JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-291/98 P,

Sarrió SA, established in Barcelona, Spain, represented by A. Mazzoni, of the Milan Bar, M. Siragusa, of the Rome Bar, and F. Maria Moretti, of the Venice Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 2 Place Winston Churchill,

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-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, 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 A. Dal Ferro, of the Vicenza Bar, with an

* Language of the case: Italian.

address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

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 28 July 1998, Sarrió SA 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-334/94 *Sarrió* v *Commission* [1998] ECR II-1439 (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.

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:

...

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

...'

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

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

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

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-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94, and Joined Cases T-339/94 to T-342/94).

The contested judgment

8 In its action before the Court of First Instance the appellant claimed that the Court should annul the Decision or, in the alternative, Article 2 thereof, and cancel or at least reduce the fine imposed on it.

The application for annulment of the Decision

9 In support of its application for annulment of the Decision the appellant relied, before the Court of First Instance, on nine pleas in law, all of which were rejected by the Court of First Instance apart from the last plea, alleging that Prat Carton did not participate in the infringement.

10 The Court of First Instance held as follows in that regard:

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

11 Having regard to the pleas put forward by the appellant in the appeal, only the passages of the contested judgment relating to the application for annulment of the Decision that are relevant to the pleas of non-collusion on transaction prices and infringement of the duty to state reasons, non-participation in a cartel

intended to freeze market shares and control supply, and error of assessment by the Commission in regard to the Fides information exchange system, will be set out below.

The plea alleging that there was no collusion on transaction prices and that the duty to state reasons was infringed

12 Before the Court of First Instance the appellant disputed that its participation in collusion on announced prices had related to transaction prices. It also submitted that the Commission had not clearly explained whether the collusion on prices attributed to Sarrió was collusion on announced prices, which it admitted, or collusion which also extended to transaction prices. That constituted an infringement of the duty to state reasons and a breach of the rights of the defence.

13 In response the Court of First Instance stated as follows:

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

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

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

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

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

...

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

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

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

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

61 Consequently, the plea must be rejected as unfounded.'

The plea alleging that the applicant did not participate in an agreement to freeze market shares and control supply

14 Before the Court of First Instance the appellant claimed that the Commission had no evidence of the existence of concerted action to freeze market shares or to control supply and, in any event, had not proved that the appellant had participated in such concerted action.

15 The appellant submitted, further, that the undertakings' actual conduct was at variance with the Commission's assertions.

16 With regard to the existence of concerted action to freeze market shares and control supply, the Court of First Instance held as follows:

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

17 As to the appellant's actual conduct, the Court of First Instance held as follows:

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

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

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

118 Third, it is settled law that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings (see, for example, the judgment in Case T-141/89 *Tréfileurope Sales* v *Commission* [1995] ECR II-791, paragraph 85). Even assuming that the applicant's conduct on the market was not in conformity with the conduct agreed, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.'

The plea alleging error of assessment by the Commission in regard to the Fides information exchange system

18 Before the Court of First Instance the appellant submitted that the Fides information exchange system was not capable of promoting collusive conduct and was therefore not incompatible with Article 85 of the Treaty.

19 The Court of First Instance rejected that plea as inadmissible on the following grounds:

'155 In response to this plea the Court observes that, by virtue of the first subparagraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

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

The application for annulment of Article 2 of the Decision

20 The Court of First Instance annulled, as regards the appellant, 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.'

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

21 In support of its application for annulment or reduction of the amount of the fine, the appellant relied, before the Court of First Instance, on 10 pleas in law, three of which allege, respectively, defects in the statement of reasons and infringement of the rights of the defence in regard to the calculation of the fine, erroneous method of calculating the fine, and erroneous calculation of the part of the fine corresponding to the infringement attributed to Prat Carton and infringement of the duty to state reasons in that regard.

Failure to state reasons and infringement of the rights of the defence as regards calculation of the fine

22 Before the Court of First Instance the appellant complained that the Commission had not set out in the Decision the criteria which it had applied, thus making it impossible to carry out an effective review of the legality of the Decision, which manifestly infringed its rights of defence.

23 In response the Court of First Instance stated as follows:

'341 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

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

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

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

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

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

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

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

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

350 The Commission also accepted at the hearing that nothing prevented it from indicating in the Decision the factors which had been systematically

taken into account and which had been divulged at a press conference held on the day on which that decision was adopted. In that regard, it is settled law that the reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and, to the same effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136).

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

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

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

354 Consequently, this plea cannot be upheld.'

The plea alleging an error in the method of calculating the fine

24 The appellant submitted before the Court of First Instance that the Commission, when fixing the amount of the fine, had failed to take account of the effects of monetary fluctuations, both the Spanish peseta and the Italian lira having undergone a substantial devaluation as against the ecu and the other European currencies since 1990. The appellant submitted further that factors such as monetary fluctuations, which are extraneous to the infringement to be punished and not imputable to the person responsible for that infringement, should not therefore have affected the amount of the fine. The Decision also led to unjustified differences in treatment, because the currency fluctuations completely altered the relationship between the various fines imposed. There was no requirement that the Commission express the amount of the fine in ecus in order to avoid unjustified differences in treatment; it should have expressed the fine in national currency.

25 In response the Court of First Instance stated as follows:

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

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

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

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

396 Second, in order to be able to compare the different turnover figures sent to it, which are expressed in the respective national currencies of the undertakings concerned, the Commission must convert those figures into a

single monetary unit. As the value of the ecu is determined in accordance with the value of each national currency of the Member States, the Commission rightly converted the turnover figure of each of the undertakings into ecus.

397 The Commission also acted correctly in taking the turnover in the reference year (1990) and converting that figure into ecus on the basis of the average exchange rates for that same year. In the first case, the taking into account of the turnover achieved by each undertaking during the reference year, that is to say, the last complete year of the period of infringement found, enabled the Commission to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those aspects being relevant for an assessment of the gravity of the infringement committed by each undertaking (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 120 and 121). In the second place, taking into account, in order to convert the turnover figures in question into ecus, the average exchange rates for the reference year adopted, enabled the Commission to prevent any monetary fluctuations occurring after the cessation of the infringement from affecting the assessment of the undertakings' relative size and economic power and the scale of the infringement committed by each of them and, accordingly, its assessment of the gravity of that infringement. The assessment of the gravity of an infringement must have regard to the economic reality as revealed at the time when that infringement was committed.

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

399 In addition, several of the addressee undertakings of the Decision own cartonboard mills in more than one country (see points 7, 8 and 11 of the Decision). Moreover, the addressees of the Decision generally carry out their activities in more than one Member State through the intermediary of local representatives. As a result, they operate in several national currencies. The applicant itself achieves a considerable part of its turnover on export markets. Where a decision like the decision at issue penalises infringements of Article 85(1) of the Treaty and where the addressees of the decision generally pursue their activities in several Member States, the turnover for the reference year converted into ecus at the average exchange rate used during that same year is made up of the sum of the turnovers achieved in each country in which the undertaking operates. It therefore takes perfect account of the actual economic situation of the undertakings concerned during the reference year.

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

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

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

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

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

The plea alleging erroneous calculation of the part of the fine corresponding to the infringement imputed to Prat Carton and infringement of the obligation to state reasons in that regard

26 Before the Court of First Instance, the appellant claimed that the Commission had wrongly calculated the part of the fine corresponding to the infringement allegedly committed by Prat Carton in that it adopted the same percentage of turnover as that selected for the applicant, namely 9%, reduced by one third for cooperation during the investigation of the case. However, the limited participation of Prat Carton in the meetings of the JMC from June 1990 to March 1991 and the fact that it was not a 'ringleader' ought to have been grounds for reducing the amount of the fine.

27 The appellant also complained of a lack of transparency and absence of reasons concerning the calculation of the part of the fine corresponding to the infringement imputed to Prat Carton.

28 The Court of First Instance held as follows in that regard:

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

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

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

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

The appeal

29 By its appeal the appellant seeks to have the contested judgment set aside and to have the case referred back to the Court of First Instance, should the Court of Justice consider that the state of the proceedings do not permit final judgment in the matter, and also seeks annulment of the Decision and, in the alternative, reduction of the amount of the fine imposed on it.

30 In support of its appeal the appellant relies on five pleas alleging:

— misinterpretation of the Decision as regards the infringement actually alleged against it;

— misinterpretation and misapplication of Community law as regards the automatically anti-competitive effect of Sarrió's participation in the meetings of the producers; in the alternative, failure to take into consideration the fact that Sarrió did not implement the cartel; and, in the further alternative, misclassification of the infringement committed;

— failure to take into consideration the lack of reasoning in regard to the calculation of the fine and a contradiction between the grounds and the operative part;

— failure to take into consideration the error in the method of calculating the fine;

— contradiction between the grounds and the operative part as regards the reduction of the fine granted.

The first plea

31 By its first plea the appellant complains that the Court of First Instance misinterpreted the Decision in finding, in paragraph 53 of the contested judgment, that the Decision does not call in question concerted action that directly concerned transaction prices, but rather participation in concerted action on announced prices, as a consequence of which there was an increase in transaction prices.

32 The distinction between concerted action on announced prices and that on transaction prices is of particular importance when examining an infringement of the competition rules, as was highlighted by the Court of Justice in its judgment in Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307.

33 According to the appellant, as the Commission imposed a single fine in respect of all the alleged infringements, that fine should have been reduced if it had been proved that the appellant had been fined in respect of acts which it had not committed. The Court of First Instance, however, which merely considered the distinction between direct and indirect concerted action on prices charged, did not find it necessary to consider whether there was evidence relating to the transaction prices and, accordingly, did not verify whether the scope of the infringement committed by the appellant was in fact more restricted than asserted by the Commission.

34 The Commission contends that the plea is inadmissible. To seek to have the contested judgment set aside on the ground that it finds that the appellant was

held liable for concerted action on announced prices rather than on transaction prices, as the Decision is alleged to have wrongly found, would necessitate a purely factual appraisal of the appellant's conduct, which falls outside the jurisdiction of the Court of Justice.

35 That plea of inadmissibility cannot be accepted. In complaining that the Court of First Instance wrongly interpreted the Decision, the appellant is raising a question of law which can be examined in appeal proceedings.

36 On the merits, the Commission submits that the Court of First Instance correctly interpreted the Decision, which makes it clear that the agreements on prices had an effect on the prices actually charged by the appellant to its customers (see point 101 and Article 1 of the Decision, and paragraphs 56, 57 and 60 of the contested judgment) but did not rule out any possibility of a difference between announced prices and prices actually charged, the latter being dictated by business needs.

37 It must be observed in that regard that in order to interpret the Decision and assess the extent of the infringement alleged against the appellant the Court of First Instance examined both the operative part of the Decision and the statement of reasons for it (see paragraphs 51 to 53 of the contested judgment).

38 Following that examination, the Court of First Instance concluded that the infringement in question consisted in concerted action on the fixing of list prices, but that this concerted action was intended to obtain an increase in invoiced prices (paragraph 53 of the contested judgment), the impact of which was acknowledged by the appellant at the hearing (paragraph 57 of the contested judgment). As the Court of First Instance correctly stated in paragraph 57 of the contested judgment,

'[T]he fixing of uniform list prices agreed by the producers would have been rendered absolutely irrelevant if those prices had not actually had any effect on transaction prices.'

39 The appellant's arguments are not such as to call in question the conclusion by the Court of First Instance that it was the list prices which were fixed by common accord, even though the object of the cartel was to standardise transaction prices. The appellant has not proved, or sought to prove, that there is any contradiction in the grounds or, in the light of the documents in the file submitted to the Court of First Instance, any substantive error such as to vitiate the very reasoning of the contested judgment.

40 The first plea must therefore be rejected.

The second plea

41 In its second plea the appellant complains primarily that the Court of First Instance rejected its argument that its participation in the meetings of the various bodies operating within the PG Paperboard, a trade association which pursued essentially lawful objectives, could not suffice to prove its participation in concerted action to maintain market shares and production downtime intended to control supply.

42 According to the appellant, participation by an undertaking in a meeting that has an anti-competitive object does not in itself amount to conduct which can be called in question and it fell to the Commission to adduce evidence that the undertaking had implemented the decisions adopted during that meeting. To require the undertaking to prove that it had in fact distanced itself from those

decisions, that is to say, that it neither approved nor implemented them, is to place on it a burden of proving something that cannot be proved.

43 It adds that the Court of First Instance erred in law in asserting, in paragraph 118 of the contested judgment, that

'[T]he fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings.... Even assuming that the applicant's conduct on the market was not in conformity with the conduct agreed, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.'

44 In the alternative, the appellant claims that, although it is settled case-law that adherence to an agreement with an anti-competitive object suffices in itself for an undertaking to incur liability for infringement of Article 85 of the Treaty, it cannot be claimed that an undertaking which is merely a party to an agreement should be treated in the same way as an undertaking which has also implemented that agreement. However, the Court of First Instance did not take into account, in paragraphs 115 to 118 of the contested judgment, the absence of any evidence that the appellant had implemented decisions adopted in regard to the stabilisation of market shares and the control of supply, if only to distinguish its liability in the infringement from that of other undertakings which took action in that regard.

45 Lastly, in the further alternative, the appellant complains that the Court of First Instance found that the infringement alleged against it was participation in a cartel, whereas the only complaint which could have been levelled against it was participation in an information exchange, a much less serious infringement.

46 In that connection the appellant contests the finding by the Court of First Instance that its plea alleging error of assessment by the Commission in regard to the Fides information exchange system was inadmissible because it was raised for the first time in the reply (see paragraph 155 and 156 of the contested judgment). The appellant refers, in support, to paragraph 46 of its application at first instance.

47 It must be stated in that regard that the Court of First Instance, after examining the documents in the Commission's file and in particular the statements by Stora Kopparbergs Bergslags AB ('Stora'), concluded that the Commission had correctly established the existence of collusion between the participants in the PWG meetings both in regard to market shares (paragraph 76 to 87 of the contested judgment) and on production downtime. The Court of First Instance rejected the criticisms levelled by the appellant in particular at Stora's statements (paragraphs 107 to 113 of the contested judgment).

48 The appellant has not called in question the conclusions of the Court of First Instance as to the very existence of the two-fold collusion referred to above. Its criticisms relate, in fact, to the implementation or alleged non-implementation by it of anti-competitive decisions.

49 After it had held that the Commission had found the collusion on stabilisation of market shares and control of supply, and not its actual implementation, to be an infringement and that the appellant had participated in that collusion, which is a finding of fact, the Court of First Instance could validly take the view that the appellant's assertions as to its actual conduct on the market were not such as to affect its liability for infringement of Article 85(1) of the Treaty (paragraph 118, last sentence, of the contested judgment).

50 It must be accepted, as the Court of First Instance accepted, that participation by an undertaking in meetings that have an anti-competitive object has the effect *de*

facto of creating or strengthening a cartel and that the fact that an undertaking does not act on the outcome of those meetings is not such as to relieve it of responsibility for the fact of its participation in the cartel, unless it has publicly distanced itself from what was agreed in them. According to the contested judgment, no such proof that the appellant had publicly distanced itself was adduced before the Court of First Instance.

51 It must therefore be found, having regard to the infringement for which the appellant was fined, that its arguments before the Court of First Instance regarding its actual conduct on the market were ineffective, and that there are therefore no grounds for complaining that the Court of First Instance did not take those allegations into account when assessing its responsibility. In any event, as the Court of First Instance found within its exclusive competence, first, it was never alleged that the collusion on market shares had led to a complete freezing of those shares; second, prior to 1990, restriction of supply by concerted stoppages of production had not been necessary because of high demand, and the fact that in 1990 and 1991 Sarrió had not stopped production temporarily does not therefore prove in any way that it was not involved in the alleged collusion (paragraph 117 of the contested judgment).

52 Lastly, as regards the complaint that the Court of First Instance wrongly held inadmissible the plea that the Commission misassessed the Fides information exchange system, it must be stated, as the Commission has submitted, that paragraph 46 of the application, to which the appellant refers, does not relate to any assessment by the Commission in that regard, but expresses the appellant's view that the exchange of information and collusion on announced prices should have been punished less severely than collusion on prices actually charged.

53 It follows from the foregoing that the second plea must be rejected.

The third plea

54 In its third plea, the appellant complains that the Court of First Instance erred in law in that it did not annul the Decision on the ground that it contained an inadequate statement of reasons, despite having found in paragraph 347 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.

55 The appellant adds that such information should, in accordance with the settled case-law referred to by the Court of First Instance in paragraph 350 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 350 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 353 of the contested judgment).

56 The appellant also complains that the Court of First Instance took into account the fact that the Commission, when it adopted the Decision, was not yet aware 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 351 of the contested judgment, and of the fact that the statement of reasons for the Decision was comparable to that in previous decisions of the Commission (paragraph 351 of the contested judgment).

57 The appellant claims that that approach is wrong in law. The fact that the extent of the duty to state reasons had not yet been clarified by the Court of First Instance did not mean that the Commission was not under that duty. Nor could the Court of First Instance lay down rules applicable for the future without applying them forthwith to the case brought before it, and thus maintain the effects of a Commission decision which it had already found to contain an inadequate statement of reasons.

58 The Commission contends that the third plea is inadmissible. It refers to the judgment in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31, from which it is clear that the Court of Justice cannot, when ruling on questions of law in the context of an appeal, 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.

59 The Commission adds that it enjoys a degree of latitude when fixing the fines (see *Ferriere Nord* v *Commission*, cited above, paragraphs 32 and 33). Its existence prevents undertakings from knowing in advance the exact amount of the fine which they risk incurring for unlawful conduct, whereby they would be induced to act lawfully or unlawfully on the basis of purely financial considerations (see Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

60 Paragraphs 349 to 353 of the contested judgment are, according to the Commission, superfluous in that they refer to the consequences of the Welded Steel Mesh judgments. The Commission contends, moreover, that the appellant's reading of those judgments is incorrect. In those judgments the Court of First

Instance expressed the wish, as it did in the contested judgment, 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, but breach of such a principle cannot in itself constitute a ground of annulment of the Decision.

61 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.

62 The Court of First Instance first of all referred, in paragraph 341 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).

63 The Court of First Instance then explained in paragraph 342 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 Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

64 In that regard, the Court of First Instance held in paragraph 348 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).'

65 However, in paragraphs 349 to 353 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 348.

66 According to paragraphs 349 and 350 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 310, 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.

67 It concluded, in paragraph 353 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.

68 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.

69 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.

70 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.

71 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.

72 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'.

73 In those circumstances, in the light of the case-law referred to in paragraphs 341 and 342 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.

74 The Court of First Instance correctly held in paragraph 348 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.

75 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 348 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.

76 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 73 of this judgment, *inter alia* 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.

77 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.

78 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 352 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 348 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 353 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

79 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 349 to 353 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

80 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.

81 The third plea must therefore be rejected.

The fourth plea

82 In its fourth plea the appellant alleges that there was a failure to state reasons. First, the Court of First Instance carried out a purely abstract assessment of the complaint that the ecu was used in order to fix the amount of the fines and that there was less favourable treatment of the undertakings whose national currency depreciated between 1990, the reference year adopted by the Commission in

order to fix the amount of the fines, and 1994, the year in which the Decision was adopted. Second, the Court of First Instance did not answer the complaint, directed at the Commission's method of calculating the amount of the fine, based on the fact that the Commission had taken into consideration the turnover in the last full year of the infringement, converted into ecus by applying the average exchange rate during that year, rather than the turnover in the business year preceding the adoption of the Decision, which was the year referred to in Article 15(2) of Regulation No 17 with regard to the limit set at 10% of turnover achieved by the undertaking charged.

83 The appellant adds that, particularly because of the effect of fluctuations in exchange rates, the use of the turnover figure for the last year of the infringement does not ensure, in all circumstances, that the fine is proportionate to the gravity of the infringement and the economic power of the undertakings fined.

84 It must be observed in that regard that paragraphs 392 to 404 of the contested judgment concern specifically the use of the ecu in order to fix the amount of the fines and the question of possible discrimination between undertakings involved in the same cartel. The complaint alleging that there was a failure to state reasons cannot therefore be upheld.

85 As to the legality of taking into account two reference years, one in order to determine the maximum amount of the fine, the other in order to assess the size and economic power of the undertaking at the time of the infringement, it should be pointed out, first, that the ceiling set by Article 15(2) of Regulation No 17 in respect of fines amounting to more than one million units of account and which corresponds to '10% of the turnover in the preceding business year' relates, as the Court of First Instance stated in paragraph 402 of the contested judgment, to the

business year preceding the date of the decision. It is, moreover, logical to refer to that business year when determining the maximum amount of the fine which can be imposed on an undertaking that has infringed the competition rules.

86 Second, when the size and economic strength of an undertaking at the time of the infringement are being assessed, it is necessary to refer to the turnover achieved at that time and thus to use the exchange rates at that time and not those applicable at the time when the decision imposing the fine was adopted. In the contrary case, the respective size of the undertakings which took part in the infringement would be distorted by account being taken of extrinsic and uncertain factors, such as the changes in the value of national currencies during the subsequent period (see Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] I-4125, paragraph 165).

87 In the present case, the appellant has not shown how the Court of First Instance, in not calling in question the Commission's method of calculation based on the turnover in the last full year of the infringement, infringed Regulation No 17 or general principles of law.

88 First, Regulation No 17 does not prohibit the use of the ecu in order to fix the fines. Next, as the Court of First Instance held in paragraphs 395 to 399 of the contested judgment, the Commission used one and the same method of calculating the fines imposed on undertakings for having participated in the same infringement and that method enabled it to assess the size and economic power of each undertaking and the scope of the infringement committed, in light of the economic reality as it appeared at the time the infringement was committed.

89 Lastly, as regards, in particular, monetary fluctuations, they are an element of chance which may produce advantages and disadvantages which the undertakings have to deal with regularly in the course of their business activities and whose very existence is not such as to render inappropriate the amount of a fine

lawfully fixed by reference to the gravity of the infringement and the turnover achieved during the last year of the period over which it was committed. In any event, the maximum amount of the fine, determined by virtue of Article 15(2) of Regulation No 17 by reference to turnover in the business year preceding the adoption of the Decision, limits the possible harmful consequences of monetary fluctuations.

90 The fourth plea must therefore be rejected.

The fifth plea

91 By its fifth plea the appellant submits that the reduction made by the Court of First Instance in the amount of the fine is inadequate in the light of its findings concerning the participation of the appellant's subsidiary, Prat Carton, in the cartel.

92 According to the appellant, taking into account the corrections it made in respect of the duration of the infringement by Prat Carton and the extent of its participation in the collusion, which was merely marginal, the Court of First Instance must, in fixing the amount of the fine at ECU 14 million, have adopted a different method of calculation than that of the Commission, and so discriminated between the undertakings involved in the cartel.

93 If the Court of First Instance had applied the Commission's method of calculation, taking into account the corrections made in respect of Prat Carton's involvement in the infringement, the amount of the fine would have been ECU 250 000 less.

94 The Commission does not dispute the amount of the additional reduction which would have resulted from application of its method of calculation, but contends that the fixing of the fine falls within the scope of the unlimited jurisdiction of the Court of First Instance.

95 In that regard it is clear from paragraph 250 of the contested judgment that the Court of First Instance considered that Prat Carton's participation in the infringement was proved only in regard to the collusion on prices and on downtime, but not on the freezing of market shares, and that it covered only the period from June 1990 to February 1991. Thus, the Court held:

> '411 Because Prat Carton participated in some only of the constituent elements of the infringement and for a much lesser period than that found by the Commission, the amount of the fine imposed on the applicant must be reduced.
>
> 412 In the present case, as none of the other pleas on which the applicant relies justifies reducing the fine, the Court, exercising its unlimited jurisdiction, sets the amount of that fine at ECU 14 million.'

96 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 (*Ferriere Nord*, cited above, paragraph 31).

97 However, when the amount of the fine to be imposed on them is determined, the exercise of unlimited jurisdiction cannot result in discrimination between

undertakings which have participated in an agreement or concerted practice contrary to Article 85(1) of the Treaty.

98 In the present case, there is no dispute that the fines were fixed by the Commission, in regard to all the undertakings involved in the infringement, using a method of calculation which was not called in question by the Court of First Instance. If the Court of First Instance intended, in the case of the appellant, to depart specifically from that method or from some of the figures adopted by the Commission, it should have given reasons for doing so in the contested judgment.

99 It must therefore be found that in paragraph 412 of the contested judgment the Court of First Instance infringed the principle of equal treatment and the first two parts of the fifth plea must be upheld.

100 It follows from the foregoing that the appeal must be upheld in so far as concerns paragraph 412 of the contested judgment and paragraph 2 in the operative part thereof.

101 Under 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. Since the state of the proceedings so permits, final judgment must be given on the amount of the fine to be imposed on the appellant.

The application for annulment

102 Having regard to paragraphs 282 to 411 of the contested judgment and in particular to the fact that the appellant can be held responsible for an infringement of Article 85(1) of the Treaty only in respect of collusion on prices and on downtime and in respect of the period from June 1990 to February 1991, the amount of the fine imposed on the appellant should be fixed at EUR 13 750 000.

Costs

103 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

104 As the appellant has been unsuccessful in the majority of its pleas in the appeal, it will be ordered to bear its own costs and to pay two thirds of the Commission's costs relating to the proceedings before the Court of Justice.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Sets aside paragraph 2 of the operative part of the judgment of the Court of First Instance of 14 May 1998 in Case T-334/94 *Sarrió* v *Commission*;

2. Fixes the amount of the fine imposed on Sarrió SA at EUR 13 750 000;

3. Dismisses the remainder of the appeal;

4. Orders Sarrió SA to bear its own costs and to pay two thirds of those of the Commission of the European Communities before the Court of Justice;

5. Order the Commission of the European Communities to bear one third of its own costs before the Court of Justice.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber