JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-279/98 P,

Cascades SA, established in Bagnolet (France), represented by J.-Y. Art, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 14 May 1998 in Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by R. Lyal and E. Gippini Fournier, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

* Language of the case: French.

THE COURT (Fifth Chamber),

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

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

having regard to the report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 23 July 1998, Cascades SA brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled part of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1, hereinafter 'the Decision') and dismissed the remainder of the application.

Facts

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

3 According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the Fédération Française du Cartonnage, and investigations which Commission officials, acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

4 The evidence obtained from those investigations and following requests for information and documents led the Commission to conclude that from mid-1986 until at least (in most cases) April 1991 the undertakings concerned had participated in an infringement of Article 85(1) of the Treaty. The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty and, by letter of 21 December 1992, served a statement of objections on each of the undertakings concerned, all of which submitted written replies. Nine undertakings requested an oral hearing.

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

...

Article 3

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

...

(ii) Cascades SA, a fine of ECU 16 200 000;

...'

6 The contested judgment also sets out the following facts:

'9 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.

10 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).

11 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.

12 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.

13 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.

14 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.

15 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.

16 The applicant, Cascades SA ("Cascades"), was formed in September 1985. Cascades Paperboard International Inc., a company incorporated under Canadian law, holds the majority of its shares.

17 The Canadian group entered the European cartonboard market in May 1985 by taking over Cartonnerie Maurice Franck (which became Cascades La Rochette SA, "Cascades La Rochette"). In May 1986 Cascades acquired the Blendecques mill (which became Cascades Blendecques SA, "Cascades Blendecques").

18 The Decision states that the Belgian company Van Duffel NV ("Duffel") and the Swedish company Djupafors AB ("Djupafors"), acquired by the applicant in March 1989, participated, prior to their acquisition, in the cartel referred to in Article 1 of the Decision. Since 1989, those two undertakings have been renamed and have operated as separate subsidiaries in the Cascades group (point 147 of the Decision). However, as regards the period both before and after their acquisition by Cascades, the Commission took the view that the Decision should be addressed to the Cascades group, represented by the applicant.

19 Finally, according to the Decision, the applicant participated in meetings of the PWG, the JMC and the Economic Committee from mid-1986 until April 1991. The Commission considered it to be one of the "ringleaders" of the cartel, which had to bear special responsibility.

...

20 The applicant brought this action by application lodged at the Registry of the Court on 6 October 1994.

21 By separate document lodged at the Registry of the Court on 4 November 1994, it also applied for suspension of the operation of Articles 3 and 4 of the Decision. By order of 17 February in Case T-308/94 R *Cascades* v *Commission* [1995] II-265 the President of the Court ordered a stay, upon certain conditions, of the applicant's obligation to provide a bank guarantee in favour of the Commission in order to avoid immediate recovery of the fine imposed by Article 3 of the Decision. The applicant was also ordered to forward to the Commission certain specific items of information by a particular date.'

7 Sixteen of the eighteen other undertakings held to be responsible for the infringement and four Finnish undertakings, members of the trade association Finnboard, and as such held jointly and severally liable for payment of the fine imposed on Finnboard, also brought actions against the Decision (Cases T-295/94, T-301/94, T-304/94, T-309/94 to 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, and Joined Cases T-339/94 to T-342/94).

The contested judgment

The application for annulment of the Decision

8 Since, with the exception of one plea, the appeal concerns the grounds of the contested judgment relating to the application for annulment or reduction of the fine, it must merely be stated that the Court of First Instance dismissed the application for annulment of the Decision itself, holding, *inter alia*, unfounded the plea that the conduct of Duffel and Djupafors prior to their acquisition could not be attributed to Cascades.

9 The Court of First Instance stated as follows in that regard:

'139 ... The Court must therefore, first, examine the statement of reasons in the Decision on that point and ascertain whether the Commission correctly applied the principles in the Decision. Second, the Court will examine the correctness of the Decision in regard to the attribution to the applicant of the unlawful conduct of Djupafors and Duffel prior to their acquisition.

140 It is settled law that the statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal validity to be carried out and must provide the person concerned with information sufficient to allow him to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving

explanations. In order to fulfil those purposes, an adequate statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question. Where, as in the present case, a decision taken in application of Article 85 or Article 86 of the Treaty relates to several addressees and poses a problem of attribution of liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for that infringement (see, in particular, *AWS Benelux* v *Commission*, cited above, paragraph 26).

141 In the present case, points 140 to 146 of the Decision contain a sufficiently clear statement of the general criteria on which the Commission relied in order to determine the undertakings to which the Decision was addressed.

142 Point 143 states that, in principle, the Commission addressed the Decision to the entity named in the membership lists of the PG Paperboard, except that:

"1. where more than one company in a group participated in the infringement; or

2. where there is express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel,

the proceedings have been addressed to the group (represented by the parent company)".

143 The applicant accepts that the Commission was entitled to hold it responsible for the unlawful conduct of Djupafors and Duffel after their acquisition, pursuant to the principle that the Decision should be addressed to the group, represented by the parent company, where more than one company in that group had participated in the infringement.

144 Where companies had been acquired, the Commission determined the addressees of the Decision on the basis of the principles set out in point 145 of the Decision:

"The application of the principles set out above has the consequence that in cases where, but for the acquisition, proceedings would normally have been addressed to the subsidiary in its own right, responsibility for its conduct prior to the transfer passes with it....

On the other hand, where a parent company or group which itself is properly considered a party to the infringement transfers a subsidiary to another undertaking, responsibility for the period up to the date of divestment does not pass to the acquirer but will remain with the first group.

In either case, if the transferred subsidiary continued as a member of the cartel, it will depend upon the individual circumstances whether proceedings in respect of such participation should be addressed to that subsidiary in its own name or to the new parent group."

145 The Court considers that this statement of reasons adequately explains that a group which has acquired a company that has participated in its

own right in the infringement must be the addressee of the decision where several companies in that group also took part in the infringement committed by that company.

146 The statement in the first paragraph of point 145, to the effect that "responsibility for... conduct [of the transferred company] prior to the transfer passes with it", does not undermine the Commission's reasoning.

147 It cannot be construed as indicating that the Decision had to be addressed to the transferred company in respect of conduct prior to its transfer. If the first two paragraphs of point 145 are read as a whole, it is clear that the first paragraph relates to the question whether responsibility for the conduct of the transferred company prior to the transfer continues to be assumed by that company or whether it should be assumed by the vendor group.

148 Consequently, where, prior to its acquisition, a company has participated in its own right in the infringement, the identity of the addressee of the Decision, that is to say, whether that should be the transferred company or the new parent company, is determined solely by the criteria set out in point 143.

149 That interpretation is supported by point 147 of the Decision, which deals with the applicant's own situation. It is stated that "it is appropriate to address this Decision to the Cascades Group represented by Cascades SA in respect of the participation in the infringement of all of Cascades cartonboard operations (see recital 143)".

150 That interpretation is consistent with the wording of the statement of objections.

151 In that document the Commission explained (p. 91 and 92) that the proceedings were addressed in principle to the entity named in the membership lists of the PG Paperboard, but that they were nevertheless addressed to the group (represented by the parent company) in particular where more than one company in a group had participated in the infringement.

152 As to the situation where companies had been transferred, the statement of objections states as follows (p. 92):

"... Where a subsidiary which was a participant in its own right in the cartel is acquired by another undertaking, its responsibility for its conduct prior to the transfer will pass with it."

153 That statement of objections clearly shows that, in a situation such as the present, responsibility for the conduct of a company prior to its transfer follows the transferred company. On the other hand, since the statement of objections does not deal with the question whether proceedings should be addressed to the transferred company or to the new parent company, that question must be answered in accordance with the general principles laid down in order to determine whether a parent company must be held responsible for the conduct of its subsidiaries.

154 It is therefore clear from the statement of objections that the proceedings were addressed to the applicant also in respect of the unlawful conduct of Djupafors and Duffel prior to its acquisition of them, and that the principle applied was that of participation in the infringement of more than one company in the same group.

155 Furthermore, contrary to the applicant's assertion in its pleadings, its reply to the statement of objections did not contain a submission that, in accordance with the principles adopted in the statement of objections, the proceedings should have been addressed to Duffel and Djupafors in respect of their unlawful conduct prior to their acquisition by it. In fact, it did not contest the correctness of the general principles adopted by the Commission in regard to cases of transfer, but merely submitted that the former parent companies of the two companies in question had been involved in their former subsidiaries' participation in the infringement, so that the proceedings should have been addressed to them. It did not, however, repeat that argument in its pleadings before the Court.

156 Since point 145 of the Decision must be interpreted in the light of the general scheme of the Decision and in the light of the statement of objections, which is worded sufficiently clearly (see, to the same effect, Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 230), the Court finds, first, that the Commission, in addressing the Decision to the applicant in respect of the conduct of Djupafors and Duffel throughout the period of their participation in the infringement found, did not misapply the principles which it had set for itself in the Decision nor infringe the obligation to state reasons as laid down by Article 190 of the Treaty. Furthermore, in view of the terms of the applicant's reply to the statement of objections, the Commission was not required to give a more detailed explanation in the Decision of the reasons for which the applicant had to be considered responsible for the unlawful conduct of Djupafors and Duffel prior to their acquisition.

157 Finally, as regards the correctness of the attribution to the applicant of the unlawful conduct of Djupafors and Duffel prior to their acquisition, it suffices to point out that there is no dispute that at the time when those two companies were acquired they were participating in an infringement in which the applicant was also participating by virtue of the involvement of Cascades La Rochette and Cascades Blendecques.

158 In those circumstances, the Commission was entitled to attribute to the applicant the conduct of Djupafors and of Duffel in respect of the period before and the period after their acquisition by the applicant. It was for the applicant, as parent company, to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of the infringement of which it was aware.

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

The application for annulment or reduction of the fine

10 Five pleas in law were raised by the appellant before the Court of First Instance regarding the fixing of the fine. They allege that the effects of the infringement were limited, that the general level of the fines was excessive, that the duty to state reasons was infringed, that the appellant was wrongly classified as a 'ringleader' and that there were mitigating circumstances.

11 Having regard to the pleas put forward by the appellant in support of its appeal, only the passages of the contested judgment relevant to the complaints of, first, the limited effects of the infringement and the excessive nature of the general level of fines and, second, infringement of the duty to state reasons, will be set out below.

The pleas alleging that the infringement had limited effects and that the general level of the fines is excessive

12 The applicant submitted, in essence, that, having regard to the lack of seriousness of the infringement, the general level of fines was excessive. It claimed in particular that, in order to assess the gravity of the infringement and thus to set the general level of the fines, the Commission should have taken the actual effects of the infringement on the market into consideration (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 107).

13 However, because of the structural and economic characteristics of the carton-board market during the relevant period, the level of prices did not differ from that which would have been achieved in the absence of any collusion. It added that the Commission had not taken account of competition from substitute products, despite the fact that such competition considerably reduced the cartel members' room for manœuvre in regard to prices.

14 Lastly, the appellant disputed that the collusion had had any actual effect on market shares. The fact that during the period in question the applicant achieved a market share of 6.5% clearly showed that there were no such effects, even if that increase was attributable to its purchase of production units.

15 The Court of First Instance stated as follows in that regard:

'— The effects of the infringement

172 According to the seventh indent of point 168 of the Decision, the Commission determined the general level of fines by taking into account, *inter alia*, the fact that the cartel "was largely successful in achieving its objectives". It is common ground that this consideration refers to the effects on the market of the infringement found in Article 1 of the Decision.

173 In order to review the Commission's appraisal of the effects of the infringement, the Court considers that it suffices to consider the appraisal of the effects of the collusion on prices. First, it is apparent from the Decision that the finding concerning the large measure of success in achieving objectives is essentially based on the effects of collusion on prices. While those effects are considered in points 100 to 102, 115, and 135 to 137 of the Decision, the question whether the collusion on market shares and collusion on downtime affected the market was, by contrast, not specifically examined in it.

174 Second, consideration of the effects of the collusion on prices also makes it possible, in any event, to assess whether the objective of the collusion on downtime was achieved, as the aim of that collusion was to prevent the concerted price initiatives from being undermined by an excess of supply.

175 Third, as regards collusion on market shares, the Commission does not submit that the objective of the undertakings which participated in the meetings of the PWG was an absolute freezing of their market shares. According to the second paragraph of point 60 of the Decision, the agreement on market shares was not static "but was subject to periodic adjustment and re-negotiation". In view of that point, the fact that the Commission took the view that the cartel was largely successful in achieving its objectives without specifically examining in the Decision the success of that collusion on market shares is not therefore open to objection.

176 As regards collusion on prices, it is apparent from the Decision, as the Commission confirmed at the hearing, that a distinction was drawn between three types of effects. Moreover, the Commission relied on the fact that the price initiatives were considered by the producers themselves to have been an overall success.

177 The first type of effect taken into account by the Commission, and not contested by the applicant, consisted in the fact that the agreed price increases were actually announced to customers. The new prices thus served as a reference point in individual negotiations on transaction prices with customers (see, *inter alia*, points 100 and 101, fifth and sixth paragraphs, of the Decision).

178 The second type of effect consisted in the fact that changes in transaction prices followed those in announced prices. The Commission states that "the producers not only announced the agreed price increases but also with few exceptions took firm steps to ensure that they were imposed on the customers" (point 101, first paragraph, of the Decision). It accepts that customers sometimes obtained concessions in regard to the date of entry into force of the increases or rebates or individual reductions, particularly on large orders, and that "the average net increase achieved after all discounts, rebates and other concessions would always be less than the full amount of the announced increase" (point 102, last paragraph, of the Decision). However, referring to graphs in the LE Report, the Commission claims that during the period covered by the Decision there was "a close linear relationship" between changes in announced prices and those in transaction prices expressed in national currencies or converted to ecus. It concludes from this that: "the net price increases achieved closely tracked the price announcements albeit with some time lag. The author of the report himself acknowledged during the oral hearing that this was the case for 1988 and 1989" (point 115, second paragraph, of the Decision).

179 When appraising this second type of effect the Commission could properly take the view that the existence of a linear relationship between changes in announced prices and changes in transaction prices was proof of an effect by the price initiatives on transaction prices in accordance with the objective pursued by the producers. There is, in fact, no dispute that on the relevant market the practice of holding individual negotiations with

customers means that, in general, transaction prices are not identical to announced prices. It cannot therefore be expected that increases in transaction prices will be identical to announced price increases.

180 As regards the very existence of a relationship between announced price increases and transaction price increases, the Commission was right in referring to the LE report, which consists of an analysis of changes in the price of cartonboard during the period to which the Decision relates, based on information supplied by several producers.

181 However, that report only partially confirms, in temporal terms, the existence of a "close linear relationship". Examination of the period 1987 to 1991 reveals three distinct sub-periods. At the oral hearing before the Commission the author of the LE report summarised his conclusion as follows: "There is no close relationship, even with a lag, between announced price increase and market prices in the early part of the period, in 1987 through 1988. There is such a relationship in 1988/89, and then the relationship breaks down and behaves rather oddly over the period 1990/91" (transcript of the oral hearing, p. 28). He also observed that those temporal variations were closely linked to variations in demand (see, in particular, transcript of the oral hearing, p. 20).

182 Those conclusions expressed by the author at the hearing are in accordance with the analysis set out in his report, and in particular with the graphs comparing changes in announced prices and changes in transaction prices (LE report, graphs 10 and 11, p. 29). The Commission has therefore only partially proved the existence of the "close linear relationship" on which it relies.

183 At the hearing the Commission stated that it had also taken into account a third type of effect of the price collusion, namely the fact that the level of transaction prices was higher than that which would have been achieved in

the absence of any collusion. Pointing out that the dates and order of the price increase announcements had been planned by the PWG, the Commission takes the view in the Decision that "it is inconceivable in such circumstances that the concerted price announcements had no effect upon actual price levels" (point 136, third paragraph, of the Decision). However, the LE report (section 3) drew up a model which enabled a forecast to be made of the price level resulting from objective market conditions. According to that report, the level of prices determined by objective economic factors in the period 1975 to 1991 would have evolved, with minor variations, in an identical manner to the level of transaction prices applied, including those during the period covered by the Decision.

184 Despite those conclusions, the analysis in the report does not justify a finding that the concerted price initiatives did not enable the producers to achieve a level of transaction prices above that which would have resulted from the free play of competition. As the Commission pointed out at the hearing, it is possible that the factors taken into account in that analysis were influenced by the existence of collusion. So, the Commission rightly argued that the collusive conduct might, for example, have limited the incentive for undertakings to reduce their costs. However, the Commission has not argued that there is a direct error in the analysis in the LE report nor submitted its own economic analysis of the hypothetical changes in transaction prices had there been no collusion. In those circumstances, its assertion that the level of transaction prices would have been lower if there had been no collusion between the producers cannot be upheld.

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

186 The above findings are in no way altered by the producers' subjective appraisal, on which the Commission relied in reaching the view that the cartel was largely successful in achieving its objectives. In that regard, the Commission referred to a list of documents which it produced at the

hearing. However, even supposing that it could base its appraisal of the success of the price initiatives on documents showing the subjective opinions of certain producers, it must be observed that several undertakings, including the applicant, rightly referred at the hearing to a number of other documents in the file showing the problems encountered by the producers in implementing the agreed price increases. In those circumstances, the Commission's reference to the statements of the producers themselves is insufficient for a conclusion that the cartel was largely successful in achieving its objectives.

187 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of its exercise of its unlimited powers in regard to fines, when it assesses the seriousness of the infringement found in the present case (see paragraph 194 below).

— The general level of the fines

188 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines ranging from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement. As is apparent from the case-law of the Court of Justice, the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case, and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

189 In the present case, the Commission determined the general level of fines by taking into account the duration of the infringement (point 167 of the Decision) and the following considerations (point 168):

"— collusion on pricing and market sharing are by their very nature serious restrictions on competition,

— the cartel covered virtually the whole territory of the Community,

— the Community market for cartonboard is an important industrial sector worth some ECU 2 500 million each year,

— the undertakings participating in the infringement account for virtually the whole of the market,

— the cartel was operated in the form of a system of regular institutionalised meetings which set out to regulate in explicit detail the market for cartonboard in the Community,

— elaborate steps were taken to conceal the true nature and extent of the collusion (absence of any official minutes or documentation for the PWG and JMC; discouraging the taking of notes; stage-managing the timing and order in which price increases were announced so as to be able to claim they were 'following', etc.),

— the cartel was largely successful in achieving its objectives."

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

191 It should be pointed out, first, that when assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy (see, *inter alia*, *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 105 to 108, and *ICI* v *Commission*, cited above, paragraph 385).

192 Second, the Commission rightly argues that, on account of the specific circumstances of the present case, no direct comparison could be made between the general level of fines adopted in the present decision and those adopted in the Commission's previous decisions, in particular in the *Polypropylene* decision, which the Commission itself considered to be the most similar to the decision in the present case. Unlike in the *Polypropylene* case, no general mitigating circumstance was taken into account in the present case when determining the general level of fines. Moreover, the adoption of measures to conceal the existence of the collusion shows that the undertakings concerned were fully aware of the unlawfulness of their conduct. Consequently, the Commission was entitled to take into account those measures when assessing the gravity of the infringement, because they constitute a particularly serious aspect of the

infringement, distinguishing it from infringements previously found by the Commission.

193 Third, the Court notes the lengthy duration and obviousness of the infringement of Article 85(1) of the Treaty which was committed despite the warning which the Commission's previous decisions, in particular the Polypropylene decision, should have provided.

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

195 In view of the foregoing, the pleas alleging that the infringement had only limited effects and that the general level of the fines is excessive must be rejected.'

The plea of infringement of the duty to state reasons

16 The appellant complained, in essence, that the Commission had given insufficient reasons in the Decision for classifying it as a 'ringleader' of the cartel and did not provide precise information regarding the percentage of turnover used in order to fix the amount of the fine imposed on each undertaking.

17 As regards the statement of reasons for the determination of the individual fines, the Court of First Instance held as follows:

'208 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).

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

210 Moreover, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered to be obliged to apply a precise mathematical formula for that purpose (see, to the same effect, the

judgment in Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

211 In the Decision, the criteria taken into account in order to determine the general level of fines and the amount of individual fines are set out in points 168 and 169 respectively. Moreover, as regards the individual fines, the Commission explains in point 170 that the undertakings which participated in the meetings of the PWG were, in principle, regarded as "ringleaders" of the cartel, whereas the other undertakings were regarded as "ordinary members". Lastly, in points 171 and 172, it states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections.

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

213 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.

214 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.

215 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, *Petrofina* v *Commission*, cited above, point 264).

216 The Court points out in that context that, according to point 170, first paragraph, of the Decision, the "ringleaders", namely the major producers of cartonboard which took part in the PWG (Cascades, Finnboard, [Mayr-Melnhof], MoDo, Sarrió and Stora), must bear a special responsibility. They clearly constituted the main decision-makers and were the prime movers of the cartel.

217 Furthermore, the Decision amply describes the central role of the PWG in the cartel (in particular, points 36 to 38 and 130 to 132 of the Decision.

218 The Decision therefore clearly contains an adequate statement of the reasons for the Commission's view that the applicant was a "ringleader". Moreover, the Commission states that it had taken into account the fact that Weig did not appear to have played as important a role in the cartel as the other producers (point 170, third paragraph, of the Decision), which adequately states the reason why the applicant and Weig were not treated identically when their fines were fixed.

219 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.

220 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, *Hilti* v *Commission*, cited above, paragraph 136).

221 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.

222 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.

223 In the specific circumstances set out in paragraph 221 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.

224 Consequently, this plea cannot be upheld.'

18 In those circumstances the Court of First Instance dismissed the application.

The appeal

19 In support of its appeal the appellant puts forward three pleas in law.

20 First, the appellant claims that the contested judgment is vitiated by inconsistency in that the Court of First Instance did not give full effect to its own findings that the statement of reasons for the Decision was inadequate in regard to the determination of the general level of the fines.

21 Second, it alleges that the Court of First Instance misinterpreted the concept of 'effects of the infringement on the market' and in any event infringed the principle of proportionality in not reducing the level of the fine imposed by the Commission when it had found that the Commission had not proved all the effects taken into account in determining the general level of the fines.

22 Third, the appellant asserts that the Court of First Instance infringed the principle of non-discrimination by upholding the criteria adopted by the Commission, themselves discriminatory, regarding the attributability of the conduct of undertakings transferred during the course of the infringement.

The first plea

23 In its first plea the appellant complains that the Court of First Instance erred in law in that it did not annul the Decision despite having found in paragraphs 214, 219 and 220 of the contested judgment that the statement of reasons was inadequate in view of the requirements laid down by Article 190 of the EC Treaty (now Article 253 EC), because the Commission had failed to set out in the Decision the factors which it had systematically taken into account in order to set the amount of the fines.

24 The appellant adds that such information should, in accordance with the settled case-law referred to by the Court of First Instance in paragraph 220 of the contested judgment, have been set out in the actual body of the Decision and that, save in exceptional circumstances, explanations given by the Commission to the press or during the proceedings before the Court of First Instance cannot be taken into account. Indeed, the Court of First Instance had specifically found in paragraph 220 of the contested judgment that the Commission had accepted at the hearing that nothing had prevented it from indicating those matters in the Decision. In those circumstances, the Court of First Instance could not take account of the fact that the 'Commission [had] showed itself to be willing to supply any relevant information relating to the method of calculating the fines' (paragraph 223 of the contested judgment).

25 Furthermore, according to the appellant, *ex post facto* reasoning does not enable the undertakings or the Community judicature to verify whether the criteria indicated by the Commission during the proceedings before the Court of First Instance in fact corresponded to the factors taken into account when initially calculating the fine. There is no guarantee that those factors were taken into account when the Decision was adopted by the College of Commissioners, which remains the only body with power to take and give reasons for a Decision.

26 The appellant also complains that the Court of First Instance limited the temporal scope of the interpretation, in regard to the fixing of fines, which it gave as to the requirements of Article 190 of the EC Treaty in its judgments in *Tréfilunion* v

Commission, *Société Métallurgique de Normandie* v *Commission* and *Société des Treillis et Panneaux Soudés* v *Commission*, cited above (hereinafter 'the Welded Steel Mesh judgments'), referred to in paragraph 221 of the contested judgment, despite the fact that the Court of Justice has always held that the interpretation which it gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force, save where it is provided to the contrary in the judgment giving that interpretation.

27 The Commission observes that the Court of First Instance held in paragraph 215 of the contested judgment that points 169 to 172 of the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and the duration of the infringement committed by each of the undertakings in question'. There is no contradiction, as the appellant alleges, in the fact that the Court of First Instance set out, in addition to that finding, comments as to the appropriateness of the Commission's including other information in its decisions, over and above the duty to state reasons, strictly construed.

28 Paragraphs 219 to 222 of the contested judgment are, according to the Commission, superfluous in that they refer to the consequences of the Welded Steel Mesh judgments. In those judgments the Court of First Instance expressed, as it did in the contested judgment, the wish that there should be greater transparency as to the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of transparency as amounting to a failure to state adequate reasons for the Decision. At most, the position adopted by the Court of First Instance reflects the principle of good administrative practice, in the sense that addressees of decisions should not be forced to bring proceedings before the Court of First Instance in order to ascertain all the details of the method of calculation used by the Commission. However, such considerations of opportuneness could not in themselves constitute a ground of annulment.

29 Last, the Commission states that the implications to that effect of the Welded Steel Mesh judgments have recently been confirmed by the Court of First Instance. According to that Court, the information which it is desirable that the Commission should communicate to the addressee of a decision must not be regarded as an additional statement of reasons, but solely as the translation into figures of the criteria set out in the Decision in so far as they are themselves capable of being quantified (see judgments in the 'Steel Beams' cases, Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239, Case T-136/94

Eurofer v *Commission* [1999] ECR II-263, Case T-137/94 *Arbed* v *Commission* [1999] ECR II-303, Case T-138/94 *Cockerill-Sambre* v *Commission* [1999] ECR II-333, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, Case T-147/94 Krupp Hoesch v *Commission* [1999] ECR II-603), Case T-148/94 *Preussag* v *Commission* [1999] ECR II-613, Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645 and Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, and more particularly the judgment in *Thyssen Stahl* v *Commission*, cited above, paragraph 610).

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

31 The Court of First Instance first of all referred, in paragraph 208 of the contested judgment, to the settled case-law to the effect that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged, the scope of that obligation being dependent on the nature of the act in question and on the context in which it was adopted (see, in particular, besides the case-law cited by the Court of First Instance, Case C-22/94 *Irish Farmers Association and Others* v *Ministry for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809, paragraph 39).

32 The Court of First Instance then explained in paragraph 209 of the contested judgment that as regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of the infringements depends on numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

33 In that regard, the Court of First Instance held in paragraph 215 of the contested judgment that:

'points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question'.

34 It added, in paragraph 218 of the contested judgment, that 'the Decision therefore clearly contains an adequate statement of the reasons for the Commission's view that the applicant was a "ringleader".'

35 However, in paragraphs 219 to 223 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 215 and 218.

36 According to paragraphs 219 and 220 of the contested judgment, the Decision does not indicate the precise figures systematically taken into account by the Commission in fixing the amount of the fines, albeit it could have disclosed them and this would have enabled the undertakings better to assess whether the Commission had erred when fixing the amount of each individual fine and whether that amount was justified by reference to the general criteria applied. The Court added, in paragraph 221, that according to the Welded Steel Mesh judgments it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

37 It concluded, in paragraph 223 of the contested judgment, that there had been an 'absence of specific grounds in the Decision regarding the method of calculation of the fines', which was justified in the specific circumstances of the case, namely the disclosure of the method of calculating the fines during the proceedings before the Court of First Instance and the novelty of the interpretation of Article 190 of the Treaty given in the Welded Steel Mesh judgments.

38 Before examining, in the light of the arguments submitted by the appellant, the correctness of the findings by the Court of First Instance regarding the consequences which disclosure of calculations during the proceedings before it and the novelty of the Welded Steel Mesh judgments may have in regard to fulfilment of the obligation to state reasons, it is necessary to determine whether fulfilment of the duty to state reasons laid down in Article 190 of the Treaty required the Commission to set out in the Decision, not only the factors which enabled it to determine the gravity and duration of the infringement, but also a more detailed explanation of the method of calculating the fines.

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

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

41 Second, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 172 of the Treaty (now Article 229 EC) and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons under Article 190 of the Treaty, to be set out in the decision.

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

43 In those circumstances, in the light of the case-law referred to in paragraphs 208 and 209 of the contested judgment, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.

44 The Court of First Instance correctly held in paragraph 215 of the contested judgment that the Commission had satisfied that requirement. It must be observed, as the Court of First Instance observed, that points 167 to 172 of the Decision set out the criteria used by the Commission in order to calculate the fines. First, point 167 concerns in particular the duration of the infringement. It also sets out, as does point 168, the considerations on which the Commission relied in assessing the gravity of the infringement and the general level of the fines. Point 169 contains the factors taken into account by the Commission in determining the amount to be imposed on each undertaking. Point 170 identifies the undertakings which were to be regarded as 'ringleaders' of the cartel, and which should accordingly bear special responsibility in comparison with the other undertakings. Lastly, points 171 and 172 of the Decision set out the effect on the amount of the fines of the cooperation by various manufacturers with the Commission during its investigations in order to establish the facts or when they replied to the statement of objections.

45 The fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the proceedings before the Court of First Instance, is not such as to call in question the finding in paragraph 215 of the contested judgment. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in

relation to review by the Community court of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision.

46 Admittedly, the Commission cannot, by a mechanical and exclusive recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 43 of this judgment, *inter alia* by indicating the figures which, especially in regard to the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement.

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

48 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 222 of the contested judgment, that 'the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision'. Nor, without contradicting itself in the grounds of its judgment, could it, after finding in paragraph 215 of the contested judgment that the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question', then refer, as it did in paragraph 223 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

49 However, the error of law so committed by the Court of First Instance is not such as to cause the contested judgment to be set aside, since, having regard to the considerations, set out above, the Court of First Instance validly rejected, notwithstanding paragraphs 219 to 223 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

50 As there was no obligation on the Commission, as part of its duty to state reasons, to indicate in the Decision the figures relating to the method of calculating the fines, there is no need to examine the various objections raised by the applicant which are based on that erroneous premiss.

51 The first plea must therefore be rejected.

The second plea

52 In its second plea the appellant complains that the Court of First Instance wrongly interpreted the concept of 'effect of the infringement on the market' which it took into account when determining the amount of the fine. It confused that concept, which is relevant in order to assess the gravity of an infringement in accordance with Article 15 of Regulation No 17, with the concept of the restrictive effect on competition of an agreement between undertakings, which is a criterion for the application of Article 85(1) of the Treaty (see paragraph 194 of the contested judgment).

53 In the present case, of the three effects of the collusion taken into consideration by the Court of First Instance (see paragraph 176 et seq. of the contested judgment: the fact that the agreed price increases were announced to customers; the fact that changes in transaction prices followed those in prices announced to customers; and the fact that the level of transaction prices would have been different from that which would have applied in the absence of collusion), only

the third effect should be taken into consideration in order to determine the gravity of the infringement. The two other effects concern only the implementation of the collusion, in that they show that as well as drawing up the terms of an agreement on prices, the undertakings actually implemented the collusion, but did not prove the existence of a real impact of the agreement on prices or on the other competitive conditions on the market.

54 The appellant submits, in the alternative, that the Court of First Instance infringed the principle of proportionality in maintaining the level of the fine imposed while finding that the Commission had not proved that the infringement had had on effect on cartonboard prices.

55 The Commission states that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute its own assessment for that of the Court of First Instance with regard to the amount of the fines, lest it encroach on the exercise of its unlimited jurisdiction (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31).

56 It contends that in paragraph 194 of the contested judgment the Court of First Instance did not confuse restriction of competition, the test for classifying a practice as prohibited under Article 85(1) of the Treaty, and the impact of that practice on the market, one of the many criteria which may be taken into consideration when assessing the gravity of the infringement, which falls precisely within the scope of its unlimited jurisdiction. The Court of First Instance held that the gravity of the infringement remained substantially the same in the present case, even in the absence of proof that it had had an effect on transaction prices.

57 According to the Commission, to accept the appellant's contention would be tantamount to accepting that the Court of First Instance is under an obligation to reduce the amount of the fine where the Commission has not succeeded in proving one or other of the factors on which it based its assessment of the gravity,

and to limiting the Court's discretion in matters of fines by reference to that of the Commission. That would be the very negation of unlimited jurisdiction.

58 In the contested judgment the Court of First Instance first set out, in paragraph 188, the Commission's powers under Article 15 of Regulation No 17, the obligation to take into consideration, when determining the amount of the fine, both the gravity and duration of the infringement, as well as the case-law of the Court of Justice which establishes 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 and that no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

59 The Court of First Instance then set out, in paragraph 189, and reviewed the considerations listed in the Decision in regard to the gravity of the infringement.

60 It held that the Commission was entitled to raise the general level of fines above that in its previous decisions in order to strengthen their deterrent effect (paragraph 191 of the contested judgment) and to take account of the fact that the undertakings concerned foot steps to conceal the existence of the collusion, which constitutes 'a particularly serious aspect of [the infringement] which differentiated it from infringements previously found' (paragraph 192 of the contested judgment). It also stressed the lengthy duration and the flagrant nature of the infringement of Article 85(1) of the Treaty (paragraph 193 of the contested judgment).

61 It concluded, in paragraph 194 of the contested judgment, that in the light of the foregoing considerations, the fact that the Commission had only partially proved the effect of the collusion on prices could not 'materially affect the assessment of the gravity of the infringement found'. It observed in that regard that 'the fact

that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition'.

62 It follows from the foregoing that, far from confusing the concept of a cartel's restrictive effect on competition and its impact on the market, the Court of First Instance considered, in the exercise of its unlimited jurisdiction, that its findings regarding the effects of the infringement were not such as to alter the Commission's own assessment of the gravity of the infringement, or, more precisely, as to diminish the gravity of the infringement so assessed. It considered, in the light of the specific circumstances of the case and the context in which the infringement took place, as taken into account by the Commission's Decision and set out in paragraphs 56 and 57 of this judgment, and in the light of the deterrent effect of the fines imposed, all being factors which could be applied, in accordance with the case-law of the Court of Justice, in assessing the gravity of the infringement (see Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 106; Order in *SPO and Others* v *Commission*, cited above, paragraph 54, and *Ferriere Nord* v *Commission*, cited above, paragraph 33), that it was not appropriate to reduce the level of the fine.

63 The second plea must therefore be rejected as unfounded.

The third plea

64 By its third plea the appellant complains that the Court of First Instance infringed the principle of non-discrimination by approving the criteria adopted by the Commission with regard to the imputability of acts of undertakings acquired during the period when the infringement was committed.

65 The Commission contests the admissibility of the plea. It observes that the appellant was aware, once the Decision was adopted, of the factors which led it to raise this plea before the Court of Justice. If it considered that there had been discrimination between the various undertakings participating in the infringement, it should have raised that plea already in its application at first instance. The third plea is therefore a new plea which, by virtue of Article 42(2) of the Rules of Procedure of the Court of Justice, applicable to appeals by virtue of Article 118 of those rules, may not be introduced in these proceedings.

66 In reply the appellant states that, although this plea was not raised before the Court of First Instance, that was because of the particularly muddled nature of the criteria adopted by the Commission, whose exact scope could be clarified only during the proceedings before the Court of First Instance.

67 The Commission's submissions cannot be upheld in that regard. As the Advocate General has observed in points 20 and 40 of his Opinion, the appellant submitted before the Court of First Instance a plea alleging that 'the conduct of Duffel and Djupafors prior to their acquisition was not attributable to Cascades', within whose scope the third plea raised before the Court of Justice undoubtedly falls. The latter plea is not therefore a new plea which may not be submitted in the course of an appeal.

68 As to the substance of the plea, the appellant claims that, according to point 145 of the Decision, responsibility for the conduct of a subsidiary prior to its transfer may be attributed either to the subsidiary itself, if it has participated in the infringement in its own right, or to the vendor group of companies if that group participated in the infringement. Moreover, according to point 143 of the Decision, if the subsidiary itself infringed Community law and the acquiring group itself participated in the infringement, the Commission may attribute to the acquiring group the responsibility for paying the fine in respect of the subsidiaries conduct prior to its acquisition.

69 The appellant concludes from the above that a group which has acquired a subsidiary which has participated in the infringement may be treated in two radically different ways depending on whether or not the vendor has participated in the infringement, a circumstance over which the appellant had no control. Thus the acquiring group will take on the burden of paying the fine in respect of its subsidiary's conduct prior to the transfer if the vendor group did not participate in the infringement; in the contrary case, it will not be responsible for the subsidiary's conduct and will not therefore have to pay the fine. Application of those criteria leads to blatant discrimination between two acquiring groups.

70 The appellant states that, applying the above criteria, the Court of First Instance held it liable for the conduct of its two subsidiaries, Duffel and Djupafors, prior to their acquisition, whereas, in Case T-347/94, Mayr-Melnhof Kartongesellschaft mbH ('Mayr-Melnhof') was not held liable for the conduct of its subsidiary Mayr-Melnhof Eerbeek BV ('Eerbeek') in respect of the period preceding its acquisition, since liability for that conduct had been attributed to NV Koninklijke KNP BT ('KNP'), the vendor group which had participated in the infringement (see Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraphs 400 to 405).

71 The appellant therefore requests the Court of Justice to set aside the contested judgment in so far as it held it liable for the conduct of Duffel and Djupafors prior to their acquisition and, if it considers the state of the proceedings so permits, to annul the Decision on the same grounds.

72 The Commission contends that the criteria set out in the Decision and confirmed by the Court of First Instance merely applied to the present case the principles laid down in the case-law regarding the imputability of an infringement within groups of undertakings.

73 The Commission states that in the case of the appellant, as in that of Mayr-Melnhof (regarding its subsidiary Deisswil), it applied those principles by attributing to the parent company responsibility for the conduct of its subsidiaries, both before and after the sale. It is only in the case of Eerbeek, originally a subsidiary of Mayr-Melnhof and then of KNP, that the Commission apportioned responsibility between the two parent companies, both of which had participated in the infringement.

74 In that regard, it must be observed that the Court of First Instance held in paragraph 148 of the contested judgment that 'where, prior to its acquisition, a company has participated in its own right in the infringement, the identity of the addressee of the Decision, that is to say, whether that should be the transferred company or the new parent company, is determined solely by the criteria set out in point 143.'

75 Point 143 of the Decision states that as regards

'acts of companies deemed to be independent subsidiaries, the Commission addressed the Decision to the entity named in the membership lists of the PG Paperboard, except that:

1. where more than one company in a group participated in the infringement; or

2. where there is express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel,

the proceedings have been addressed to the group (represented by the parent company)'.

76 In the present case, the Court of First Instance held, in paragraph 157 of the contested judgment, that at the date of the acquisition of Djupafors and Duffel 'those two companies... were participating in an infringement in which the applicant was also participating by virtue of the involvement of Cascades La Rochette and Cascades Blendecques' and concluded, in paragraph 158:

'In those circumstances, the Commission was entitled to attribute to the applicant the conduct of Djupafors and of Duffel in respect of the period before and the period after their acquisition by the applicant. It was for the applicant, as parent company, to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of the infringement of which it was aware.'

77 Although the appellant was rightly held liable for the conduct of the two subsidiaries in question with effect from their acquisition, it had not been proved that it could validly be held liable for their infringements prior to that date.

78 It falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking.

79 In the present case, it is apparent from the contested Decision that Djupafors and Duffel participated in their own right in the infringement from mid-1986 until

their acquisition by the appellant in March 1989 (see paragraph 18 of the contested judgment). Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it.

80 Consequently, the Court of First Instance erred in law in holding that the appellant was liable for the infringements committed by Duffel and Djupafors prior to their acquisition and the contested judgment must be set aside on that ground.

81 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded, the Court is to set aside the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

82 Since the documents in the file do not indicate what part of the fine related to the participation in their own right by Duffel and Djupafors in the cartel from mid-1986 until their acquisition by the appellant in March 1989, the case must be referred back to the Court of First Instance for assessment of the amount of the fine, taking into account the foregoing considerations. Costs must be reserved.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Sets aside the judgment of the Court of First Instance of 14 May 1998 in Case T-308/94 *Cascades* v *Commission* in so far as it attributes to Cascades SA responsibility for the infringements committed by Van Duffel NV and Djupafors AB during the period from mid-1986 until February 1989 inclusive;**

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

3. **Refers the case back to the Court of First Instance;**

4. **Reserves the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber