JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-280/98 P,

Moritz J. Weig GmbH & Co. KG, established in Mayen, Germany, represented by T. Jestaedt, of the Brussels Bar, and V. von Bomhard, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the Chambers of P. Dupont, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 14 May 1998 in Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by R. Lyal, of its Legal Service, acting as Agent, and D. 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 at first instance,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 23 July 1998, Moritz J. Weig GmbH & Co. KG brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Case

T-317/94 *Weig* v *Commission* [1998] ECR II-1235 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled part of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1, hereinafter 'the Decision') and dismissed the remainder of the application.

Facts

2 In the Decision the Commission imposed fines on 19 producers supplying cartonboard in the Community on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

3 According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the Fédération Française du Cartonnage, and investigations which 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) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

4 The evidence obtained from those investigations and following 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. The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty and, by letter of 21 December 1992, served a statement of objections on each of the undertakings concerned, all of which submitted written replies. Nine undertakings requested an oral hearing.

5 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 2

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.

Article 3

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

...

(xix) Moritz J. Weig GmbH & Co. KG, a fine of ECU 3 000 000;

...'

6 The contested judgment also sets out the following facts:

'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 The Commission found that the applicant, Moritz J. Weig GmbH & Co KG ("Weig"), had participated in meetings of the PC during the period covered by the Decision and in meetings of the JMC and of the PWG from 1988.'

7 Sixteen of the eighteen other undertakings held to be responsible for the infringement and 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, also brought actions against the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94 to T-311/94, 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, and Joined Cases T-339/94 to T-342/94).

The contested judgment

8 As regards the application for annulment of the Decision, the Court of First Instance annulled, as regards the appellant, Article 1 of the Decision in so far as it held that the appellant had participated in an infringement of Article 85(1) of the

Treaty prior to March 1988, and also the first to fourth paragraphs of Article 2 of the Decision, save and except for 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.'

9 The Court of First Instance dismissed the remainder of the application.

10 Before the Court of First Instance, the appellant also put forward eight pleas in law concerning the fixing of the fine. The appeal relates specifically to the grounds of the contested judgment bearing on the fixing of that fine. Having regard to the pleas put forward by the appellant in support of its appeal, only the passages of the contested judgment relevant to the complaints of breach of Article 190 of the EC Treaty (now Article 253 EC), absence of economic effects of the infringements, the excessiveness of the general level of the fines and failure to have proper regard to the appellant's cooperation in the proceedings will be set out below.

The plea alleging infringement of Article 190 of the Treaty

11 The appellant complains, in essence, that the Commission failed to give adequate reasons for its Decision in that the addressee undertakings were not able to ascertain whether the amount of the fine imposed on them was justified or whether the fine was fair in comparison with the fines imposed on the other undertakings.

12 In response the Court of First Instance stated as follows:

'182 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).

183 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

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

185 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". The applicant is not included in the list of the undertakings which were considered to be cartel "ringleaders" and the third paragraph of point 170 of the Decision explains that "although [it] was a member of the PWG from 1988, it does not seem to have played as important a role in the determination of the policy of the cartel as did the major industrial groups". Lastly, in points 171 and 172, the Commission states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings, including the applicant, were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

186 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. The Commission explained that in the applicant's case it had applied a rate of 8% of turnover because, although the applicant was a "member of the PWG", it did not seem to have played as important a role as that of the other undertakings which participated in PWG

meetings. 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.

187 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.

188 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.

189 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). Point 170, third paragraph, of the Decision clearly sets out the grounds for the Commission's assessment of the gravity of the infringement committed by the applicant and shows why it was treated differently from both the "ringleaders" of the cartel and its "ordinary members".

190 Similarly, point 168 of the Decision, which must be read in the light of the general criteria relating to the fines in point 167, contains a sufficient statement of the criteria taken into account in order to determine the general level of the fines.

191 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.

192 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 the press conference of 13 July 1994, the very day on which the 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).

193 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.

194 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.

195 In the specific circumstances set out in paragraph 193 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. Finally, the applicant has not shown that it was prevented from properly asserting its rights of defence.

