# JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-298/98 P,

°

**Metsä-Serla Sales Oy**, formerly Finnish Board Mills Association (Finnboard), established in Espoo (Finland), represented by H. Hellmann, Rechtsanwalt, Cologne, and H.-J. Hellmann, Rechtsanwalt, Mannheim, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

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-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, seeking to have that judgment set aside,

the other party to the proceedings being,

**Commission of the European Communities**, represented by R. Lyal, of its Legal Service, acting as Agent, assisted by D. Schroeder, Rechtsanwalt, Cologne, with

* Language of the case: German.

an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant at first instance,

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 29 July 1998, Metsä-Serla Sales Oy 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-338/94 *Finnboard* v *Commission* [1998] ECR II-1617 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled part of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1, hereinafter 'the Decision') and dismissed the remainder of the application.

## Facts

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

3 According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the Fédération Française du Cartonnage, and investigations which Commission officials, acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty

(OJ, English Special Edition 1959-1962, p. 87) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

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

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

'*Article 1*

Buchmann GmbH, Cascades SA, Enso-Gutzeit Oy, Europa Carton AG, Finnboard — the Finnish Board Mills Association, Fiskeby Board AB, Gruber & Weber GmbH & Co. KG, Kartonfabriek "de Eendracht" NV (trading as BPB de Eendracht NV), NV Koninklijke KNP BT NV (formerly Koninklijke Nederlandse Papierfabrieken NV), Laakmann Karton GmbH & Co. KG, Mo Och Domsjö AB (MoDo), Mayr-Melnhof Gesellschaft mbH, Papeteries de Lancey SA, Rena

Kartonfabrik A/S, Sarrió SpA, SCA Holding Ltd (formerly Reed Paper & Board (UK) Ltd), Stora Kopparbergs Bergslags AB, Enso Española SA (formerly Tampella Española SA) and Moritz J. Weig GmbH & Co. KG have infringed Article 85(1) of the EC Treaty by participating,

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

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

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

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

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

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

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

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

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

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

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

*Article 2*

The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall henceforth refrain in relation to their cartonboard activities from any agreement or concerted practice which may have the same or a similar object or effect, including any exchange of commercial information:

(a) by which the participants are directly or indirectly informed of the production, sales, order backlog, machine utilisation rates, selling prices, costs or marketing plans of other individual producers; or

(b) by which, even if no individual information is disclosed, a common industry response to economic conditions as regards price or the control of production is promoted, facilitated or encouraged;

or

(c) by which they might be able to monitor adherence to or compliance with any express or tacit agreement regarding prices or market sharing in the Community.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude not only any information from which the behaviour of individual producers can be identified but also any data concerning the present state of the order inflow and backlog, the forecast utilisation rate of production capacity (in both cases, even if aggregated) or the production capacity of each machine.

Any such exchange system shall be limited to the collection and dissemination in aggregated form of production and sales statistics which cannot be used to promote or facilitate common industry behaviour.

The undertakings are also required to abstain from any exchange of information of competitive significance in addition to such permitted exchange and from any meetings or other contact in order to discuss the significance of the information exchanged or the possible or likely reaction of the industry or of individual producers to that information.

A period of three months from the date of the communication of this Decision shall be allowed for the necessary modifications to be made to any system of information exchange.

*Article 3*

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

...

(v) Finnboard — the Finnish Board Mills Association, a fine of ECU 20 000 000, for which Oy Kyro AB is jointly and severally liable with Finnboard in the sum of ECU 3 000 000, Metsä-Serla Oy in the sum of ECU 7 000 000, Tampella Corporation in the sum of ECU 5 000 000 and United Paper Mills Ltd in the sum of ECU 5 000 000;

...'

6 The contested judgment also sets out the following facts:

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

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

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

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

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

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

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

20 The applicant, Finnish Board Mills Association — Finnboard (hereinafter "Finnboard") is a trade association governed by Finnish law which, in 1991, had six member companies, including cartonboard producers Oy Kyro AB, Metsä-Serla Oy, Tampella Corporation and United Paper Mills. The cartonboard produced by those four member companies is marketed by Finnboard throughout the Community, partly through its own subsidiaries.

21 According to the Decision, from mid 1986 until at least April 1991, Finnboard participated in the meetings of all the bodies of the PG Paperboard. For approximately two years a representative of Finnboard presided over the PWG and the PC.'

7 Sixteen of the eighteen other undertakings held to be responsible for the infringement and four Finnish undertakings, members of the trade association Finnboard, and as such held jointly and severally liable for payment of the fine

imposed on Finnboard, also brought actions against the Decision (Cases T-295/94, T-301/94, T-304/94, T-308/94 to T-311/94, T-317/94, T-319/94, T-327/94, T-334/94, T-337/94, T-347/94, T-348/94, T-352/94 and T-354/94, and Joined Cases T-339/94 to T-342/94).

## The contested judgment

8 As regards the application for annulment of the Decision, the Court of First Instance only annulled, as regards the appellant, the first to fourth paragraphs of Article 2 of the Decision, save and except for the following passages:

'The undertakings named in Article 1 shall forthwith bring the said infringement to an end, if they have not already done so. They shall henceforth refrain in relation to their cartonboard activities from any agreement or concerted practice which may have the same or a similar object or effect, including any exchange of commercial information:

(a) by which the participants are directly or indirectly informed of the production, sales, order backlog, machine utilisation rates, selling prices, costs or marketing plans of other individual producers.

Any scheme for the exchange of general information to which they subscribe, such as the Fides system or its successor, shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified.'

9 The application was dismissed as regards the remaining claims.

10 Before the Court of First Instance, the appellant also put forward several pleas in law concerning the fixing of the fine. The appeal relates specifically to the grounds of the contested judgment bearing on the fixing of that fine. Having regard to the pleas put forward by the appellant in support of its appeal, only the passages of the contested judgment relevant to the complaints that an irrelevant turnover figure was taken into account, that the duty to state reasons was infringed, that the effects of the infringement were wrongly assessed, and that the Commission erred in the general assessment of the fines or when they were reduced, will be set out below.

*The plea alleging that the fine was calculated on the basis of an irrelevant turnover figure*

11 Before the Court of First Instance, the appellant submitted, first, that the fine had been calculated, incorrectly, on the basis of the turnover of four of its member companies producing cartonboard, that is to say, Oy Kyro AB, Metsä-Serla Oy, Tampella Corporation and United Paper Mills and, second, that it is apparent from the statement in defence that the Commission had calculated the fine on the basis of an incorrect turnover figure, because Metsä-Serla Oy's production of wallpaper had been taken into account, thus over-estimating the turnover for 1990 by 17%.

12 The Court of First Instance replied as follows:

'268 As regards the first part of the plea, it follows from the Court's examination of the pleas relied on by the applicant in support of its application for annulment of the Decision that the Commission has proved that the applicant participated in meetings of the bodies of the PG

Paperboard and in the collusion with an anti-competitive object which took place at those meetings. The applicant has not disputed that, if that were proved, it could be held liable for the infringement found in Article 1 of the Decision and, on that basis, be fined under Article 15(2) of Regulation No 17.

269 That Article provides:

"The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, 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:

•

(a) they infringe Article 85(1)..."

270 It is settled case-law that the use of the general term "infringement" in Article 15(2) of Regulation No 17, inasmuch as it covers without distinction agreements, concerted practices and decisions of associations of undertakings, indicates that the upper limits for fines laid down in that provision apply in the same way to agreements and concerted practices as to decisions of associations of undertakings. It follows that the upper limit of 10% of turnover must be calculated by reference to the turnover of each of the undertakings which are parties to those agreements and concerted practices or of all of the undertakings which were members of the association of undertakings, at least where, by virtue of its internal rules, the association is able to bind its members. The correctness of this view is borne out by the fact that the influence which an association of undertakings has been able to exert on the market does not depend on its own 'turnover', which discloses neither its size nor its economic power,

but rather on the turnover of its members, which constitutes an indication of its size and economic power (judgments in Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraphs 136 and 137, and in Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385).

271 In this case, although the applicant was classified as an "undertaking" (point 173 of the Decision), the fine imposed on it was not fixed on the basis of the turnover appearing in its annual reports and published accounts, which corresponds to the amount of commission received by it on sales of cartonboard effected on behalf of its member companies: the turnover used to calculate the fine is made up of the total invoiced value of the sales which the applicant made on behalf of its members (see point 173, third paragraph, and point 174, first paragraph, of the Decision).

272 To assess whether the Commission was entitled to take account of that turnover, the principal information, as contained in the documents before the Court, must be examined and, in particular, the applicant's reply to the written questions of the Court regarding its organisation and its legal and factual relations with its member companies.

273 According to its statutes of 1 January 1987, the applicant is an association which markets the cartonboard produced by some members and paper goods produced by other members.

274 Under paragraphs 10 and 11 of those statutes, each of the members is to have one representative on the Board of Directors, responsible, *inter alia*, for the adoption of guidelines for the operations of the association; confirmation of the budget, the financing plan and principles regarding the division of expenses among the member companies; and the appointment of the "Managing Director."

275 Paragraph 20 of the statutes provides:

"The members shall be jointly and severally liable for undertakings given on behalf of the Association as if it were for their own debt.

The liability for debt and undertakings shall be distributed in proportion to the net invoicings of the members for the current year and for the two preceding years."

276 As regards the sale of cartonboard products, it is clear from the applicant's reply to the Court's written questions that, at the material time, its member companies had given it authority to make all their sales of cartonboard, with the sole exception of the intra-group sales of each member company and sales of small quantities to occasional customers in Finland (see also paragraph 14 of the statutes). In addition, the applicant fixed and announced identical prices for its cartonboard-producing members.

277 The applicant also explains that, in the case of individual sales, customers placed their orders with it and generally indicated which mill they preferred. Such preferences are attributable, *inter alia*, to differences in quality between the products of the applicant's member companies. Where no preference was expressed, orders were divided amongst its members, pursuant to paragraph 15 of its statutes, under which:

"The orders received are to be divided justly and equally for manufacture by the members, in consideration of the production capacity of each

member as well as the principles of distribution laid down by the Board of Directors."

278 The applicant was authorised to negotiate conditions of sale, including prices, with each potential customer, its member companies having drawn up general guidelines for such individual negotiations. Each order had none the less to be submitted to the member company concerned, which decided whether or not to accept it.

279 The procedures for individual sales and the accounting principles applied for such sales are described in a statement of 4 June 1997 by the applicant's accountants:

"Finnboard acts as Commission agent for the principals, invoicing 'in its own name on behalf of each Principal'.

1. Each order is confirmed by the Principal mill.

2. At the moment of shipment from the mill, the mill issues a base invoice to Finnboard ('Mill invoice'). The invoice is entered into the Principals' Account as a receivable and into Finnboard's purchase ledger as a debt to the mill.

3. The mill invoice (less the estimated costs of transport, storage, delivery and financing) is prepaid by Finnboard within an agreed period (10

days in 1990/1991). Finnboard thus finances the foreign stocks and customer receivables of the mill without taking title to the goods shipped.

4. At the moment of delivery to the customer, Finnboard issues a customer invoice on behalf of the mill. The invoice is recorded as a sale in the Principals' Account and as a receivable in Finnboard's sales ledger.

5. Customer payments are recorded in the Principals' Accounts and the possible differences between estimated and actual prices and costs (ref. point 3) are cleared through the Principals' Account."

280 It is thus clear, first, that, although the applicant was bound to submit each individual order to the member company concerned for its final approval, contracts for sale concluded by it on behalf of its member companies could bind them, as those companies were liable for undertakings given by the applicant under paragraph 20 of its statutes.

281 Second, the commission received by the applicant, which appears as its turnover in its annual reports, covers only expenses connected with the sales it effected on behalf of its member companies, such as transport or financing costs. It follows that the applicant had no economic interest of its own in taking part in collusion on prices, since the price increases announced and implemented by the undertakings meeting in the bodies of the PG Paperboard could not generate any profit for it. On the other hand, its cartonboard-producing member companies had a direct economic interest in the applicant's participation in such collusion.

282 Accordingly, the applicant's turnover for accounting purposes discloses neither its size nor its economic power. It cannot therefore, constitute the basis for calculation of the upper limit provided by Article 15(2) of Regulation No 17 for a fine exceeding ECU 1 000 000. The Commission was therefore entitled to base its calculation of that upper limit on the total value of cartonboard sales invoiced to customers, which the applicant made in its own name on behalf of its member companies since the value of those sales constitutes an indication of its real size and economic power (see, by analogy, the judgment in *CB and Europay* v *Commission*, cited above, paragraphs 136 and 137).

283 In the particular circumstances of this case, that interpretation is not undermined by the mere fact that the Commission formally classified the applicant as an undertaking rather than an association of undertakings.

284 The first part of the plea must therefore be rejected.

285 As regards the second part, it suffices to find that, in its letter of 6 October 1995, the Commission explained that the statement made in its defence was an error: it actually based its calculation on the fact that the applicant had marketed 221 000 tonnes of cartonboard in 1990, which corresponds to the figure supplied by the applicant itself in a letter of 27 September 1991. That explanation is confirmed by a letter from the Commission to the applicant dated 28 March 1994 setting out the method of calculation of the turnover used to determine the amount of the fine. The turnover so calculated is shown in a table concerning the calculation of the amount of individual fines, which the Commission supplied in response to a written question by the Court.

286 Accordingly, the second part of the plea cannot be accepted.

287 In the light of the foregoing, the plea must be rejected in its entirety.'

*Failure to state reasons relating to the amount of the fines*

13 Before the Court of First Instance, the appellant complained that the Commission had not set out in the Decision the manner in which it had in fact applied the criteria adopted for the purpose of calculating the fines.

14 The Court of First Instance replied as follows:

'300 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*, *Van Megen Sports* v *Commission*, cited above, paragraph 51).

301 As regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no

binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

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

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

304 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.

305 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.

306 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.

307 In the present case, first, points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, point 264). Similarly, point 168 of the Decision, which must be read in the light of the general criteria relating to the fines in point 167, contains a sufficient statement of the criteria taken into account in order to determine the general level of the fines.

308 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.

309 The Commission also accepted at the hearing that nothing prevented it from indicating in the Decision the factors which had been systematically taken into account and which had been divulged at a press conference held on the day on which that decision was adopted. In that regard, it is settled law that the reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and, to the same effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136).

310 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 in *Tréfilunion* v *Commission*, cited above, 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.

311 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.

312 In the specific circumstances set out in paragraph 310 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.'

*Misassessment of the effects of the infringement*

15 Before the Court of First Instance the appellant submitted that, contrary to the Commission's allegations, there is no evidence to show that the cartel was successful.

16 In that regard the Court stated as follows:

'313 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.

314 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. Consideration of the effects of the collusion on prices, the only effects disputed by the applicant, makes it possible to assess, in general, whether the cartel was successful, because the purpose of the collusion on downtime and on market shares was to ensure the success of the concerted price initiatives.

315 As regards collusion on prices, the Commission appraised the general effects of this collusion. Consequently, even assuming that the individual data supplied by the applicant show, as it claims, that the effects of collusion on prices were, in its case, less significant than those found on the European cartonboard market taken as a whole, such individual data cannot in themselves suffice to call into question the Commission's assessment. Furthermore, the applicant's assertion that, in point 16 of the Decision, the Commission based its argument on an erroneous definition of the cartonboard producers' average operating margin is also irrelevant. There are no grounds for considering that the Commission took that definition of the operating margin into account when it assessed the effects on the market of the collusion on prices, nor that the operating margin earned should have been taken into account for the purpose of that assessment.

316 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.

317 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).

318 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, an economic study produced on behalf of several addressee undertakings of the Decision for the purposes of the procedure before the Commission, 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).

319 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.

320 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, including the applicant itself.

321 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).

322 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.

323 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.

324 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.

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

326 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.

327 Having regard to the foregoing considerations, the effects of the infringement described by the Commission are only partially proved. The Court will consider the implications of that conclusion as part of the exercise of its unlimited powers in regard to fines, when it assesses the general level of the fines imposed in the present case (see paragraph 342 below).'

*The general level of the fines*

17 Before the Court of First Instance, the appellant challenged the general level of the fines and, in particular, the degree of gravity of the alleged cartel.

18 In that regard, the Court of First Instance held as follows:

'336 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 *SPO and Others* v *Commission*, cited above, paragraph 54).

337 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."

338 Furthermore, it is common ground that 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.

339 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).

340 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 Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, hereinafter "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, as the Court has already held, the intricate steps taken by the undertakings to conceal the existence of the infringement constitute a particularly serious aspect of it which differentiates it from the infringements previously found by the Commission.

341 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.

342 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.'

*Errors committed by the Commission when reducing the fines*

19 Before the Court of First Instance, the appellant submitted, in essence, that it should have received a reduction in the amount of the fine on the ground that it had not contested the main factual allegations on which the Commission based its complaints against it. It also contested the correctness of the reduction in the fine granted to Stora Kopparbergs Bergslags AB, whose statements were intended to weaken its major competitors. Owing to the high level of the fines, that reduction had resulted in distortions of competition.

20 The Court of First Instance held as follows:

'362 In its reply to the statement of objections the applicant disputed, as it did before the Court, that it participated in any infringement of Article 85(1) of the Treaty.

363 Accordingly, the Commission correctly considered that the applicant, by replying in that way, did not conduct itself in a manner which justified a reduction in the fine on grounds of cooperation during the administrative procedure. A reduction on that ground is justified only if the conduct enabled the Commission to establish an infringement more easily and, where relevant, to bring it to an end (see *ICI* v *Commission*, cited above, paragraph 393).

364 Insofar as the applicant argues that the reduction of Stora's fine is excessive, the Court points out that Stora supplied the Commission with statements containing a highly detailed description of the nature and object of the infringement, the operation of the various bodies of the PG Paperboard, and the participation of the various producers in the infringement. Through those statements, Stora supplied information well in excess of that which the Commission may require to be supplied under Article 11 of Regulation No 17. Although the Commission states in the Decision that it obtained evidence corroborating the information contained in Stora's statements (points 112 and 113 of the Decision), it is clear that Stora's statements constituted the principal evidence of the existence of the infringement. Without those statements, it would therefore have been, at the very least, much more difficult for the Commission to establish or put an end to the infringement with which the Decision is concerned.

365 In those circumstances, the Commission, by reducing by two thirds the fine imposed on Stora, did not overstep the limits of its discretion when determining the amount of fines. The applicant cannot therefore validly claim that the fine imposed on it is excessive in relation to that imposed on Stora.

366 There is thus no need to ask the Commission to indicate whether discussions were held with Stora on the subject of the level of the fine and/or possible reductions in fines.

367 That plea must, therefore, also be rejected.'

21 In conclusion, the Court of First Instance held that, as none of the pleas relied on in support of the application for annulment or reduction of the fine had been upheld, the fine imposed on the applicant should not be reduced.

## The appeal

22 In its appeal the appellant submits that the Court should set aside the contested judgment, except for the declaration annulling the first to fourth paragraphs of Article 2 of the Decision, annul the Decision and, in the alternative, reduce the amount of the fine imposed on it.

23 In support of its appeal the appellant relies on five pleas in law, alleging

— inadequate statement of reasons for the Decision as regards the fixing of the fine;

— infringement of Article 15(2) of Regulation No 17 as regards the Commission's use of its discretion in reducing the fines imposed on some members of the association;

— infringement of Article 15(2) of Regulation No 17 as regards the determination of the relevant turnover figure;

— infringement of Article 15(2) of Regulation No 17 on account of the failure to take into account, when determining the fine, the fact that the cartel had no effect on prices;

— abuse of power and infringement of the principle of non-discrimination because of the rounding-up of the amount of the fines.

*The first plea*

24 In its first plea, the appellant complains that the Court of First Instance erred in law in not annulling the Decision on the ground that it contained an inadequate statement of reasons, despite having found in paragraph 306 of the contested judgment that the Commission had failed to set out in the Decision the factors which it had systematically taken into account in order to set the amount of the fines.

25 The appellant adds that such information should, in accordance with the settled case-law referred to by the Court of First Instance in paragraph 309 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. The Court of First Instance had specifically found in paragraph 309 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 312 of the contested judgment).

26 The appellant also complains that the Court of First Instance took into account the fact that the Commission, when it adopted the Decision, was not yet aware of the interpretation, in regard to the fixing of fines, which it gave as to the requirements of Article 190 of the EC Treaty (now Article 253 EC) in its judgments in T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, *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 310 of the contested judgment, and of the fact that the statement of reasons for the Decision was comparable to that in previous decisions of the Commission (paragraph 310 of the contested judgment).

27 That position is also wrong in law, since, according to the appellant, review of the requirements flowing from the duty to state reasons is an objective question of law which cannot therefore depend on the Commission's subjective awareness of the situation at the moment when it adopted the Decision. Nor could the Court of First Instance lay down rules applicable for the future without applying them forthwith to the case brought before it, and thus maintain the effects of a decision which it had already found to contain an inadequate statement of reasons.

28 The Commission submits that, having regard to its unlimited jurisdiction, the Court of First Instance dos not necessarily need to have a detailed understanding of the manner in which the Commission, which also has some latitude in that regard, fixed the amount of the fine.

29 The Commission adds that the Court of First Instance held in paragraph 307 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'.

30 Paragraphs 308 to 312 of the contested judgment are, according to the Commission, superfluous in that they refer to the consequences of the Welded Steel Mesh judgments. The Commission contends, moreover, that the appellant's

reading of those judgments is incorrect. In those judgments the Court of First Instance expressed the wish, as it did in the contested judgment, 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, but breach of such a principle cannot in itself constitute a ground of annulment of the Decision.

31 Last, the Commission states that those implications of the Welded Steel Mesh judgments have recently been confirmed by the Court of First Instance. It has held that 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 criteria set out in the Decision in so far as they are capable of being quantified (see, in particular, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 610).

32 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.

33 The Court of First Instance first of all referred, in paragraph 300 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).

34 The Court of First Instance then explained in paragraph 301 of the contested judgment that as regards a decision which, as in this case, imposes fines on several

undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of the infringements depends on numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission*, cited above, paragraph 54).

35 In that regard the Court of First Instance held in paragraph 307 of the contested judgment that:

'points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, point 264). Similarly, point 168 of the Decision, which must be read in the light of the general criteria relating to the fines in point 167, contains a sufficient statement of the criteria taken into account in order to determine the general level of the fines'.

36 However, in paragraphs 308 to 312 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 307.

37 According to paragraphs 308 and 309 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 310, 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.

38 It concluded, in paragraph 312 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.

39 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.

40 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.

41 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.

42 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.

43 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'.

44 In those circumstances, in the light of the case-law referred to in paragraphs 300 and 301 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.

45 The Court of First Instance correctly held in paragraph 307 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.

46 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 307 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.

47 Admittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 44 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.

48 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.

49 Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 311 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 307 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 312 of the contested judgment, to 'the absence of specific grounds in the Decision regarding the method of calculation of the fines'.

50 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 308 to 312 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

51 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 premise.

52 The first plea must therefore be rejected.

*The second plea*

53 By its second plea, the appellant complains that the Court of First Instance did not find fault with the Commission's use of its discretion to fix the amount of

fines by which it took into account cooperation during the administrative procedure by some of the undertakings which had participated in the cartel.

54 The appellant submits that the reductions in the fines which the Commission granted, depending on the extent of cooperation and on the basis of pre-defined general and abstract criteria, have no legal basis and are contrary to fundamental rights. First, by virtue of Article 15(2) of Regulation No 17, the Commission should make an assessment in each case. Second, the practice in question leads undertakings to incriminate themselves, to render themselves unable to exercise their rights of defence or, at least, improperly to restrict those rights and, conversely, penalises those undertakings which make use of those rights.

55 Lastly, the appellant complains that the Court of First Instance did not find that there was an inadequate statement of reasons for the reduction in the fine granted to some undertakings.

56 It should be observed in that regard that Article 15(2) of Regulation No 17 does not lay down an exhaustive list of the criteria which the Commission may take into account when fixing the amount of the fine (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 32 and 33). The conduct of the undertaking during the administrative procedure may therefore be one of the factors to be taken into account when fixing that fine (see Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45, summary publication).

57 Moreover, the Commission cannot be criticised for having adopted guidelines to direct the exercise of its discretion concerning the fixing of fines, and for thus better ensuring equal treatment of the undertakings concerned.

58 Nor, second, can the complaint of infringement of the rights of the defence be upheld. An undertaking which, when challenging the Commission's stance, limits its cooperation to that which it is required to provide under Regulation No 17 will not, on that ground, have an increased fine imposed on it. If the Commission considers that it has proved the existence of an infringement and that the infringement can be imputed to the undertaking, the undertaking will be fined in accordance with criteria which may lawfully be taken into account and which are subject to review by the Court of First Instance or the Court of Justice. As the Advocate General has stated in point 25 of his Opinion, the appellant's premiss is based on the purely theoretical hypothesis of an undertaking's accusing itself of an infringement which it has not committed, contrary to the Commission's own view, in the hope of receiving a reduction in the fine which it nevertheless fears will be imposed on it. Such an assumption cannot serve as a basis for an argument alleging infringement of rights of the defence.

59 Last, as regards the alleged inadequate statement of reasons in the Decision for the reductions granted, it suffices to observe that the Court of First Instance stated in paragraph 303 of the contested judgment:

'in points 171 and 172, the Commission states that the amounts of fines imposed on Rena and Stora must be considerably reduced in order to take account of their active cooperation with the Commission, and that eight other undertakings, including the applicant, were also to benefit from a reduction, to a lesser extent, owing to the fact that in their replies to the statement of objections they did not contest the essential factual allegations on which the Commission based its objections'.

60 Those points in the Decision contain an adequate statement of reasons for the reductions in the fines.

61 The second plea must therefore be rejected.

*The third plea*

62 By its third plea, the appellant complains that the Court of First Instance did not hold that the Commission had infringed Article 15(2) of Regulation No 17, first, in that it had adopted, as a basis for calculating the amount of the fine imposed on it, the turnover figures of the four member undertakings which sell their cartonboard production through it, namely Metsä-Serla Oy, Tampella Corporation, United Paper Mills and Oy Kyro AB, and in that it had not taken into account turnover actually achieved in 1990, the reference year for calculating the fine.

The taking into account of turnover achieved by Finnboard's member companies

63 The appellant submits that neither the Decision nor the contested judgment show that the four undertakings that were members of Finnboard were involved in the infringement. Their turnover could not therefore be taken into account in order to determine the fine.

64 According to the appellant, the Court of First Instance could not, without contradicting itself, find, as justification for the imposition of a fine on the appellant, that it had acted autonomously (see paragraphs 273 to 280 of the contested judgment), yet find in the judgment in Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, in particular paragraphs 55, 56 and 58), as a ground for the member companies' joint and several liability for payment of the fine imposed on the appellant, that the appellant had acted merely as an 'auxiliary organ' of those companies.

65 Lastly, the appellant submits that the Court of First Instance wrongly held that it had no economic interest of its own in price increases (paragraph 281 of the contested judgment) even though the commission which it received for acting as

intermediary for its member undertakings was a percentage of the price agreed with the customer.

66 It must be held in that regard that, as the Commission has stated, when a fine is imposed on an association of undertakings, whose own turnover most often does not reflect its size or power on the market, it is only when the turnover of the member undertakings is taken into account that a fine with deterrent effect can be determined (see, to that effect, the judgment in Case 1100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 121). It is not necessary that the members of the association should have actually participated in the infringement, but the association must, by virtue of its internal rules, have been able to bind its members.

67 In the present case, the Court of First Instance held in paragraph 280 of the contested judgment that the sales contracts concluded by the appellant on behalf of its member companies could bind them. The appellant has not adduced any evidence to cast doubt on that finding.

68 As regards the alleged contradiction between the contested judgment and the judgment in *Metsä-Serla and Others* v *Commission*, cited above, it must be observed, as the Commission has also submitted, that far from contradicting the former judgment, the latter judgment provides an additional reason for taking into account the turnover of the appellant's members in order to determine the fine imposed on it, because it is apparent from paragraphs 55 and 58 of the latter judgment that the appellant was authorised to negotiate prices and other sales conditions with customers, in accordance with the guidelines laid down by its members, and that showed that it formed an economic unit with each of its member companies.

69 Lastly, the finding by the Court of First Instance, in paragraph 281 of the contested judgment, that the appellant had no economic interest of its own in

taking part in the collusion on prices is also a finding of fact which cannot be called in question in appeal proceedings.

The turnover figure taken into account

70 The appellant complains that the Court of First Instance did not find fault with the Commission's refusal to take into account the turnover figures of its members which it had communicated to it and, in any event, with the Commission's failure to give reasons for rejecting its arguments in that regard.

71 Thus, unlike the way in which the fines imposed on all the other undertakings involved in the infringement were fixed, in the appellant's case the Commission did not take into consideration the figures sent to it by the appellant, but merely made an estimate. In that regard, the Court of First Instance did not correctly apply the rules on the burden of proof and failed to explain why it intended to base its judgment on the Commission's figures.

72 It is apparent from the contested judgment that the appellant was informed of the reasons why the Commission had taken the view that it could not accept the figures sent to it and had to make an estimate. Thus, according to paragraph 267 of the contested judgment, the figures sent by the appellant assumed, according to the Commission, an average sales price almost 15% lower than the amount indicated by the appellant in its offers to major United Kingdom customers, as shown by a confidential note found at the premises of its United Kingdom subsidiary, and, despite the Commission's requests for clarification, the appellant had not explained those discrepancies.

73 Failing explanations that could dispel the Commission's doubts as to the reliance which could be placed on the audit certificates submitted by the appellant, the Court of First Instance cannot be criticised for having taken the Commission's estimates into consideration.

74 It follows from the foregoing that the third plea must be rejected.

*The fourth plea*

75 By its fourth plea, the appellant complains that the Court of First Instance did not reduce the fine imposed by the Commission after the Court had found that the Commission had not proved all the alleged effects of the infringement (paragraph 325 of the contested judgment).

76 According to the appellant, the Court of First Instance wrongly held that the absence of any negative effect on the level of transaction prices could not materially affect the assessment of the gravity of the infringement and accordingly result in a reduction of the fine (paragraph 342 of the contested judgment). The Court of First Instance disregarded the principle that the amount of the fine must be proportionate to the gravity of the infringement, and breached the principle of equal treatment.

77 The Commission submits that the Court of First Instance was entitled, in the exercise of its unlimited jurisdiction, to reach its own view on the appropriate amount of the fine. It states that in the present case an infringement was found and proved and that its gravity depends not solely on the effects which it produced, but also on the participants' intention to control markets and to maintain prices at a high level, in the sure knowledge that the measures which they were taking were unlawful and that they were running the risk of incurring heavy fines.

78 In the contested judgment the Court of First Instance first set out, in paragraph 336, 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).

79 The Court of First Instance then set out, in paragraph 337, and reviewed the considerations listed in the Decision in regard to the gravity of the infringement.

80 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 339 of the contested judgment) and to take account of the fact that the undertakings concerned took 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 340 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 341 of the contested judgment).

81 It concluded, in paragraph 342 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'.

82 It follows from the foregoing that the Court of First Instance considered, in the exercise of its unlimited jurisdiction, that its findings regarding the effects of the infringement were not such as to alter the Commission's own assessment of the gravity of the infringement, or, more precisely, as to diminish the gravity of the infringement so assessed. It considered, in the light of the specific circumstances of the case and the context in which the infringement took place, as taken into account by the Commission's Decision and set out in paragraphs 74 and 75 of this judgment, and in the light of the deterrent effect of the fines imposed, all being factors which could be applied, in accordance with the case-law of the Court of Justice, in assessing the gravity of the infringement (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 106; order in *SPO and Others* v *Commission*, cited above, paragraph 54, and *Ferriere Nord* v *Commission*, cited above, paragraph 33), that it was not appropriate to reduce the level of the fine.

83 The fourth plea must therefore be rejected as unfounded.

*The fifth plea*

84 By its fifth plea the appellant complains that the Court of First Instance did not hold that the Commission's practice of rounding up the amount of fines which it adopts under Article 15(2) of Regulation No 17 is an abuse of power that is discriminatory and unsupported by any reasons.

85 The Commission, which does not dispute having rounded up the amount of the fines, submits that the plea is inadmissible because the line of argument which the appellant complains that the Court of First Instance did not uphold was raised only at the hearing before that Court. On the merits, the Commission submits that, by rounding up the amount of the fine imposed on the appellant, it amended it only slightly, by 1%, and that other undertakings fined received a comparable increase.

86 Contrary to the Commission's submissions, the plea must be regarded as admissible, since, as the Advocate General has correctly pointed out in point 56 of his Opinion, the appellant, when it brought its action before the Court of First Instance, was not aware of the precise manner in which the fine had been calculated, so that it was entitled to dispute that method of calculation, for the first time, at the hearing before the Court of First Instance.

87 On the merits, the Court of First Instance rightly observed in paragraph 302 of the contested judgment that when fixing the fine the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose. Having regard to paragraphs 336 to 342 of the contested judgment, set out above, which relate to the general level of the fine, the Court of First Instance could validly conclude, in the exercise of its unlimited jurisdiction, that the fine of ECU 20 000 000 imposed on the appellant was appropriate.

88 It follows that the appeal must be rejected in its entirety.

## Costs

89 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has asked for costs to be awarded against the appellant and the latter has been unsuccessful in all its pleas, the appellant must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Orders Metsä-Serla Sales Oy to pay the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber