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

14 May 1998 *

In Case T-352/94,

Mo och Domsjö AB, a company incorporated under Swedish law, established at Örnsköldsvik, Sweden, represented by Antony Woodgate, Martin Smith and Vincent Smith, Solicitors, London, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Richard Lyal, of its Legal Service, and Rosemary Caudwell, a national official seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

...

Article 3

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

...

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

...'

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

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

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

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

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

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

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

20 The Decision sets out the reasons why that decision was addressed to the applicant, Mo och Domsjö AB (hereinafter 'MoDo') (point 151 et seq.). According to the Decision, Thames Board Ltd (hereinafter 'TBM'), a manufacturer of GC grade cartonboard with a cartonboard mill in Workington, United Kingdom, took part from mid-1986 in meetings of the bodies of the PG Paperboard, including PWG

meetings. With effect from 1 January 1988, the whole of TBM was acquired by AB Iggesunds Bruk (hereinafter 'Iggesunds Bruk'), an associated company of MoDo, in which MoDo held 49.9% of the voting rights. TBM was then renamed Iggesund Paperboard (Workington) Ltd.

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

Procedure

22 The applicant brought this action by application lodged at the Registry of the Court on 20 October 1994.

23 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94 and T-354/94).

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

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

26 Lastly, an action was also brought by an association, CEPI-Cartonboard, which was not an addressee of the Decision. However, it withdrew its action by letter lodged at the Registry of the Court on 8 January 1977 and the case was removed from the Register of the Court by order of 6 March 1997 (Case T-312/94 *CEPI-Cartonboard* v *Commission*, not published in the ECR).

27 By letter of 5 February 1997 the Court requested the parties to take part in an informal meeting with a view, in particular, to their presenting observations on a possible joinder of Cases T-295/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94 for the purposes of the oral procedure. At that meeting, which took place on 29 April 1997, the parties agreed to such a joinder.

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

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

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

31 The parties in the cases referred to in paragraph 27 above presented oral argument and gave replies to the Court's questions at the hearing which took place from 25 June to 8 July 1997.

Forms of order sought

32 The applicant claims that the Court should:

— annul the Decision in so far as it concerns it;

— annul Article 2;

— annul the fine or reduce its amount;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

The application for annulment of the Decision

34 The organisation of the pleas which are considered in this judgment differs from that in the report for the hearing. Some of the pleas on which the applicant relies in support of its claim for annulment of the Decision can lead only to a reduction in the fine and must therefore be considered in that context.

A — *The pleas alleging infringements of essential procedural requirements*

The plea that the statement of reasons is defective

Arguments of the parties

35 The applicant contends that the Decision is vitiated by a defect in the statement of the reasons on which it is based, because it does not reveal how the Commission assessed certain evidence and arguments submitted during the administrative procedure.

36 First, its arguments contesting the probative value of Stora's statements were probably misunderstood by the Commission (see point 108 of the Decision). Stora might have been influenced by the likely consequences of its statements. The Commission should not therefore have relied on those statements.

37 Moreover, while the Commission sometimes blindly followed Stora's statements, it nevertheless drew conclusions that are incompatible with or different from those statements.

38 In that context, the applicant refers to several points on which the Commission did not follow Stora's statements, in particular the assertion that a number of aspects of the alleged infringement had little impact on the market, the comments showing that customers enjoyed considerable power, the statement that the information exchanges did not include disclosure of the length of order backlogs and, lastly, the statement that the main purpose of the collection of data on orders in hand was to enable companies to monitor their own performance on the market.

39 Nor did the Commission take due account of certain observations in Stora's statements. The applicant refers to points 3, 11, 12 and 28 of Stora's second statement (appendix 39 to the statement of objections) and to paragraph 1.1 of Stora's third statement (appendix 43 to the statement of objections).

40 The Commission therefore adopted an unfair approach in regard to Stora's statements, since it followed them only in the absence of other evidence. By contrast, where evidence other than the statements existed, it accepted the evidence that was most unfavourable to the addressees of the Decision.

41 Second, the Commission did not correctly assess the reports by London Economics (hereinafter the 'LE report'), produced on behalf of several addressees of the Decision, which aimed to explain the market phenomena noted by the Commission. The applicant had also supplied data to the Commission in order to show

that production costs at its Workington plant had increased almost as much as the transaction prices, despite the strong demand during the period in question.

42 Third, the implication that the applicant deliberately concealed evidence in order to frustrate the investigation (point 116 of the Decision) is unfounded.

43 Lastly, it is apparent from the Decision that no consideration was given to the possibility that Unilever plc, the owner of TBM before its acquisition by Iggesunds Bruk, was responsible for part of the alleged infringement.

44 The Commission observes that it is not obliged to respond in detail to every matter raised in a reply to a statement of objections (see Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 66) and that, in accordance with its duties, it considered the evidence and arguments submitted by the applicant and replied in the Decision to the matters which were relevant to its conclusions.

45 As regards the applicant's arguments relating to the reliability of Stora's statements, the Commission maintains that it understood them and took them into account. It simply did not agree with the applicant. As indicated in points 112 and 113 of the Decision, the statements were corroborated by numerous documents. Moreover, it seems absurd to maintain that the Commission blindly followed Stora's statements and to complain that it did not follow those statements in every detail.

46 As regards the LE report, the Commission refers in the main to the arguments on which it relies to show that it correctly assessed the effects of the cartel on the market (see paragraph 289 et seq. below).

47 Contrary to the applicant's claim, the Commission never asserted that the applicant had concealed evidence during the administrative procedure.

48 Lastly, in its reply to a written question from the Court, the Commission stated that it had no evidence of the involvement of Unilever plc in the cartel.

Findings of the Court

49 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). Although pursuant to Article 190 of the Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, *inter alia*, *Van Landewyck and Others* v *Commission*, cited above, paragraph 66).

50 As regards Stora's statements, the Commission explained in points 112 and 113 of the Decision that the essential points of those statements are corroborated by other proof.

51 The fact that the Commission did not adopt all the assertions made in Stora's statements cannot render the statement of reasons for the Decision inadequate or

defective. In essence, the applicant's arguments merely contest the correctness of the Commission's assessment of the reliability of Stora's statements. As such arguments fall within the scope of the Court's examination of the substance of the Decision, they are irrelevant in the present context.

52 The same holds for the applicant's assertion that the Commission did not correctly assess the LE report or the evidence produced by the applicant in order to show that its costs increased in line with the prices which it charged.

53 As regards the applicant's assertion that the Decision wrongly implied that it had deliberately concealed evidence in order to frustrate the investigation, it suffices to find that there is no such implication in the Decision. As the Commission has rightly stated, the point in the Decision to which the applicant refers concerns only the measures taken by the participants in the cartel designed to conceal its existence. The Commission's assessment of that aspect is explained in detail in the Decision (see, in particular, point 73 thereof).

54 Finally, the applicant did not submit any evidence during the administrative procedure before the Commission to show that Unilever plc was involved in the cartel as former parent company of TBM. In those circumstances, the fact that the Commission did not examine in the Decision whether that decision might be addressed to Unilever plc in order to make it answerable for part of the infringement committed by TBM cannot constitute a defect in reasoning.

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

The plea grounded upon infringement of the rights of the defence

Arguments of the parties

56 The applicant contends that the grounds of the Decision refer to evidence which was not set out in the statement of objections and thus infringes its rights of defence.

57 That is the case in regard to many of the assertions concerning the alleged 'price before tonnage' policy, the fact that the Commission considers the Fides information exchange in itself to infringe Article 85 of the Treaty and the fact that the Commission considers the 1987 price increase in the United Kingdom to have been the result of collusion.

58 Furthermore, although in the statement of objections the Commission accepted that supply and demand were in balance for at least three or four years prior to 1991, the Decision contains less favourable findings, in particular in that it states several times that downtime was taken in 1990 (see, for example, point 134).

59 Lastly, information relating to the October 1988 price increases by Iggesunds Bruk in the Netherlands and by Feldmühle (of the Stora group) in Belgium and data relating to an October 1989 price increase by Enso-Gutzeit in Italy were included in the tables annexed to the Decision, but had not been included in those annexed to the statement of objections.

60 The Commission maintains that the statement of objections contained all the evidence relating to the 'price before tonnage' policy. Likewise, the statement of objections showed that the 1987 price increase in the United Kingdom was the result of collusion (pages 68 and 69 and the annex concerning the fixing of prices referred to therein).

61 It observes that the initial statement of objections concerned only the Fides system, which was linked to the operation of the cartel as a whole. It was not therefore necessary to make any findings in regard to the unlawfulness of the system in itself. However, the addendum to the statement of objections explained that the system implemented after July 1991 continued to infringe Article 85 of the Treaty.

62 Lastly, there is no inconsistency between the information relating to supply and demand in the statement of objections and that in the Decision.

Findings of the Court

63 It is settled law that the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (see, *inter alia*, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42).

64 In this case, the Court must reject the applicant's argument that a large part of assertions relating to the alleged 'price before tonnage' policy was not set out in the statement of objections. The applicant does not specify in what respect the assertions in the Decision differ from those in the statement of objections. Moreover, the Decision does not contain objections relating to the price before tonnage policy that were not brought to the attention of the applicant in the statement of objections.

65 Nor can the Court uphold the applicant's argument to the effect that in the statement of objections there was no allegation that the Fides information exchange system was in itself an infringement of Article 85(1) of the Treaty. It suffices to hold that, according to the Decision, that information exchange system infringed the Community competition rules only in that it supported the cartel found (Article 1, last indent, of the Decision, read in the light of point 134, third paragraph, of the Decision), even though the Commission considered that 'in fact, in many cases individual data were shown or could be worked out without much difficulty' (*ibidem*).

66 As regards the concerted price increase in the United Kingdom in January 1987, this allegation was made sufficiently clearly against certain undertakings, including the applicant, in the statement of objections.

67 That allegation is set out in particular on page 54 of the statement of objections:

'A handwritten note (appendix 44) in the desk diary of Mr Opladen of Feldmühle covering three pages from 15-17 January 1987 relates to an exchange of information on pricing, order backlog and downtime between Feldmühle and several other producers in the context of the price increase which was being introduced in the United Kingdom market in December 1986-January 1987 (c. f. Appendix 61,

found at [Mayr-Melnhof]'s UK sales agent "Recent Fides meeting included the representative of Weig, stating they thought 9% too high for the UK and were settling at 7%" ... etc.).'

68 Furthermore, the Commission states (page 69 of the statement of objections):

'Details of the concerted price initiatives in West Europe from 1987 to 1991 are set out in the Pricing Annex which is attached to these objections.

Details are also shown on the price initiative in the United Kingdom market in early 1987.'

69 In technical appendix A, to which the statement of objections expressly refers, the Commission sets out its detailed objections relating to the January 1987 price increase in the United Kingdom. It is stated unambiguously in particular (on page 4) that it 'is clear ... that this increase had been discussed and planned at the "President" level'.

70 It follows that the applicant could not have been unaware that the Commission was alleging that it had participated in a concerted price initiative in the United Kingdom in January 1987.

71 Furthermore, the applicant wrongly claims that the statement of objections does not show that downtime was taken in 1990.

72 In fact the statement of objections (page 85) states:

'Subsequently when in 1990 they were faced with a combination of increased capacity and reduced demand they were able to coordinate the taking of downtime by each producer and thereby avoid excess production and falling prices.'

73 Lastly, as regards the information on the price increases announced and implemented by some producers, the Commission does not contest the applicant's assertion that this information was not set out in the statement of objections or in the appendices thereto. The applicant was therefore unable to make known its views properly on those matters of fact. The Commission was not entitled to base its decision on information which had not been brought to the attention of the undertakings during the administrative procedure. In consequence, those matters of fact must be disregarded when considering the validity of the Decision.

74 However, that infringement of the applicant's right of defence is not in itself such as to affect the validity of the Decision as a whole, since it was not based solely on the information in question (see, to the same effect, Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 30).

75 This plea must therefore be rejected.

B — *The pleas grounded on the infringement of substantive rules*

The plea that the applicant was not the correct addressee of the Decision

Admissibility of the plea

76 The Commission questions the applicant's legal interest in submitting that the Decision should have been addressed to Iggesund Paperboard, when the applicant acknowledges that it will answer for that company's liability if a fine is ultimately imposed on it.

