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

In Case T-347/94,

Mayr-Melnhof Kartongesellschaft mbH, a company incorporated under Austrian law, represented by Otfried Lieberknecht, Burkhard Richter and Klaus Benner, Rechtsanwälte, Düsseldorf, and Michel Waelbroeck, of the Brussels Bar, subsequently by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Bonn, 7 Val Sainte-Croix,

applicant,

v

Commission of the European Communities, represented by B. Langeheine and R. Lyal, of its Legal Service, acting as Agents, and Dirk Schroeder, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Facts

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

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

2 The product with which the Decision is concerned is cartonboard. The Decision refers to three types of cartonboard, designated as 'GC', 'GD' and 'SBS' grades.

3 GD grade cartonboard (hereinafter 'GD cartonboard') is white-lined chipboard (recycled paper) which is normally used for the packaging of non-food products.

4 GC grade cartonboard (hereinafter 'GC cartonboard') is cartonboard with a white top layer and is normally used for the packaging of food products. GC cartonboard is of higher quality than GD cartonboard. During the period covered by the Decision there was normally a price differential of approximately 30% between those two products. High quality GC cartonboard is also used, but to a lesser extent, for graphic purposes.

5 SBS is the abbreviation used to refer to cartonboard which is white throughout (hereinafter 'SBS cartonboard'). The price of this cartonboard is approximately 20% higher than that of GC cartonboard. It is used for the packaging of foods, cosmetics, medicines and cigarettes, but is designated primarily for graphic uses.

6 By letter of 22 November 1990, the British Printing Industries Federation ('BPIF'), a trade organisation representing the majority of printed carton producers in the United Kingdom, lodged an informal complaint with the Commission. It claimed

that the producers of cartonboard supplying the United Kingdom had introduced a series of simultaneous and uniform price increases and it requested the Commission to investigate whether there had been an infringement of the Community competition rules. In order to ensure that its initiative received publicity, the BPIF issued a press release. The content of that press release was reported in the specialised trade press in December 1990.

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

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

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

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

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

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

'*Article 1*

Buchmann GmbH, Cascades SA, Enso-Gutzeit Oy, Europa Carton AG, Finnboard — the Finnish Board Mills Association, Fiskeby Board AB, Gruber & Weber GmbH&Co KG, Kartonfabriek "de Eendracht NV" (trading as BPB de Eendracht NV), NV Koninklijke KNP BT NV (formerly Koninklijke Nederlandse Papierfabrieken NV), Laakmann Karton GmbH&Co KG, Mo Och Domsjö AB (MoDo), Mayr-Melnhof Gesellschaft mbH, Papeteries de Lancey SA, Rena Kartonfabrik A/S, Sarrió SpA, SCA Holding Ltd (formerly Reed Paper & Board (UK) Ltd), Stora Kopparbergs Bergslags AB, Enso Española SA (formerly Tampella Española SA) and Moritz J. Weig GmbH&Co KG have infringed Article 85(1) of the EC Treaty by participating,

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

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

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

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

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

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

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

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

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

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

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

...

Article 3

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

...

(xi) Mayr-Melnhof Karton Gesellschaft mbH, a fine of ECU 21 000 000;

...'

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

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

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

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

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

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

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

20 In the Decision the Commission finds that the applicant, Mayr-Melnhof Karton-gesellschaft mbH (hereinafter 'Mayr-Melnhof'), participated in meetings of all four bodies of the PG Paperboard referred to above, namely the PWG, the PC, the JMC, and the Economic Committee.

21 Throughout the period covered by the Decision, the management and marketing activities of Mayr-Melnhof were fully integrated with those of FS-Karton, a producer of cartonboard in Germany acquired by Mayr-Melnhof in 1984. For that reason, Mayr-Melnhof was held responsible for FS-Karton's involvement in the cartel (point 150 of the Decision).

22 Mayr-Melnhof was also held responsible for the participation in the infringement of its Swiss 66% subsidiary, Deisswil, throughout the period of that infringement (*ibidem*). Lastly, it was held responsible for the involvement of Mayr-Melnhof Eerbeek BV (hereinafter 'Eerbeek'), a company established in the Netherlands, which it acquired in September 1990. Its responsibility for Eerbeek's conduct was held to have begun on 1 January 1990, the effective date of the acquisition.

Procedure

23 The applicant brought this action by application lodged at the Registry of the Court on 18 October 1994.

24 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/97, T-337/94, T-338/94, T-348/94, T-352/94 and T-354/94).

25 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).

26 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).

27 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).

28 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.

29 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.

30 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.

31 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.

32 The parties in the cases referred to in paragraph 28 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

33 The applicant claims that the Court should:

— annul Article 1 of the Decision;

— annul Article 2 of the Decision;

— annul Article 3 of the Decision or reduce the amount of the fine imposed by it;

— order the Commission to pay the costs.

34 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The application for annulment of Article 1 of the Decision

A — *The pleas relating to the infringement of essential procedural requirements*

Infringement of Article 190 of the Treaty

Arguments of the parties

35 The applicant submits that the obligation to state reasons for a decision is intended to protect the interested parties and to enable the Community judicature to review that decision (Case 18/57 *Nold* v *High Authority* [1959] ECR 41). The Commission is obliged to mention in particular the factual and legal elements which led it to adopt the decision and which provide the legal basis for it.

36 Furthermore, the Commission can decline to answer arguments of the addressees of the decision only where it considers them to be irrelevant (Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 328). In the present case it infringed that principle because it failed to answer a number of the applicant's central arguments.

37 The Commission, in the main, ignored the argument that the alleged agreements and concerted practices did not have any appreciable impact on the market situation. That argument was based on an in-depth study, namely the London Economics Report ('the LE report'). The Decision (point 115) does not deal with the views set out in that report.

38 Furthermore, the Commission failed to consider the special features of the market which the applicant had explained both in its reply to the statement of objections and at the hearing before the Commission. The regular price increases, which were usual in the sector, are referred to in the Decision only as a fact which demonstrates the existence of the alleged cartel (points 18 to 20 of the Decision). By taking that approach, the Commission failed to comment on the explanations given by the applicant and thereby infringed Article 190 of the Treaty.

39 Lastly, the Commission has applied a wrong definition of the concept of benefit.

40 The Commission contends that a decision contains an adequate statement of reasons where it mentions the factual and legal elements which provide the legal basis for the measure and the considerations which led it to adopt its decision (Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 222). Those requirements are fully satisfied in the present case.

41 It commented on the LE report not only in point 115 of the Decision but also in points 16, 21 and 101. The Decision also contains a detailed description of the cartonboard market (points 6 to 21). In particular, the Commission considered the needs of the market as regards capital investment (point 13) and the tendency for prices to increase simultaneously at certain times of the year in the sector (point 18).

Findings of the Court

42 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). Although pursuant to Article 190 of the Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, *inter alia*, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 66).

43 In the present case, the Decision contains a detailed statement of the Commission's reasons for rejecting the argument submitted by some undertakings, including the applicant, that the infringement found had not had any effect on the market (see, in particular, points 101, 102 and 115 of the Decision). Likewise, the specific features of the market to which the applicant refers were all considered in the Decision (see, in particular, points 13 and 18).

44 Lastly, in so far as the applicant disputes the correctness of the Commission's assessment of the benefits gained by the cartonboard producers (see paragraph 39 above) that argument should be considered in the context of the substance of the Decision and is irrelevant in the context of the present plea.

45 This plea must therefore be rejected.

Infringement of the requirements relating to proof under Community law

46 The applicant claims that the Commission failed to satisfy the requirements relating to proof under Community law, because it relied on mere presumptions, suppositions and imaginary empirical principles. In particular, the Commission overestimated the probative value of Stora's statements, because, on the Commission's own view, Stora bore prime responsibility for the alleged infringement (point 46 of the Decision).

47 By that argument, the applicant is in reality seeking to contest the Commission's assessment of the evidence set out in the Decision. Such an argument goes to the substance of the Decision, and this plea must therefore be rejected.

B — *The pleas alleging infringement of substantive rules*

The plea that there were no agreements on prices

Arguments of the parties

48 The applicant points out certain special features of the cartonboard market which are essential for an understanding of the way in which list prices and transaction prices arise. In order to pass on to their own customers any increases in cartonboard prices, the cartonboard converters always required that the cartonboard producers fix their prices for each six-monthly period and that at least two month's prior notice be given of the producers' intention to increase prices. The convertors insisted that any increase in the price of cartonboard should be of at least 5%.

49 The meetings of the cartonboard producers did not therefore have the significance which the Commission attributed to them. Each producer's conclusions as to the amount of each price increase were influenced by increases in costs which affected all of them more or less identically. All the price increases were absolutely necessary because of increases in production costs.

50 Nor were the producers compelled to follow one particular producer's decision to increase prices by a certain amount. However, on this type of market — for more or less homogeneous bulk goods — it is usual to sell at uniform list prices, which means that the real competition takes place in individual negotiations with customers.

51 The market ensured that price initiative were transparent because, once letters announcing price increases had been sent, producers could, during the adequate period of notice demanded by the convertors, ascertain what initiatives were planned by other producers and how buyers were reacting before they had to decide whether or not to follow those increases themselves. It adds that the Commission has not claimed that restrictions on competition affected individual price negotiations with buyers.

52 The Commission failed to take into account the fact that demand for cartonbaord is determined solely by demand for the goods to be packaged. An individual producer cannot therefore automatically increase his market shares by reducing his prices because the converters' production is often adapted to their usual supplier's type of cartonboard and they can, without great difficulty, call on him to reduce his prices as well.

53 Lastly, the heavy investment required in the cartonboard sector was not properly taken into account by the Commission.

54 The applicant submits that it is settled law that there is an agreement within the meaning of Article 85 of the Treaty only when the undertakings have expressed their joint intention to conduct themselves on the market in a specific way (*Chemie Linz* v *Commission*, cited above, paragraph 301). It is therefore inherent in the concept of an 'agreement' that a — not necessarily legally binding — obligation exists in the form of the participants' actual intention to be bound. In order to find that an agreement exists, it is at least necessary that the persons concerned should assume a moral obligation to conduct themselves in accordance with what has been agreed. However, in the Decision the Commission has not even asserted that the undertakings in fact undertook to adopt a specific course of conduct whose object was to restrict competition.

55 The applicant accepts that it participated in the exchange of information on planned increases in list prices and that this exchange can be regarded as a concerted practice which restricts competition. However, the evidence on which the Commission relies in point 74 et seq. of the Decision does not prove the existence of agreements. In particular, Stora's second statement (appendix 39 to the statement of objections), on which the Commission relies, does not contain any evidence of the existence of such agreements. Moreover, Stora's statements do not have any probative value.

56 Furthermore, the fact that the producers' price increases were substantially the same and entered into force at more or less the same time does not prove that there were binding agreements in regard to prices. It merely reflects the particular conditions of the relevant market.

57 Lastly, the applicant disputes that there is a causal link between the discussions on increases in list prices and the increases in transaction prices which were observed on the market. It therefore disputes that the actual increases in price can be regarded as proof of the existence of pricing agreements.

58 The Commission states that it is clear from the case-law that in order for their to be an agreement within the meaning of Article 85 it is sufficient that the undertakings in question should have expressed their joint intention to conduct themelves on the market in a specific way (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256).

59 In points 72 to 90 of the Decision it set out in detail the evidence showing the nature of the infringement in question. That evidence showed that the cartonboard producers agreed in advance in the PWG upon the size of each price increase, which producer would be the first to announce each of the increases, the date of that increase and the dates on which the other producers would follow by sending their own letters announcing increases (point 73 of the Decision).

60 In those circumstances, the applicant's argument that the timing and nature of the price increase announcements is explained by the wishes of their customers is not inconsistent with the existence of agreements. Its arguments based on market the transparency which resulted from letters announcing price increases and on market characteristics are also irrelevant, because it has been proved that the undertakings had agreed on the price increases in advance.

61 Moreover, the price collusion was part of an overall plan. In such a complex system of agreements, the various measures should be considered as a whole in the light of the overall objective of the cartel (point 128 of the Decision). Having regard to the increasing concretisation of the collusion, the planning and common implementation of price initiatives, and also the agreement on market shares and volume control, the Commission maintains its view, set out in points 131 and 132 of the Decision, that the infringement was a concerted practice from mid-1986 and that from the end of 1987 it displayed all the characteristics of a full agreement within the meaning of Article 85 of the Treaty.

62 Lastly, it submits that the price increases affected the prices actually applied.

Findings of the Court

63 The applicant admits that it participated in collusion on planned price increases.

64 According to the Decision, the undertakings referred to in Article 1 thereof had fixed 'by agreement ... the regular price increases to be applied in each national market' (point 130, second paragraph, third indent). As the Commission stated (paragraph 61 above), in its view there had been an agreement from the end of 1987.

65 It is settled law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see, *inter alia*, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and *Van Landewyck and Others* v *Commission*, cited above, paragraph 86 and *Hercules Chemicals* v *Commission*, cited above, paragraph 256). Contrary to the applicant's submission, the question whether the undertakings in question considered themselves bound — in law, in fact or morally — to adopt the agreed conduct is therefore irrelevant.

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

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

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

The PWG considered that an initial increase of 10% should be implemented in 1988. This amounted, for example, to FF 50 per 100 kilograms for GC grades and FF 35 per 100 kilograms for GD grades for the French market. Similar increases were implemented in other countries. Subsequent increases were agreed at similar absolute amounts and therefore reducing percentages of increase.

...

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

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

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

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

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

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

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

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

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

FFF	40
NL	14
DDM	12
ILIT	80
BBF	2.50
CHSF	9
GB£	40
IRL£	45

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

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

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

74 Consequently, without there being any need to examine other evidence, the Court considers that the Commission has proved that the undertakings which participated in the meetings of the PWG and the JMC expressed their joint intention to carry out uniform and simultaneous price increases. The Commission was therefore entitled to find that the joint intention which had been formed by the applicant and other cartonboard producers regarding price initiatives constituted an agreement with effect from the end of 1987.

75 In those circumstances the applicant's arguments based on the alleged particularities of the cartonboard market, on the one hand, and the absence of any causal link between the increases in list prices and the increases in transaction prices, on the other, are irrelevant. Even if the factual assertions made by the applicant in the context of those arguments were correct, that could not call into question the Commission's finding that the infringement concerning prices in which the applicant participated could be characterised as an agreement from the end of 1987.

76 This plea must therefore be rejected.

The plea that there was no agreement or concerted practice relating to the alleged 'price before tonnage' policy

Arguments of the parties

77 The applicant's submissions are in three parts.

78 First, it argues that there was no agreement or concerted practice to maintain market shares at a constant level.

79 It submits that the Commission's assertions regarding the alleged collusion on 'freezing' the market shares of the main cartonboard producers are based solely on Stora's statements and the confidential note of 28 December 1988 found at FS-Karton (appendix 73 to the statement of objections). However, those documents do not contain any evidence of the existence of an agreement or concerted practice to 'freeze' market shares.

80 Appendix 73 to the statement of objections is merely a general report on the situation by the sales director of FS-Karton which sought to explain to the group management the reasons for the stagnation in its turnover. According to that note, the sales director had expressed reservations regarding the new sales policy of the group, which required absolute price discipline from subsidiaries even if that entailed a reduction in volumes sold. The note proves that this decision had been taken by the group management and had been imposed on the sales director of FS-Karton. Moreover, he was unaware of the substance of the discussions in the PG Paperboard.

81 Stora's statements do not prove the existence of the alleged basic agreement on a 'price before tonnage' policy. In its second statement Stora merely refers to 'discussions' on market shares (appendix 39 to the statement of objections, p. 4 and 11). Likewise, its third statement (appendix 43 to the statement of objections) refers to 'discussions' and to 'understandings' (pp. 1 and 2). Furthermore, reference is made not to a basic agreement but rather to several individual agreements — not confirmed by other documents — based on figures for the preceding year. Stora did not use the word 'agreement' within the special meaning of Article 85 of the Treaty (see paragraph 54 et seq. above), because it stated that the 'agreements' were

not binding on the producers and were observed by them only if it was in their own interests to do so (appendix 39 to the statement of objections, p. 4, and point 59 of the Decision).

82 Moreover, there are doubts as to the credibility of Stora's statements, in view of the fact that its cooperation with the Commission may be explained by discussions on the extent to which the fine would be reduced in return for it.

83 Lastly, the handwritten note of 11 January 1990 found in the office of the sales director of FS-Karton (appendix 113 to the statement of objections, points 84 to 86 of the Decision) was drawn up in preparation for an internal report intended for the Mayr-Melnhof management and is based on the sales director's personal views and on information obtained in discussions with colleagues and customers. The other documents to which the Commission refers do not support its assertions.

84 Second, the applicant constructs an argument based on the change in its market shares. It states that the increase in the capacity of FS-Karton by 200 000 tonnes in 1990 shows that it intended to increase its market share in its main market, namely the Community market. Its exports to non-Community markets were unconnected with the effective control of supply. They followed the basic rule that business should be conducted in accordance with market conditions. Its 'price before tonnage' policy was the result of its own decision and aimed to prevent a general collapse of prices on the Community market.

85 The market shares of the various producers, including its own, also changed. It disputes the Commission's assertions that the fluctuations in market shares are explained by the fact that the market shares were not static but adapted from time

to time and renegotiated, and that discussions on market shares took place each year on a fresh basis. There is no evidence to support those assertions or the Commission's claim that producers who increased their market shares were taken to task.

86 Third, the applicant submits an argument relating to downtime and changes in production volumes.

87 First, the Commission did not have due regard to the fact that the European cartonboard market is a buyers' market. The applicant describes the characteristics of the relationship between producers and their customers on that market.

88 The Commission has not supplied any evidence to show that there was an understanding between the major producers on downtime. Its assertions are based solely on a few vague insinuations in Stora's second statement. Furthermore, the Commission never answered the applicant's argument that it had always used its production capacity to the maximum, even though that argument is supported by a table, relating to capacity utilisation, annexed to its application. The actual machine downtime found to have taken place in 1990 in the Mayr-Melnhof group's factories was caused by the introduction of a new machine, maintenance, trials and conversion work.

89 The Commission refers principally to its findings in the Decision regarding the 'price before tonnage' policy (points 51 to 60). It also refers to Stora's second statement (appendix 39 to the statement of objections, in particular pp. 3, 12, 14 and 15).

90 As regards more specifically the 'freezing' of the main producers' existing market shares, it states that this was a necessary component of the 'price before tonnage' policy which aimed to monitor the cartel members' actual policy on production volumes. Proof of the existence of collusion on 'freezing' market shares is provided in particular by the confidential note discovered at FS-Karton (appendix 73 to the statement of objections). In addition, the Decision refers to a whole series of other evidence which the applicant does not mention and which confirms most precisely the information in Stora's second statement and the confidential note of FS-Karton (see points 84, 87, 94 and 95 of the Decision and the documents considered therein).

91 As regards Stora's statements, the Commission repeats that a joint intention as to future conduct on the market constitutes an infringement of Article 85 of the Treaty. Those statements are confirmed in all material respects by other documents and there is therefore no reason to doubt their credibility. Furthermore, no agreement was reached between it and Stora regarding the level of the fine and the reduction which might be expected in return for its cooperation.

92 As to the increase in the applicant's production capacity, the Commission states that consumption of cartonboard in western Europe increased by 18.6% between 1987 and 1990, which means that some increase in capacity in the sector was necessary in order to satisfy the increased demand. However, the increase in capacity, in particular through the introduction of a new machine at FS-Karton, was not necessarily accompanied by a shift in market shares.

93 There is no evidence that production from newly created capacity at FS-Karton was sold on the Community market. According to the documents submitted by

the applicant, its market share increased between 1987 and 1991 by only 0.6% in the case of GD grades and by 0.3% in the case of GC grades, and the new capacity created at FS-Karton did not lead to any increase in its market shares. As the applicant itself admits, it exported to non-member countries in order to avoid a fall in prices on the Community market; that is precisely in line with the objectives of the 'price before tonnage' policy.

94 Even an increase in the applicant's market shares would not justify its participation in discussions during which the market shares of the major manufacturers of cartonboard were determined annually (point 60 of the Decision).

95 Lastly, as regards downtime, the Commission submits that the documents produced by the applicant during the proceedings before the Court show that particularly in 1990 the utilisation rate of some factories fell considerably in comparison with previous years and that in 1991 the utilisation rate of the Hirschwang factory also fell considerably in comparison with previous years.

96 In any event it is irrelevant whether the applicant actually produced at full capacity. As there was a complex system of agreements which aimed, *inter alia*, to control supply and to allocate markets in the Community and as the applicant took part in the PWG meeting at which the policy in question was drawn up, the applicant is responsible for the entire infringement committed by the producers (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraphs 256 to 261 and 305, and *Hercules Chemicals* v *Commission*, cited above, paragraph 272).

Findings of the Court

1. Existence of concerted action to freeze market shares and control supply

97 According to Article 1 of the Decision, the undertakings referred to in that article infringed Article 85(1) of the Treaty by participating, during the relevant period, in an agreement and concerted practice whereby the suppliers of cartonboard in the Community 'reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time' and 'increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the said concerted price rises'.

98 According to the Commission, those two types of collusion, dealt with in the Decision under the heading 'volume control', were initiated during the reference period by the participants in the PWG meetings. It is apparent from the third paragraph of point 37 of the Decision that the true purpose of the PWG, as described by Stora, 'included "discussions and concertation on markets, market shares, prices, price increases and capacity"'.

99 As to the PWG's role in relation to the collusion on market shares, the Decision (point 37, fifth paragraph) states as follows: 'In connection with the moves to increase prices, the PWG held detailed discussions on the market shares in western Europe of the national groupings and of individual producer groups. As a result, certain "understandings" were reached between the participants as to their respective market shares, the object being to ensure that the concerted price initiatives were not jeopardised by excess of supply over demand. The large producer groups in effect agreed to maintain their market shares at the levels disclosed for each year by the annual production and sales figures and available in definitive form through

Fides in March of the following year. Market share developments were analysed in each meeting of the PWG on the basis of the monthly Fides returns and if significant fluctuations emerged, explanations would be sought from the undertaking presumed responsible.'

100 According to point 52 of the Decision: 'The agreement reached in the PWG during 1987 included the "freezing" of the west European market shares of the major producers at existing levels, with no attempts to be made to win new customers or extend existing business through aggressive pricing'.

101 The first paragraph of point 56 states: 'The basic understanding between the major producers on maintaining their respective market shares continued throughout the period covered by this Decision'. According to point 57: '"Market share development" was analysed at each meeting of the PWG on the basis of provisional statistics'. Finally, the last paragraph of point 56 states: 'The undertakings which took part in these discussions on market shares were those represented in the PWG, namely Cascades, Finnboard, KNP (until 1988), [Mayr-Melnhof], MoDo, Sarrió, the two Stora group producers CBC and Feldmühle, and (from 1988) Weig'.

102 The Court therefore considers that the Commission correctly established the existence of collusion on market shares between the participants in the meetings of the PWG.

103 The Commission's analysis is in essence based on Stora's statements (appendices 39 and 43 to the statement of objections) and is confirmed by appendix 73 to the statement of objections.

104 In appendix 39 to the statement of objections, Stora states: 'The PWG met from 1986 to assist in the introduction of discipline in the market. ... Among other (legitimate) activities, its purpose included discussion and concertation on markets, market shares, prices, price increases, demand and capacity. Its role included assessing and explaining to the President Conference the precise state of supply and demand on the market and the measures to be taken to attempt to bring order to the market.'

105 As regards more specifically the collusion on market shares, Stora indicates that 'the shares taken by national groups of EC, EFTA and other countries supplied by members of the PG Paperboard were considered in the PWG' and that the PWG 'discussed the possibility of holding market shares at the previous year's level' (appendix 39 to the statement of objections, point 19). It also states (same document, point 6) that '[d]iscussions about producers' European market shares also took place during this period, the first reference period being 1987 levels'.

106 In a reply to a request by the Commission of 23 December 1991, sent on 14 February 1992 (appendix 43 to the statement of objections), Stora also states: 'The understandings on market share levels reached by the PWG members related to Europe as a whole. The understandings were based on the previous total year figures, usually definitively available by the following March' (point 1.1).

107 That assertion is confirmed in the same document as follows: '... the discussions led to understandings usually in March of each year between members of the PWG to maintain their market shares at the previous year's level' (point 1.4). Stora reveals that 'no measures were taken to ensure respect for the understandings' and that the participants in the meetings of the PWG 'were aware that if they took exceptional positions in certain markets supplied by others, those others could retaliate in other markets' (*ibidem*).

108 Lastly, it states that Mayr-Melnhof took part in the discussions concerning market shares (point 1.2).

109 Stora's assertions concerning collusion on market shares are supported by appendix 73 to the statement of objections. That document, found at FS-Karton, is a confidential note dated 28 December 1988 sent by the marketing director of the Mayr-Melnhof/FS-Karton Group in Germany (Mr Katzner) to the General Manager of Mayr-Melnhof in Austria (Mr Gröller) concerning the market situation.

110 According to that document, cited in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided on in 1987 had produced 'winners' and 'losers'. The author of the note considers the applicant to be amongst the losers for various reasons, including the following:

'(2) An agreement could only be reached by our being "punished" — we were asked to make "sacrifices".

(3) Market shares had to be "frozen" at 1987 levels, existing contacts maintained and no new activities or grades obtained via pricing (the result will be apparent in January 1989 — if all are honest)'.

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

112 In that regard, the author of the note refers by way of introduction to the closer cooperation within the 'Presidents' grouping'. That expression was interpreted by the applicant as a general reference to both the PWG and the PC, that is to say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a).

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

114 It is necessary, therefore, to understand the phrase relating to the market shares which were to be frozen at 1987 levels against the background of that discipline decided upon by the 'Presidents' grouping'.

115 Moreover, the reference to 1987 as reference year is consistent with Stora's second statement (appendix 39 to the statement of objections; see paragraph 105 above).

116 As to the role played by the PWG in the collusion on the control of supply, which was a feature of the consideration of machine downtime, the Decision states that the PWG played a decisive role in implementing downtime when, from 1990, production capacity increased and demand fell: 'From the beginning of 1990 ... the industry leaders ... considered it necessary to concert on the need for taking downtime in the forum of the PWG. The major producers recognised that they could not increase demand by lowering prices and that maintaining full production would simply bring prices down. In theory, the amount of downtime required to bring supply and demand back into balance could be calculated from the capacity reports' (point 70 of the Decision).

117 It is also observed: 'However, the PWG did not formally allocate the "downtime" to be taken by each producer. According to Stora, there were practical difficulties in reaching a coordinated plan on downtime to cover all the producers. Stora says that for these reasons only "a loose system of encouragement existed"' (point 71 of the Decision).

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

119 The documents it produces support its analysis.

120 In its second statement (appendix 39 to the statement of objections, point 24), Stora gives the following explanation: 'With adoption by the PWG of the policy of price before tonnage and the gradual implementation of an equivalent price system from 1988, members of the PWG recognised that downtime would have to be taken to maintain those prices in the face of a reduced growth in demand. Without taking downtime the producers would have been unable to maintain agreed price levels in the face of an increasing excess of capacity'.

121 In point 25 of its statement, Stora adds: 'In 1988 and 1989 the industry was able to run at near full capacity. Downtime in addition to normal closure for repairs and holidays became necessary from 1990. ... Ultimately downtime had to be taken when the order flow ceased in order to maintain the price before tonnage policy. The amount of downtime required to be taken by producers (to maintain the balance between production and consumption) could be calculated from the capacity reports. No formal allocation of downtime was made by the PWG, although a loose system of encouragement existed...' .

122 As to appendix 73 to the statement of objections, the reasons adduced by the author of the note in order to explain why he considered the applicant to be a 'loser' at the time when the note was written are significant evidence of the existence of collusion on downtime between the participants in the meetings of the PWG.

123 The author states:

'(4) It is at this point that there begins to be a difference in opinion between the parties involved as to what is desired.

...

(c) All sales representatives and European agents were released from their quantity budgets and a pricing policy followed which admitted of practically no exceptions (our employees often did not understand our changed attitude to the market — in the past they were just required to go for tonnage and now the sole objective is price discipline with the danger of having to stop machines).'

124 The applicant states in appendix 75 to the statement of objections and in his written pleadings to the Court (paragraph 80 above) that the note, and therefore the passage reproduced above, refers to its own internal situation. However, when considered in the light of the more general background to the note, that passage reflects the implementation, at the level of sales personnel, of a rigorous policy adopted within the 'Presidents' grouping'. The document must therefore be construed as meaning that the participants in the 1987 agreement, that is to say, the participants in the meetings of the PWG at least, undoubtedly weighed up the consequences the agreed policy would have if it were to be applied rigorously.

125 The fact that discussions relating to consideration of downtime took place between the manufacturers when they prepared price increases is corroborated, in particular, by a Rena note dated 6 September 1990 (appendix 118 to the statement of objections), which refers to the amounts of price increases in several countries, the dates for the future announcements of those increases and the state of the order backlogs expressed in working days for several manufacturers.

126 The author of the document notes that certain manufacturers were providing for downtime, which he illustrates as follows:

'Kopparfors 5-15 days
5/9 will stop for five days'.

127 The applicant, which participated in the JMC meeting to which the note relates (table 4 annexed to the Decision), is referred to several times in the note. In particular, the note indicates the date on which the applicant was to send letters announcing the price increases. It is also stated as follows:

'Deisswi 15 days (GC)
2.5 week for GD
plan to stop within 2 weeks step (?)'

128 On the basis of the foregoing, the Commission has proved to the requisite legal standard that there was collusion on market shares between the participants in the meetings of the PWG and that there was collusion on downtime between those same undertakings. Since it is not disputed that the applicant took part in the meetings of the PWG and that that undertaking is expressly referred to in the main inculpatory evidence (Stora's statements and appendix 73 to the statement of objections), the Commission was fully entitled to hold the applicant liable for its participation in those two types of collusion.

129 The applicant's criticism of Stora's statements, by which it disputes their probative value, does not weaken that finding.

130 It is not disputed that Stora's statements are made by one of the undertakings regarded as having participated in the alleged infringement and that they contain a detailed description of the nature of the discussions held in the bodies of the PG Paperboard, of the objective pursued by the undertakings which met within it, and of the participation of those undertakings in the meetings of its various bodies. Since this central evidence is corroborated by other documents, it constitutes a sound basis for the Commission's assertions.

131 Since the Commission has proved the existence of the two types of collusion in question, it is unnecessary to consider the applicant's criticism of appendix 113 to the statement of objections.

2. The applicant's actual conduct

132 Nor does the Court accept the argument that applicant's actual conduct is irreconcilable with the Commission's assertions that the two types of collusion in question actually took place.

133 First, the existence of collusion between the members of the PWG on the two aspects of the 'price before tonnage policy' should not be confused with their implementation. The probative value of the proof adduced by the Commission is such that information as to the applicant's actual conduct on the market cannot affect the Commission's conclusions concerning the fact of the existence of collusion on the two aspects of the policy at issue. At the very most, the applicant's

contentions might tend to show that its conduct did not follow that agreed by the undertakings which met in the PWG.

134 Second, the Commission's conclusions are not contradicted by the information supplied by the applicant. It must be emphasised that the Commission expressly accepts that the collusion on market shares involved 'no formal machinery of penalties or compensation to reinforce the understanding on market shares' and that the market shares of some large producers did creep up from year to year (see, in particular, points 59 and 60 of the Decision). Moreover, the Commission acknowledges that since the industry had operated at full capacity until the beginning of 1990, practically no downtime was required until that date (point 70 of the Decision).

135 Third, it is settled law that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings (see, for example, the judgment in Case T-141/89 *Tréfileurope Sales* v *Commission* [1995] ECR II-791, paragraph 85). Even assuming that the applicant's conduct on the market was not in conformity with the conduct agreed, and in particular that, as it contends, it made full use of its production capacity during 1990, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.

3. The characterisation in law of the concerted action to freeze market shares and control supply

136 The question of the characterisation in law of the concerted action to freeze market shares and to control supply will be considered in the context of the plea alleging that there was no common industry plan to restrict competition (paragraph 137 et seq. below).

The plea that there was no common industry plan to restrict competition

Arguments of the parties

137 The applicant submits that the Commission has not produced evidence to show that there was an agreement on a common industry plan to restrict competition. The applicant relies mainly on the arguments which it submitted in the context of its two previous pleas.

138 Moreover, it states that the complaint that such a plan existed does not reveal the the Commission's grounds for concluding that there was an infringement of Article 85(1) of the Treaty. There was no binding agreement requiring the participants to follow a common industry plan to restrict competition (see, on the concept of an 'agreement' paragraph 54 et seq. above).

139 The Commission deals with this plea in the context of its arguments relating to the plea that there was no agreement on prices (see paragraph 58 et seq. above).

Findings of the Court

140 The Court has already found that the undertakings which met in the PWG participated in collusion on market shares, downtime and prices.

141 Article 1 of the Decision provides that the undertakings referred to therein infringed Article 85(1) of the Treaty by participating, during the relevant period, in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the European Community, *inter alia*, 'met regularly in a series of secret and institutionalised meetings to discuss and agree a common industry plan to restrict competition'.

142 According to the Decision, '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 has presented all the characteristics of a full "agreement" in the sense of Article 85' (point 131, first paragraph).

143 The Commission correctly characterised the increased cooperation between the participants in the PWG meetings from the end of 1987 as an agreement within the meaning of Article 85 of the Treaty. Those undertakings expressed their joint intention to conduct themselves on the market in a specific way (see, *inter alia*, the judgments cited in paragraph 65 above). On the basis of the foregoing, the Court finds that those undertakings expressed their joint intention to implement simultaneous, uniform price increases, to control supply by considering downtime, and to maintain their market shares at constant levels, subject to modification from time to time.

144 As to the period from mid-1986 until the end of 1987, the Commission states in the Decision (point 132): 'If collusion between the producers probably did not crystallize into the full "price before tonnage" agreement until about the end of 1987, this does not however mean that their behaviour in the preceding 18 months falls outside the scope of Article 85.' Since the collusion on downtime and market shares must be considered to have commenced at the end of 1987, that assertion by the Commission can only refer to collusion on prices.

145 As the applicant does not dispute that it participated in a concerted practice in regard to prices (paragraph 55 above), the correctness of that characterisation does not have to be considered.

146 Since none of the applicant's arguments has been upheld, the plea must be rejected.

The plea that the Fides information exchange system is lawful

Arguments of the parties

147 The applicant contends that the Commission wrongly considered that the Fides information exchange system was an indispensable element in the implementation of the alleged agreements on quotas and quantities. The information sent to Fides in the context of the information exchange system were aggregated at the level of each country and did not therefore allow any agreement or concerted behaviour to be monitored.

148 The information processed by Fides concerning order backlogs could have given producers only a general view of the overall market situation. The exchange of the aggregated data, which related solely to orders already placed, could not have impaired competition. It was rather a basis for individual measures by producers (downtime, sales on markets of non-member countries, etc.).

149 The capacity reports distributed by Fides contained for the main part merely data with which the market was already familiar and which was reproduced in publications available and accessible to all.

150 The Commission argues that the information exchanged was used to plan concerted conduct relating to prices and quantities for the whole of the sector (point 134 of the Decision).

151 Furthermore, the information on capacity, when combined with information on order backlogs, enabled the cartonboard producers to establish the sector's utilisation rate. The information on order backlogs was not available to customers and there was therefore no general market transparency. Moreover, when assessing the significance of the capacity reports, it is necessary to take all the information exchanged into account.

152 An information exchange implemented for the purpose of collusion is caught by Article 85 of the Treaty. Whether the statistics on orders contained information which was capable of being put into the form of individual information is therefore irrelevant.

Findings of the Court

153 According to Article 1 of the Decision, the undertakings referred to in that article infringed Article 85(1) of the Treaty by participating in an agreement and concerted practice whereby the undertakings, *inter alia*, 'exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures', that is to say, collusion on prices, market shares and downtime.

154 In view of its operative part and the third paragraph of point 134, the Decision must be interpreted as meaning that the Commission considered the Fides infor-

mation exchange system to be contrary to Article 85(1) of the Treaty because it supported the cartel.

155 The third paragraph of point 134 of the Decision explains that the Fides information exchange system 'was an essential aid to:

— monitoring market share development,

— monitoring conditions of supply and demand so as to maintain full capacity utilisation,

— deciding whether concerted price increases could be introduced,

— determining the necessary downtime'.

156 Moreover, it is apparent from the Decision that the Fides statistics were analysed and discussed in the PWG. The first paragraph of point 57, which also refers to point 63 of the Decision, states: '"Market share development" was analysed at each meeting of the PWG on the basis of provisional statistics'. In addition, the first paragraph of point 69 states: 'A comparison could be made of the weekly order backlog and the available capacity, in the light of which the PWG reached an assessment of the overall state of demand in the cartonboard industry'.

157 The Court finds that those allegations by the Commission are proved.

158 First, the applicant does not dispute that the Fides statistics were discussed in the PWG.

159 Second, the Commission rightly considered that the Fides statistics were used in that body to '[monitor] market share development' (point 134, third paragraph, first indent) and to '[monitor] conditions of supply and demand so as to maintain full capacity utilisation' and to '[determine] the necessary downtime' (point 134, third paragraph, second and fourth indents).

160 As regards the use of the Fides statistics in order to 'monitor market share development', Stora acknowledged that 'if it appeared from analysis of the statistics that the level of sales by national groupings was moving too much, members of the PWG ... would encourage each other and take it upon themselves to limit fluctuations in national markets' (appendix 39 to the statement of objections, point 19).

161 Likewise, according to appendix 43 to the statement of objections (point 1.1):

'Fluctuations in supply to national markets were examined and discussed at each PWG (ie every two to three months) on the basis of the Fides quick statistics ... These were produced on a monthly basis with a total per calendar year and not on a running year total basis. Fluctuations that appeared in the statistics would not necessarily accurately reflect the final end year position and could not be relied on

with any great certainty. It did not make sense for the major producers represented in the PWG to discuss market shares on a national basis in detail since producers were not able to determine the end destination of their deliveries.

...

The understandings on market share levels reached by the PWG members related to Europe as a whole. The understandings were based on the previous total year figures, usually definitively available by the following March.'

162 As regards the use of the Fides statistics for the purpose of 'monitoring conditions of supply and demand so as to maintain full capacity utilisation', reference should be made to Stora's statement (appendix 39 to the statement of objections, point 5):

'Linked with the pricing initiative from 1987, was the need to maintain a near balance between production and consumption (price before tonnage policy). In 1988 and 1989, producers were operating at full or near full capacity. In 1990, as a result of a combination of increased capacity and a reduced growth in demand, downtime began to be taken by producers in order to maintain the balance between production and consumption. ... The producers could work out from the annual capacity reports the amount of downtime necessary and encouraged each other to take downtime sufficient to maintain the balance between production and demand ... [N]ot all manufacturers took downtime in this way with the result that some, usually the larger, producers suffered proportionately greater tonnage losses in an effort to maintain price levels' (to the same effect, *ibidem*, point 25).

163 Stora's statements are indirectly confirmed by appendices 73 and 75 to the statement of objections. It is apparent from appendix 73 (see point 109 et seq. above) that the marketing director for the Mayr-Melnhof/FS-Karton group in Germany (Mr Katzner) suggested to the applicant's general manager in Austria that the Fides information exchange system then in operation should be amended (page 5, subparagraph 5, under the heading 'Kontrolle'). According to appendix 75 (page 11) of the applicant's reply to a request for information: 'The Fides rules were subsequently amended, broadly along the lines of the proposals' set out in appendix 73 (see also point 63, second paragraph, of the Decision). In view of the general tenor of appendix 73, Mr Katzner's request for an amendment to the Fides information exchange system must be understood in the sense that this system did not allow adequate control of changes in market shares and/or examination of downtime and that accordingly it should be improved in order to ensure better control.

164 In the light of that evidence, and having regard to the fact that the Commission rightly considered that the applicant participated in collusion on downtime and on market shares in the PWG, this plea must be rejected.

The application for annulment of Article 2 of the Decision

Arguments of the parties

165 As regards the prohibition on the future exchange of information, the applicant contends principally that the wording of Article 2 of the Decision is so vague and general that an assessment cannot be made of the type of information which may lawfully be exchanged in the future. It seems that almost any information exchange system might be regarded as falling within the scope of that prohibition.

166 Furthermore, Article 2 of the Decision is nugatory, since it relates to measures which were abandoned when the information exchange system was reorganised and the CEPI-Cartonboard association created (see point 106 of the Decision).

167 In the alternative, the applicant contends that Article 2 must be annulled to the extent that it prohibits the exchange of any data (even if aggregated) concerning the present state of the order inflow and backlog, that is to say, of purely statistic data [see the Commission notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings (OJ 1968 C 75, as corrected in OJ C 84, p. 14) and the *Seventh Report on Competition Policy* paragraph 7].

168 The exchange of such information does not conflict with the principle that each economic operator must determine independently the policy which he intends to adopt on the market (Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 240). The exchange of purely historical data that are not capable of being individualised is contrary to the Treaty only where it is accompanied by more extensive cooperation between the undertakings.

169 Lastly, the applicant contends that Article 2 of the Decision prejudges the result of CEPI-Cartonboard's notification to the Commission of an information exchange system. When a notification is made, the Commission is required to ascertain whether the conditions for an exemption are satisfied. However, the exchange of historical data on the state of the order inflow and backlog is the very subject-matter of the information exchange system notified by CEPI-Cartonboard.

170 The Commission does not accept that the prohibition on the future exchange of information is too vague. It suffices that the operative part and the grounds of the decision indicate the anticompetitive conduct which is to be brought to an end (judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73

and 114/73, *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 122 to 124). In the present case, Article 2(a) to (c) of the Decision themselves contain a detailed description of the nature of the information which may be exchanged. Furthermore, the findings of fact concerning the information exchanged were set out in detail in points 61 to 68, 105 and 106 of the Decision. In addition, the Decision contains a precise description of the restrictive effects which the information exchange had on the conditions of competition (points 134 and 166). The scope of the prohibition is therefore clear from Article 2 of the Decision, when read in conjunction with the statement of reasons for it.

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

172 Nor does the Commission accept that the prohibition is too wide. The information exchange system was incompatible with Article 85 of the Treaty, even after the PWG had modified it on 27 November 1991 (points 105 and 106 of the Decision). When the information exchange is assessed, it is necessary to take into account the high degree of concentration in the sector and the detailed knowledge of the structure and policy of the various undertakings as a result of their former cooperation in the PG Paperboard. On concentrated markets residual competition consists principally in the uncertainty and secrecy existing between the main suppliers with regard to market conditions. The exchange of information on order backlogs at frequent intervals gives the market such artificial transparency that the existing residual competition ultimately ceases to have any effect.

173 Furthermore, as a result of the weekly exchange of statistics on order entries, combined with capacity reports, capacity utilisation in the sector could be ascertained and downtime planned throughout the sector. The producers could thereby maintain a balance between supply and demand and counteract any fall in prices in the event of a fall in demand. The existence of those effects does not depend upon

whether the data is in the form of individual data or relates to orders which have already been placed. The Commission therefore correctly concluded that an exchange of information on the state of order entry and order backlog, even if aggregated, is contrary to Article 85(1) of the Treaty; that conclusion is in line with the information obtained in the course of its investigation of the case.

174 Lastly, the information exchange system notified by CEPI-Cartonboard is separate from the information exchange with which the Decision is concerned, because CEPI-Cartonboard has made certain amendments to its system in order to take account of the Commission's objections. It did not therefore need to consider a possible exemption in the context of the present procedure.

Findings of the Court

175 It will be recalled that Article 2 of the Decision provides as follows:

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

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

(b) by which, even if no individual information is disclosed, a common industry response to economic conditions as regards price or the control of production is promoted, facilitated or encouraged;

or

(c) by which they might be able to monitor adherence to or compliance with any express or tacit agreement regarding prices or market sharing in the Community.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude not only any information from which the behaviour of individual producers can be identified but also any data concerning the present state of the order inflow and backlog, the forecast utilisation rate of production capacity (in both cases, even if aggregated) or the production capacity of each machine.

Any such exchange system shall be limited to the collection and dissemination in aggregated form of production and sales statistics which cannot be used to promote or facilitate common industry behaviour.

The undertakings are also required to abstain from any exchange of information of competitive significance in addition to such permitted exchange and from any meetings or other contact in order to discuss the significance of the information exchanged or the possible or likely reaction of the industry or of individual producers to that information.

A period of three months from the date of the communication of this Decision shall be allowed for the necessary modifications to be made to any system of information exchange.'

176 As is apparent from point 165 of the Decision, Article 2 was adopted in accordance with Article 3(1) of Regulation No 17. By virtue of that provision, where the Commission finds that there is an infringement, *inter alia*, of Article 85 of the Treaty, it may require the undertakings concerned to bring the infringement to an end.

177 It is settled law that Article 3(1) of Regulation No 17 may be applied so as to include an order directed at bringing an end to certain acts, practices or situations which have been found to be unlawful (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45, Case C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 90), and also at prohibiting the adoption of similar conduct in the future (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 220).

178 Moreover, since Article 3(1) of Regulation No 17 is to be applied according to the nature of the infringement found, the Commission has the power to specify the extent of the obligations on the undertakings concerned in order to bring an infringement to an end. Such obligations on the part of the undertakings may not, however, exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the rules infringed (judgment in *RTE and ITP* v *Commission*, cited above, paragraph 93; to the same effect, see Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 209, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 163).

179 As regards, first, the applicant's argument that the Commission committed an error of law in adopting Article 2 of the Decision without having first expressed its

view on the compatibility with Article 85 of the information exchange system notified by CEPI-Cartonboard, the Court observes that the notification made by that association on 6 December 1993 related to a new information exchange system, separate from that considered by the Commission in the Decision. When adopting Article 2 of the contested decision, the Commission could not therefore assess the legality of the new system in the context of that decision. When it adopted Article 2, it was therefore entitled simply to examine and express a view on the old information exchange system.

180 Furthermore, the Court rejects the applicant's argument that the Commission cannot exercise its power to give directions to the applicant under Article 3(1) of Regulation No 17 where those directions relate to aspects of an information exchange system which were abandoned before the decision was adopted. In that regard, it suffices to point out that the applicant disputes the substantive scope of the directions in Article 2 of the Decision, which demonstrates the Commission's legitimate interest in specifying the extent of the obligations on the undertakings, including the applicant (see, Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraphs 26 to 28).

181 Next, in order to verify whether, as the applicant claims, the scope of the direction in Article 2 of the Decision is too wide, it is necessary to consider the extent of the various prohibitions it places on the undertakings.

182 The prohibition in the second sentence of the first paragraph of Article 2, requiring the undertakings to refrain in future from any agreement or concerted practice which may have an effect which is the same as, or similar to, those of the infringements found in Article 1 of the Decision, is aimed solely at preventing the undertakings from repeating the behaviour found to be unlawful. Consequently, in adopting such directions, the Commission has not exceeded the powers conferred on it by Article 3 of Regulation No 17.

183 The provisions of subparagraphs (a), (b) and (c) of the first paragraph of Article 2 are directed more specifically at prohibiting future exchange of commercial information.

184 The direction in subparagraph (a) of the first paragraph of Article 2, which prohibits any future exchange of commercial information by which the participants directly or indirectly obtain individual information on competitors, presupposes a finding by the Commission in the Decision that an information exchange of such a nature is unlawful under Article 85(1) of the Treaty.

185 It should be noted that Article 1 of the Decision does not state that the exchange of individual commercial information in itself constitutes an infringement of Article 85(1) of the Treaty.

186 It states more generally that the undertakings infringed that article of the Treaty by participating in an agreement and concerted practice whereby the undertakings, *inter alia*, 'exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures'.

187 However, since the operative part of a decision must be interpreted in the light of the statement of reasons for it (*Suiker Unie and Others* v *Commission*, cited above, paragraph 122), it should be noted that the second paragraph of point 134 of the Decision states:

'The exchanging by producers of normally confidential and sensitive individual commercial information in meetings of the PG Paperboard (mainly the JMC) on order backlog, machine closures and production rates was patently anti-

competitive, being intended to ensure that the conditions for implementing agreed price initiatives were as propitious as possible. ...'

188 Consequently, as the Commission duly found in the Decision that the exchange of individual commercial information in itself constituted an infringement of Article 85(1) of the Treaty, the future prohibition of such an exchange of information satisfies the conditions for the application of Article 3(1) of Regulation No 17.

189 The prohibitions relating to the exchanges of commercial information referred to in subparagraphs (b) and (c) of the first paragraph of Article 2 of the Decision must be considered in the light of the second, third and fourth paragraphs of that article, which support what is expressed in those subparagraphs. It is in this context that it is necessary to determine whether, and if so to what extent, the Commission considered the exchanges in question to be illegal, since the extent of the obligations on the undertakings must be restricted to that which is necessary in order to bring their conduct into line with what is lawful under Article 85(1) of the Treaty.

190 The Decision must be interpreted as meaning that the Commission considered the Fides system to be contrary to Article 85(1) of the Treaty in that it underpinned the cartel (point 134, third paragraph, of the Decision). Such an interpretation is borne out by the wording of Article 1 of the Decision, from which it is apparent that the commercial information was exchanged between the undertakings 'in support of the ... measures' considered to be contrary to Article 85(1) of the Treaty.

191 The scope of the future prohibitions set out in subparagraphs (b) and (c) of the first paragraph of Article 2 of the Decision must be assessed in the light of that interpretation by the Commission of the compatibility, in the present case, of the Fides system with Article 85 of the Treaty.

192 In that regard, first, the prohibitions in question are not restricted to exchanges of individual commercial information, but relate also to certain aggregated statistical data (Article 2, first paragraph, (b), and second paragraph, of the Decision). Second, subparagraphs (b) and (c) of the first paragraph of Article 2 prohibit the exchange of certain statistical information in order to prevent the establishment of a possible support for future anti-competitive conduct.

193 Such a prohibition exceeds what is necessary in order to bring the conduct in question into line with what is lawful because it seeks to prevent the exchange of purely statistical information which is not in, or capable of being put into, the form of individual information on the ground that the information exchanged might be used for anti-competitive purposes. First, it is not apparent from the Decision that the Commission considered the exchange of statistical data to be in itself an infringement of Article 85(1) of the Treaty. Second, the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article 85(1) of the Treaty, since in such circumstances it is necessary to establish its actual anti-competitive effect.

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

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

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

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

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

A — *The plea that manifest errors of fact or of law were made when the amount of the fine was fixed*

195 This plea is in five parts. Each part will be considered separately.

First part: errors by the Commission when it determined the scope of the infringements

196 Referring to its pleas in support of its application for annulment of Article 1 of the Decision, the applicant submits that the general level of fines should be considerably reduced. The Commission has not proved the existence of agreements or concerted practices to divide the market or to control supply, or the existence of agreements on prices.

197 The Court points out that all the pleas on which the applicant relied in support of its application for annulment of Article 1 of the Decision have been rejected.

198 The first part of this plea cannot therefore be upheld.

Second part: no detailed regulation of the Community cartonboard market

Arguments of the parties

199 The applicant contends that, even if the alleged infringements were committed, there was no regulation 'in ... detail [of] the market for cartonboard in the Community' (point 168, fifth indent, of the Decision). On the contrary, the alleged infringements could have had only a very general effect on competition.

200 The Decision contains contradictory statements as to the nature of the anti-competitive measures allegedly implemented. For example, the alleged collusion on market sharing is described in point 52 of the Decision as a general agreement not to increase market shares, whereas in point 50 references made to annual negotiations concerning market shares. In any event, there was no detailed regulation of the cartonboard market; the Commission has not even claimed that there was collusion which aimed to establish quotas for each cartonboard grade.

201 The Commission maintains, on the basis of its findings in the Decision, that the producers regulated the cartonboard market in detail.

Findings of the Court

202 The Court has already held that the Commission has proved, with respect to the applicant, that the constituent elements of the infringement found in Article 1 of

the Decision existed, that is to say, collusion on prices, downtime and market shares. It has also held that the participants in the PWG meetings, including the applicant, concluded an agreement at the end of 1987. Furthermore, the applicant does not dispute that the PWG orchestrated the dates of and order in which letters announcing price increases were despatched, that the JMC was informed of this (see in particular point 73 of the Decision), and that the object of the JMC was to prescribe the methods of implementing the price initiatives decided by the PWG, country-by-country and for the major customers (point 44, second paragraph, second indent, of the Decision).

203 Lastly, the applicant does not dispute the Commission's finding that 'the cartel covered virtually the whole territory of the Community' nor that 'the undertakings participating in the infringement account for virtually the whole of the market' (point 168, second and third indents, of the Decision).

204 In those circumstances, no valid objection can be made to the Commission's assertion that the undertakings participating in the infringement had regulated 'in explicit detail the market for cartonboard in the Community' (point 168, fifth indent of the Decision).

205 The second part of the plea cannot therefore be upheld.

Third part: secrecy and disguise should not be regarded as aggravating factors

Arguments of the parties

206 The applicant states that the Commission took the view that the fact that elaborate steps were taken to conceal the nature and extent of the collusion constituted an aggravating factor (points 167 and 168 of the Decision).

207 The absence of any official minutes or documentation concerning the meetings of the PWG and of the JMC cannot be regarded as an elaborate step. The Commission has not proved that measures were adopted in order to prevent the taking of notes by participants in the meetings. Even if those measures were proved, they would not amount to elaborate steps. In any event, since the Commission also — wrongly — held that the infringements were deliberate, it cannot also take into account the alleged steps to conceal the cartel.

208 As regards the alleged prior orchestration of the dates on which price increases were to enter into force, the applicant submits that the collusion on prices necessarily involved concerted steps to implement the price increases, at least by the ringleaders. Since the Commission has taken the view that the infringements were deliberate, it should not have also taken into account aspects which are part and parcel of a deliberate infringement.

209 The Commission contends that it rightly took the view that the secrecy involved should be taken into account in order to assess the gravity of the infringement. Deliberate infringements of the competition rules are not always accompanied by steps to disguise them. In the present case, the participants in the cartel did not merely agree to refrain from taking notes of their discussions (minutes of the hearing before the Commission, page 46), but they also planned the sequence of the various price initiatives in great detail (point 73 of the Decision). The Commission therefore correctly considered that the secrecy was an aggravating feature of the infringement which should be taken into account when the fines were calculated.

Findings of the Court

210 According to the third paragraph of point 167 of the Decision, 'a particularly grave aspect of the infringement is that in an attempt to disguise the existence of the cartel the undertakings went so far as to orchestrate in advance the date and

sequence of the announcement of each major producer of the new price increases'. The Decision also states as follows: 'the producers could as a result of this elaborate scheme of deception have attributed the series of uniform, regular and industry-wide price increases in the cartonboard sector to the phenomenon of "oligopoly behaviour"' (point 73, third paragraph). Finally, according to the sixth indent of point 168, the Commission, in determining the general level of fines, took into account the fact that '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.)'.

211 The applicant does not contest the Commission's assertion that the undertakings planned the dates and order of dispatch of letters announcing the price increases. Furthermore, as regards the Commission's conclusion that the purpose of fixing the dates and order of those letters was to disguise the existence of price collusion, the applicant has not explained what purpose, other than that found by the Commission, could have been served by the collusion on the dates and order of letters announcing price increases.

212 The lack of official minutes and the almost total absence of internal notes relating to the meetings of the PWG and of the JMC constitute, having regard to the number of such meetings, to the length of time for which they continued and to the nature of the discussions in question, sufficient proof of the Commission's allegation that the participants were discouraged from taking notes.

213 It follows from the foregoing that the undertakings which participated in the meetings of those bodies were not only aware of the unlawfulness of their conduct but also took steps to conceal the collusion. Accordingly, the Commission was fully

entitled to hold those steps to be aggravating circumstances when it assessed the gravity of the infringement.

214 The third part of the plea must therefore be rejected.

Fourth part: the Commission wrongly found that the cartel had been 'largely successful in achieving its objectives'

Arguments of the parties

215 The applicant disputes that the cartel was 'largely successful in achieving its objectives' (point 168, seventh indent, of the Decision). Referring to its description of the particularities of the cartonboard (paragraph 48 et seq. above) and to the LE report, it submits that there are no grounds for the view that price changes would have differed in any way if the producers had not colluded.

216 It contends that the Commission's findings relating to changes in the costs of, and revenue from, cartonboard sales in the industry do not apply to it. Furthermore, the statement in the Decision regarding the operating margin is misleading (point 16 of the Decision). Depreciation in capital makes up to approximately 27% of the average cartonboard price. The Commission failed to take that factor into account when calculating the producers' average operating margin. Consequently, when it states that this average margin was about 20% in the period 1986 to 1991, that means that there was in fact a loss of about 7%.

217 In support of its assertion that collusion on prices did not have any impact on the market, the applicant refers to tables showing changes in its list prices in comparison with changes in gross prices actually achieved on the market. Those tables, which show changes in prices for representative customers and cartonboard grades on its principal national markets, show the considerable gap which existed between list prices and transaction prices.

218 The Commission states that it is necessary to distinguish between two types of effect which the price initiatives had on the market. The applicant does not dispute the existence of the first type of effect, namely that the prices agreed in the PG Paperboard served as a basis for negotiations with customers. It is therefore inconceivable that the second type of effect, the impact of the price increase initiatives on actual market prices, did not also occur, because the basis fixed by the seller for price negotiation always has an effect on the transaction price. That is all the more so where all sellers adopt the same basis for their negotiations.

219 Furthermore, in their negotiations with customers the cartonboard producers endeavoured to impose the agreed price increases (see appendix 73 to the statement of objections, page 2).

220 Admittedly, it was not always possible to impose the price increases to the same extent on all customers and on all markets (points 100 to 102 of the Decision). However, as it clear from a number of internal documents prepared by the producers themselves (documents C-4-1 and C-11-11), such difficulties in implementing the price increases did not mean that they were unsuccessful.

221 The tables on which the applicant relies cannot undermine the Commission's findings. No probative value can be accorded to those tables, in particular because they show 'erratic' price increases. Moreover, although the applicant asserts that the tables show changes in invoiced prices in regard to representative customers and grades, the criteria used to select those invoices are not, however, stated.

222 The LE report does not prove that there was no connection between announced prices and transaction prices. On the other hand, tables 10 and 11 of that report clearly show that, on average, changes in transaction prices followed the announced prices. For the period 1988/89, the report even shows a linear relationship between those prices, which was, moreover, acknowledged by the author of the report at the oral hearing before the Commission (minutes, pp. 21 and 28). Consequently, the increases in uniform list prices allowed the cartonboard producers to achieve a clear increase in transaction prices.

223 Lastly, it is irrelevant whether the uniform increases in list prices were in fact made by reference to increases in costs, as the applicant asserts. Moreover, the information in the Decision as to increases in costs and the operating margin were taken from the LE report.

Findings of the Court

224 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.

225 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. Consideration of the effects of the collusion on prices, the only effects disputed by the applicant, makes it possible to assess, in general, whether the cartel was successful, because the purpose of the collusion on down-time and on market shares was to ensure the success of the concerted price initiatives.

226 As regards collusion on prices, the Commission appraised the general effects of this collusion. Consequently, even assuming that the individual data supplied by the applicant show, as it claims, that the effects of collusion on prices were, in its case, less significant than those found on the European cartonboard market taken as a whole, such individual data cannot in themselves suffice to call into question the Commission's assessment. Furthermore, the applicant's assertion that, in point 16 of the Decision, the Commission based its argument on an erroneous definition of the cartonboard producers' average operating margin is also irrelevant. There are no grounds for considering that the Commission took that definition of the operating margin into account when it assessed the effects on the market of the collusion on prices, nor that the operating margin earned should have been taken into account for the purpose of that assessment.

227 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.

228 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).

229 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, an economic study produced on behalf of several addressee undertakings of the Decision for the purposes of the procedure before the Commission, 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).

230 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.

231 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, including the applicant itself.

232 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).

233 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.

234 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.

235 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.

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

237 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.

238 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of the exercise of its unlimited powers in regard to fines, when it assesses the seriousness of the infringement found in the present case (see paragraph 262 below).

Fifth part: an erroneous operating margin was taken into account

Arguments of the parties

239 The applicant repeats that the Commission incorrectly took the view that the undertakings in the cartonboard sector achieved an operating margin of 20% over the period 1986 to 1991. In adopting that figure, the Commission failed to take account of the considerable capital investment in the sector (see point 216 above). Although it is not expressly stated in the Decision that this element was taken into account when the general level of fines was set, it must be assumed that the Commission's error had a significant influence, because the Decision refers to the operating margin several times. Moreover, the financial benefit which companies have derived from their infringements is, according to the Commission itself, an increasingly important consideration when the fine is assessed (*XXIst Report on Competition Policy*, point 139). That error should lead to a considerable reduction in the fine.

240 The Commission submits that the cartonboard producers' average operating margin was not taken into consideration when the fine was calculated. Furthermore, in its *XXIst Report on Competition Policy* it only referred to the general criteria which may be taken into account when it calculates a fine. Lastly, the information on the operating margin in point 16 of the Decision is correct, because it was taken from the LE report.

Findings of the Court

241 The average operating margin achieved by the cartonboard producers does not figure amongst the factors taken into account by the Commission in order to determine the general level of fines and the amount of the individual fines (points 167 to 169 of the Decision).

242 In any event, it is apparent from the last paragraph of point 16 of the Decision that the information relating to the average operating margin of the cartonboard producers was taken from the LE report. It is also apparent (from footnote 1) that the Commission was aware that the average operating margin had been calculated without taking depreciation of capital into account.

243 The Court cannot therefore uphold the applicant's argument that the Commission took into account an erroneous finding regarding the profit made by the cartonboard producers.

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

245 Consequently, the whole of the plea must be rejected.

B — *The pleas alleging infringement of Article 190 of the Treaty and infringement of the principle of equal treatment in regard to the general level of the fines*

Arguments of the parties

246 The applicant accepts that in a decision the Commission is entitled to raise the general level of fines above that adopted in its previous practice, where it considers that it is necessary in order to reinforce their deterrent effect (judgment in Joined Cases 100/80, 101/80, 192/80 and 103/80 *Musique Diffusion Françcaise and Others* v *Commission* [1983] ECR 1825, paragraph 108, and *ICI* v *Commission*, cited above). However, the Commission infringed Article 190 of the Treaty and the

principle of equal treatment when it arbitrarily increased the level of fines in this case without indicating why it had done so.

247 The applicant then compares the basic rates of the fines (7.5% of turnover on the Community cartonboard market in 1990 for 'ordinary members' and 9% for alleged 'ringleaders') with the total fines imposed in the Commission's previous decisions (see, for example, Commission Decision 86/398 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 Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.866 — LDPE, OJ 1989 L 74, p. 21)). It concludes from this that the basic rate of the fines applied in this case is considerably higher than the rates applied in previous cases and that it has almost doubled for the alleged 'ringleaders'. Moreover, the total amount of the fines is far higher than that of previous fines.

248 Referring to the Decision which was the subject-matter of the judgment of the Court of First Instance in Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, it also disputes that the conduct impugned in the present case can be regarded as particularly serious when compared with previous cases in which the Commission has adopted decisions.

249 The error in assessing the gravity of the infringement is also confirmed by a comparison with the level of fines adopted in Commission Decision 94/815/EEC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — *Cement*, OJ 1994 L 343, p. 1).

250 The applicant concludes that the level of fines imposed in this case marks a considerable, even exorbitant, increase above that adopted in similar cases. On 16 Sep-

tember 1994 the Member of the Commission responsible for competition policy gave a speech in which he stated that in the present case the Commission had increased the fines considerably above the level of its previous practice.

251 Even if the Commission is not, in general, obliged to give detailed reasons for its decision regarding fines, it must explain the reasons for its flagrant departure from its previous practice in regard to fines (see, to the same effect, Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [19759 ECR 1491, paragraphs 30 to 33, and Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 35).

252 Lastly, the applicant alleges infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter 'the EHRC'), which established a right to review by the courts. Only if greater transparency exists, can it be verified whether the Commission has observed the principle of equal treatment in a particular case.

253 The Commission points out that under Article 15(2) of Regulation No 17 it may impose fines of up to 10% of the total annual turnover of the undertakings concerned. The rate applied in this case is clearly within the limits laid down by that regulation, because only turnover relating to sales of cartonboard in the Community was taken into account.

254 Moreover, the Commission may raise the level of the fines, within the limits laid down by Regulation No 17, at any time where that is necessary to ensure the implementation of the Community competition policy, and in particular to ensure the deterrent effect of the fines (*Musique Diffusion Françcaise and Others* v *Commission*, cited above, paragraphs 106 to 109). In doing so, it is not bound by its previous decisions (*ICI* v *Commission*, cited above, paragraphs 382 and 385) and it is therefore irrelevant whether the case in point is comparable to previous cases or whether the Commission has appreciably raised the general level of fines. In any event, the level of fines was not raised arbitrarily or considerably above that in previous cases.

255 Lastly, the Commission rightly found that the infringement in question was particularly serious.

Findings of the Court

256 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).

257 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.'

258 Furthermore, it is undisputed that 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.

259 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).

260 Second, the Commission rightly argues that, on account of the specific circumstances of the present case, no direct comparison can 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, as the Court has already held, the intricate steps taken by the undertakings to conceal the existence of the infringement constitute a particularly serious aspect of it which differentiates it from the infringements previously found by the Commission.

261 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.

262 On the basis of those factors, the criteria set out in point 168 of the Decision adequately indicate the reasons which led the Commission to set the general level of fines and suffice to justify that level. 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.

263 Finally, 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*, Groupement des Fabricants de Papiers Peints de Belgique and Others v Commission, cited above, paragraph 31).

264 The plea must therefore be rejected.

C — *The plea alleging infringement of Article 190 of the Treaty when the individual fines were fixed*

Arguments of the parties

265 The applicant asserts that a mere list in point 169 of the Decision of the criteria adopted in order to fix the individual fines does not constitute an adequate statement of reasons. There is nothing in the Decision to indicate how the various fines

were calculated, or to provide a basis for ascertaining whether the distinction drawn between the various undertakings in regard to the fines is justified. A more detailed statement of reasons is necessary, especially where, as in the present case, a grossly excessive distinction has been drawn between the undertakings. In particular, if some of the circumstances which the Commission took into account did not exist, the Court could review the amount of the individual fines only if it was aware of the significance which the Commission had attached to each circumstance taken into account as an aggravating factor. That is all the more necessary where, as in the present case, there are indications that a much higher fine was imposed on undertakings which did not waive their rights to defend themselves against the Commission's charges.

266 Moreover, the Commission acknowledged the need to give additional reasons for its method of distinguishing between the various undertakings, because at its press conference of 13 July 1994 it supplied information in that regard, disclosing even the mathematical formula which it had allegedly not used. However, the statement of reasons should form an integral part of the Decision itself.

267 Lastly, the Decision does not explain why the Commission took the view that the applicant should not receive a reduction in the fine, when the Commission's principal factual allegations were not disputed by the applicant in its reply to the statement of objections. The Commission should have indicated in the Decision the matters of fact acknowledged or not disputed during the administrative procedure by undertakings which received a reduction in the amount of their fines.

268 The Commission considers that the Decision adequately sets out the essential grounds for each undertaking's fine. The criteria set out in point 169 of the Decision should be read in the light of the statement of reasons for the Decision as a whole (*ICI* v *Commission*, cited above, paragraph 355). In fact, the Decision (in

particular points 8, 9, 36 et seq., and 170 to 173) contains a number of statements concerning its assessment of the applicant's own situation.

269 The Commission contends that the statement of reasons in the Decision does not enable the Court to review whether the principle of proportionality has been observed. Clearly the applicant mistakenly assumes that the fines were fixed on the basis of a mathematical formula. They were not. The basic rate adopted was amended to take account of the particular situation of each undertaking. Moreover, turnover figures are business secrets and must be protected by the Commission.

270 As regards the reductions given for cooperation with the Commission, the Decision summarises the submissions made by the various undertakings in their defence (points 107 to 110) and the Commission's assessment of those submissions (points 111 to 115). It is apparent from points 108 and 114 of the Decision that the Commission took the view that the applicant's submissions were materially incorrect in regard to essential points, and that it could not therefore be considered to have made any admissions (see also point 172 of the Decision). The applicant was thus well able to assess whether it had been fined properly and whether it had been treated less favourably than other undertakings.

271 Lastly, the Commission observes that the statement of reasons relating to the calculation of the individual fines is wholly comparable to that supplied in the Polypropylene decision, which was regarded as adequate (*ICI* v *Commission*, cited above, paragraphs 353 and 354).

Findings of the Court

272 The purpose of the duty to state reasons for an individual decision has already been noted (see paragraph 42 above).

273 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 (see paragraph 256 above).

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

275 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.

276 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.

277 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.

278 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.

279 In the present case, first, points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, point 264). Furthermore, the statement of the criteria justifying reductions in the amounts of the fines and the list of undertakings which received such reductions (points 171 and 172 of the Decision)

make it possible to comprehend the Commission's line of reasoning. Accordingly, the Commission was not required to give a more detailed explanation of how those criteria were applied in individual cases.

280 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.

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

282 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.

283 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.

284 In the specific circumstances set out in paragraph 282 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.

285 Consequently, this plea cannot be upheld.

D — *The plea that the applicant was wrongly characterised as a 'ringleader' of the cartel*

Arguments of the parties

286 The applicant contends that the Commission wrongly considered it to be one of the cartel 'ringleaders'. The Commission has relied on only one piece of evidence in support of that finding, namely the fact that it was represented in the PWG (point 170 of the Decision). However, that evidence cannot be regarded as sufficient, because the Commission had not explained why Weig and KNP — which were also represented in the PWG — were not considered to be 'ringleaders'.

287 Nor does the fact that the applicant presided over the PWG for less than 6 months justify its characterisation as as one of the 'ringleaders'.

288 The participants in the PWG meetings were not the 'prime movers' of the cartel. All the participants in meetings of the various bodies of the PG Paperboard took part in all the discussions which may be regarded as infringements of Article 85 of the Treaty. Moreover, the Commission itself asserts that all the bodies of the PG Paperboard carried out functions which were part of an overall common plan to restrict competition and that each undertaking took part in that overall scheme.

289 The Commission submits that the applicant must be regarded as one of the cartel 'ringleaders' because it participated in meetings of the PWG, the body in which the main decisions relating to the price initiatives and the 'price before tonnage' policy were taken (points 36 to 40 of the Decision). Moreover, having regard to the

fact that the applicant presided over the PWG for a lengthy period, it must be regarded as having played an especially active role in it.

Findings of the Court

290 It follows from the Court's findings in regard to the applicant's pleas in support of its application for annulment of Article 1 of the Decision that the nature of the PWG's functions, as described in the Decision, has been duly proved by the Commission. The role played by the undertakings which met in that body, particularly at the end of 1987, has also been proved.

291 In those circumstances, the Commission was entitled to conclude that the undertakings, including the applicant, which participated in the meetings of that body had to be regarded as 'ringleaders' of the infringement and that they therefore had to bear special responsibility (see point 170, first paragraph of the Decision). It should be pointed out that the Commission's criterion for classifying undertakings as 'ringleaders' is not that they presided over the PWG but rather that they participated in its meetings.

292 In the present case, there is no dispute that the applicant participated in the meetings of the PWG from the creation of that body. Furthermore, it has not proved that it played an essentially passive role in the bodies of the PG Paperboard.

293 Even if were correct that all the undertakings which participated in the meetings of the various bodies of the PG Paperboard should be regarded as responsible for the infringement, that would not undermine the finding that the undertakings which

met in the PWG played a special role in the planning and implementation of the unlawful acts.

294 Lastly, the Court considers that the explanations in the Decision are such as to allow an assessment to be made of the role played by KNP and Weig. Thus, according to point 170, second paragraph, of the Decision, KNP was considered to be one of the 'ringleaders' of the cartel only during the period of its membership of the PWG, a period that was shorter than that of its participation in the cartel. Furthermore, the Commission states that it took account of the fact that Weig, although a member of the PWG, did not seem to have played an important role in the determination of the policy of the cartel (point 170, third paragraph). The applicant's assertion that it has been treated less favourably than those undertakings is therefore groundless.

295 This plea must therefore be rejected.

E — *The plea alleging infringement of the rights of the defence*

Arguments of the parties

296 The applicant contends that its rights of defence were infringed. The amount of the fine imposed on it was, in effect, increased by 50% because it challenged some of the Commission's allegations. It therefore received a heavier penalty because it did not waive its rights of defence.

297 According to the case-law of the European Court of Human Rights, any pressure placed on undertakings to refrain from challenging the charges against them in return for a reduction in their fine conflicts with Article 6 of the ECHR (judgments of the European Court of Human Rights of 27 February 1980 in *Deweer*, A series No 35, paragraphs 41 to 47, and of 25 February 1993 in *Funke*, A series No 256-A, paragraph 44). Furthermore, even in competition procedures directed against undertakings, the investigating authorities are required to observe the procedural guarantees laid down in Article 6 of the ECHR, in particular that of the presumption of innocence (judgments of the European Court of Human Rights of 8 June 1976 in *Engel and Others*, A series, No 22 of 21 February 1984 in *Öztürk*, A series, No 73, *Deweer*, cited above, and the opinion of the Commission of Human Rights in *Stenuit*, No 11598/85, report of 30 May 1991).

298 The rights of the defence are recognised as a general principle of Community law, and so undertakings cannot be compelled to admit the correctness of the objections raised against them (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 35). More particularly, it has been acknowledged that Article 6 of the ECHR is applicable to the administrative procedure before the Commission (*ibidem*, paragraph 30).

299 Threats were made against the undertakings during the administrative procedure before the Commission in order to force them not to challenge the Commission's allegations. The Commission admits that during that procedure it informed the undertakings that cooperation on their part would be taken into account when it calculated the fine.

300 Furthermore, the applicant's rights of defence were infringed as a result of the fact that it was unable to have sight of the pleadings of undertakings whose fines had been reduced for non-contestation of the Commission's essential allegations of fact. In those circumstances, it was unable to verify whether they had really not

contested the essential allegations and, therefore, whether it had been treated less favourably than those undertakings.

301 The Commission considers that it is entitled to reduce fines in order to take account of active cooperation on the part of undertakings (Case T-122/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and *ICI* v *Commission*, cited above, paragraph 393). Such a reduction in the fine can be regarded as an infringement of the rights of defence of the undertakings in question only if the Commission threatens to impose heavier fines on undertakings which do not admit the infringements.

302 No pressure whatsoever was put on the applicant not to dispute the correctness of the statement of objections. It offered the applicant the possibility of a reduced fine upon the same conditions as those offered to all the other undertakings in question.

303 The arguments based on the case-law of the European Court of Human Rights and on the judgment in *Orkem* v *Commission*, cited above, are irrelevant. Moreover, in the latter judgment it is expressly stated (paragraph 30) that the ECHR is irrelevant to the question at issue here.

304 Lastly, the Commission is not required to reveal, during the administrative procedure, the criteria which it plans apply in order to fix the fine (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 17 et seq.). It suffices for it to indicate those criteria in the Decision itself. It is therefore sufficient for the Decision to indicate the extent to which the various undertakings cooperated.

Findings of the Court

305 The Commission determined the general level of fines on the basis of the considerations set out in points 167 and 168 of the Decision. Moreover, it is common ground that fines of a basic level of 9 or 7.5% of each undertaking's turnover on the Community cartonboard market in 1990 were imposed on the undertakings considered to be the cartel 'ringleaders' and on the other undertakings respectively.

306 The Court finds that the criteria set out in point 168 of the Decision justify the general level of fines set by the Commission (see paragraph 262 above).

307 Points 169 to 172 of the Decision set out the factors which the Commission took into account in order to determine the fine to be imposed on each undertaking. In particular, in points 171 and 172, the Commission states that the fines imposed on Rena and Stora had to be considerably reduced in order to take account of their active cooperation with the Commission and that eight other undertakings were also to benefit, to a lesser extent, from a reduction, owing to the fact that in their replies to the statement of objections they had not contested the essential factual allegations on which the Commission based its objections. In the proceedings before the Court, the Commission has explained that it took account of the cooperative attitude of some undertakings during the administrative procedure by reducing the fines imposed on two of them by two-thirds, and by one-third in the case of the other undertakings.

308 Since the general level of fines adopted by the Commission has been found to be justified in the light of the criteria set out in the Decision, the Court finds that the Commission, as it indicated in the Decision, in fact reduced the amount of fines imposed on the undertakings where they had adopted a cooperative attitude during the administrative procedure. The applicant's contention that the Commission

increased the amount of fines imposed on undertakings which had exercised their rights of defence cannot therefore be accepted.

309 A decision not to reply to the statement of objections or not to express a view in such a reply on the Commission's factual allegations in the statement of objections, together with a decision to challenge all or most of those allegations in a reply — all of which are ways of exercising rights of the defence during the administrative procedure before the Commission — cannot justify a reduction in the fine on grounds of cooperation during the administrative procedure. A reduction on those grounds is justified only if the conduct made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (see the judgment in *ICI* v *Commission*, cited above, paragraph 393). In those circumstances, an undertaking which expressly states that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having facilitated the Commission's task of finding and bringing to an end infringements of the Community competition rules.

310 Lastly, as regards Article 6 of the ECHR, contrary to the applicant's contention, the Court of Justice did not hold in its judgment in *Orkem* v *Commission* that that provision applies to the administrative procedure before the Commission, but merely envisaged the possibility that it might apply in the case in point, as is clear from the wording of the judgment (paragraph 30).

311 The Court of First Instance has no jurisdiction to apply the ECHR when reviewing an investigation under competition law, because the ECHR is not itself part of Community law.

312 However, it is settled law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect (Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, as provided in Article F(2) of the Treaty on European Union, 'the Union shall respect fundamental rights, as guaranteed by the [European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

313 It is therefore necessary to examine whether, in the light of those considerations, the Commission failed to observe the rights of the defence, a fundamental principle of the Community legal order (*Michelin* v *Commission*, cited above, paragraph 7), by exercising allegedly unlawful pressure on the applicant during the administrative procedure so as to induce it to acknowledge the factual allegations in the statement of objections.

314 The fact that, without specifying the size of a reduction, the Commission indicates, during the administrative procedure, to an undertaking involved in the investigation that it would be possible to reduce the fine to be imposed if it were to admit most or all of the factual allegations, cannot of itself constitute pressure on that undertaking.

315 In any event, the applicant has not explained how the Commission's offer during the administrative procedure of a possible reduction in the fine to be imposed amounted to pressure of such a kind that it was compelled to admit the essential factual allegations in the statement of objections. Moreover, the applicant exercised its rights of defence during the administrative procedure, because it in fact con-

tested the essential allegations of fact on which the Commission based its objections. It follows that this argument must be rejected.

316 Finally, the applicant has not explained how the principle of the presumption of innocence has been infringed.

317 The applicant's argument that it has been unable to establish whether it was treated differently from the other undertakings involved in the investigation will be considered in the context of the plea alleging infringement of the principle of equal treatment (see paragraphs 334 and 335 below).

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

F — *The plea alleging infringement of the principle of equal treatment in that the applicant's fine was not reduced*

Arguments of the parties

319 The applicant contends that it was treated less favourably than the undertakings whose fines were reduced on the ground that they had not contested the Commission's essential factual allegations (point 172 of the Decision).

320 It is apparent from the Commission's letter of 27 April 1994 that in order to receive a reduction the applicant was required to acknowledge the material correctness of the objections, whereas the other undertakings were asked merely not to contest the essential allegations of fact.

321 The applicant did not contest the Commission's essential factual allegations. Its fine should therefore have been reduced. It has always admitted that it participated in discussions on prices and price increases and even stated that such discussions were, according to the case-law, concerted practices contrary to Article 85 of the Treaty. Furthermore, the Commission expressly acknowledged in the individual particulars annexed to the statement of objections that the applicant had cooperated in this way.

322 The applicant was unable to admit that the Commission's assessment of the facts was correct, particularly as regards its allegations relating to the existence of agreements on pricing and a perfectly organised cartel, because to do so might have exposed it to proceedings brought against it in the national courts.

323 The applicant claims that it cooperated actively with the Commission, given, particularly, that it proposed, jointly with certain other undertakings, a solution whereby they would refrain from bringing actions in return for a reduction in the amount of the fine. That proposal in itself justified a reduction in the fine.

324 Finally, to the extent that it has been able to assess the submissions made by the undertakings which received a reduction in the fine, the applicant concludes that it has obviously been the subject of discrimination. In that regard, it relies on the main pleas in the actions brought by Sarrió and by Enzo-Española, as published in the Official Journal (OJ 1994 C 380, p. 20 and p. 22). It is apparent that in the proceedings before the Court of First Instance those undertakings are contesting the Commission's allegations at least to the same extent as the applicant. However, those two undertakings obtained reductions in the fines on account of their alleged

failure to contest those allegations. Moreover, the applicant cites extracts from the statements made by the representative of Weig at the hearing before the Commission and refers to that undertaking's pleas before the Court of First Instance (as set out in OJ 1994 C 380, p. 16 et seq.). The applicant concludes from this that, although Weig obtained a reduction in the fine, it is contesting the Commission's allegations to the same extent as itself.

325 The Commission observes that it is not merely entitled to reduce fines to take account of active cooperation, but that a reduction is sometimes even required (*ICI* v *Commission*, cited above, paragraph 393). When calculating the fines, the Commission may therefore take a failure to contest facts into account as a mitigating factor, because such cooperation helps to clarify the facts and to accelerate the procedure.

326 The applicant has not proved any active cooperation of that kind. First, it admitted only the existence of a concerted practice, which does not constitute an acknowledgement of the facts. Moreover, it has always disputed not only that pricing agreements were adopted but also that there was any collusion on production volumes, market shares and the planned implementation of price initiatives.

327 The applicant's proposal for ending the procedure cannot be regarded as active cooperation justifying a reduction in the fine. The waiver of a right to bring an action cannot clarify the facts. Nor does it accelerate the procedure, since the Commission has no interest in concluding such 'arrangements' with undertakings.

328 As regards the alleged unequal treatment of the applicant in comparison with Sarrió and Enzo-Espanñola, the Commission submits that those two undertakings did not, on any view, contest the substance of the Commission's findings of fact

before the Decision was published. The reduction in their fines was therefore justified. Nor is Weig's behaviour comparable to that of the applicant. First, neither in its reply to the statement of objections nor thereafter did Weig challenge the substance of the Commission's findings. Second, it helped to clarify the facts by obtaining a statement from a member of the Feldmühle management board who had taken part in meetings of several bodies of the PG Paperboard.

Findings of the Court

329 In its reply to the statement of objections, the applicant admitted only that the discussions which took place in the bodies of the PG Paperboard could have concerned prices and price increases.

330 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).

331 As the Court has already pointed out (see paragraph 309 above), 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.

332 The situation is different where the undertaking does not reply to the statement of objections or merely states that it is not expressing any view on the Commission's factual allegations in the statement of objections, or where the essential aspects of those allegations are contested by it in its reply to that statement, as they were by the applicant. 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. It is also clear that the applicant's proposal to the Commission during the administrative procedure, namely not to bring proceedings before the Court of First Instance to challenge the decision which would be adopted, could not further that task either.

333 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.

334 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, that argument cannot be upheld.

335 As the fact that the Commission may have unlawfully reduced some fines cannot lead to a reduction in the applicant's fine, the applicant cannot claim that its rights

of defence were infringed by its inability to verify whether it was treated differently from the other undertakings in that regard.

336 Lastly, the applicant cannot avail itself of the argument that Sarrió and Enzo-Española and, to a certain extent Weig, obtained a reduction of one-third in the amount of their fines, even though they have disputed the allegations in the Decision in their actions brought before the Court. In granting reductions in the fines the Commission took into account only the undertakings' conduct during the administrative procedure.

337 The plea must therefore be rejected.

G — The plea alleging infringement of the principle of equal treatment in that the fine imposed on the applicant is too high in comparison with that imposed on Stora

Arguments of the parties

338 The applicant contends that it is settled law that fines must be fixed on an individual basis, without discrimination, and take into account each undertaking's participation in the infringement, its market position and its general economic situation (see Case 44/69 *Buckler* v *Commission* [1970] ECR 733, *Suiker Unie and Others* v *Commission*, cited above, and Case 32/78 and 36/78 to 82/78 *BMW and Others* v *Commission* [1979] ECR 2435). The Court of Justice and Court of First Instance have repeatedly stressed the importance of the principle of equal treatment (Case 35/83 *BAT* v *Commission* [1985] WECR 363, paragraphs 43 to 47, Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261, summary publication,

paragraphs 40 and 41, and *Dansk Pelsdyravlerforening* v *Commission*, cited above, paragraph 52, and *ICI* v *Commission*, cited above).

339 In view of that case-law, the applicant considers that the Commission cannot argue that the applicant is precluded from relying on the fact that favourable treatment was given to Stora.

340 The plea is in two parts.

341 In the first part, the applicant contends that its fine is disproportionate in comparison with that imposed on Stora.

342 It states that Feldmühle systematically undercut prices, which forced the applicant and other non-Community producers to cease their policy of expanding their shares of the Community market. The representatives of Stora/Feldmühle played a particularly active role in the JMC and PWG. Lastly, Stora was, during the period in question, the European cartonboard market leader, with a market share of approximately 14%.

343 Stora's fine, before any reduction, should therefore have been considerably higher than the applicant's. The Commission therefore infringed the principle of equal treatment when it fixed the fines (*ICI* v *Commission*, cited above, paragraphs 352 and 354 et seq.).

344 In the second part of the plea the applicant submits that the reduction in the fine granted to Stora also infringes the principle of equal treatment. In the first place,

the Commission wrongly took the view that Stora's cooperation was voluntary and spontaneous. Stora's 'admission' was in fact made nine months after the BPIF complaint had been lodged (which came rapidly to the attention of the industry), that is to say, four months after the Commission's investigations and only after Stora received the Commission's request for information, .

345 Second, the applicant disputes that Stora's 'admission' really contributed decisively to proving the alleged infringement. It refers in that regard to the Commission's assertion that Stora's statements are corroborated on all material points by other documents.

346 Third, the reduction granted to Stora is in any event disproportionate. A comparison between the Court's findings in *ICI* v *Commission*, cited above, paragraph 393), and the facts of the present case shows that Stora should not in any event have received more favourable treatment than that received by ICI before the Court.

347 Fourth, relying in particular on *Solvay* v *Commission*, cited above (points 341 et seq.), it contends in its reply that it is doubtful whether the mere fact of an admission may be rewarded by a reduction for cooperation, because undertakings are in any event required to reply to the Commission's request for information.

348 Lastly, in its reply, it asserts that the Commission imposed higher fines on some undertakings solely because they had not fully accepted Stora's version of the facts. That is unacceptable, particularly in view of the fact that Stora was one of the undertakings most seriously involved and therefore had an obvious interest in playing down its own role in the cartel in comparison with that of the other undertakings.

349 According to the Commission, the applicant is not disputing the lawfulness of its own fine but rather that of Stora's fine. However, the applicant cannot invoke the unlawfulness, if any, of Stora's fine, because the principle of equal treatment does not mean that, if the fine imposed on Stora is unlawful, the applicant may claim such unlawful treatment for itself.

350 In any event, the fine imposed on Stora is appropriate. Furthermore, infringement of the principle of equal treatment presupposes that comparable cases have been treated differently. The applicant's situation is not comparable to that of Stora. Although both undertakings had to be regarded as 'ringleaders' who had to bear a special responsibility, it is nevertheless the case that Stora fully and rapidly cooperated with the Commission, which the applicant failed to do.

351 Lastly, the Commission observes that Stora's statement went well beyond the Commission's requests for information and that Stora did not, as the applicant asserts, retract the major part of its admissions.

Findings of the Court

352 It is settled law that the principle of equal treatment, one of the fundamental principles of Community law, is infringed only if comparable situations are treated differently or different situations are treated in the same way and such treatment is not objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25 and, to the same effect, Case T-100/92 *La Pietra* v *Commission* [1994] ECR-SC II-275, paragraph 50).

353 In the present case, the applicant claims that this principle was infringed. It contends that its fine was calculated on the basis of a basic rate identical to that adopted in order to calculate the fine imposed on Stora, namely 9% of turnover on the Community cartonboard market in 1990, whereas its role in the cartel differed from that of Stora.

354 It suffices to find in that regard that it is clear from the Decision that Stora and the applicant participated in the various constituent elements of the cartel as participants in the PWG meetings and that the two undertakings were characterised as 'ringleaders' of the cartel on account of their participation in the meetings of that body of the PG Paperboard. It follows that the situations of those undertakings in the cartel did not differ and that their identical treatment when calculating the fine was justified. Even if the factors on which the applicant relies in order to show that it played a less active role than Stora in the PWG were proved, they would not be capable of undermining the Commission's finding as to the respective roles of the applicant and Stora. In those circumstances, the first part of the plea must be rejected.

355 Nor can the second part of the plea be upheld.

356 Stora supplied the Commission with statements containing a highly detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard, and the participation of the various producers in the infringement. Through those statements, Stora supplied information well in excess of that which the Commission may require to be supplied under Article 11 of Regulation No 17. Although the Commission states in the Decision that it obtained evidence corroborating the information contained in Stora's statements (points 112 and 113 of the Decision), it is clear that Stora's statements constituted the principal evidence of the existence of the infringement. Without those statements, it would therefore have been, at the very least, much more difficult for the Commission to establish or put an end to the infringement with which the Decision is concerned.

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

358 Furthermore, the principle of equal treatment was not infringed in this case because, unlike Stora, which cooperated actively with the Commission, the applicant contested the essential factual allegations on which the Commission based its objections. Since their situations were not comparable, the Commission was therefore entitled to treat those undertakings differently when deciding whether and to what extent a reduction in their fines should be granted.

359 In the light of the foregoing, the plea must be rejected as unfounded.

H — *The plea of mitigating circumstances*

Arguments of the parties

360 The applicant submits that certain facts should have been regarded by the Commission as mitigating factors when the amount of the fine was fixed.

361 First, the applicant did not attempt to conceal incriminating documents, even though it had been given prior notice of an investigation by the Commission's representatives.

362 Second, it was a medium-sized undertaking until mid-1990. Only in that year was its new machine installed at the Neuss cartonboard mill and the takeover of Deisswil and Eerbeek completed in April and September respectively (with retroactive effect from 1 January 1990).

363 Third, it is the first infringement in the cartonboard industry.

364 Fourth, the price increases of GD cartonboard, the type principally produced by the applicant, were less than those for GC cartonboard. The applicant was therefore unable to obtain the operating margin which the other undertakings were held to have obtained.

365 Lastly, in its reply the applicant submits that, in accordance with its previous practice, the Commission should have taken into account the difficult conditions which prevailed in the cartonboard sector until the end of the 1980s which precluded the possibility of a proper return on capital invested. It should also have taken into account the fact that the sector in question is characterised by high turnover but relatively low profits. Fines calculated on the basis of the cartonboard producers' turnover alone therefore has a particularly severe impact on the producers.

366 The Commission argues that it was not required to take those matters into consideration as mitigating factors.

Findings of the Court

367 As the Court has already pointed out (paragraph 256 above) the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case, and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

368 Consequently, the mere fact that the Commission has found in its previous decisions that certain factors constitute mitigating circumstances for the purpose of determining the amount of the fine does not mean that it is obliged to do so also in a subsequent decision. Even if the loss-making situation of the industry had been established, the Commission was not by reason of this fact required to take it into account.

369 Moreover, in order to calculate the amount of the fine the Commission took into account the applicant's turnover on the Community cartonboard market in 1990. The applicant's position in the sector and the scale of the infringement which it had committed were therefore taken into account by the Commission.

370 Lastly, the fact that, according to the applicant, the infringement is the first to have taken place in the sector in question cannot constitute a mitigating circumstance. The fact that the Commission has already found an undertaking guilty of infringing the competition rules in the past and has penalised it for that infringement may be treated as an aggravating factor as against that undertaking. However, the absence of any previous infringement is a normal circumstance which the Commission does not have to take into account as a mitigating factor, especially since the present case involves a particularly clear infringement of Article 85(1) of the Treaty (see Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833, paragraph 317).

371 In those circumstances, the Commission was entitled to take the view that the factors to which the applicant refers should not be taken into account in mitigation.

372 This plea cannot therefore be upheld.

I — *The plea that the infringement was not intentional*

373 The applicant submits that at the material time it was not aware that the information exchange in which it was participating was unlawful. Regard should be had to the fact that it was a medium-sized undertaking, without an in-house lawyer, and was situated outside the Community. Moreover, Austrian competition law provides for fines only in the case of binding agreements; in the present case there were only concerted practices.

374 This plea cannot be upheld.

375 It is settled case-law that it is not necessary for an undertaking to have been aware that it was infringing Article 85(1) of the Treaty for an infringement to be regarded as having been committed intentionally. It is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41, and *Dansk Pelsdyravlerforening* v *Commission*, cited above, paragraph 157).

376 In the present case, the Commission has proved that the applicant participated in the constituent elements of the infringement found in Article 1 of the Decision. In view of the nature of the conduct in question, the applicant could not have been unaware that its object was to restrict competition.

J — *The plea that the wrong turnover figure was taken into account*

377 This plea is in two parts which will be considered separately.

First part: turnover from sales of greyboard was wrongly taken into account in order to calculate the fine

Arguments of the parties

378 The applicant submits that the Commission calculated the fine on the basis of its turnover in 1990 from all sales of cartonboard products. That figure therefore includes turnover from sales of greyboard. However, the Commission stated in its press release of 13 July 1994 that the fines had been calculated on the basis of the each undertaking's turnover from cartonboard grades covered by the Decision.

379 As greyboard is not one of the cartonboard grades covered by the Decision, the turnover figure taken as the basis for calculating the fine should be reduced by ECU 13.1 million, the amount attributable to greyboard sales. The fine should therefore be reduced proportionately.

380 The Commission contends that a strictly mathematical formula cannot be used to calculate the fine. In the present case, the fine is appropriate in view of the appli-

cant's total turnover, because the undertakings have no right to require that only turnover from products to which the infringement directly relates should be taken into account. There are aggravating, but no mitigating, circumstances. Moreover, it took turnover in 1990 (rather than in 1993), and only turnover achieved through cartonboard sales in the Community, as its basis for calculating the fine.

381 In its rejoinder it submits that in its letter of 8 October 1993 it requested the applicant to inform it of its turnover relating to cartonboard. In its reply of 3 November 1993 the applicant supplied that figure under the heading 'cartonboard products (GC, GD)'. Since the statement of objections had expressly indicated that greyboard was not covered by the proceedings, the Commission therefore had no reason to verify the correctness of the turnover figure given.

Findings of the Court

382 According point 4, second paragraph, of the Decision, greyboard was not the subject of the infringement with which the Decision is concerned.

383 It is not disputed that the Commission calculated the amount of the applicant's fine on the basis of its turnover on the Community market in 1990 from sales of GC cartonboard, GD cartonboard and greyboard. As the Commission accepted at the hearing, the information supplied by the applicant to the Commission prior to the statement of objections expressly stated that the turnover figure given included turnover from greyboard sales.

384 Moreover, even though the Commission could not have been unaware that the turnover figure which it was using included turnover from greyboard, it never requested the applicant to inform it of its turnover in 1990 solely from products

with which the proceedings were concerned, namely GC, GD and, as appropriate, SBS cartonboard.

385 Nevertheless, as it also admitted at the hearing, in the case of the other undertakings to which the Decision was addressed, the Commission took into account only turnover from products to which the infringement related.

386 In view of that finding, and having regard to the fact that the inclusion of turnover from greyboard had a not inconsiderable effect on the amount of the fine, the Court must reduce that amount in order to eliminate the disadvantage suffered by the applicant in comparison with the other addressees of the Decision.

387 The Court will consider the implication of that conclusion, in the exercise of its unlimited powers in regard to fines, when it assesses what fine should be imposed in respect of the infringement which the applicant is found to have committed (see paragraph 405 below).

Second part: the turnover of Deisswil and Eerbeek was erroneously taken into account in order to calculate the amount of the fine

Arguments of the parties

388 The applicant submits that the turnover achieved in 1990 by the Deisswil and Eerbeek mills should not have been taken into account in order to calculate the fine.

389 As regards Deisswil, it observes that it acquired a 66% holding in that company in April 1990, which was effective from 1 January 1990, and so acquired control over it. Deisswil's former owners, who were responsible for its conduct for more than three quarters of the relevant period, still hold a 34% share in it. It is therefore inequitable to attribute the whole of Deisswil's turnover to the applicant, when the former owners, who still receive one third of the profits, are not affected by the fine. In those circumstances, a fine should either be imposed directly on Deisswil — as in the case of Laakmann (point 150, third paragraph, of the Decision) — or Deisswil's turnover should be attributed to the applicant only on a pro rata temporis (13/16) basis, the denominator corresponding to the total period of the infringement, expressed in months, to which the Commission referred when calculating the amount of the individual fines).

390 The applicant is responsible for Eerbeek's conduct only from 1 January 1990, prior to which KNP has been held responsible (point 150 of the Decision). However, by taking the whole of Eerbeek's turnover in 1990 in order to calculate the applicant's fine, the Commission did not follow its own approach, because it also took that figure into account when calculating the fine imposed on KNP.

391 Furthermore, the applicant acquired full control over Eerbeek only in September 1990. It was therefore able to exercise decisive influence on its conduct on the market only from that date. According to the practice in regard to fines and the principles in the case-law, Eerbeek's turnover should be attributed to the applicant only from that date. Eerbeek's turnover in 1990 (the reference year) can therefore be attributed to it only as to 8/60, namely from September 1990 to April 1991.

392 In its reply, the applicant adds that the treatment of the Eerbeek and Deisswil cases is contradictory, because the Commission submits that in the case of Eerbeek the decisive criterion is the identity of the recipient of the profits during the relevant period, but that, in the case of Deisswil, that criterion is irrelevant and that the decisive criterion is that of actual control.

393 The Commission submits that, when calculating the fine, it rightly took into account the turnover achieved in 1990 by Deisswil and Eerbeek. For the purposes of that calculation, it was necessary to fix a reference year. That was 1990 in this case. Companies which had a higher turnover in that year than in other years were therefore fined more heavily. However, as the reference year was correctly chosen, there are no grounds for a distinction to be made according to the reasons for such an increase in turnover.

394 The Commission correctly took account of the fact that the applicant fully controlled Deisswil in 1990 and that it could therefore direct its business conduct. In those circumstances, the fact that the applicant did not receive all Deisswill's profits is irrelevant.

395 The Commission contends that, in the case of Eerbeek, the decisive factor was the fact that the applicant had received the profits from 1 January 1990 and that it had therefore benefited economically from the infringement with effect from that date.

396 Lastly, Eerbeek's turnover was not unlawfully taken into account twice.

Findings of the Court

397 The applicant does not dispute that on the date when it acquired control of Deisswil both Deisswil and itself were participating in the infringement with which the Decision is concerned. It must therefore have been aware of Deisswil's anti-competitive conduct.

398 In those circumstances, the Commission was entitled to attribute to it Deiswil's conduct in the period before and after its acquisition of that undertaking. It was for the applicant, as parent company, to adopt in regard to its subsidiary any measure necessary to prevent the continuation of the infringement of which it was not unaware. The applicant does not dispute that Deisswil's unlawful conduct continued after the date on which it acquired control over it.

399 For the purpose of calculating the fine imposed on the applicant, the Commission was therefore entitled to include Deisswil's turnover on the Community cartonboard market in 1990, which was chosen as reference year and has not been challenged as such by the applicant. It also follows that it is irrelevant whether the Commission could have imposed some or all of the fine on Deisswil itself or on its former owners.

400 As regards Eerbeek, the second paragraph of point 150 of the Decision states as follows:

'[Mayr-Melnhof] is also responsible for the participation in the infringement of ... Mayr-Melnhof Eerbeek BV (as KNP Vouwkarton was renamed) from the date of its acquisition on 1 January 1990. Responsibility for the participation of KNP Vouwkarton before the takeover lies with KNP and no liability is attributed to [Mayr-Melnhof] for this period'.

401 Nevertheless, in order to calculate the fine imposed on the applicant, the Commission took into account Eerbeek's total turnover on the Community cartonboard market in 1990 (the reference year) and did not apportion it pro rata temporis so as to take into account solely the period during which Eerbeek was under the applicant's control. In so doing, it failed to have regard to its own finding that the applicant was responsible for the participation of KNP Vouwkarton/Eerbeek in the infringement only from 1 January 1990.

402 Since the Commission has expressly accepted at the hearing that it committed an error in that regard, the amount of the fine must be reduced.

403 It should be added that, although the applicant acquired 100% control of Eerbeek in September 1990, it does not dispute that the acquisition was effective as from 1 January 1990. In those circumstances, since the applicant could not have been unaware of the unlawful conduct of the company which it acquired (see, to the same effect, paragraph 397 above), the Commission was entitled to take the view that the applicant had to bear responsibility for that conduct from 1 January 1990.

404 It follows from the whole of the foregoing that the pleas on which the applicant relies in support of its application for annulment of Article 1 of the Decision must be rejected, but that the plea in support of its application for annulment of Article 2 of the Decision must be upheld in part.

405 The fine imposed must be reduced in order to take account, first, of the fact that the applicant's turnover from sales of greyboard was wrongly taken into account in order to calculate the amount of the fine and, second, of the fact that the applicant was responsible for Eerbeek's conduct only with effect from 1 January 1990.

406 As none of the other pleas on which the applicant relies justifies a reduction in the fine, the Court, exercising its unlimited jurisdiction, sets the amount of that fine at ECU 17 000 000.

Costs

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

On those grounds,

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

hereby:

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

'The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall hence-

forth refrain in relation to their cartonboard activities from any agreement or concerted practice which may have the same or a similar object or effect, including any exchange of commercial information:

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

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

2. Sets the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 17 000 000;

3. Dismisses the application as regards the remaining claims;

4. Orders the Commission to bear its costs and to pay one quarter of the applicant's costs;

5. Orders the applicant to bear three quarters of its costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President

Summary