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

14 May 1998 *

In Case T-295/94,

Buchmann GmbH, a company incorporated under German law, established at Rinnthal (Germany), represented by Helmut Braun, Rechtsanwalt, 21 Bergmannstraße, Dresden,

applicant,

v

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

defendant,

* Language of the case: German.

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

(...)

Article 3

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

(...)

(i) Buchmann GmbH, a fine of ECU 2 200 000;

(...)'

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

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

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

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

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

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

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

20 The Decision states that the applicant, Buchmann GmbH ('Buchmann'), took part in some meetings of the JMC and one meeting of the Economic Committee. It is held responsible for participation in the infringement from March 1988 until at least the end of 1990.

Procedure

21 The applicant brought this action by application lodged at the Registry of the Court on 28 September 1994.

22 By separate document lodged at the Court Registry on 14 October the applicant also applied for suspension of the operation of the Decision. By order of 21 December 1994 in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265 the President of the Court dismissed that application.

23 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-301/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

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

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

26 Lastly, an action was also brought by an association, CEPI-Cartonboard, which was not an addressee of the Decision. However, it withdrew its action by letter

lodged at the Registry of the Court on 8 January 1997 and the case was removed from the Register of the Court by order of 6 March 1997 (Case T-312/94 *CEPI-Cartonboard* v *Commission*, not published in the ECR).

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

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

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

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

31 The parties in the cases referred to in paragraph 27 above presented oral argument and gave replies to the Court's questions at the hearing which took place from 25 June to 8 July 1997.

Forms of order sought

32 The applicant claims that the Court should:

— annul the Decision;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including those of the interim proceedings.

The application for annulment of the Decision

The plea alleging a procedural irregularity

Arguments of the parties

34 The applicant submits that, according to the minutes of the hearing before the Commission, the Commission's representative stated in the hearing that the applicant was one of the cartonboard producers which had more or less admitted all the

allegations in the statement of objections. The applicant, which did not take part in that hearing, states that this assertion is incorrect.

35 All the evidence produced at, and after, the oral hearing was therefore obtained illegally, because the other undertakings submitted their observations on the basis of the applicant's alleged acceptance of the abovementioned allegations.

36 The Commission contends that the remark made by its representative at the hearing is correct, because the applicant had in fact acknowledged the essential factual allegations made by the Commission. In any event, the Commission's representative expressly stated that his remarks were subject to correction.

37 Lastly, there is no basis for the view that the Commission did not correctly assess the applicant's participation in the cartel.

Findings of the Court

38 This plea cannot be upheld. Even if the statement by the Commission's representative at the oral hearing before the Commission was incorrect, the applicant merely submits, without producing any supporting evidence, that the evidence set out in the Decision was obtained by the Commission as a result of that statement.

39 In any event, the Commission's representative expressly stated that his remarks were subject to correction (minutes of the oral hearing, p. 12). The undertakings present at the hearing must therefore have been aware that they could not rely on his statement.

The plea that the facts relating specifically to the applicant were incorrectly assessed

Arguments of the parties

40 The applicant contends that the Decision shows that the Commission based itself on incorrect or imprecise findings of fact in several respects. The Commission erred in relying on general findings. The statement of reasons for the Decision should have disclosed how the Commission assessed the constituent elements of the infringement in regard to it and to the other undertakings. The Decision must therefore be considered unlawful.

41 The Commission points out that the infringement concerned a large number of undertakings and took place over a period of almost five years. In such circumstances, the Decision necessarily had to contain relatively general statements concerning the cartel. However, the Decision and the annexes thereto set out the factual allegations made against the applicant (see points 44 et seq., 49 et seq., 74 et seq., and 167 et seq.).

42 Furthermore, the Commission refers to point 116 et seq. of the Decision, which explains that it is unnecessary to show in detail each undertaking's participation in every manifestation of the cartel. Each manifestation was part of an overall plan

which pursued a common objective, and the undertakings which subscribed to that plan therefore automatically participated in the cartel as a whole. The various elements of the infringement were inextricable elements of one and the same overall plan.

Findings of the Court

43 The applicant's arguments must be understood as a submission that the Decision contains an inadequate statement of reasons in regard to its participation in the infringement.

44 It is settled law (Case 24/62 *Germany* v *Commission* [1963] ECR 63, at page 69, Joined Cases 43/82 and 63/82 *VBVB and VBVB* v *Commission* [1984] ECR 19, paragraph 22, and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42) that the statement of the reasons on which a decision adversely affecting a person is based must be such as to enable the Community judicature to exercise its power of review as to the legality of the decision and to enable the person concerned to ascertain the matters justifying the measure adopted, so that he can defend his rights and verify whether the decision is well founded.

45 It follows that a claim that there is no, or only an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the Decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision.

46 In the present case, the Decision refers directly to the applicant in the context of its description of the concerted price increases (points 76, 78 and 79 of the Decision). Moreover, the points of the Decision describing the discussions with an anti-competitive object in the JMC (in particular, points 44 to 46, 58, 71, 73, 84, 85

and 87 of the Decision) necessarily relate to the applicant, which does not dispute having participated in meetings of that body. Lastly, the Decision clearly sets out the reasoning followed by the Commission in reaching its conclusion that the applicant participated in an overall cartel (points 116 to 119 of the Decision).

47 In those circumstances, the statement of reasons for the Decision gave the applicant an adequate indication of the essential elements of fact and of law supporting the reasoning which led the Commission to hold it responsible for an infringement of Article 85(1) of the Treaty.

48 It follows that the plea that the Decision contains an inadequate statement of reasons must be rejected as unfounded.

The plea that there was an error of assessment regarding the duration of the applicant's participation in the cartel

49 In its pleadings the applicant submits that the Commission wrongly took the view that it had participated in the cartel from mid-1986 (point 2 of the Decision), despite the fact that it began to participate in the cartel only in 1988.

50 The applicant did not, however, maintain this plea at the hearing.

The plea alleging an error of assessment as to the applicant's participation in the various bodies and committees of the PG Paperboard

Arguments of the parties

51 The applicant contends that the Commission wrongly assessed its participation in the various bodies of the PG Paperboard. From 1988 onwards it participated only occasionally in JMC meetings. It did not therefore participate in 'a series of secret and institutionalised meetings' (see point 2, first indent, of the Decision). In particular, it did not take part in the JMC meeting of 16 October 1989, to which Appendix 109 to the statement of objections relates (point 82 of the Decision).

52 Nor did it take part in meetings of the PWG or of the PC. In reply to the Commission's assertion in its pleadings that point 42 of the Decision contains an error as it states that all the producers took part in meetings of the PC, the applicant points out that participation in meetings of the PWG and of the PC was regarded as an essential element of the infringement.

53 Lastly, the applicant took part in only one meeting of the Economic Committee, the purpose of which was to visit new plant at Cascades' cartonboard mill.

54 The Commission does not dispute the applicant's assertions as to its participation in the meetings of the various bodies and committees of the PG Paperboard. It is apparent from the Decision that the applicant was not found to have participated in more meetings of bodies of the PG Paperboard than it had itself acknowledged.

55 As regards meetings of the PC, the Commission accepts that point 42 of the Decision wrongly indicates that all the addressees of the Decision participated in that body. That is, however, simply an error, as is shown by point 119 of the Decision and Table 7 annexed thereto. Moreover, participation in the PC meetings was not an essential element of the cartel.

56 The fact that the applicant may not have taken part in the JMC meeting of 16 October 1989 is irrelevant.

57 Lastly, it asserts that it correctly found that the applicant had taken part in only one meeting of the Economic Committee.

Findings of the Court

58 The Commission's finding that the applicant did not participate in PWG meetings is undisputed.

59 According to Table 7 annexed to the Decision, the applicant participated in the JMC. Moreover, the Decision states that the applicant had participated in only one meeting of the Economic Committee since 1986.

60 The frequency of its participation in the JMC meetings is indicated in Table 4 annexed to the Decision. It is apparent from that table that the applicant took part in five JMC meetings between mid-1986 and the end of 1990, all of which took place between February and November 1990. Furthermore, a footnote states that

'Buchmann admits participation from 1988 but no details available before 1990'. Table 4 also shows that the Commission took the view that the applicant did not participate in the JMC meeting of 16 October 1989.

61 Lastly, as regards its participation in PC meetings, it is apparent from the Decision, when read as a whole, that the sentence in the first indent of point 42 stating that 'all the undertakings to which this Decision is addressed were represented in the President Conference' is, as the Commission accepts, erroneous. It suffices to find in that regard that the applicant does not appear in Tables 3 and 7 annexed to the Decision in the list of undertakings which took part in PC meetings.

62 The applicant's participation in JMC meetings, the dates of the meetings in which the Commission found that the applicant had taken part, and its participation in one meeting of the Economic Committee have not been disputed. The Court therefore finds that the Commission has duly proved that the applicant participated in the bodies of the PG Paperboard.

63 This plea must therefore be rejected as unfounded.

The plea alleging error of assessment as to the applicant's participation in the cartel's activities

Arguments of the parties

64 The applicant submits that the Commission wrongly took the view that it had participated in measures to control volumes and to freeze market shares at existing

levels. The applicant always produced at full capacity during the period in question, and never stopped its machines or sold its products outside the Community. On the contrary, it was able to double its turnover on the French market through an aggressive pricing policy. Furthermore, it never took part in the PWG, the body in which, according to point 56 of the Decision, market shares were discussed.

65 As regards its alleged participation in the price initiatives, the applicant states, referring to point 38 of the Decision and its own letter to the Commission of 2 November 1991, that it never asked for the price increase information which it received from Feldmühle. Furthermore, the information supplied unilaterally by Feldmühle did not influence its behaviour and Feldmühle's often increased its prices by a lesser amount, or implemented them later, than had been indicated in that information. Contrary to the Commission's assertion, the applicant was not fully aware of its competitors' behaviour.

66 Nor was the applicant subject to any price discipline. That is confirmed by the fact that it was able to increase its market shares in Germany and abroad. Consequently, the assertion in the last subparagraph of point 136 of the Decision that 'the perceived laggards [were] urged to support the price increases by the market leaders' is incorrect in regard to the applicant.

67 More specifically, the applicant is not one of the undertakings which, according to point 77 of the Decision, participated in the price increase in France between February and April 1998. Nor does the report on prices in the note discovered at FS-Karton (Appendix 115 to the statement of objections) relate to it, because there is no mention of it in the list of prices charged to the major customers in Germany.

68 Lastly, it never took part in the exchanges of information on order entries and order backlogs, did not supply such information to Fides or to any other person, and did not receive any of those statistics. Point 82 of the Decision states, however, that the exchange of information on order backlogs was an important element of the cartel. Moreover, the Commission relied on the incorrect finding that the applicant had actually taken part in the information exchange in question (see points 2, 116 and 134 of the Decision) and, in particular, in monitoring the level of order backlogs.

69 The Commission states that the Decision and its annexes set out the facts alleged against the applicant as regards the measures taken to control supply and to fix market shares (see points 44 et seq., 49 et seq., 74 et seq., and 167 et seq.).

70 Furthermore, point 116 et seq. of the Decision explain that it is unnecessary to demonstrate in detail each undertaking's participation in each element of the cartel. Each element was part of an overall plan pursuing a common objective, and the undertakings which subscribed to that overall plan therefore necessarily took part in the cartel as a whole.

71 The JMC performed an extremely important function in the cartel, because its task was, *inter alia*, to determine whether and, if so how, it was possible to impose price increases. The practical aspects of implementing the proposed price increases were also discussed and planned in the JMC. That body was also responsible for actually implementing the price initiatives. The applicant's regular participation in its meetings therefore justified the objection made against it. Given the nature of the discussions in the JMC, its meetings inevitably dealt with volume control and market sharing. In the absence of any evidence to the contrary, it must therefore be

concluded that the applicant subscribed to the agreements adopted at those meetings (Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraphs 56 and 66 et seq.).

72 The fact that the applicant may not have participated in all the measures in question is irrelevant. Even though those measures principally concerned the major producers, they could not be separated from the measures adopted in regard to price increases (see Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 287, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 272). The producers' awareness that the price increases could not be imposed if there was an excess of supply was the very reason why the cartel extended to volume control and why a 'price before tonnage' policy was expressly raised.

73 The applicant's argument that it did not take downtime and that it used its production capacity are also irrelevant, since point 70 et seq. of the Decision expressly describes how the industry operated at full capacity in 1988 and 1989 and how the producers encouraged the taking of downtime in 1990. Furthermore, since the agreements indisputably related to volume control, the extent to which the applicant contributed to the observance of those agreements has no bearing on the question of its participation in them (*Rhône-Poulenc* v *Commission*, cited above, paragraph 125, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraphs 291, 293 and 305).

74 The Commission states that the applicant does not dispute that it participated in the price initiatives, as listed in the appendices to the Decision. The Commission has never alleged that the applicant participated in the February-April 1988 price increase in France. The applicant did, however, take part in all the price increases in Germany over the relevant period.

75 Furthermore, the applicant's assertion that the information received from Feldmühle did not influence its behaviour does not alter the fact that as a result of its participation in the JMC meetings it always knew how its competitors would behave.

76 Lastly, as regards the exchange of information, the Commission accepts that the applicant did not inform Fides of its order entries and order backlogs. However, point 69 of the Decision explains that it was regular practice for the producers to disclose information on their order backlogs in JMC meetings. That is confirmed by a note discovered at the premises of FS-Karton (Appendix 115 to the statement of objections; see point 92 of the Decision) which contains information on percentage market shares, the level of order backlogs of particular undertakings, and data on prices and planned price increases.

77 The applicant solely disputes that it received Fides' statistics, not that it received such information from another source (letter to the Commission of 5 August 1991, point 6(c)).

Findings of the Court

78 According to Article 1 of the Decision, the undertakings referred to therein infringed Article 85(1) of the Treaty by participating, in the case of the applicant from about March 1988 until at least the end of 1990, in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the Community, *inter alia*, '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', and 'increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the said concerted price rises'.

79 It therefore follows that, according to the Decision, each of the undertakings referred to in Article 1 infringed Article 85(1) of the Treaty by participating in a single infringement consisting of collusion on three matters which were different but which pursued a common objective. Those three types of collusion must be regarded as the constituent elements of the overall cartel.

80 It is common ground that the applicant did not participate in an infringement of Article 85(1) of the Treaty before March 1988. The applicant does not dispute that it participated in five JMC meetings between February 1990 and the end of that year and in one meeting of the Economic Committee in February 1990.

81 As regards the applicant's actual conduct on the market between March 1988 and the end of 1990, it is apparent from the Decision that the Commission considers that it has evidence showing that the applicant took part in the concerted price increases in Germany in March/April 1988, October 1988, April 1989, October 1989 and April 1990.

82 In those circumstances, before examining the applicant's arguments concerning the Fides information exchange system, it is necessary to determine whether the Commission has shown that during the relevant period the applicant took part in the three constituent elements of the infringement, that is to say, collusion on prices, downtime and market shares,

— The applicant's participation in collusion on prices

83 According to the Commission, the main purpose of the JMC was, from the outset:

'— to determine whether, and if so how, price increases could be put into effect and to report its conclusions to the PWG,

— to work out the details of the price initiatives decided by the PWG on a country-by-country basis and for the major customers with the aim of achieving an equivalent (i. e. uniform) price system in Europe ...' (point 44, last paragraph, of the Decision).

84 More specifically, the Commission maintains in the first and second paragraphs of point 45 of the Decision, that:

'This committee discussed market-by-market how the price increases agreed by the PWG were to be implemented by each producer. The practicalities of bringing proposed price increases into effect were addressed in "round table" discussions, with each participant having the chance to comment on the suggested increase.

Difficulties in the implementation of price increases decided by the PWG, or the occasional refusal to cooperate, were reported back to the PWG, which then (as Stora put it) "sought to achieve the level of cooperation considered necessary". Separate reports were made by the JMC for GC and GD grades. If the PWG modified a pricing decision on the basis of the reports it had received back from the JMC, the steps necessary to implement it would be discussed at the next meeting of the JMC'.

85 The Court finds that the Commission was entitled to refer to Stora's statements (appendices 35 and 39 to the statement of objections) as support for those findings as to the object of the meetings of the JMC.

86 Moreover, even if the Commission does not possess any official minutes of a meeting of the JMC, it obtained from Mayr-Melnhof and Rena some internal notes relating to the meetings of 6 September 1989, 16 October 1989 and 6 September 1990 (appendices 117, 109 and 118 to the statement of objections). Those notes, the tenor of which is given in points 80, 82 and 87 of the Decision, set forth the detailed discussions held during those meetings relating to concerted price initiatives. They therefore constitute evidence which clearly corroborates the description of the JMC's functions given by Stora.

87 In that regard, it suffices to refer by way of example to the note obtained from Rena regarding the JMC meeting of 6 September 1990 (Appendix 118 to the statement of objections), in which it is stated, *inter alia*:

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

F	FF 40
NL	NLG 14
D	DM 12
I	LIT 80
B	BF 2.50
CH	SF 9
GB	£ 40
IRL	£ 45

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

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

88 As the Commission explains in points 88 to 90 of the Decision, it was also able to obtain internal documents supporting the conclusion that the undertakings, and in particular those named in appendix 118 to the statement of objections, actually announced and implemented the agreed price increases.

89 Even though the documents on which the Commission relies concern only a small number of the JMC's meetings held during the period covered by the Decision, all the available documentary evidence corroborates Stora's statement indicating that the main object of the JMC was to determine and plan the implementation of concerted price increases. The almost total absence of minutes, whether official or internal, of the meetings of the JMC must be regarded as sufficient proof of the Commission's assertion that the undertakings which participated in the meetings attempted to hide the true nature of the discussions in that body (see, in particular, point 45 of the Decision). In those circumstances, the burden of proof has been reversed and it is for the addressees of the Decision which participated in the meetings of that body to prove that it had a lawful object. Since such proof was not adduced by those undertakings, the Commission was entitled to consider that the discussions which the undertakings held in the meetings of that body had a principally anti-competitive object.

90 As regards the applicant's own position, its participation in five JMC meetings of over a period of approximately eleven months must, in the light of the foregoing and notwithstanding the lack of documentary evidence relating to the discussions

which took place at those five meetings, be regarded as sufficient proof of its participation in collusion on prices during that period.

91 That finding is borne out by the documents, to which the Commission refers, relating to the applicant's actual conduct in regard to prices. The applicant does not dispute the correctness of the information in the tables annexed to the Decision, setting out the amounts of the price increases, the date of their announcement and the date of their entry into force. It is clear from those tables that, during the period of its alleged responsibility for the infringement, the applicant announced and implemented price increases on the German market which corresponded, in their amounts, date of announcement and date of implementation, to the decisions adopted in the PG Paperboard.

92 The Court rejects the applicant's argument that its behaviour was not influenced by the information on price increases received from Feldmühle. First, its admission that it received information on prices corroborates Stora's statement that 'smaller German companies producing GD grades that were not represented at PWG meetings, including Buchmann and [Laakmann], were from time to time informed of their outcome by one of the German-speaking companies attending such meetings, i. e. Feldmühle, Mayr-Melnhof, Weig' (Appendix 38 to the statement of objections). Second, the assertion that it behaved autonomously on the market is unsupported by the particulars contained in that regard in the Decision, which have not been contested by the applicant.

93 The Commission has therefore proved that the applicant participated in collusion on prices from March 1988 until the end of 1990.

— The applicant's participation in collusion on downtime

94 According to the Decision, the undertakings present at PWG meetings participated, from the end of 1987, in collusion on downtime and downtime was actually taken as from 1990.

95 It is apparent from point 37, third paragraph, of the Decision that the true purpose of the PWG, as described by Stora, 'included "discussions and concertation on markets, market shares, prices, price increases and capacity"'. Moreover, referring to 'the agreement reached in the PWG during 1987' (point 52, first paragraph, of the Decision), the Commission states that that agreement aimed in particular to maintain 'constant levels of supply' (point 58, first paragraph, of the Decision).

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

97 The Decision also states: 'However, the PWG did not formally allocate the "downtime" to be taken by each producer. According to Stora, there were practical difficulties in reaching a coordinated plan on downtime to cover all the produc-

ers. Stora says that for these reasons only "a loose system of encouragement existed"' (point 71 of the Decision).

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

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

100 The Commission also bases its conclusions on Appendix 73 to the statement of objections, a confidential note dated 28 December 1988 from the marketing director of the Mayr-Melnhof Group in Germany (Mr Katzner) to the general manager of Mayr-Melnhof in Austria (Mr Gröller) concerning the market situation.

101 According to that document, referred to in points 53 to 55 of the Decision, the closer cooperation within the 'Presidents' grouping' ('Präsidentenkreis') decided

on in 1987 had produced 'winners' and 'losers'. The expression 'Presidents' grouping' was interpreted by Mayr-Melnhof as a general reference to both the PWG and the PC, that is to say, without reference to a specific event or meeting (appendix 75 to the statement of objections, point 2. a). It is unnecessary to consider that interpretation in the present context.

102 The reasons adduced by the author of the note in order to explain why he considered Mayr-Melnhof to be a 'loser' at the time when the note was written are significant evidence of the existence of collusion on downtime between the participants in the PWG meetings.

103 The author states:

> '(4) It is at this point that there begins to be a difference in opinion between the parties involved as to what is desired.
>
> [...]
>
> (c) All sales representatives and European agents were released from their quantity budgets and a pricing policy followed which admitted of practically no exceptions (our employees often did not understand our changed attitude to the market — in the past they were just required to go for tonnage and now the sole objective is price discipline with the danger of having to stop machines).'

104 Mayr-Melnhof states (appendix 75 to the statement of objections) that the passage reproduced above refers to its own internal situation. However, when considered in the light of the more general background to the note, that passage reflects the

implementation, at the level of sales personnel, of a rigorous policy adopted within the 'Presidents' grouping'. The document must therefore be construed as meaning that the participants in the 1987 agreement, that is to say, the participants in the meetings of the PWG at least, undoubtedly weighed up the consequences the agreed policy would have if it were to be applied rigorously.

105 On the basis of the foregoing, the Commission has proved that there was collusion on downtime between the participants in the meetings of the PWG.

106 According to the Decision, the undertakings which participated in the meetings of the JMC, the applicant amongst them, also took part in that collusion.

107 In that regard the Commission states, *inter alia*: 'Besides the Fides procedure which gave globalised figures, it was regular practice for each individual producer to disclose its own order backlog to competitors in JMC meetings.

This information on the number of days' orders in hand was relevant for two purposes:

— deciding whether conditions were right for introducing a concerted price increase,

— determining the downtime necessary to maintain the supply-demand balance ...' (point 69, third and fourth paragraphs, of the Decision).

108 The Commission also observes as follows:

'The unofficial notes made of two JMC meetings, one in January 1990 (see recital 84), the other in September 1990 (recital 87), as well as other documents (recitals 94 and 95) confirm, however, that the major producers kept their smaller competitors closely and continuously informed in the PG Paperboard of their plans to take additional downtime as an alternative to decreasing prices' (point 71, third paragraph, of the Decision).

109 The documentary evidence relating to the JMC meetings (appendices 109, 117 and 118 to the statement of objections) confirm that discussions on downtime took place in the context of the preparation of concerted price increases. In particular, Appendix 118 to the statement of objections, a Rena note dated 6 September 1990 (see also paragraph 87 above), refers to the amounts of price increases in several countries, the dates for the future announcements of those increases and the state of the order backlogs expressed in working days for several manufacturers. The author of the document notes that certain manufacturers were providing for downtime, which he illustrates as follows:

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

110 Moreover, although appendices 109 and 117 to the statement of objections do not contain any information relating directly to the downtime envisaged, they show that the state of order backlogs and order entries were discussed at the JMC meetings of 6 September 1989 and 16 October 1989.

111 Those documents, read in conjunction with Stora's statements, constitute sufficient proof of participation in collusion on downtime by the producers represented at the JMC meetings. The undertakings participating in collusion on prices were necessarily aware that the object of examining the state of order backlogs and order entries and discussions on possible downtime was not merely to determine whether the market conditions were favourable to a concerted price increase but also to determine whether downtime was necessary in order to avoid the agreed price level being jeopardised by an excess of supply. In particular, it is apparent from appendix 118 to the statement of objections that the participants in the JMC meeting of 6 September 1990 agreed on the announcement of an imminent price increase, even though several producers had stated that they were preparing to stop production. Consequently, the market conditions were such that the effective application of a future price increase was going to require, in all probability, that (additional) downtime be taken, and this is therefore a consequence which was accepted, at least implicitly, by the producers.

112 On that basis, and without the need to consider the other evidence on which the Commission relies in the Decision (appendices 102, 113, 130 and 131 to the statement of objections), the Court finds that the Commission has proved that the undertakings participating in the meetings of the JMC and in the collusion on prices took part in collusion on downtime.

113 The applicant must therefore be considered to have participated, from March 1988 until the end of 1990, in collusion on downtime.

(c) The applicant's participation in collusion on market shares

114 The applicant disputes that it participated in collusion on market shares, but does not challenge the assertion in the Decision that the producers which participated in the PWG meetings reached an agreement which provided for 'the "freezing" of the west European market shares of the major producers at existing levels, with no attempts to be made to win new customers or extend existing business through aggressive pricing' (point 52, first paragraph, of the Decision).

115 In those circumstances, the Court points out that, as regards the undertakings which did not participate in the meetings of the PWG, the Commission states as follows:

'While the smaller cartonboard producers attending meetings of the JMC were not privy to the detailed discussions on market shares in the PWG, they were, as part of the "price before tonnage" policy to which they all subscribed, well aware of the general understanding between the major producers to maintain "constant levels of supply" and no doubt of the need to adapt their own conduct to it' (point 58, first paragraph, of the Decision).

116 Although it does not emerge expressly from the Decision, the Commission is in this respect confirming Stora's statements according to which:

'Other producers who did not participate in the PWG were not generally informed of the detail of the market share discussions. Nevertheless, as part of the price before tonnage policy in which they participated, they would have been

aware of the understanding by the major producers not to undermine prices by maintaining constant levels of supply.

As regards the supply of GC [cartonboard], in any event, the shares of the producers who did not participate in the PWG were of such an insignificant level that their participation or non-participation in the market share understandings had virtually no impact one way or the other' (appendix 43 to the statement of objections, point 1.2).

117 The Commission, like Stora, is therefore proceeding from the assumption that, even in the absence of direct evidence, the undertakings which did not participate in meetings of the PWG but which have been proved to have subscribed to the other constituent elements of the infringement set out in Article 1 of the Decision must have been aware of the existence of collusion on market shares.

118 Such a line of reasoning cannot be accepted. First, the Commission does not rely on any evidence to show that the undertakings which were not present at the meetings of the PWG subscribed to a general agreement providing, in particular, for the freezing of the market shares of the main producers.

119 Second, the mere fact that those undertakings participated in collusion on prices and collusion on downtime does not demonstrate that they also participated in collusion on market shares. Contrary to the Commission's apparent claim, the collusion on market shares was not intrinsically linked to collusion on prices and/or collusion on downtime. It suffices to point out that the aim of the collusion on market shares by the main producers who met in the PWG was, according to the Decision (point 52 et seq.), to maintain market shares at constant levels, with occasional amendments, even during periods in which market conditions, and in particular the balance between supply and demand, were such that it was unnecessary to control production in order to guarantee the effective implementation of the

agreed price increases. It follows that any participation in collusion on prices and/or collusion on downtime does not show that the undertakings which were not present at the meetings of the PWG participated directly in collusion on market shares, or that they were, or necessarily should have been, aware of it.

120 Third, in the second and third paragraphs of point 58 of the Decision, the Commission relies, as additional evidence to support the assertion in question, on appendix 102 to the statement of objections, a note obtained from Rena which, according to the Decision, relates to a special meeting of the Nordic Paperboard Institute ('NPI') held on 3 October 1988. It suffices to state that the applicant was not a member of the NPI and that the reference in that document to a possible need to take downtime cannot, for the reasons already stated, constitute evidence of collusion on market shares.

121 In order to be entitled to hold each addressee of a decision, such as the present decision, responsible for an overall cartel during a given period, the Commission must demonstrate that each undertaking concerned either consented to the adoption of an overall plan comprising the constituent elements of the cartel or that it participated directly in all those elements during that period. An undertaking may also be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel. Where that is the case, the fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 85(1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed.

122 In the present case, the Court finds that the Commission has not proved that the applicant knew, or must have known, that its own unlawful conduct was part of an

overall plan which included, over and above the collusion on prices and the collusion on downtime in which it actually participated, also collusion on the market shares of the major producers.

123 The eighth indent of Article 1 of the Decision, according to which the object of the agreement and concerted practice in which the applicant participated was to '[maintain] the market shares of the major producers at constant levels, subject to modification from time to time', should therefore be annulled as regards the applicant.

— The applicant's arguments concerning the Fides information exchange system

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

125 As regards the Fides information exchange system, the Decision must, in view of its operative part and the third paragraph of point 134, be interpreted as meaning that the Commission considered that system to be contrary to Article 85(1) of the Treaty because it supported the cartel.

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

— monitoring market share development,

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

— deciding whether concerted price increases could be introduced,

— determining the necessary downtime'.

127 The Commission does not dispute the applicant's assertion that it did not supply information on order entries and order backlogs to Fides. Nor does the Decision assert that the applicant supplied such information to Fides. The Commission merely finds, in point 61, second paragraph, of the Decision, that 'most of the members of the PG Paperboard' supplied information to Fides.

128 As the Fides information exchange system was considered contrary to Article 85(1) of the Treaty only because it supported the cartel found, the fact that the applicant did not supply information to that system is not, in itself, relevant. On the other hand, it is necessary to examine whether the applicant took part in discussions concerning the Fides statistics, as a means of supporting the anti-competitive activities in which it is shown to have participated.

129 The Court points out in that regard that in a letter of 5 August 1991, sent to the Commission in reply to a request for information under Article 11 of Regulation

No 17, the applicant admitted that it took part in discussions concerning the Fides statistics, a fact which it acknowledged again at the hearing. As regards the discussions which took place in the JMC meetings, it states in that letter (point 6(c)): 'Discussions took place in particular on the Fides statistics [...]. In addition, reports on the activities of individual undertakings took up a great deal of time. Fides' current statistics relating to order entries, order backlogs, sold and unsold stocks in comparison with the production capacity of the companies which supplied information were of great interest to us; as we did not participate in the relevant supply of information to Fides, we did not receive those statistics from it.'

130 Moreover, the applicant does not assert that the statement in the Decision as to the use of the Fides statistics for anti-competitive purposes (see paragraph 126 above) is incorrect.

131 In those circumstances, it has been proved that the applicant participated in an exchange of information regarding, *inter alia,* order entries and order backlogs in support of the anti-competitive acts in which it is proved that it participated.

132 It follows from the foregoing that the eighth indent of Article 1 of the Decision must be annulled as regards the applicant and that the remainder of the plea must be rejected.

The plea that the Commission wrongly took the view that the applicant had not contested the main factual allegations

133 The applicant submits that the Commission wrongly asserted that it was one of the producers addressed by the Decision which 'did not seek in their written submissions to contest the main factual allegations made against them in the statement of objections' (point 107 of the Decision).

134 This plea must be rejected.

135 The applicant has not explained how any error in the Decision in that regard could have affected its legality. It does not submit that it was prevented from contesting the Commission's factual allegations in the administrative procedure before the Commission or in the proceedings before the Court.

The application for annulment or reduction of the fine

The pleas concerning matters dealt with in the course of common argument

136 At the informal meeting on 29 April 1997 the undertakings which had brought actions to contest the Decision were requested to consider whether they wished to present common oral argument in the event that the cases were joined for the purposes of the oral procedure. It was stressed that oral argument could be presented in common only by applicants which had actually relied on pleas in their applications which corresponded to the subjects to be dealt with in common argument.

137 By fax of 14 May 1997, lodged in the name of all the applicants, those applicants informed the Court of their decision to deal with six subjects in common oral argument, including the following:

(a) the description of the market and the cartel's lack of effects;

(b) the general level of fines and the statement of reasons in that regard in the Decision;

and

(c) the legality of the reductions made by the Commission in the amount of the fines.

138 The applicant's application contains certain remarks relating to the statement of reasons of the Decision in regard to the fines (see paragraph 158 below). On the other hand, it does not contain any plea or argument relating to the description of the market and the cartel's lack of effects, the general level of the fines, or the legality of the reductions made by the Commission in the amount of the fines. The applicant nevertheless stated at the hearing that it adopted the common oral argument in question.

139 The Court points out that under the first subparagraph of Article 48(2) of the Rules of Procedure no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure. In the present case, the applicant has not relied on any matter of law or of fact which has come to light during the procedure such as to justify the submission of the new pleas in question.

140 Those pleas, on which the applicant relied for the first time at the hearing, are therefore inadmissible.

The plea alleging that turnover from the sale of greyboard was erroneously taken into account for the purpose of calculating the fine

Arguments of the parties

141 At the hearing the applicant contended that the Commission had taken an incorrect turnover figure into account in order to calculate the fine. It observed that, according to the Commission's reply to a written question from the Court, the amount of each fine was fixed on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking referred to in Article 1 of the Decision.

142 The Commission erroneously took into account the applicant's turnover in 1990 from a product with which the Decision was not concerned, namely greyboard (see point 4, second paragraph, of the Decision).

143 By letter of 28 August 1991, sent to the Commission in reply to a request for information under Article 11 of Regulation No 17, the applicant sent details of its turnover from sales of cartonboard in 1990. It stated in that letter that its worldwide turnover in cartonboard products was approximately DM 156 million, of which DM 154 million related to the Community market. That letter made it clear that approximately 17% of those amounts was attributable to sales of cartonboard other than FBB cartonboard (see the definitions of the various cartonboard grades in point 4 of the Decision). The Commission should therefore have made further enquiries of it in order to obtain more precise details of turnover solely from products with which the proceedings were concerned.

144 Since it did not know how the fines had been calculated until it received the Commission's reply to a written question from the Court concerning the calculation method, the applicant could not challenge the Commission's error in its application.

145 In reply the Commission states that the applicant's letter of 28 August 1991 does not contain a breakdown of turnover by reference to cartonboard grades. Furthermore, although it is apparent from that letter that the turnover indicated was not solely attributable to sales of FBB cartonboard, the Decision does not relate to that type of cartonboard alone (see point 4 of the Decision). Lastly, the statement of objections expressly states that the proceedings did not concern greyboard. In those circumstances, it was entitled to rely on the figure supplied by the applicant.

Findings of the Court

146 As the Court has already pointed out, under the first subparagraph of Article 48(2) of the Rules of Procedure no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

147 The Court rejects the applicant's argument that this plea is based on matters which have come to light in the Commission's reply to a written question from the Court.

148 It is apparent from the third indent of the first paragraph of point 169 of the Decision that in order to calculate the fine imposed on each undertaking the Commission took into account, *inter alia*, turnover in cartonboard. Furthermore, the

Commission states, in the first and second paragraphs of point 4 of the Decision, that the Decision is concerned with GC, GD and SBS cartonboard and that other products, such as greyboard, 'do not fall within the definition of "cartonboard" as used by the producers themselves and are not the subject of the present proceedings.'

149 The applicant could not therefore have been unaware of the fact that the Commission had determined the amount of each fine on the basis of each undertaking's turnover in 'cartonboard', that is to say, the turnover of each undertaking from sales of the products with which the Decision was concerned, excluding, in particular, turnover from sales of greyboard.

150 Furthermore, the individual particulars annexed to the statement of objections contain a reference to the applicant's turnover in cartonboard in the years 1988 to 1990. It follows that the Commission understood the applicant's letter of 28 August 1991 to mean that the figures supplied by it referred solely to the products to which the proceedings related. The turnover figures sent by the applicant made no distinction between cartonboard products.

151 Lastly, as the applicant has not submitted that the Commission had details — possibly regarding a year other than 1990 — of the applicant's turnover solely from sales of products to which the Decision relates, it had all the information necessary to submit the present plea when it brought this action.

152 This plea must therefore be rejected as inadmissible.

The plea that the applicant's worldwide turnover was wrongly taken into account

153 At the hearing the applicant contended that it is clear from the table relating to the calculation of the fines, which the Commission submitted in reply to a written question from the Court, that its own fine was fixed on the basis of its turnover from sales of cartonboard worldwide (ECU 76.2 million, or approximately DM 156 million) and not on the basis of its turnover from cartonboard sales in the Community (ECU 75.1 million, or approximately DM 154 million).

154 The Commission merely submits that this contention is incorrect.

155 The Court finds that the table produced by the Commission shows that, when it determined the amount of the fine to impose on the applicant, the Commission took a turnover figure of ECU 76.2 million as the basis for its calculation. It is apparent from the individual particulars annexed to the statement of objections that this figure corresponds to the applicant's turnover from sales of cartonboard worldwide in 1990. It is also apparent from the individual particulars that the Commission was aware of the applicant's turnover in cartonboard in the Community in 1990.

156 In accordance with the principle of equal treatment, which requires that comparable situations should not be treated differently unless such treatment is objectively justified, the Commission should therefore have taken into account, as it did in regard to the other undertakings referred to in Article 1 of the Decision, the applicant's turnover in cartonboard in the Community in 1990, namely ECU 75.1 million, and not its worldwide turnover. Only when it became aware of the manner in which the Commission had calculated the amount of each fine was the applicant able to establish that, in its case, the Commission had taken turnover into

account on a different basis from that applied to the other undertakings concerned by the Decision. Having regard to the fact that its turnover from sales of cartonboard in the Community in 1990 was ECU 1.1 million less than from sales of that product worldwide in 1990, a reduction in the fine is therefore justified.

157 The Court will take that finding into account when exercising its unlimited powers in regard to fines (see paragraph 181 below).

The plea of infringement of Article 190 of the Treaty in regard to the fines

Arguments of the parties

158 In its written pleadings to the Court the applicant claims that the Commission did not adequately examine the facts which led to the imposition of the fine, and that the Decision should have specified how the Commission assessed those facts and which criteria it had applied in order to calculate the fine.

159 At the hearing the applicant stated that this was intended to be a submission that the obligation to state reasons for the Decision had been infringed in regard to the fines (see paragraph 138 above).

160 The Commission has not replied specifically to those arguments in its written pleadings. At the hearing, it contended, in the course of its reply to the common oral argument concerning the statement of reasons in the Decision in regard to the fines, that points 167 to 172 of the Decision adequately explain the factors taken into account by the Commission in order to determine the amount of those fines.

Findings of the Court

161 In its written pleadings the applicant has not expressly raised a plea that the statement of reasons in the Decision is defective in regard to the fines. However, at the hearing, it explained that it intended to raise such a plea, and it adopted the common oral argument submitted in that regard. Since a plea of infringement of Article 190 of the Treaty must be considered by the Court of its own motion, it is necessary to examine the substance of the plea and unnecessary to rule on the question of its admissibility.

162 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).

163 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 of the Court of Justice in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

164 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).

165 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines, the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as 'ringleaders' of the cartel, whereas the other undertakings were regarded as 'ordinary members'. Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings, 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.

166 In its reply to a written question put by the Court, the Commission explained that the fines were calculated on the basis of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision. Fines of a basic level of 9 or 7.5% of that individual turnover were then imposed, respectively, on the undertakings considered to be the cartel 'ringleaders' and on the other undertakings. Finally, the Commission took into account any cooperation by undertakings during the procedure before it. Two undertakings received a reduction of two-thirds of the amount of their fines on that basis, while other undertakings received a reduction of one-third.

167 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.

168 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.

169 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 *Petrofina* v *Commission*, cited above, point 264). Likewise, point 168 of the Decision, which must be read in the light of the general considerations regarding the fines set out in point 167, contains an adequate indication of the factors taken into account in order to determine the general level of fines.

170 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.

171 The Commission also accepted at the hearing that nothing prevented it from indicating in the Decision the factors which had been systematically taken into account

and which had been divulged at a press conference held on the day on which that decision was adopted. In that regard, it is settled law that the reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and, to the same effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136).

172 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.

173 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.

174 In the specific circumstances set out in paragraph 172 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.

175 Consequently, this plea cannot be upheld.

176 It follows from the whole of the foregoing that the eighth indent of Article 1 of the Decision must be annulled as regards the applicant.

177 As regards the fine imposed on the applicant by Article 3 of the Decision, the Court must first determine whether the fact that the infringement committed by the applicant cannot be considered to extend to collusion on market shares must lead to a reduction in that fine.

178 The Court considers, in the exercise of its unlimited jurisdiction, that the gravity of the infringement of Article 85(1) of the Treaty which the applicant is found to have committed, namely its participation in the collusion on prices and on downtime, is still such that the amount of the fine should not be reduced.

179 In that regard, the Court observes that the applicant did not participate in the PWG meetings, and fines were not therefore imposed upon it as a cartel 'ringleader'. Because, as the Commission itself states, the applicant was not a 'prime mover' of the cartel (point 170, first paragraph, of the Decision), the level of fine adopted in regard to it was 7.5% of its turnover on the Community cartonboard market in 1990. That general level of fines-which the applicant has not challenged-is justified (see paragraph 301 et seq. above).

180 Furthermore, even though the Commission wrongly considered that producers which were not represented in the PWG were 'well aware' of the collusion on market shares (point 58, first paragraph, of the Decision), the Decision itself nevertheless makes it clear that it was the undertakings meeting in the PWG which took concerted action on the 'freezing' of market shares (in particular point 52 of the Decision) and that there was no discussion of market shares held by the producers which were not represented in it. Moreover, as the Commission stated in point 116, second paragraph, of the Decision, 'by their very nature the market sharing arrangements (particularly the freezing of shares described in recitals 56 and 57) involved primarily the major producers'. The collusion on market shares wrongly attributed to the applicant was therefore, in the Commission's own view, merely a secondary aspect of collusion on prices.

181 As regards the pleas for annulment or reduction of the fine, the Court has found that when the Commission determined the amount of that fine it wrongly took into account the applicant's turnover from sales of cartonboard worldwide in 1990 rather than turnover from sales in the Community alone in that year. As the other pleas have been rejected, the Court, exercising its unlimited jurisdiction, will set the amount of the fine imposed on the applicant by Article 3 of the Decision at ECU 2 150 000.

Costs

182 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been largely unsuccessful, it must be ordered to pay the costs, including those of the interim proceedings, as sought by the Commission.

On those grounds,

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

hereby:

1) Annuls, as regards the applicant, the eighth indent of Article 1 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);

2) Sets the amount of the fine imposed on the applicant by Article 3 of Decision 94/601 at ECU 2 150 000;

3) Dismisses the application as regards the remaining claims;

4) Orders the applicant to pay the costs, including those relating to the interim proceedings.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President