JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
14 May 1998 *

In Case T-308/94,

Cascades SA, a company incorporated under French law, established at Bagnolet (France), represented by Jean-Louis Fourgoux, Jean-Patrice de La Laurencie, Jacques Buhart, of the Paris Bar, and Jean-Yves Art, of the Brussels Bar, represented by David O'Keeffe, Solicitor of the Law Society of Ireland, with an address for service in Luxembourg at the Chambers of Arendt et Medernach, 8-10, rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented initially by Richard Lyal, of its Legal Service, and Géraud de Bergues, a national official on secondment to the Commission, subsequently by Richard Lyal and Guy Charrier, a national official on secondment to the Commission, 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: French.

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

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 June to 8 July 1997,

gives the following

Judgment

Facts

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

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

2 By letter of 22 November 1990, the British Printing Industries Federation ('BPIF'), a trade organisation representing the majority of printed carton producers in the United Kingdom, lodged an informal complaint with the Commission. It claimed that the producers of cartonboard supplying the United Kingdom had introduced a series of simultaneous and uniform price increases and it requested the Commission to investigate whether there had been an infringement of the Community competition rules. In order to ensure that its initiative received publicity, the BPIF issued a press release. The content of that press release was reported in the specialised trade press in December 1990.

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

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

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

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

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

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

'*Article 1*

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

Tampella Española SA) and Moritz J. Weig GmbH&Co KG have infringed Article 85(1) of the EC Treaty by participating,

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

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

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

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

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

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

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

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

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

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

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

(...)

Article 3

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

(...)

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

(...)'

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 the methods of implementation for the price initiatives decided by the PWG, country-by-country and for the major customers, in order to achieve a system of equivalent prices in Europe.

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

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

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

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

18 The Decision states that the Belgian company Van Duffel NV ('Duffel') and the Swedish company Djupafors AB ('Djupafors'), acquired by the applicant in March 1989, participated, prior to their acquisition, in the cartel referred to in Article 1 of the Decision. Since 1989, those two undertakings have been renamed and have operated as separate subsidiaries in the Cascades group (point 147 of the Decision). However, as regards 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.

19 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.

Procedure

20 The applicant brought this action by application lodged at the Registry of the Court on 6 October 1994.

21 By separate document lodged at the Registry of the Court 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 in Case T-308/94 R *Cascades* v *Commission* [1995] II-265 the President of the Court 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.

22 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-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).

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

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

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

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

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

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

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

30 The parties in the cases referred to in paragraph 26 above presented oral argument and gave replies to the Court's questions at the hearing which took place from 25 June to 8 July 1997.

Forms of order sought

31 The applicant claims that the Court should:

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

— in the alternative, annul or reduce the fine imposed on it by Article 3 of the Decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment of the Decision

The plea grounded upon infringement of the rights of the defence

Arguments of the parties

33 The applicant states that the Decision contains an objection which did not appear in the summary of the statement of objections, namely that there was discussion and agreement on a common industry plan to restrict competition (Article 1, fifth indent, of the Decision). The summary of the statement of objections is, however, an essential element of the file which is intended to inform the addressees of the facts on which it is based. The objection in question is not mentioned in the body of the statement of objections either.

34 The applicant states that the Commission is incorrect in arguing that, since the objection that there was an 'industry plan' covers the various acts called into question, is not a wholly separate objection: an 'industry plan' refers to the totality of economic and social measures adopted and formalised in writing, generally by a State, in order to restructure an industry. However, the PG Paperboard never brought together all the producers on the Community market, nor was the export market ever the subject-matter of the PG Paperboard's meetings. Finally, the mere fact that this objection was formally separate from the other objections in Article 1 of the Decision shows that it is a separate objection.

35 Referring to the case-law of the Court of Justice concerning the purpose of the statement of objections (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1979] ECR I-1307, paragraphs 42 and 52), the applicant states that

the Decision, in containing an objection which had not previously been notified to it, irreparably impaired its rights of defence.

36 The Commission points out that the statement of objections expressly indicates that the summary is intended for guidance only, is an indication in concise terms of the nature of the alleged infringement, and is to be read subject to the detailed objections set out in the statement. It is clear from the statement of objections, read as a whole, that the Commission was alleging that the applicant had participated in the discussion and adoption of a common plan to restrict competition in the cartonboard industry.

37 The word 'plan' was used in order to emphasise that, from the end of 1987, the participants had reached an actual, definitive agreement regarding the conditions of their collusion, the various subsequent price initiatives being part of that same framework agreement. Those assertions of intentional and institutionalised conduct were also set out in the statement of objections.

38 The objection that an 'industry plan' had been adopted covers the various other acts objected to and is not a separate objection. It was not therefore necessary to set it out separately in the statement of objections (*Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 50).

Findings of the Court

39 Observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of

Community law which must be respected even if the proceedings in question are administrative proceedings (*Hoffmann-La Roche* v *Commission*, cited above, paragraph 9).

40 Applying that principle, Article 19(1) of Regulation No 17 and Article 4 of Commission Regulation No 99/63 of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (OJ English Special Edition, 1963-1964, p. 47) oblige the Commission to adopt in its final decision only those objections in respect of which the undertakings concerned have been afforded the opportunity of making known their views.

41 The fifth indent of Article 1 of the Decision asserts that the undertakings referred to in that Article met regularly 'in a series of secret and institutionalised meetings to discuss and agree a common industry plan to restrict competition'.

42 Since the applicant submits that the statement of objections does not contain such an objection, it is necessary to ascertain whether in this instance the statement of objections was couched in terms that, albeit succinct, were sufficiently clear to enable the parties concerned properly to take cognizance of that objection. It is only on that condition that the statement of objections could have fulfilled its function under the Community regulations of giving undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision (see, *inter alia*, *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 42).

43 The Commission has rightly submitted that the objection concerning the discussion and adoption of a 'common industry plan' set out in Article 1, fifth indent, of the Decision must be understood as meaning that the undertakings are alleged to have discussed and adopted a continuing agreement covering the anti-competitive

acts referred to in Article 1 of the Decision. The use of the word 'industry' indicates that the common plan concerned the cartonboard industry.

44 That interpretation of the operative part of the Decision is consistent with the statement of reasons, which make it clear that the Commission is referring to the 'plan' in order to describe one element of an 'agreement' within the meaning of Article 85(1) of the Treaty.

45 Thus, according to point 126, second paragraph, of the Decision:

'[...] an *agreement* can be said to exist when the parties have reached a consensus even in broad terms as to the lines of their mutual action or abstention from action in the market. While it involves joint decision-making and commitment to a common scheme, it does not have to be made formally or in writing [...]'.

46 Furthermore, the Decision explains (point 131, first and second paragraphs):

'The Commission considers that from the end of 1987, with the concretization of the progressive collusion of the producers in the so-called "price before tonnage" scheme, the infringement has presented all the characteristics of a full "agreement" in the sense of Article 85.

The working out of the plan via the twice-yearly price initiatives is not to be treated as involving a series of separate agreements or concerted practices but as part of one and the same continuing agreement.'

47 It is therefore necessary to examine whether the statement of objections contains a complaint that the applicant took part in discussion and adoption of a continuing agreement covering all the alleged anti-competitive acts.

48 The statement of objections addressed to the applicant is made up of the basic document, the appendices and the individual particulars relating to the applicant. The basic document does not contain an operative part but does contain a 'summary of infringement' which explains that it is 'intended for guidance only and as an indication in concise terms of the nature of the alleged infringement' and that it 'is to be read subject to the detailed objections set out hereafter'. In the light of that explanation, the applicant's argument that its rights of defence were infringed because the objection in question was not referred to in the summary of the statement of objections cannot be upheld.

49 In the basic document, the description of the objections is divided into two main parts, dealing with the facts and the Commission's legal assessment respectively. Since there is no operative part, it is therefore necessary to refer to the second part of the statement in order to ascertain which acts the undertakings are alleged to have committed.

50 A reading of that part of the statement of objections shows that the objection in question was in fact set out in it.

51 In particular, under the point headed 'The nature of the infringement in the present case', the Commission states (p. 83):

'The main features of the "price before tonnage" scheme were:

— the control of production so as to ensure market conditions favourable to price increases;

— the periodic implementation of agreed price initiatives involving simultaneous and uniform price increases by all producers in each national market;

— the achievement of a uniform pricing system on a European-wide basis;

— the control of the market shares of the major producers.

The Commission considers that from the end of 1987, with the concretisation of the progressive collusion of the producers in the so-called "price before tonnage" scheme, the infringement could be said to present all the characteristics of a full "agreement" in the sense of Article 85.'

52 As the allegation that the undertakings to which the statement of objections was addressed had participated in discussion and adoption of a continuous agreement covering all the anti-competitive acts alleged was set out sufficiently clearly in that statement, the Decision, in finding that the applicant participated in discussions and agreement on a 'common industry plan', did not adopt an objection which had not been brought to the applicant's attention in the statement of objections.

53 This plea must therefore be rejected.

The plea of infringement of the obligation of confidentiality

Arguments of the parties

54 The applicant submits that under Article 214 of the Treaty and Article 20(2) of Regulation No 17 the Commission's officials are not to disclose information of the kind covered by the obligation of professional secrecy. However, the reports which appeared in the trade press from 13 July 1994 onwards indicated that the Decision was imminent. The information revealed in those reports, which contained detailed comments not only on the existence of the procedure and stage which it had reached, but also on the content of the Decision, must have emanated from the Commission, in breach of the rules governing confidentiality.

55 The failure to comply with the obligation of confidentiality calls into question the very validity of the Commission's economic assessments. It is not therefore a case of a mere 'external irregularity' but of a defect justifying annulment of the Decision.

56 The Commission disputes that it was the source of the information disclosed to the press and states that other authorities were aware of the content of the draft decisions before they were adopted by the College of Commissioners.

57 In any event, the applicant has not indicated how the alleged infringement of the principle of confidentiality affected the content of the Decision. Any infringement of the obligation of confidentiality is therefore merely an external irregularity which does not affect the validity of the Decision (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 284 to 288, and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraphs 27 to 29).

Findings of the Court

58 Even on the assumption that Commission officials were responsible for improperly divulging the information contained in the press reports to which the applicant refers — which is not, however, admitted by the Commission or proved by the applicant — that would in any event not affect the legality of the Decision (*Dunlop Slazenger* v *Commission*, cited above, paragraph 29). The applicant has not proved that the Decision would not in fact have been adopted, or would have been different, had the disputed statements not been made (*United Brands* v *Commission*, cited above, paragraph 286), or that the Commission, in adopting the Decision, based itself on considerations other than those set out in it (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136). Accordingly, this plea must be rejected.

The plea of infringement of the principle of collegiality

Arguments of the parties

59 The applicant submits that the decision of 26 July 1994 (see paragraph 1 above) was adopted in irregular circumstances and in breach of the principle of collegiality.

60 In its reply it states that that decision does not state that the Advisory Committee on Restrictive Practices and Dominant Positions ('the Advisory Committee') had been consulted before it was adopted. However, pursuant to Article 190 of the Treaty and Articles 10 and 15 of Regulation No 17, the opinion of the Advisory Committee is required before the adoption of a decision which, like that of 26 July 1994, imposes a fine (Case T-19/91 *Vichy* v *Commission* [1992] ECR II-415).

61 The Decision should therefore be annulled on the ground that it fails to comply with procedural rules (Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/99, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555).

62 The Commission submits that in its decision of 26 July 1994 it did not make any fresh assessment of facts or law. It merely corrected the name of one of the addressee undertakings and rectified an error in its calculation of the fine imposed on Europa Carton. The applicant therefore had no legal interest in relying on any defects in the procedure for the adoption of that decision.

63 As regards the alleged failure to consult the Advisory Committee, the argument submitted by the applicant in its reply constitutes a new plea in law, and its introduction is prohibited under Article 48 of the Rules of Procedure.

Findings of the Court

64 This plea must be understood as a plea that the Commission failed to observe the principle of collegiality when it adopted the decision of 26 July 1994.

65 The applicant's argument that, contrary to the provisions of Article 10(3) of Regulation No 17, the Advisory Committee was not consulted before the adoption of that decision was introduced for the first time in its reply. It cannot be regarded as an extension of the argument in its application, grounded on infringement of the principle of collegiality. It is, in reality, an independent plea alleging that a procedural defect vitiated the lawfulness of the procedure for the adoption of the Decision.

66 Under Article 48(2), first paragraph, of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

67 Since the plea alleging lack of consultation of the Advisory Committee is not based on matters of fact or of law which have come to light in the course of the procedure, it must be declared inadmissible.

68 As to the plea of infringement of the principle of collegiality, the Court finds that the applicant has not pleaded any evidence or specific fact such as to displace the presumption of validity which applies to Community acts (see, in particular, *Dunlop Slazenger* v *Commission*, cited above, paragraph 24). It is not therefore necessary to investigate whether the alleged infringement existed (see, by analogy, Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 27).

69 Consequently, the plea must be rejected as unfounded.

The plea alleging discrepancies between the Decision and the Commission's press release of 13 July 1994

Arguments of the parties

70 The applicant submits that the Decision was not definitively adopted prior to the decision of 26 July 1994.

71 It states that the Commission published a press release on 13 July 1994, the day on which the Decision was adopted. Since that press release was therefore made prior to the definitive decision, any substantive discrepancies between it and the Decision are, since they show that the Commission took into account considerations other than those set out in the Decision, of such a nature as to affect its validity (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 16, and *Hilti* v *Commission*, cited above, paragraph 136).

72 In the present case, it is in fact clear from the press release that the Commission founded the Decision on considerations which were not set out in it. The press release states that from the 1970s the undertakings attempted, with limited success, to organise the market, whereas the Decision expressly states that the Commission 'has no evidence' of attempts to fix prices between 1975 and 1986. The statement in the press release that the alleged attempts enjoyed limited success infringed the applicant's rights of defence, in that it was declared guilty before it had been given an opportunity to express its views, and even though it was cleared by the decision subsequently adopted.

73 The fact that the Commission's defence reproduced the wording of the press release confirms that the Decision was founded on considerations which had not been set out in it.

74 The Commission disputes that the Decision was definitively adopted on 26 July 1994. The decision of 26 July 1994 was adopted only in order to correct small errors in the previous decision. In those circumstances, any discrepancies between the press release and the Decision do not affect the Decision's validity (*Hilti* v *Commission*, cited above, paragraph 136).

75 Furthermore, there is no substantive discrepancy between the documents in question. The Commission quotes parts of the two documents which, according to it, show that conduct prior to mid-1986 was not called into question by the press release or the Decision.

Findings of the Court

76 It is unnecessary to determine whether the applicant's allegation that the Decision was adopted after the press release is correct: the Court can review only the contested decision (to that effect, see *Hilti* v *Commission*, cited above, paragraph 136). The Court must therefore examine whether the press release of 13 July 1994 contains evidence that the Decision was based on considerations other than those set out in it.

77 The fact that the Commission stated in the press release that from the 1970s the undertakings attempted, with limited success, to organise the market does not prove that the Commission based the Decision on that consideration.

78 In any event the Decision refers to an attempt to organise the market before mid-1986, the time considered to mark the beginning of the infringement referred to in Article 1 of the Decision.

79 Point 35, first paragraph, of the Decision states:

'According to Stora (second statement, p. 2) the Cartonboard producers had "attempted to bring order to the ... market since 1975. Members of the PG Paperboard or its predecessor (prior to 1981) have met to discuss pricing and market shares during that period"'.

80 Moreover, the first paragraph of point 161 of the Decision, explains:

'Although it is apparent from Stora's statements that collusive arrangements had been in existence since at least 1975, and that the PG Paperboard was in all likelihood set up as a vehicle for unlawful cooperation, the Commission will in the present case limit its assessment under Article 85 and the application of any fines to the period from June 1986 onward.'

81 The applicant does not dispute that the grounds of the Decision adequately justify in law the finding that the infringement referred to in Article 1 began in mid-1986.

82 Since there are therefore no grounds for concluding that the Commission in fact based its Decision on considerations not set out in that decision, the plea must be rejected.

The plea that the collusion should not be attributed to the applicant

Arguments of the parties

83 In the first part of the plea the applicant submits that, under certain conditions, if it has acted under compulsion, an undertaking cannot be held liable for an infringement of Article 85 of the Treaty. Necessity and self-defence have, however, so far only been considered by the Community judicature in cases concerning the ECSC Treaty.

84 Article 85 of the Treaty applies only where the undertakings concerned have real autonomy in determining their conduct on the market (see, to that effect, the case-law relating to the application of Article 85 of the Treaty to undertakings in the same group (Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, Case 30/87 *Bodson* [1988] ECR 2479, and Case T-102/92 *Viho Europe* v *Commission* [1995] ECR II-17)). Article 85 does not therefore apply to agreements or concerted practices between two undertakings where an undertaking is forced by another undertaking to participate and has no real possibility of freeing itself from the influence and control of that other undertaking. That contention is implicitly supported by the judgment in Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435. The applicant's contention has been upheld by the Cour d'Appel de Paris in a judgment of 9 November 1989, in which national competition rules were applied.

85 Article 85 of the Treaty should not therefore apply to an undertaking which has acted under compulsion, where that conduct is the only course of action which can remove threats of danger to the undertaking; the threats are direct; and the danger is imminent and cannot be warded off by any other lawful means. Those requirements are in essence the same as those for the plea of self-defence.

86 In the second part of the plea, the applicant asserts that it was compelled to participate in meetings of the bodies of the PG Paperboard by other members of that association.

87 From its entry onto the European market, marked by the takeover of the Cartonnerie Maurice Franck (Cascades La Rochette) in May 1985, it acted aggressively on that market.

88 However, at the beginning of 1986 Mr Lemaire and Mr Bannermann, managing director and commercial advisor of Cascades La Rochette respectively, were approached by the chairman of Finnboard and of KNP (the latter then presiding over the PC) and by Mr Roos (then managing director of Feldmühle) who requested that it cease its aggressive pricing policy and comply with the market discipline of the other producers in the PG Paperboard. After it had refused to do so, the applicant found in the subsequent months that it was losing the majority of the orders which it sought to win. That was explained by the systematic undercutting by other producers of prices quoted by the applicant.

89 Following the acquisition of the Blendecques Cartonboard Mill (Cascades Blendecques) in May 1986, the applicant had to raise its prices in order to amortise significant investments, cover its financing costs and obtain an adequate gross margin. To survive on the market it had to cease the price war it was then conducting against the whole of the industry. In those circumstances, in order to bring the

undercutting policy to an end the applicant was forced to accept the conditions imposed by the instigators of that policy. Those conditions were that the applicant should join the PG Paperboard, comply with the decisions adopted and participate in meetings of the PWG.

90 In support of its claims, the applicant refers to statements by Mr Lemaire and Mr Bannermann, two persons who had experienced the above events as representatives of the applicant, and asks the Court to hear their oral testimony.

91 It states that the assertions in those statements are corroborated by other evidence.

92 First, according to Stora's statement (Appendix 39 to the statement of objections), the applicant's attempts to increase its market shares and the reactions of the other producers gave rise to a considerable, unstoppable fall in prices. That statement confirms the existence of a 'price war' caused by the applicant's entry on to the European market, as described by Mr Bannermann.

93 Second, the applicant's participation in the PWG meetings was an 'anachronism', because it was a new entrant on the European market, and the most important French producer (Papeteries Béghin-Corbehem, currently belonging to the Stora Group) was already participating in those meetings. The applicant's participation is, in fact, explained by the other participants' desire to monitor it and to prevent it from acting independently.

94 Third, its conduct prior to joining the PWG indirectly confirms that it never deliberately participated in the collusion. It never played an active role in the PWG and the PG Paperboard, the PWG decisions, in particular on price increases, were

adopted by agreement between Finnboard, Mayr-Melnhof and Feldmühle before the PWG meetings began. The Commission has not adduced any evidence to call that assertion into question, even though it is for it to prove the role played by the various members of the PWG.

95 Moreover, contrary to the allegation in point 38 of the Decision, it was never the 'channel of communication' for decisions of the PWG or of the PC to Papeteries de Lancey. That task was performed by the other French member of the PWG, Papeteries Béghin-Corbehem, a subsidiary of Feldmühle.

96 Finally, despite the pressure on it to follow the decisions adopted in the PG Paperboard, the applicant always followed a policy of aggressive competition whereby it sought to increase its market share. That is confirmed by notes made by other members of the PG Paperboard (Appendices 109 and 117 to the statement of objections) and by statements from purchasers of cartonboard. In that regard, the applicant explains that it has no other way of proving that it always sought to pursue a pricing policy that was independent from the recommendations of the organs of the PG Paperboard.

97 Lastly, in a third part of the plea, it submits that the compulsion was irresistible and that, pursuant to the principles set out in the first part of the plea, the infringements in question cannot be attributed to it. Compulsion must be considered to be irresistible where the undertaking which suffered it could legitimately believe, first, that its existence was threatened by the conduct of the undertakings exercising the compulsion and, second, that the only way of preserving its existence was to fall into line. In the present case, it claims that those conditions are fulfilled.

98 As regards the second condition, namely that the undertaking could legitimately have believed that the only means of safeguarding its existence was to fall into line, the applicant considers that it fulfils that condition, even though it could have resorted to the Commission or to a national court in order to request an order that the compulsion cease.

99 In the alternative, it submits that it could not have adequately and effectively warded off that compulsion by lodging a complaint with the Commission or bringing proceedings before the national court.

100 As regards the first part of the plea, the Commission submits that the answer to the question whether an undertaking which has acted under compulsion may escape the application of Article 85 must be based on the Community case-law relating to the defence of necessity (see, for example, Joined Cases 303/81 and 312/81 *Klöckner-Werke* v *Commission* [1981] ECR 1507, and Case 188/82 *Thyssen* v *Commission* [1983] ECR 3721) and of self-defence (Case 16/61 *Acciaierie Ferriere et Fonderie di Modena* v *High Authority* [1962] ECR 289, 303 and, to the same effect, Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 365 and 366, and Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629, paragraphs 358 and 359). The case-law relating to the application of Article 85 of the Treaty to undertakings in the same group, on which the applicant relies, is therefore irrelevant.

101 An undertaking can escape the application of Article 85 on the ground that it was compelled to act, only if its conduct was essential to ward off threats of danger to it, the threats were direct, the danger imminent, and there was no other lawful means of averting it.

102 As regards the second part of the plea, the Commission submits that the statements of Mr Bannermann and Mr Lemaire have no probative value, as they are unsupported by any other evidence. As its participation in the meetings of the

bodies of the PG Paperboard has been proved, the applicant must prove the assertions made in those statements (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 128, and Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 53).

103 The probative value of the statements of Mr Bannermann and Mr Lemaire is all the more doubtful as the applicant did not seek to establish, during the administrative procedure, that it participated in the meetings against its will. Although some vague references were made, in the reply to the statement of objections, to compulsion exercised by the other cartonboard producers, those references were formulated only in the context of the applicant's assertions of its allegedly independent conduct.

104 The Commission disputes the applicant's assertions that the statements of Mr Bannermann and Mr Lemaire are supported by other evidence.

105 The applicant cannot claim that its allegedly purely passive role in the PWG is evidence that it was compelled to participate in the meetings: it has not adduced any evidence to show that it never proposed a price increase. In any event, it took an active part in the implementation of the price initiatives on the French market.

106 As regards the alleged evidence of compulsion, the Commission observes that even if it were proved that the applicant's pricing policy was independent of the agreement reached in the PG Paperboard, that does not mean that the applicant did not fully participate in the cartel (Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 60).

107 As regards the third part of the plea, the Commission submits that even if compulsion may have been exercised by the other producers, the applicant had various lawful means by which it could have escaped that compulsion: the lodging of a complaint with the Commission under Article 3 of Regulation No 17 or the bringing of an action before a national court. In those circumstances, the applicant cannot escape the application of Article 85 of the Treaty by arguing that it acted only under compulsion (see *Hoechst* v *Commission*, cited above, paragraph 358 and *Tréfileurope* v *Commission*, cited above, paragraphs 58, 71 and 178).

Findings of the Court

108 The Court must establish whether the applicant has adequately proved its claim that it was compelled by member undertakings of the PG Paperboard to participate in meetings of its bodies, in particular those of the PWG.

109 The statements of Mr Bannermann and Mr Lemaire are made by persons who held managerial functions in the Cascades Group during the period referred to in Article 1 of the Decision. Unless supported by other evidence, they cannot themselves therefore constitute proof of the effectiveness of the alleged compulsion.

110 Mr Lemaire describes, in very general terms, the compulsion alleged to have been exercised on the applicant.

111 With regard to a private meeting to which Mr Bannermann and he were invited, he states (point 6 of his statement):

'[..] the other producers informed us that if Cascades continued the aggressive policy which it had been pursuing until then, its attitude would provoke a serious war on the European market. They stated that Cascades could never win that war and would be excluded from the market. They suggested that it would be better for Cascades to cooperate with them.'

112 Mr Bannermann states that, until the applicant joined the PG Paperboard in mid-1986, the applicant's competitors colluded in conducting a price war directed exclusively against it. He states in particular (point 10 of the statement) that at the end of a meeting in February or March 1986 between the representatives of Cascades and the managers of three of its main competitors (KNP, Finnboard and Feldmühle or Mayr-Melnhof), the President of Finnboard stated, in regard to the applicant's commercial policy: 'If you continue like that, we will bury you.' He states: 'Even if the two other persons present did not speak, it was clear to us that they formed a block and that the statement by Mr Köhler (of Finnboard) reflected the three participants' common position.'

113 Mr Bannermann states in regard to the alleged practice of undercutting the applicant's prices (point 12 of the statement):

'My impression at that time was that a real "price war" was being conducted against Cascades and that the other producers took turns in order to share the financial sacrifices which that "war" involved.'

114 Finally, he states (point 17 of the statement):

'I therefore agreed to participate in the PWG meetings in order to avoid reprisals by the other producers and thus to ensure the survival of the cartonboard mills in our group in Europe.'

115 The Court considers that the statements in question, which, if the facts alleged in them were proved, would also show that the applicant was fully aware of the illegality of the conduct of the undertakings concerned, do not in themselves prove that compulsion was exercised on the applicant. Mere assertions cannot constitute proof of such compulsion.

116 The Court points out in that regard that, in its reply to the statement of objections, the applicant did not admit the facts set out in the statement of objections or plead compulsion.

117 In that document (p. 5) the applicant stated that its attempt to penetrate the European market had been met with a fierce reaction from the Scandinavian producers and that:

'That attempt to penetrate the market was met by a fierce reaction on the part of the major Scandinavian producers.

That is why Cascades La Rochette was excluded from meetings of the PG Paperboard between 1986 and 1987 [...].

That exclusion was accompanied by an attempt by the existing producers to exclude it from the market.'

118 It is therefore clear from that document that the other producers sought to keep the applicant away from the bodies of the PG Paperboard, not to force it to participate in those bodies so as to monitor, or indeed control, its conduct on the market. However, the applicant's actual exclusion from meetings of the PG Paperboard in 1986 and 1987 is not confirmed by the statements of Mr Lemaire and Mr Bannermann.

119 Consequently, the detailed explanation of the applicant's reasons for participating in the bodies of PG Paperboard, furnished for the first time in the proceedings before the Court, are not consistent with those furnished in the administrative procedure before the Commission, which, in the circumstances of this case, can only weaken the probative value of the statements produced by the applicant.

120 As regards Mr Bannermann's assertion that the compulsion took the form of the quotation of lower prices than those offered by the applicant to its customers, the Court points out that an aggressive pricing policy pursued by competitors, unless proved to result from collusion between them, cannot be regarded as a form of compulsion against another undertaking that is intended to force it to adopt a specific future course of conduct.

121 Although Mr Bannermann states that the pressure exercised on the applicant might have been caused by an unlawful cartel between the competing producers meeting in the PG Paperboard, the applicant has not, however, adduced any evidence of the systematic quotation of lower prices than those offered by it to its customers, or of an unlawful agreement by competitors.

122 In any event, evidence of the existence of unlawful pressure could easily have been obtained by reporting such acts to the competent authorities and by lodging a complaint with the Commission under Article 3 of Regulation No 17. The applicant nevertheless participated in meetings of certain bodies of the PG Paperboard, in particular the PWG, from mid-1986 until April 1991 without ever having complained of the alleged compulsion. By contrast, it does not dispute that it always announced price increases on the various national markets which corresponded to those agreed by the undertakings meeting in the bodies of the PG Paperboard and implemented those increases on the dates fixed by them (see tables A to H annexed to the Decision).

123 In those circumstances, its assertion that it played a passive role in the PG Paperboard and operated an independent pricing policy are irrelevant. On the contrary, having regard to its regular participation in the meetings of the PWG and of the JMC (see tables 2 and 4 annexed to the Decision), whose anti-competitive object it does not dispute, there are no grounds for finding that it was only a reluctant participant in the infringement and acted under compulsion.

124 Stora's statement (Appendix 39 to the statement of objections), to which the applicant refers, confirms that the alleged 'price war' was triggered off by the applicant after its arrival on the European market.

125 Stora states (point 2 of the appendix):

'Cascades entered the European market in 1985 with the acquisition of La Rochette Mills and attempted to gain market share in Europe. The consequent reaction of the other producers resulted in significant drops in prices during this period. Attempts to stop the fall in prices were unsuccessful; prices fell again in 1987 (by 10%).'

126 However, that statement does not say that the undertakings meeting in the PG Paperboard colluded in order to force the applicant to adopt a particular course of conduct on the market. It does not therefore support the applicant's assertions.

127 Consequently, the Court finds that the applicant has not adduced evidence of the compulsion allegedly suffered, and it is unnecessary to hear Mr Lemaire and Mr Bannermann as witnesses.

128 Having regard to the foregoing, the plea must be rejected, there being no need for the Court to examine the other arguments.

The plea that the conduct of Duffel and Djupafors prior to their acquisition cannot be attributed to Cascades

Arguments of the parties

129 The applicant states, first, that the principles governing responsibility for conduct of an undertaking prior to its acquisition were set out by the Commission in the Decision.

130 According to point 145, first and second paragraphs, of the Decision, responsibility for such conduct had to be attributed:

— to the transferred company, where, but for the acquisition, the Decision would have been addressed to it and the transferred company enjoys functional and economic continuity;

— to the vendor company, where, but for the acquisition, the Decision would have been addressed to the parent company of the vendor group.

131 The third paragraph of point 145, which states that '... if the transferred subsidiary continued as a member of the cartel, it will depend upon the individual circumstances whether proceedings in respect of such participation should be addressed to that subsidiary in its own name or to the new parent group', is referring solely to conduct after the acquisition.

132 The applicant concludes that the Decision should, by virtue of the principles laid down in the first paragraph of point 145, have been addressed to the two subsidiaries in respect of their conduct prior to the acquisition.

133 It submits, second, that the statement of reasons on that point is inadequate or, at the very least, contradictory. The statement of objections included a statement of reasons similar to that in the Decision and, in its reply to that statement, the applicant had set out the reasons for its view that the Commission had incorrectly applied its own principles. In those circumstances, the Commission should have clarified its reasons for attributing to the applicant the conduct of the two subsidiaries prior to their acquisition (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211).

134 The Commission's interpretation of point 143 of the Decision in its defence, according to which that point refers to the situation where several companies in the same group participated in a single infringement, a situation not therefore covered by point 145 of the Decision, does not appear at all in the Decision.

135 Furthermore, point 147 of the Decision refers to the applicant's own situation. The first part of that point refers to the principles set out in point 145, whereas the last sentence, although referring to point 143, does not give any reasons for the Commission's position.

136 Article 1 of the Decision should therefore be annulled in part inasmuch as the participation by Duffel and Djupafors in the infringement is attributed to the applicant for the period preceding its acquisition of them.

137 The Commission submits that it correctly applied the principles which it laid down in the Decision, because it applied the principle in point 143 of the Decision, under which the Decision was addressed to the parent company of a group where, *inter alia*, more than one company in the group participated in the infringement. As point 145 refers expressly to the principles set out in points 143 and 144, it cannot be interpreted in a manner contrary to those principles.

138 The Decision contained a proper statement of reasons regarding the attribution to the applicant of its two subsidiaries' conduct prior to their acquisition. The last sentence of point 147 of the Decision refers expressly to point 143, which concerns situations in which more than one company in a group participated in the infringement.

Findings of the Court

139 The applicant's argument must be understood as challenging both the statement of reasons for, and the correctness of, the Decision as regards the attribution to the applicant of the infringements of Djupafors and Duffel prior to their acquisition. The Court must therefore, first, examine the statement of reasons in the Decision on that point and ascertain whether the Commission correctly applied the principles in the Decision. Second, the Court will examine the correctness of the Decision in regard to the attribution to the applicant of the unlawful conduct of Djupafors and Duffel prior to their acquisition.

140 It is settled law that the statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal validity to be carried out and must provide the person concerned with information sufficient to allow him to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving explanations. In order to fulfil those purposes, an adequate statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question. Where, as in the present case, a decision taken in application of Article 85 or Article 86 of the Treaty relates to several addressees and poses a problem of attribution of liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for that infringement (see, in particular, *AWS Benelux* v *Commission*, cited above, paragraph 26).

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

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

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

or

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

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

143 The applicant accepts that the Commission was entitled to hold it responsible for the unlawful conduct of Djupafors and Duffel after their acquisition, pursuant to the principle that the Decision should be addressed to the group, represented by the parent company, where more than one company in that group had participated in the infringement.

144 Where companies had been acquired, the Commission determined the addressees of the Decision on the basis of the principles set out in point 145 of the Decision:

'The application of the principles set out above has the consequence that in cases where, but for the acquisition, proceedings would normally have been addressed to the subsidiary in its own right, responsibility for its conduct prior to the transfer passes with it. [...]

On the other hand, where a parent company or group which itself is properly considered a party to the infringement transfers a subsidiary to another undertaking, responsibility for the period up to the date of divestment does not pass to the acquirer but will remain with the first group.

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

145 The Court considers that this statement of reasons adequately explains that a group which has acquired a company that has participated in its own right in the infringement must be the addressee of the decision where several companies in that group also took part in the infringement committed by that company.

146 The statement in the first paragraph of point 145, to the effect that 'responsibility for ... conduct [of the transferred company] prior to the transfer passes with it', does not undermine the Commission's reasoning.

147 It cannot be construed as indicating that the Decision had to be addressed to the transferred company in respect of conduct prior to its transfer. If the first two paragraphs of point 145 are read as a whole, it is clear that the first paragraph relates to the question whether responsibility for the conduct of the transferred company prior to the transfer continues to be assumed by that company or whether it should be assumed by the vendor group.

148 Consequently, 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.

149 That interpretation is supported by point 147 of the Decision, which deals with the applicant's own situation. It is stated that 'it is appropriate to address this Decision to the Cascades Group represented by Cascades SA in respect of the participation in the infringement of all of Cascades cartonboard operations (see recital 143)'.

150 That interpretation is consistent with the wording of the statement of objections.

151 In that document the Commission explained (p. 91 and 92) that the proceedings were addressed in principle to the entity named in the membership lists of the PG Paperboard, but that they were nevertheless addressed to the group (represented by the parent company) in particular where more than one company in a group had participated in the infringement.

152 As to the situation where companies had been transferred, the statement of objections states as follows (p. 92):

'[...] Where a subsidiary which was a participant in its own right in the cartel is acquired by another undertaking, its responsibility for its conduct prior to the transfer will pass with it.'

153 That statement of objections clearly shows that, in a situation such as the present, responsibility for the conduct of a company prior to its transfer follows the transferred company. On the other hand, since the statement of objections does not deal with the question whether proceedings should be addressed to the transferred company or to the new parent company, that question must be answered in accordance with the general principles laid down in order to determine whether a parent company must be held responsible for the conduct of its subsidiaries.

154 It is therefore clear from the statement of objections that the proceedings were addressed to the applicant also in respect of the unlawful conduct of Djupafors and Duffel prior to its acquisition of them, and that the principle applied was that of participation in the infringement of more than one company in the same group.

155 Furthermore, contrary to the applicant's assertion in its pleadings, its reply to the statement of objections did not contain a submission that, in accordance with the principles adopted in the statement of objections, the proceedings should have been addressed to Duffel and Djupafors in respect of their unlawful conduct prior to their acquisition by it. In fact, it did not contest the correctness of the general principles adopted by the Commission in regard to cases of transfer, but merely submitted that the former parent companies of the two companies in question had been involved in their former subsidiaries' participation in the infringement, so that the proceedings should have been addressed to them. It did not, however, repeat that argument in its pleadings before the Court.

156 Since point 145 of the Decision must be interpreted in the light of the general scheme of the Decision and in the light of the statement of objections, which is worded sufficiently clearly (see, to the same effect, Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 230), the Court finds, first, that the Commission, in addressing the Decision to the applicant in respect of the conduct of Djupafors and Duffel throughout the period of their participation in the infringement found, did not misapply the principles which it had set for itself in the Decision nor infringe the obligation to state reasons as laid down by Article 190 of the Treaty. Furthermore, in view of the terms of the applicant's reply to the statement of objections, the Commission was not required to give a more detailed explanation in the Decision of the reasons for which the applicant had to be considered responsible for the unlawful conduct of Djupafors and Duffel prior to their acquisition.

157 Finally, as regards the correctness of the attribution to the applicant of the unlawful conduct of Djupafors and Duffel prior to their acquisition, it suffices to point out that there is no dispute that at the time when those two companies were acquired they were participating in an infringement in which the applicant was also participating by virtue of the involvement of Cascades La Rochette and Cascades Blendecques.

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.

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

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

The pleas alleging that the infringement had limited effects and that the general level of the fines is excessive

Arguments of the parties

160 The applicant submits that, having regard to the lack of seriousness of the infringement, the general level of fines is excessive.

161 First, it refers to the considerations taken into account by the Commission in point 168 of the Decision in order to determine the general level of the fine and to the Commission's previous practice in its decisions. The object and nature of the infringement found in this case is similar to the infringements which were the subject of Commission Decisions 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') and 89/190/EEC of 21 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.865 — PVC) (OJ 1989 L 74, p. 1, 'the PVC decision'). In general, the respective fines adopted in those two cases were approximately 4%, and under 1%, of the value of the market, whereas in the present case the total amount of the fines is 5.3% of the value of the market. Although the Commission is entitled to raise the general level of the fines, its previous practice nevertheless provides an indication of the normal level of fines.

162 Second, in order to assess the gravity of the infringement and thus to set the general level of the fines, the Commission must take the actual effects of the infringement on the market into consideration (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825,

paragraphs 105 to 107). It is therefore necessary to ascertain whether the infringement distorted market conditions.

163 As regards any effects of the collusion on prices, the applicant accepts that there was collusion on announced prices and that the desired effect of the announcement was achieved. However, because of the structural and economic characteristics of the cartonboard market during the relevant period, the level of prices did not differ from that which would have been achieved in the absence of any collusion. In that regard, the applicant refers to the conclusions in the report of London Economics ('the LE Report'), an economic study carried out for the purpose of the procedure before the Commission on behalf of several undertakings addressed by the Decision. It adds that the Commission did not take account of competition from substitute products, despite the fact that such competition considerably reduced the cartel members' room for manoeuvre in regard to prices.

164 It contests the Commission's argument, set out in points 135 to 138 of the Decision, that the collusion on announced prices must have had an appreciable effect on actual price levels on the market.

165 Nor does the applicant accept that the collusion had any actual effect on market shares. The fact that during the period in question the applicant achieved a market share of 6.5% clearly shows that there were no such effects, even if that increase was attributable to its purchase of production units.

166 The Commission points out that it is entitled to raise the general level of fines (*Musique Diffusion Française and Others* v *Commission*, cited above) and that a comparison with the general level of fines in the *Polypropylene* and *PVC* decisions is therefore irrelevant.

167 Where it has been proved that collusion has had an anti-competitive object, It is not required to take the actual effects of the infringement into consideration in order to assess its gravity and to fix the amount of the fines (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 310, Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 386, and Case T-142/89 *Boël* v *Commission* [1995] ECR II-867, paragraph 122).

168 Furthermore, as stated in point 115 of the Decision, the net price increases closely tracked the announced price increases, albeit with some time lag. That was even expressly acknowledged, as regards 1988 and 1989, by the author of the LE Report on which the applicant relies. The Commission is entitled to take account of such effects of a cartel with an anti-competitive object (see, for example, Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 276 to 284, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraphs 359 to 364). Moreover, it has never alleged that announced price increases always went up by the full amount of the proposed increase and at the same time for all customers (point 115 of the Decision).

169 The reasons why the collusion in question must have had an appreciable effect on market conditions were duly set out in points 135 to 138 of the Decision. There is no reason to doubt the cartel members' assessment that the cartel had been successful (point 137).

170 As regards collusion on market shares, the Commission points out that the applicant acquired its market share only through the acquisition of existing production units and that the market share obtained corresponds to that of the units acquired. In those circumstances, the applicant cannot allege that the acquisition of that share of the market proves that the collusion on market shares had no actual effect.

Findings of the Court

171 In its written pleadings the applicant's arguments are set out in the context of the plea that the infringement had only limited effects. However, there are in fact two separate pleas and the Court will examine them separately.

— The effects of the infringement

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

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

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

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

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

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

178 The second type of effect consisted in the fact that changes in transaction prices followed those in announced prices. The Commission states that 'the producers not only announced the agreed price increases but also with few exceptions took firm steps to ensure that they were imposed on the customers' (point 101, first paragraph, of the Decision). It accepts that customers sometimes obtained concessions in regard to the date of entry into force of the increases or rebates or individual reductions, particularly on large orders, and that 'the average net increase achieved after all discounts, rebates and other concessions would always be less than the full amount of the announced increase' (point 102, last paragraph, of the Decision). However, referring to graphs in the LE Report, the Commission claims

that during the period covered by the Decision there was 'a close linear relationship' between changes in announced prices and those in transaction prices expressed in national currencies or converted to ecus. It concludes from this that: 'the net price increases achieved closely tracked the price announcements albeit with some time lag. The author of the report himself acknowledged during the oral hearing that this was the case for 1988 and 1989' (point 115, second paragraph, of the Decision).

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

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

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

temporal variations were closely linked to variations in demand (see, in particular, transcript of the oral hearing, p. 20).

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

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

184 Despite those conclusions, the analysis in the report does not justify a finding that the concerted price initiatives did not enable the producers to achieve a level of transaction prices above that which would have resulted from the free play of competition. As the Commission pointed out at the hearing, it is possible that the factors taken into account in that analysis were influenced by the existence of collusion. So, the Commission rightly argued that the collusive conduct might, for example, have limited the incentive for undertakings to reduce their costs. However, the Commission has not argued that there is a direct error in the analysis in the LE report nor submitted its own economic analysis of the hypothetical

changes in transaction prices had there been no collusion. In those circumstances, its assertion that the level of transaction prices would have been lower if there had been no collusion between the producers cannot be upheld.

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

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

187 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of its exercise of its unlimited powers in regard to fines, when it assesses the seriousness of the infringement found in the present case (see paragraph 194 below).

— The general level of the fines

188 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines ranging from ECU 1 000 to 1 000 000, or a sum in

excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement. As is apparent from the case-law of the Court of Justice, the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case, and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

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

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

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

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

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

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

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

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

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

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

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

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

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

195 In view of the foregoing, the pleas alleging that the infringement had only limited effects and that the general level of the fines is excessive must be rejected.

The plea that the statement of reasons for the increase in the general level of the fines is inadequate

196 The applicant contends that the Decision involves an increase of approximately 25% in the general level of the fines, when compared with previous similar decisions, that is to say, the Polypropylene and PVC Decisions, and that although it is true that the Commission is entitled to increase the general level of the fines, the Decision must then set out the reasons justifying such an increase.

197 The Court points out in that regard that, as is apparent from its examination of the plea alleging that the general level of the fines is excessive (see, in particular, paragraph 192 above), that level is justified in the light of the particular circumstances of this case and cannot be directly compared with the levels of fines previously adopted by the Commission. The Court therefore finds that, in setting the general level of fines in the present case, the Commission did not so depart from its previous line of decisions as to oblige it to give a more detailed account of the reasons for its assessment of the gravity of the infringement (see, *inter alia*, Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31).

198 This plea must therefore be rejected.

The plea of infringement of the obligation to state reasons and the plea that the applicant was incorrectly classified as a 'ringleader'

Arguments of the parties

199 The applicant states that according to point 170 of the Decision, the undertakings considered to be the 'ringleaders' had to bear a special responsibility, as 'they clearly constituted the main decision-makers and were the prime movers of the cartel'.

200 First, that statement of reasons is insufficient to justify the fine imposed. The 'prime movers of the cartel' were the undertakings which took the initiative for it, laid down its policy, and ensured that the other producers complied with it. Mere participation in the PWG meetings does not suffice for the attribution to it of such a role. Weig was not regarded as one of the 'ringleaders', even though it participated in PWG meetings from 1988 onwards. In its reply to the statement of objections the applicant contested its classification amongst the 'ringleaders'. However, despite the arguments and evidence submitted, the Decision did not explain the Commission's grounds for that allegation.

201 The Commission's argument that there is only a slight difference between the fines (expressed as a percentage of turnover) imposed on the applicant and on Weig should be rejected. Moreover, the applicant is unable to reply to that argument, because the Decision does not give any precise information of the percentage of turnover taken in order to fix each undertaking's fine.

202 The applicant asserts, second, that in any event there are no grounds for attributing to it the role of 'ringleader'. It had always adopted a passive role in regard to the

organisation and operation of the cartel and always sought to pursue an independent competitive policy. It was never the channel whereby decisions adopted in the PWG were communicated to producers not represented there.

203 Finally, inasmuch as it was regarded as one of the 'ringleaders' because it was 'major producer', the applicant points out that its market share did not exceed 6.5% during the relevant period. The market shares of the other undertakings regarded as major producers were, however, between 10 and 20%.

204 The Commission refers to its arguments submitted in the context of the plea that the infringement should not have been attributed to the applicant (see paragraphs 105 and 106).

205 In addition, it states that the reason why Weig was not regarded as a 'ringleader' was that it had not played as important a role in the PG Paperboard as the other major producers (point 170, third paragraph, of the Decision). Although it is true that Weig was not regarded as one of the 'ringleaders', the Commission nevertheless took account of the fact that it had participated in the PWG meetings. The fine imposed on Weig is therefore only slightly less than that imposed on the applicant.

Findings of the Court

206 The applicant's arguments were put forward in the written pleadings in the context of a single plea alleging infringement of the obligation to state reasons in regard to the amount of the fine imposed. In reality, those arguments involve two separate pleas. They will be examined separately.

— The statement of reasons regarding the fixing of the individual fines

207 At the hearing the applicant adopted, in particular, the arguments submitted on one of the subjects dealt with in the course of common oral argument, namely those dealing with the statement of reasons in regard to the determination of individual fines. In its written pleadings to the Court it submitted that the Decision contained an insufficient statement of reasons for the classification of the applicant as a 'ringleader' of the cartel. It has, however, stated that it was impossible to reply to some of the Commission's arguments, because the Decision does not contain any information regarding the percentages of turnover adopted in order to set the amount of the individual fines. The applicant's arguments submitted at the hearing before the Court are therefore merely an extension of the arguments already contained in its pleadings and not a new plea in law within the meaning of Article 48(2) of the Rules of Procedure.

208 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).

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

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

211 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines, the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as 'ringleaders' of the cartel, whereas the other undertakings were regarded as 'ordinary members'. Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

212 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.

213 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.

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

215 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, *Petrofina* v *Commission*, cited above, point 264).

216 The Court points out in that context that, according to point 170, first paragraph, of the Decision, '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. They clearly constituted the main decision-makers and were the prime movers of the cartel.

217 Furthermore, the Decision amply describes the central role of the PWG in the cartel (in particular, points 36 to 38 and 130 to 132 of the Decision.

218 The Decision therefore clearly contains an adequate statement of the reasons for the Commission's view that the applicant was a 'ringleader'. Moreover, the Commission states that it had taken into account the fact that Weig did not appear to have played as important a role in the cartel as the other producers (point 170, third paragraph, of the Decision), which adequately states the reason why the applicant and Weig were not treated identically when their fines were fixed.

219 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.

220 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, *Hilti* v *Commission*, cited above, paragraph 136).

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

222 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.

223 In the specific circumstances set out in paragraph 221 above, and having regard to the fact that in the procedure before the Court the Commission showed itself to be willing to supply any relevant information relating to the method of calculating the fines, the absence of specific grounds in the Decision regarding the method of calculation of the fines should not, in the present case, be regarded as constituting an infringement of the duty to state reasons such as would justify annulment in whole or in part of the fines imposed.

224 Consequently, this plea cannot be upheld.

— The classification of the applicant as a 'ringleader'

225 The applicant does not dispute that it participated in the PWG meetings. Nor does it 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.

226 Consequently, the Court must find that the applicant was correctly classified as a 'ringleader' for the purpose of calculating the fine, and there is no need to rule on the correctness of the Commission's assertion that the applicant informed Papeteries de Lancey of the PWG's decisions (see point 38, fifth paragraph, of the Decision).

227 The applicant has not proved that its role in the PWG was less significant than those of the other undertakings considered to be the 'ringleaders' of the cartel (see also points 122 and 123 above).

228 Nor has the applicant adduced any evidence to show that it always played a passive role in the PWG. In those circumstances, the Commission, when determining the amount of the fine, was entitled to treat it differently from Weig, because Weig had sent to the Commission a statement of 22 March 1993 (sent to the applicant, for comment, with the Commission's letter of 1 June 1993) by Mr Roos (Feldmühle's representative at the PWG meetings) which confirmed that Weig had played a less important role in the PWG than that of the other participants in its meetings.

229 In adopting a basic rate of 9% of the applicant's turnover on the Community cartonboard market in 1990 the Commission did not therefore treat the applicant

less favourably than Weig, for which, according to the table produced by the Commission (see paragraph 213 above), it had adopted a basic rate of 8%.

230 Furthermore, the fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.

231 In this case, the evidence adduced by the applicant does not show that its actual conduct on the market was likely to defeat the anti-competitive effects of the infringement found.

232 There is no dispute that it actually took part in the concerted price initiatives by announcing the agreed prices on the market. It was even the first undertaking to announce the March/April 1988 and April 1991 price increases in France (see tables B and G annexed to the Decision).

233 The applicant does indeed rightly state that, according to Appendices 109 and 117 of the statement of objections, other undertakings complained about the applicant's prices. However, such evidence relating to isolated examples of aggressive pricing do not prove that the applicant always behaved independently on the market.

234 The Commission expressly accepts that some customers obtained favourable terms or rebates on announced prices (see, in particular, the last paragraph of point 101 of the Decision). The statements of some customers, to which the applicant refers and which state that the applicant always endeavoured to offer the most competitive pricing terms, do not therefore prove that its conduct differed from that agreed with the other undertakings.

235 Furthermore, the applicant has expressly admitted in its pleadings that during the period to which the Decision relates it increased its market share only by virtue of its acquisition of production units. There is therefore no basis for the view that its transaction prices were appreciably lower than those of the other producers participating in the collusion on prices.

236 Having regard to the foregoing, the plea that the applicant was wrongly classified as a 'ringleader' of the cartel must also be rejected.

The plea alleging the existence of mitigating circumstances

Arguments of the parties

237 The applicant contends that the Commission did not properly take into account four mitigating circumstances when it fixed the amount of the fine.

238 The first circumstance is the compulsion exercised on the applicant by the other producers in the industry.

239 The second is its policy of free competition.

240 The third is its cooperation during the investigation. The Commission was not entitled to make a distinction as to whether or not an undertaking had, during the administrative procedure, contested the allegations of fact raised against it.

241 If a fine is reduced on account of a failure to contest the Commission's factual allegations, that may lead to incorrect decisions because, simply in order to obtain a substantial reduction in any fine, the undertakings would be induced to refrain from contesting those allegations, even though they had evidence showing them to be incorrect. Examination of the facts would thereby shift from the procedure before the Commission to the proceedings before the Community judicature, which would clearly be inconsistent with the division of tasks laid down in the Treaty.

242 There is a risk that the Commission's approach would lead to discrimination, given the difficulties associated with determining which undertakings have not contested the Commission's allegations of fact. The applicant states that it is not clear why the Commission treated Sarrió as an undertaking which had not contested the factual allegations and that the transcript of the hearing before the Commission clearly demonstrates the inherent difficulties in applying such a test.

243 There are no such difficulties where the test applied is that of an undertaking's contribution to the investigation of the case through the submission of substantive, tangible evidence. The applicant demonstrated such cooperation during the investigation, as it supplied the Commission with all the documents in its possession and furnished it with important information, such as information on the number of the PWG meetings in which it had participated. The Commission should therefore have taken account of its cooperation when it fixed the amount of its fine.

244 It is irrelevant that the evidence furnished to the Commission formed part of the applicant's replies to the Commission's requests for information. As is shown in the case of Rena and Stora, the Commission decided to reduce the fines even when the evidence had been furnished in reply to requests under Article 11 of Regulation No 17.

245 The applicant adds that it is clear from points 30, 40, 93 and 170 of the Decision that the evidence which it supplied played a crucial role in proving the infringement. Even if that evidence was not crucial, that would not alter the fact that, on any view, the applicant had cooperated with the Commission in establishing the infringement.

246 Finally, the applicant considers that a fourth mitigating factor was not taken into account. It states that, although the Commission is not, in general, required to take account of the financial situation of undertakings on which fines are imposed (*ICI* v *Commission*, cited above, paragraph 372), regard should be had to their financial situation in circumstances such as those in the present case, where payment of the fine imposed on the applicant might cause the applicant to file for bankruptcy.

247 The Commission considers that the first two alleged mitigating circumstances have already been refuted in the context of the pleas alleging that the collusion could not be attributed to the applicant (see paragraphs 105 and 106 below) and that it was wrongly classified as a 'ringleader' (see paragraph 204 et seq. above).

248 As regards the third mitigating circumstance, it states that the applicant has no legal interest in claiming that the Commission, when calculating the fines, was not entitled to take into account the cooperative attitude of undertakings which had not contested the Commission's factual allegations.

249 The Commission must take an undertaking's cooperation into account where it materially facilitated the establishment of the infringement (*ICI* v *Commission*, cited above, paragraph 393). Just like the supply of evidence, a failure to contest the facts facilitates the establishment of the infringement by the Commission.

250 None of the serious consequences to which the applicant refers are result of the fact that the Commission took into consideration the choice by some undertakings not to contest the facts. As the Decision shows, the Commission did not rely solely on the admissions of the undertakings to which its investigation related. Nothing in the transcript of the hearing before the Commission confirms the applicant's concern that there is a risk of discrimination.

251 In any event, the applicant did not actively cooperate during the pre-litigation procedure. Referring to the grounds of the Decision (points 40 to 102), the Commission also disputes that the documents furnished by the applicant were particularly useful.

252 Finally, when fixing the fine, the Commission is not required to take into account an undertaking's financial situation (*IAZ and Others* v *Commission*, cited above, paragraphs 54 and 55) and, to the same effect, Case 81/83 *Busseni* v *Commission* [1984] ECR 2951, paragraph 22). It is, however, a factor to be taken into consideration at the stage where the fine is paid (*Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 135).

Findings of the Court

253 As regards the first two circumstances to which the applicant refers, the Court has already found (see paragraph 108 et seq. and paragraph 225 et seq. above) that the

applicant has not proved that it participated in the meetings of the bodies of the PG Paperboard solely because it was compelled to do so and that it always endeavoured to pursue a policy of free competition.

254 As to the third consideration, the applicant's alleged cooperation with the Commission, the Court points out that in its reply to the statement of objections the applicant did not admit that any of the factual allegations raised against it were correct.

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

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

257 The situation is different where the essential allegations made by the Commission in its statement of objections are contested by an undertaking in its reply to that statement, or where the undertaking does not reply or merely states that it is not expressing any view on the Commission's factual allegations. By adopting such an attitude during the administrative procedure the undertaking does not further the Commission's task of finding infringements of the Community competition rules and bringing them to an end.

258 Consequently, when the Commission states in the first paragraph of point 172 of the Decision that it has awarded reductions in the fines to be imposed on undertakings which did not contest the essential factual allegations upon which it relied against them, those reductions can be considered to be lawful only in so far as the undertakings concerned have expressly stated that they are not contesting those allegations.

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

260 As regards the applicant's argument that it furnished to the Commission all the documents in its possession and supplied important information to it, the Court points out that the applicant accepts that it sent the documents and information in question in reply to requests for information served under Article 11 of Regulation No 17. It is settled law that cooperation in an investigation which does not go beyond that which is required of undertakings under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine (see, for example, *Solvay* v *Commission*, cited above, paragraphs 341 and 342).

261 The applicant cannot validly claim that the reductions in the fines of Stora and Rena prove that cooperation in the form of replies to requests for information must be taken into consideration.

262 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 under Article 11 of Regulation No 17.

263 As regards Rena, the applicant has not disputed the statement in point 171, second paragraph, of the Decision that it had 'provided important documentary evidence to the Commission on a voluntary basis'.

264 It follows from the foregoing considerations that the Commission was not required to reduce, for cooperation during the administrative procedure, the amount of the fine imposed on the applicant.

265 Finally, as to the fourth mitigating circumstance, the applicant's alleged inability to pay the fine imposed on it, it suffices to find that it is for the Commission to decide, in an appropriate case and having regard to the current financial situation of the undertaking, whether it is desirable to allow payment to be deferred or effected in instalments (*Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 135).

266 This plea must therefore be rejected.

267 In the light of the whole of the foregoing, the application must be dismissed.

Costs

268 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 in its submissions, it must be ordered to pay the costs, as sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those relating to the application for interim relief.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary