OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. By application lodged on 28 July 1998 Sarrió SA (hereinafter 'Sarrió') appealed against the judgment of the Court of First Instance of 14 May 1998 in *Sarrió* v *Commission* [1] (hereinafter 'the contested judgment'), which had ruled on its action against 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) [2] (hereinafter 'the Decision').

2. In that decision fines were imposed on 19 manufacturers supplying cartonboard on the Community market on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC). As regards the amount of the fine imposed on Sarrió, Article 3(xv) of the Decision stated:

'Sarrió SpA, a fine of ECU 15 500 000'.

3. In its action before the Court of First Instance, Sarrió claimed that the Court should annul the Decision, in the alternative annul Article 2 of the Decision and Article 3 in so far as it imposed a fine on the applicant, and, in the further alternative, reduce the amount of the fine.

4. By the contested judgment the Court of First Instance upheld Sarrió's application in part, by partly annulling the order in Article 2 of the Decision prohibiting the appellant from participating in the future in certain forms of information exchange between companies in the cartonboard sector and by reducing the amount of the fine to ECU 14 000 000, but dismissed the remainder of the action.

5. For the full statement of the complaints formulated by Sarrió against the Decision and the grounds on which the Court considered it should uphold them in part only, I refer you to the contested judgment. However, I would point out here that the reduction in the amount of the fine made by the Court of First Instance was stated by the Court to be the consequence of its finding that Prat Carton, one of Sarrió's subsidiaries, had participated only in certain constituent elements of the infringement and for a shorter duration than the Commission claimed.

* Original language: French.

1 — Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439.

2 — OJ L 243, p. 1.

6. In its appeal, Sarrió claims that the Court of Justice should:

(1) set aside the contested judgment

— in so far as the Court of First Instance held that the Decision did not hold Sarrió responsible for an infringement relating to transaction prices and did not consider it necessary to evaluate Sarrió's conduct regarding the prices actually applied;

— in so far as the Court of First Instance held that Sarrió's participation in the PG Paperboard meetings is in itself sufficient to implicate it in the collusion on market shares and downtime, or — in the alternative — in so far as the Court did not take account of the fact that Sarrió's failure to implement any concerted initiatives reduces the gravity of the infringement committed by Sarrió in comparison to that committed by other undertakings, and did not take into consideration the evidence offered to that end by Sarrió, or — in the further alternative — in so far as its categorisation of the infringement committed by Sarrió is incorrect with regard to the collusion on market shares and downtime;

— in so far as the Court of First Instance did not consider it necessary to annul, in whole or in part, the fine imposed on Sarrió on the ground that the statement of reasons was defective, that defect being that the parameters systematically taken into consideration by the Commission for the purpose of calculating the said fine were not indicated in the Decision itself;

— in so far as the Court of First Instance approved the Commission's method of calculating the fine, which consisted in converting the turnover for the reference year into ecus at the average exchange rate for that year and, on the basis of that conversion, fixing the amount of the fine directly in ecus, without evaluating the legal consequences or assessing the harm caused to Sarrió by the use of such a method;

— in so far as the Court of First Instance granted a reduction of ECU 1 500 000 in the fine by reason of the short duration of Prat Carton's participation in the infringement;

(2) refer the case back to the Court of First Instance if the Court of Justice con-

siders that the state of the proceedings does not allow a final ruling to be given;

(3) in any circumstances in which the Court allows this appeal against the contested judgment, annul the corresponding parts of the Decision;

(4) reduce the fine by the amount the Court thinks appropriate;

(5) order the Commission to bear the costs of the proceedings before both the Court of First Instance and the Court of Justice.

7. The Commission, the respondent in the appeal and defendant in the proceedings before the Court of First Instance, contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs;

8. In support of the form of order sought, Sarrió submits five pleas, which are contained in point 1 of the form of order set out above and allege as follows:

— the first plea: misinterpretation of the Decision in so far as concerns the infringement actually alleged;

— the second plea: misinterpretation and misapplication of Community law as regards the inevitably anti-competitive effect of Sarrió's participation in the meetings of the producers; in the alternative, failure to take into consideration the fact that Sarrió did not implement the cartel; and, in the further alternative, incorrect categorisation of the infringement committed;

— the third plea: failure to take into consideration the inadequate statement of reasons in the calculation of the fine and inconsistency between the grounds and the operative part of the judgment;

— the fourth plea: failure to take into consideration the error in the method of calculating the fine;

— the fifth plea: inconsistency between the grounds and the operative part of the judgment in so far as concerns the reduction in fine which was granted.

9. In order to avoid needless repetition, the details of those pleas will be set out as necessary as and when I examine them.

The first plea: interpretation of the Decision as regards the alleged infringement

10. The first plea raised by the appellant seems at first sight paradoxical. The appellant is criticising the Court of First Instance for having held that the infringement which it was alleged to have committed and for which it was fined was not as wide-ranging as it thought could be inferred from the Decision.

11. According to the appellant, the Decision cannot be interpreted as alleging, as far as concerns prices, that the appellant participated in a cartel on both the announced prices, that is to say, the list prices, and the transaction prices, that is to say, the invoice prices to purchasers.

12. It claims to find confirmation of this point of view in the Commission's defence before the Court of First Instance, in which it states that 'the price cartel operated by the PWG in collaboration with the JMC was not merely a cartel on announced prices, but a cartel that went as far as agreeing periodic price increases for each type of product in each national currency and planning and applying simultaneous price rises throughout the Community'.

13. For Sarrió, the distinction between collusion on announced prices and collusion on transaction prices has a particularly relevant legal significance, which was highlighted by the Court of Justice in its judgment in *Ahlström Osakeyhtiö and Others* v *Commission*, the so-called 'wood-pulp case'. [3]

14. The Court of First Instance was therefore wrong to hold that, '[i]n the present case, it follows from the foregoing that the Commission adequately explained in the grounds of the Decision that the concerted action related to list prices and aimed to bring about an increase in transaction prices' (paragraph 60).

15. In fact, if Sarrió is so insistent that it should be accepted that it has been penalised for participating in a cartel on both

3 — Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 [1993] ECR I-1307.

announced prices and transaction prices, it is because it is seeking to establish that it has been penalised for acts it did not commit and thus obtain a reduction in the fine imposed on it.

16. Before the Court of First Instance and before the Court of Justice, it has expounded lengthy arguments designed to prove that, although it did indeed participate in a cartel on announced prices, which it acknowledged without any difficulty during the administrative procedure, it never participated in any way in a cartel on transaction prices.

17. By interpreting the Decision as not having held those involved in the cartel responsible for colluding on transaction prices, the Court of First Instance rendered those arguments completely irrelevant and deprived the claim for a reduction of the fine of any foundation.

18. In so far as it alleges that the contested judgment misinterpreted the Decision, the plea is admissible, contrary to the contention of the Commission, which regards it only as a dispute on the facts.

19. To assess the validity of the plea, it is necessary to look into the grounds put forward by the Court of First Instance for not considering that the Decision holds Sarrió responsible for participating in a cartel on transaction prices.

20. The Court of First Instance started with the finding that the Decision does not clearly indicate the prices — list prices or transaction prices — on which the members of the cartel agreed, and we cannot but agree with the Court on this point. Indeed, Article 1 of the Decision states that the parties to the cartel participated in 'an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the Community

...

— 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...,

— 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.'

21. To dispel that uncertainty, the Court of First Instance, as required by the settled case-law of the Court of Justice, directed its examination at the statement of reasons for the Decision.

22. At the end of that examination it reached the conclusion that the Decision is indeed interested in the transaction prices, if only because the fine imposed on the members of the cartel had to take into account the cartel's effects on the market, as a factor in determining the gravity of the infringement; however, what is held to be an infringement is only the collusion on fixing the list prices, which were quite clearly intended to achieve a rise in the invoice prices.

23. Indeed, I cannot see why a cartel would be interested in reaching agreement on list prices by which the various sellers would not feel at all bound in their negotiations with their customers.

24. Identical list prices — even if not accompanied by absolutely identical transaction prices, since buyers could, in specific cases, depending on the quantities bought or other factors, obtain transaction terms which were more favourable than the list prices — are in themselves clearly a factor seriously restricting competition, because they are liable to convince buyers that they will probably not obtain significantly better terms from one supplier than from another, and should give rise to a fine.

25. The Decision sought to fine an infringement, collusion on announced prices, in so far as it had an unlawful purpose in the light of competition law, namely the standardisation of transaction prices.

