OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. On 23 July 1998 Cascades SA (hereinafter 'Cascades') lodged an appeal against the judgment of the Court of First Instance of 14 May 1998 in *Cascades* v *Commission* [1] (hereinafter 'the contested judgment') seeking to have that judgment set aside.

2. Cascades had sought the annulment of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) [2] (hereinafter 'the Decision'), in which the Commission imposed fines on 19 manufacturers supplying cartonboard on the Community market on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC). A fine of ECU 16 200 000 had been imposed on Cascades.

3. For the views expressed by the appellant and the Commission before the Court of First Instance, and for the grounds on which the Court dismissed the application, I refer you to the contested judgment.

4. In its appeal, the appellant claims that the Court of Justice should:

'— set aside the judgment of the Court of First Instance of 14 May 1998 in Case T-308/94 *Cascades* v *Commission*;

— uphold the submissions made by Cascades SA before the Court of First Instance;

— order the Commission to pay all the costs, in respect of the proceedings before the Court of First Instance and the proceedings before the Court of Justice.

* Original language: French.

1 — T-308/94 ECR II-925.

2 — OJ L 243, p. 1.

In the alternative:

— if it were to consider that it is not possible to give a final judgment in the proceedings, refer the case back to the Court of First Instance to be reheard;

— reserve costs.'

5. The Commission contends that the Court should:

'— reject the appeal;

— in the alternative, refer the case back to the Court of First Instance for judgment;

— in any event, order the appellant to pay the costs.'

6. In support of its appeal, the appellant submits three pleas.

7. Firstly, the appellant considers that the grounds of the contested judgment are inconsistent, in so far as the Court of First Instance did not draw the proper conclusions from its own findings concerning the inadequacy of the statement of reasons for the Commission Decision in respect of the determination of the general level of the fines.

8. Secondly, it maintains that the Court misinterpreted the concept of effects of the infringement on the market and, in any event, infringed the principle of proportionality by not reducing the level of the fine imposed by the Commission, even though it pointed out that the Commission had not proved all the effects which it took into account in determining the general level of the fines.

9. Thirdly, the appellant considers that the Court of First Instance infringed the principle of non-discrimination in so far as it approved the criteria according to which the Commission attributed liability for the conduct of undertakings transferred during the period of infringement.

10. Since the first two pleas have also been put forward by most of the undertakings in the cartonboard sector which have lodged appeals against the respective judgments of the Court of First Instance, I have considered these pleas only once, that is, in the

Opinion I have delivered in the appeal brought by the company Mo och Domsjö AB (Case C-283/98 P).

11. In that Opinion I reached the conclusion that these two pleas could not be upheld.

The third plea: infringement of the principle of non-discrimination

12. According to the appellant, the Court of First Instance infringed the principle of non-discrimination by approving the criteria applied by the Commission in respect of responsibility for the conduct of undertakings acquired during the period of infringement.

13. The appellant also maintains that it is apparent from point 145 of the statement of reasons of the Decision that responsibility for the conduct of a subsidiary prior to its transfer may be attributed to the subsidiary itself if it has participated on an individual basis in the infringement, or may be attributed to the transferor group if this group has been a party to the infringement. Furthermore, according to point 143 of the statement of reasons for the Decision as interpreted by the Court of First Instance, if a subsidiary has itself infringed Community law on an individual basis and the acquiring group has participated in the infringement, the Commission could hold that group liable for payment of the fine in respect of the conduct of the subsidiary prior to its acquisition.

14. The appellant infers from this that a group which acquires a subsidiary which has participated in the infringement may be treated in two radically different ways depending on whether or not the transferor has participated in the infringement: the transferee will be responsible for paying the fine in respect of the subsidiary's conduct before the transfer if the transferor group has not participated in the infringement; otherwise, it will not be responsible for the subsidiary's conduct and will not pay the fine. Application of these criteria would therefore lead to obvious discrimination between two transferees.

15. Applying the abovementioned criteria, the Court of First Instance held Cascades responsible for the conduct of its two subsidiaries Van Duffel NV (hereinafter 'Duffel') and Djupafors AB (hereinafter 'Djupafors') prior to their acquisition, although, in Case T-347/94,[3] Mayr-Melnhof Kartongesellschaft mbH (hereinafter 'Mayr-Melnhof') was not considered responsible for the conduct of its subsidiary Mayr-Melnhof Eerbeek (hereinafter 'Eerbeek') in the period preceding its acquisition, the responsibility for which was attributed to NV Koninklijke KNP BT (hereinafter 'KNP'), the transferor group which had participated in the infringement.

