JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
28 February 2002 *

In Case T-308/94,

Cascades SA, established in Bagnolet (France), represented by J.-Y. Art, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal and É. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant,

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),

* Language of the case: French.

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

composed of: B. Vesterdorf, President, K. Lenaerts, J. Pirrung, M. Vilaras and N.J. Forwood, Judges,

Registrar: D. Christensen, Administrator,

having regard to the judgment of the Court of First Instance of 14 May 1998,

having regard to the judgment of the Court of Justice of 16 November 2000,

having regard to the written procedure and further to the hearing on 2 October 2001,

gives the following

Judgment

Facts of the case

1 The present 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 (now Article 81(1) EC).

2 The operative part of the Decision is worded as follows:

'*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:

...

(ii) Cascades SA, a fine of ECU 16 200 000;

...'

3 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.

4 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).

5 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.

6 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.

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

8 Last, 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.

9 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.

10 The applicant, Cascades SA ('Cascades'), was formed in September 1985. Cascades Paperboard International Inc., a company incorporated under Canadian law, holds the majority of its shares.

11 The Canadian group entered the European cartonboard market in May 1985 by taking over Cartonnerie Maurice Franck (which became Cascades La Rochette SA). In May 1986, Cascades acquired the Blendecques mill (which became Cascades Blendecques SA, 'Cascades Blendecques').

12 The Decision states that the Belgian company Van Duffel NV ('Duffel') and the Swedish company Djupafors AB ('Djupafors'), acquired by the applicant on 1 March and 1 April 1989 respectively (table 8 appended to the Decision), participated, prior to their acquisition, in the cartel referred to in Article 1 of the Decision. Since 1989, those two undertakings, still according to the Decision, have been renamed and have operated as separate subsidiaries in the Cascades group (point 147). However, as regards the participation of both those undertakings in the cartel during the period both before and after their acquisition by Cascades, the Commission took the view that the Decision should be addressed to the Cascades group, represented by the applicant.

13 Finally, according to the Decision, the applicant participated in meetings of the PWG, the JMC and the Economic Committee from mid-1986 until April 1991. The Commission considered it to be one of the 'ringleaders' of the cartel, which had to bear special responsibility.

14 By application lodged at the Registry of the Court of First Instance on 6 October 1994, the applicant brought this action.

15 By separate document lodged at the Registry of the Court of First Instance on 4 November 1994, it also applied for suspension of the operation of Articles 3 and 4 of the Decision. By order of 17 February 1995 in Case T-308/94 R *Cascades* v *Commission* [1995] ECR II-265, the President of the Court of First Instance ordered a stay, upon certain conditions, of the applicant's obligation to provide a bank guarantee in favour of the Commission in order to avoid immediate recovery of the fine imposed by Article 3 of the Decision. The applicant was also ordered to forward to the Commission certain specific items of information by a particular date.

16 By judgment of 14 May 1998 in Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925 ('the judgment of the Court of First Instance'), the Court of First Instance dismissed the action for annulment of the Decision in so far as it concerned the applicant and, in the alternative, for reduction of the amount of the fine imposed. The Court held, *inter alia*, that the plea in law alleging that the conduct of Duffel and Djupafors prior to the acquisition of those undertakings was not attributable to Cascades was unfounded.

17 By application lodged at the Registry of the Court of Justice on 23 July 1998, the applicant brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance.

18 In support of its appeal, the appellant put forward three pleas in law.

19 First, the appellant claimed that the contested judgment was vitiated by inconsistency in that the Court of First Instance had not given full effect to its own findings that the statement of reasons for the Decision was inadequate in regard to the determination of the general level of the fines.

20 Second, it alleged that the Court of First Instance had misinterpreted the concept of 'effects of the infringement on the market' and in any event had infringed the principle of proportionality in not reducing the level of the fine imposed by the Commission when it had found that the Commission had not proved all the effects taken into account in determining the general level of the fines.

21 Third, the appellant claimed that the Court of First Instance had infringed the principle of non-discrimination by upholding the criteria adopted by the Commission regarding the attributability of the conduct of undertakings acquired during the course of the infringement.

22 In its judgment of 16 November 2000 in Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693 ('the judgment of the Court of Justice'), the Court of Justice rejected the first and second pleas in law.

23 However, it upheld the third plea in law. In that regard, the Court of Justice held:

'74 ... it must be observed that the Court of First Instance held in paragraph 148 of the contested judgment that "where, prior to its acquisition, a company has participated in its own right in the infringement, the identity of the addressee of the Decision, that is to say, whether that should be the transferred company or the new parent company, is determined solely by the criteria set out in point 143".

75 Point 143 of the Decision states that as regards "acts of companies deemed to be independent subsidiaries, 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)".

76 In the present case, the Court of First Instance held, in paragraph 157 of the contested judgment, that at the date of the acquisition of Djupafors and Duffel "those two companies... were participating in an infringement in which the applicant was also participating by virtue of the involvement of Cascades La Rochette and Cascades Blendecques" and concluded, in paragraph 158:

"In those circumstances, the Commission was entitled to attribute to the applicant the conduct of Djupafors and of Duffel 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 aware."

77 Although the appellant was rightly held liable for the conduct of the two subsidiaries in question with effect from their acquisition, it had not been proved that it could validly be held liable for their infringements prior to that date.

78 It falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking.

79 In the present case, it is apparent from the contested Decision that Djupafors and Duffel participated in their own right in the infringement from mid-1986 until their acquisition by the appellant in March 1989 (see paragraph 18 of the contested judgment). Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its

subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it.

80 Consequently, the Court of First Instance erred in law in holding that the appellant was liable for the infringements committed by Duffel and Djupafors prior to their acquisition and the contested judgment must be set aside on that ground.'

24 In paragraph 82 of the judgment, the Court of Justice held that '[s]ince the documents in the file do not indicate what part of the fine related to the participation in their own right by Duffel and Djupafors in the cartel from mid-1986 until their acquisition by the appellant in March 1989, the case must be referred back to the Court of First Instance for assessment of the amount of the fine, taking into account the foregoing considerations' and that '[c]osts must be reserved'.

25 The Court of Justice therefore set aside in part the judgment of the Court of First Instance 'in so far as it attribute[d] to Cascades SA responsibility for the infringements committed by Van Duffel NV and Djupafors AB during the period from mid-1986 until February 1989 inclusive' (point 1 of the operative part), dismissed the remainder of the appeal, referred the case back to the Court of First Instance and reserved the costs.

26 The case was assigned to the First Chamber, Extended composition, of the Court of First Instance.

27 Pursuant to Article 119 of the Rules of Procedure of the Court of First Instance, the applicant and the defendant lodged written observations.

28 Upon hearing the report of the Judge Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure. In the context of the measures of organisation of procedure, it requested the Commission to reply in writing to a question, which the Commission did within the prescribed period.

29 The parties presented oral argument and gave replies to the Court's questions at the hearing on 2 October 2001.

Forms of order sought by the parties in the proceedings following referral of the case

30 The applicant claims that the Court should:

— reduce the amount of the fine imposed on it under Article 3 of the Decision;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— fix the amount of the fine at an appropriate level, having regard to the responsibility of the applicant in the infringement;

— order the applicant to pay the costs.

Law

Arguments of the parties

32 The applicant draws two inferences from the decision of the Court of Justice that the conduct of Duffel and Djupafors prior to their acquisition by Cascades is not attributable to Cascades. Those inferences relate to the turnover figures to be taken into consideration in determining the amount of the fine imposed on Cascades and to the rate of that fine.

33 First, the turnover to be taken into consideration in determining the amount of the fine must be reduced. According to the method used by the Commission in setting the fines, the fine imposed on Cascades was calculated on the basis of the turnover corresponding to sales of cartonboard in the Community in 1990 by the entire Cascades group, including sales of cartonboard by Duffel and Djupafors.

34 The applicant observes that the turnover taken into account by the Commission came to ECU 180 million, or FRF 1 244 million at the conversion rate applied by the Commission. That amount corresponds to the total turnover on sales of cartonboard in the Community in 1990 by Cascades Blendecques-La Rochette ('Blendecques-La Rochette') (ECU 877 million), Djupafors (ECU 186 million) and Duffel (ECU 180 million).

35 The applicant also disputes the duration of the participation in the infringement taken into account by the Commission in calculating the amount of the fine imposed on the applicant, namely 60 months (from June 1986 to May 1991). Since the Court of Justice held that Cascades could not be held liable for the infringements committed by Duffel and Djupafors before their acquisition, the period of participation taken into consideration by the Commission should be reduced proportionately where the applicant participated in the cartel for less than 60 months. Duffel and Djupafors were acquired on 1 March and 1 April 1989 respectively.

36 Therefore, according to the calculation method used by the Commission, the turnover to be taken into consideration for the purposes of determining the fine imposed on Cascades results from the following operation:

ECU 877 million × 1/6.91 × 33/60 (for the infringement by Blendecques-La Rochette for the period June 1986 to February 1989), ie ECU 69.8 million

+

(ECU 877 million + ECU 180 million) × 1/6.91 × 1/60 (for the infringement by Blendecques-La Rochette and by Duffel in March 1989), ie ECU 2.55 million

+

ECU 1 244 million × 1/6.91 × 26/60 (for the infringement by Blendecques-La Rochette, by Duffel and by Djupafors during the period April 1989 to May 1991), ie ECU 78 million,

that is to say, ECU 150 million.

37 Second, the applicant observes that in its case the Commission applied the rate of 9% to the relevant turnover, not 7.5%, on the ground that Cascades was regarded as one of the ringleaders of the cartel.

38 The applicant has always denied having acted as a ringleader of the cartel. Its participation in the PWG meetings was demanded by the other members of that body in 1986 so that they would be better able to monitor its conduct on the market. However, it points out that the Court of First Instance held that it had not adduced sufficient evidence to support that assertion.

39 The fact that the conduct of Duffel and of Djupafors between 1986 and 1989 is not attributable to Cascades constitutes further evidence, which corroborates all the other evidence previously put forward by Cascades, that it did not participate in the PWG meetings of its own will.

40 According to the Decision (point 170), the PWG brought together the largest European cartonboard producers. Since the conduct of Duffel and of Djupafors before 1989 is not attributable to Cascades, their sales could not be taken into consideration in determining the relative weight of Cascades on the European

market in 1986. In 1986 sales by Cascade of GC grade cartonboard (cartonboard with a white top layer, normally used for the packaging of food products) and GD cartonboard (cartonboard with a grey interior normally used for the packaging of non-food products) in Europe represented only 4% and 6%, respectively, of total sales, while the market share of each of the other members of the PWG (with the sole exception of KNP) was between 15% and 30% for one or other grade of cartonboard.

41 The applicant maintains, therefore, that it was not among the largest producers of cartonboard when the PWG was set up and that its presence at the PWG meetings could not therefore be explained by its size. As it argued in the action initially brought before the Court of First Instance, it attended the PWG meetings in order to comply with the ringleaders' desire to place Cascades under their direct supervision. Consequently, the attribution to Cascades of the role of a ringleader is a manifest error.

42 The applicant concludes from the foregoing that the amount of the fine should be calculated by applying a basic rate of 7.5% to the turnover of ECU 150 million. The amount of the fine imposed on it should therefore be ECU 11.25 million.

43 The Commission, relying on paragraphs 79 and 80 of the judgment of the Court of Justice, contends that Cascades cannot be held liable for the unlawful conduct of Djupafors and of Duffel before March 1989 and that those companies must answer individually for their conduct during that period.

44 It must therefore be examined whether, and if so to what extent, the individual responsibility of Duffel and of Djupafors for their participation in the cartel before March/April 1989 must lead to a reduction in the amount of the fine imposed on the Cascades group.

45 On that point, the Commission refutes the parameters put forward by Cascades for the calculation of the reduction of the amount of the fine, on the ground that they are based on incorrect assumptions. It contends, first, that it is illogical to use the turnover figures achieved by Duffel and Djupafors in 1990 to calculate the part of the fine corresponding to the participation of those two companies before their acquisition by Cascades. Using the turnover figures achieved in 1990, when they were no longer individually responsible, amounts to conferring on their participation in the cartel before 1989 greater weight than it actually had. Their turnover figures increased significantly between 1989 and 1990. Second, the Commission contends that the calculation method proposed by the applicant would eliminate part of the responsibility Cascades must bear as a ringleader, whereas it was a ringleader well before 1989. That additional liability must continue to be borne by Cascades even though it is no longer liable for the conduct of Duffel and of Djupafors before their acquisition.

46 On the assumption that the amount of the fine must be reduced, the Commission proposes a calculation method consisting in deducting from the amount of the fine imposed on Cascades the amount of the fines that would be imposed on Duffel and Djupafors for the infringements which they committed during the period before they came under the control of Cascades if they had to answer for their actions.

47 Such a calculation would be based on the turnover figures achieved by Duffel and Djupafors in 1988, the last year before their acquisition by Cascades, ie FRF 145 million and FRF 113 million respectively.

48 The Commission further submits that before being acquired by the applicant Duffel and Djupafors were not members of the PWG group and they cannot therefore be classified as 'ringleaders'; the rate of the fine should therefore, according to the method followed in 1994, be 7.5% of the reference turnover.

49 The amount of the theoretical fine which the Commission should impose on Duffel and on Djupafors for their individual actions might be ECU 865 593 (33/60 × 7.5% × FRF 145 000 000 = FRF 5 981 250) and ECU 695 007 (34/60 × 7.5% × FRF 113 000 000 = FRF 4 802 500) respectively.

50 The amount to be deducted from the fine imposed on Cascades might therefore be ECU 1 560 600 at the most, thus reducing the fine imposed on the applicant to ECU 14 639 400.

51 However, the Commission observes that it is for the Court to assess all the circumstances of the case in order to determine the appropriate fine, namely, first, the fact that Cascades always represented itself during the proceedings before the Commission as the representative of Duffel and of Djupafors, second, that it is the assets of the Cascades group that will actually bear the fines imposed on Duffel and Djupafors for their conduct prior to their acquisition, third, the fact that, in certain aspects, the cartel became more 'intensive' during its final period (the penultimate indent of Article 1 of the Decision) and, fourth, the fact that a significant reduction in the amount of the fine would have the perverse effect of favouring Cascades in comparison with the other ringleaders of the cartel. On the latter point, the Commission states that the fine imposed on Cascades, as calculated by Cascades, would be equivalent to 6.18% of the group's relevant turnover in 1990.

52 The Commission observes that, in the second part of its observations, the applicant requests the Court to reconsider the finding in the Decision that it was a 'ringleader'. The question of the classification of the applicant as a 'ringleader' has already been definitively settled by the judgment of the Court of First Instance (paragraph 207 et seq., and in particular paragraphs 225 to 236), and since the applicant did not dispute that classification in its appeal to the Court of Justice, and since the judgment of the Court of Justice set aside the judgment of the Court of First Instance only 'in so far as it attributes to Cascades SA responsibility for the infringements committed by Van Duffel NV and Djupafors AB during the period from mid-1986 until February 1989 inclusive'.

53 It is therefore in the interest of completeness that the Commission contends that there is no factual basis for the allegation in respect of the weak economic weight of Cascades. In 1990, its economic weight was 7% of European production capacity in cartonboard (point 9 of the Decision); in 1986, Cascades supplied 4% of European sales of GC cartonboard and 6% of European sales of GD cartonboard. It cannot therefore be concluded that Cascades was a minor actor.

54 In any event, the Commission observes that the principal criterion used in the Decision to classify an undertaking as a 'ringleader' was the fact of having been a member of the PWG, and that Cascades was a member of that group.

Findings of the Court

The subject-matter of the dispute

55 The Court of Justice held that the documents in the file did not indicate what part of the fine related to the participation in their own right by Duffel and Djupafors in the cartel from mid-1986 until their acquisition by the appellant in March 1989. It therefore decided that 'the case must be referred back to the Court of First Instance for assessment of the amount of the fine, taking into account the foregoing considerations' and that 'costs must be reserved' (paragraph 82).

56 In the observations lodged after referral of the case back to the Court of First Instance, the parties are agreed that it is for the Court of First Instance alone to reassess the amount of the fine imposed on Cascades.

The procedure for setting the fine

57 Having regard to the arguments put forward by the parties, it is necessary, more precisely, to determine the procedure for reducing the amount of the fine. The parties' arguments as to those procedures differ, each advocating its own method. In that regard, the choice of method clearly has a direct impact on the extent of the reduction of the fine, which is EUR 11 250 000 or EUR 14 639 400 depending on whether the applicant's or the Commission's method is used, without prejudice to the possibility that the Court may take into consideration factors capable of altering the amount of the fine, in the exercise of the unlimited jurisdiction conferred on it by Article 229 EC and Article 17 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

58 First, it will be recalled that Duffel and Djupafors were taken over by the applicant on 1 March and 1 April 1989 respectively (paragraph 12 above).

59 Next, it should be pointed out that the applicant's 1990 turnover in the Community cartonboard market was FRF 1 244 200 000, or ECU 180 057 890 at the conversion rate applied by the Commission. According to the reply of 27 June 1991 to the request for information sent pursuant to Article 11 of Regulation No 17, that turnover represented the sum of the turnover figures achieved individually by Blendecques-La Rochette (FRF 877.5 million), by Duffel (FRF 180.3 million) and by Djupafors (FRF 186.4 million). The difference between those figures and the figures used by the applicant in its arguments may be explained by the fact that the applicant rounded the figures down (see paragraph 36 above). However, the Court will determine the amount of the fine on the basis of the turnover figures shown in the file.

60 Last, in order to assess the merits of the criteria advanced by the parties, it is necessary to refer to the way in which the Commission determined the amount of the fines set out in Article 3 of the Decision.

61 According to the detailed explanations which the Commission gave in 1997 in answer to a written question put by the Court of First Instance, fines of a basic level of 9% or 7.5% of the turnover achieved in the Community cartonboard market by each of the undertakings to which the decision was addressed were imposed, respectively, on the undertakings regarded as the 'ringleaders' of the cartel, including Cascades, and on the other undertakings. The duration of the infringement found against Cascades was 60 months (from June 1986 to the end of May 1991). Cascades was granted no reduction for cooperation with the Commission during the administrative procedure (points 171 and 172 of the Decision). The amount of the fine imposed on the applicant following that operation was ECU 16 200 000 (Article 3 of the Decision).

62 In the present case, a literal and contextual interpretation of the grounds of the judgment of the Court of Justice and observance of the principle of equal treatment require that the amount of the fine imposed on the applicant be calculated on the turnover figures achieved in 1990 on sales of cartonboard in the Community by the three entities concerned, Blendecques-La Rochette, Duffel and Djupafors, taking into account solely the periods during which the unlawful conduct found is attributable to the applicant.

63 Where the Court of Justice states in paragraph 79 of its judgment that Duffel and Djupafors must 'answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it' it does not mean that those two undertakings must be fined for their anticompetitive conduct prior to their acquisition, but only that they are responsible for it. The Court of Justice is therefore stating, in a different form, that Cascades could not validly be held liable for their infringements prior to their acquisition (paragraph 77 of the judgment of the Court of Justice).

64 It cannot therefore be inferred from the judgment of the Court of Justice that the Court of First Instance must take into account, in setting the amount of Cascades's fine, the fine that the Commission could have imposed in that regard. It follows that it is for the Court of First Instance not to assess the impact on the amount of the fine imposed on Cascades of the penalties which the Commission could have imposed on Duffel and on Djupafors had it adopted decisions addressed to those undertakings, but to determine the amount of Cascades' fine taking account of the participation in the cartel of Duffel and of Djupafors solely during the period following their acquisition.

65 Furthermore, in accordance with the principle of equal treatment, it is necessary to determine the amount of the fines imposed on undertakings which participated in an agreement or a concerted practice contrary to Article 85(1) of the Treaty according to the same method unless objective justification is put forward which makes it possible not to follow that method (see, on that point, Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraphs 63 to 68, and Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 97 to 99). In this case, the Court finds that no objective justification of that nature exists, so that the amount of the fine imposed on Cascades must be determined using, in principle, the method which the Commission applied to all the undertakings which were fined and which are referred to in Article 3 of the Decision, including the same average rate of exchange as that used by the Commission, 6.91 FRF/ECU, for 1990.

66 Accordingly, in determining the fine to be imposed on the applicant, the Court will take into account: for the period prior to the acquisition of Duffel, that is, the period from June 1986 to 1 March 1989, only the turnover achieved by Blendecques-La Rochette in the Community market in cartonboard in 1990; for the period corresponding to the participation in the cartel of Blendecques-La Rochette and Duffel, namely March 1989 alone, the sum of their turnover figures in the Community cartonboard market in 1990 and, last, for the period during which the applicant is held liable for the participation in the cartel of Blendecques-La Rochette, of Duffel and of Djupafors, namely from 1 April

1989 until the end of May 1991, the total turnover achieved by those three entities in that market in 1990.

67 The rate applicable to the turnover figures in question depends on the classification of the applicant as a 'ringleader', a classification which the applicant disputes in the observations which it has lodged following referral of the case.

68 The Commission contends, in that regard, that the applicant cannot dispute the classification as a 'ringleader' of the cartel in the proceedings following referral, since it did not call in question in its appeal the finding of the Court of First Instance on that point.

69 In that regard, the Court of First Instance held, first, that the Decision contains an adequate statement of the grounds on which the applicant was regarded by the Commission as a 'ringleader' (paragraph 218 of the judgment of the Court of First Instance) and, second, that the Commission had correctly classified the applicant as a ringleader (paragraphs 225 to 236 of that judgment). The applicant did not challenge the finding of the Court of First Instance on that point in its appeal (see paragraphs 18 to 20 above).

70 The findings of the Court of First Instance on those points of fact and of law are definitive, since those points were settled by the judgment of the Court of First Instance (see, in that regard, Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14, and order of the Court of Justice in Case C-277/95 P *Lenz* v *Commission* [1996] ECR I-6109, paragraphs 50 to 54) and are not affected by the fact that that judgment was set aside in part, since it was set aside by the

Court of Justice only in so far as it attributed to Cascades responsibility for the infringements committed by Duffel and Djupafors prior to their acquisition.

71 Admittedly, the arguments put forward by the applicant in its observations seek to show that after the Court of Justice held in its judgment that the applicant must not answer for the infringements committed by Duffel and Djupafors before their acquisition it could no longer be regarded as a 'ringleader'. However, those arguments are irrelevant and do not call into question the classification of the applicant as a 'ringleader', since the judgment of the Court of First Instance approved the Commission's assessment in the Decision that the classification as a 'ringleader' was justified solely by participation in the PWG. Point 170 of the Decision states, in that regard, that 'the "ringleaders", namely the major producers of cartonboard which took part in the PWG (Cascades, Finnboard, [Mayr-Melnhof], MoDo, Sarrió and Stora), must bear a special responsibility', since '[t]hey clearly constituted the main decision-makers and were the prime movers of the cartel'.

72 Cascades has itself always admitted that it began to participate in the various organs of GEP Carton, and in particular of the PWG, in the middle of 1986. Furthermore, in the observations which it lodged before the Court of First Instance following the judgment of the Court of Justice, its argument is not that it did not participate in the PWG before acquiring Duffel and Djupafors but that its lesser economic weight before acquiring those undertakings shows that its participation in the PWG was not voluntary. Last, the applicant did not dispute 'that the object of the PWG was in fact essentially anti-competitive or that the conduct found by the Commission was in fact anti-competitive' (paragraph 225 of the judgment of the Court of First Instance).

73 The rate of 9% must therefore be applied in calculating the applicant's fine.

74 In the light of the criteria used to determine the amount of the fine imposed on the applicant (see paragraphs 60 to 73 above), the Court, in the exercise of its unlimited jurisdiction, fixes that amount at EUR 13 538 000.

Costs

75 In its judgment, the Court of Justice reserved the costs. It is therefore for the Court of First Instance to determine, in the present judgment, all the costs relating to the various proceedings, in accordance with Article 121 of the Rules of Procedure.

76 Under Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. In the present case, the applicant was only partly successful before the Court of Justice on appeal and before the Court of First Instance in the proceedings following referral of the case.

77 The Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear five sixths of its own costs and of the Commission's costs, and the Commission to bear one sixth of the applicant's costs and of its own costs, incurred before the Court of Justice and the Court of First Instance.

On those grounds,

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

hereby:

1. Sets the amount of the fine imposed on the applicant by Article 3 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) at EUR 13 538 000;

2. Orders the applicant to bear five sixths of its own costs and of the Commission's costs, incurred before the Court of Justice and the Court of First Instance, including those relating to the interlocutory proceedings;

3. Orders the Commission to bear one sixth of the applicant's costs and of its own costs, incurred before the Court of Justice and the Court of First Instance, including those relating to the interlocutory proceedings.

Vesterdorf Lenaerts Pirrung

Vilaras Forwood

Delivered in open court in Luxembourg on 28 February 2002.

H. Jung

Registrar

B. Vesterdorf

President