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

14 May 1998 *

In Case T-337/94,

**Enso-Gutzeit Oy**, a company incorporated under Finnish law, with its registered office in Helsinki, represented by Ivo Van Bael and Jean-François Bellis, of the Brussels Bar, and by Ciarán Keaney, Solicitor of the Law Society of Ireland, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 11 Rue Goethe,

applicant,

v

**Commission of the European Communities**, represented by Hans Gerald Crossland and Richard Lyal, of its Legal Service, acting as Agents, 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: English.

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 was held from 25 June to 8 July 1997,

gives the following

## Judgment

### Facts

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

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

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

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

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

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

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

that the producers of cartonboard supplying the United Kingdom had introduced a series of simultaneous and uniform price increases and 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:

(...)

(iii) Enso-Gutzeit Oy, a fine of ECU 3 250 000;

(...)'

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 According to the Decision, the applicant, Enso-Gutzeit Oy (hereinafter 'Enso-Gutzeit'), which produces only SBS cartonboard, participated in the meetings of the PC. It was also a member of the Nordic Paperboard Institute (hereinafter 'NPI'). The Commission considered that the applicant had participated in the infringement referred to in Article 1 of the Decision from mid-1986 until April 1991.

## Procedure

21 The applicant brought this action by application lodged at the Registry of the Court on 14 October 1994.

22 Sixteen of the eighteen other undertakings held to be responsible for the infringement have also brought actions to contest the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94).

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

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

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

26 By letter of 5 February 1997 the Court requested the parties to take part in an informal meeting with a view, in particular, to their presenting observations on a

possible joinder of Cases T-295/94, T-304/94, T-308/94, T-309/94, T-310/94, T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-338/94, T-347/94, T-348/94, T-352/94 and T-354/94 for the purposes of the oral procedure. At that meeting, which took place on 29 April 1997, the parties agreed to such a joinder.

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

28 By order of 20 June 1997 he allowed an application for confidential treatment submitted by the applicant in this case which related to a document produced in response to a written question from the Court.

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

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

## Forms of order sought

31 The applicant claims that the Court should:

— annul Article 1 of the Decision in so far as it concerns the applicant;

— annul or reduce the fine;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

## The application for annulment of the Decision

33 In support of its head of claim seeking annulment of the Decision in so far as it concerns itself, the applicant relies on four pleas alleging (a) that SBS cartonboard should have been excluded from the scope of the Decision; (b) that there is no proof of its participation in an infringement of Article 85(1) of the Treaty; (c) infringement of Article 190 of the Treaty; and (d) infringement of its rights of defence.

34 The Court considers that it should begin by examining the second plea.

*The plea that there is no evidence of the applicant's participation in any cartel*

Arguments of the parties

— Arguments of the applicant

35 The applicant submits that the Commission has not proved that it participated in any cartel.

36 First it disputes the assertion in point 121 of the Decision that appendix 102 to the statement of objections, a note obtained from Rena allegedly relating to a meeting of the NPI at Arlanda airport (Sweden) on 3 October 1988, is evidence of its participation in the unlawful practices referred to in the Decision. Relying on an invitation (appendix 101 to the statement of objections) to an extraordinary board meeting of the NPI, the Commission concluded that this note concerned that meeting. However, there is nothing in the note to show that it related to the meeting referred to in that invitation.

37 The NPI board meeting of 3 October 1988 was called because Iggesunds Bruk AB ('Iggesunds Bruk'), a producer of SBS cartonboard and currently part of the MoDo group, was planning to cease its participation in and any financing of the 'pro-carton' activities. Prices were not discussed at that meeting. The reference to 'pro-carton' activities in appendix 102 ('how to market and to whom') does not

show that the extraordinary meeting of the NPI was involved, because it does not pertain to what was to be discussed at the meeting in question.

38 Furthermore, if appendix 102 to the statement of objections were to be considered to contain information relating to price increases in the United Kingdom in April 1989, such information does not relate to the applicant. The prices of the cartonboard manufactured by the applicant were not increased in the United Kingdom in April 1989 but in January 1989. Moreover, the reference to a price increase for cartonboard intended for the cigarette industry does not relate to the applicant either, because, first, it has not supplied cartonboard to that industry since 1987 and, second, the applicant's cartonboard price was significantly higher than that referred to in the note in question. Nor is SBS cartonboard expressly referred to in appendix 102.

39 Second, the applicant disputes the assertion in the first paragraph of point 97 of the Decision to the effect that appendix 133 to the statement of objections, a note found at Iggesund Board Sales Ltd (also of the MoDo group), is 'clearly indicative of collusion on pricing between the producers of coated board for graphics purposes ... on the occasion of the price increase in the United Kingdom effective on 2 April 1990'.

40 The author of the note has explained that it was a note of a telephone conversation between two employees of Iggesund and that the reference to 'presidents/Enso' was to the practice of some competitors of sending senior staff from their head offices in the United Kingdom for the purpose of negotiating prices. That practice, which is still adopted, is necessary for the most important customers, for whom price negotiation is regarded as a matter of prime importance. The reference to 'presidents/Enso' does not therefore constitute evidence of any collusion between undertakings, and in particular any involving the applicant.

41 Furthermore, the Commission's allegations of collusion on pricing between the applicant and the other producers referred to in appendix 133 to the statement of objections are not supported by table F annexed to the Decision relating to price increases in April 1990 in the United Kingdom. Both the announcement and the implementation of the applicant's price increase were made more than one week after the announcements and actual increases of the other producers concerned.

42 Third, appendix 44 to the statement of objections, a note in the diary of a Feldmühle employee (of the Stora group), does not reveal collusion on prices and production control between Feldmühle and other producers, including the applicant, in the context of the January 1987 price increase in the United Kingdom.

43 The only reference to the applicant's prices in that note ('Enso 86 same prices as 85') concerns a matter of public knowledge at the beginning of 1987, the period to which the note is said to relate. Moreover, the applicant increased its prices in the United Kingdom by UKL 10 per tonne on 1 December 1986, which is inconsistent with the Commission's assertions.

44 The reference to the applicant's order backlog ('circa two weeks' activity') does not show collusion. Two weeks' orders in hand are normal at the beginning of the year and that state of affairs is obvious to any person with knowledge of the sector. Customers faced with a price increase from their usual supplier will normally ask other producers to indicate their delivery period and will then use the information obtained in order to refuse or to delay the announced price increase. Information on the orders in hand of the various producers is therefore rapidly available to the whole sector.

45 Fourth, the applicant contests the Commission's assertion that proof of its participation in collusion on prices is provided by the 'virtually exact correspondence' of its price increases with the figures contained in appendix 111 to the statement of objections, a price list obtained from Rena. Rena has explained that it did not receive the list from the NPI, but that it had been given to it by another Scandinavian producer during a meeting. As it is an undated list obtained from an unknown Scandinavian producer, it cannot therefore be used as evidence against the applicant. Moreover, since the applicant announced its price increases in the United Kingdom and in Germany six days and 21 days respectively after Iggesunds Bruk, its actual pricing conduct confirms that it did not participate in collusion on prices.

46 Fifth, the applicant disputes the accuracy of Stora's belief (appendix 38 to the statement of objections) that Finnboard informed it of the outcome of the PWG meetings. The applicant has never been a member of Finnboard and Finnboard has never acted as its representative. Any links between Finnboard, the PWG, the JMC and the NPI are irrelevant to the question whether Finnboard informed the applicant of the outcome of the PWG meetings. Moreover, Stora never stated that the information was communicated and discussed in the context of the NPI, as the Commission asserts.

47 Furthermore, the Commission has not taken the appendix in question to be evidence of a link between the PG Paperboard and several other producers mentioned by Stora. Amongst the undertakings allegedly informed of the outcome of the PWG meetings, Stora mentioned not only Strömsdahl, a Finnish member of the NPI, but also two Spanish companies not covered by the Decision.

48 Sixth, the applicant disputes that, because it was a member of the NPI, it received information on the meetings of the PWG or of the Economic Committee. Nor can it be assumed that it received such information.

49 Seventh, the Commission's assertion that the PC was carrying on an unlawful activity before 1987 (point 35 of the Decision) is unfounded. That assertion is based on an incorrect interpretation of Stora's statements (appendix 39 to the statement of objections).

50 Contrary to the assertion in point 41 of the Decision, the minutes of the PC meetings are not misleading. The applicant's representatives in the PC meetings have confirmed that no discussion of prices took place in their presence.

51 Nor can the note found at Mayr-Melnhof's sales agent (appendix 61 to the statement of objections) be regarded as proof that prices were discussed in the PC. The Commission stated in the statement of objections that it did not even know whether the note concerned a meeting of the PC.

52 Eighth, the applicant disputes the accuracy of the allegation in the Decision (points 38 and 41) that, first, the PWG reported to the PC regarding the precise state of supply and demand and, second, that managing directors attending the meetings of the PC were informed of pricing decisions adopted by the PWG and of information to be passed on to their sales departments for the purpose of implementing the price initiatives. That allegation is not proved by reference to Stora's statement alone.

53 The four examples on which the Commission relies in its defence in order to establish a link between the PC meetings, the PWG and the applicant's pricing behaviour do not prove that allegation. It is impossible to establish any link between the PC meetings in which the applicant participated and its pricing behaviour.

54 Lastly, the applicant contends that the documents relating to price increases are not evidence of its participation in an infringement of Article 85(1) of the Treaty. On the contrary, those documents show that it did not participate in any infringement. An overall comparison between its own price increases and those of Iggesunds Bruk and of Finnboard reveals significant differences in the dates and amounts of the price increases.

55 The relative similarity between Iggesunds Bruk's prices and those of the applicant in regard to some price increases can be explained by the normal workings of the market. Because of the way in which the market works, the opportunity for undertakings to increase their prices arises at approximately the same time. The applicant's price increases are therefore the result either of pressure from production costs or of price movements on the market. Moreover, when it learned from its customers and/or the trade press that another producer had announced a price increase, the applicant would try to exploit that announcement in order to increase its own prices if it believed that the market could accept such an increase.

56 In that context, the applicant observes that parallel conduct cannot be regarded as furnishing proof of collusion unless collusion constitutes the only plausible explanation for such conduct (judgment in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 71). Even assuming that the Commission had evidence other than the price documentation (which the applicant denies), it would still be necessary to examine the various similarities in prices in order to establish whether they could be explained otherwise than by collusion.

57 Lastly, the applicant carries out an extremely detailed analysis of the alleged concerted price initiatives in which it is considered to have participated. It concludes that its analysis also shows that it did not participate in any collusion, since it reveals considerable differences in the dates and amounts of each of price increase.

— Arguments of the Commission

58 The Commission states that it found that a single infringement had been committed consisting of a 'common industry plan to restrict competition', involving price increases, an understanding on market shares, concerted measures to control supply of the market and an exchange of commercial information to support those actions (point 116 et seq. of the Decision). Moveover, all the addressees of the Decision had participated in that infringement which was constituted by the 'price before tonnage' scheme (point 129 et seq. of the Decision) applied by all the producers. In consequence, the fact that a particular producer did not take part in one or other meeting or did not carry out every action of the cartel is irrelevant.

59 The applicant cannot attempt to compartmentalise each piece of evidence relied on against it and claim that each item does not prove anything in itself. It is necessary to consider all the evidence of participation in a cartel as a whole and to determine whether there are sufficient concordant indications to support the Commission's allegations (judgment in Case 48/69 *ICI* v *Commission* [1972] ECR 619). All the Commission's arguments should be understood in the light of those general considerations, as it has never asserted that each item of evidence relied upon as against the applicant sufficed to prove all the objections raised against it.

60 As regards the applicant's arguments on each item of evidence, the Commission maintains, first, that appendix 102 to the statement of objections (see paragraph 36 above) confirms that the applicant participated in the infringement.

61 It states that the invitation to a meeting of the NPI on 3 October 1988 at Arlanda airport (appendix 101 to the statement of objections) was addressed *inter alios* to

Mr Paronen (Enso-Gutzeit) and to Mr Kordal (Rena) and that appendix 102 to the statement of objections contains the notes taken by Mr Kordal at that meeting. Moreover, the applicant accepts that Mr Paronen was present at a meeting at Arlanda airport on 3 October 1988 in order to discuss the 'pro-carton' activities. There is a reference to 'pro-carton' activities in the note in question.

62 Even though the note in question does not contain any reference to SBS cartonboard as such, it is nevertheless the case that the Ensocoat grade manufactured by the applicant competes directly with certain GC 1 cartonboard grades intended for graphic purposes. The applicant increased its prices in some countries in April 1989 (table D annexed to the Decision) and did not need to increase its prices in the United Kingdom because it had already increased them in that country with effect from 23 January 1989 by UKL 50, the exact amount referred to in appendix 102 to the statement of objections. That increase was postponed until April 1989 for most customers.

63 Lastly, Iggesunds Bruk increased its prices in the United Kingdom by the same amount with effect from 9 January 1989.

64 Second, as regards appendix 133 to the statement of objections (paragraph 39 above), Iggesund's contrived explanation of the meaning of the word 'presidents' in the note in question is implausible, because it is not confirmed by the written evidence before the Commission and it is in fact incompatible with it.

65 The evidence confirms the assertion that appendix 133 to the statement of objections shows that collusion took place in regard to the April 1990 price increase for graphic grades in the United Kingdom. The differences pointed out by the applicant concerning the undertakings which announced the price increase and the dates of those announcements are not inconsistent with the existence of collusion. Agreement was reached in the PWG, for each price initiative, on the order in

which the price increases would be announced by the members of the PWG, whereas the other undertakings could choose the moment when they announced their own increase (points 72 and 73 of the Decision). Consequently, the nature of the April 1990 price increase is cogent proof of the existence of collusion.

66 The fact that the author of appendix 133 to the statement of objections regularly attended meetings of the Paper Agents Association (hereinafter 'the PAA') and in particular those at which the April 1990 price increase was planned, and the fact that the date of the note is close to that of the relevant JMC meeting, confirm that the note can be used as evidence of the collusion. In that context it is irrelevant that the applicant did not participate in JMC meetings and that it did not participate in the PAA meetings in question. Although it did not participate in all the cartel's activities, the applicant had a role in the scheme as a whole (point 121 of the Decision).

67 The striking similarities between the prices referred to in appendix 133 to the statement of objections and those referred to in other documentary evidence (appendices 113 and 130 to the statement of objections) also confirm that the Commission's allegations relating to collusion on the April 1990 price collusion are well founded.

68 All the producers referred to in appendix 133 to the statement of objections increased their list prices for the United Kingdom by similar or identical amounts. The price increases in the United Kingdom ranged from UKL 50 to UKL 60 for the different grades (documents F-5-6, F-12-7 to F-12-9 and F-3-2 of the pricing annexes) and — the decisive point — there is a close correspondence between the percentage price increases of the applicant, Finnboard and Iggesunds Bruk for the relevant grades. Finnboard increased its prices for graphic grades by 8.5%, namely the same increase as the applicant, and Iggesunds Bruk increased its prices by 8%. The similarities in the price increases are even more striking in other years, as the

applicant and Iggesunds Bruk increased their prices by UKL 50 in October 1988 and by UKL 60 in October 1989. As regards the latter price increase, it should also be borne in mind that the applicant's price increases corresponded to those set out in appendix 111 to the statement of objections (paragraph 72 et seq. below).

69 Third, as regards appendix 44 to the statement of objections, the Commission states that the applicant's name figures on a list of a number of producers, together with information on pricing, order backlogs and downtime, information which cannot be considered to have been public knowledge. In those circumstances, it is of little significance that it was well known that the applicant's prices in 1986 were the same as those for 1985 and that the reference to the applicant's prices might be considered to be innocent in itself.

70 The applicant actually increased its prices in December 1986, at the same time as the other producers of GC cartonboard graphic grades and of SBS cartonboard. The proof of collusion provided by the diary note is therefore confirmed by the price increases applied by the relevant producers.

71 Nor can the level of the applicant's orders in hand, referred to in appendix 44 to the statement of objections, be considered to be public knowledge.

72 Fourth, as regards the price list obtained from Rena (appendix 111 to the statement of objections), the Commission observes that, according to Rena, that list was given to its then managing director at meetings in Stockholm with other Scandinavian producers on the occasion of an NPI meeting (point 80 of the Decision). The list was found amongst documents relating to the NPI and Rena was unable to state exactly where and from whom it had obtained the list, although the individual concerned did not think that he had received it from the NPI itself.

73 That price list is cogent proof of collusion, because the applicant's price increases on all markets in October 1989 were identical in almost all cases to those for coated SBS cartonboard referred to in that list (see table E annexed to the Decision). The price increases announced by the other producers also corresponded to those in the list. In those circumstances, the differences highlighted by the applicant between the dates of the price increase announcements are irrelevant.

74 Fifth, the Commission submits that Stora's statement (appendix 38 to the statement of objections) that Finnboard informed the applicant of the outcome of the PWG meetings is additional evidence of its participation in the cartel. Finnboard's representative was chairman of the NPI, of which the applicant was a member, and he represented the NPI in the PWG and the JMC. He even presided over the PWG from May 1988. Moreover, Stora's understanding of the manner in which information was passed on and discussed in the context of the NPI is confirmed by other evidence, such as appendix 102 to the statement of objections (see paragraph 60 et seq. above), the handing over to Rena of price lists at NPI meetings, and Fiskeby's admission that this was in fact the practice (point 46 of the Decision).

75 The Commission states that it is not linking the applicant to the cartel on the basis of its membership of a trade association alone.

76 Sixth, as regards the applicant's membership of the NPI, the Commission observes that, although it cannot be concluded from an undertaking's membership of a trade association that the undertaking is aware of all the information in that association's possession, in the present case there is ample evidence that the applicant, a member of the Board and Marketing Committee of the NPI, did obtain relevant information and acted upon it.

77 Seventh, the Commission maintains its assertion in the Decision, based on Stora's statements, to the effect that the meetings of the PC had an anti-competitive object. The anodyne nature of the minutes of the PC meetings is irrelevant, because the members of a cartel obviously try to conceal its existence. However, in the present case, the real nature of the discussions in the PC is shown by Stora's statements. Those statements are confirmed, first, by the statement of Mr Roos (a former manager in Feldmühle, of the Stora group) supplied to the Commission by Weig and, second, by the note found at Mayr-Melnhof's agent (appendix 61 to the statement of objections).

78 Eighth, the Commission rejects the applicant's assertion that there is no proof that the outcome of the PWG meetings was communicated to the other undertakings at meetings of the PC. According to Stora, the PC discussed the situation regarding prices and over-capacity. From 1986, the PWG informed the PC of the precise state of supply and demand on the market and of the measures to be adopted in order to regulate it. The participants in the PC meetings were therefore informed of the decisions adopted by the PWG, in particular in regard to pricing, and of the instructions to be given to their sales agents in order to implement those decisions. In the light of Stora's statements, the applicant cannot therefore claim that it never participated in discussions on pricing in the PC.

79 Stora's explanations are corroborated by the statement of Mr Roos (see paragraph 77 above). It is clear from his statement that when a PC meeting followed a PWG meeting, the content of the discussions in the latter meeting was reported to the PC.

80 The Commission gives examples of the relationship between certain meetings of the PC, of the PWG and the applicant's pricing behaviour. The finding that the applicant was informed of the pricing decisions adopted by the PWG is confirmed by the price increases announced and implemented by the applicant following the PC meetings.

81 Lastly, the Commission observes that the precise date on which a proposed price increase took effect might vary, depending on the customer, the product or the national market in question (point 72 of the Decision). That date might even vary from one undertaking to another, because one of them led the price increase initiative and the others followed (point 73 of the Decision). It is therefore inevitable that an analysis of the price increases will reveal differences between the undertakings.

82 The judgment in *Ahlström Osykeyhtiö and Others* v *Commission*, cited above, on which the applicant relies, is not relevant in this case. That judgment solely concerned the question whether parallel pricing could in itself constitute proof of collusion. By contrast, in the present case, the price-fixing activities of the members of the PG Paperboard must be considered in the light of the evidence as a whole and, since there is ample evidence of collusion, the similarities in prices confirm that evidence and cannot be explained by reference to mere parallelism.

83 The applicant's meticulous comparison between its own price increases and those of Iggesunds Bruk and of Finnboard reveals only that there are minor differences between the dates of the announcements.

— Findings of the Court

84 According to Article 1 of the Decision, the undertakings referred to in that provision infringed Article 85(1) of the Treaty by participating, during the relevant period, in an agreement and concerted practice whereby the suppliers of cartonboard in the Community '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'.

85 In the Decision the Commission sets out the evidence on which it relied in order to prove that the applicant participated in the collusion referred to in the operative part of that decision.

86 Point 121 of the Decision states:

'[... The applicant] only went to President Conferences, and was the sole producer which never attended any meetings of the JMC. The Commission does not however rely simply as proof of its participation in the infringement on its attendance at President Conferences. Further proof of its involvement is provided *inter alia* by its membership of both the Board and the Marketing Committee of the NPI, a body whose role in collusion is amply demonstrated; its attendance at the Arlanda meeting noted by Rena (recital 58); the various references in the Iggesund note on the price increase of April 1990 (recital 97); and its own commercial documentation which (in so far as it is available) shows not only a continuing pattern of price increases identical to those of the other major SBS producer, Iggesunds Bruk, but also, for October 1989, a virtually exact correspondence to the NPI price list obtained from Rena (recital 80). The cumulative effect of these different items of both direct and circumstantial evidence is such that there is no reasonable doubt as to Enso-Gutzeit's involvement in a system of collusion.'

87 In order to assess whether the Commission has proved the applicant's participation in an infringement of Article 85(1) of the Treaty in respect of the period from mid-1986 to April 1991, the Court will consider, first, the object of the meetings of the PC, the body in which the applicant participated during the period in question; second, the Commission's evidence referring directly to the applicant; third, the

question whether the applicant participated in the cartel in question as a member of the NPI and; fourth, the applicant's actual pricing behaviour.

— The object of the PC meetings

88 There is no dispute that the applicant participated regularly in meetings of the PC (see table 3 annexed to the Decision). However, the Commission does not advance any evidence as to the object of the meetings in which the applicant is proved to have participated. Consequently, when it refers to that participation as evidence of the undertaking's participation in an infringement of Article 85(1) of the Treaty, it necessarily bases its assertion on the general description, set out in the Decision, of the object of the meetings of that body and on the evidence put forward in the Decision in order to support that description.

89 In that regard, the description of the objectives and activities of the PC, set out specifically in points 41 to 43 of the Decision, is based on Stora's statement (appendix 39 to the statement of objections). The Commission submits that Stora has admitted that 'the President Conference did in fact discuss collusive pricing' (point 31, third paragraph; see also point 75, second paragraph, of the Decision). That admission is said to be corroborated by a note discovered at Mayr-Melnhof's United Kingdom sales agent (appendix 61 to the statement of objections). Furthermore, the managing directors who participated in meetings of the PC were informed of the decisions taken by the PWG and of the instructions to be given to their sales departments in order to implement the price initiatives (point 41, first paragraph, of the Decision). It is also stated that the PWG submitted to the PC its evaluation of 'the precise state of supply and demand on the market and the measures to be taken to bring order to the market' (point 38, first paragraph, of the Decision).

90 Lastly, according to the first paragraph of point 53 of the Decision, a confidential note dated 28 December 1988 sent by the marketing manager responsible for Mayr-Melnhof group sales in Germany (Mr Katzner) to the managing director of

Mayr-Melnhof in Austria (Mr Gröller) (appendix 73 to the statement of objections) confirms that 'at the end of 1987 agreement had been reached in the two Presidents' groups on the linked issues of volume control and price discipline'.

91 The Commission bases its assertion of the anti-competitive object of the PC meetings primarily on Stora's statements. However, the correctness of that assertion is contested by several undertakings, including the applicant, which participated in the PC meetings. In consequence, unless supported by other evidence, Stora's statements concerning the PC's role cannot be regarded as adequate proof of the object of that body's meetings.

92 The document in appendix 61 to the statement of objections (paragraph 68 above) relates to a meeting held in Vienna on 12 and 13 December 1986. It contains the following:

'UK pricing

Recent Fides meeting included the representative of Weig stating that they thought 9% too high for the United Kingdom and were settling at 7%! Great disappointment as it signals a "negotiating" level for everybody else. UK pricing policy will be left to RHU with the support of [Mayr-Melnhof] even if it means a *temporary* reduction in tonnes while we attempt (and be seen to attempt) to pursue 9%. [Mayr-Melnhof/FS] maintain a growth policy for UK but reduced returns are serious and we have to fight to regain control on pricing. [Mayr-Melnhof] accept that it doesn't help that they are known to have increased their tonnes in Germany by 6 000!'

93 According to Mayr-Melnhof (reply to a request for information, appendix 62 to the statement of objections), the Fides meeting referred to at the beginning of the passage quoted is probably the PC meeting of 10 November 1986. Table 3 annexed to the Decision reveals that the applicant was not present at that meeting.

94 The document in question shows that Weig reacted to an initial level of price increase by indicating its future pricing policy in the United Kingdom.

95 It cannot, however, be considered to prove that Weig reacted in relation to a particular level of price increase agreed between the undertakings within the PG Paperboard before 10 November 1986.

96 The Commission does not rely on any other evidence to that effect. Moreover, Weig's reference to a price increase of '9%' may be explained by the price increase in the United Kingdom announced by Thames Board Ltd on 5 November 1986 (annex A-12-1). That announcement was made public shortly afterwards, as is clear from a press cutting (annex A-12-3). Lastly, the Commission has not produced any other document capable of constituting direct evidence that discussions on price increases took place at meetings of the PC. In those circumstances, it cannot be ruled out that Weig's remarks, as related in appendix 61 to the statement of objections, were made on the fringe of the meeting of the PC on 10 November 1986, as Weig repeatedly submitted at the hearing.

97 As regards appendix 73 to the statement of objections, on which the Commission relies in the Decision (paragraph 90 above), the Court points out that the author of that document refers by way of introduction to the closer cooperation at European level within the 'presidents' grouping' ('Präsidentenkreis'). That expression 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).

98 Although there is no dispute in the context of this case that appendix 73 to the statement of objections is corroborative evidence of Stora's statements as to the existence of collusion on market shares between the undertakings allowed to participate in the 'Presidents' grouping' and on collusion on downtime between those same undertakings, the Commission has not, however, adduced any other evidence to confirm that the object of the PC was, *inter alia*, to discuss collusion on market shares and control of production volume. Consequently, the expression 'Presidents' grouping' ('Präsidentenkreis') used in appendix 73 to the statement of objections cannot, despite the explanations supplied by Mayr-Melnhof, be construed as referring to bodies other than the PWG.

99 Lastly, Stora's allegation that one of the PC's functions was to inform the managing directors of decisions taken by the PWG and of the instructions to be given to their sales departments in order to implement those pricing initiatives (appendix 39 to the statement of objections, point 8) cannot be considered to be corroborated by the statement of 22 March 1993 of Mr Roos, a former member of the management of Feldmühle.

100 In his statement, which was sent to the applicant during the administrative procedure and to which the Commission refers (see paragraph 77 above), Mr Roos indicates, *inter alia*, as follows: 'The content of the discussions in the PWG was communicated to the undertakings not represented in that group at the immediately following Presidents' Conference, or, if there was no immediate Presidents' Conference, at the JMC'. That document, upon which no express reliance was placed in the Decision to support the Commission's assertions as to the object of the PC meetings, cannot, on any view, be considered to constitute evidence supplementing Stora's statements. As those statements are a synthesis of the replies submitted by each of the three undertakings, including Feldmühle, owned by Stora

during the period of the infringement, the former member of the management of Feldmühle necessarily constitutes one of the sources for the statements by Stora itself.

101 Having regard to the foregoing, the Court considers that it has not been proved that, because the applicant was present at meetings of the PC, it participated in an infringement of Article 85(1) of the Treaty.

— The direct evidence

102 In order to prove that the applicant participated in an infringement of Article 85(1) of the Treaty the Commission relies, in the Decision, on two documents which expressly refer to the applicant. According to the Commission, those documents, appendices 44 and 133 to the statement of objections, are direct evidence of the applicant's participation in collusion with an anti-competitive object. They will be considered separately.

103 As regards, first of all, appendix 44 to the statement of objections, which consists of a handwritten note in the desk diary of an employee of Feldmühle (of the Stora group) on the pages for 15 to 17 January 1987, the Commission considers that this constitutes 'further evidence of concertation' (third paragraph of point 75 of the Decision) on the January 1987 price increase in the United Kingdom.

104 However, that note does not have the probative value accorded it by the defendant. It is in the form of handwritten comments which refer to several cartonboard producers and data — generally historical — on prices and downtime. However, it is not possible to determine the origin of the note by reference to the data which it contains, or whether it was written at a meeting or in the course of a telephone

conversation, or whether it consists of comments intended to act as an aide-mémoire for its author.

105 Even assuming that the note relates to a meeting, there is no identification of that meeting, so the possibility cannot be ruled out that it concerns an internal Feldmühle meeting. Moreover, since the note probably dates from mid-January 1987, it does not prove that the application of the price increase 'TBM included' was the result of collusion, given that the note was possibly only an observation. According to table A annexed to the Decision, Thames Board Mills Ltd ('TBM') had announced an increase in its prices in the United Kingdom on 5 November 1986 (see also annex A-12-1).

106 Some indications in the note are even such as to contradict the Commission's claim that the note confirms the existence of collusion in regard to the decision to increase prices in the United Kingdom. In particular, the statement that the director of Feldmühle had declared that he was 'sceptical' of Kopparfors (of the Stora group) and had regarded Mayr-Melnhof as 'irresponsible' ('ohne Verantwortung') cannot be regarded as supporting the Commission's contention. The position is the same in regard to the statement: 'Finnboard: Preisautonomie auch f. Tako' ['Finnboard: price autonomy also for Tako'].

107 Furthermore, the Court observes that, as regards the applicant, the note indicates:

'Enso production below plan in 1986
Enso 86 same prices as 85 [...]
circa 2 weeks activity'.

108 The fact that this information concerning the applicant is contained in a document created, probably in the middle of January 1987, by a competitor cannot constitute proof that the applicant participated in collusion between undertakings. That information could have been obtained from customers of Feldmühle.

109 The only information concerning the applicant which is not clearly historical, namely that relating to the state of its order backlog, is not so precise that it must be regarded as emanating from the applicant. In that context, the Court points out that the Commission has challenged the applicant's — prima facie plausible — claim that the customers of cartonboard manufacturers generally have information as to the state of their suppliers' order backlogs, but has not substantiated its challenge.

110 Lastly, the applicant, relying on a document setting out the changes in the prices applied to one of its United Kingdom customers, asserts that it increased its prices of SBS cartonboard in the United Kingdom in December 1986 by UKL 10 per tonne. That price increase is therefore well below that allegedly agreed between the undertakings which met in the PG Paperboard (see point 74, last paragraph, of the Decision). As the Commission has not adduced any evidence to refute that assertion, the Court considers that there is no basis whatsoever, as against the applicant, for the Commission's allegation that appendix 44 to the statement of objections is additional evidence of collusion on the January 1987 price increase in the United Kingdom.

111 Having regard to the foregoing considerations, appendix 44 to the statement of objections does not prove that the applicant participated in an infringement of Article 85(1) of the Treaty.

112 Next, as regards appendix 133 to the statement of objections, a document discovered at Iggesund Board Sales Ltd, the Commission explains (point 97, first and fifth paragraphs, of the Decision):

'Another note found at Iggesund Board Sales during the investigations is clearly indicative of collusion on pricing between the producers of coated board for graphics purposes (which includes both SBS and high quality GC grade) on the occasion of the price increase in the United Kingdom effective on 2 April 1990. In addition to a number of jottings relating to the amount of the price increase, two references to the "Presidents" and a reference to "Enso/Finnboard/Strömsdahl", the note contains a list of names of senior marketing managers or directors from Iggesund, Kopparfors [of the Stora group], Enso-Gutzeit and Finnboard. These producers are the main suppliers of graphic grades in the United Kingdom.

[...]

There are a number of marked similarities between the prices for the United Kingdom shown in this note, those in the [Mayr-Melnhof] note of the JMC of 11 January 1990 (recital 84) and the [Paper Agents Association] note of 23 January 1990 made by Kopparfors [of the Stora group].'

113 The Court observes that, according to Iggesunds Bruk, the document was drawn up between 3 and 14 January 1990 (point 97, fourth paragraph, of the Decision). That period is therefore prior to the dates on which Iggesunds Bruk and the applicant announced a price increase to enter into force in April 1990, namely on 24 January and 9 February 1990 respectively.

114 That — undated — appendix consists of a sheet of paper, apparently divided into three parts, containing handwritten notes set out in a particularly disorganised manner. The words and figures written on that sheet, such as 'SBS', 'Presidents', 'Anything Goes', 'Buddy', '780', '805/850', '£55/850', '£815/35' are not obviously connected. Looking at that sheet, it is not possible to know whether the notes on it were taken at a meeting with competitors or during a telephone conversation with one of them. They might therefore be notes of a historical nature intended to constitute an aide-mémoire. Moreover, it is impossible to establish whether all the words and figures were noted down on the same day.

115 In those circumstances, appendix 133 to the statement of objections cannot be regarded as proof of the applicant's participation in collusion on the price increase implemented in April 1990.

116 The use of the term 'Presidents', the reference to 'Enso/Finnboard/Strömsdahl' and the fact that the document contains a list of names of managers or directors of Iggesunds Bruk, Koppafors, Enso-Gutzeit and Finnboard, are not in themselves evidence to support the Commission's allegation that the document shows collusion on pricing between the undertakings mentioned in it. Even assuming that the word 'Presidents' must be regarded as a reference to the PC, which is disputed both by the applicant and by MoDo (point 97, second paragraph, of the Decision), it suffices to point out that the Commission has not demonstrated that the meetings of that body had an anti-competitive object.

117 The information contained in the document regarding prices and price increases for the various grades of cartonboard (GC1, GC2 and SBS) do not support the Commission's allegation either.

118 Although it is true that the document does indeed contain several figures which might refer to the prices of the various grades of cartonboard and to the planned price increases, it is nevertheless the case that no precise figure can be linked to the prices or price increases of a specific undertaking. More particularly, appendix 133 to the statement of objections does not contain the slightest indication which could be understood as a reference to the United Kingdom price increase of UKL 69 per tonne announced by the applicant on 9 February 1990. That amount, which the applicant has specified in its written pleadings to this Court, has not been disputed by the Commission.

119 Moreover, the differences between the price increases announced by Iggesunds Bruk and by the applicant respectively are so wide that they cannot be reconciled with the Commission's assertion that '[t]he suppliers of graphics grade cartonboard referred to in the Iggesund note all increased their list prices for the United Kingdom by similar or identical amounts' (point 97, sixth paragraph, of the Decision).

120 The amount of the price increase of UKL 69 per tonne for SBS cartonboard announced by the applicant on 9 February 1990 differs from that announced by Iggesunds Bruk on 24 January 1990, which amounted to UKL 50 per tonne. That difference is so wide that those amounts cannot be categorised as 'similar' or 'identical'.

121 Furthermore, although the Commission referred in the Decision to the amounts of the announced price increases, it has claimed in its written pleadings to the Court that the amount of the price increase announced by Iggesunds Bruk in the United Kingdom corresponded to an 8% price increase and that this increase ought to be regarded as 'similar' to the 8.5% price increase announced by the applicant. However, irrespective of whether a comparison can be made between price increases expressed as a percentage, the substance of the Commission's assertion is inaccurate. According to the pricing documentation annexed to the statement of objections (appendix F-12-6), Iggesunds Bruk's list price for SBS cartonboard was, prior

to the increase in question, UKL 800 per tonne. Its price increase of UKL 50 per tonne for SBS cartonboard therefore corresponds to a 6.25% price increase. It follows that, even expressed as a percentage, the price increases in question cannot be characterised as 'similar' or 'identical'.

122 Lastly, the Commission's allegation that there are 'marked similarities' between the prices in appendix 133 to the statement of objections and those appearing, first, in a Mayr-Melnhof note of 11 January 1990 relating to a JMC meeting (appendix 113 to the statement of objections) and, second, in a Kopparfors note of 23 January 1990 relating to a meeting of the Paper Agents Association (appendix 130 to the statement of objections) is irrelevant as regards the applicant, because it never attended meetings of those bodies.

123 Moreover, the document in question contains several handwritten remarks which have no connection with the prices of cartonboard products.

124 Having regard to those factors, the Court finds that appendix 133 to the statement of objections has no probative value as evidence of the applicant's participation in an infringement of Article 85(1) of the Treaty.

125 The Court therefore finds that the documents which expressly mention the applicant do not constitute evidence of its participation in an infringement of Article 85(1) of the Treaty.

— Membership of the NPI

126 In order to prove the applicant's participation in the infringement, the Commission states in point 121 of the Decision that the applicant was a member 'of both the Board and the Marketing Committee of the NPI, a body whose role in collusion is amply demonstrated'.

127 Representatives of the NPI are alleged to have participated in the meetings of the PC and of the Economic Committee (point 42, second paragraph, and tables 3 and 6 of the Decision). As the NPI was not separately represented in the PWG and the JMC, the Commission submits that Finnboard's representatives in those bodies participated in them as representatives of the NPI and also in their own right, and that the applicant was informed by Finnboard of the decisions taken in those bodies (see, in particular, points 38, fourth paragraph, and 46, first paragraph, of the Decision). As regards the Economic Committee, the Commission appears to submit that the applicant was informed of the outcome of the meetings of that body by the representative of the NPI who had participated in it (point 50, fourth paragraph, of the Decision).

128 The Court points out, first of all, that the Commission has expressly acknowledged in its pleadings that even though it considers that it has demonstrated the role played by the NPI in the infringement, the applicant's membership of the NPI alone does not constitute adequate proof of its participation in the infringement found. Consequently, the Commission itself considers that it is necessary to show that the decisions taken in the PWG, the JMC or the Economic Committee were actually communicated to the applicant by a representative of the NPI or by the representative of a member undertaking of the NPI who had also participated in the meetings of those bodies. In that context, the Court points out that the Commission did not consider that it could be inferred from their membership of the NPI alone that the other members of that association participated in the infringement found. Rena, for example, was considered to have taken part in the infringement found in Article 1 of the Decision only from March 1988, although it was a member of the NPI throughout the period covered by the Decision.

129 In those circumstances, the evidence on which the Commission relies to support its allegation that the applicant was informed of decisions taken in the PWG, the JMC or the Economic Committee, namely appendices 38, 102 and 111 to the statement of objections, will be considered in turn.

130 Appendix 38 to the statement of objections, a statement by Stora, provides information concerning the producers which were informed of the outcome of the PWG meetings:

'Scandinavian producers were usually informed of the outcome by the Scandinavian representative who was the Finnboard representative. Kopparfors was informed of the outcome in this way. It is the Stora Producers' understanding that other Scandinavian producers informed were [Rena] (Norway), [Strömsdahl] and Enso (both Finland).'

131 As is clearly apparent from the wording of that statement, Stora is merely indicating its belief that the applicant was informed of the outcome of the meetings of the PWG. The basis for that belief is not in fact indicated. In those circumstances, that statement cannot constitute proof of the applicant's participation in an infringement of Article 85(1) of the Treaty. That conclusion is all the more necessary in view of the fact that in appendix 38 to the statement of objections Stora implicates not only a member undertaking of the NPI which is not concerned by the Decision (Strömsdahl), but also two Spanish member undertakings of the PG Paperboard which were not considered in the Decision to have participated in any infringement.

132 As regards appendix 102 to the statement of objections, the Commission submits that this document, obtained from Rena, contains the notes taken on the occasion of discussions at a meeting of the NPI's 'Marketing Committee' on 3 October 1988 at Arlanda airport. It states that this document confirms that downtime was contemplated in the context of the April 1989 price increase (point 58, second and

third paragraphs, of the Decision). The applicant, which was represented at that meeting, has stated that the object of that meeting was in particular the financing of the 'pro-carton' advertising campaign. The Commission explained at the hearing that the representative of Rena who had supplied that document to the Commission had stated that it was attached to the invitation to the meeting in question.

133 In order to assess whether that document proves that a representative of the NPI or a representative of a member undertaking of the NPI participating in the PWG, the JMC or the Economic Committee informed the applicant at the NPI meeting on 3 October 1988 of collusion between the undertakings meeting in the PG Paperboard, the Court must consider whether it has been proved that the notes were made at that meeting.

134 In that regard, the Court finds that appendix 102 to the statement of objections does not contain any specific references to the NPI. However, that document states as follows:

'How? PRO-CARTON in Nordic context. How to market and to whom. Is to be cleared up before the Helsingfors-meeting'.

135 On account of the reference to 'pro-carton' and the purpose which the applicant claims that meeting had, that statement could suggest that appendix 102 to the statement of objections does in fact recount the remarks made at the NPI meeting on 3 October 1988.

136 However, as the applicant has disputed that it participated in the anti-competitive discussions recounted by that document, which does not itself contain any express or implicit reference to the applicant or to the grade of cartonboard manufactured by it, it cannot be ruled out that it is a note recounting discussions which Rena had with other Scandinavian producers outside the framework of the NPI and without

the applicant's participation. In that regard, the Court points out, first, that the Commission has not adduced any other evidence to prove that discussions with an anti-competitive object took place at meetings of the NPI and, second, that the explanations of Rena's managing director as to the origin of the price lists contained in appendices 110 and 111 to the statement of objections (see paragraph 139 below) appear to show that the NPI meetings were also the opportunity for member undertakings of that association to hold meetings in which a more restricted circle of undertakings took part.

137 In those circumstances, appendix 102 to the statement of objections does not prove that the applicant participated in an infringement of Article 85(1) of the Treaty.

138 Lastly, appendix 111 to the statement of objections, a price list obtained from Rena, contains information concerning price increases for GC 1, GC 2 and SBS grade cartonboard which were to be implemented on 1 October 1989.

139 As regards the origin of that price list and that of another price list obtained from Rena (appendix 110 to the statement of objections), Rena's managing director stated as follows in a letter of 10 July 1992 (appendix 112 to the statement of objections):

'The price lists as you state, were among the papers from meetings in [NPI], and I must have received them during a visit to Stockholm regarding a [NPI]-meeting. During these visits I normally had several meetings with some of the other Scandinavian producers. I was new as managing director at Rena at that moment and had a lot of discussions with other members of the trade, and this was a crucial time for our board mill with a big loss that year and it was important for me to have a best possible foundation for the 1990 budget. I probably got the lists during one of these meetings.

I understand that this explanation sounds peculiar regarding the circumstances for your investigation, but as far as I remember I cannot have received these lists from the [NPI].'

140 In the light of that explanation, the Court considers that it cannot be considered to have been proved that Rena obtained that list at a meeting of the NPI or at another meeting at which the applicant was present. In that context, there is no reason to doubt the truthfulness of Rena's explanation of the origin of the price lists in question.

141 Nor can the evidence which the Commission has regarding the price increases announced by the applicant be considered to support its contention that appendix 111 to the statement of objections shows that the applicant participated in collusion on prices.

142 The applicant announced an increase in its prices in the Netherlands of HFL 13 per 100 kg which was to take effect on 1 October 1989 but was subsequently postponed until 1 January 1990 (appendices E-3-3 to E-3-7 of the price documents). However, according to appendix 111 to the statement of objections, the price of SBS cartonboard in the Netherlands was to be increased on 1 October 1989 by HFL 17 per 100 kg. Table E annexed to the Decision also shows that the applicant announced an increase in its prices in Denmark on 25 May 1989, almost two months before the first letter announcing a price increase was sent by one of the other undertakings deemed to have participated in the collusion on prices (see table E annexed to the Decision). Furthermore, according to Stora (appendix 39 to the statement of objections, point 34), the decision to increase prices for GC and SBS cartonboard with effect from October 1989 was taken in the PWG in June of the same year, that is to say, after the date on which the applicant announced the increase in its prices in Denmark.

143 Having regard to those factors, and even if the price increases announced by the applicant in Germany, France and the United Kingdom correspond to those set out in appendix 111 to the statement of objections, that document cannot be regarded as proof of the applicant's participation in collusion on prices. The references to the price increases of SBS cartonboard might have concerned Iggesunds Bruk alone, the other producer of that grade of cartonboard deemed to have participated in the infringement.

144 Having regard to all the above considerations, the Court considers that the Commission has not proved that decisions with an anti-competitive object adopted in the PWG, the JMC or the Economic Committee were communicated to the applicant by the NPI or by a representative of a member undertaking of the NPI who had also participated in meetings of those bodies.

— The applicant's actual pricing conduct

145 According to the Decision, the applicant's own commercial documentation, in so far as it is available, shows 'not only a continuing pattern of price increases identical to those of the other major SBS producer, Iggesunds Bruk, but also, for October 1989, a virtually exact correspondence to the NPI price list obtained from Rena' (point 121).

146 As regards the April 1990 price increase initiative, the Commission states (point 86, last paragraph, of the Decision):

'Enso's announced price increase for the United Kingdom of 8.5% is also exactly the same as that notified by Finnboard for its GC graphic grades which compete with Enso's SBS product "Ensocoat". There is indeed documentary evidence (see recital 97) pointing to collusion between Iggesund, Enso, Kopparfors and Finnboard on the price increase for graphic grades in the United Kingdom on this occasion.'

147 The Court has already held that the figures concerning the applicant's price increases for cartonboard in October 1989 are not so similar in comparison with those contained in appendix 111 to the statement of objections (the price list obtained from Rena, paragraph 138 above) as to support the Commission's assertion that that document proves that the applicant participated in collusion on prices (paragraph 141 et seq. above).

148 The Court has also held that appendix 133 to the statement of objections, on which the Commission relies as evidence of the applicant's participation in collusion on the April 1990 price increase in the United Kingdom, has no probative value (see paragraph 112 et seq. above). In that context, the Court has also held that the price increases announced by Iggesunds Bruk and by the applicant in the United Kingdom at the beginning of 1990 cannot be regarded as 'similar' or 'identical' (paragraphs 119 to 121 above).

149 Lastly, the Court finds that the applicant's actual pricing conduct at the time of the increases for which the Commission does not rely on any documentary evidence as against it, namely the increases in March/April 1988, October 1988, April 1989 and January 1991, does not constitute evidence of its participation in collusion on prices during the reference period. The pricing conduct of the applicant and that of Iggesunds Bruk and of Finnboard, as set out in the tables annexed to the Decision (tables B, C, D and G), do not display such a degree of similarity that the possibility that the applicant adapted its conduct to that of its competitors on the market seems less plausible than the possibility that it participated in collusion on prices. It is settled law that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see, *inter alia*, *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 71).

150 In those circumstances, the applicant's pricing conduct cannot be accepted as evidence of its participation in collusion on prices.

— Conclusions

151 The items of evidence on which the Commission relies in the Decision in order to prove the existence of an infringement of Article 85(1) of the Treaty by an undertaking must not be assessed separately, but as a whole (*ICI* v *Commission*, cited above, paragraph 68).

152 In its appraisal of the object of the PC meetings, of the documents expressly referring to the applicant (appendices 44 and 113 to the statement of objections), of the consequence of the applicant's membership of the NPI, and of the applicant's actual pricing conduct, the Court has held that none of those elements can, when considered separately, constitute evidence of the applicant's participation in an infringement of Article 85(1) of the Treaty.

153 Even when the documents before it are considered as a whole, the Court finds that their probative value is not sufficient to prove that the applicant committed an infringement of Article 85(1) of the Treaty.

154 The Decision must therefore be annulled in so far as it concerns the applicant, and it is not necessary to consider the other pleas on which the applicant relies in support of its application for annulment of the Decision.

## Costs

155 Under 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful in its submissions, it must be ordered to pay the costs, as sought by the applicant.

On those grounds,

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

hereby:

**(1) Annuls, as regards the applicant, 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) Orders the Commission to pay the costs.**

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 14 May 1998.

H. Jung B. Vesterdorf

Registrar President