16. Nevertheless, the situations of Cascades and Mayr-Melnhof are wholly comparable. Both cases involve a company

3 — *Mayr-Melnhof* v *Commission* [1998] ECR II-1751.

which acquired one or more subsidiaries which had participated, prior to their acquisition, in an infringement. The only difference between the two situations lies in the possible participation of the transferor prior to the transfer. According to the appellant, this circumstance, over which the acquirer has no control and of which it might even be unaware, does not justify one of the transferee groups being treated differently.

17. The appellant therefore asks the Court of Justice to set aside the contested judgment in so far as it held Cascades responsible for the conduct of its subsidiaries Duffel and Djupafors prior to their acquisition and, if it considers that the proceedings permit final judgment to be given, to annul the Decision on the same ground.

Admissibility of the plea

18. The Commission submits, first of all, that the situation of which the appellant complains existed before the action was brought before the Court of First Instance. The third plea is therefore a new plea; under Article 42(2) of the Rules of Procedure of the Court of Justice, which is rendered applicable to appeals by Article 118, no new plea in law may be introduced during the course of proceedings.

19. The appellant denies that its plea is inadmissible. It contends that, if it was not raised before the Court of First Instance, that was because the criteria followed by the Commission were particularly confusing and their precise scope could only be defined during the proceedings before the Court.

20. In this connection, it should be pointed out, first of all, that, in the proceedings before the Court of First Instance, the appellant had submitted the plea that 'the conduct of Duffel and Djupafors prior to their acquisition cannot be attributed to Cascades.'

21. That plea was based on two arguments or complaints:

— the Commission had incorrectly applied its own criteria;

— alternatively, the statement of reasons on that point was inadequate and contradictory.

22. It was in relation to these two arguments that the Court of First Instance expressed its view.

23. Admittedly, in the second subparagraph of point 94 of the reply it presented *before the Court of First Instance*, the appellant had stated as follows:

'In this respect, it should be pointed out that when a company *which has belonged to a group of which one or more companies have participated in the infringement* is transferred to another group, the Commission considers that "responsibility for the period up to the date of divestment prior to the transfer does not pass to the acquirer but will remain with the first group" (the second indent of point 145 of the Decision; for a case in which this was applied, see the position of KNP Vouwkarton BV Eerbeek which belonged first to the KNP group and then to the Mayr-Melnhof group, points 149 and 150 of the Decision). By contrast, the Commission takes the view that if the acquired company participated in the infringement *in its own right* before its acquisition, the acquiring group must bear the responsibility for its unlawful conduct if one or more of the other companies in the group also participate in the infringement. This constitutes unequal treatment which, in the appellant's view, is unjustified.'

24. The Commission points out that the appellant uses here the expression 'unjustified unequal treatment' not infringement of the principle of non-discrimination. It argues that the passage I have just quoted appears only in the reply submitted by the appellant before the Court of First Instance and that, therefore, in so far as it invokes the principle of non-discrimination, it constituted a new plea in law presented to the Court and was, accordingly, inadmissible. It is therefore *a fortiori* inadmissible on appeal.

25. Finally, the Commission observes that 'Cascades' argument, in which it alleged that it had experienced difficulty in understanding the criteria for attributing responsibility laid down by the Commission, would not be enough to justify the introduction of a new plea during proceedings, even less so during appeal proceedings. Cascades knew, from the time the Decision was adopted, the facts which have led it to submit this plea. The two situations which Cascades is comparing in order to try and establish unequal treatment were clearly set out in points 147, 150 and 162 of the Commission Decision. If Cascades considered that there was unequal treatment, it could have, and therefore should have, put forward this plea in its application at first instance' (point 20 of the Commission's rejoinder).

26. What are we to make of this?

27. In the contested judgment, the Court of First Instance did not make a substantive ruling on the appellant's argument alleging 'difference in treatment', nor did it hold that the argument constituted a new plea in law which was inadmissible because it had been presented only during the course of the proceedings.

28. Under Article 51 of the EC Statute of the Court of Justice, appeals are restricted

to points of law and must be based on lack of competence of the Court of First Instance, a breach of procedure before it or infringement of Community law by the Court of First Instance. Article 112(1)(c) of the Rules of Procedure of the Court of Justice stipulates that an appeal shall contain 'the pleas in law and *legal arguments* [4] relied on'.

29. As the Court of Justice has held, particularly in its order in *Del Plato* v *Commission*, [5] 'It follows from those provisions that an appeal must indicate precisely the contested elements of the judgment and the legal arguments supporting the application to have it set aside. According to settled case-law, that requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance...'.

30. In order to be admissible, an appeal must therefore contain some new legal arguments. However, this is inevitable since, in an appeal, criticism is levelled at the judgment of the Court of First Instance, which itself represents a new aspect in relation to the written and oral proceedings brought before that Court.

31. Article 42(2) of the Rules of Procedure of the Court of Justice states that 'no new plea in law may be introduced *in the course of proceedings*'. [6]

32. Under Article 118 of the Rules of Procedure, Article 42(2) applies '*to the procedure before the Court of Justice* [7] on appeal from a decision of the Court of First Instance'.

33. This text unquestionably refers to the new pleas in law introduced before the Court of Justice after the appeal is lodged.

34. But does it also refer to the insertion in the application initiating the appeal of any other argument than those contained in the application lodged with the Court of First Instance?

35. It appears to me, in the first place, that, if this were the case, any appeal would be

4 — Emphasis added.

5 — Case C-31/95 P, [1996] ECR I-1443, paragraphs 19 and 20.

6 — Emphasis added.

7 — Emphasis added.

condemned in advance as inadmissible since it would inevitably be based on arguments amounting to:

— either new pleas in law, which are prohibited by the aforementioned provision;

— or a word for word repetition of the pleas in law already presented before the Court of First Instance.

36. Secondly, it is clear from Article 51 of the EC Statute of the Court of Justice that an appeal may be based on new pleas in law such as the fact that the Court of First Instance exceeded its jurisdiction, that breaches of procedure were committed during the proceedings at first instance, or that the Court of First Instance infringed Community law when ruling on the pleas in law introduced before it.

37. I consider that the solution to the problem therefore lies in applying the following criteria.

38. An appeal cannot alter *the subject-matter of the dispute*. It may seek to set aside, in whole or in part, the decision of the Court of First Instance, but must seek the same form of order, in whole or in part, as that sought at first instance, *and shall not seek a different form of order* (Article 113 of the Rules of Procedure of the Court of Justice).

39. Nor is it possible, on appeal, to put forward, *in relation to the decision* which is at the root of the whole dispute, a complaint which has not already been pleaded before the Court of First Instance.

40. This is not the situation in the present case, since the appellant is still acting within the framework of the complaint (or plea in law) introduced before the Court of First Instance, namely that 'the conduct of Duffel and Djupafors prior to their acquisition cannot be attributed to Cascades'. It is not, therefore, introducing a completely new issue.

41. The appellant had also pleaded before the Court of First Instance, in its reply, 'the difference in treatment between two transferee companies', which it maintained was the consequence of the Commission's argument. Since the Court of First Instance did not express its opinion on that argument, the appellant cannot be criticised for coming back to it.

42. The fact that it now gives the argument a more formal significance by stating that it constitutes an infringement of the principle of non-discrimination and describing it as a plea in law is not enough, in my view, to declare it inadmissible. What we are really seeing is the development of a legal argument which has already been presented and is still part of one of the complaints or pleas in law introduced at first instance.

Assessment of the third plea in law, regarding the substance of the case

43. Point 147 of the statement of reasons for the Decision is worded as follows:

'Prior to their acquisition by Cascades in 1989, Kartonfabriek Van Duffel and Djupafors AB were participants in the cartel as independent undertakings. But for the acquisition, proceedings could have been addressed to both undertakings in their own name. Duffel and Djupafors were renamed and continued to exist as separate subsidiaries in the Cascades group. However, 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).'

44. In point 143 of the statement of reasons for the Decision, the Commission explains that, as far as concerns the 'actions of what are said to be autonomous subsidiaries, the Commission has, in principle, treated the entity named in the membership lists of the PG Paperboard as the appropriate "undertaking" for the purposes of addressing the present proceedings, subject to the following exceptions:

(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)'.

45. In paragraph 148 of the contested judgment, the Court of First Instance held 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.'

46. It then states, in paragraphs 157 to 159:

'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.

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.

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

47. Cascades does not deny that it is liable for the infringements committed by Duffel and Djupafors after it had acquired them.

48. On the other hand, it considers that it was wrongly required to pay a fine in respect of the conduct of those companies during the period prior to their acquisition.

49. It points out that no fine was imposed on Mayr-Melnhof in respect of the conduct of its subsidiary, Eerbeek, during the period prior to acquisition, although the criteria contained in the contested judgment could also be applied to the relations between Mayr-Melnhof and Eerbeek.

50. Liability for Eerbeek's previous conduct was attributed to the transferor company, KNP, which was itself involved in the cartel.

51. The Commission and the Court of First Instance accepted that Mayr-Melnhof 'was responsible for Eerbeek's conduct' only from the time that company 'was under the applicant's control'. [8]

8 — See the judgment in Mayr-Melnof, referred to above, paragraphs 400 to 405.

52. Cascades claims the same treatment in respect of its two subsidiaries, by invoking the principle of non-discrimination.

53. I propose that the Court should uphold its claim. What we have here, in fact, are two identical situations which have been treated differently. Prior to acquisition, neither Mayr-Melnhof nor Cascades controlled the conduct of the companies which were subsequently to become their respective subsidiaries.

54. If Mayr-Melnhof is not held responsible for Eerbeek's conduct, then Cascades should not be held responsible for the conduct of Duffel and Djupafors.

55. Eerbeek's conduct was determined by KNP. It was therefore reasonable to hold KNP responsible for the infringement committed by Eerbeek.

56. The conduct of Duffel and Djupafors was the consequence of their own decisions. Therefore they alone should be held responsible for it, since they were not simply taken over by Cascades but carried on their activities, although under a new corporate name, as independent subsidiaries.

57. The Commission contends that it is not possible to detect unequal treatment in its Decision. It states that, in the only case in which another company affected by its Decision was in the same position as Cascades and Duffel and Djupafors, it was treated in exactly the same way. That was the undertaking Deisswil, 66% of whose share capital was acquired by Mayr-Melnhof in 1990. As the Commission states in point 55 of its reply, 'Mayr-Melnhof was held responsible, just like the appellant and for the same reasons, for the unlawful conduct in respect of conduct prior to and after acquisition, and for the other subsidiary, only in respect of conduct after acquisition. It therefore received the same treatment as the appellant and was subject to the same principles, with an identical outcome in the case of one of its subsidiaries, and a different one in the case of the other, because the situation was not the same.'

58. However, this argument cannot be upheld. The fact that the Commission made the same mistake twice in the same Decision does not nullify the mistake.

59. It is not disputed that, prior to their acquisition, Eerbeek, Deisswil, Duffel and Djupafors were in exactly the same position *in relation to the undertakings which were to become their parent companies*: their conduct was not yet determined by those undertakings.

60. The question we are considering here must be settled according to the principle: 'where there is power, there is responsibility'.

61. In its judgment in *Enichem* v *Commission*, [9] the Court of First Instance expressed the principle as follows:

'When such an infringement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.'

62. I conclude from this that, in every case in which an undertaking, which has subsequently become a subsidiary, committed infringements while it was still wholly independent, it must itself be held responsible for those infringements.

63. This view finds support in the case-law of the Court of Justice referred to in the Opinion which I have delivered today in the appeal brought by the company Stora Kopparbergs Bergslags AB, [10] in which I state that, even if an undertaking is a wholly owned subsidiary of another undertaking, and the latter may therefore have a decisive influence on its subsidiary's commercial policy, responsibility for the infringements committed by the subsidiary can be attributed to the parent company only if there is at least some evidence that the parent company has actually exercised that power.

64. Now, in the present case, the Court of First Instance has upheld an argument which is tantamount to saying that even an undertaking which has no shares in the capital of another undertaking, and which cannot be shown to have exercised power over it by any other means, [11] must nevertheless assume responsibility for the infringements the latter undertaking has committed.

65. I therefore propose that the Court of Justice should declare that the Court of First Instance erred in law by holding

9 — Case T-6/89 [1991] ECR II-1623, paragraph 236.

10 — Case C-286/98 P.

11 — For example, because the other undertaking was only the 'sales counter' of several paperboard-producing undertakings. See the Opinion I have delivered today in Case C-294/98 P *Metsä-Serla and Others* v *Commission*.

Cascades responsible for the infringements committed by Duffel and Djupafors prior to their acquisition, and should set aside the contested judgment to that extent.

66. Should a ruling now be given in this case or should it be referred back to the Court of First Instance?

67. The fine of ECU 16 200 000 imposed on Cascades is the result of several factors:

(a) the involvement of the parent company in the cartel, as 'ringleader' during the period from mid-1986 to April 1991;

(b) the involvement of Duffel and Djupafors in the cartel from mid-1986 until their acquisition by Cascades in March 1989;

(c) the involvement of Duffel and Djupafors in the cartel from this last date onwards.

68. For the reasons stated above, point (b) must not be taken into consideration. However, we do not know precisely what influence it had on the final conclusion reached by the Commission and then the Court of First Instance. We cannot, therefore, reduce the fine merely by making a subtraction. Consequently, it is necessary for another hearing to be held before the Court of First Instance and the case should be referred back to that Court.

69. It is for the Commission to decide whether it should send a statement of objections to the companies which took over financial and operational responsibility for Duffel and Djupafors and possibly impose fines on them in respect of the infringements committed by Duffel and Djupafors during the period before they came under the control of Cascades.

Costs

70. Under Article 121 of the Rules of Procedure of the Court of First Instance, that Court is to decide on the costs.

Conclusion

71. In the light of the foregoing arguments, I propose that the Court should:

(1) set 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:

— holds the appellant responsible for the infringements committed by Van Duffel NV and Djupafors AB during the period between mid-1986 and February 1989 inclusive;

— rejects the appellant's claim for a reduction of the fine;

— orders the appellant to pay the costs.

(2) dismiss the remainder of the appeal.

(3) refer the case back to the Court of First Instance.