26. However, it definitely did not state that that purpose had been systematically achieved during the whole period of the infringement nor did it consider that the fact that the purpose had, in most cases, been achieved, itself constituted a different infringement, in addition to the one which the undertakings involved in the cartel had committed by standardising the list prices.

27. In that, it is clearly distinguishable from the decision which gave rise to the woodpulp case, which was presented as penalising two different infringements, a collusion on announced prices and an agreement on transaction prices.

28. The fact that, when an undertaking deviated in its commercial dealings from the list prices agreed at the periodic meetings of the members of the cartel, the others complained and drew its attention to posted prices, cannot be regarded as evidence that the transaction prices had also been fixed by common accord.

29. It confirms only that the ultimate aim, clearly agreed between the parties, of the collusion on list prices, was to standardise transaction prices as fully as possible and to ensure that any deviation from the agreed list prices in the prices charged by one undertaking should appear to the others as likely to jeopardise the achievement of the cartel's objective.

30. It was the list prices which were fixed by common accord, but if an undertaking deviated too far from them in its commercial dealings, this was seen as a breach of the duty to act in good faith towards the other members of the cartel, that is if it is possible to invoke the principle of acting in good faith in the case of an unlawful agreement.

31. The Commission was indeed interested in the transaction prices and in the discussions to which a price gave rise if it differed too much from the list prices, but this was to establish that the aim was the implementation of standard transaction prices and to assess the true extent of the commitments made by the members of the cartel. [4]

32. As pointed out above, the Commission's concern to evaluate the effects of the cartel was totally reasonable, and Sarrió is in no position to describe it as a reflection of the Commission's intention to penalise, in addition to the cartel on announced prices, a cartel on transaction prices.

33. In fact, it is the appellant which can be criticised for misinterpreting the Decision, not the Court of First Instance, and therefore its first plea should, in my view, be rejected. There is no need to assess the relevance of the arguments it puts forward to show that at no time did it participate in a cartel on invoiced prices, an infringement with which, as we have just seen, it was never charged.

4 — See, for example, points 82 and 101 of the statement of reasons for the Decision.

The second plea: the inferences properly drawn from the finding that the appellant took part in the meetings of the members of the cartel

34. In its second plea the appellant's main complaint is that the contested judgment rejected its argument that its participation in the meetings of the various bodies of the PG Paperboard, a professional association whose aims are essentially lawful, is not sufficient to establish its participation in a cartel to maintain market shares and to arrange planned production stoppages to control supply.

35. The appellant considers that the Court of First Instance erred in law in stating, in paragraph 118 of the contested judgment, 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* 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, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.'

36. From the appellant's point of view, participation in a meeting which has an anti-competitive purpose does not in itself constitute conduct which can be fined, and it was for the Commission to adduce evidence that the undertaking implemented the decisions adopted during such a meeting. To require the undertaking to prove that it did indeed distance itself from those decisions, that is to say, that it neither approved nor implemented them, was to place it under an impossible burden of proof.

37. I shall begin by stating, as does the Commission, that the conclusion reached by the Court of First Instance, namely that Sarrió was correctly fined for having participated in a collusion to stabilise market shares and control supply, is not based only on paragraph 118 of the contested judgment, cited above. This argument is described as taking 'third place', the Court having previously established that it was the collusion which the Commission considered an infringement, not its implementation, and that Sarrió had definitely participated fully in that collusion.

38. That participation clearly raises issues of fact on which the Court of Justice is not to give a ruling on appeal. However, I would point out that, apart from the fact that the Court of First Instance carefully considered the probative value of the evidence adduced by the Commission to establish both that there had been collusion and that the appellant had participated in it, Sarrió's denials seem to me singularly lacking in credibility.

39. Indeed, the appellant, without disputing that it attended the meetings during which the collusion was arranged, is trying to attribute to that attendance a significance and effect which it believes exculpates it.

40. If we are to believe the appellant, its attendance was merely a defensive measure, since all it meant was that the appellant had the opportunity to protect itself against the aggressivity of the Scandinavian, German and Austrian producers, whose competitive position was much more favourable than its own.

41. I am not sure that this explanation regarding the concerns which motivated it, when it participated in the meetings held by the members of the cartel, serves the appellant's cause. Quite the contrary, since it thus appears that Sarrió had, from its own point of view, an obvious interest in participating in a cartel which, by eliminating price wars, by sanctioning the distribution of market shares and by regulating supply, could mitigate the effects of the weakness of its competitive position.

42. In any event, the possibility that conduct which objectively constitutes an infringement of the competition rules may be penalised is completely unconnected with the 'aggressive' or 'defensive' motives of the participants; however, the second of these is in practice by far the more frequent because only those who fear the effects of competition have a genuine interest in restricting it.

43. Moreover, whatever Sarrió's motives may have been, *de facto* the effect of its participation in the meetings of the members of the cartel has been to support them, by allowing the cartel to bring together all the important sellers in the Community market and, consequently, to lend the infringement a degree of gravity rarely achieved.

44. All these factors preclude the finding that the Court of First Instance infringed Community law by rejecting Sarrió's argument that it did not participate in a collusion arranged during the meetings it attended.

45. Nevertheless, I do not intend to evade the issue of the validity of paragraph 118 of the contested judgment, namely the attribution of liability to an undertaking merely because it has participated in meetings which clearly have an anti-competitive purpose, if it has not publicly distanced itself from them. Actually I am convinced that an undertaking's participation in such meetings must be taken to mean that it intends to participate in the decisions made, and that it would be impossible to prevent infringements of competition law committed by cartels if it were to be accepted that an undertaking may attend such meetings with impunity. A meeting between directors of undertakings trying to agree on prices or market shares is quite

different from a literary circle, and the representatives of an undertaking who realise, during a meeting, that the agenda is not the one on which they took the decision to participate, are still free to leave the meeting, without even needing to criticise the other participants for leading them into a trap.

46. Nor do I find anything unlawful in the Court's requirement that an undertaking, if its participation in the meeting is not to be considered as participation in an infringement, should publicly distance itself from it. Although Sarrió argues that it may prove difficult to distance oneself in the circumstances, the answer to that is that an undertaking which attends a meeting whose purpose is completely unambiguous takes a deliberate risk and is therefore in no position to claim that it found it difficult to prevent the implementation of that purpose. Moreover, in view of the skill with which the members of the cartonboard cartel concealed their anti-competitive practices, I have no doubt that an undertaking which has become involved in a meeting to whose aims it does not subscribe can adduce evidence that it has distanced itself from an infringement.

47. The main allegation contained in the appellant's second plea should therefore be rejected as unfounded.

48. It is also necessary to reject the complaint, submitted in the alternative, that the Court failed to take into account that there was no evidence whatsoever that the appellant had implemented the decisions taken with regard to stabilising market shares and controlling supply.

49. Sarrió points out that its sales volume has been falling, its market shares have been cut back and it has never arranged production stoppages other than those ordered for technical reasons.

50. With regard to the infringement for which it has been penalised, this evidence is of no consequence. As the contested judgment states, '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' (paragraph 116).

51. In any event, even supposing that this evidence reflects Sarrió's actual conduct, it could not contradict the Commission's conclusions, as the Court points out in paragraph 117 of the contested judgment. It has never been claimed that the collusion regarding market shares led to a complete freeze of these shares and it has always been acknowledged that, prior to 1990, the

restriction of supply by planned production stoppages was not necessary, because demand was brisk, so that the fact that, in 1990 and 1991, Sarrió did not itself stop production as part of the concerted action which the members of the cartel are alleged to have taken, does not prove that it was not involved in it.

52. There is still one final complaint, submitted in the further alternative, to be considered: that the Court of First Instance was wrong to hold that there was a cartel in respect of the freeze on market shares and planned production stoppages, since the only complaint which can be made against Sarrió is that it participated in an exchange of information, the insignificance of which could, at the very most, if we are to believe the appellant, justify only a token fine. We do not need to dwell on this complaint since it is clear, after examining the previous claims, that it conflicts with the facts as established by the Commission and confirmed by the Court of First Instance.

53. All the arguments expounded by the appellant concerning the distinction which must be drawn, with respect both to the gravity of the infringement and to the fine imposed in respect of it, between a mere exchange of information and a cartel are irrelevant since it has been established that, in this case, it did not merely participate in an exchange of information but was actively involved in a collusion on market shares and volume of production, so that there were, in so far as the appellant was concerned, multiple infringements.

54. Finally, the appellant describes as 'disappointing' the reasoning which led the Court of First Instance to hold that its argument contesting the Commission's evaluation of the information exchange scheme, in which it acknowledged taking part, was inadmissible because it was presented for the first time in the reply. In this connection I shall merely point out that the appellant's disappointment is obviously not likely to lead the Court of Justice hearing its appeal to question the validity of the conclusion reached by the Court of First Instance. That conclusion is well founded in law and, as the Commission points out, Sarrió has not submitted any evidence to contradict the finding of the Court of First Instance that this plea appeared only at the reply stage.

55. I therefore propose that Sarrió's second plea be rejected in its entirety.

The third plea: the inadequate statement of reasons in the Decision as regards the fixing of the fine

56. The appellant claims that the Court of First Instance could not, without being inconsistent, hold that the statement of reasons in the Decision was insufficient in

so far as the fine imposed on the appellant was concerned and, at the same time, refuse to annul it on this point.

57. As this criticism is the same as that made by the appellant Mo och Domsjö AB in Case C-283/98 P, I refer, as regards the reasons which justify the rejection of this plea, to the Opinion which I am delivering today in that case.

The fourth plea: the Commission's use of an incorrect method of calculating the amount of the fine

58. By this plea the appellant contests the Court's refusal to agree with its criticism of the method used by the Commission to calculate the amount of the fine imposed on it. Before examining Sarrió's claims point by point, it is expedient to recall the method used.

59. The Commission opted to fix the amount of the fines in ecus. In order to determine the amount, it took into consideration the turnover, expressed in ecus, of the various members of the cartel for 1990, the last full year in which the cartel operated. The conversion into ecus was made using the average rate of exchange during 1990 of the national currencies of the various members of the cartel.

60. Sarrió's first complaint against the contested judgment is that the statement of grounds is defective, in that at no time did the Court of First Instance expressly determine the issue, raised by the appellant, of the discrimination suffered by those undertakings whose national currency had depreciated between 1990, the Commission's year of reference for fixing the amount of the fines, and 1994, the year in which the Decision imposing those fines was adopted.

61. In point of fact, Sarrió's complaint against the Court is that it did not rule on one of its arguments. On that point, I have to share in the Commission's surprise, since the considerations set out in paragraphs 392 to 404 of the contested judgment regarding the method used by the Commission to fix the amount of the fines are, in essence, specifically designed to show that the method makes it possible, by the use of objective data expressed in the same unit of currency, to avoid the distortions which would be the inevitable consequence of using the different national currencies which, over the years, have moved in different directions.

62. Now, what is the aim of using a single unit of currency when fixing the fines to be imposed on the undertakings belonging to a

cartel — depending on the degree of liability of each undertaking — if not to avoid discrimination? Sarrió is wrong to claim that it cannot find a response to an allegation of discrimination in a line of argument which makes every effort to show that the principle of equal treatment has been observed.

63. It is true that Sarrió is entitled to consider that the Court's arguments are not convincing, but it cannot seriously argue that the question of possible discrimination was passed over in the contested judgment.

64. The appellant's second complaint concerns the Court's failure to criticise the Commission's decision to fix the fine according to the turnover of the last full year in which the cartel operated, a decision which introduces a dualism arising from the fact that two turnovers are taken into account, one by reference to which the fine is fixed and one of the last financial year prior to the adoption of the Decision imposing the penalty, which is applied in order to verify compliance with the limit of 10% of the turnover of the penalised undertaking, established by Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty. [5]

5 — OJ English Special Edition (1959-1962), p. 87.

65. To this complaint is added, once again, a complaint relating to the reasoning. Sarrió maintains that the innovative nature of this dualism required particularly detailed reasoning, which it claims not to have found in the Court's arguments on this matter.

66. In fact, the appellant is careful not to state that, by using the turnovers of two different years, the Commission infringed Article 15(2) of Regulation No 17, but seeks to establish that the choice of the turnover for the last year of the cartel's activity, far from ensuring that the fine will reflect the gravity of the infringement and the economic power of the penalised undertakings, risks producing the opposite result.

67. Thus, according to the appellant, if an undertaking's turnover increased significantly during the period between the end of the infringement and the imposition of the fine, the Commission will inevitably be tempted — in order to make sure that, compared with the turnover for the last financial year before the penalty, the amount of the fine does not seem, if not derisory, at least too low, because very much below the 10% threshold fixed by Article 15(2) of Regulation No 17 — to fix the fine by applying a very high rate to the turnover used for that purpose, that is to say, to impose on the undertaking a fine wholly disproportionate to its economic power at the time of the infringement

68. I would say, in the first place, that this argument is not at all convincing.

69. Indeed, as well as the fact that it ascribes very dark designs to the Commission and makes light of the judicial review to which the institution is subject, it completely and wrongly disregards the fact that it only needs the turnover of one member of the cartel to slump, or at least stagnate or fall off, for the Commission, having regard to its obligation to observe the principle of equal treatment and the limit fixed by Regulation No 17, to be prevented from using such tactics, even if it were tempted to do so.

70. However, I should point out above all that it is not a question of determining whether the method used by the Commission is the only one which is admissible or the best, but of ascertaining whether it is admissible, that is to say, whether or not it is rendered inadmissible by Regulation No 17 or the general principles laid down by the case-law of the Court of Justice.

71. Now, on this point, Sarrió is hard put to adduce evidence to cast doubt on the validity of the finding of the Court of First Instance.

72. From my point of view, the Court, by listing the advantages of the method chosen by the Commission to assess both the scale of the infringement and the size and power of its perpetrators, gave a wholly convincing explanation of why the method is not unlawful. In other words, the dualism criticised by the appellant is justified and, even if it were innovative, was adequately justified by the Court of First Instance.

73. The appellant's third and last complaint relates to the Court's refusal to acknowledge the validity of its argument that the fixing of the fine in ecus on the basis of the turnover of the last complete year during which the cartel operated, converted into ecus by applying the average rate of exchange during that year, led to discrimination each time the exchange rates subsequently altered: undertakings whose national currencies appreciated saw the burden of the fine they had to pay lessen in real terms, while those whose currency depreciated saw the burden increase, sometimes, and particularly in the present case, considerably.

74. In Sarrió's view, the method implemented by the Commission, since it made it bear exchange risks, had iniquitous consequences and is therefore unacceptable. It was also unacceptable from a logical point of view, since it was impossible to invoke the need to avoid the repercussions of exchange rate fluctuations in order to justify calculating the fine on the basis of the turnover of the reference year converted into ecus, the currency of reference, not of payment, and at the same time to show no interest in the impact of the fluctuations in

those rates on the amount which the penalised undertaking will actually have to pay in national currency.

75. To examine the validity of this complaint, it is necessary to keep in mind that the Commission has a degree of latitude, which is admittedly not unlimited — Article 15(2) of Regulation No 17 is a reminder of that fact — but which prevents the Court from criticising the method used by the Commission unless it is able to show that it is unlawful.

76. It is therefore pointless for Sarrió to put forward alternatives, more favourable to its own interests, to the method used to fine it, when the issue is not to determine which is the best possible method but to ascertain whether the one which has been implemented is lawful.

77. On this point, Sarrió does not adduce convincing evidence. It is true that it criticises the fixing of the fine in ecus, but Regulation No 17 nowhere prohibits the use of the ecu for fixing the amount of the fine, and the reasons which led the Court of Justice, in its judgment in *Générale Sucrière and Béghin-Say* v *Commission and Others*, [6] to refuse to allow the fine to be fixed in the unit of account no longer apply, as the Court of First Instance points out, since the ecu has a very different status from that of a unit of account.

78. Sarrió also protests against the introduction, into the mechanism for putting an end to infringements, of uncertainty arising from the currency fluctuations, maintaining that such uncertainty is acceptable only in business relations, but it is silent on the fact that the perpetrator of an infringement is subject to many other uncertainties. There is no guarantee that, when the time comes for it to meet its obligations in respect of its past unlawful conduct, it will have the financial resources to prevent the payment causing it significant loss.

79. On a constant turnover, its profit margin may have fallen drastically; it may have borrowed so heavily from banks that it is refused further credit; or, as a consequence of a deterioration in the economic situation, its turnover may have fallen, bringing a drop in income, if its profit margin has remained constant.

80. However, this uncertainty may also bring pleasant surprises. The undertaking may have come though a difficult phase and be enjoying a prosperity which it could not even have envisaged a few years previously.

6 — Joined Cases 41/73, 43/73 and 44/73 [1977] ECR 445.

81. All this cannot alter the gravity of the infringement which the undertaking committed at a certain time, and it is that gravity which determines the extent of the penalty it must pay.

82. The currency uncertainty itself will not necessarily be to the disadvantage of an undertaking whose national currency has depreciated.

83. Consequently, if an undertaking exports a significant proportion of its products to countries with strong currencies, it will have had the opportunity both to increase its market shares, and therefore its turnover in national currency, and to improve its profit margin, since the profits it has made in the export markets will have been converted into the national currency at a more favourable rate.

84. Conversely, undertakings whose national currency has been revalued will have had to make sacrifices as regards profit margin in order to keep their export markets; accordingly, the revaluation of their national currency against the ecu, and the resulting decrease in the fine expressed in national currency, will only offset the increased burden of the fine in the light of the fall in profits.

85. To attempt to remove these uncertainties, which form an integral part of business life, by fixing the fines in national currency or using, only for undertakings whose currency has depreciated, a rate of conversion between the ecu and the national currency other than that of the last year in which the cartel operated, which was chosen in order to assess the gravity of the infringement, would risk introducing other distortions, without promoting equality between the members of the same cartel with regard to the method chosen by the Commission.

86. As the Commission rightly points out, whatever moment is chosen for the application of the ecu/national currency exchange rate, there is a risk of harming one undertaking or the other. Consequently, even the criterion suggested by the appellant, namely, the exchange rate on the date of the Decision, would only cause a wholly fortuitous element of disruption.

87. Furthermore, I agree with the Commission that the point made by the Court of First Instance in paragraph 399 of the contested judgment, concerning the appellant's presence in several markets, is also significant. The appellant thus, simultaneously, enjoyed the advantages and suffered the disadvantages of the exchange rate criterion which is in dispute. Moreover, as a result of selling its products it has received several European currencies, not only pesetas.

88. Finally, I should point out that the uncertainty connected with the fall of a national currency can, in any event, have only limited consequences, since Article 15(2) of Regulation No 17 precludes the amount which the undertaking has to pay from exceeding, at the time the fine is imposed, 10% of the turnover of its last financial year.

89. It cannot therefore but be found that neither the principle nor the impact of the uncertainty criticised by Sarrió is open to question. I therefore propose that the Court reject the appellant's fourth plea in its entirety.

The fifth plea: the reduction in fine made by the Court of First Instance

90. In this plea Sarrió argues that the reduction of ECU 1 500 000 made in the fine by the Court of First Instance is not consistent with the findings it made concerning the appellant's involvement through its subsidiary Prat Carton[7] in the anti-competitive activities attributable to the cartel in the cartonboard sector between 1986 and 1991. Let me begin by pointing out that these findings related both to the duration of that subsidiary's involvement, which the Commission had determined to be 60 months out of 60 and the Court reduced to 9 months, and to the anti-competitive practices in which it had taken part. The Court of First Instance held that Prat Carton could be held responsible for only a participation in the collusion on prices and in the collusion on supply control, whereas the Commission had considered that it was also actively involved in the collusion on freezing market shares.

91. Let us also remember that, in paragraphs 411 and 412 of the contested judgment, the Court of First Instance held:

'Because Prat Carton participated in some only of the constituent elements of the infringement and for a much lesser period than that found by the Commission, the amount of the fine imposed on the applicant must be reduced.

In the present case, as none of the other pleas on which the applicant relies justifies reducing the fine, the Court, exercising its

7 — Sarrió does not object to the fact that it has been held responsible for the conduct of its subsidiary.

unlimited jurisdiction, sets the amount of that fine at ECU 14 million.'

92. Sarrió infers from this — and I think we have to agree with it on this point— that the whole of the reduction it has received in the fine is linked to the errors of assessment made by the Commission in respect of its subsidiary. To demonstrate that the reduction is inadequate, it takes the turnovers of the parent company and of Prat Carton, ECU 224 200 000 and ECU 33 800 000 respectively, and calculates, by breaking down the total amount of the fine imposed by the Commission, ECU 15 500 000, the proportion payable by the parent company, which it assesses at ECU 13 500 000, and the proportion payable by Prat Carton, which it assesses at ECU 2 000 000. Comparing the amount of ECU 2 000 000 with the amount of the reduction, it then argues that, in view of the significance of the correction made by the Court of First Instance in respect of the part played by Prat Carton in the infringement, the reduction in the fine should have been much greater.

93. The Commission rebuts this argument by saying that the Court of First Instance exercised its unlimited jurisdiction, that the Court of Justice sitting in an appellate capacity cannot interfere in the exercise of that jurisdiction and that all Sarrió's calculations are without probative value, since the Commission, with which the Court of First Instance agrees on this point, had imposed an overall fine on Sarrió, not a fine which could be broken down into different amounts corresponding to the conduct of the various constituent parts of the undertaking.

94. However, I take the view, as does Sarrió, that the contested judgment is inconsistent or, to be more specific, contains an inadequate statement of grounds. Admittedly, it is indisputable that the Court of First Instance exercised its unlimited jurisdiction and it is also indisputable that the amount of a fine cannot be fixed by applying a mathematical formula.

95. However, the exercise of unlimited jurisdiction does not relieve the Court of its obligation to state grounds. In this case, if the Court thought that the reduction in the fine should not exceed ECU 1 500 000, on the supposition that the amount was based on the gravity of the infringement committed by Sarrió, it should have given an explanation for this, because the reduction received by Sarrió does not seem prima facie — in the light of the way in which the fines were calculated by the Commission, with which the Court of First Instance agreed in that respect — to be appropriate to the findings made concerning the extent of Prat Carton's involvement in the cartel.

96. I therefore consider that Sarrió's fifth plea is well founded and that the contested judgment should be set aside in so far as it fixed at ECU 14 000 000 the amount of the fine imposed on Sarrió.

97. This annulment should not, in my view, be accompanied by a referral of the case back to the Court of First Instance. The Court of Justice has the information required to draw the proper conclusions, since it is not necessary to discuss the validity of the findings of fact made by the Court of First Instance or to question the general level of the fines. The only issue is whether the Court of First Instance made an adequate reduction in the amount of the fine.

98. I, for my part, do not think so. The fine imposed on Sarrió was calculated by the Commission on the basis of its turnover for 1990 including, of course, that of Prat Carton. Now, the Court of First Instance found that Prat Carton participated in the collusion on prices and on supply control only from June 1990. It therefore has to be acknowledged that, as regards the subsidiary, the reference turnover, which in the Commission's calculation was based on Sarrió's overall turnover, relates to a period during which the undertaking participated in the collusion for only seven months, from June to December, which most certainly raises a problem of consistency.

99. I therefore consider that, in view of the connection between Sarrió's overall turnover and Prat Carton's turnover, the fact that Prat Carton did not participate in one of the elements of the infringement, and the brief duration of its participation, the amount of the fine imposed on Sarrió should be reduced to EUR 13 650 000.

Costs

100. It is clear that the annulment of the contested judgment, even if only on one point, should be reflected in the costs.

101. In the contested judgment, the Court of First Instance ordered the appellant to pay its own costs and also half of the costs incurred by the Commission, and ordered the Commission to pay half of its own costs.

102. I propose that this distribution should be amended and that the appellant should pay its own costs and only two fifths of the costs incurred by the Commission. With regard to the costs relating to the appeal proceedings, I consider it appropriate for the appellant to pay its own costs and two thirds of the costs incurred by the Commission, given that, in my view, most of its pleas should be rejected.

Conclusion

103. In the light of the foregoing arguments, I propose that the Court should:

(1) Set aside the judgment of the Court of First Instance of 14 May 1998 in Case T-334/94 *Sarrió* v *Commission* in so far at it fixed the amount of the fine imposed on the appellant at ECU 14 000 000 and in so far as it ordered the appellant to bear its own costs and to pay half of the costs incurred by the Commission of the European Communities and ordered the Commission of the European Communities to bear half of its own costs;

(2) Set the fine at EUR 13 650 000;

(3) Order the appellant to bear, in respect of the proceedings before the Court of First Instance, its own costs and pay two fifths of the costs incurred by the Commission of the European Communities and, in respect of the proceedings before the Court of Justice, bear its own costs and pay two thirds of the costs incurred by the Commission of the European Communities;

(4) Order the Commission of the European Communities to bear, in respect of the proceedings before the Court of First Instance, three fifths of its own costs and, in respect of the proceedings before the Court of Justice, one third of its own costs;

(5) Dismiss the remainder of the appeal.