77 It suffices to observe in that regard that the applicant is one of the undertakings stated in Article 1 of the Decision to have participated in an infringement of Article 85(1) of the Treaty. On that basis, the applicant has a legal interest in disputing that finding, irrespective of any question of fines, because that finding is at the very least likely to affect its reputation.

78 The plea must therefore be declared admissible.

Substance

— Arguments of the parties

79 According to the applicant, the Decision was addressed to the parent company of a group of companies where more than one company had participated in the infringement or where there was specific evidence implicating the parent company in the infringement (point 143 of the Decision). However, neither of those criteria

is satisfied in its own case. In reality, only one undertaking in the MoDo group, Iggesund Paperboard, is accused of having participated in the infringement and the applicant itself did not participate in it.

80 In the present case, the Commission has not even applied the general criteria set out in the Decision. According to points 152 and 153 of the Decision, the Commission took the view, first, that there might be difficulties in collecting the fine if Iggesund Paperboard were the addressee of the Decision and, second, that Iggesund Paperboard was not really independent of the applicant. In applying those specific criteria in the applicant's case alone, the Commission infringed the principles of fairness, equal treatment, non-discrimination and protection of legitimate expectations.

81 Moreover, the specific criteria referred to in point 153 of the Decision do not justify the Commission's approach. First of all, it is incorrect to state that Iggesund Paperboard was not able to pay the fine. The Commission was also wrong to take the view that Iggesund Paperboard did not enjoy real independence in relation to the applicant. The mere fact that Iggesund Paperboard had no assets or employees did not preclude its being characterised as an undertaking for the purposes of Community law. The Commission itself conceded that Iggesund Paperboard, as an autonomous economic entity, fulfilled all the criteria in order to be considered as an undertaking. Iggesund Paperboard cannot therefore be regarded as a 'shell' company.

82 Where an undertaking has under its control all the assets necessary to manage its activities, it is not necessary that it should own those assets. That is confirmed by Commission Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 — IJsselcentrale (IJC) and Others, OJ 1991 L 28, p. 32). Nor does the fact that the parent company supplies some ancillary services, such as legal and accounting services, and charges the group companies for them preclude Iggesund Paperboard from being characterised as an undertaking.

83 Lastly, it has not been proved that the applicant was aware of the alleged unlawful acts and had *de facto* control over the activities of Iggesund Paperboard. Nor does the fact that the applicant could issue directions to Iggesund Paperboard or the fact that it had chosen the directors of that undertaking suffice to render the applicant liable for the conduct of the undertaking or to conclude that Iggesund Paperboard and the applicant are a single economic entity.

84 The Commission contends that an undertaking, within the meaning of competition law, may be defined as an economic unit consisting of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis (Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311).

85 Several companies in the same group, acting under the same management and control, may be considered to be part of the same undertaking. In that regard the Commission has a discretion in determining the level of such a structure to which it is most appropriate to address a decision. Consequently, even if it had been possible for the Commission to address the Decision to Iggesund Paperboard, that would not have meant that it was obliged to do so. Two of the applicant's subsidiary companies, Iggesund Paperboard (Workington) Ltd. and Iggesunds Bruk, were indeed involved in the cartel.

86 Lastly, the Commission rightly relied on the reasons set out in points 152 and 153 of the Decision, because Iggesund Paperboard has no assets or employees. It is therefore merely a 'shell company' with capital of only SKR 50 000.

— Findings of the Court

87 In prohibiting undertakings *inter alia* from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (*Shell* v *Commission*, cited above, paragraph 311).

88 In the present case the applicant and the various companies belonging to its paperboard division, a division which was formally managed by Iggesund Paperboard, must be regarded as consisting of a unitary organisation of personal, tangible and intangible elements which pursues, on a long-term basis, the aim *inter alia* of producing and selling cartonboard with a view to maximising profits, even, in some cases, to the detriment of the individual profits of its various components. In that organisation, each company plays a specific role (see, to the same effect, *Shell* v *Commission*, cited above, paragraph 312).

89 According to the Decision (see, in particular, the first paragraph of point 153), Iggesund Paperboard is a 'commission company' that is wholly owned by the applicant, its capital amounting to SKR 50 000.

90 The second paragraph of point 153 adds:

'Iggesund Paperboard AB neither owns the production facilities for cartonboard nor employs its labour force. The cartonboard assets formerly owned by Iggesunds Bruk AB remain owned by that company which is now a dormant company entirely owned by MoDo. All personnel in Sweden are employed by MoDo itself.'

91 The applicant has not disputed any of those statements.

92 Moreover, it is apparent from the applicant's replies to the Court's written questions that at the date when the infringement ended Iggesund Paperboard (Workington) Ltd, formerly TBM, still owned the cartonboard mill at Workington, United Kingdom; that it posted the turnover of that mill in its accounts; and that it still employed the staff at that mill. It is also clear that no turnover was posted in the annual accounts of Iggesund Paperboard and that, in particular, the turnover of the Iggesunds Bruk carton mill was posted in the applicant's annual accounts.

93 Lastly, according to the applicant's annual accounts for 1991, the business of the MoDo group was conducted through six 'commission companies', including Iggesund Paperboard, but the applicant supplied certain services, such as legal, data processing and accountancy services, for all the group companies.

94 In consequence, the Commission rightly states at the end of the second paragraph of point 153 of the Decision that 'it is therefore appropriate for the purposes of the present proceedings to address the decision to the MoDo group itself [represented by its parent company] rather than to a subsidiary which has no real independence, owns no assets and employs no staff', and it is unnecessary to consider whether the other reasons relied on in points 152 and 153 of the Decision may justify the Commission's choice to address the Decision to the applicant.

95 Contrary to the applicant's assertion that only Iggesund Paperboard participated in the infringement, Iggesund Paperboard (Workington) Ltd was also in the list of the members of the PG Paperboard, and employees of that company took part in JMC meetings. In addressing the Decision to the applicant, the Commission therefore acted in conformity with the criterion set out in point 143 of the Decision,

according to which that decision was to be addressed to the parent company of the group where more than one company in that group had participated in the infringement.

96 In the light of the foregoing considerations, the plea must be rejected.

The plea that the Commission has not proved the existence of collusion on volume control and limitation of production

97 This plea is in three parts. The first two parts will be considered together while the third part will be considered separately.

The first two parts of the plea: no proof of the existence of collusion aimed at freezing market shares and controlling supply

— Arguments of the parties

98 In the first part of the plea the applicant disputes the Commission's allegations regarding the existence of volume control measures. Those allegations are, in effect, based on Stora's statements. Those statements are not, however, corroborated by any evidence.

99 The applicant contends that demand continued to increase until May 1991 and that production capacity in the industry was fully utilised from 1987 until 1990. On

that basis, it disputes the assertion in the Decision that producers were increasingly forced to take downtime during 1990.

100 Furthermore, the note of 3 October 1988 (appendix 102 to the statement of objections) proves that there was no system of volume control at that date.

101 Lastly, the applicant disputes that the documents relating to meetings of the Paper Agents' Association ('PAA') can support the Commission's contention. It considers that they should not be taken into consideration.

102 In the second part of the plea it contests the Commission's allegations of the existence of collusion on the freezing of market shares. Several items of evidence show that Stora's statements, on which the Commission relied, are not reliable.

103 First, the description of the measures aimed at freezing market shares is incoherent. The Commission failed to take into account the fact that the producers could not agree on a freezing of market shares without contact with customers and without turning away orders. The Decision does not indicate the products to which the market shares related. It does not specify whether the forecast percentage growth rate for the following year was determined individually or centrally. However, those matters ought necessarily to have been at the heart of any understanding on freezing market shares. Lastly, the information provided by Stora is not coherent either. Stora stated (appendix 39 to the statement of objections) that discussions on that topic related to national groupings, whereas in its letter of 23 December 1992 (appendix 43 to the statement of objections) it is alleged that the agreement related to market shares by producer group.

104 Second, its national market shares changed significantly and its share of the continental European market increased considerably. Moreover, the Commission itself accepts that several of the larger producers were able to increase their market shares slightly.

105 Third, the Commission did not duly take into account the low price elasticity of cartonboard.

106 Fourth, an agreement to freeze market shares would necessarily have had to be accompanied by agreements on the taking of downtime and on the creation of new production capacity. However, several producers increased their production capacity during the period in question.

107 The Commission states that the Decision explains that the producers understood that in the long term it was not possible to control prices without at the same time controlling volumes in order to ensure a balance between supply and demand. On that basis, the producers considered it necessary to strengthen the cartel on prices with an agreement on volume control. Consequently, the fact that it was not necessary to put that system into practice during a particular period is irrelevant. Furthermore, there is evidence that measures to control supply had been taken by Iggesund when necessary (points 94 and 95 of the Decision). The Commission also observes that it found that the producers agreed to freeze market shares at existing levels but that this was not an absolute freeze (points 52 to 56 of the Decision).

108 As regards the reasons for which the volume control scheme was considered necessary, the Commission states that a substantial increase in volumes would have entailed a fall in prices. The applicant's argument based on low price elasticity does not therefore answer the Commission's argument.

109 The Commission states that the conclusions drawn in the Decision are based on sound evidence. It refers in that regard to Stora's statements and to the documents described in points 53 to 55 and 58 to 59 of the Decision.

110 It maintains that it never alleged that market shares remained constant (points 59 and 60 of the Decision).

— Findings of the Court

111 According to Article 1 of the Decision, the undertakings referred to in that article infringed Article 85(1) of the Treaty by participating, during the relevant period, in an agreement and concerted practice whereby the suppliers of cartonboard in the Community 'reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time' and 'increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the said concerted price rises'.

112 According to the Commission, those two types of collusion, dealt with in the Decision under the heading 'volume control', were initiated during the reference period by the participants in the PWG meetings. It is apparent from the third paragraph of point 37 of the Decision that the true purpose of the PWG, as described by Stora, 'included "discussions and concertation on markets, market shares, prices, price increases and capacity"'.

113 As to the PWG's role in relation to the collusion on market shares, the Decision (point 37, fifth paragraph) states as follows: 'In connection with the moves to

increase prices, the PWG held detailed discussions on the market shares in western Europe of the national groupings and of individual producer groups. As a result, certain "understandings" were reached between the participants as to their respective market shares, the object being to ensure that the concerted price initiatives were not jeopardised by excess of supply over demand. The large producer groups in effect agreed to maintain their market shares at the levels disclosed for each year by the annual production and sales figures and available in definitive form through Fides in March of the following year. Market share developments were analysed in each meeting of the PWG on the basis of the monthly Fides returns and if significant fluctuations emerged, explanations would be sought from the undertaking presumed responsible.'

114 According to point 52 of the Decision: 'The agreement reached in the PWG during 1987 included the "freezing" of the west European market shares of the major producers at existing levels, with no attempts to be made to win new customers or extend existing business through aggressive pricing'.

115 The first paragraph of point 56 states: 'The basic understanding between the major producers on maintaining their respective market shares continued throughout the period covered by this Decision'. According to point 57: '"Market share development" was analysed at each meeting of the PWG on the basis of provisional statistics'. Finally, the last paragraph of point 56 states: 'The undertakings which took part in these discussions on market shares were those represented in the PWG, namely Cascades, Finnboard, KNP (until 1988), [Mayr-Melnhof], MoDo, Sarrió, the two Stora group producers CBC and Feldmühle, and (from 1988) Weig'.

116 The Court therefore considers that the Commission correctly established the existence of collusion on market shares between the participants in the meetings of the PWG.

117 The Commission's analysis is in essence based on Stora's statements (appendices 39 and 43 to the statement of objections) and is confirmed by appendix 73 to the statement of objections.

118 In appendix 39 to the statement of objections, Stora states: 'The PWG met from 1986 to assist in the introduction of discipline in the market. ... Among other (legitimate) activities, its purpose included discussion and concertation on markets, market shares, prices, price increases, demand and capacity. Its role included assessing and explaining to the President Conference the precise state of supply and demand on the market and the measures to be taken to attempt to bring order to the market.'

119 As regards more specifically the collusion on market shares, Stora indicates that 'the shares taken by national groups of EC, EFTA and other countries supplied by members of the PG Paperboard were considered in the PWG' and that the PWG 'discussed the possibility of holding market shares at the previous year's level' (appendix 39 to the statement of objections, point 19). It also states (same document, point 6) that '[d]iscussions about producers' European market shares also took place during this period, the first reference period being 1987 levels'.

120 In a reply to a request by the Commission of 23 December 1991, sent on 14 February 1992 (appendix 43 to the statement of objections), Stora also states: 'The understandings on market share levels reached by the PWG members related to Europe as a whole. The understandings were based on the previous total year figures, usually definitively available by the following March' (point 1.1).

121 That assertion is confirmed in the same document as follows: '... the discussions led to understandings usually in March of each year between members of the

PWG to maintain their market shares at the previous year's level' (point 1.4). Stora reveals that 'no measures were taken to ensure respect for the understandings' and that the participants in the meetings of the PWG 'were aware that if they took exceptional positions in certain markets supplied by others, those others could retaliate in other markets' (*ibidem*).

122 Lastly, it states that the applicant ('Iggesund') took part in the discussions concerning market shares (point 1.2, p. 3).

123 Stora's assertions concerning collusion on market shares are supported by appendix 73 to the statement of objections. That document, found at FS-Karton (of the Mayr-Melnhof group), is a confidential note dated 28 December 1988 sent by the marketing director of the Mayr-Melnhof Group in Germany (Mr Katzner) to the General Manager of Mayr-Melnhof in Austria (Mr Gröller) concerning the market situation.

124 According to that document, cited in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided on in 1987 had produced 'winners' and 'losers'. The author of the note considers Mayr-Melnhof to be amongst the losers for various reasons, including the following:

'(2) An agreement could only be reached by our being "punished" — we were asked to make "sacrifices".

(3) Market shares had to be "frozen" at 1987 levels, existing contacts maintained and no new activities or grades obtained via pricing (the result will be apparent in January 1989 — if all are honest).'

125 Those sentences must be read in the more general context of the note.

126 In that regard, the author of the note refers by way of introduction to the closer cooperation within the 'Presidents' grouping'. That expression was interpreted by Mayr-Melnhof as a general reference to both the PWG and the PC, that is to say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a). It is unnecessary to consider that interpretation in the present context.

127 The author goes on to indicate that this cooperation had led to 'price discipline' which had produced 'winners' and 'losers'.

128 It is necessary, therefore, to understand the phrase relating to the market shares which were to be frozen at 1987 levels against the background of that discipline decided upon by the 'Presidents' grouping'.

129 Moreover, the reference to 1987 as reference year is consistent with Stora's second statement (appendix 39 to the statement of objections; see paragraph 119 above).

130 As to the role played by the PWG in the collusion on the control of supply, which was a feature of the consideration of machine downtime, the Decision states that the PWG played a decisive role in implementing downtime when, from 1990, production capacity increased and demand fell: 'From the beginning of 1990 ... the industry leaders ... considered it necessary to concert on the need for taking downtime in the forum of the PWG. The major producers recognised that they could not increase demand by lowering prices and that maintaining full production would simply bring prices down. In theory, the amount of downtime required to

bring supply and demand back into balance could be calculated from the capacity reports' (point 70 of the Decision).

131 It is also observed: 'However, the PWG did not formally allocate the "downtime" to be taken by each producer. According to Stora, there were practical difficulties in reaching a coordinated plan on downtime to cover all the producers. Stora says that for these reasons only "a loose system of encouragement existed"' (point 71 of the Decision).

132 The Court finds that the Commission adequately established the existence of collusion on downtime between the participants in the meetings of the PWG.

133 The documents it produces support its analysis.

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

135 In point 25 of its statement, Stora adds: 'In 1988 and 1989 the industry was able to run at near full capacity. Downtime in addition to normal closure for repairs and holidays became necessary from 1990. ... Ultimately downtime had to be taken when the order flow ceased in order to maintain the price before tonnage policy.

The amount of downtime required to be taken by producers (to maintain the balance between production and consumption) could be calculated from the capacity reports. No formal allocation of downtime was made by the PWG, although a loose system of encouragement existed ...'

136 As to appendix 73 to the statement of objections, the reasons adduced by the author of the note in order to explain why he considered Mayr-Melnhof to be a 'loser' at the time when the note was written are significant evidence of the existence of collusion on downtime between the participants in the meetings of the PWG.

137 The author states:

'(4) It is at this point that there begins to be a difference in opinion between the parties involved as to what is desired.

...

(c) All sales representatives and European agents were released from their quantity budgets and a pricing policy followed which admitted of practically no exceptions (our employees often did not understand our changed attitude to the market — in the past they were just required to go for tonnage and now the sole objective is price discipline with the danger of having to stop machines).'

138 Mayr-Melnhof states (appendix 75 to the statement of objections) that the passage reproduced above refers to its own internal situation. However, when considered in the light of the more general background to the note, that passage reflects the implementation, at the level of sales personnel, of a rigorous policy adopted within the 'Presidents' grouping'. The document must therefore be construed as meaning that the participants in the 1987 agreement, that is to say, the participants in the meetings of the PWG at least, undoubtedly weighed up the consequences the agreed policy would have if it were to be applied rigorously.

139 On the basis of the foregoing, and without the need to consider appendix 102 to the statement of objections, 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 TBM/Iggesund Paperboard (Workington) Ltd/Iggesund Paperboard participated in the meetings of the PWG (see point 370 et seq. below) and the applicant is expressly referred to in Stora's statements, the Commission was entitled to hold the applicant liable for participation in those two types of collusion.

140 The applicant's criticism of Stora's statements, by which it disputes the probative value of those documents, does not weaken that finding.

141 It is not disputed that those statements are made by one of the undertakings regarded as having participated in the alleged infringement and that they contain a detailed description of the nature of the discussions held in the bodies of the PG Paperboard, of the objective pursued by the undertakings which met within it, and of the participation of those undertakings in the meetings of its various bodies. Since this central evidence is corroborated by other documents, it constitutes a sound basis for the Commission's assertions.

142 Nor can the Court accept the applicant's argument that the undertakings' actual conduct shows that the Commission's allegations are unfounded.

143 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.

144 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).

145 Third, two documents in the file confirm that the applicant implemented the price before tonnage policy agreed in the PWG.

146 Thus, according to the minutes of the PAA meeting on 23 January 1990, drawn up by a representative of Kopparfors (of the Stora group): '... Iggesund said that Thames had been having some production downtime which was their policy as opposed to lowering prices' (appendix 130 to the statement of objections).

147 To the same effect, the minutes of the PAA meeting of 4 April 1990, drawn up by a representative of Mayr-Melnhof Pegg, states as follows:

'*Thames Board* (Iggesund). 3 weeks lead time. UK demand lower than same period 1989. Downtime preferred to decreasing prices. April price increase full (*sic*) implemented' (appendix 131 to the statement of objections).

148 In the light of the foregoing, the first and second parts of the plea must be rejected.

The third part of the plea: error in assessing the significance of the Fides statistics

— Arguments of the parties

149 The applicant contends that the Commission did not correctly assess the significance of the Fides statistics. It exaggerated their importance and unlawful nature. Moreover, those statistics were not sufficiently detailed to allow a quota system to be monitored.

150 Although it is true that the statistics gathered by Fides were broken down country-by-country except in the case of the weekly order inflow reports, they did not enable the deliveries of each producer to be identified.

151 Furthermore, the applicant states that the Commission acknowledges that during the year the producers normally used provisional statistics (point 63 of the Decision). In fact, those statistics provided only general information on trends in demand. In those circumstances, the participants in the PWG meetings could hardly have relied on those statistics for rational analysis of market shares and capacity utilisation.

152 Moreover, contrary to the Commission's assertion, the state of the order backlog of each producer is not secret. The statistics supplied by Fides on the state of order backlogs therefore simply served to provide producers with a Europe-wide picture.

153 As regards statistics on capacities and capacity utilisation, those statistics were imprecise and merely for the purpose of observing dynamic trends in the industry and of comparing changes in the utilisation rates of each undertaking with changes in aggregate rates.

154 Lastly, the statistics concerned were not necessary in order to find that there was a balance between supply and demand, as that state of affairs was obvious for the whole industry.

155 According to the Commission, the applicant's arguments principally aim to show that the Fides information exchange system was not inherently contrary to Article 85(1) of the Treaty. As that system was used simply to reinforce and facilitate the implementation of an unlawful cartel, the discussion is purely academic.

— Findings of the Court

156 The third part of the plea must be understood to be a claim that the Commission's assessment of the significance of the Fides statistics was incorrect, those statistics being neither necessary nor useful for the purposes of the alleged cartel.

157 According to Article 1 of the Decision, the undertakings referred to in that article infringed Article 85(1) of the Treaty by participating in an agreement and concerted practice whereby the undertakings, *inter alia*, 'exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures', that is to say, collusion on prices, market shares and downtime.

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

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

— monitoring market share development,

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

— deciding whether concerted price increases could be introduced,

— determining the necessary downtime'.

160 Moreover, it is apparent from the Decision that the Fides statistics were analysed and discussed in the PWG. The first paragraph of point 57, which also refers to point 63 of the Decision, states: '"Market share development" was analysed at each meeting of the PWG on the basis of provisional statistics'. In addition, the first paragraph of point 69 states: 'A comparison could be made of the weekly order backlog and the available capacity, in the light of which the PWG reached an assessment of the overall state of demand in the cartonboard industry'.

161 The Court finds that those allegations by the Commission are proved.

162 First, the applicant does not dispute the fact that the Fides statistics were discussed in the PWG.

163 Second, the Commission rightly considered that the Fides statistics were used in that body, first, for the purpose of 'monitoring market share development' (point 134, third paragraph, first indent) and, second, of 'monitoring conditions of supply and demand so as to maintain full capacity utilisation' and 'determining the necessary downtime' (point 134, third paragraph, second and fourth indents).

164 As regards the use of the Fides statistics in order to 'monitor market share development', Stora acknowledged that 'if it appeared from analysis of the statistics that the level of sales by national groupings was moving too much, members of the PWG ... would encourage each other and take it upon themselves to limit fluctuations in national markets' (appendix 39 to the statement of objections, point 19).

165 Likewise, according to appendix 43 to the statement of objections (point 1.1):

'Fluctuations in supply to national markets were examined and discussed at each PWG (ie every two to three months) on the basis of the Fides quick statistics ... These were produced on a monthly basis with a total per calendar year and not on a running year total basis. Fluctuations that appeared in the statistics would not necessarily accurately reflect the final end year position and could not be relied on with any great certainty. It did not make sense for the major producers represented in the PWG to discuss market shares on a national basis in detail since producers were not able to determine the end destination of their deliveries.

...

The understandings on market share levels reached by the PWG members related to Europe as a whole. The understandings were based on the previous total year figures, usually definitively available by the following March.'

166 As regards the use of the Fides statistics for the purpose of 'monitoring conditions of supply and demand so as to maintain full capacity utilisation', reference should be made to Stora's statement (appendix 39 to the statement of objections, point 5):

'Linked with the pricing initiative from 1987, was the need to maintain a near balance between production and consumption (price before tonnage policy). In 1988 and 1989, producers were operating at full or near full capacity. In 1990, as a result of a combination of increased capacity and a reduced growth in demand, down-

time began to be taken by producers in order to maintain the balance between production and consumption. ... The producers could work out from the annual capacity reports the amount of downtime necessary and encouraged each other to take downtime sufficient to maintain the balance between production and demand ... [N]ot all manufacturers took downtime in this way with the result that some, usually the larger, producers suffered proportionately greater tonnage losses in an effort to maintain price levels' (to the same effect, *ibidem*, point 25).

167 Stora's statements are indirectly confirmed by appendices 73 and 75 to the statement of objections. It is apparent from appendix 73 (see point 123 et seq. above) that the marketing director for the Mayr-Melnhof/FS-Karton group in Germany (Mr Katzner) suggested to the general manager of Mayr-Melnhof in Austria that the Fides information exchange system then in operation should be amended (page 5, subparagraph 5, under the heading 'Kontrolle'). According to appendix 75 (page 11), Mayr-Melnhof's reply to a request for information: 'The Fides rules were subsequently amended, broadly along the lines of the proposals' set out in appendix 73 (see also point 63, second paragraph, of the Decision). In view of the general tenor of appendix 73, Mr Katzner's request for an amendment to the Fides information exchange system must be understood in the sense that this system did not allow adequate control of changes in market shares and/or examination of downtime and that accordingly it should be improved in order to ensure better control.

168 In the light of that evidence, and having regard to the fact that the Commission rightly considered that the applicant participated in collusion on downtime and on market shares in the PWG, the third part of the plea must be rejected.

169 The whole of the plea must therefore be rejected.

The plea that the duration of the cartel was incorrectly assessed

Arguments of the parties

170 The applicant submits that even on the basis of the allegations made in the Decision there was no infringement prior to 1988. If Stora's statements are left out of account, there is no evidence to show that the creation of the PWG in itself constituted an infringement. Moreover, the evidence does not show that the PWG was created before 10 November 1986.

171 Moreover, neither the statement of objections nor the Decision show that the January 1987 price initiative in the United Kingdom was an infringement.

172 The Commission maintains that the infringement began in mid-1986 and that this date must be adopted for the purpose of calculating the fines. That is the approximate time when the PG Paperboard was reorganised and when discussions on prices and quantities began. In that regard, it was entitled to rely on Stora's statements.

Findings of the Court

173 According to the second paragraph of point 161 of the Decision, the majority of the undertakings to which the Decision was addressed participated in the infringement from June 1986 onward, that being the date 'when the PWG was set up and the collusion between the producers intensified and started to be more effective'.

174 As regards the date on which the PWG was set up, Stora has stated (appendix 39 to the statement of objections, point 8): 'The PWG met from 1986 ...'.

175 On that basis, and in the absence of evidence showing the precise date on which that body was set up, the Commission was entitled to take the view that the PWG was set up around mid-1986 and that it met regularly from that date onward. The Court points out in that context that the applicant participated in the PWG meetings right from the creation of that body (see point 370 et seq. below). In those circumstances, the applicant cannot, without evidence to support its claim that the PWG was set up at a later date, validly dispute the Commission's assessment of the date on which the PWG was set up.

176 The Commission correctly concluded that the applicant, being an undertaking which participated in the PWG meetings right from the creation of that body in about mid-1986, must be held liable for collusion on prices with effect from that date.

177 The PWG was set up by certain undertakings, including the applicant, for an essentially anti-competitive purpose. As Stora stated (appendix 39 to the statement of objections, point 8), it 'met from 1986 to assist in the introduction of discipline to the market' and its purpose included 'discussion and concertation on markets, market shares, prices, price increases and capacity' (appendix 35 to the statement of objections, point 5(iii)).

178 The role played by the undertakings meeting in that body in regard to collusion on market shares and on downtime has been described in the previous plea (see paragraphs 113 to 139 above). The undertakings which met in that body also discussed price initiatives. According to Stora (appendix 39 to the statement of objections, point 10), '[f]rom 1987 the PWG reached an agreement and took broad decisions

on both the timing ... and level of price increases to be introduced by cartonboard producers'.

179 Consequently, the fact that they had agreed to set up and participate in meetings of a body whose anti-competitive object, in particular the discussion of future price increases, was known to and accepted by the undertakings which originally established it, constitutes a sufficient ground for considering that the applicant is liable for collusion on prices with effect from mid-1986.

180 This plea must therefore be rejected.

The plea that the Commission committed an error of assessment in considering that SBS cartonboard was the subject of the infringement and formed part of the same market as GC and GD cartonboard and that there are defects in reasoning and procedural defects in that regard

181 This plea is in three parts. Each part will be considered separately.

First part: infringement of the rights of the defence

182 The applicant submits that it was unable to exercise its rights of defence during the administrative procedure, because the statement of objections did not refer to the existence of an infringement relating to SBS cartonboard. That product was mentioned only once, in brackets, in relation to one price increase.

183 The Court finds that there is no basis for that submission.

184 It is apparent from the statement of objections (pages 3 and 4) that three main grades of cartonboard manufactured in western Europe, including SBS cartonboard, are covered by the definition of 'cartonboard' and are the subject of the proceeding.

185 Moreover, all the evidence on which the Commission relies in the Decision in order to demonstrate that SBS cartonboard was the subject of the infringement is referred to in the statement of objections or in the individual particulars annexed thereto which were addressed to the applicant (see, in particular, appendices 111, 113 and 117 to the statement of objections).

186 Lastly, each of the pricing annexes to the statement of objections contain, in regard to each alleged concerted price initiative, information on the price increases of SBS cartonboard.

187 The statement of objections therefore clearly showed that SBS cartonboard was the subject of the procedure.

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

Second part: Commission's error of assessment in that it considered that SBS cartonboard was the subject of the infringement, and an inadequate statement of reasons in that regard

— Arguments of the parties

189 The applicant contends that the Decision and the evidence referred to in it do not prove that SBS cartonboard was the subject of the infringement. It also submits that the Decision does not contain adequate explanations to support the Commission's allegations.

190 First of all, Stora's statements do not mention SBS cartonboard.

191 Moreover, none of the allegations relating to the volume control measures concern SBS cartonboard. The allegation that an agreement was made in the PWG to observe 1987 market shares relates to a period in which no producer of SBS cartonboard was represented in that body.

192 The handwritten notes obtained at Rena concerning a JMC meeting on 6 September 1989 (appendix 117 to the statement of objections) are not relevant, because Iggesund Paperboard did not take part in that meeting and the note refers to a price increase which took place more than one month before the meeting.

193 Nor do the tables relating to price increases annexed to the Decision demonstrate the existence of collusion in regard to SBS cartonboard. Comparisons between the price increases announced by the applicant and those announced by Enso-Gutzeit, the other producer of SBS cartonboard to which the Decision was addressed, and between those price increase announcements and increases for GC and GD cartonboard confirm that there was no collusion in regard to SBS cartonboard.

194 The Decision's statement of reasons relating to SBS cartonboard is also defective because, contrary to what is indicated in point 4 thereof, the term 'GC grades' does not cover SBS cartonboard.

195 Furthermore, the statement in the Decision that the price initiatives 'involved increases in all national markets ..., with SBS usually (but not always) going up in line with GC grades' (point 20, second paragraph) is the only passage in the

Decision, apart from the summary of the infringement and some unclear statements in points 86 and 97 of the Decision, in which it is stated that the price initiatives concerned SBS cartonboard.

196 Contrary to the assertion made in point 4 of the Decision, SBS cartonboard is not covered by the terms 'GC' or 'FBB'. Part of Iggesund Paperboard's production of SBS cartonboard is not even covered by the definition of the product concerned by the activities of the PG Paperboard, that is to say, according to point 28 of the Decision, cartonboard 'of 200 g/m^2 and more'.

197 Furthermore, the information given in the Decision concerning producers, purchasers and production volumes of SBS cartonboard is incorrect. There are European producers of SBS cartonboard other than Enso-Gutzeit and the applicant, and Enso-Gutzeit's production of SBS cartonboard was over-estimated.

198 The Commission submits that there is ample proof that the collusion related to SBS cartonboard, in particular in regard to some of the price increase initiatives. SBS cartonboard is produced by a small number of manufacturers and in much smaller quantities than the other cartonboard grades. That may explain the fact that it figured less in discussions at meetings of the PG Paperboard and that there is less documentary evidence concerning it.

199 SBS cartonboard was covered by a large part of the Fides information exchange system (appendix 5 to the statement of objections) and by the market studies made by the director general of Finnboard (the 'Kosk' studies, appendices 56 and 95 to the statement of objections). The Commission also refers to appendices 111, 113 and 117 to the statement of objections, which set out all the price increases for SBS cartonboard (or GZ board, an alternative designation of SBS cartonboard).

200 As regards the tables relating to the various price increase initiatives annexed to the Decision, some addressees of the Decision did not provide complete price documentation (see point 118 of the Decision). In particular the undertakings' replies, and especially those of the applicant's subsidiaries, to requests for information were incomplete as regards the price increases.

201 In any event, the documentation on price increase announcements shows that for each of the initiatives the producers had agreed to increase prices on all the national markets.

— Findings of the Court

202 It is apparent from the Decision that the Commission's claim that there was price collusion concerning SBS cartonboard is founded in particular on appendix 111 to the statement of objections (point 80 of the Decision), a price list in Swedish obtained at Rena, which contains information relating to price increases in nine Community countries for GC cartonboard (GC 1 and GC 2 grades) and SBS cartonboard (referred to as 'GZ', see point 4 of the Decision) implemented in September/October 1989. It is common ground that, in so far as information is available relating to that price increase, the particulars in the price list as to the level and date of price increases for SBS cartonboard are in conformity with the price increases actually implemented by the applicant.

203 At the hearing the applicant submitted that because the price list is undated, it does not have the probative value which the Commission attributes to it.

204 That submission must be understood in the sense that, in the applicant's view, it has not been proved that the information in the list relates to future price increase announcements.

205 However, the probative value of appendix 111 must be assessed in the light of the other documentary proof of collusion on prices. As the Commission explains in the Decision (points 79, 80 and 83), it obtained two other price lists drawn up in the same format and also in Swedish, namely a price list obtained at Finnboard (UK) Ltd (hereinafter 'the Finnboard list'), and also appendix 110 to the statement of objections (obtained at Rena), which relate to the price increases implemented in April 1989 and April 1990 respectively.

206 In view of the striking similarities in the form of those three price lists, the Court finds that they have a common origin. Moreover, appendix 110 is dated 3 December 1989, a date prior to the price announcements to which it refers. As a result, the Commission was justified in inferring that the two other undated price lists had to be regarded as having been drawn up prior to the dates of the actual price increase announcements to which those lists refer. Lastly, the Court observes that Rena and Finnboard produce only GC cartonboard, whereas the three price lists refer to several other types of cartonboard.

207 On that basis, the Commission rightly considered that those three price lists, when taken in conjunction with the other evidence, constituted weighty evidence of price collusion in the bodies of the PG Paperboard, given that the applicant did not dispute such collusion except with regard to SBS cartonboard. Moreover, as the applicant is the only producer of SBS cartonboard which participated in the meetings of the PWG and of the JMC, the principal bodies of the cartel, the Court finds that the information on price increases of SBS cartonboard in appendix 111 to the statement of objections demonstrates its participation in collusion on prices in regard to both GC cartonboard and SBS cartonboard.

208 That finding is corroborated by appendix 113 to the statement of objections, a note dated 11 January 1990 obtained at FS-Karton, which, according to the Commission, relates to a JMC meeting (point 84 of the Decision). That document contains information on the dates of the price increase announcements for the GC and GD cartonboard of various producers (Kopparfors (of the Stora group), Mayr-Melnhof, Finnboard and Cascades). As regards the applicant, the note states as follows: 'Thames: 10 Tg Igges. 15/20 Tg' ('Tg' for 'Tage' indicates the number of days of order backlog) and 'Th/Ig KW5 GC/GZ +13, -' ('KW5' for 'Kalenderwoche 5' indicates that the price increase will have to be announced in the course of the fifth calendar week of the year).

209 Consistently with what is stated in that note, the applicant announced a price increase for its GC and SBS cartonboard of DM 13 per 100 kg on 31 January 1990 (documents F-12-5 and F-12-6).

210 The Commission therefore correctly considered that that document was proof of price collusion in regard to GC, GD and SBS cartonboard.

211 That conclusion is not undermined by the argument which the applicant made at the hearing, namely that it has not been proved that appendix 113 to the statement of objections related to a JMC meeting. The Court points out, first, that all the producers referred to in that document participated in the meetings of the PWG and of the JMC and, second, that there is no dispute that collusion on prices took place at meetings of those two bodies. In consequence, even if the Commission had not proved that appendix 113 to the statement of objections related to a JMC meeting, that document proves collusion on prices either in that body or in the PWG.

212 In the light of the foregoing, the Court considers that it has been proved that the applicant participated in price collusion in regard to SBS cartonboard and it is not necessary to consider the other evidence upon which the Commission relies.

213 It follows that the Commission has proved that the applicant, being an undertaking which attended meetings of the PWG from the date when that body was set up, participated in collusion on cartonboard prices from mid-1986 and in collusion on market shares and on downtime from the end of 1987.

214 Admittedly, as regards the latter two types of collusion, the Court has not examined which grades of cartonboard were involved. However, as the purpose of the two types of collusion was to ensure the success of the price initiatives and the applicant does not dispute that this was their purpose, it must be held that it participated in those two aspects of collusion also in regard to its production of SBS cartonboard, which was the subject of the collusion on prices.

215 Finally, in as much as the applicant submits that the reasoning of the Decision is inadequate and/or contains errors concerning SBS cartonboard, the Court finds that the Decision clearly states that the infringement found related to SBS cartonboard and clearly sets out the evidence on which that conclusion is based (see, in particular, points 3, 4, 80, 81, 85 and 97, and the tables on the price initiatives annexed to the Decision). Furthermore, it is clear from the first and second paragraphs of point 28 of the Decision that, although the activity of the PG Paperboard was officially defined as relating to cartonboard 'of 200 g/m^2 and more', this was not an absolute threshold.

216 On the basis of the foregoing considerations, the second part of the plea must also be rejected.

Third part: Commission's error of assessment in that it considered that SBS cartonboard was part of the same market as GC and GD cartonboard

— Arguments of the parties

217 The applicant argues that SBS cartonboard is not part of the same product market as GC and GD cartonboard.

218 In the present case, it is necessary to define the relevant product market, because of the inferences made by the Commission in regard to the gravity of the infringement and its success on the market. Without a definition of the market, it is not possible to reach the conclusion in point 168 of the Decision that the cartel was largely successful in achieving its objectives. A definition of the market is all the more necessary as SBS cartonboard differs considerably from GC and GD cartonboard.

219 Moreover, according to points 168 and 169 of the Decision, when calculating the fines the Commission took into account the fact that the producers accounted for 'virtually the whole of the market' and the importance of the undertakings in 'the industry'. No such assertions can be made, because the Commission denies that a definition of the market is relevant.

220 Nor were the characteristics of SBS cartonboard correctly assessed in points 3 and 4 of the Decision. SBS cartonboard is used principally for graphical purposes and not, as indicated in points 3 and 4 of the Decision, for packaging. There is a very limited use for the packaging of luxury items.

221 In view of their very different uses, SBS cartonboard does not compete with GC cartonboard. That is confirmed by the relationship between the prices of the different types of cartonboard, the prices of SBS cartonboard being considerably higher than those of GC and GD cartonboard.

222 Lastly, it is incorrect to include SBS cartonboard but at the same time to exclude products which are much more comparable to GC and GD cartonboard, such as greyboard and the cartonboard used for drinks packaging.

223 The Commission submits that there is no need for a definition of the product market in a case such as this, and that what is important is what the producers actually did. A definition of the relevant product market is not necessary in order to find that SBS cartonboard was the subject of the cartel. The Decision took account of the specific circumstances of the relevant market in other respects.

224 Lastly, it has no evidence of collusion in regard to greyboard. In those circumstances, the applicant's argument that greyboard is more comparable to GC and GD cartonboard than SBS cartonboard is irrelevant.

— Findings of the Court

225 Article 85(1) of the Treaty prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition with the common market ...'.

226 In the present case, the Commission has proved that the applicant participated from mid-1986 in collusion on prices and, from the end of 1987, in collusion on market shares and on downtime, that is to say, the three constituent elements of the infringement found in Article 1 of the Decision. As the Court has already held (see paragraphs 202 to 215 above), the Commission has proved that those three types of collusion concerned the three types of cartonboard defined in point 4 of the Decision, namely, GC, GD and SBS cartonboard.

227 Furthermore, the Commission concluded, and the applicant has not disputed, that the object of the abovementioned collusion was to restrict competition within the common market and that the collusion had affected trade between Member States (points 113 to 138 of the Decision).

228 In those circumstances the Commission could justifiably find that there was an infringement of Article 85(1) of the Treaty in regard to GC, GD and SBS cartonboard without first having defined the relevant product market (see, to the same effect, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342, and Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 74).

229 Finally, as the Commission did not have any evidence of an infringement in regard to greyboard, it correctly took the view that the infringement had not involved that product.

230 The third part of the plea cannot therefore be upheld.

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

The application for annulment of Article 2 of the Decision

Arguments of the parties

232 The applicant argues that, in issuing the direction in Article 2 of the Decision, the Commission abused the powers conferred on it by Article 3 of Regulation No 17. Article 2 prohibits a very broad category of conduct for the future. Such a prohibition goes beyond what is necessary to bring the conduct in question into line with what is lawful. In particular, that article deprives it of the possibility of requesting and obtaining an exemption or negative clearance for a future information exchange system.

233 The exchange of information in aggregated form on production, sales, order backlog, order entries, production capacity and its utilisation were wrongly characterised as infringements of Article 85. The Commission should have taken the view that the addressees of the Decision had put an end to the infringement. They should therefore be able to exchange information as if they had not been held to have committed an infringement.

234 Furthermore, the Commission committed an error of law and infringed the rights of CEPI-Cartonboard and of the applicant by adopting the Decision without expressing a view on the compatibility with Article 85 of the system noted by CEPI-Cartonboard.

235 Lastly, Article 2 of the Decision is too imprecise, because any form of statistical exchange, even in aggregated form, might be used to implement unlawful agreements. Moreover, the prohibition of any exchange 'of competitive significance' in fact covers any information.

236 The Commission states that in its judgments in the Polypropylene cases (in particular Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867) and in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, the Court upheld two directions similar to that in Article 2 of the Decision.

237 The scope of the directions made under Article 3 of Regulation No 17 must be determined by the unlawful conduct found to have been committed and the Commission must be in a position to forbid future conduct identical to that found in the Decision. The Commission considers that when it assesses how information might be used, it may also take account of the undertakings' past conduct. In that context, it sets out the findings it made in the Decision as regards the Fides information exchange system (points 61 to 71 and 134 of the Decision) and those concerning the first CEPI-Cartonboard information exchange system (points 105, 106 and 166 of the Decision).

238 A prohibition such as that in Article 2 of the Decision must necessarily be expressed in general terms, because it covers a range of future conduct. However, that does not mean that any exchange of information is prohibited or that there is no possibility of granting an exemption or negative clearance for a system notified to the Commission.

Findings of the Court

239 It will be recalled that Article 2 of the Decision provides as follows:

'The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall henceforth refrain in relation to their cartonboard activities from any agreement or concerted practice

which may have the same or a similar object or effect, including any exchange of commercial information:

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

(b) by which, even if no individual information is disclosed, a common industry response to economic conditions as regards price or the control of production is promoted, facilitated or encouraged;

or

(c) by which they might be able to monitor adherence to or compliance with any express or tacit agreement regarding prices or market sharing in the Community.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude not only any information from which the behaviour of individual producers can be identified but also any data concerning the present state of the order inflow and backlog, the forecast utilisation rate of production capacity (in both cases, even if aggregated) or the production capacity of each machine.

Any such exchange system shall be limited to the collection and dissemination in aggregated form of production and sales statistics which cannot be used to promote or facilitate common industry behaviour.

The undertakings are also required to abstain from any exchange of information of competitive significance in addition to such permitted exchange and from any meetings or other contact in order to discuss the significance of the information exchanged or the possible or likely reaction of the industry or of individual producers to that information.

A period of three months from the date of the communication of this Decision shall be allowed for the necessary modifications to be made to any system of information exchange.'

240 As is apparent from point 165 of the Decision, Article 2 was adopted in accordance with Article 3(1) of Regulation No 17. By virtue of that provision, where the Commission finds that there is an infringement, *inter alia*, of Article 85 of the Treaty, it may require the undertakings concerned to bring the infringement to an end.

241 It is settled law that Article 3(1) of Regulation No 17 may be applied so as to include an order directed at bringing an end to certain acts, practices or situations which have been found to be unlawful (Joined Cases 6/73 and 7/73 *Istituto Chemicoterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45, Case C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 90), and also at prohibiting the adoption of similar conduct in the future (*Tetra Pak* v *Commission*, cited above, paragraph 220).

242 Moreover, since Article 3(1) of Regulation No 17 is to be applied according to the nature of the infringement found, the Commission has the power to specify the extent of the obligations on the undertakings concerned in order to bring an infringement to an end. Such obligations on the part of the undertakings may not, however, exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the rules infringed (*RTE and ITP* v *Commission*, cited above, paragraph 93; to the same effect, see Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 209, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 163).

243 As regards, first, the applicant's argument that the Commission committed an error of law in adopting Article 2 of the Decision without having first expressed its view on the compatibility with Article 85 of the information exchange system notified by CEPI-Cartonboard, the Court observes that the notification made by that association on 6 December 1993 related to a new information exchange system, separate from that considered by the Commission in the Decision. When adopting Article 2 of the contested decision, the Commission could not therefore assess the legality of the new system in the context of that decision. When it adopted Article 2, it was therefore entitled simply to examine and express a view on the old information exchange system.

244 In the present case, in order to verify whether, as the applicant claims, the scope of the direction in Article 2 of the Decision is too wide, it is necessary to consider the extent of the various prohibitions it places on the undertakings.

245 The prohibition in the second sentence of the first paragraph of Article 2, requiring the undertakings to refrain in future from any agreement or concerted practice which may have an effect which is the same as, or similar to, those of the infringements found in Article 1 of the Decision, is aimed solely at preventing the undertakings from repeating the behaviour found to be unlawful. Consequently, in adopting such directions, the Commission has not exceeded the powers conferred on it by Article 3 of Regulation No 17.

246 The provisions of subparagraphs (a), (b) and (c) of the first paragraph of Article 2 are directed more specifically at prohibiting future exchange of commercial information.

247 The direction in subparagraph (a) of the first paragraph of Article 2, which prohibits any future exchange of commercial information by which the participants directly or indirectly obtain individual information on competitors, presupposes a finding by the Commission in the Decision that an information exchange of such a nature is unlawful under Article 85(1) of the Treaty.

248 It should be noted that Article 1 of the Decision does not state that the exchange of individual commercial information in itself constitutes an infringement of Article 85(1) of the Treaty.

249 It states more generally that the undertakings infringed that article of the Treaty by participating in an agreement and concerted practice whereby the undertakings, *inter alia*, 'exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures'.

250 However, since the operative part of a decision must be interpreted in the light of the statement of reasons for it (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, paragraph 122), it should be noted that the second paragraph of point 134 of the Decision states:

'The exchanging by producers of normally confidential and sensitive individual commercial information in meetings of the PG Paperboard (mainly the JMC) on

order backlog, machine closures and production rates was patently anti-competitive, being intended to ensure that the conditions for implementing agreed price initiatives were as propitious as possible. ...'

251 Consequently, as the Commission duly found in the Decision that the exchange of individual commercial information in itself constituted an infringement of Article 85(1) of the Treaty, the future prohibition of such an exchange of information satisfies the conditions for the application of Article 3(1) of Regulation No 17.

252 The prohibitions relating to the exchanges of commercial information referred to in subparagraphs (b) and (c) of the first paragraph of Article 2 of the Decision must be considered in the light of the second, third and fourth paragraphs of that article, which support what is expressed in those subparagraphs. It is in this context that it is necessary to determine whether, and if so to what extent, the Commission considered the exchanges in question to be illegal, since the extent of the obligations on the undertakings must be restricted to that which is necessary in order to bring their conduct into line with what is lawful under Article 85(1) of the Treaty.

253 The Decision must be interpreted as meaning that the Commission considered the Fides system to be contrary to Article 85(1) of the Treaty in that it underpinned the cartel (point 134, third paragraph, of the Decision). Such an interpretation is borne out by the wording of Article 1 of the Decision, from which it is apparent that the commercial information was exchanged between the undertakings 'in support of the ... measures' considered to be contrary to Article 85(1) of the Treaty.

254 The scope of the future prohibitions set out in subparagraphs (b) and (c) of the first paragraph of Article 2 of the Decision must be assessed in the light of that interpretation by the Commission of the compatibility, in the present case, of the Fides system with Article 85 of the Treaty.

255 In that regard, first, the prohibitions in question are not restricted to exchanges of individual commercial information, but relate also to certain aggregated statistical data (Article 2, first paragraph, (b), and second paragraph, of the Decision). Second, subparagraphs (b) and (c) of the first paragraph of Article 2 prohibit the exchange of certain statistical information in order to prevent the establishment of a possible support for future anti-competitive conduct.

256 Such a prohibition exceeds what is necessary in order to bring the conduct in question into line with what is lawful because it seeks to prevent the exchange of purely statistical information which is not in, or capable of being put into, the form of individual information on the ground that the information exchanged might be used for anti-competitive purposes. First, it is not apparent from the Decision that the Commission considered the exchange of statistical data to be in itself an infringement of Article 85(1) of the Treaty. Second, the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article 85(1) of the Treaty, since in such circumstances it is necessary to establish its actual anti-competitive effect.

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

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

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

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

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

A — *Infringement of the obligation to state reasons regarding the calculation of the fines*

Arguments of the parties

258 The applicant contends that the basis on which the fines were calculated should have been set out in the Decision.

259 The criteria set out in points 167 to 172 of the Decision do not contain an exhaustive statement of the grounds taken into consideration by the Commission for the purpose of fixing the amount of the fines. Although the Decision and the press release issued by the Commission do not contain any information in that regard, it is clear from the statements made at the press conference given by the Commissioner responsible for competition policy on 13 July 1994, the day on which the Decision was adopted, that the Commission applied a precise mathematical formula in order to determine the amount of the fines. The Commission is therefore wrong to assert that the information given at that press conference merely gave a 'broad notion' of the level of the fine. Where the Commission in fact applies such a mathematical formula, the addressees should be informed of it in the grounds of the Decision.

260 Moreover, the Decision contains no reasoning concerning the deterrent effect which, according to the Commission, justified the high amount of the fine.

261 Nor does it adequately demonstrate the link between the applicant's situation and the criteria adopted for the purpose of determining the amount of the fine.

262 Lastly, the Commission's failure to explain the basis for its calculation of the fines impaired the applicant's ability to defend itself.

263 The Commission submits that points 167 to 172 of the Decision contain an exhaustive and appropriate description of the criteria used to calculate the fines. Similar criteria were approved by the Court of First Instance in the *Polypropylene* cases (see in particular *Rhône-Poulenc* v *Commission*, cited above).

264 The Commission is not required to state the exact percentage of turnover which the fine represents. The disclosure of that figure would be undesirable, in particular because it might reveal confidential business information. Furthermore, although it chose the turnover of each undertaking as a reference point for calculating the fines, that does not mean that it used a precise mathematical formula. Moreover, the use of a mathematical formula might encourage undertakings to seek to calculate the risks associated with unlawful conduct.

265 As regards the deterrent effect of fines, that is one of their elementary functions and it is therefore unnecessary to point this out each time that a fine is imposed.

Findings of the Court

266 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, *Van Megen Sports* v *Commission*, cited above, paragraph 51).

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

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

269 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines, the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as 'ringleaders' of the cartel, whereas the other undertakings were regarded as 'ordinary members'. Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and Stora must be considerably

reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

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

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

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

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

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

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

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

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

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

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

280 Consequently, this plea cannot be upheld.

B — *Error in assessing the LE report*

Arguments of the parties

281 The applicant disputes that the cartel was 'largely successful in achieving its objectives' (point 168, seventh indent, of the Decision).

282 The only evidence which the Commission has in regard to the effects of the price increase announcements on transaction prices is the LE report, which took into account all the factors liable to influence transaction prices in a competitive market, such as demand characteristics and production costs. The LE report concluded that the transaction prices did not differ from those which would have resulted from the free play of competition.

283 Despite the information in the LE report and that regarding the transaction prices of GC cartonboard produced by Iggesund Paperboard supplied by the applicant in its reply to the statement of objections, the Commission focused on the price increase announcements, without taking into account factors which explained the increases in transaction prices.

284 Moreover, the Commission did not sufficiently take into account individual negotiations with customers, as a result of which transaction prices were considerably lower than list prices.

285 The Commission is wrong in asserting that the announced prices constituted a market reference price (see point 21 of the Decision). In the present case, although there were discussions concerning the announced price increases, there was no collusion on transaction prices; the announced prices were merely part of the negotiation procedure whereby individual prices were fixed. Moreover, it is misleading to state, as the Commission does, that list prices were increased by an overall 42%.

286 As the producers did not succeed in imposing prices higher than those which would have resulted from market forces, the cartel must be regarded as generally unsuccessful, since the Commission considered that the sole objective of the other alleged forms of collusion was to ensure the success of the price initiatives.

287 The applicant states that the Decision contains errors in its description of the increase in transaction prices (see point 21 of the Decision). Thus, net transaction prices in domestic currencies for GC and GD grades increased by 30%, not by 33%, during the period concerned and the figure of 19% given for actual average price increases in ecus is also too high (see graph 11 in the LE report).

288 Furthermore, although the real per unit revenue increased by about twice as much as production costs during the period concerned, the Decision fails to note that they were modest increases and that during the same period demand increased by 16%. In addition, the operating margin referred to in point 16 of the Decision is insufficient to ensure a reasonable return on investment (see LE report, section 5).

289 The Commission observes that it is not obliged to show that a cartel had an effect on the market. Nevertheless, in the present case the cartel did actually have such an effect.

290 The LE report confirms that net transaction prices increased by about a third between 1988 and 1991. It is fanciful to allege that the concerted efforts of all the cartonboard producers in western Europe did not contribute to that result. Moreover, the author of the LE report expressly acknowledged at the hearing before the Commission that the changes in transaction prices had closely followed the price increase announcements, which proves the success of the cartel in that regard.

291 The fact that the agreement concerned announced prices and that the transaction prices were determined on the basis of negotiations between the producers and their customers cannot affect the conclusion that the cartel had an effect on transaction prices. The announced price constituted a reference price for the whole market and it is irrelevant that the larger customers received discounts or other special conditions.

Findings of the Court

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

293 In order to review the Commission's appraisal of the effects of the infringement, the Court considers that it suffices to consider the appraisal of the effects of the collusion on prices. As the applicant itself emphasises, consideration of the effects of the collusion on prices makes it possible, in general terms, to assess the success of the cartel, because the purpose of collusion on downtime and on market shares was to ensure the success of the concerted price initiatives.

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

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

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

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

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

the oral hearing that this was the case for 1988 and 1989' (point 115, second paragraph, of the Decision).

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

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

301 However, that report only partially confirms, in temporal terms, the existence of a 'close linear relationship'. Examination of the period 1987 to 1991 reveals three distinct sub-periods. At the oral hearing before the Commission the author of the LE report summarised his conclusion as follows: 'There is no close relationship, even with a lag, between announced price increase and market prices in the early part of the period, in 1987 through 1988. There is such a relationship in 1988/1989, and then the relationship breaks down and behaves rather oddly over the period 1990/1991' (transcript of the oral hearing, p. 28). He also observed that those temporal variations were closely linked to variations in demand (see, in particular, transcript of the oral hearing, p. 20).

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

303 At the hearing the Commission stated that it had also taken into account a third type of effect of the price collusion, namely the fact that the level of transaction prices was higher than that which would have been achieved in the absence of any collusion. Pointing out that the dates and order of the price increase announcements had been planned by the PWG, the Commission takes the view in the Decision that 'it is inconceivable in such circumstances that the concerted price announcements had no effect upon actual price levels' (point 136, third paragraph, of the Decision). However, the LE report (section 3) drew up a model which enabled a forecast to be made of the price level resulting from objective market conditions. According to that report, the level of prices determined by objective economic factors in the period 1975 to 1991 would have evolved, with minor variations, in an identical manner to the level of transaction prices applied, including those during the period covered by the Decision.

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

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

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

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

308 Finally, the errors which, according to the applicant (see paragraphs 287 and 288 above), are to be found in the grounds of the Decision cannot affect the above conclusions, even if it were proven that such errors had been made. Consequently, there is no purpose in considering whether the applicant's arguments in that regard are well founded.

C — *Error in assessing the gravity of the infringement*

309 This plea is in two parts, each of which will be considered separately.

The first part: error of assessment of the form and objectives of the alleged cartel

Arguments of the parties

310 The applicant contends that the Commission wrongly took the view that the alleged cartel was the most serious on which it had had to impose penalties.

311 It disputes the assertion that the JMC's terms of reference included the fixing of equivalent prices for certain major customers (see point 44 of the Decision).

312 It also disputes that the object of price collusion was to achieve a system of equivalent prices in Europe. As Stora has stated, the reduction in price differences between the national markets was the result of market conditions.

313 Furthermore, contrary to the allegations made in the Decision, the main function of the PG Paperboard was not to organise the market. The PG Paperboard exercised many perfectly legitimate functions.

314 The Commission observes that it found that the cartel had not only put into operation a sophisticated system of concerted price increases but also incorporated an agreement on the freezing of market shares and on the control of production.

315 It states that the characteristics which the applicant claims were not found in the present case are misleading or peripheral. In any event, the alleged errors are insignificant or do not exist and are hardly of such a nature as to alter the assessment of the gravity of the infringement.

316 Lastly, the applicant's argument that there was no attempt to fix uniform prices in Europe is a pure assertion and contrary to the evidence.

Findings of the Court

317 The applicant's line of argument is unclear but must be understood as meaning that the infringement attributed to it is not as serious as the Commission claims, because some elements of that infringement have not been proved. It claims that this justifies a reduction in the amount of the fine.

318 The Commission rightly considered that the applicant had infringed Article 85(1) of the Treaty by participating from mid-1986 until at least April 1991 in an agreement and concerted practice originating in mid-1986 which consisted of several separate constituent elements. In that regard, the Commission found that the applicant had participated in collusion on prices, downtime and market shares.

319 It is apparent from the first indent of point 168 of the Decision that the Commission determined the general level of fines by taking into account, *inter alia*, the consideration that 'collusion on pricing and market sharing are by their very nature serious restrictions on competition'.

320 The Court finds that the applicant's arguments in support of this part of the plea are not such as to mitigate the gravity of the infringements already found and, in consequence, to justify a reduction in the fine. Those arguments are in any event unfounded.

321 First, the argument that the PG Paperboard exercised legitimate functions is irrelevant, because it has been found that constituent bodies of that trade association, particularly the PWG and the JMC, had an essentially anti-competitive purpose.

322 Second, the assertion that the object of the JMC did not include the fixing of equivalent prices for the major customers is refuted by Stora's statements (appendix 39 to the statement of objections, point 14). Furthermore, the applicant does not dispute that, as is asserted in the Decision (points 80 and 87), appendices 117 and 118 to the statement of objections relate to JMC meetings. Those two documents contain information regarding the prices to be applied to various categories of customers according to their size.

323 Lastly, since it does not dispute that the effect of the price increases agreed in the PG Paperboard was to reduce the initial differences between the prices applied on

the various national markets, the applicant cannot argue that the object of the collusion on prices was not to establish a system of equivalent prices in Europe.

324 Having regard to the foregoing, the first part of the plea must be rejected.

Second part: error of assessment as regards the existence of a single infringement

Arguments of the parties

325 The applicant disputes that all the elements to which objections have been raised can constitute one single infringement. Certain links have not been proved. Others have not been described in sufficiently clear terms in the statement of objections. Some others are illogical. Lastly, some allegations should have no effect on the fine imposed.

326 The allegations relating to SBS and to the 1987 price increase announcements in the United Kingdom should not have appeared in the Decision.

327 According to the Decision, national meetings whose object was to implement the price increases decided in the PG Paperboard took place regularly in Germany, France and the United Kingdom. However, the Decision contains no other evidence of the applicant's participation in the meetings in Germany or France, no link between the national meetings and the PG Paperboard is demonstrated and the evidence relating to the meetings of the PAA (see points 94 et seq. of the

Decision) and those of the Association of Cartonboard Manufacturers ('ACBM', see points 98 and 99 of the Decision) in the United Kingdom was misinterpreted. Moreover, the Decision is silent in regard to the meetings held in Scandinavia. The Commission's erroneous findings concerning the national meetings thus influenced the amount of the fine, because point 168 of the Decision stated that the existence of 'regular institutionalised meetings' was one of the factors taken into consideration in order to determine the general level of fines.

328 Furthermore, the Commission's claim that the meetings of the PAA and of the ACBM and the activities of the PG Paperboard were part of the same general infringement are the result of its application of the doctrine of 'common purpose' (see in particular *Shell* v *Commission*, cited above). However, that doctrine is applicable only in cases where some evidence is missing but the Commission's allegations are otherwise based on cogent evidence.

329 The Commission observes that the applicant seems merely to be contesting the existence of the necessary links between the various elements of the single infringement in regard to some national meetings in some countries. In reply to the applicant's arguments that the allegations relating to SBS and the 1987 United Kingdom price increase should not have been included in the Decision, the Commission refers to its arguments concerning the inclusion of SBS in the Decision and adds that the link between the abovementioned price increase and the PG Paperboard is shown by the note referred to in point 75 of the Decision (appendix 62 to the statement of objections).

330 As regards the national meetings concerning the implementation of the price initiatives, there is sufficient evidence to show that such meetings took place in Ger-

many, France, the United Kingdom and Scandinavia. Those meetings formed part of the structure of the cartel and should therefore be regarded as an extension of it.

331 However, even if there were no evidence of the applicant's participation in meetings in Germany or France, the assessment of the gravity of the cartel would be fundamentally the same. In that regard, the Commission refers to the criteria set out in point 168 of the Decision, which concern in essence the actual substance of the infringement.

332 As regards the arguments relating to the 'common purpose' doctrine, the Commission refers to point 116 of the Decision, which explains the approach it adopted.

Findings of the Court

333 As regards, first of all, the submission that the 'links' are not described with sufficient precision (paragraph 325 above), the Court points out that under Article 44(1) of the Rules of Procedure the application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, so that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68). Similar requirements are called for where a submission is made in support of a plea in law.

334 In this case, the submission in question is worded too imprecisely to enable the Court to identify its substance. This submission must therefore be rejected as inadmissible.

335 The applicant's argument to the effect that the allegations relating to SBS and the January 1987 price announcements in the United Kingdom should not have been included in the Decision must be rejected. It suffices to point out that the Commission correctly considered that SBS cartonboard was the subject of the cartel (paragraph 228 above) and that the duration of the infringement attributed to the applicant was duly established (paragraph 173 et seq. above).

336 The argument, first, that there is no evidence of the existence of national meetings relating to the implementation of decisions adopted in the committees of the PG Paperboard and, second, that there is no evidence of links between those meetings and the activities of the PG Paperboard, cannot lead to the annulment of Article 1 of the Decision. The Commission rightly considered that the applicant had infringed Article 85(1) of the Treaty by participating, as a member of the PWG, in collusion on prices, downtime and market shares.

337 It follows that the applicant's argument can result only in a reduction in the fine.

338 The Court must therefore assess whether the Commission took those national meetings into account when it assessed the gravity of the infringement committed.

339 According to the fifth indent of point 168 of the Decision, the Commission took into account, *inter alia*, the fact that 'the cartel [had been] 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'.

340 That consideration relates, in effect, to the meetings of the bodies of the PG Paperboard.

341 According to the second and third paragraphs of point 91 of the Decision:

'It is not known whether, besides national meetings to prepare for the Economic Committee ..., there was also an institutionalised system throughout Europe of regular local meetings in each country to implement the increases previously agreed for each Community national market.

This was, however, certainly the case in several important national markets [namely the German, French and United Kingdom markets].'

342 In those circumstances, the Court finds that the fact that the national meetings were an extension of the collusion between the members of the PG Paperboard in several Member States could not materially affect the assessment of the gravity of the infringement.

343 It follows that the second part of the plea must be rejected.

344 The plea must therefore be rejected in its entirety.

D — *The plea that the level of the fine is disproportionate*

Arguments of the parties

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

346 The Commission has already discovered more serious infringements than that in the present case. A comparison between the Decision and the decision with which the judgment in *Tetra Pak* v *Commission*, cited above, was concerned shows that the infringement found in that case was more serious and of a longer duration.

347 Furthermore, the Commission has already been faced with infringements of a considerably longer duration than that found in the Decision and, contrary to the submissions in its defence, the Commission cannot take into account the fact that the infringement was intended to be of indefinite duration. The Commission's approach is incompatible with Article 15(2) of Regulation No 17 because regard may be had only to the actual duration of the infringements found.

348 Moreover, the Decision does not state the reasons for which the level of the fine was increased in relation to those in the Commission's previous decisions. It must therefore be concluded that the criteria set out in the Decision cannot justify the level of the fine.

349 The Commission observes that the fine imposed on the applicant represents approximately 9% of its turnover in the Community cartonboard sector in 1990. The applicant has not produced any evidence that the fine approaches 10% of its total turnover, the maximum level fixed by Article 15(2) of Regulation No 17. The Commission stated that the infringement was a particularly serious one, but never claimed that it was the most serious infringement ever discovered. Lastly, the Commission may at any moment increase the general level of fines in order to ensure their deterrent effect.

350 The Commission never stated that it had increased the general level of fines, the fine imposed on the applicant not being significantly higher than the level of fines imposed on the ringleaders in Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene, OJ 1986 L 230, p. 1, hereinafter 'the Polypropylene decision'). In any event, it is not necessary to indicate in the Decision that there has been any increase in the general level of fines.

351 Finally, as regards the duration of the infringement, the rapid discovery of an infringement such as the infringement found in the present case does not make it inherently less serious. That does not mean that the Commission imposed a fine in respect of a period following the Decision (see point 167 of the Decision).

Finding of the Court

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

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

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

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

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

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

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

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

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

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

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

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

356 Second, the Commission rightly argues that, on account of the specific circumstances of the present case, no direct comparison could be made between the

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

357 Third, the Court notes the lengthy duration and obviousness of the infringement of Article 85(1) of the Treaty which was committed despite the warning which the Commission's previous decisions, in particular the Polypropylene decision, should have provided. There is no basis for concluding that in order to determine the level of the fines the Commission, contrary to the indications given in point 167 of the Decision, took into account a lengthier duration of the infringement than that stated in Article 1 of the Decision.

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

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

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

360 Consequently, this plea must be rejected.

E — *Erroneous assessment of the role played by Iggesund Paperboard*

Arguments of the parties

361 The applicant contends, first, that it was wrongly characterised as a 'ringleader' of the cartel. Representatives of Iggesund Paperboard participated in only some meetings of the bodies of the PG Paperboard and they never acted as chairman of those bodies.

362 Iggesund Paperboard did not take part in any PWG meeting before the end of November 1989. It is thus for the Commission to prove that Iggesunds Bruk or TBM participated before that date. Furthermore, no representative of Iggesund Paperboard attended the PWG meetings of 6 February 1990, 12 April 1991, 27 May 1991 or 5 June 1991. That company therefore took part in only five of the nine meetings of the PWG held from November 1989 onwards.

363 Stora's statements that TBM participated in meetings of the PWG right from the creation of that body are not reliable. In breach of the principles of fairness and proportionality, the Commission therefore failed to take due account of the fact that Iggesund Paperboard had participated only occasionally in PWG meetings from November 1989 onwards.

364 As regards the JMC, contrary to what is stated in table 4 annexed to the Decision, Iggesund Paperboard did not participate in the meetings of 6 and 7 September 1989.

365 As regards Iggesunds Bruk, that mill principally produced SBS cartonboard, its production of high-quality GC cartonboard having always been of less importance for it. That explains the fact that it was never more than an occasional participant in meetings of the committees of the PG Paperboard and that it was not a member of the PG Paperboard after 1985. Before November 1988, except for general assemblies of the PG Paperboard, Iggesunds Bruk participated in only nine out of 20 meetings of the PC and four out of 18 meetings of the Economic Committee.

366 Second, there is no basis for alleging that downtime taken by the applicant was the result of collusion. Iggesunds Bruk's mill closed routinely in autumn for technical reasons. In 1990, however, the routine shut-down was deferred, because Iggesunds Bruk was producing record volumes during the last third of 1990 and the first third of 1991. As regards the Workington mill, downtime took place only when orders were limited.

367 The Commission states that it was the participants in the PWG meetings which were considered to be the cartel 'ringleaders'. The question whether Iggesund Paperboard's representative was one of the officers of the committees is therefore irrelevant. TBM and, later, Iggesund Paperboard participated in meetings of all the

committees of the PG Paperboard, including the PWG. Consequently, the applicant's arguments relating to Iggesunds Bruk's role prior to 1988 are irrelevant.

368 As to the applicant's assertions relating to downtime in respect of SBS cartonboard, they are irrelevant, because the Commission never asserted that there was a downtime system specifically for SBS cartonboard. Moreover, demand for SBS cartonboard was strong throughout the period in question and there was therefore no need to stop production of that product.

369 Lastly, the argument that downtime was taken at the Workington mill only when orders were low is unconvincing, since downtime is necessary only in such circumstances.

Findings of the Court

370 It is apparent from the Court's ruling on the applicant's pleas in support of its application for annulment of the Decision that the nature of the PWG's functions, as described in the Decision, has been proved by the Commission.

371 In those circumstances the Commission rightly concluded that the undertakings which participated in the meetings of that body should be regarded as the 'ringleaders' of the infringement found and that they should accordingly bear special responsibility (see point 170, first paragraph, of the Decision).

372 In the present case, it is not disputed that Iggesund Paperboard participated in the meetings of the PWG with effect from November 1989. In that regard, the applicant's argument that Iggesund Paperboard was only an occasional participant in PWG meetings must be rejected. It is apparent from table 2 annexed to the Decision that Iggesund Paperboard took part in five of the seven meetings held during the period from November 1989 until April 1991, the date on which the Commission carried out simultaneous investigations without prior notice at the premises of several undertakings and trade associations in the cartonboard sector pursuant to Article 14(3) of Regulation No 17.

373 As regards the period from mid-1987 until November 1989, Stora states: 'One other producer was represented at the PWG: the UK Workington mill was represented at the PWG from when it was set up. The Workington mill has been bought by Iggesund/MoDo' (appendix 37 to the statement of objections, p. 2). Moreover, in a reply by Iggesund Paperboard (Workington) Ltd of 20 August 1991 to a request for information it is stated (page 12) in regard to the participation in PWG meetings of TBM/Iggesund Paperboard (Workington) Ltd: 'It is assumed that Mr P. L. Herring attended some or all such meetings.'

374 In those circumstances, since Iggesund Paperboard (Workington) Ltd itself assumed in its reply that Mr Herring had participated in the PWG meetings on behalf of TBM/Iggesund Paperboard (Workington) Ltd, the Commission rightly relied on Stora's statements that the Workington mill had been represented in the PWG from the date on which it was set up.

375 The Court has already held that the Commission was entitled to address the Decision to the applicant in regard to the infringements of Iggesund Paperboard, Iggesund Paperboard (Workington) Ltd and TBM. The applicant, as a participant in meetings of the PWG throughout the period of the infringement, was therefore

correctly regarded as one of the 'ringleaders' of the infringement. In that context, it is irrelevant that, for its part, Iggesunds Bruk did not participate in the PWG meetings.

376 Lastly, it has been proved that the applicant participated in collusion on downtime and that it even took actual downtime in the Workington mill when, with effect from 1990, production capacity increased and demand fell (paragraphs 145 to 147 above). The applicant's argument that downtime was not taken at Iggesunds Bruk's mill because demand for SBS cartonboard was strong throughout the period covered by the Decision must be rejected. The Commission never contended that collusion on downtime implied that the undertakings participating in that collusion had to take downtime when demand was strong.

377 In the light of the foregoing, the plea cannot be upheld.

F — *Breach of the principle of equal treatment*

Arguments of the parties

378 This plea is in two parts.

379 In the first part the applicant asserts that the fine imposed on it is excessive in comparison with those imposed on undertakings which did not contest the essential factual allegations. The distinction drawn between those two groups of undertakings is unclear, because it is not based on any rule or policy previously declared by the Commission.

380 A mere failure to contest the Commission's allegations does not justify the distinction so made, as such conduct does not constitute cooperation within the meaning of the case-law. By contrast, notwithstanding any failure by some undertakings to contest allegations, it is for the Commission to prove its allegations of fact in all cases. Even an express admission by some undertakings cannot be used to prove the allegations against undertakings which do not admit them. The undertakings to which the statement of objections is addressed should be able to reply to the Commission's allegations in it, without the risk of their being penalised for that conduct by an increase in their fine (or by a smaller reduction in it).

381 The distinction drawn by the Commission therefore infringes the rights of the defence, the principle of fairness, the principle of due process and the presumption of innocence.

382 Even supposing that the Commission was entitled to impose a larger fine on the applicant than on the undertakings which did not contest the essential factual allegations, the 50% increase in the fine imposed on it is excessive and disproportionate. In *ICI* v *Commission*, cited above, the Court of First Instance held, in the exercise of its unlimited jurisdiction, that a reduction of about 20% in the fine was reasonable in the case of an undertaking which had fully cooperated with the Commission.

383 In the second part of the plea the applicant contends that the fine imposed on it is excessive in comparison with the fines imposed on the undertakings held to have actively assisted the Commission (Rena and Stora). Its fine, in terms of percentage of turnover, is three times higher than those imposed on Rena and Stora. That difference is excessive and discriminatory.

384 The Decision does not contain an adequate statement of reasons for that substantial reduction in the fines (see point 172 of the Decision). Furthermore, according to the judgment in *ICI* v *Commission*, cited above, active cooperation justifies only a small difference in treatment.

385 The reductions awarded to Rena and Stora can also be regarded as an abuse of power, because all the undertakings were not necessarily in possession of appropriate information so as to be able to provide active assistance to the Commission.

386 Moreover, it is questionable whether the Commission is entitled to obtain information in return for a reduction in the fine. In the present case, the Commission, speaking through the Member of the Commission responsible for competition policy, acknowledged that it could not have established the existence of the cartel without the information provided by Stora. Consequently, if undertakings receive a financial incentive to provide information to the Commission in circumstances in which the Commission cannot require them to provide it (see Case 374/87 *Orkem* v *Commission* [1989] ECR 3283 and Case 27/88 *Solvay* v *Commission* [1989] ECR 3355, summary publication), it cannot be ruled out that, in order to obtain the maximum financial advantage, some undertakings may be over-enthusiastic in their admissions, thereby undermining the credibility of their statements.

387 Lastly, Stora's cooperation was not spontaneous, since it cooperated only after the investigations had been carried out pursuant to Article 14 of Regulation No 17 and it had received the Commission's written questions concerning the PG Paperboard.

388 In reply to the first part of the plea the Commission states that the recognition by certain undertakings of the essential elements of the allegations against them made

its task easier and should therefore be regarded as a form of cooperation justifying a reduction in the fine (*ICI* v *Commission*, cited above, paragraph 393).

389 Contrary to its assertion, the applicant was not penalised for a lack of cooperation. It was the undertakings which actually acknowledged the infringements which in fact benefited from a reduction of one-third in the amount of the fine. There is no basis for considering that the reductions were too large. In any event, if the Court were to consider that the reduction given to some undertakings was too large, it could, in the exercise of its unlimited jurisdiction, increase the fines in question.

390 Lastly, the applicant's arguments that there was discrimination against undertakings which did not possess documents is without foundation.

391 As regards the second part of the plea, the Commission considers that its attitude towards Rena and Stora was fully justified.

392 Stora in particular spontaneously provided a detailed account of the operation of the cartel. The applicant's assertion that undertakings might be tempted to exaggerate the unlawful conduct of their competitors in order to obtain significant reductions is unfounded. Although the Commission must closely scrutinise evidence supplied by members of a cartel, that does not mean that it may not take frank and complete cooperation into account.

Findings of the Court

393 As regards the first part of the plea, the Court observes that in the administrative procedure before the Commission the applicant acknowledged that it had participated in collusion on price increase announcements concerning GC cartonboard but that it otherwise disputed that it had participated in the alleged infringement.

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

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

396 The situation is different where an undertaking does not reply to the statement of objections, merely states that it is not expressing any view on the factual allegations made by the Commission in that document, or, as the applicant did, contests the essential points of those allegations in its reply. By adopting such an attitude

during the administrative procedure the undertaking does not further the Commission's task of finding infringements of the Community competition rules and bringing them to an end.

397 Consequently, when the Commission states in the first paragraph of point 172 of the Decision that it has awarded reductions in the fines to be imposed on undertakings which did not contest the essential factual allegations upon which it relied against them, those reductions can be considered to be lawful only in so far as the undertakings concerned have expressly stated that they are not contesting those allegations. It should be added in that context that, by reducing by one-third the fines imposed on those undertakings, the Commission did not overstep the limits of its discretion when determining the amount of fines.

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

399 As regards the second part of the plea, the Court observes that Rena and Stora received a two-thirds reduction in their fines on account of their active cooperation with the Commission during the administrative procedure (see, in that regard, point 171 of the Decision). In pointing out the active cooperation of those undertakings during the administrative procedure, the Decision adequately explains the reasons for the award of a substantial reduction in the fine imposed on those two undertakings.

400 The Court points out that the applicant could itself have obtained a reduction in the fine by demonstrating its active cooperation with the Commission. As its participation in the infringement has been proved, its argument that it did not have the necessary information to provide active assistance to the Commission cannot but be rejected.

401 Inasmuch as the applicant contends that the fine imposed is excessive in comparison with that imposed on Stora, the Court points out that Stora supplied the Commission with statements containing a highly detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard, and the participation of the various producers in the infringement. Through those statements, Stora supplied information well in excess of that which the Commission may require to be supplied under Article 11 of Regulation No 17. Although the Commission states in the Decision that it obtained evidence corroborating the information contained in Stora's statements (points 112 and 113 of the Decision), it is clear that Stora's statements constituted the principal evidence of the existence of the infringement. Without those statements, it would therefore have been, at the very least, much more difficult for the Commission to establish or to put an end to the infringement with which the Decision is concerned.

402 In those circumstances, and even though Stora cooperated only after the Commission had initiated investigations at the undertakings pursuant to Article 14(3) of Regulation No 17, the Commission, by reducing by two-thirds the fine imposed on Stora, did not overstep the limits of its discretion when determining the amount of fines.

403 As regards the reduction in Rena's fine, it suffices to hold that the applicant has not disputed the statement in the second paragraph of point 171 of the Decision that Rena 'provided important documentary evidence to the Commission on a voluntary basis'.

404 Lastly, the applicant has not adduced any evidence in support of its assertion that the reductions in the fines received by Rena and Stora constitute an abuse of power.

405 The fine imposed on the applicant cannot therefore be regarded as disproportionate in comparison with those imposed on Rena and Stora.

406 Consequently, the second part of the plea cannot be accepted either.

407 The plea must therefore be rejected.

G — *The plea alleging that the applicant cooperated and that other mitigating circumstances exist*

Arguments of the parties

408 The applicant claims that it cooperated with the Commission in its investigation.

409 That cooperation is shown by the fact that (a) Iggesund Paperboard stayed away from meetings of the PG Paperboard's committees after the Commission had carried out its investigations; (b) in its reply to the statement of objections the applicant did not contest the essential facts; (c) it acknowledged the existence of discussions on the price announcements; and (d) the undertakings in the MoDo group have implemented a compliance programme in order to ensure observance of the competition rules.

410 Moreover, the applicant furnished detailed information concerning the participation of undertakings from its group in meetings of the PG Paperboard's committees, even though the Commission had not made any reference to the provisions of Regulation No 17 in its requests.

411 In those circumstances, since the applicant did not dispute the documents relating to prices referred to in the statement of objections, it should be placed in the same category as the undertakings which did not contest the essential allegations of fact.

412 Lastly, to impose a fine at a level never previously imposed is unjustified because the cartonboard sector has never been the subject of a Commission investigation and the applicant itself has never previously committed an infringement.

413 The Commission disputes that the applicant can be considered to have cooperated. In particular, since the applicant continues to contest almost all of the Commission's findings, it cannot claim to have admitted the essential factual allegations. Moreover, its reticence in replying to requests for information did not demonstrate a willingness to cooperate.

Findings of the Court

414 The Court has already held that in its reply to the statement of objections the applicant contested the essential allegations of fact on which the Commission had based the objections against it and that its reply cannot therefore be considered to constitute cooperation with the Commission which would justify a reduction in the amount of its fine.

415 Even if, without a request by the Commission to that effect under Regulation No 17, the applicant had supplied information concerning the undertakings in its group which had participated in meetings of bodies of the PG Paperboard, such conduct could not be considered to justify a reduction in the fine either. The applicant contested the Commission's essential allegations relating to the anti-competitive discussions held at the meetings in question.

416 As regards the compliance programme implemented by the MoDo group after the cessation of the infringement, the Court has already pointed out that the gravity of the infringement falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

417 Consequently, although the implementation of a compliance programme demonstrates the intention of the undertaking in question to prevent future infringements and thus better enables the Commission to accomplish its task of applying the principles laid down by the Treaty in competition matters and of influencing undertakings in that direction, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in this case.

418 The Commission was therefore entitled to take the view that in the present case it should treat as mitigation only conduct of the undertakings which enabled it to prove the infringement in question more easily. Consequently, since the essential allegations of fact on which the Commission relied as against the applicant were

contested by the applicant during the administrative procedure, the Commission cannot be criticised for not having reduced the amount of the fine imposed on it.

419 Moreover, while it is important that the applicant should take steps to prevent fresh infringements of Community competition law from being committed in the future by members of its staff, that circumstance does not alter the the fact that an infringement has been found to have been committed in this case (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 357).

420 In those circumstances, when determining the amount of the fine imposed on the applicant, the Commission rightly also took no account of the fact that the applicant did not attend meetings of the PG Paperboard's committees after the Commission carried out its investigations under Article 14(3) of Regulation No 17.

421 Lastly, the Court holds that the fact that the Commission has already found an undertaking guilty of infringing the competition rules in the past and has penalised it for that infringement may be treated as an aggravating factor as against that undertaking but that the absence of any previous infringement is a normal circumstance which the Commission does not have to take into account as a mitigating factor, especially since the present case involves a particularly clear infringement of Article 85(1) of the Treaty (see Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833, paragraph 317).

422 It follows that the plea must be rejected.

H — *Infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950*

423 In its application the applicant observes, under the heading 'Closing submissions', that the application of Community competition law in relation to proceedings leading to the imposition of fines is of such a nature as to make it subject to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') (or analogous principles of Community law), which require that charges of this nature be determined by an independent and impartial tribunal.

424 It submits that, as the relevant tribunal, the Court of First Instance should therefore make a full examination of the facts and all the legal aspects of the case. It follows that 'the Court should come to its own, independent view on the facts of the case' or, at least, that it 'should be quick rather than reluctant' to form its own independent view of the appropriate penalty.

425 At the hearing the applicant submitted that its submissions as so presented constituted a plea in law.

426 However, as the Court has already observed, in order to satisfy the requirements of Article 44(1) of the Rules of Procedure the application must specify the nature

of the grounds on which the action is based, so that a mere abstract statement of those grounds is insufficient (paragraph 333 above). In the present case, the submissions concerning Article 6(1) of the ECHR made by the applicant in its application are so unspecific that the Court is not able to evaluate them. The plea must therefore be rejected as inadmissible.

427 As none of the pleas relied on in support of the application for annulment or reduction of the fine has been upheld, the fine imposed on the applicant should not be reduced.

428 Having regard to all the foregoing, the plea of illegality of Article 2 of the Decision must be upheld in part and the remainder of the application must be dismissed.

Costs

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

On those grounds,

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

hereby:

1. **Annuls, as regards the applicant, the first to fourth paragraphs of Article 2 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) save and except 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';

2. **Dismisses the application as regards the remaining claims;**

3. Orders the applicant to pay the costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary