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

14 May 1998 *

In Case T-354/94,

Stora Kopparbergs Bergslags AB, a company incorporated under Swedish law, established at Falun, Sweden, represented by Alexander Riesenkampff, Heinz-Joachim Freund and Stefan Lehr, Rechtsanwälte, Frankfurt am Main, with an address for service in Luxembourg at the Chambers of René Faltz, 6 Rue Heinrich Heine,

applicant,

v

Commission of the European Communities, represented by Julian Currall and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Facts

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

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

2 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.

3 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.

4 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.

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

6 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.

7 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.

8 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:

(...)

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

(...)'

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

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

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

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

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

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

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

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

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

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

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

Procedure

20 The applicant brought this action by application lodged at the Registry of the Court on 24 October 1994.

21 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94 and T-352/94).

22 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).

23 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).

24 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).

25 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.

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

27 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.

28 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.

29 The parties in the cases referred to in paragraph 25 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

30 The applicant claims that the Court should:

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

— in the alternative, annul or reduce the fine;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— reject the first plea as inadmissible, alternatively as unfounded;

— reject the other pleas as unfounded;

— order the applicant to pay the costs.

The application for annulment of the Decision

32 The applicant puts forward one plea alleging that it is not the correct addressee of the Decision.

Admissibility of the plea

Arguments of the parties

33 The Commission submits that it was led to disregard other possible addressees of the Decision during the preliminary procedure by the way in which the applicant itself had acted. Moreover, the position adopted by the applicant during the administrative procedure enabled it to achieve a very substantial reduction in its fine. In view of those circumstances, it should not be allowed to change its position before the Court of First Instance. An analogy may be drawn with the equitable maxim, applied in common law jurisdictions, that a party seeking a relief must 'come with clean hands'.

34 The Commission states that the initial letters under Article 11 of Regulation No 17 were not sent to the applicant but to three other companies in the group. However, the letter of 19 August 1991 from the solicitor acting for the applicant and the applicant's one reply of 30 August 1991 (appendices 34 and 35 to the statement of objections) presented the applicant as the interlocutor representing the group in regard to the proceedings in question. Those two documents gave it to understand that the applicant's senior management had decided to cooperate with the Commission and was not interested in who was the correct addressee of the proceedings. Its purpose, which was achieved, was therefore to make the Commission treat it favourably because of its cooperative attitude.

35 The applicant's approach produced an effect, since all subsequent correspondence, including correspondence under Article 11 of Regulation No 17, was addressed to the applicant. The applicant's replies confirmed the impression given by the initial correspondence, because the applicant continued to present itself as the correct addressee of the proceedings and of any final decision.

36 For that reason the Commission specifically stated in the statement of objections, which it addressed to the applicant, that the applicant accepted its responsibility for its subsidiaries' conduct (see also point 158 of the Decision). The fact that the reply to the statement of objections did not comment on that statement must therefore be regarded, in the circumstances of this case, as an effective admission in that regard.

37 Moreover, the Stora Group still presents itself to the outside world as having a common identity and acting in a uniform manner. The fact that the applicant presented itself as the Commission's sole interlocutor is wholly consistent with that policy.

38 Lastly, the Court of First Instance has implicitly held that in certain circumstances an undertaking may be bound by the position which it adopted before the Commission, such that it is not then entitled to change that position before the Court (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439).

39 The applicant disputes that it explicitly or implicitly accepted that it was the correct addressee of the Decision. The Commission correctly sent the initial letters under Article 11 of Regulation No 17 to the applicant's subsidiaries and nothing in its reply to those letters implied that it was answering in its own name. In the letter of 19 August 1991, its lawyer expressly indicated that he was acting as agent of the applicant and of its subsidiaries. It was logical for the applicant to decide that, owing to the particular nature of the matters, its legal service would coordinate the treatment of the investigations initiated against the various group companies.

40 The applicant observes that it was not obliged to reply to the statement of objections. In its reply it stated that it was not seeking to comment on the Commission's legal analysis. It was entitled to restrict its reply to certain factual points and

so nothing supports the conclusion that, in adopting that approach, it had accepted any responsibility for the alleged infringements.

Findings of the Court

41 It is common ground that the applicant never expressly acknowledged that it was the right addressee of the statement of objections or of the Decision.

42 It is therefore necessary to ascertain whether the applicant impliedly acknowledged that it was the correct addressee of that statement and of the Decision.

43 Following the requests for information sent pursuant to Article 11 of Regulation No 17 to several of the applicant's subsidiaries, the applicant's lawyer stated as follows in his letter to the Commission of 19 August 1991 (appendix 34 to the statement of objections):

'In the above case, this firm is instructed by Stora Kopparbergs Bergslags AB ("Stora") to represent it and its various subsidiaries, including the Billerud, Kopparfors and Feldmühle companies involved in the production and supply of cartonboard; Stora and its relevant cartonboard subsidiaries are referred to for the purposes of this case as the Stora Group.

The senior management of Stora has instructed me to inform the Commission that it recognises the seriousness of the allegations of infringement of the competition rules raised in the Commission's decisions under Article 14 of Regulation 17 (to

investigate on-the-spot) and in its letters issued under Article 11 of that Regulation (requests for information) and that it has initiated a review of relevant policies and practices of the various subsidiaries within the Stora Group. From the early results of that review, Stora has concluded that companies within the Stora Group have engaged in certain policies and practices that are likely to constitute infringements of the competition rules.

...

In the meantime, the answers to the various requests for information that have been sent to eleven companies within the Stora Group are being completed and will be submitted to the Commission very shortly'.

44 In its first statement of 30 August 1991 (appendix 35 to the statement of objections) the applicant then stated as follows:

'This document contains the replies of Cartonnerie Béghin Corbehem SA (CBC), Feldmühle AG (Feldmühle) and Kopparfors AB (Kopparfors) (together referred to as the Stora Producers) to the Commission's first Article 11 Request to producers dated 11 June 1991. The Stora Producers are all owned by Stora Kopparbergs Bergslags AB (Stora) which has collated the answers to the Article 11 requests addressed to its subsidiaries. Each of the Stora Producers has supplied the information contained in these answers ...'.

45 Lastly, the applicant's subsequent statements (appendices 38, 39, 43 and 44 to the statement of objections) did not indicate in whose name they were drawn up. They contain references to 'Stora' and to 'the Stora Producers'.

46 In the light of those documents and in view of the applicant's equivocal position during the administrative procedure prior to the service of the statement of objections, the Commission could reasonably assume that the applicant did not intend to contest its responsibility for its subsidiaries' unlawful conduct. At that stage, the Commission was also entitled to interpret the applicant's position as being that it was putting itself forward as a sole interlocutor, prepared to cooperate in order to establish the unlawful conduct alleged against the Stora Group companies, but without thereby implicitly accepting that it was the right addressee of the statement of objections and of any subsequent decision.

47 As regards the subsequent period, the statement of objections addressed to the applicant stated: 'Stora accepts that it is responsible for the involvement in the infringement of its subsidiary companies Feldmühle, Kopparfors and CBC both before and after their acquisition by the group'. Consequently, in deciding to reply to some only of the allegations in the statement of objections, the applicant deliberately chose not to respond to the Commission's express allegation that it was responsible for its subsidiaries' involvement in the infringement.

48 In those circumstances, even though its lack of response cannot be held against it given that an undertaking is not compelled to reply to the statement of objections served on it (*Hilti* v *Commission*, cited above, paragraphs 37 and 38), in view of the circumstances set out in paragraphs 43 to 47 above the Commission was nevertheless entitled to infer from the applicant's stance that the applicant considered itself to be the correct addressee of the future decision and that it would not put this point in issue before the Court of First Instance.

49 However, notwithstanding that conclusion, the plea must be declared admissible.

50 Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute evidence for this Court when determining whether an action brought before it is well founded, such an acknowledgement cannot restrict the actual exercise of the right to bring proceedings under the fourth paragraph of Article 173 of the Treaty. In the absence of a specific legal basis, such a restriction would be contrary to the fundamental principles of the rule of law and of respect for the rights of the defence.

51 In the present case, Stora's conduct in the administrative procedure before the Commission and, in particular, the content of the statements addressed to the Commission are evidence which the Court will take into account when considering the merits of the application.

Substance

52 The plea is in two parts. First, the applicant asserts that there has been an infringement of the obligation to state the reasons on which the Decision is based. Second, it submits that the infringement is not imputable to it.

First part: inadequate statement of reasons

— Arguments of the parties

53 The applicant points out that the Commission opted as a general principle to address the Decision to the companies named in the membership lists of the PG Paperboard. It adds that, in derogation from that principle, however, the Commission addressed the Decision to a group, as represented by its parent company, where more than one company in the group had participated in the infringement

or where there was specific evidence implicating the parent company in the participation of the subsidiary in the cartel (point 143 of the Decision). However, those two criteria have no foundation in Community law. The only ground for sending the Decision to the applicant is its alleged acceptance of responsibility for the conduct of its subsidiary companies (point 158 of the Decision). That ground is not a genuine reason, with the result that the Decision does not satisfy the requirements laid down in Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 30, pursuant to which a decision adopted under Article 85 of the Treaty concerning several addressees must disclose the grounds for attributing the infringements concerned to the various addressees.

54 The applicant also rejects the Commission's contention that it is not required to reply in the Decision to arguments that were not raised in the administrative procedure. In Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 14, on which the Commission relies, the Court of Justice stated that the Commission must mention the considerations which led it to adopt its decision.

55 The Commission contends that point 140 et seq. of the Decision sets out the general principles on which it relied. Point 147 et seq., dealing with the question of the correct addressee in individual cases, is merely the specific application of those principles. In any event, it was not obliged to give a full statement of reasons in regard to matters which had not even been raised before it (see *Michelin* v *Commission*, cited above, paragraphs 14 and 15).

— Findings of the Court

56 It is settled law that the statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal valdity to be carried out and must provide the person concerned with information sufficient to allow him to ascertain whether or not the decision is well founded.

The adequacy of such a statement of reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving explanations. In order to fulfil those purposes, an adequate statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question. Where, as in the present case, a decision taken in application of Article 85 or Article 86 of the Treaty relates to several addressees and poses a problem of attribution of liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for that infringement (see, in particular, *AWS Benelux* v *Commission*, cited above, paragraph 26).

57 In the present case, points 140 to 146 of the Decision contain a sufficiently clear statement of the general criteria on which the Commission relied in order to determine the undertakings to which the Decision was addressed.

58 Point 143 states that, in principle, the Commission addressed the Decision to the entity named in the membership lists of the PG Paperboard, except that:

'1. where more than one company in a group participated in the infringement; or

2. where there is express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel,

the proceedings have been addressed to the group (represented by the parent company).'

59 Where ownership of a company had been transferred, the Commission determined the addressee of the Decision in particular on the basis of the following criterion, set out in the third paragraph of point 145:

'... if the transferred subsidiary continued as a member of the cartel, it will depend upon the individual circumstances whether proceedings in respect of such participation should be addressed to that subsidiary in its own name or to the new parent group'.

60 In points 147 to 160 of the Decision, the Commission explained how it applied the abovementioned general criteria in each individual case.

61 Admittedly, as regards the applicant's situation, point 158 merely states: 'Stora accepts that it is responsible for the involvement in the infringement of its subsidiary companies Feldmühle, Kopparfors and CBC both before and after their acquisition by the group'.

62 However, as the Court has already held (paragraph 48 above), the Commission cannot be criticised for having interpreted the applicant's stance during the administrative procedure as indicating its intention not to contest its responsibility for the infringement found.

63 Consequently, as the applicant did not expressly take issue with the unambiguous assertion in the statement of objections that it had accepted responsibility for its subsidiaries' infringements, the Commission was not obliged to give particular reasons in the applicant's individual case, for the application of the general criteria adopted.

64 Moreover, the individual particulars annexed to the statement of objections contain several passages concerning the reasons which led the Commission to address that document to the applicant. In particular, it is stated that (p. 7): 'The liability of Feldmühle for its involvement prior to the acquisition by Stora passes to the combined entity. The same considerations apply to the behaviour of CBC before it

became part of Feldmühle. In any case, Stora cannot claim to have acquired responsibility as the "innocent" purchaser of an infringing producer: Kopparfors was a full and active member of the cartel from the beginning, and the conduct of Feldmühle and CBC was continued by the new grouping'.

65 Since the statement of objections thus indicated the Commission's reasoning with sufficient clarity, the applicant had all the information necessary in order to ascertain whether or not the Decision was properly addressed to it (see, by analogy, Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, point 230).

66 So far as concerns the question of the legality of the general criteria applied by the Commission, this is a matter to be considered in the examination of the substance of the Decision. The applicant's assertion that the criteria set out in point 143 of the Decision are not lawful is therefore irrelevant in the present context.

67 The first part of the plea cannot therefore be upheld.

Second part: the applicant is not responsible for the infringements

— Arguments of the parties

68 The applicant claims, first, that responsibility for the infringement in question is not imputable to it as legal successor to the companies which committed the infringement, because those companies still exist.

69 Second, the conditions for attributing to the applicant responsibility for infringements committed within the group are not satisfied either.

70 According to the Commission's previous decisions and the case-law, three conditions must be satisfied before responsibility for the unlawful conduct of subsidiaries may be attributed to the parent company by virtue of their constituting a single economic unit. Those conditions are (a) a link between the companies as a result of share ownership; (b) overlapping management of the companies participating in the anti-competitive practices; and (c) the absence of autonomy of the subsidiaries because they are members of a centrally managed group of companies or because their management interlocks with that of the parent company (see, in particular, Case 48/69 *ICI* v *Commission* [1972] ECR 619, Case 107/82 *AEG* v *Commission* [1983] ECR 3151 and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389).

71 In this case, however, the applicant had no effective control over the commercial policy of the three companies in question during the period covered by the Decision.

72 Kopparfors has been a wholly-owned subsidiary of the applicant since 1986. However, in keeping with the decentralised structure of the Stora Group, Kopparfors continued to operate on the cartonboard market as an autonomous legal entity and determined its business policy largely on its own, it having been the only group company active in the cartonboard sector at the material time. Moreover, it had its own board of directors with outside representatives.

73 As regards Feldmühle, in April 1990 the applicant itself concluded contracts for the acquisition of approximately 75% of shares in the FeNo Group, which included Feldmühle. The actual transfer of shares took place only in September 1990. At the end of 1990 the applicant acquired some shares from small shareholders, so that in April 1991 it held 97.84% of shares in FeNo. Although it therefore

held the majority of shares in Feldmühle at the end of the period covered by the Decision, it did not have the control necessary for attribution to it of responsibility for conduct for which the subsidiary was mainly responsible.

74 The applicant submits that it could not have replaced the members of Feldmühle's management board ('Vorstand') by managers from the Stora Group, because under Paragraph 84 of the Aktiengesetz (German Law on Public Limited Companies) the appointment of a member of the management board may be revoked only in specific circumstances and there was no cause for revocation in this case. Since the applicant began to integrate Feldmühle's cartonboard business into its cartonboard division only after Autumn 1991, the applicant was unable to influence Feldmühle's commercial policy prior to the cessation of the infringement.

75 The arguments relating to the applicant's lack of influence over Feldmühle also apply in regard to CBC, because CBC was a wholly-owned subsidiary of Feldmühle at the time when FeNo was acquired.

76 Lastly, the applicant disputes the Commission's contention that a parent company may be held responsible for a subsidiary's anti-competitive conduct solely on the ground that the subsidiary is wholly owned by it. In particular, the Commission's interpretation of the judgment in *AEG* v *Commission*, cited above, is incorrect, because the reason why the Court of Justice did not require further proof of AEG's influence over one of the subsidiaries in question was that AEG had not disputed that it was in a position to exercise a decisive influence on that subsidiary's pricing policy (paragraph 50 of the judgment). AEG also strongly influenced its subsidiaries in regard to the infringement in question, which consisted in the establishment and enforcement of a selective distribution system devised by it. Moreover, the Advocate General's Opinion and paragraph 49 of the judgment are at variance with the Commission's contention. That contention is also inconsistent with the judgments of the Court of First Instance in *BPB Industries and British Gypsum* v *Commission*, cited above, and in Case T-102/92 *Viho* v *Commission*

[1995] ECR II-17. The Commission's contention is in any event inapplicable as regards Feldmühle, because, even now, the applicant holds only 98.3% of its shares.

77 The Commission states that even if it were in fact the case that Feldmühle, Kopparfors and CBC still existed as autonomous legal entities, that would be irrelevant. It follows from the judgment in *AEG* v *Commission*, cited above (paragraph 49), that where a subsidiary is wholly-owned the Commission is perfectly entitled to address the decision to the parent company, as it did in this case. In such circumstances, the parent company's control of commercial policy is presumed. That case was confirmed by the judgments in Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 312, and in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865. Consequently, only where a subsidiary is not wholly owned is it necessary to look for evidence of actual control.

— Findings of the Court

78 As this Court has already held, it is necessary to refer to the individual particulars annexed to the statement of objections in order to assess the reasons which led the Commission to address the Decision to the applicant. It is apparent from those particulars that the conduct of Kopparfors, Feldmühle and CBC was imputed to the applicant in its capacity as parent company of the Stora Group.

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

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

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

82 Furthermore, the applicant does not dispute that at the date when it acquired the majority of shares in the FeNo Group two companies in that group, Feldmühle and CBC, were participating in an infringement in which Kopparfors, the applicant's wholly-owned subsidiary, was also participating. Since Kopparfors' conduct must be imputed to the applicant, the Commission justifiably stated in the individual particulars annexed to the statement of objections (see paragraph 64 above) that the applicant could not have been unaware of the anti-competitive conduct of Feldmühle and CBC.

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

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

85 In the light of the foregoing considerations, the Commission was entitled to impute the conduct of the companies in question to the applicant. That finding is also supported by the applicant's conduct during the administrative procedure, in which it presented itself as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question (see, by analogy, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 6). Finally, the choice of the applicant as addressee of the Decision is in conformity with the general criteria adopted by the Commission in point 143 of the Decision (see paragraph 58 above), since several companies in the Stora Group participated in the infringement in question.

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

The application for annulment of Article 2 of the Decision

Arguments of the parties

87 The applicant claims that the prohibition of future exchanges of information is not lawful.

88 It observes, first, that Article 2 of the Decision does not indicate with sufficient precision what information is prohibited from exchange in the future. Article 2 is worded so vaguely that any exchange of information could be regarded as prohibited by it. In particular, Article 2 seems to prohibit any exchange of information which might potentially be used for anti-competitive purposes.

89 Second, Article 2 of the Decision prohibits some exchanges of information which are not anti-competitive. In that regard, the applicant refers to the Commission's notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings (OJ 1968 C 75, p. 3, as corrected in OJ C 84, p. 14) and to the *Seventh Report on Competition Policy* (paragraph 7), according to which an exchange of purely statistical data unrelated to individual data from individual firms is not prohibited. Consequently, Article 2 goes too far in that it prohibits both any exchange of commercial information, even if it is general, and any exchange of statistics of competitive significance.

90 The applicant disputes that the scope of the order in Article 2 may be deduced from the grounds of the Decision. Since the Commission did not consider in the Decision the extent to which the information exchange in itself constituted an infringement of Article 85 of the Treaty, the information provided in the grounds

of the Decision is not sufficiently precise to enable the scope of Article 2 to be established. The Decision differs from previous cases in this regard (Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755). The applicant adds that the point was not raised in the '*Polypropylene*' judgments (see, for example, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711).

91 Lastly, the Commission had no legitimate interest in issuing the direction contained in Article 2 of the Decision to the applicant. The applicant's cooperation with the Commission and the implementation of a compliance programme had demonstrated its intention to prevent any future infringement of competition law. In those circumstances, the Commission had no power to issue that order (Case 7/82 *GVL* v *Commission* [1983] ECR 483).

92 The Commission observes that, under Article 3 of Regulation No 17, it is entitled to require undertakings to put an end to infringements actually found. The scope of the direction can be ascertained by reference to what the undertakings have done. The Decision contains detailed information about the workings of the cartel, which thus makes it possible to determine the precise scope of Article 2 of the Decision (see, in particular, points 49 and 69 thereof). That provision identifies the type of information and specifies the circumstances in which it may not be exchanged.

93 Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene*, OJ 1986 L 230, p. 1, hereinafter 'the *Polypropylene* decision') and Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.043 — *Tetra Pak II*, OJ 1992 L 72, p. 1) contain similar orders which were confirmed by the Court of First Instance. Moreover, in Case T-35/92 *John Deere* v

Commission [1994] ECR II-957 and in *Fiatagri and New Holland Ford* v *Commission*, cited above, the Court of First Instance also rejected an argument analogous to that invoked by the applicant, relating to an order concerning information exchanges between competitors. The Commission states that, having regard to the fact that the system was used as a means of applying an unlawful agreement, it did not need to analyse the information exchange system as an infringement in itself. It took the same approach in the *Polypropylene* decision.

94 Lastly, the Commission disputes that it had no legitimate interest in addressing the order to the applicant.

Findings of the Court

95 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.'

96 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.

97 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 (*Tetra Pak* v *Commission*, cited above, paragraph 220).

98 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 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).

99 In the present case, the Court rejects the applicant's argument that the Commission cannot exercise its power to give directions to the applicant under Article 3(1) of Regulation No 17 because the applicant has proved its intention to prevent any

future infringement of the Community competition rules. In that regard, it suffices to point out that the applicant disputes the substantive scope of the directions in Article 2 of the Decision, which demonstrates the Commission's legitimate interest in specifying the extent of the obligations on the undertakings, including the applicant (see, to the same effect, *GVL* v *Commission*, cited above, paragraphs 26 to 28).

100 Next, 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.

101 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.

102 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.

103 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.

104 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.

105 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'.

106 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 provides:

'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. ...'.

107 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.

108 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.

109 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.

110 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.

111 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.

112 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.

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

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

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

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

The application for annulment or reduction of the fine

114 The applicant puts forward one plea alleging infringement of Article 15 of Regulation No 17. The plea is in five parts which must be considered separately.

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

Arguments of the parties

115 The applicant maintains that in the Decision the Commission should have explained how the amount of the fines imposed on the various undertakings was determined. Although point 167 of the Decision sets out the criteria taken into consideration, the Decision does not reveal what importance was attributed to each of those criteria. Likewise, the explanation of the rate applied in order to determine the amount of the fine, which the Commission has supplied in its defence, should have been included in the Decision.

116 The Commission contends that point 167 et seq. of the Decision adequately set out the criteria applied to calculate the fines. They are very similar to the criteria adopted in the *Polypropylene* decision and confirmed by the Court of First Instance.

Findings of the Court

117 It is settled law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

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

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

120 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines, the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as 'ringleaders' of the cartel, whereas the other under-

takings were regarded as 'ordinary members'. Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and the applicant must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

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

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

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

reduction granted to Rena and the applicant, on the one hand, and to eight other undertakings, on the other.

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

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

126 The Commission also accepted at the hearing that nothing prevented it from indicating in the Decision the factors which had been systematically taken into account and which had been divulged by the Commissioner responsible for competition policy at a press conference held on the day on which that decision was adopted. In that regard, it is settled law that the reasons for a decision must appear in the

actual body of the decision and that, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and, to the same effect, *Hilti* v *Commission*, cited above, paragraph 136).

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

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

129 In the specific circumstances set out in paragraph 127 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of

calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed.

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

Second part of the plea: the applicant should not have been considered to be one of the 'ringleaders' of the cartel

131 The applicant claims that the Commission, in point 170 of the Decision, wrongly considered it to be one of the ringleaders of the cartel on the ground that it took part in the PWG. It maintains that it is not responsible for the conduct of Feldmühle and CBC. Consequently, there is no justification for attributing special responsibility to it on the basis of its alleged participation in the PWG.

132 It suffices for the Court to observe in that regard that both Feldmühle and CBC participated in the PWG meetings and that the applicant does not dispute that the participants in the meetings of that body must be considered to be the 'ringleaders' of the cartel. Consequently, as the Commission was entitled to impute the conduct of Feldmühle and CBC to the applicant (see point 78 et seq. above), it correctly considered the applicant to be one of the 'ringleaders' of the cartel.

133 The second part of the plea must therefore be rejected.

Third part of the plea: error of appraisal by the Commission as to the effects of the cartel

Arguments of the parties

134 The applicant states that, according to the seventh indent of point 168 of the Decision, the cartel was largely successful in achieving its objectives and that this was regarded as an aggravating circumstance for the purposes of determining the level of the fine. It also states that its reply to the statement of objections gave a detailed explanation of the market conditions and the reasons for which the agreements on price increases had only had an extremely limited effect on the prices actually applied. Nevertheless, the Commission did not examine those matters in the Decision and merely presumed that the cartel was 'largely successful' in achieving its objectives. That approach constitutes an abuse of power.

135 The Commission observes that it was entitled to take into account the effects of the infringement as a criterion for assessing its gravity. It submits that to that end it was entitled to draw conclusions from observable facts and to take account of any documentary evidence showing that the participants themselves regarded the cartel as a success.

136 Referring to the information relating to capacity utilisation and profit margins (points 15 and 16 of the Decision); to the fact that most producers participated in the cartel, which thus covered almost all of the market (point 168 of the Decision); to the complaints made against cartel members if they did not implement the price increases (points 82 and 136 of the Decision); and to the documents showing that the members of the PG Paperboard thought that the cartel had been successful (points 101 and 137), the Commission submits that it amply demonstrated the effect of the cartel for the purpose of determining the amount of the fines.

Findings of the Court

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

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

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

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

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

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

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

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

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

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

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

147 However, that report only partially confirms, in temporal terms, the existence of a 'close linear relationship'. Examination of the period 1987 to 1991 reveals three distinct sub-periods. At the oral hearing before the Commission the author of the LE report summarised his conclusion as follows: 'There is no close relationship, even with a lag, between announced price increase and market prices in the early part of the period, in 1987 through 1988. There is such a relationship in 1988/1989, 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).

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

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

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

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

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

153 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of its exercise of its unlimited powers in regard to fines, when assessing the seriousness of the infringement found in the present case (see paragraph 170 below).

Fourth part of the plea: the Commission should have taken into consideration, as a mitigating circumstance, the compliance programme implemented by the applicant

Arguments of the parties

154 The applicant states that since 1991 it has adopted and applied a Community competition law compliance programme for the whole of the Stora Group. It states

that fines have a deterrent function in that they are imposed, *inter alia*, in order to induce offending undertakings to comply with competition law in the future. The compliance programme implemented in 1991 proves its real intention to provide the best protection against future infringements. In accordance with its previous practice, the Commission should have taken into consideration, as a mitigating circumstance, the speed with which that programme was implemented (see, in particular, Commission Decision 91/532/EEC of 5 June 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.879 — Viho/Toshiba), OJ 1991 L 287, p. 39). That aspect is separate from its cooperation in the procedure before the Commission, which consisted in the disclosure of facts regarding the alleged infringements; the compliance programme was introduced in order to prevent future infringements. Contrary to the Commission's claims, the taking into account of the compliance programme does not therefore involve a double mitigation in respect of the same factor.

155 The Commission submits that it has already allowed for the applicant's cooperation and that, since the compliance programme is part of the policy which led the applicant to cooperate, it would be mitigating twice in respect of the same factor if it were to reduce the fine on account of that programme. It adds that a compliance programme is merely a means of ensuring compliance with the law. However, all undertakings are meant to obey the law in any event.

Findings of the Court

156 It has already been stated 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 the criteria which must be applied has been drawn up (Order in *SPO and Others* v *Commission*, cited above, paragraph 54).

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

158 The Commission was therefore entitled to take the view that in the present case it should treat as mitigation only conduct of the undertakings which enabled it to prove the infringement in question more easily. Consequently, since the applicant received a reduction of two-thirds in the amount of the fine on account of its active cooperation with the Commission during the administrative procedure, the Commission cannot be criticised for not having granted the applicant a further reduction in the fine imposed on it.

159 Finally, while it is important that the applicant should take steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that action does not alter the the fact that an infringement has been found to have been committed in this case (*Hercules Chemicals* v *Commission*, cited above, paragraph 357).

160 The fourth part of the plea cannot therefore be upheld.

Fifth part of the plea: the Commission relied on extraneous considerations when determining the amount of the fine

Arguments of the parties

161 The applicant states that the total amount of the fine is the highest ever imposed by the Commission. In the absence of explanations in that regard in the Decision, it can only be assumed that extraneous considerations were taken into account. Since point 161 of the Decision refers to the existence of collusive arrangements since 1975, it cannot be ruled out that the fine was imposed in respect of a period commencing in 1975, which would not be justified. Furthermore, in point 168 of the Decision, the Commission was not entitled to consider that the fact that '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' and that 'elaborate steps were taken to conceal the true nature and extent of the collusion' constituted aggravating circumstances. Since those factors are inherent in the infringement found, they cannot be regarded as aggravating circumstances when the fine is calculated.

162 Contrary to the Commission's contention in its defence, the alleged warning function of the *Polypropylene* decision does not constitute a legitimate criterion justifying an increase in the amount of the fine.

163 The Commission states that, in view of the gravity of the infringement, the amount of the fine is not disproportionate. The fact that the fine is higher than those imposed in previous cases is justified because, unlike in some previous cases (in particular the *Polypropylene* decision), the participants in the cartel did not suffer serious losses during the period of the infringement. In any case, the participants cannot reply upon the cartel's lack of success. Furthermore, the *Polypropylene* decision should have served as a warning at the time. What is more, the Court of First Instance held in regard to that decision that the infringement amply justified

the fines (Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 229).

164 Lastly, the applicant's claim that the fine was determined on the basis of 'extraneous considerations' is pure speculation. The Decision does not mark a significant change in policy. The Court of First Instance has already confirmed, in relation to the *Polypropylene* decision, that secrecy and a high degree of organisation constitute aggravating circumstances.

Findings of the Court

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

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

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

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

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

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

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

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

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

167 It should be pointed out, first, that when assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that

level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy (see, *inter alia*, Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 108, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 385).

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

169 Third, the Court notes the lengthy duration and obviousness of the infringement of Article 85(1) of the Treaty which was committed despite the warning which the Commission's previous decisions, in particular the *Polypropylene* decision, should have provided.

170 On the basis of those factors, the criteria set out in point 168 of the Decision justify the general level of fines set by the Commission. There is therefore nothing to

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

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

172 Consequently, the plea in support of the claim for annulment or reduction of the fine imposed on the applicant must be rejected.

173 Having regard to all of the foregoing, the plea that Article 2 of the Decision is illegal should be upheld in part and the remainder of the action should be dismissed.

Costs

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

On those grounds,

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

hereby:

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

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

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

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

2. Dismisses the remainder of the application;

3. Orders the applicant to pay the costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary