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

14 May 1998 *

In Case T-317/94,

Moritz J. Weig GmbH & Co. KG, a company incorporated under German law, established at Mayen (Germany), represented by Thomas Jestaedt, Karsten Metzlaff and Hanns-Christian Salger, Rechtsanwälte, Düsseldorf, Hamburg and Frankfurt am Main, subsequently also by Verena von Bomhard, Rechtsanwältin, Hamburg, with an address for service in Luxembourg at the Chambers of Philippe Dupont, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Bernd Langeheine and Richard Lyal, of its Legal Service, acting as Agent, and by Dirk Schroeder, Rechtsanwalt, Cologne, 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: German.

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 INSTANCEOF 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 1997 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 it 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:

(...)

(xix) Moritz J. Weig & Co KG, a fine of ECU 3 000 000;

(...)'

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 Commission found that the applicant, Moritz J. Weig & Co KG ('Weig'), had participated in meetings of the PC during the period covered by the Decision and in meetings of the JMC and of the PWG from 1988.

Procedure

21 The applicant brought this action by application lodged at the Registry of the Court on 14 October 1994.

22 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-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

23 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 GmbH* v *Commission*, not published in the ECR).

24 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).

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

26 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.

27 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 the present case.

28 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.

29 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.

30 The parties in the cases referred to in paragraph 26 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

31 The applicant claims that the Court should:

— annul the Decision in whole or in part;

— order the Commission to pay the costs, including those arising from the provision of a bank guarantee;

in the alternative,

— reduce the amount of the fine imposed on the applicant;

— order the Commission to pay the costs, including those incurred by the applicant in providing a bank guarantee for the amount by which the fine is reduced.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment, in whole or in part, of Article 1 of the Decision

The plea that the applicant did not participate in volume control measures

Arguments of the parties

33 This plea is in two parts.

34 In the first part of the plea the applicant states that, according to Article 1 of the Decision, the undertakings referred to in that article 'reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time' and that 'increasingly from early 1990, took concerted measures to control the supply of the product in the Community...'.

35 As the applicant participated only occasionally in the meetings of the PG Paperboard, it was unaware of extensive understandings or collusion of that kind. At the PC, PWG and JMC meetings attended by its representatives the maintenance of the volumes of some national groups of manufacturers and periods of downtime were discussed but only in general terms.

36 The discussions at the PWG meetings in which its representatives participated related to the sales volumes on the European market of undertakings from individual States. Statistics on the sales volumes of the various national groups were compared with those at previous meetings. The information was supplied in the

expectation that the various national groups would not increase their shares on the European market.

37 The JMC meetings at which the applicant's representatives were present sometimes dealt with the issue of downtime. However, the applicant's representative from 1990 onwards consistently stated that he had no authority to provide any information on the applicant's volumes policy. Nor did the market situation justify any stoppage of production by the applicant during the period covered by the Decision.

38 The Commission's assertions relating to the alleged control of volumes are based on three pieces of evidence: Stora's reply of 14 February 1992 to a request for information under Article 11 of Regulation No 17 (Appendix 43 to the statement of objections); the confidential memorandum of the sales director of FS-Karton (Mayr-Melnhof group) of 28 December 1988 (Appendix 73 to the statement of objections); and the note of Rena's managing director relating to an extraordinary meeting of the Nordic Paper Institute ('NPI') of 3 October 1988 (Appendix 102 to the statement of objections).

39 The applicant contends that the Commission should not have used Stora's statements as a key piece of evidence.

40 Appendices 73 and 102 to the statement of objections make no mention whatsoever of the 'price before tonnage policy' referred to by Stora in its reply to the Commission. They merely express general wishes or concerns and cannot be regarded as proof that production control measures had been agreed or, *a fortiori*, adopted.

41 In the second part of the plea, the applicant submits that its own production data show that it did not participate in any volume control. It gives a detailed description of the changes in its own sales, pointing out that between 1986 and 1991 they more than doubled on the Community market as a whole, whereas sales of cartonboard increased by barely 20%. The increase in volumes sold on its most important geographical market, the German market, was even greater.

42 Lastly, the applicant never told the other participants in JMC meetings that it would stop its machines in order to reduce quantities. The production stoppages at the end of 1990 and the beginning of 1991, referred to in a handwritten note of FS-Karton's sales director (Appendix 115 to the statement of objections), were explained by Christmas holidays.

43 The Commission submits that there is no contradiction between its own findings and the applicant's assertion that the maintenance of volumes and production stoppages were discussed in the PWG and the JMC only in general terms, even if those discussions related to the maintenance of the volumes of specific national producer groups and downtime (paragraphs 36 and 37 above). In fact the discussions clearly concerned the restriction of individual producers' sales volumes, and therefore dealt with specific issues.

44 Although those statements in themselves confirm that the maintenance of volumes and downtime were discussed at meetings of the PG Paperboard, the evidence found by the Commission also shows that the discussions were not limited to a general exchange of ideas but that the participants made firm arrangements for the maintenance of given production volumes and market shares.

45 In its second statement (Appendix 39 to the statement of objections) Stora gave a detailed description of the policy whereby a near balance was maintained between supply and demand, which it referred to as the 'price before tonnage' policy. It is clear from this description that this policy was a material element in the anti-competitive cooperation which took place in the PG Paperboard and that a consensus had been reached on the need to maintain a balance between supply and demand in order to ensure price stability. Furthermore, because of the fall in demand in 1990 the producers accepted downtime calculated on the basis of the annual capacity reports (points 24 and 25 of the statement).

46 Stora's statements concerning the 'price before tonnage' policy, which consisted of volume control and the restriction of market shares, are supported by numerous other items of evidence, in particular the confidential memorandum from the sales director of FS-Karton (Appendix 73 to the statement of objections, p. 3, point 1 and p. 5, point 5).

47 The Commission also refers to that same person's handwritten note (Appendix 115 to the statement of objections), in which he refers to the order backlogs of a number of individual producers, expressed in days or weeks, and sometimes even in relation to specific cartonboard machines. That information, together with the data on capacities, was used in order to determine capacity utilisation and, if necessary, to plan downtime.

48 The information in Stora's statement is also corroborated by a note entitled 'Highlights', which refers to the Economic Committee meeting of 3 October 1989 (Appendix 70 to the statement of objections).

49 On the basis of those considerations, the Commission concludes that the applicant participated in meetings of the PG Paperboard at which restrictions of production volumes, the maintenance of market shares and downtime were discussed.

50 The applicant's submissions in the second part of the plea, concerning its own conduct, are therefore irrelevant.

Findings of the Court

— Existence of concerted action to freeze market shares and to control supply

51 As regards the first part of the plea, it should be observed that, 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'.

52 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"'.

53 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.'

54 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'.

55 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'.

56 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.

57 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.

58 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.'

59 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'.

60 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).

61 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*).

62 Lastly, it states that Weig took part in the discussions concerning market shares (point 1.2).

63 Stora's assertions concerning collusion on market shares are supported by appendix 73 to the statement of objections. That document, found at FS-Karton, 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.

64 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)'.

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

66 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.

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

68 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'.

69 Moreover, the reference to 1987 as reference year is consistent with Stora's second statement (appendix 39 to the statement of objections; see paragraph 58 above).

70 Finally, the applicant's line of argument, being a mere assertion that the undertakings in the PWG only discussed matters in general terms, cannot undermine the probative value of the abovementioned documents. In the light of the above considerations, the admission of that fact even supports the Commission's allegations in the Decision.

71 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).

72 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).

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

74 The documents it produces support its analysis.

75 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'.

76 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 ...'.

77 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.

78 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 practi-

cally 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).'

79 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.

80 On the basis of the foregoing, the Commission has proved to the requisite legal standard that there was collusion on market shares between the participants in the meetings of the PWG and that there was collusion on downtime between those same undertakings. Since it is not disputed that the applicant took part in the meetings of the PWG and that that undertaking is expressly referred to in Stora's statements, the Commission was fully entitled to hold the applicant liable for its participation in those two types of collusion, at least from when it began to participate in the meetings of the PWG, namely from 1988.

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

82 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.

83 Since the Commission has proved the existence of the two types of collusion in question, it is unnecessary to consider the applicant's criticism of appendices 102 and 115 to the statement of objections.

— The applicant's actual conduct

84 Nor is it possible to uphold the second part of the plea, namely that the applicant's actual conduct is irreconcilable with the Commission's assertions concerning the existence of the two disputed types of collusion.

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

86 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).

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

88 The plea must therefore be rejected in its entirety.

Error by the Commission regarding the duration of the infringement

Arguments of the parties

89 The applicant disputes that it began to commit an infringement in mid-1986. There was no infringement by it prior to February/March 1988.

90 The Commission took the view that the setting up of the PWG and the 'intensification of the collusion' between the producers were the events marking the beginning of the infringement (point 161 of the Decision). However, the applicant is not in a position to know whether the PWG had already been set up in 1986. Even if the PWG had been set up then, members of the PG Paperboard who were not represented in the PWG would have been unaware of that fact. Furthermore, there is no documentary evidence to support the Commission's assertion that 'collusion intensified' from mid-1986 onward.

91 Prior to February/March 1988, the applicant's participation in the meetings of bodies of the PG Paperboard was limited to one meeting of the PC. That participation cannot, however, justify the Commission's view that the applicant took part in the alleged infringement from June 1986 onward. The practice whereby the president of the PWG informed the PC of the principal decisions which had been made began only at the end of 1988 or beginning of 1989. Furthermore, the statement allegedly made by the applicant's representative at a Fides meeting in 1986 to the effect that a 9% increase was 'too high for the United Kingdom' so that it was settling at 7% (see point 41 of the Decision) cannot have been made at a meeting of the PC. The applicant's representative at the PC meeting of 10 November 1986 does not recall having made such a statement. It could, at the very most, have been made on the fringe of a meeting.

92 The applicant did not participate in any collusion on prices prior to the collusion in regard to the spring 1988 price increase. In particular, the Commission does not dispute the fact that it did not participate in the January 1987 price increase in the United Kingdom, an increase which the Commission considered to be the result of collusion between producers.

93 Second, the applicant contends that it is clear from point 164 of the Decision that the Commission wrongly assumed that the infringement had continued until June 1991. There were no discussions with an anti-competitive object after the Commission had carried out its investigations in April 1991.

94 The Commission submits that it was correct in taking the view that the applicant committed an infringement from mid-1986 until at least April 1991.

95 The applicant had been a member of the PG Paperboard and a regular participant in PC meetings from February 1986 onwards. The applicant was therefore aware of the cartonboard producers' unlawful arrangements for common and uniform price increases, because it was the PC's task, *inter alia*, to inform managing directors of decisions taken by the PWG and of instructions to be given to their sales departments in order to implement the price initiatives. As a general rule, that information was communicated by the president of the PC, who was also president of the PWG.

96 The applicant's claim that it did not participate in the 1987 price increase in the United Kingdom is irrelevant. The fact that it continued to participate in PC meetings suffices to classify it as a member of the cartel and to attribute the infringement to it. When it planned its own conduct on the market, it must have taken into account the information which it received on its competitors' imminent price increases.

97 As regards the end of the infringement, the Commission never asserted that the applicant continued to participate in an infringement after April 1991.

Findings of the Court

98 According to Article 1 of the Decision, the applicant infringed Article 85(1) of the Treaty from mid-1986 until at least April 1991.

99 As regards the beginning of the infringement, point 161 of the Decision states that the majority of the addressees of the decision participated in the infringement from June 1986 onward, the date when 'the PWG was set up and the collusion between the producers intensified and started to be more effective'. Moreover, the first paragraph of point 74 of the Decision explains that the first concerted price initiative took place in the United Kingdom at the end of 1986 'while the new mechanism of the PG Paperboard was still being set up'. The Commission considers that 'it is thus clearly established that by mid-1986 the cartonboard producers were already at the very least involved in a form of collusion which may be characterised as a concerted practice ...' (point 132, fourth paragraph, of the Decision).

100 Since the applicant admits that it participated in collusion on the March/April 1988 price increase, its participation in collusion on prices is established at least from that date.

101 As regards the period from mid-1986 until March 1988, the fact that the PWG was set up in mid-1986 does not by itself prove that the applicant participated from that date in an infringement of the Community competition rules. Nor does the Commission set out any evidence to show that from mid-1986 the applicant was aware that the PWG had been set up or, *a fortiori*, that the PWG meetings had an anti-competitive objective.

102 It is therefore necessary to consider whether the fact that the applicant took part in some meetings of the PC, that is to say, those of 29 May 1986, 10 November 1986 and 4 December 1987 (table 3 annexed to the Decision), proves that it participated in an infringement of Article 85(1) of the Treaty prior to March 1988.

103 The applicant disputes the probative value of Appendix 61 to the statement of objections and the Commission's assertion that prior to the end of 1988 participants in PC meetings were informed of decisions adopted by the PWG.

104 As regards appendix 61 to the statement of objections, a note found at the United Kingdom sales agent of Mayr-Melnhof, the Commission considers that it is an 'internal note made at a President Conference [corroborating] Stora's admission that the President Conference did in fact discuss collusive pricing' (third paragraph of point 41 and second paragraph of point 75 of the Decision).

105 That document, which refers to a meeting held in Vienna on 12 and 13 December 1986, contains the following:

'UK pricing

Recent Fides meeting included the representative of Weig stating that they thought 9% too high for the United Kingdom and were settling at 7%! Great disappointment as it signals a "negotiating" level for everybody else. UK pricing policy will be left to RHU with the support of [Mayr-Melnhof] even if it means a *temporary* reduction in tonnes while we attempt (and be seen to attempt) to pursue 9%. [Mayr-Melnhof]/FS maintain a growth policy for UK but reduced returns are serious and we have to fight to regain control on pricing. [Mayr-Melnhof] accept that it doesn't help that they are known to have increased their tonnes in Germany by 6 000!'

106 According to Mayr-Melnhof (reply to a request for information, appendix 62 to the statement of objections), the Fides meeting referred to at the beginning of the passage quoted is probably the PC meeting of 10 November 1986.

107 The document in question shows that the applicant's representative reacted to an initial level of price increase by indicating its future pricing policy in the United Kingdom.

108 It cannot, however, be considered to prove that the applicant reacted in relation to a particular level of price increase agreed between the undertakings within the PG Paperboard before 10 November 1986.

109 The Commission does not rely on any other evidence to that effect. Moreover, the applicant's reference to a price increase of '9%' may be explained by the price increase in the United Kingdom announced by Thames Board Ltd on 5 November 1986 (annex A-12-1). That announcement was made public shortly afterwards, as is clear from a press cutting (annex A-12-3). Lastly, the Commission has not produced any other document capable of constituting direct evidence that discussions on price increases took place at meetings of the PC. In those circumstances, it cannot be ruled out that the applicant's remarks, as related in appendix 61 to the statement of objections, were made on the fringe of the meeting of the PC on 10 November 1986, as the applicant repeatedly submitted at the hearing.

110 It is settled law that 'concerted practice' refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The criteria of coordination and cooperation used to define that term must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each

economic operator must determine independently the policy which he intends to adopt on the market (Joined Case 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). It follows that the fact that an undertaking of its own accord announces what its future prices on the market will be is not sufficient evidence of an infringement of Article 85(1) of the Treaty unless it is proved that that announcement was made in the context of cooperation between undertakings.

111 As regards the question whether the statement by the applicant's representative to which Appendix 61 to the statement of objections refers was made in the context of cooperation between undertakings, it is necessary to assess the other evidence on which the Commission relies in support of its assertions that there was collusion on prices in the United Kingdom in January 1987.

112 The minutes of a Feldmühle (UK) Ltd board meeting of 7 November 1986 (annex A-17-2), on which the Commission relies in the Decision (third paragraph of point 74), merely confirm that this United Kingdom subsidiary of Feldmühle was aware prior to 10 November 1986 of Thames Board Ltd's announcement of a price increase of approximately 9%: 'TBM and the Fins (*sic*) have announced price increases of approximately 9% to be effective from February 1987 and it would appear that most other mills will be looking for the same sort of increase' [annex A-17-2 cited by the Commission in point 74 of the Decision].

113 As regards appendix 44 to the statement of objections, which consists of a handwritten note in the desk diary of a Feldmühle employee on the pages for 15 to 17 January 1987, the Commission considers that this constitutes 'further evidence of concertation' (third paragraph of point 75 of the Decision).

114 However, that note does not have the probative value accorded it by the defendant. There is no identification of the meeting of which it is an account, so that the possibility cannot be ruled out that it concerns an internal Feldmühle meeting. Moreover, since the note probably dates from mid-January 1987, it does not prove that the application of the price increase 'TBM included' was the result of concertation, it being possible that the note was only an observation.

115 Some indications in the note are even such as to contradict the Commission's claim that the note confirms the existence of collusion in regard to the decision to increase prices in the United Kingdom. In particular, the statement that the director of Feldmühle had declared that he was 'sceptical' of Kopparfors and had regarded Mayr-Melnhof as 'irresponsible' (ohne Verantwortung) cannot be regarded as supporting the Commission's contention. The position is the same in regard to the statement: 'Finnboard: Preisautonomie auch f. Tako' ['Finnboard: price autonomy also for Tako'].

116 Furthermore, the information set out in table A annexed to the Decision — information relating to the alleged concerted price increase initiative in the United Kingdom in January 1987 — does not show that the amounts or the dates of the announcement and implementation of price increases were so uniform that they could be regarded as probative evidence of the existence of price collusion. Moreover, the Commission accepted at the hearing that it had no concrete evidence that the applicant increased its prices on the United Kingdom market at the beginning of 1987.

117 It follows from the foregoing that the Commission has not proved that the undertakings agreed to increase prices in the United Kingdom in January 1987 nor, *a fortiori*, that the applicant was involved in discussions to that end.

118 Lastly, the Court rejects the Commission's allegation that the applicant must have been aware of the cartonboard producers' unlawful arrangements because one of the PC's tasks was to inform managing directors of decisions adopted by the PWG and of instructions to be given to their sales departments in order to implement the price initiatives. The Commission has not pointed to any specific information that was communicated to participants in PC meetings prior to the beginning of 1988 other than information relating to the January 1987 price increase in the United Kingdom and it is unnecessary to examine whether it has been proved that participants in PC meetings were informed of decisions adopted by the PWG from the beginning of 1988. It follows that collusion on prices, in which the applicant admits having participated, must be considered to have begun in March 1998.

119 As regards the beginning of collusion on market shares and on downtime, the Commission states that '[d]ocumentation found by the Commission at FS-Karton (part of the M-M group) confirms that at the end of 1987 agreement had been reached in the two Presidents' groups on the linked issues of volume control and price discipline' (point 53, first paragraph, of the Decision). It refers in that regard to appendix 73 to the statement of objections (see paragraph 63 above). The author of that document refers, by way of introduction, to the closer cooperation at European level within the 'Presidents' grouping' ('Präsidentenkreis'), an expression interpreted by Mayr-Melnhof as referring both to the PWG and the PC in a general context, that is to say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a).

120 It is true that appendix 73 to the statement of objections is corroborative evidence of Stora's statements concerning the existence of collusion on market shares between the undertakings allowed to participate in the 'Presidents' grouping' and of collusion on downtime between those same undertakings (see paragraph 51 et seq. above). However, there is no other evidence to confirm the Commission's claim that the object of the PC was, *inter alia*, to discuss collusion on market shares and control of production volume. Consequently, the expression

'Presidents' grouping' ('Präsidentenkreis') used in appendix 73 to the statement of objections cannot, despite the explanation supplied by Mayr-Melnhof, be construed as referring to bodies other than the PWG.

121 It follows that the applicant's participation in collusion on market shares and on downtime can be considered also to have been proved only as from March 1988, the date on which it first took part in a PWG meeting (see paragraph 261 below).

122 As regards the end of the infringement, it is apparent from Article 1 of the Decision that the Commission took the view that the infringement in which the applicant participated came to an end in April 1991. Contrary to the applicant's assertion, it does not follow from point 164 of the Decision that the Commission took the view that the infringement continued until June 1991.

123 Having regard to the foregoing considerations, Article 1 of the Decision must be annulled to the extent that it finds that the applicant participated in an infringement of Article 85(1) of the Treaty prior to March 1988. The remainder of the plea must be rejected.

The plea that there were no agreements concerning price increases

Arguments of the parties

124 The applicant accepts that there was collusion on the price increases of the various producers in the PG Paperboard but disputes that any agreements were concluded in that regard.

125 The participants in the PWG meetings informed each other of the planned dates and amounts of their price increases. In general, the undertakings represented in the PWG exchanged information on the price increases which they were planning, but specific prices were not discussed.

126 The participants in JMC meetings consulted each other in detail regarding the date of implementation and the amount of a particular price increase and fixed the order in which the price increases were to be announced.

127 However, although the undertakings informed each other of the planned price increases, those prices were not calculated arbitrarily or fixed uniformly pursuant to a common plan. Increases were decided individually by each undertaking by reference to costs and the market, so that any similarity in the amounts of the increases is due solely to market information and the fact that the undertakings had been affected in the same way by increases in costs.

128 Furthermore, no measures were taken to force undertakings to adhere to agreements.

129 Finally, the Commissions's assertions are based solely on Stora's statements. However, those statements have no probative value, in particular because Stora exaggerated the scope of the infringements in order to support its testimony and ultimately to reduce the amount of its fine.

130 The Commission contends that it has been proved that undertakings represented in the PWG colluded on plans to increase prices by adopting binding decisions

concerning the timing, order of announcement, and amount of the increases (see points 72 and 73 of the Decision). The cartel members therefore reached agreement on the conduct which they intended to adopt on the market. In those circumstances, it must be concluded that there was an agreement within the meaning of Article 85(1) of the Treaty (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 253). That conclusion is confirmed in particular by Stora's second statement (appendix 39 to the statement of objections), although that is not the only evidence on which the Commission relies.

Findings of the Court

131 The applicant admits that it participated in collusion on the planned price increases. Moreover, it has been found that this participation began in March 1988 (see paragraph 98 et seq., in particular paragraph 118, above).

132 According to the Decision, the undertakings referred to in Article 1 thereof had fixed 'by agreement ... the regular price increases to be applied in each national market' (point 130, second paragraph, third indent). The Commission states that 'the working out of the plan via the twice-yearly price initiatives is not to be treated as involving a series of separate agreements or concerted practices but as part of one and the same continuing agreement' (point 131, second paragraph).

133 In the present case, it is therefore necessary to ascertain whether the collusion on prices in which the applicant participated with effect from March 1988 was correctly characterised by the Commission as an agreement.

134 It is settled law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see, *inter alia*, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256). Contrary to the applicant's apparent submission, the question whether measures were taken to compel the undertakings to adopt the agreed conduct is therefore irrelevant.

135 The Court must therefore establish whether the addressees of the Decision expressed their joint intention to conduct themselves on the market in a specific way in regard to prices.

136 As regards the price initiatives, Stora states *inter alia* (appendix 39 to the statement of objections, points 27, 28 and 30):

'... a near balance between capacity and consumption had emerged in 1987. In that year there was a 5% surplus of capacity over consumption. This discrepancy (which was much less than the industry itself had realised until then) gave the PWG the opportunity to agree on price increases from 1987 onwards with some certainty that those increases would be successfully implemented. When this opportunity arose, the producers were concerned to recover the losses made in the previous years.

The PWG considered that an initial increase of 10% should be implemented in 1988. This amounted, for example, to FF 50 per 100 kilograms for GC grades and FF 35 per 100 kilograms for GD grades for the French market. Similar increases

were implemented in other countries. Subsequent increases were agreed at similar absolute amounts and therefore reducing percentages of increase.

...

The PWG would discuss and agree on who would announce each price increase first and the dates of announcements of the other main producers. The pattern was not the same each time.'

137 It adds (appendix 39 to the statement of objections, points 13 and 14):

'... the purpose ... of the JMC ... included comparative pricing for certain major customers and the working out of details for the implementation on a country-by-country basis of the pricing decisions of the PWG for both GC and GD grades.

The JMC discussed market-by-market the detailed implementation of the pricing decisions taken by the PWG and reported back to the PWG.'

138 According to Stora, the undertakings meeting in the PWG and the JMC therefore expressed their joint intention to make identical and simultaneous price increases on the various national markets.

139 Stora's statements are supported on that point by various items of documentary evidence referred to by the Commission in points 74 et seq. of the Decision.

140 In that regard, it suffices to refer to the three price lists mentioned in points 79, 80 and 83 of the Decision. Those lists, obtained by the Commission from Rena (appendices 110 and 111 to the statement of objections) and from Finnboard (UK) Ltd, contain information, in respect of several types of cartonboard and several Community countries, regarding the dates and precise amounts of the price increases implemented by the undertakings in question in April 1989, September/October 1989 and April 1990 respectively. The information in the three price lists corresponds, as regards the amounts of the price increases and the dates of their implementation, to the actual conduct of those undertakings on the market (see tables D, E and F annexed to the Decision).

141 Moreover, the Commission obtained from Rena handwritten notes regarding a JMC meeting of 6 September 1990 (Appendix 118 to the statement of objections), in which it is stated, *inter alia*:

'Price increase will be announced *next week in September*.

F	FF 40
NL	14 HFL
D	DM 12
I	LIT 80
B	BF 2.50
CH	SF 9
GB	£ 40
IRL	£ 45

All grades should be increased equally GD, UD, GT, GC etc.

Only 1 price increase a year.
For deliveries from 7 Jan.
Not later than 31st January.
14 of September letter with price increase (Mayr-Melnhof).
19 Sept. Feldmühle sending its letter.
Cascades before end of Sept.
All must have sent out their letters before 8 October.'

142 The applicant does not dispute that those three price lists relate to collusion on prices or that appendix 118 to the statement of objections relates to the JMC meeting of 6 September 1990.

143 Consequently, without there being any need to examine other evidence, the Court considers that the Commission has proved that the undertakings which participated in the meetings of the PWG and the JMC expressed their joint intention to carry out uniform and simultaneous price increases. The Commission was therefore entitled to find that the joint intention which had been formed by the applicant and other cartonboard producers regarding price initiatives did constitute an agreement.

144 This plea must therefore be rejected.

The application for annulment of Article 2 of the Decision

Arguments of the parties

145 This plea is in two parts.

146 First, the applicant submits that the wording of Article 2 of the Decision is too vague and imprecise. Any exchange of information might be regarded as falling within the scope of the prohibition in it. In particular, there is always a risk that information exchanged may be used for the purpose of cooperation between undertakings. Similarly, the prohibition on the future exchange of information is too vague in so far as it prohibits the exchange of information of competitive significance; any exchange of information is of such significance.

147 Second, the applicant submits that the Decision is the first to prohibit the exchange of aggregate information on order entries and order backlogs and the planned utilisation rate of production capacity where the conduct of each undertaking is not identifiable. The prohibition in question is, to that extent, contrary to the Commission's previous practice.

148 Furthermore, an information exchange system which is as precise as possible is indispensable in the cartonboard sector because it enables undertakings to make individual economic choices, in particular those relating to investments.

149 The applicant states that the Commission justifies the broad prohibition on the exchange of information by the fact that the statistics are used in a manner which infringes Article 85 of the Treaty. Consequently, the Commission itself takes the view that it is not the statistics as such which infringe the Treaty but solely the use made of them.

150 The Commission does not accept that the prohibition on the future exchange of information is too vague. It suffices that the operative part and the grounds of the decision indicate the anti-competitive conduct which is to be brought to an end (judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs

122 to 124). In the present case, Article 2(a) to (c) of the Decision themselves contain a detailed description of the nature of the information which may be exchanged. Furthermore, the findings of fact concerning the information exchanged were set out in detail in points 61 to 68, 105 and 106 of the Decision. In addition, the Decision contains a precise description of the restrictive effects which the information exchange had on the conditions of competition (points 134 and 166). The scope of the prohibition is therefore clear from Article 2 of the Decision, when read in conjunction with the statement of reasons for it.

151 The second and third subparagraphs of Article 2 of the Decision merely explain how a lawful information exchange may be created.

152 As regards the second part of the plea, the Commission submits that it was right to take the view that the aggregate exchange of information on order entries and order backlogs and on planned utilisation of production capacity was unlawful.

153 The prohibition in Article 2 of the Decision must be understood in the context of the findings in points 68 to 70 of the Decision. The prohibition on the exchange of aggregate information relates only to information on order entries, order backlogs and capacity utilisation. An assessment of the exchange of that type of information must take into account the structure of the relevant market, which is characterized by a high degree of concentration and extensive homogeneity of the products. As a result of their previous cooperation in the PG Paperboard, the producers have very good knowledge of the structure and policy of the various undertakings.

154 On concentrated markets residual competition consists principally in the uncertainty and secrecy existing between the main suppliers. The exchange of

information on order backlogs and utilisation capacities at frequent intervals gives the market such transparency that the existing residual competition ultimately ceases to have any effect. On the basis of that information the producers are in a position to plan downtime at sector level in order to maintain a balance between supply and demand, which enables them to avoid lowering prices in the event of a fall in demand and to impose prices increases in the event of increased demand.

155 The exchange of such information therefore removes the uncertainty and secrecy between offerors and thus encourages common, industry-wide conduct; that applies all the more where those statistics were actually used in order to coordinate commercial conduct throughout the industry. The exchange, at short intervals, of aggregate data on order backlogs and capacity utilisation leads by itself to a restriction of competition. The Commission therefore correctly considered that the exchange of information in question, even in aggregate form, was contrary to Article 85(1) of the Treaty.

Findings of the Court

156 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.'

157 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.

158 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 Chemioterapico 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 (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 220).

159 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 (judgment in *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).

160 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.

161 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.

162 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.

163 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.

164 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.

165 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'.

166 However, since the operative part of a decision must be interpreted in the light of the statement of reasons for it (*Suiker Unie and Others* v *Commission*, cited above, 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. ...'.

167 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.

168 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.

169 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.

170 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.

171 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.

172 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. It follows that the Commission's argument that Article 2 of the Decision is purely declaratory in nature (paragraph 261 above) is unfounded.

173 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 claim for annulment or reduction of the amount of the fine

The plea alleging infringement of Article 190 of the Treaty in regard to the calculation of the fines

Arguments of the parties

174 The applicant submits that the Decision contains an inadequate statement of reasons because the addressee undertakings were not able to ascertain whether the

amount of the fine imposed on them was justified or whether the fine was fair in relation to the fines imposed on the other undertakings. Commission decisions must contain an adequate statement of reasons in regard to each addressee (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211).

175 That requirement is not satisfied in the present case. In particular, the statement of reasons is not as detailed and precise as 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) because the Decision merely sets out the abstract criteria applied by the Commission in order to calculate the fine imposed on each undertaking. Moreover, the Commission has not explained, in regard to each undertaking, which criteria it applied or what significance was attributed to each criterion when it calculated the fine.

176 At a press conference on 13 July 1994 the Member of the Commission responsible for competition policy gave much more precise information concerning the calculation of the fines than that contained in the Decision. The undertakings are therefore unable to determine whether the real reasons are those given to the press or those in the Decision.

177 The Decision states (in point 170) that the applicant was one of the cartel 'ringleaders' and the Member of the Commission indicated that the basic rate of 9% had been applied only to them. In those circumstances, the applicant cannot know whether the fine imposed on it corresponds to 9% of the reference turnover adopted. Similarly, it does not know whether it in fact received a one-third reduction in the amount of the fine, as the statement by the Member of the Commission

leads it to believe. Lastly, according to the press statement, the Commission took into account the duration of the infringement by each undertaking, a fact which the Decision does not make clear in the applicant's case.

178 Furthermore, the fact that the applicant is stated to be, on the one hand, a cartel 'ringleader' and, on the other, an undertaking which did not play 'as important a role in the determination of the policy of the cartel as did the major industrial groups' (point 170) means that it is unable to ascertain the basis on which its fine was imposed.

179 As a result of those contradictory statements, the applicant is also unable to defend itself properly.

180 The Commission contends that the criteria which it applied when calculating the fine were sufficiently individualised. The considerations taken into account in order to determine the general level of the fines and the criteria applied in order to fix the amount of the fine imposed on each undertaking are set out in points 168 and 169 of the Decision respectively. Those criteria are just as detailed and precise as those adopted in the Polypropylene decision, which was considered to contain an adequate statement of reasons (*ICI* v *Commission*, cited above, paragraphs 353 and 354).

181 The Decision reveals how the Commission applied the criteria in point 169 when it fixed the applicant's fine. The reasons given for the amount of a fine must be read in the light of the whole of the statement of reasons for the Decision (*ICI* v *Commission*, cited above, paragraph 355). The Decision indicates the role placed by the applicant in the cartel (point 170), the duration of its participation in the cartel (point 43 and table 3 annexed to the Decision), and the way in which its cooperation during the proceedings was taken into account (point 172). Lastly, point 8 shows that the Commission took into account the applicant's position as an important, but relatively small, producer.

Findings of the Court

182 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).

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

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

185 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'. The applicant is not included in the list of the undertakings which were considered to be cartel 'ringleaders' and the third paragraph of point 170 of the Decision explains that 'although [it] was a member of the PWG from 1988, it does not seem to have played as important a role in the determination of the policy of the cartel as did the major industrial groups'. Lastly, in points 171 and 172, the Commission states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings, including the applicant, were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

186 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. The Commission explained that in the applicant's case it had applied a rate of 8% of turnover because, although the applicant was a 'member of the PWG', it did not seem to have played as important a role as that of the other undertakings which participated in PWG meetings. 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.

187 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.

188 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.

189 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). Point 170, third paragraph, of the Decision clearly sets out the grounds for the Commission's assessment of the gravity of the infringement committed by the applicant and shows why it was treated differently from both the 'ringleaders' of the cartel and its 'ordinary members'.

190 Similarly, point 168 of the Decision, which must be read in the light of the general criteria relating to the fines in point 167, contains a sufficient statement of the criteria taken into account in order to determine the general level of the fines.

191 Second, where, as in the present case, the amount of each fine is determined on the basis of the systematic application of certain precise figures, the indication in the decision of each of those factors would permit undertakings better to assess whether the Commission erred when fixing the amount of the individual fine and also whether the amount of each individual fine is justified by reference to the general criteria applied. In the present case, the indication in the Decision of the factors in question, namely the reference turnover, the reference year, the basic

rates adopted, and the rates of reduction in the amount of fines would not have involved any implicit disclosure of the specific turnover of the addressee undertakings, a disclosure which might have constituted an infringement of Article 214 of the Treaty. As the Commission has itself stated, the final amount of each individual fine is not the result of a strictly mathematical application of those factors.

192 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 the press conference of 13 July 1994, the very day on which the 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).

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

194 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.

195 In the specific circumstances set out in paragraph 193 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.

196 Consequently, this plea cannot be upheld.

The plea that the infringements had no economic effects

Arguments of the parties

197 According to the applicant, the economic effects of an infringement must be taken into account when assessing the gravity of the infringement and calculating the amount of the fines (*ICI* v *Commission*, cited above, paragraph 359). In the present case, the collusion on prices had no or, at the very most, a negligible effect on the market.

198 That is shown, first, by the report produced for the purpose of the procedure before the Commission by London Economics on behalf of several participants in that procedure, including the applicant (hereinafter 'the LE report').

199 The LE report concludes as follows: (a) the price changes in the cartonboard sector during the period in question are explained by changes in unit costs and demand; (b) the research carried out at a representative number of customers does not show that there was any change in conduct in regard to prices after 1986; (c) there is only a very vague correlation between announced price increases and prices actually paid by the customers; and (d) the profits made by the sector during the relevant period were insufficient to cover investment costs adequately in the long-term.

200 In the Decision the Commission did not even attempt to refute the LE report's conclusions that changes in prices on the cartonboard market would have been the same even if there been no collusion on price increases. It must therefore be concluded that there was no causal link between the concerted price increase initiatives and actual changes in transaction prices.

201 Second, the lack of economic effects of the collusion on prices is shown by the fact that the applicant was able to impose only a very small proportion of its announced price increases on the market. The applicant compares changes in net transaction prices before the increases with changes in announced prices. The average success rate of its price increase initiatives was 38.8% in Germany and 36% in France.

202 The applicant also refers to a graph showing changes in prices of GD2 grade cartonboard in the Community between 1986 and 1994 and changes in the price index

over the same period. It shows that the price level for the first quarter in 1986 was never again reached; that prices continued to fall until the end of 1987 and were consolidated in 1988 but only at a low level. Although prices began to rise consistently again in 1989-1990, that was merely the consequence of general economic changes (the reunification of Germany) and they started to fall again with the beginning of the recession in 1991.

203 Changes in transaction prices, when compared with those in announced prices, shows that announced prices were of minor importance in the fixing of prices for individual customers and that the practices in question did not cause any economic damage or, at least, that any economic damage was clearly less than the Commission asserts.

204 The Commission states that there is no doubt that the cartel affected the market, as the agreed increases served as a basis for negotiating prices with customers.

205 Furthermore, the concerted price increases had an additional effect on the market, since the changes in prices invoiced to customers corresponded to the prices agreed between the producers. The LE report does not show that the unlawful agreements had no effect on price levels, as was confirmed by the author of the report during the hearing before the Commission (minutes, p. 28). Nor is it disputed that the agreed price increases were imposed, at least in part, on customers. Moreover, the LE report shows that for 1988 and 1989 there was a linear relationship between announced prices and actual prices, because net price increases corresponded to announced prices. Changes in prices invoiced to customers therefore followed, with a lag, changes in agreed announced prices, as the author of the LE report himself acknowledged (minutes of the oral hearing, pp. 21 and 28).

206 At the oral hearing the author of the LE report stated (minutes p. 31) that a fall or slow increase in demand could — in a sector such as cartonboard, characterised by inelastic demand and high capital costs — often lead to a ruinous price war. However, in the present case, despite a slight increase in total consumption in the Community during the relevant period, there had not even been normal healthy competition on prices. The price increases were not based on the undertakings' own individual decisions but on agreements which they had concluded to that effect by them. Consequently, despite possible cost increases, it must be concluded that the prices did not change in the way they would have done in the absence of the price initiatives.

207 The Commission duly took into account the fact that the producers would have had to make concessions in individual price negotiations, particularly to their major customers (points 102 and 115 of the Decision). Even if concessions were made, that does not alter the fact that this took place on the basis of prices which had already been increased.

208 The data relating to changes in the applicant's prices in Germany and France is not inconsistent with the Commission's findings.

209 Nor are those findings contradicted by the graph showing changes in the prices of the applicant's cartonboard in the Community compared with changes in the price index. It is clear from that graph that, apart from a brief fall at the end of 1989 or beginning of 1990, the prices charged by the applicant increased continuously and by over 20% between 1988 and 1991.

210 The Commission therefore correctly assessed the effects of the cartel. In finding that the cartel had largely been successful in achieving its objectives (point 168 of

the Decision), the Commission was referring not only to increases in actual prices but also to other aspects of the cartel (see, in particular, points 136 and 137). Its assessment is, moreover, in accordance with that of the cartel members themselves, who took the view that the majority of the price initiatives had been successful.

Findings of the Court

211 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.

212 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, the only effects disputed by the applicant. It is apparent from the Decision that the finding concerning the large measure of success in achieving objectives is essentially based on the effects of collusion on prices (see points 100 to 102, 115, and 135 to 137 of the Decision).

213 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 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.

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

215 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).

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

217 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.

218 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.

219 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).

220 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.

221 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.

222 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.

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

224 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 assessment 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.

225 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 the exercise of its unlimited powers in regard to fines, when it assesses the seriousness of the infringement found in the present case (see paragraph 246 below).

The plea that there was no system of sanctions to compel undertakings to observe the cartel's rules

Arguments of the parties

226 The applicant submits that the fact that there were no plans for economic or moral measures in order to compel undertakings to apply announced price increases should lead to a reduction in the fine. The Commission's assertion that there was a system of sanctions is incorrect and not supported by any evidence.

227 Admittedly, according to the statement of 22 March 1993 made at the applicant's request by Mr Roos (Feldmühle's representative at PWG meetings), the applicant was asked to explain its uncooperative behaviour. However, that does not amount to a sanction. The applicant did not change its approach and the undertakings' conducted themselves on the basis of their own freely-adopted decisions. Stora's statements do not refer to any system of sanctions.

Findings of the Court

228 Contrary to the applicant's submission, the Decision does not allege that the undertakings to which it is addressed had established a 'system of sanctions' in order to force them to observe the cartel's decisions. Nor does the applicant specify which of the Commission's findings in the Decision is incorrect.

229 Moreover, it is not apparent from points 167 to 172 of the Decision that the existence of sanctions or coercive measures was a factor taken into account in order to determine the amount of the fines.

230 In those circumstances, the plea must be rejected.

The plea alleging that the general level of the fines is excessive

Arguments of the parties

231 The applicant states that according to the information divulged by the member of the Commission responsible for competition policy at the press conference of

13 July 1994 the fines of 9% imposed on the alleged 'ringleaders' represented more or less the maximum fine.

232 The infringement found in this case is not the most serious infringement of Article 85(1) of the Treaty. There was no volume control; the price increases were the result not of agreement but of mere collusion between the producers; the infringements were not enforced by a system of sanctions and had, at the very most, quite minor effects on the market. The fine should also be reduced inasmuch as the Fides information exchange system was regarded as a factor which made the infringement particularly reprehensible.

233 Furthermore, the Commission wrongly assessed the gravity of the infringements in question by failing to take account of the fact that they took place within a trade association which also pursued lawful activities.

234 Lastly, the Commission wrongly took the view that meetings of the PG Paperboard were secret. On the contrary, there were lists of participants and the absence of minutes is explained by the content of the discussions at the meetings. The absence of minutes is, moreover, inherent in cooperation involving discussions with a partially anti-competitive object.

235 The applicant concludes that the infringement found in this case is certainly not as serious as the cartels previously discovered by the Commission (see, in particular, the Polypropylene decision).

236 The Commission considers that the gravity of the infringement fully justifies the level of the fines imposed. The cartel in question involved not only agreements on prices and market shares but also measures to control the supply of cartonboard and measures which enabled the price initiatives to be implemented and which prevented the normal evolution of prices. The unlawfulness of the actions is manifest; agreements on prices and market shares are expressly prohibited by Article 85 of the Treaty.

237 The applicant's argument that the PG Paperboard's activities were in essence the normal activities of a trade association is neither credible for substantiated. Moreover, it is irrelevant that the PG Paperboard may have also pursued lawful objectives.

238 Another important factor when assessing the gravity of the infringement is the secrecy practised within the cartel. Although an absence of notes is a typical feature of unlawful arrangements, the measures adopted by the PG Paperboard went well beyond the usual measure of secrecy. First, the members were given express instructions not to take notes, a fact admitted by the managing director of Gruber & Weber at the oral hearing (minutes, p. 46). Second, the undertakings attempted to disguise the existence of the agreements by changing, for each price initiative, the order in which the undertakings announced the price increase in question (point 73 of the Decision).

239 Lastly, when assessing the gravity of the infringement, it is also necessary to take into account the other criteria set out in point 168 of the Decision.

Findings of the Court

240 Having regard to the Court's findings relating to the pleas in support of the application for annulment in whole or in part of Article 1 of the Decision, the applicant's arguments alleging that there was no volume control or agreement on prices must be rejected. The same applies to the argument that there was no 'system of sanctions' (see points 228 and 229 above).

241 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.'

242 Furthermore, as the Court has already pointed out, according to the Commission's reply to a written question from the Court, fines of a basic level of 9 or 7.5% of the turnover 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 the other undertakings respectively.

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

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

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

245 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. The applicant's argument that the PG Paperboard carried on lawful activities is irrelevant, because it has already been found that its bodies, in particular the PWG and the JMC, had an essentially anti-competitive object.

246 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.

247 This plea must therefore be rejected.

The plea that the Commission incorrectly assessed the applicant's participation in the cartel

Arguments of the parties

248 The applicant submits that the amount of the fine imposed on it is excessive because the Commission did not correctly assess its participation in the infringement.

249 First, the Commission did not properly take into account the applicant's negligible participation in meetings of the various bodies of the PG Paperboard.

250 The Commission wrongly found that the applicant had been a 'member' of the PWG since 1988 (point 170, third paragraph of the Decision). Although a representative of the applicant seems to have participated in a PWG meeting in February/March 1988, he did not inform the applicant's senior managemerial staff of his participation or even of the existence of the PWG. They learned of the PWG's existence only at the PG Paperboard's general meeting in May 1988 in Barcelona. Having been invited to the PWG meeting, which was to be held before that of the PC, they decided to attend merely in order to ascertain what was being discussed in it. As the PWG's meetings were ultimately of no interest to them, they did not take part in any meeting in 1988.

251 Only in May 1989 did the applicant start to take part more or less regularly in PWG meetings. On two occasions in 1988-1989, Feldmühle's representative at PWG meetings (Mr Roos) visited the applicant's directors in order to persuade them to participate regularly in the meetings. The applicant's decision to participate in them is explained by the fact that there was a possibility that the large groups, which already controlled the market at that time, might begin a price war in order to force their smaller competitors out of the market. In order to preserve its independence, the applicant therefore decided to participate in PWG meetings so as to gain access to the exchange of information between undertakings represented in the PWG and JMC.

252 Ultimately it participated in only nine of the 21 PWG meetings which the Commission found to have taken place (point 39 of the Decision).

253 It participated in the other bodies of the PG Paperboard only irregularly or not at all: in eight JMC meetings between March 1988 and April 1991, seven of the 11 PC meetings which the Commission found to have taken place between 1986 and 1991, but in no meetings of the Economic Committee.

254 Second, the Commission failed to take due account of the applicant's entirely passive role in the various bodies of the PG Paperboard. The applicant refers to Mr Roos' statement (see paragraph 227 above), which confirms, first, that the applicant participated in the PWG meetings only after he had convinced its directors that it would be useful to do so and, second, that it played a passive role and, in particular, played no part in the conclusion of the agreements. His statement also confirms the applicant's passive role in the JMC and shows that it was regarded as a reluctant and uncooperative participant.

255 Finally, the applicant did not play any part in the exchange of information between the PWG and the PC.

256 The Commission states that the applicant has admitted that it participated in meetings of three of the four committees of the PG Paperboard. At a number of meetings in which it participated the participants exchanged information and colluded in regard to price increases, capacities, volumes and possible downtime. Furthermore, the applicant conducted itself, at least as regards price increases, in line with the actions of the other undertakings and therefore used the information for its own benefit.

257 Moreover, the applicant was a member of the PWG with effect from 1988 and took part in almost all meetings of that body from 1989 onwards. The PWG was the central body of the cartel and discussed and elaborated the cartel's strategies. The fact that the applicant participated in the PWG's meetings justifies the finding that it was a more than average participant in the cartel.

258 On the basis of the applicant's participation in meetings of the central body of the cartel and its position as second largest German producer of GD grades, the Commission correctly took the view that a higher fine — corresponding to approximately 8% of its turnover in cartonboard in the Community in 1990 — should be imposed on it than on undertakings which participated in the cartel only to an average extent. However, in not imposing a fine of the same order as that imposed on the cartel 'ringleaders', the Commission duly took into account the fact that the applicant's role was less significant than that of the large industrial groups.

259 Lastly, the applicant cannot play down its role in the cartel by relying on the statement of Mr Roos. Even if it were accepted that the other participants considered

the applicant to be an uncooperative undertaking, it nevertheless cooperated in the price initiatives and therefore contributed to the success of the cartel.

Findings of the Court

260 The Court has already pointed out that, according to the Commission's reply to a written question from the Court, fines of a basic level of 9 or 7.5% of the turnover 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 the other undertakings respectively. It has also been noted that the amount of the fine imposed on the applicant corresponds to a rate of 8% of its turnover on the Community cartonboard market in 1990, that amount being reduced by one-third on the ground that in its reply to the statement of objections the applicant did not contest the essential factual allegations on which the Commission founded its objections against it.

261 In assessing whether that level of fine is justified, the Court points out, first, that the applicant accepts that it participated in one meeting of the PWG in May 1988 and that it participated on a more or less regular basis ('eine mehr oder weniger regelmäßige Teilnahme') in meetings of that body from May 1989 onwards. Furthermore, it states that as a result of investigations carried out by its lawyer it discovered that a former manager 'evidently participated in February/March 1988 in one meeting of the PWG' ('offenbar im Februar/März 1988 an einer einzigen Sitzung der PWG teilgenommen hat') but did not inform the applicant's directors of that fact or even of the existence of the PWG. The Court also points out in that regard that although the Commission indeed states that the applicant was a 'member' of the PWG from 1988 (point 170, third paragraph of the Decision), it does not claim that the applicant took part in PWG meetings other than those to which the applicant itself refers.

262 It follows from the Court's findings relating to the applicant's pleas in support of its application for annulment in whole or in part of Article 1 of the Decision that the nature of the PWG's functions, as set out in the Decision, has been demonstrated by the Commission.

263 In those circumstances, the Commission was fully entitled to conclude that the undertakings which participated in the meetings of that body had to be regarded, in principle, as 'ringleaders' of the infringement found and that accordingly they had to bear special responsibility (see point 170, first paragraph, of the Decision). It did not, however, include the applicant amongst the 'ringleaders' of the infringement, because it did not seem to have played as important a role in the determination of the policy of the cartel as the other participants in those meetings (point 170, third paragraph, of the Decision).

264 The Commission correctly assessed the applicant's role by taking into account, first, the fact that it had participated in the PWG meetings in which the main decisions with an anti-competitive object had been taken and, second, the fact that it had played a less important part in the determination of the cartel's policy. In so doing, the Commission also duly took into account the information in the statement of Mr Roos concerning the part played by the applicant in the cartel.

265 In those circumstances, the applicant's explanation that it participated in the meetings of the PWG only in order to gain access to the information exchanged between the undertakings represented there merely confirms that its participation had an essentially anti-competitive purpose.

266 Finally, having regard to the fact that the applicant participated in meetings of the PWG, in which the main decisions with an anti-competitive object had been taken, the Commission rightly found that the infringement committed by the applicant

was more serious than that committed by the other undertakings characterized as 'ordinary members' of the cartel, which had not been represented in the PWG.

267 Having regard to the whole of the foregoing considerations, this plea must be rejected.

The plea that insufficient account was taken of the applicant's cooperation in the procedure

Arguments of the parties

268 This plea is in two parts.

269 In the first part of the plea, the applicant submits that the Commission should have taken into account the fact that it replied fully and truthfully to the request for information sent under Article 11 of Regulation No 17. As the Commission did not carry out investigations at the applicant's premises, the applicant was unaware that the Commission had discovered documents which would lead it to conclude that there had been a serious infringement of Article 85 of the Treaty. Furthermore, as the applicant had participated in the PG Paperboard only to a limited extent, it was not aware of the full facts which had been established by the Commission. That being the case, it could not have cooperated more actively with the Commission at that time.

270 In the second part of the plea, it submits that, according to the case-law and the Commission's practice, the discontinuance, immediately after the Commission's investigations were carried out on 23 April 1991, of its participation in meetings of

the PG Paperboard and in any practice which might have constituted an infringement must be regarded as a mitigating factor (see, in particular, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 146).

271 In the third part of the plea, it submits that the Commission, when calculating the fine, took no account of the fact that applicant's active cooperation had contributed to the speedy conclusion of the procedure. It was only upon receipt of the statement of objections that it learned that the Commission was alleging that it had committed a serious infringement of Article 85 of the Treaty. However, in its letter of 23 March 1993, that is to say, before the end of the period fixed for its reply to the statement of objections, the applicant admitted that it had infringed Article 85 of the Treaty by participating in discussions on price increases and in a general exchange of views on the maintenance of quantities to be sold. That admission that there had been an infringement of Article 85 of the Treaty was wholly voluntarily and clearly led other undertakings also to admit, or at least not to contest, the substance of the infringement.

272 The applicant was the only undertaking which expressly stated at the hearing before the Commission that it did not contest the essence of the infringement alleged by the Commission. It was also, with Cascades, the only undertaking to give all the dates of the meetings at which it was represented. Lastly, it sent the Commission Mr Roos' statement, to which the Commission referred on several occasions at the hearing and which is referred to indirectly in point 59 of the Decision, where it is stated that the applicant was taken to task because of the increase in its market share.

273 As that active cooperation was not taken into account, the applicant has been treated less favourably than Stora in particular. Stora cooperated only after the Commission had carried out its investigations. Furthermore, Stora was aware not only of the compromising documents which the Commission had found at undertakings in the Stora group, but also of documents found at other undertakings. It is also apparent from the correspondence between Stora and the Commission

(appendices 34 to 43 to the statement of objections) that Stora's admission was not immediate and that the Commission in fact had to extract various items of information from Stora. In those circumstances, the applicant should have benefited from its cooperation to the same extent as Stora, that is to say, the amount of the fine should have been reduced by two-thirds.

274 Moreover, the Commission did not offer the smaller producers an opportunity to cooperate at an early stage, since they were not made aware of Stora's cooperation or of the evidence which the Commission had obtained.

275 Lastly, because the evidence of its active cooperation with the Commission was not taken into account, the applicant was also treated less favourably than the other undertakings which received a one-third reduction in their fines for not contesting the main factual allegations.

276 The Commission states that the applicant's fine was reduced by a one-third because it did not contest the essential factual allegations in the statement of objections (point 172 of the Decision). There were no grounds for any greater reduction.

277 The fact that the applicant replied fully and truthfully to the request for information cannot justify a reduction in the fine, since it was legally obliged to do so.

278 The applicant's argument that it was unable to cooperate actively at an early stage of the procedure cannot be accepted. It was open to it to clarify the facts and so contribute actively to the rapid conclusion of the procedure. Moreover, the

applicant exaggerates the value of the statement made by Mr Roos. The purpose of that statement was not merely to clarify the facts but also to defend the applicant.

279 It was not treated less favourably than Stora. Stora cooperated spontaneously and actively and helped to clarify the facts significantly in its reply to the requests for information of 30 August and 23 October 1991. By contrast, it was only in a letter of 23 March 1993, that is to say, after service of the statement of objections, that the applicant admitted that it might have participated in an infringement of competition law. At that stage, its cooperation still amounted to the non-contestation of the essential allegations made against it. Such conduct, already rewarded by a one-third reduction in the fine, cannot be regarded as active cooperation.

Findings of the Court

280 The applicant received a one-third reduction in the fine, because, according to the Decision, in its reply to the statement of objections it did not contest the essential factual allegations relied upon by the Commission against it.

281 A reduction on grounds of cooperation during the administrative procedure is justified only if the undertaking's conduct made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (*ICI* v *Commission*, cited above, paragraph 393). Accordingly, 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 facilitated the Commission's task of finding and bringing to an end infringements of the Community competition 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.

282 In the present case, none of the arguments upon which the applicant relies can show that its cooperation with the Commission went beyond an acknowledgment of the Commission's factual allegations.

283 In the first part of the plea, the applicant submits that it replied fully and truthfully to the request for information sent to it by the Commission under Article 11 of Regulation No 17. It is, however, settled law that cooperation in an investigation which does not go beyond that which undertakings are required to provide under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine (see, for example, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342). Moreover, the applicant, which participated in the infringement with effect from March 1988 and was therefore aware of the functions of the PWG and JMC, could in fact have cooperated more actively with the Commission, as Stora did, and so have given grounds for a greater reduction in the fine. Its argument that at the material time it lacked the information required in order to provide active assistance to the Commission must therefore be rejected.

284 As regards the second part of the plea, namely that after the investigations had been carried out by the Commission on 23 April 1991 (see paragraph 8 above) the applicant immediately ceased to participate in meetings of the PG Paperboard and in any practice capable of constituting an infringement, the Court points out that the gravity of infringements falls to be determined by reference to numerous factors and that no binding or exhaustive list of criteria to be applied has been drawn up (see paragraph 183 above). Consequently, although the discontinuance of an infringement before service of the statement of objections may, in principle, be regarded as a factor mitigating the gravity of the infringement which an undertaking is found to have committed, the Commission was not required to reach such a conclusion in the particular circumstances of this case. Since the applicant has not adduced any argument to show that the Commission exceeded the limits of the

discretion which it enjoys when determining which factors should be taken into account in order to fix the amount of the fine, the second part of the plea must be rejected.

285 Nor can the Court uphold the third part of the plea, to the effect that the applicant actively cooperated with the Commission.

286 The applicant submits that it supplied full details of its participation in meetings of the various committees of the PG Paperboard. It points out, moreover, that at the hearing before the Commission it expressly stated that it was not contesting the essential factual allegations levelled against it. However, the Court finds that such cooperation with the Commission did not justify a greater reduction in the fine than the one-third reduction actually made. Mr Roos' statement, which the applicant sent to the Commission with its reply to the statement of objections, did not contain any evidence which could have served to facilitate the Commission's task in a material respect. It suffices to find in that regard that the Decision contains only one — indirect — reference to the information supplied in that statement (point 59, last paragraph).

287 Lastly, in so far as the applicant submits that it has been the subject of discrimination in comparison with Stora and Rena, the Court points out that, in accordance with settled law, the principle of equal treatment, a general principle of Community law, is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25; to the same effect Case T-100/92 *La Pietra* v *Commission* [1994] ECR-SC II-275, paragraph 50).

288 In the present case Stora supplied the Commission with statements containing a very detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard and the participation in the infringement of various producers. By those statements, Stora supplied information going well beyond that which may be required by the Commission pursuant to 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 clearly apparent that Stora's statements constituted for the Commission the principal evidence of the existence of the infringement. It must therefore be concluded that without Stora's statements it would at the very least have been much more difficult for the Commission to find and, where necessary, put an end to the infringement with which the Decision is concerned. In the light of those considerations, the applicant cannot validly claim that the principle of equal treatment requires that the reduction in its fine should have been similar to that granted to Stora.

289 Furthermore, since the applicant has not proved that its cooperation with the Commission went beyond an admission of its factual allegations, the applicant was not treated less favourably than the other undertakings which received a one-third reduction in their fine.

290 Having regard to the foregoing considerations, the whole of the plea must be rejected.

The plea that the fine imposed on the applicant was excessive in comparison with the Commission's previous practice

291 The applicant submits that, as the Commission has acknowledged (in the *Thirteenth Report on Competition Policy*, point 64), the Commission must take the principle of proportionality into account when it fixes the amount of fines. The fine imposed on the applicant is excessive in the light of the Commission's previous practice.

292 The Commission has imposed fines of ECU 3 million only on undertakings with a turnover of several billion ecus. Moreover, such fines have been imposed most often in cases of repeated infringements.

293 The Court points out that it has found that the general level of fines adopted by the Commission was justified even in the light of the Commission's previous practice (see paragraph 240 et seq. above). It has also found that the Commission correctly assessed the applicant's role in the infringement (see paragraph 260 et seq. above).

294 This plea cannot therefore be upheld.

The plea that the Commission failed to take into account the fact that the applicant manufactures only one product and is restricted in its ability to compete

Arguments of the parties

295 The applicant submits that the Commission must fix the amount of the fine on the basis of the total turnover of each undertaking, which gives an indication of its size and economic power (*Dunlop Slazenger* v *Commission*, cited above, paragraph 160). In its judgment in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94, the Court held that the Commission cannot fix the fine solely on the basis of the turnover accounted for by the goods in respect of which the infringement was committed (see also *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 121).

296 In the present case, the Commission took into account exclusively turnover from goods in respect of which the infringement was committed. Where an undertaking, like the applicant, largely achieves its turnover from one product in respect of which the infringement was committed, that approach treats it less favourably than undertakings which also manufacture other products. The fine imposed on the applicant amounts to a relatively high proportion of its total turnover, whereas, for example, in Stora's case the fine constitutes an insignificant part of its total turnover. The applicant is therefore much more severely affected by the fine than undertakings which committed a much more serious infringement.

297 Lastly, as a result of the excessive amount of the fine the applicant's ability to invest has been seriously impaired for several years, so that there is an increased risk that it will be taken over by one of the large undertakings on the market.

298 The Commission contends that, inasmuch as the applicant manufactured only one product, it derived particular benefit from a cartel which covered the whole of its cartonboard production. The fine was therefore correctly fixed on the basis of the applicant's turnover on the Community cartonboard market. Furthermore, the applicant's total turnover in 1990 was almost ECU 11 million higher than the turnover figure used in order to calculate the fine.

Findings of the Court

299 As already stated, the gravity of infringements falls to be determined by reference to numerous factors and no binding or exhaustive list of criteria to be applied has been drawn up (see paragraph 183 above).

300 Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market. It follows that it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (*Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 120 and 121).

301 Furthermore, the Commission should ordinarily use one and the same method of calculating the fines imposed on undertakings penalised for having participated in the same infringement (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 122). The Commission cannot therefore be criticised for having systematically taken, as a basis for calculating the fines, the undertaking's turnover on the Community cartonboard market in 1990 solely from goods in respect of which the infringement was committed.

302 In those circumstances, the applicant cannot validly claim that the Commission's method operated to its disadvantage, particularly since it does not dispute the Commission's assertion that its total turnover in 1990 was higher than the turnover figure applied by the Commission.

303 This plea must therefore also be rejected.

304 It follows from the whole of the foregoing that Article 1 of the Decision must be annulled in regard to the applicant in so far as it states that the applicant participated in an infringement of Article 85(1) of the Treaty prior to March 1988. Article 2 of the Decision must be annulled in part as regards the applicant.

305 As regards the amount of the fine imposed, it is necessary to take into account the fact that the applicant can be held responsible for infringement of Article 85(1) of the Treaty only in respect of the period from March 1988 until April 1991.

306 As the other pleas relied upon by the applicant in support of its application for annulment or reduction of the fine have been rejected, the Court, exercising its unlimited jurisdiction, will set the fine at ECU 2 500 000.

Costs

307 Under Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been only partially successful, the Court considers it fair in the circumstances of the case to order each party to bear its own costs.

308 The applicant has sought an order that the Commission should pay the costs, including those associated with the provision of a bank guarantee. However, it is settled law that expenses incurred in providing a bank guarantee in order to avoid the enforcement of a decision are not expenses incurred for the purpose of the proceedings within the meaning of Article 91(b) of the Rules of Procedure (see the order of 20 November 1987 in Case 183/83 *Krupp* v *Commission* [1987] ECR 4611, paragraph 10, and *Parker Pen* v *Commission*, cited above, paragraph 101).

On those grounds,

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

hereby:

1) **Annuls, as regards the applicant, Article 1 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.8333 — Cartonboard) in so far as the date of the beginning of the infringement alleged against it is stated to be prior to March 1988;**

2) **Annuls, as regards the applicant, the first to fourth paragraphs of Article 2 of Commission Decision 94/601/EC save and except 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.';

3) Sets the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 2 500 000;

4) Dismisses the application as regards the remaining claims;

5) Orders each party to bear its own costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary