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

14 May 1998 *

In Case T-319/94,

Fiskeby Board AB, a company incorporated under Swedish law, established at Norrköping, Sweden, represented by Carl Wetter, of the Stockholm Bar, and Christopher Vajda, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Preussen, 15 Côte d'Eich,

applicant,

v

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

defendant,

* Language of the case: English.

APPLICATION for a reduction in the fine imposed on the applicant by 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 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:

...

(vi) Fiskeby Board AB, a fine of ECU 1 000 000;

...'

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 prescribe 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 Decision states that the applicant, Fiskeby Board AB, was acquired on 1 June 1990 by a US corporation, Manville Forest Products. Upon instructions from its new parent company, the applicant ceased to participate in meetings of the JMC with effect from June 1990. However, it did not withdraw from the PC or from the Nordic Paperboard Institute, the Scandinavian producers' trade association (hereinafter 'NPI').

17 The Decision also states that after June 1990 the applicant continued to receive and act upon information from other producers as to the price increases to be applied (point 163, first paragraph, of the Decision).

18 For those reasons, Article 1 of the Decision states that the applicant participated in the cartel throughout the period covered by the Decision, namely from mid-1986 until April 1991.

Procedure

19 The applicant brought this action by application lodged at the Registry of the Court on 10 October 1994.

20 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-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

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

22 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).

23 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).

24 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.

25 By order of 4 June 1997 the President of the Third Chamber, Extended Composition, of the Court of First Instance, in view of the connection between the above-mentioned 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.

26 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.

27 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.

28 The parties in the cases referred to in paragraph 24 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

29 The applicant claims that the Court should:

— reduce substantially the fine imposed on it;

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— reject the application as unfounded;

— order the applicant to pay the costs.

Substance

The plea that in determining the amount of the fine the Commission should have taken account of fluctuations in the applicant's turnover on the Community cartonboard market during the period of the infringement

Arguments of the parties

31 The applicant states that where the turnover in the products concerned by an infringement has fluctuated during the period covered by the infringement, the Commission must, if it is to make a proper assessment of the scale of the infringement, look at the turnover throughout the period in question. The Commission, however, took into consideration only turnover on the Community cartonboard market in 1990 when determining the amount of the fine.

32 In its case, it is unfair to take only that turnover figure into account because it is not representative of its turnover during the period of the infringement, to wit mid-1986 to April 1991. Its turnover on the Community cartonboard market in 1990 was four times higher than its average turnover in 1987 and 1988 and more than 80% higher than its average turnover over the period 1987-1990. The low turnover in 1987 and 1988 was the result of the rebuilding of its one and only cartonboard machine.

33 The mere fact that 1990 was the last full year of the infringement did not mean that the Commission could ignore events before that year. The Commission should have taken account of the applicant's individual circumstances, as the addressee of a decision imposing a fine (Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraph 55). Likewise, it should have taken account of the fact that the applicant had left the market in 1987 and 1988 owing to the rebuilding of its only carton-

board machine. The Commission accepted that a choice other than that of the turnover in the last full year of the infringement may be made in special circumstances, such as where an undertaking has left the market.

34 The special features of the applicant's situation, namely the abnormal and severe drop in its turnover, should have been taken into consideration all the more, because, according to the case-law of the Court of First Instance, the turnover in the sector concerned gives an indication of the scale of the infringement (see Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94) and of the economic power and influence on the market of the undertaking in question.

35 Lastly, in Case T-142/89 *Boël* v *Commission* [1995] ECR II-867 the Court upheld a similar plea on the ground that the applicant had shown that its turnover in the reference year chosen by the Commission was higher than that achieved over the whole of the period of the infringement.

36 The Commission states that by taking 1990 as a basis, it deliberately sought to evaluate the economic power of the undertakings in the last full year of the infringement, in order to take account of any benefit in terms of increased turnover which the undertakings participating in the infringement might have derived from it. Referring to the judgment of the Court in Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, it contends that this consideration is part of any policy of deterrence.

37 Fiskeby's production in 1987 and 1988 did not reflect its true economic power because it was engaged in rebuilding its production machinery.

38 In any event, in order to avoid any discrimination, fines should be calculated on a uniform basis, save where there are special circumstances, such as where an undertaking has previously left the market.

Findings of the Court

39 It is not disputed that the amount of the individual fines was determined by taking into account the 1990 turnover on the Community cartonboard market of each of the undertakings addressed by the Decision.

40 The Commission rightly chose that turnover figure as one of the elements systematically taken into consideration in order to determine the amount of the fines.

41 As 1990 was the last full year of the infringement found in Article 1 of the Decision, reference to the turnover in that year allowed the Commission to assess the size and economic power of each undertaking in the cartonboard sector and the scale of the infringement committed by each of them, those factors being relevant to an assessment of the gravity of the infringement (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 121).

42 To the extent to which reliance is to be placed on the turnover of the undertakings involved in the same infringement for the purpose of determining the proportions between the fine to be imposed, the period to be taken into consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible (*ibidem*, paragraph 122). Consequently, an individual undertaking cannot compel the Commission to rely, in its case, upon a period different from that used for the

other undertakings, unless it proves that, for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed.

43 In the present case, there is nothing to support the conclusion that in the applicant's specific case the Commission should have relied upon turnover in a period other than the period actually chosen, which, in the applicant's case too, was the last full year of the infringement it was found to have committed.

44 Although the applicant has explained that it was rebuilding its production machinery in the course of 1987 and 1988, the effect of which was to cause a substantial fall in its turnover in those two years, it is nevertheless the case that it was foreseeable and even certain that it was a temporary fall and that, once rebuilding had been completed, turnover would again reach a normal level, comparable to, and even higher than, turnover in the year preceding the beginning of the rebuilding work.

45 Consequently, the Commission was entitled to take the view that the applicant's turnover in the reference year (1990) gave an indication of its true size and economic power in the cartonboard sector and of the scale of the infringement which it had committed. By contrast, it would have made an incorrect assessment of the applicant's situation and the scale of the infringement, if, as the applicant requests, it had taken into account the applicant's average turnover during the 1987-1990 period, that figure being abnormally low.

46 This case is therefore different from that in *Boël* v *Commission*, cited above, on which the applicant relies. In the *Boël* case, the applicant had submitted, without

having been contradicted by the Commission, that its turnover in the reference year chosen was abnormally high, especially by contrast with the turnover of the other addressees of the Decision. In those circumstances, the Court of First Instance was entitled to take the view that the turnover upon which the Commission had relied for the purpose of determining the amount of the fine did not give an indication of the applicant's true size and economic power and of the scale of the infringement which it had committed (paragraph 133 of the judgment).

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

Existence of mitigating circumstances

48 The applicant submits that there is a set of circumstances which should have been taken into account in mitigation when the amount of its fine was determined. The Court will consider each of those circumstances separately.

The Commission should have taken account of the passive and minor role played by the applicant

— Arguments of the parties

49 The applicant submits that the level of the fine imposed on it shows that the Commission failed to take account of its minor and passive role in the collusive arrangements.

50 It states that it never took part in meetings of the PWG, the instigator and subsequently the driving force behind the cartel, whose function was to 'assist in the introduction of discipline in the market' and included 'discussions and concertation on markets, market shares, prices, price increases and capacity' (point 37 of the Decision). It last attended a meeting of the JMC and a meeting of the Paper Agents Association (see point 94 et seq. of the Decision) in April 1990, and left the JMC of its own accord in June 1990, that is to say, approximately five months before the BPIF lodged its complaint with the Commission (November 1990).

51 Since in reality it was out of the market in 1987 and 1988, it had little interest in taking an active part in the JMC. It does not dispute that, after it left the JMC, it received price information from other manufacturers in autumn 1990, or that it used that information (point 163 of the Decision). However, that aspect concerns the duration of the infringement rather than the role which it played in the cartel.

52 Its participation in the JMC, in the price increases and in the announcements of those increases was minor and passive, since it never proposed price increases.

53 According to point 51 of the Decision, it was a key concern of the cartel to control volume in such a way as to maintain a near balance between production and consumption. However, the applicant never limited its production as the result of its participation in the cartel.

54 In that context, as regards more particularly the Commission's assertion that a single infringement was found consisting of a 'common industry plan to restrict competition' involving, *inter alia*, an understanding on market shares and concerted measures to control supply of the product, the applicant accepts that it played a minor role in the activities in question by providing information in the

JMC which could be used by members of the PWG to limit production. However, volume control became an issue of practical importance only from the beginning of 1990, after the industry had ceased operating at full capacity.

55 The applicant concludes that it could have been a party to an infringement relating to the control of supply for only four years at most (mid-1986 to April 1990) and that the information was of practical significance for only a few months in early 1990.

56 The Commission states that it found a single infringement consisting of a 'common industry plan to restrict competition', involving agreed price increases, an understanding on market shares, concerted measures to control supply of the product and the exchange of commercial information to support those policies. All the addressees of the Decision committed that entire infringement, even if they did not have to carry out every action which the scheme required. Consequently, the applicant cannot ask to have its fine reduced on the ground that it did not take steps to limit its own production.

57 The measures to restrict production were actually applied, for the benefit of all, by the large producers in the PWG. They were intended to reinforce the pricing measures, in which the small producers were directly involved.

58 The applicant's contribution to volume control is confirmed by its knowledge and acceptance of the PWG's market-sharing policy, by the fact that it provided information to Fides about its production, sales, and utilisation capacity, and by the fact that it participated in discussions on order backlogs in the JMC.

59 The Commission acknowledges that the applicant was not one of the 'ringleaders' of the cartel. However, that does not automatically mean that its role was minor and passive. The applicant sat in the PC, the JMC and the Economic Committee, cooperated with the PWG as a member of the JMC, and participated in the price initiatives in the same way as the others.

— Findings of the Court

60 The Commission states that in order to determine the fine imposed on each addressee of the Decision, it took into account, *inter alia*, the role played by each of them in the collusive arrangements (point 169, first paragraph, first indent, of the Decision). Moreover, in point 170 of the Decision it explains that it was the undertakings which took part in the PWG meetings which were considered to be the 'ringleaders' of the cartel, whereas the other undertakings were considered to be 'ordinary members'. Lastly, there is no dispute that the basic rate of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each addressee of the Decision was applied respectively for the purpose of determining the fine to be imposed on the 'ringleaders' of the cartel and its 'ordinary members'.

61 The applicant made it clear at the hearing that it does not dispute that it participated in the infringement found in Article 1 of the Decision. It is merely contesting the Commission's assessment of the role which it is alleged to have played in that infringement.

62 Moreover, the applicant does not dispute the description given of the role of each body in the PG Paperboard. In that regard, according to the Decision, the PWG was the body in which the principal decisions with an anti-competitive object were adopted. Furthermore, although the Commission considers that all the undertakings referred to in Article 1 of the Decision must be considered to have participated in all the constituent elements of the infringement set out in that article, it is apparent from the Decision that the collusion on maintaining the market shares of

the main producers at constant levels, subject to occasional adjustments, concerned only the market shares of undertakings which participated in the PWG meetings (points 51 to 60 of the Decision). Lastly, the Commission accepts that as regards collusion on downtime, 'it seems again that it was the main producers who took upon themselves the burden of reducing output so as to maintain price levels' (point 71, second paragraph, of the Decision).

63 In the light of those factors, the applicant's objection that the Commission did not correctly assess its role in the cartel cannot be upheld.

64 First, the applicant was not considered to be one of the 'ringleaders' of the cartel. The Commission therefore took into account the applicant's non-participation in meetings of the PWG.

65 Second, the Decision explains that the undertakings which did not participate in the meetings of the PWG were informed of its decisions at meetings of the JMC and that that body constituted the main centre both for preparation of decisions adopted by the PWG and for detailed discussions on the implementation of those decisions (see, in particular, points 44 to 48 of the Decision).

66 The applicant admits that it participated in meetings of the JMC and in those of its predecessor, the Marketing Committee, from 1983 to April 1990, but it was unable to supply precise information regarding the meetings which it had attended prior to the beginning of 1989 (see Table 4 annexed to the Decision). As regards the JMC meetings held from the beginning of 1989 until April 1990, for which specific information has been supplied, the applicant admits that it participated in five of the nine JMC meetings (*ibidem*). Lastly, it admits that on a few occasions a representative of the NPI gave it information over the telephone about matters dealt

with at JMC meetings at which it was not represented (point 46, first paragraph, of the Decision).

67 In those circumstances, as the applicant does not dispute either the Decision's description of the JMC's functions or its own participation in the infringement found in Article 1 of the Decision, it cannot validly claim that the Commission should have taken the view that it played a less significant role in the cartel than the other undertakings regarded as 'ordinary members'.

68 That finding is not undermined by the fact that the applicant did not participate in JMC meetings after April 1990.

69 The applicant does not dispute the assertion in point 163, first paragraph, of the Decision that even if it had ceased attending JMC meetings, it continued to receive and act upon information from other producers as to the price increases to be applied. Although it is indeed apparent from the Decision that, as the applicant states, it was only in 1990 that market conditions were such that the producers considered it necessary to take downtime in order to maintain price levels (point 70), it is also apparent from the Decision that the question of capacity utilisation and downtime was examined in the JMC, in the context of preparation for concerted price increases, even before the date on which downtime was actually applied (see, in particular, point 69 of the Decision).

70 Since the applicant participated in the meetings of the JMC before April 1990, it could not have been unaware of the more general collusive background to the information which it obtained and acted upon after April 1990 in order to determine its own pricing policy. The mere fact that downtime may have actually been

taken only after the date on which the applicant last attended a meeting of the JMC is therefore irrelevant to the assessment of its role in the infringement.

71 On the basis of those considerations, the applicant's objection cannot be upheld.

The losses recorded by the applicant should have been taken into account by the Commission as a mitigating circumstance

— Arguments of the parties

72 The applicant contends that the Commission should have taken the view that the losses which it suffered during the period of the infringement constituted mitigating circumstances. That is confirmed by 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, 'the Polypropylene decision'). The Commission also wrongly took the view that the applicant had made a profit from the infringement.

73 The Commission observes that the applicant does not suggest that the sector was unprofitable during the period in question. The absence of major difficulties encountered in that sector during that period is, however, a factor which distinguishes this situation from that considered in the Polypropylene decision.

74 In any event, the Commission is not automatically obliged to take losses into account by way of mitigation, because to do so could be considered contrary to the purpose of prohibiting collusion, particularly where collusion has taken place in an industry in difficulty.

— Findings of the Court

75 The applicant does not submit that the cartonboard sector was in a crisis during the period covered by the Decision, but solely that the Commission should have taken its loss-making situation into consideration as a mitigating circumstance.

76 However, as the Court of Justice has already held, recognition of such an obligation would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 55.

77 Consequently, the complaint must be rejected.

The compliance programme introduced by the applicant should have been taken into account by the Commission as a mitigating circumstance

— Arguments of the parties

78 The applicant submits that the fact that it has taken measures to avoid fresh infringements, namely by introducing a compliance programme and ceasing to supply information to CEPI-Cartonboard, the successor of the fiduciary company Fides for the processing of information, until the position regarding the exchange of information has been clarified, should also be taken into account in mitigation.

79 It rejects the Commission's argument that its compliance programme is merely part of its policy of not contesting the facts after it received the statement of objections, for which an allowance has already been made. Its attitude towards the Commission in regard to the past infringement is separate from its introduction of a compliance programme to prevent a future infringement.

80 The Commission accepts that, depending upon the facts of the case, a compliance programme may constitute a mitigating circumstance (*Parker Pen* v *Commission*, cited above, paragraph 93). In the present case, the compliance programme introduced by the applicant was part of its policy of not contesting the allegations of fact in the statement of objections, for which an allowance has already been made. Moreover, that programme had no effect on the infringement itself or on the applicant's participation in it.

— Finding of the Court

81 The gravity of infringements falls to be determined by reference to a number of factors including, in particular, the specific circumstances and context of the case and the deterrent character of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

82 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.

83 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 one-third in the amount of the fine on account of its 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.

84 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 fact that an infringement has been found to have been committed in this case (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 357).

85 This objection must therefore also be rejected.

Infringement of the principle of equal treatment in that the fine imposed on Fiskeby is too high in comparison with that imposed on the 'ringleaders'

Arguments of the parties

86 The applicant states that the fine of ECU 1 000 000 imposed on it corresponds to 5% of its turnover on the Community cartonboard market in 1990.

87 It considers that this fine is far too high in comparison with the fine imposed on the 'ringleaders' who did not cooperate, namely Finnboard, Mayr-Melnhof and MoDo (an amount corresponding to 9% of their Community turnover). As the Commission points out, those undertakings must bear a special responsibility for the infringement. The percentages of the fines should correctly reflect the respective degrees of participation in the cartel by the ringleaders and by the companies which played a minor role. They do not do so in the present case, since ringleaders who cooperated to the same extent as the applicant were fined only an amount corresponding to 6% of their turnover.

88 The fine imposed on Stora corresponds to merely 3% of its turnover on the Community cartonboard market in 1990. The applicant considers that it is unjust that its own fine was set at a level above that of the fine imposed on Stora.

89 Lastly, the fine imposed on the applicant is also disproportionate to those imposed on two of the ringleaders, KNP and Weig.

90 The Commission considers that the applicant has no basis for claiming a reduction in the fine. The increase in the fine for the ringleaders (basic rate of 9% instead of 7.5%) is broadly in line with what has been accepted by the Court of Justice and the Court of First Instance in other cases.

91 Moreover, the fine imposed on the applicant, fixed at 5% of its turnover on the ground that it had not contested the principal factual allegations in the statement of objections, corresponds in relative terms to just over half of the fine imposed on ringleaders which had not cooperated with the Commission.

92 Owing to the special circumstances of their participation in the PWG, an initial rate below 9% was adopted for the ringleaders KNP and Weig. The rate of KNP's fine was then reduced on account of its cooperation, and then amounted to between 5 and 6% of its Community turnover for cartonboard in 1990.

93 Finally, Stora's conduct, much more useful to the Commission than the applicant's, justified the very considerable reduction in the fine. Nor has that allowance anything to do with the fact that Stora was a ringleader, as it proved by the case of Rena, an ordinary member, whose fine was also reduced by two-thirds.

Findings of the Court

94 As the Court has already noted, the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 achieved by each of the addressees of the Decision and basic rates of 9 and 7.5% of that turnover were then applied in order to determine the fine to be imposed on the 'ringleaders' of the cartel and on its 'ordinary members' respectively. There is, moreover, no dispute that Rena and Stora received a two-thirds reduction in their fines in view of their active cooperation with the Commission from the outset, whereas certain other undertakings, including the applicant, received a one-third reduction in their fines in view of the fact that in their replies to the statement of objections they did not contest the essential factual allegations relied upon by the Commission against them (see points 171 and 172 of the Decision).

95 In accordance with the above criteria, the fine imposed on the applicant therefore corresponds to 7.5% of its turnover on the Community cartonboard market in 1990, that rate then being reduced by one-third because in its reply to the

statement of objections the applicant did not contest the essential factual allegations relied upon by the Commission against it.

96 Before considering whether that level of fine is excessive in comparison with that of the fines imposed on the undertakings considered to be the cartel 'ringleaders', the Court observes that, as it has already held, the Commission was entitled systematically to take into account the turnover on the Community cartonboard market in 1990 of each of the undertakings addressed by the Decision.

97 As regards, first, the question whether the fine imposed on the applicant is excessive in comparison with the fines imposed on the 'ringleaders' which did not receive any reduction in their fines for cooperation with the Commission, the Commission rightly considered that undertakings which participated in the meetings of the PWG had to bear a special responsibility for the infringement (point 170 of the Decision). It then correctly evaluated the gravity of the infringement committed by the 'ringleaders' of the cartel and by 'ordinary members' respectively, by adopting, for the purpose of calculating the fines imposed on those two categories of undertakings, basic rates of 9 and 7.5% of relevant turnover.

98 In that context, it must be emphasised that the applicant has not disputed the description of the infringement in the Decision or advanced specific evidence to support its claim that the basic rates adopted for the purpose of calculating the fines do not correctly reflect the special responsibility to be borne by the undertakings which participated in the meetings of the PWG.

99 Second, there is no basis for criticising the Commission's decision to grant reductions in the amount of the fines originally calculated. Consequently, since the

applicant's fine was reduced by one-third on account of its cooperation with the Commission, there was no discrimination against it in comparison with the 'ringleaders' who, according to point 172 of the Decision, received an identical reduction. In any event, the applicant has not submitted that its cooperation with the Commission was more significant than the other undertakings which received a one-third reduction in their fines.

100 Third, as regards the comparison made by the applicant with the treatment accorded to KNP and Weig, it is apparent from a table supplied by the Commission in reply to a written question from the Court that the level of the fines imposed on those two undertakings is above that of the fine imposed on the applicant but that their fines were calculated on the basis of a rate below the basic rate of 9% applied to the other undertakings which participated in the PWG meetings.

101 However, the Decision provides sufficient explanation as to why the basic rate of 9% adopted for the ringleaders of the cartel was not applied to KNP and to Weig. Thus, according to point 170, second paragraph, of the Decision, KNP was considered to be one of the 'ringleaders' of the cartel only during the period in which it participated in PWG meetings, that is to say, for a shorter period than that of its participation in the cartel. Moreover, the Commission states that it took into account the fact that, although Weig was a member of the PWG, it did not seem to have played an important role in the determination of the policy of the cartel (point 170, third paragraph). There is therefore no foundation for the applicant's claim that the fine imposed on it is disproportionate to those imposed on KNP and Weig.

102 Fourth and last, Stora supplied the Commission with statements containing a highly detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard, and the participation of the various producers in the infringement. Through those statements, Stora supplied information well in excess of that which the Commission may require to be supplied

under Article 11 of Regulation No 17. Although the Commission states in the Decision that it obtained evidence corroborating the information contained in Stora's statements (points 112 and 113 of the Decision), it is clear that Stora's statements constituted the principal evidence of the existence of the infringement. Without those statements, it would therefore have been, at the very least, much more difficult for the Commission to establish or put an end to the infringement with which the Decision is concerned.

103 In those circumstances, the Commission, by reducing by two-thirds the fine imposed on Stora, did not overstep the limits of its discretion when determining the amount of fines. The applicant cannot therefore validly claim that the fine imposed on it is excessive in relation to that imposed on Stora.

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

The alternative plea: infringement of Article 190 of the Treaty

Arguments of the parties

105 The applicant considers that the statement of reasons in the Decision is defective, because it does not allow the applicant properly to ascertain the circumstances which led the Commission to impose a fine of ECU 1 000 000 on it. The Decision does not therefore satisfy the requirements laid down by the Court of Justice (Case 24/62 *Germany* v *Commission* [1963] ECR 63, at p. 69, and Case C-358/90 *Compagnia Italiana Alcool* v *Commission* [1992] ECR I-2457, paragraph 40).

106 Although the matters disclosed for the first time at a press conference held by a member of the Commission on 13 July 1994 were clearly extremely important factors in the reasoning adopted by the Commission when it determined the level of the fines, they are not set out in the Decision.

107 The Commission did not indicate, as required by the above cases, the principal issues of fact upon which its decision was based and it failed to disclose its reasoning, which it must do in order to make the persons concerned aware of the reasons for the measure adopted and to enable them to defend their rights and the Court to exercise its supervisory jurisdiction. Thus, the Decision does not indicate the reference year for the turnover chosen as the basis for calculating fines, the percentage rate of the fine imposed on the ringleaders and on the other undertakings, or the amount of the reduction granted to Stora and to the applicant.

108 More particularly, the applicant disputes the Commission's claim that indications had been given to it that 1990 was the year chosen for the purpose of calculating the fine. The first document to which the Commission refers, a letter dated 16 July 1991 requesting information under Article 11 of Regulation No 17, contains the Commission's request to communicate the turnover figure for 'each of the past five calendar years'. As regards the turnover figures indicated in the individual particulars annexed to the statement of objections, they relate to four years (from 1987 to 1990). Lastly, the passage in the Decision to which the Commission refers (point 168, third indent) does not give any hint that the reference year chosen was 1990.

109 Even if the Commission intended to rely on the general criteria set out in point 169 of the Decision in order to justify the fine imposed on the applicant, the statement of reasons in that point would therefore be inadequate. The addressees which relied on 'mitigating factors' (a concept which the Commission did not define)

could not know which of those factors were ultimately taken into account. The Commission cannot justify its failure to consider those mitigating factors by claiming that they do not constitute 'real mitigation'.

110 Furthermore, the Commission should have explained how the general criteria adopted for all the undertakings in order to determine the amount of the fine were to be applied to each undertaking individually (see, to that effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087). That is necessary because the Commission has an obligation to explain which mitigating circumstances it is taking into account when it adopts a decision on a fine imposed on only one undertaking.

111 Lastly, the Commission's obligation to provide reasons for its decision was all the more important because of the high level of the fine and, as is the view of the European Commission on Human Rights in *Société Stenuit* v *France* (Opinion No 11598/85, Report of 30 May 1991, Series A, No 232-A), because competition proceedings liable to result in a fine are in the nature of criminal proceedings.

112 The Commission contends that the Decision contains an adequate statement of reasons.

113 As regards its decision to choose turnover in 1990, reference was made to that turnover in several documents, namely in a letter sent to the applicant in 1991 under Article 11 of Regulation No 17 and in the individual particulars annexed to the statement of objections. Furthermore, the choice of reference year could be deduced from the third indent of point 168 of the Decision, which gives the value of the Community cartonboard market. The Decision therefore closely resembles the Polypropylene decision, which the Court of First Instance upheld in all essential respects.

114 In any event, the Commission does not have to indicate the year taken into consideration in its decisions imposing fines. Nor has that practice been criticised by the Community judicature.

115 As regards the other supporting reasons contained in the Decision, the Commission refers to the grounds of that decision for its explanation of the concept of a single infringement and the lump sum fine resulting therefrom (in particular point 61 et seq. and point 129 et seq.) and the gravity of the infringement (points 167 and 168, and Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 227), and for its consideration of the individual roles of the undertakings which participated in the infringement (points 171 and 172).

116 The mere fact that the Commissioner responsible for competition policy added some additional details at the press conference on 13 July 1994 does not mean that the Decision does not contain an adequate statement of reasons. The Court should not take those details into account when reviewing the Decision.

117 Lastly, the Commission does not have to respond to every argument put forward by each undertaking, only to the main arguments (Case 332/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 14, and Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 55). In this case it took into account the real mitigating circumstances, stated in the Decision who benefited from them, including, particularly, the applicant (points 171 and 172 of the Decision), and took the view that there were neither other individual mitigating factors nor any factors of general mitigation.

Findings of the Court

118 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).

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

120 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).

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

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

122 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.

123 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.

124 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. In that regard, contrary to the Commission's contention, neither the third indent of point 168 of the Decision, nor the individual particulars to the statement of objections nor the request for information to which the Commission refers give any guidance as to the reference year adopted.

125 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 either. Nor does it set out the rates of reduction granted to Rena and Stora, on the one hand, and to eight other undertakings, including the applicant, on the other.

126 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*, cited above, point 264).

127 In that context, the Commission cannot be criticised for not having expressly indicated in the Decision the reasons for its view that it did not have to take into consideration the alleged mitigating circumstances upon which the applicant relied. Although Article 190 of the Treaty requires the Commission to mention the facts forming the basis of the decision and the considerations which led it to adopt the decision, it does not require the Commission to discuss all the points of fact and of law dealt with during the administrative procedure (see *Michelin* v *Commission*, cited above, points 14 and 15).

128 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.

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

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

131 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.

132 In the specific circumstances set out in paragraph 129 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 the annulment in whole or in part of the fines imposed.

133 Consequently, this plea cannot be upheld.

134 Having regard to all the foregoing, the application must be dismissed.

Costs

135 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 unsuccessful, it must be ordered to bear the costs, as sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the application;

2. 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