficient evidence.

30 It follows from the foregoing that the first part of the first plea is based on a misreading of the contested judgment and must therefore be rejected.

The attribution to the appellant of the conduct of Feldmühle and CBC

31 First, the appellant contests the statements by the Court of First Instance in paragraph 82 and 83 of the contested judgment to the effect that in 1990, after it had acquired FeNo, which included Feldmühle, itself the owner of CBC, the appellant, on the one hand, could not have been unaware of the participation of the latter two companies in the same cartel as Kopparfors, for whose actions the appellant was already responsible and, on the other hand, was able to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of the infringement.

32 The appellant's complaints relate to findings of fact which, as such, cannot be questioned in appeal proceedings (see, to that effect, Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 42). They must therefore be rejected as inadmissible.

33 Second, the appellant complains that the Court of First Instance attributed to it the infringements by Feldmühle and CBC over the period prior to the acquisition of FeNo.

34 It contends that, according to the case-law of the Court of Justice (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 83 et seq.) and the Commission's own practice, infringements of the competition rules committed by undertakings which have subsequently been acquired by another undertaking, without losing their legal personality, cannot be attributed to the acquiring company merely because of the fact of their acquisition.

35 According to paragraph 81 of the contested judgment it was only in April 1990 that the applicant 'concluded contracts for the acquisition of approximately 75% of shares in the FeNo Group, which included Feldmühle, although the actual transfer of those shares took place only in September 1990' and that the applicant 'has stated that it acquired the shares of small shareholders at the end of 1990, so that it held 97.84% of shares in FeNo'.

36 The Court of First Instance attributed to the appellant the infringements committed by Feldmühle and CBC in the period prior to September 1990.

37 It should be noted that it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking.

38 In the present case there is no dispute that Feldmühle and CBC continued to exist after control of them had been acquired by the appellant in September 1990, so that responsibility for their actions had to be attributed to the legal person that directed the operation of their businesses in the period preceding their acquisition by the appellant.

39 The fact that the appellant could not have been unaware during that period that Feldmühle and CBC were participating in the cartel, because it had itself been participating in it since January 1987 through its subsidiary Kopparfors, cannot, as the Advocate General correctly observes at point 80 of his Opinion, suffice to impute to it responsibility for the infringements committed by those companies prior to their acquisition.

40 The first plea must therefore be upheld on this point and the contested judgment set aside on that ground.

The second plea

41 By its second plea, the appellant complains that the Court of First Instance erred in law in not annulling the Decision on the ground that it contained an inadequate statement of reasons, even though it had found, in paragraph 123 of the contested judgment, that the Decision did not set out the factors which the Commission took into account when calculating the fine and, in paragraph 125 of the contested judgment, that disclosure of those factors in the Decision would have enabled the addressees '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'.

42 The appellant contends that, as the Court of First Instance observed in paragraph 126 of the contested judgment, it is settled case-law that the reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, cannot be given *ex post facto*. In the present case, no such circumstances had been shown to exist, since the Commission itself accepted that nothing prevented it from revealing its calculation method in the Decision (paragraph 126 of the contested judgment).

43 It is irrelevant that the extent of that obligation to state reasons was clarified by the Court of First Instance only 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 127 of the contested judgment. According to the appellant, if the Court of First Instance finds, as it did in the present case, that a decision does not contain an adequate statement of reasons, it must annul the decision without taking account of the question whether the Commission had previously been apprised, by a judgment of that Court, of the extent of the obligation to state reasons. The appellant also refers to the case-law of the Court of Justice regarding the temporal effects of interpretations given in judgments delivered pursuant to Article 177 of the EC Treaty (now Article 234 EC).

44 The Commission observes that the Court of First Instance held in paragraph 124 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'.

45 In paragraphs 125 to 129 of the contested judgment the Court of First Instance merely stated that in certain circumstances it was desirable that the Commission should set out in detail in its decision the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of information in that regard 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, breach of which cannot in itself constitute a ground of annulment of the decision.

46 Last, the Commission states that the implications to that effect of the Welded Steel Mesh judgments have recently been confirmed by the Court of First Instance. According to that Court, the information which it is desirable that the Commission should communicate to the addressee of a decision must not be regarded as an additional statement of reasons, but solely as the translation into figures of the criteria set out in the Decision in so far as they are themselves capable of being quantified (see, in particular, the judgment in Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraphs 627 and 628).

47 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.

48 The Court of First Instance first of all referred, in paragraph 117 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).

49 The Court of First Instance then explained in paragraph 118 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).

50 In that regard, the Court of First Instance held in paragraph 124 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 (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 264)'.

51 However, in paragraphs 125 to 129 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 124.

52 According to paragraphs 125 and 126 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 127, 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.

53 It concluded, in paragraph 129 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 EC Treaty (now Article 253 EC) given in the Welded Steel Mesh judgments.

54 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 EC 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.

55 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.

56 First, under Article 173 of the EC 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.

57 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 EC 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.

58 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'.

59 In those circumstances, in the light of the case-law referred to in paragraphs 117 and 118 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.

60 The Court of First Instance correctly held in paragraph 124 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.

61 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 124 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.

62 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 59 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.

63 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.

64 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 128 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 124 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 129 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

65 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 125 to 129 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

66 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.

67 The second plea must therefore be rejected.

The third plea

68 By its third 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 (paragraph 151 of the contested judgment).

69 According to the appellant, the Court of First Instance, in holding 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 170 of the contested judgment), disregarded the principle that the amount of the fine must be proportionate to the gravity of the infringement, and breached the principle of equal treatment.

70 According to the Commission, the third plea is inadmissible since it calls on the Court of Justice to exercise unlimited jurisdiction to assess facts, which the Court is not entitled to do in the context of an appeal (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31).

71 The Commission adds, in regard to the merits, 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 to 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.

72 In the contested judgment the Court of First Instance first set out, in paragraphs 118 and 156, 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).

73 The Court of First Instance then set out, in paragraph 165, and reviewed the considerations listed in the Decision in regard to the gravity of the infringement.

74 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 167 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 168 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 169 of the contested judgment).

75 It concluded, in paragraph 170 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'.

76 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 70 and 71 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.

77 The third plea must therefore be rejected as unfounded.

78 According to the first paragraph of Article 54 of the EC Statute of the Court of Justice, the Court of Justice is to set aside the decision of the Court of First Instance if the appeal is well founded. It may either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

79 Since the documents before the Court do not indicate the portion of the appellant's 1990 turnover accounted for by the activities of Feldmühle and CBC, the case must be referred back to the Court of First Instance for fresh review of the amount of the fine, taking into account the considerations set out in paragraphs 37 to 40 of this judgment. Costs must be reserved.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Sets aside the judgment of the Court of First Instance of 14 May 1998 in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* in so far as it attributes to Stora Kopparbergs Bergslags AB responsibility for the infringements committed by Feldmühle and Papeteries Beghin-Corbehem prior to September 1990;**

2. **Dismisses the remainder of the appeal;**

3. **Refers the case back to the Court of First Instance;**

4. **Reserves 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