196 Consequently, this plea cannot be upheld.'

The plea that the infringements had no economic effects

13 According to the appellant, the economic effects of an infringement should have been taken into account when assessing the gravity of the infringement and calculating the amount of the fines (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 359). In the present case, the collusion on prices had no or, at the very most, a negligible effect on the market.

14 The Court of First Instance held in that regard:

'211 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.

212 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, the only effects disputed by the applicant. It is apparent from the Decision that the finding concerning the large measure of success in achieving objectives is essentially based on the effects of collusion on prices (see points 100 to 102, 115, and 135 to 137 of the Decision).

213 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.

214 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.

215 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).

216 The second type of effect consisted in the fact that changes in transaction prices followed those in announced prices. The Commission states that "the producers not only announced the agreed price increases but also with few exceptions took firm steps to ensure that they were imposed on the customers" (point 101, first paragraph, of the Decision). It accepts that customers sometimes obtained concessions in regard to the date of entry into force of the increases or rebates or individual reductions, particularly on large orders, and that "the average net increase achieved after all discounts, rebates and other concessions would always be less than the full amount of the announced increase" (point 102, last paragraph, of the Decision). However, referring to graphs in the LE report, the Commission claims that during the period covered by the Decision there was "a close linear relationship" between changes in announced prices and those in transaction prices expressed in national currencies or converted to ecus. It concludes from this that: "the net price increases achieved closely tracked the price announcements albeit with some time lag. The author of the report himself acknowledged during the

oral hearing that this was the case for 1988 and 1989" (point 115, second paragraph, of the Decision).

217 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.

218 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.

219 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 1988/89, and then the relationship breaks down and behaves rather oddly over the period 1990/91" (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).

220 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.

221 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.

222 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.

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

224 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 assessment 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.

225 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 246 below).'

The plea that the general level of the fines was excessive

15 Before the Court of First Instance, the appellant submitted that the infringement found in this case was not the most serious infringement of Article 85(1) of the Treaty and therefore challenged the general level of the fines, in particular in the light of the Commission's previous decisions.

16 The Court of First Instance replied as follows:

'241 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."

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

243 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*, Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 108, and *ICI* v *Commission*, cited above, paragraph 385).

244 Second, the Commission rightly argues that, on account of the specific circumstances of the present case, no direct comparison could be made between the general level of fines adopted in the present decision and those

adopted in the Commission's previous decisions, in particular in the *Polypropylene* decision, which the Commission itself considered to be the most similar to the decision in the present case. Unlike in the *Polypropylene* case, no general mitigating circumstance was taken into account in the present case when determining the general level of fines. Moreover, the adoption of measures to conceal the existence of the infringement shows that the undertakings concerned were fully aware that their conduct was unlawful. The Commission was therefore entitled to take those measures into account when it assessed the gravity of the infringement because they were a particularly serious aspect of it which differentiated it from infringements previously found by the Commission.

245 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. The applicant's argument that the PG Paperboard carried on lawful activities is irrelevant, because it has already been found that its bodies, in particular the PWG and the JMC, had an essentially anti-competitive object.

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

247 This plea must therefore be rejected.'

The plea that the appellant's cooperation in the proceeding was not properly taken into account

17 The appellant submitted that the Commission should have taken into account the fact that it had replied fully and truthfully to the request for information sent under Article 11 of Regulation No 17, that the immediate discontinuance, as soon as the Commission's investigations were carried out on 23 April 1991, of its participation in the meetings of the PG Paperboard and in any practice which might have constituted an infringement were, according to the case-law and the Commission's practice, a mitigating factor, and that the Commission, when calculating the fine, took no account of the appellant's active cooperation, which had contributed to the speedy conclusion of the procedure.

18 The Court of First Instance held as follows in that regard:

'280 The applicant received a one-third reduction in the fine, because, according to the Decision, in its reply to the statement of objections it did not contest the essential factual allegations relied upon by the Commission against it.

281 A reduction on grounds of cooperation during the administrative procedure is justified only if the undertaking's conduct made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (*ICI* v *Commission*, cited above, paragraph 393). Accordingly, 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. 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.

282 In the present case, none of the arguments upon which the applicant relies can show that its cooperation with the Commission went beyond an acknowledgment of the Commission's factual allegations.

283 In the first part of the plea, the applicant submits that it replied fully and truthfully to the request for information sent to it by the Commission under Article 11 of Regulation No 17. It is, however, settled law that cooperation in an investigation which does not go beyond that which undertakings are required to provide under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine (see, for example, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342). Moreover, the applicant, which participated in the infringement with effect from March 1988 and was therefore aware of the functions of the PWG and JMC, could in fact have cooperated more actively with the Commission, as Stora did, and so have given grounds for a greater reduction in the fine. Its argument that at the material time it lacked the information required in order to provide active assistance to the Commission must therefore be rejected.

284 As regards the second part of the plea, namely that after the investigations had been carried out by the Commission on 23 April 1991... the applicant immediately ceased to participate in meetings of the PG Paperboard and in any practice capable of constituting an infringement, the Court points out that the gravity of infringements falls to be determined by reference to numerous factors and that no binding or exhaustive list of criteria to be applied has been drawn up (see paragraph 183 above). Consequently, although the discontinuance of an infringement before service of the statement of objections may, in principle, be regarded as a factor

mitigating the gravity of the infringement which an undertaking is found to have committed, the Commission was not required to reach such a conclusion in the particular circumstances of this case. Since the applicant has not adduced any argument to show that the Commission exceeded the limits of the discretion which it enjoys when determining which factors should be taken into account in order to fix the amount of the fine, the second part of the plea must be rejected.

285 Nor can the Court uphold the third part of the plea, to the effect that the applicant actively cooperated with the Commission.

286 The applicant submits that it supplied full details of its participation in meetings of the various committees of the PG Paperboard. It points out, moreover, that at the hearing before the Commission it expressly stated that it was not contesting the essential factual allegations levelled against it. However, the Court finds that such cooperation with the Commission did not justify a greater reduction in the fine than the one-third reduction actually made. Mr Roos' statement, which the applicant sent to the Commission with its reply to the statement of objections, did not contain any evidence which could have served to facilitate the Commission's task in a material respect. It suffices to find in that regard that the Decision contains only one — indirect — reference to the information supplied in that statement (point 59, last paragraph).

287 Lastly, in so far as the applicant submits that it has been the subject of discrimination in comparison with Stora and Rena, the Court points out that, in accordance with settled law, the principle of equal treatment, a general principle of Community law, is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche*

[1990] ECR I-2681, paragraph 25; to the same effect Case T-100/92 *La Pietra* v *Commission* [1994] ECR-SC II-275, paragraph 50).

288 In the present case Stora supplied the Commission with statements containing a very detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard and the participation in the infringement of various producers. By those statements, Stora supplied information going well beyond that which may be required by the Commission pursuant to 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 clearly apparent that Stora's statements constituted for the Commission the principal evidence of the existence of the infringement. It must therefore be concluded that without Stora's statements it would at the very least have been much more difficult for the Commission to find and, where necessary, put an end to the infringement with which the Decision is concerned. In the light of those considerations, the applicant cannot validly claim that the principle of equal treatment requires that the reduction in its fine should have been similar to that granted to Stora.

289 Furthermore, since the applicant has not proved that its cooperation with the Commission went beyond an admission of its factual allegations, the applicant was not treated less favourably than the other undertakings which received a one-third reduction in their fine.

290 Having regard to the foregoing considerations, the whole of the plea must be rejected.'

19 After it had rejected all the pleas relied on in support of the application for annulment or reduction of the fine, the Court of First Instance held, in paragraph

305 of the contested judgment, that, as regards the amount of the fine imposed, it was nevertheless necessary to take into account the fact that the applicant could be 'held responsible for infringement of Article 85(1) of the Treaty only in respect of the period from March 1988 until April 1991'.

20 The Court of First Instance, 'exercising its unlimited jurisdiction', set the fine at ECU 2 500 000 (paragraph 306 of the contested judgment).

The appeal

21 In its appeal the appellant submits that the Court should set aside the contested judgment and thus cancel or at least reduce the fine imposed on it.

22 In support of its appeal, the appellant relies on two pleas alleging, first, that the Court of First Instance misconstrued the full extent of the duty to state reasons and, second, infringed the principle of equal treatment, Article 15(2) of Regulation No 17 and Article 172 of the EC Treaty (now Article 229 EC), because it did not reduce the fine sufficiently.

The first plea

23 In its first plea, the appellant complains that the Court of First Instance erred in law in that it did not find that the Decision contained an inadequate statement of reasons and did not annul it on that ground, despite having found in paragraph 188 of the contested judgment that the Commission had failed to set out in the

Decision the factors which it had systematically taken into account in order to set the amount of the fines.

24 The appellant adds that such information should, in accordance with the settled case-law referred to by the Court of First Instance in paragraph 192 of the contested judgment, have been set out in the actual body of the Decision and that, save in exceptional circumstances, explanations given by the Commission to the press or during the proceedings before the Court of First Instance cannot be taken into account. Indeed, the Court of First Instance had specifically found, again in paragraph 192 of the contested judgment, that the Commission had accepted at the hearing that nothing had prevented it from indicating those matters in the Decision. In those circumstances, the Court of First Instance could not take account of the fact that the 'Commission [had] showed itself to be willing to supply any relevant information relating to the method of calculating the fines' (paragraph 195 of the contested judgment).

25 The appellant also states that if it had been aware, when the Decision was adopted, of the method used by the Commission in order to fix the amount of the fines, it would have been possible to submit arguments to the Court of First Instance regarding the application of that method to it. By reason of the deferment of the statement of reasons until the proceedings before the Court of First Instance, the appellant could not adduce arguments at that instance, which meant that it had to contest the calculation of the fine in the course of the appeal before the Court of Justice.

26 The appellant complains, lastly, that the Court of First Instance limited the temporal scope of the interpretation, in regard to the fixing of fines, which it gave as to the requirements of Article 190 of the EC Treaty (now Article 253 EC) in its judgments in *Tréfilunion* v *Commission*, *Société Métallurgique de Normandie* v *Commission* and *Société des Treillis et Panneaux Soudés* v *Commission*, cited above (hereinafter 'the Welded Steel Mesh judgments'), referred to in paragraph 193 of the contested judgment, despite the fact that the Court of Justice has always held that the interpretation which it gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force, save where it is provided to the contrary in the judgment giving that interpretation.

27 The Commission contends, in the light of the case-law of the Court of Justice (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 32 et seq., and the order in *SPO and Others* v *Commission*, cited above, paragraph 54), that both the Commission and the Court of First Instance, where the latter amends the amount of a fine in a specific case in the exercise of its unlimited jurisdiction under Article 172 of the Treaty and Article 17 of Regulation No 17, have a margin of discretion when they determine the amount of the fine. The existence of that discretion implies that it is not absolutely necessary for the statement of reasons to set out in minute detail the method by which the amount of the fine was calculated.

28 The Commission observes that the Court of First Instance held in paragraph 189 of the contested judgment that points 169 to 172 of the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and the duration of the infringement committed by each of the undertakings in question'.

29 Paragraphs 191 to 195 of the contested judgment are, according to the Commission, superfluous. The Commission contends, moreover, that the appellant's reading of the Welded Steel Mesh judgments is incorrect. In those judgments the Court of First Instance found, as it did in the contested judgment, that the statement of reasons for the Commission's Decision was adequate, while expressing the wish that there should be greater transparency as to the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of transparency as amounting to a failure to state adequate reasons for the Commission's Decision. At most, the position adopted by the Court of First Instance reflects the principle of good administrative practice, in the sense that addressees of Decisions should not be forced to bring proceedings before the Court of First Instance in order to ascertain all the details of the method of calculation used by the Commission. However, such considerations could not in themselves constitute a ground of annulment of the Decision.

30 It is necessary, first, to set out the various stages in the reasoning adopted by the Court of First Instance in response to the plea alleging infringement of the duty to state reasons in regard to the calculation of the fines.

31 The Court of First Instance first of all referred, in paragraph 182 of the contested judgment, to the settled case-law to the effect 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 being dependent on the nature of the act in question and on the context in which it was adopted (see, in particular, besides the case-law cited by the Court of First Instance, Case C-22/94 *Irish Farmers Association and Others* v *Ministry for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809, paragraph 39).

32 The Court of First Instance then explained in paragraph 183 of the contested judgment that 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 the infringements depends on numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

33 In that regard, the Court of First Instance held in paragraph 189 of the contested judgment that

'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). Point 170, third paragraph, of the Decision clearly sets out the grounds for the Commission's assessment of the gravity of the infringement committed by the applicant and shows why it was treated differently from both the "ringleaders" of the cartel and its "ordinary members".'

34 The Court of First Instance added in paragraph 190 of the contested judgment that 'point 168 of the Decision, which must be read in the light of the general criteria relating to the fines in point 167, contains a sufficient statement of the criteria taken into account in order to determine the general level of the fines'.

35 However, in paragraphs 191 to 195 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, those statements in paragraphs 189 and 190.

36 According to paragraphs 191 and 192 of the contested judgment, the Decision does not indicate the precise figures systematically taken into account by the Commission in fixing the amount of the fines, albeit it could have disclosed them and this would have enabled the undertakings better to assess whether the Commission had erred when fixing the amount of each individual fine and whether that amount was justified by reference to the general criteria applied. The Court added, in paragraph 193, that according to the Welded Steel Mesh judgments 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.

37 It concluded, in paragraph 195 of the contested judgment, that there had been an 'absence of specific grounds in the Decision regarding the method of calculation of the fines', which was justified in the specific circumstances of the case, namely the disclosure of the method of calculating the fines during the proceedings before the Court of First Instance and the novelty of the interpretation of Article 190 of the Treaty given in the Welded Steel Mesh judgments.

38 Before examining, in the light of the arguments submitted by the appellant, the correctness of the findings by the Court of First Instance regarding the consequences which disclosure of calculations during the proceedings before it and the novelty of the Welded Steel Mesh judgments may have in regard to fulfilment of the obligation to state reasons, it is necessary to determine whether

fulfilment of the duty to state reasons laid down in Article 190 of the Treaty required the Commission to set out in the Decision, not only the factors which enabled it to determine the gravity and duration of the infringement, but also a more detailed explanation of the method of calculating the fines.

39 The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules.

40 First, under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) it has the task of reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 190 of the Treaty, infringement of which renders a decision liable to annulment.

41 Second, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 172 of the Treaty and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons under Article 190 of the Treaty, to be set out in the decision.

42 As regards review of compliance with the duty to state reasons, the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

43 In those circumstances, in the light of the case-law referred to in paragraphs 182 and 183 of the contested judgment, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors

which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.

44 The Court of First Instance correctly held in paragraphs 189 and 190 of the contested judgment that the Commission had satisfied that requirement. It must be observed, as the Court of First Instance observed, that points 167 to 172 of the Decision set out the criteria used by the Commission in order to calculate the fines. First, point 167 concerns in particular the duration of the infringement. It also sets out, as does point 168, the considerations on which the Commission relied in assessing the gravity of the infringement and the general level of the fines. Point 169 contains the factors taken into account by the Commission in determining the amount to be imposed on each undertaking. Point 170 identifies the undertakings which were to be regarded as 'ringleaders' of the cartel, and which should accordingly bear special responsibility in comparison with the other undertakings. Lastly, points 171 and 172 of the Decision set out the effect on the amount of the fines of the cooperation by various manufacturers with the Commission during its investigations in order to establish the facts or when they replied to the statement of objections.

45 The fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the proceedings before the Court of First Instance, is not such as to call in question the findings in paragraphs 189 and 190 of the contested judgment. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in relation to review by the Community court of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision.

46 Admittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 43 of this judgment, *inter alia* by indicating the figures which, especially in regard to

the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement.

47 It may indeed be desirable for the Commission to make use of that possibility in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed. However, as the Commission has submitted, the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons.

48 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 194 of the contested judgment, that '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'. Nor, without contradicting itself in the grounds of its judgment, could it, after finding in paragraph 189 of the contested judgment that the Decision contained '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', then refer, as it did in paragraph 195 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

49 However, the error of law so committed by the Court of First Instance is not such as to cause the contested judgment to be set aside, since, having regard to the considerations, set out above, the Court of First Instance validly rejected, notwithstanding paragraphs 191 to 195 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

50 As there was no obligation on the Commission, as part of its duty to state reasons, to indicate in the Decision the figures relating to the method of

calculating the fines, there is no need to examine the various objections raised by the applicant which are based on that erroneous premiss.

51 The first plea must therefore be rejected.

The second plea

52 By its second plea the appellant complains that the Court of First Instance infringed the principle of equal treatment, Article 15(2) of Regulation No 17 and Article 172 of the Treaty when the Court fixed the fine imposed on it.

53 The second plea is in four parts.

54 In the first two parts, which should be considered together, the appellant complains that the Court of First Instance did not apply the Commission's method of calculation, namely:

relevant turnover × percentage in respect of the gravity of the infringement × percentage in respect of duration (in the present case a maximum of 60 months) = total (basic amount); basic amount - reduction in the event of cooperation = amount of the fine,

even though the Court of First Instance accepted that the method was valid.

55 In those circumstances, the appellant was treated less favourably than the undertakings whose lesser participation in the infringement the Commission had already recognised and on which it had imposed a lower fine in accordance with its formula. That had been the outcome in Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, and Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875.

56 The appellant contends that it was also treated less favourably inasmuch as the Court of First Instance itself applied to other undertakings the Commission's method of calculation and thereby reduced the fines. It refers, to that effect, to the judgments in *Enso Española* v *Commission*, *Gruber + Weber* v *Commission*, cited above, and in Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129 and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751. Although it is true that those judgments do not disclose the way in which the Court of First Instance calculated the reduction in the fines, if account is taken of the criteria adopted by the Court of First Instance (duration of participation in the infringement, relevant turnover, the degree of gravity), the application of the Commission's method, would, according to the appellant, lead to practically the same result. That shows that in those cases the Court of First Instance was influenced by the calculation method adopted by the Commission when it fixed the fines.

57 In the present case, after it had found that the appellant had not participated in the first 22 months of the infringement (the total duration of the infringement being 60 months), the Court of First Instance fixed the fine at ECU 2 500 000, whereas, if it had applied the Commission's formula, it would, according to the appellant, have calculated the new fine as follows:

ECU 56 500 000 × 0.08 × 38/60 = ECU 2 863 (basic amount)

ECU 2 863 000 - ECU 954 000 = ECU 1 909 000 (amount of the fine).

58 The Commission submits that the application for review of the fine, as amended by the Court of First Instance, is inadmissible according to the case-law of the Court of Justice on the ground that the exercise of unlimited jurisdiction involves a global assessment of all the factors in the case, so that it is not possible to carry out such an assessment in appeal proceedings (see *Ferriere Nord* v *Commission*, cited above, paragraph 31, and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34).

59 On the merits, the Commission submits, with regard to the alleged failure by the Court of First Instance to apply the Commission's method of calculation, that the Court of First Instance, as is clear from paragraph 306 of the contested judgment, fixed the fine imposed on the appellant in the exercise of its unlimited jurisdiction, that is to say, using its own power to assess that fine.

60 The Commission adds that, apart from *Enso Española* v *Commission*, cited above, the cases to which the appellant refers do not concern the duration of the infringement, but rather the turnover taken into account by the Commission (*Gruber + Weber* v *Commission* and *Mayr-Melnhof* v *Commission*, cited above) or the fact that less serious participation in the infringement was combined with a shorter duration of the infringement (*BPB de Eendracht* v *Commission*, cited above).

61 In *BPB de Eendracht* v *Commission* a purely arithmetical reduction of the fine by reference to the duration of the participation would have resulted in a reduced fine of ECU 729 167. However, the Court of First Instance imposed a fine of ECU 750 000, in particular because of the undertaking's minor active participation in the infringement. Likewise, in the case of *Enso Española* v *Commission*, cited above, the Court reduced the fine from ECU 1 750 000 to ECU 1 200 000. A reduction in proportion to the duration of the infringement would have resulted in a fine of ECU 1 181 250. Contrary to the appellant's assertion, the Court of First Instance did not use a simple mathematical formula, but fixed the

fine by taking into account all the circumstances of the case in the exercise of its unlimited jurisdiction, as is apparent from paragraph 306 of the contested judgment.

62 It should be observed that the Court of First Instance has unlimited jurisdiction when it rules on the amount of fines imposed on undertakings for infringements of Community law and that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance in the matter (*Ferriere Nord* v *Commission*, cited above, paragraph 31).

63 However, when the amount of the fines imposed is determined the exercise of unlimited jurisdiction must not result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 85(1) of the Treaty.

64 The appellant's complaint alleging infringement of the principle of non-discrimination is based on the premiss that in the judgments in *Buchmann* v *Commission*, *Enso Española* v *Commission*, *Gruber + Weber* v *Commission*, *BPB de Eendracht* v *Commission* and *Mayr-Melnhof* v *Commission*, cited above, the Court of First Instance intended to apply, unlike in its own case, the method of calculation adopted by the Commission.

65 In the absence of any indication to the contrary in the latter judgments, that premiss must be regarded as correct. Although in those judgments the Court of First Instance does not expressly state its intention actually to apply the method of calculation adopted by the Commission, it should be noted that not only did

the Court of First Instance not expressly call in question the correctness of that method, but the amount of the fine imposed by it in each of those judgments corresponds generally to that which would have resulted from application of the method to the new figures adopted by the Court, in particular in regard to turnover, gravity or the duration of the infringement.

66 Thus, in *Enso Española* v *Commission*, cited above, which, as the Commission has stated, is the most similar to the present case in that the Court of First Instance there also reduced the duration of the infringement to be taken into account in order to calculate the fine, but did not uphold any other argument by the applicant which would have justified a reduction of its fine, the Court fixed the fine at ECU 1 200 000, which corresponds approximately to the amount which would ensue if the Commission's method of calculation were applied (ECU 1 150 000).

67 As the Advocate General has observed in point 42 of his Opinion, the amount of the fine imposed on the appellant is clearly an exception to that general approach, but no objective justification for it was given by the Court of First Instance. Although application of the method would have led to an amount of ECU 1 900 000, the Court of First Instance fixed the amount of the fine at the considerably higher amount of ECU 2 500 000. The appellant, which considered that the contested judgment was undoubtedly vitiated by a clerical or calculation error, therefore applied to the Court of First Instance for rectification of the judgment, but its application was rejected by order of the Court of First Instance of 16 September 1998. In that order, the President of the Third Chamber (Extended Composition) of the Court of First Instance stated, notwithstanding the foregoing, that the contested judgment did not contain 'any clerical or calculation error, nor any manifest inaccuracy as to the amount of the fine'.

68 It must therefore be found that in paragraph 306 of the contested judgment the Court of First Instance infringed the principle of equal treatment and the first two parts of the second plea must be upheld.

69 In the third part the appellant complains that the Court of First Instance did not reduce the fine imposed by the Commission after it had found that the Commission had not proved all the alleged economic effects of the infringement on the market.

70 The Commission contends that the Court of First Instance was entitled, in the exercise of its unlimited jurisdiction, to form its own opinion on the appropriate amount of the fine. As the Court found in paragraph 246 of the contested judgment, the fact that the undertakings actually announced the agreed price increases and that the announced prices served as a basis for fixing individual transaction prices sufficed for a finding that the collusion on prices had had both as its object and effect a serious restriction of competition. As justification for the fact that no mitigating circumstances had been taken into account in this case, the Court of First Instance referred, in paragraph 244 of the contested judgment, to the adoption of measures intended to conceal the collusion and, in paragraph 245, to the lengthy duration and obviousness of the infringement which had been committed despite the warning which the Commission's previous decisions should have provided.

71 According to the Commission, the Court of First Instance could therefore, in the exercise of its unlimited jurisdiction, validly conclude that the findings made as to the effects of the infringement did not justify any reduction in the general level of fines fixed by the Commission.

72 It must be observed in that regard that the Court of First Instance set out in paragraph 241 of the contested judgment the considerations contained in the Decision with regard specifically to the gravity of the infringement and then reviewed those considerations.

73 The Court of First Instance held that the Commission was entitled to raise the general level of fines above that in its previous decisions in order to strengthen the deterrent effect of fines (paragraph 243 of the contested judgment) and to take account of the fact that the undertakings concerned had adopted measures to conceal the existence of the collusion, which constitutes 'a particularly serious aspect [of the infringement] which differentiated it from infringements previously found by the Commission' (paragraph 244 of the contested judgment). The Court of First Instance also noted the lengthy duration and obviousness of the infringement of Article 85(1) of the Treaty (paragraph 245 of the contested judgment).

74 It concluded, in paragraph 246 of the contested judgment, that in the light of the foregoing considerations, the fact that the Commission had only partially proved the effects of the collusion on prices could not 'materially effect the assessment of the gravity of the infringement found'. It observed in that regard that '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 is object and effect a serious restriction of competition'.

75 It follows from the foregoing that the Court of First Instance considered, in the exercise of its unlimited jurisdiction, that its findings regarding the effects of the infringement were not such as to alter the Commission's own assessment of the gravity of the infringement, or, more precisely, as to diminish the gravity of the infringement so assessed. It considered, in the light of the specific circumstances of the case and the context in which the infringement took place, as taken into account by the Decision and set out in paragraphs 69 and 70 of this judgment, and in the light of the deterrent effect of the fines imposed, all being factors which could be applied, in accordance with the case-law of the Court of Justice, in assessing the gravity of the infringement (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 106; Order in *SPO and Others* v *Commission*, cited above, paragraph 54, and *Ferriere Nord* v *Commission*, cited above, paragraph 33), that it was not appropriate to reduce the level of the fine.

76 The third part of the second plea must therefore be rejected.

77 In the fourth part of this plea the appellant claims that the Court of First Instance, when reviewing the amount of the fine, failed to assess its cooperation at its true value and in comparison with the conduct of other undertakings which had participated in the cartel.

78 In its letter of 23 March 1993 the appellant expressly offered to cooperate with the Commission; it not only acknowledged the existence of an infringement but also revealed, at hearings before the Commission, details of the nature of the infringement, that is to say, certain price increase initiatives. It was the only undertaking which expressly acknowledged at those hearings that it had committed an infringement.

79 It suffices in that regard to observe, as the Commission has submitted, that the Court of First Instance set out in detail, in paragraphs 280 to 289 of the contested judgment, its reasons for not upholding the objection alleging that the Commission failed to have adequate regard to the appellant's cooperation in the procedure. In reaching that conclusion, the Court of First Instance undertook an assessment of the facts which cannot be questioned in appeal proceedings (see Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 42).

80 The fourth part must therefore be rejected as inadmissible.

81 It follows from the foregoing that the appeal must be upheld in so far as concerns paragraph 306 of the contested judgment and paragraph 3 of the operative part thereof.

82 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, the Court of Justice is to set aside the decision of the Court of First Instance if the appeal is well founded. It may either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. Since the state of the proceedings so permits, final judgment must be given on the amount of the fine to be imposed on the appellant.

The application for annulment

83 Having regard to paragraphs 174 to 305 of the contested judgment and in particular to the fact that the appellant can be held responsible for an infringement of Article 85(1) of the Treaty only in respect of the period from March 1988 to April 1991, the amount of the fine imposed on it should be fixed at EUR 1 900 000.

Costs

84 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

85 As the appellant has been unsuccessful in the majority of its pleas in the appeal, it will be ordered to bear its own costs and to pay two thirds of the Commission's costs relating to the proceedings before the Court of Justice.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Annuls paragraph 3 of the operative part of the judgment of the Court of First Instance of 14 May 1998 in Case T-317/94 *Weig* v *Commission*;**

2. **Fixes at EUR 1 900 000 the amount of the fine to be imposed on Moritz J. Weig GmbH & Co. KG by Article 3 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard);**

3. **Dismisses the remainder of the appeal;**

4. **Orders Moritz J. Weig GmbH & Co. KG to bear its own costs and to pay two thirds of the costs of the Commission of the European Communities before the Court of Justice;**

5. **Orders the Commission of the European Communities to bear one third of its own costs before the Court of Justice.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber