OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. By application lodged on 29 July 1998 Metsä-Serla Sales Oy, formerly Finnish Board Mills Association (Finnboard) (hereinafter 'Finnboard') appealed against the judgment of the Court of First Instance of 14 May 1998 in *Finnboard* v *Commission* [1] (hereinafter 'the contested judgment'). That judgment had ruled on the action which it had brought against 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'). The Decision imposed fines on 19 manufacturers which supplied cartonboard in the Community on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC). In respect of the amount of the fine imposed on Finnboard, Article 3(v) of the Decision provided:

'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.'

2. In its action before the Court of First Instance, Finnboard sought the annulment of the Decision in so far as it concerned Finnboard and, in the alternative, a reduction in the amount of the fine.

3. In the contested judgment, the Court of First Instance upheld Finnboard's application in part, partially annulling the order that the applicant refrain from participating in the future in certain kinds of exchange of information between undertakings in the cartonboard sector, but dismissed the remainder of the application, particularly in so far as concerns the fine imposed on the applicant.

4. For a full statement of the complaints formulated by Finnboard against the Decision and the grounds on which the Court of First Instance decided to uphold them in part only, I refer to the contested judgment. However, I would point out at this stage that Finnboard is a trade association incorporated under Finnish law, which, in 1991, had six member companies, amongst which were the cartonboard manufacturers Oy Kyro Ab, Metsä-Serla Oy, Tampella Corporation and United Paper Mills Ltd, and which markets throughout the Community, to a certain extent through the intermediary of its own subsidiaries, cartonboard manufactured by these four member companies.

* Original language: French.

1 — Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617.

2 — OJ 1994 L 243, p. 1.

5. In its appeal against the contested judgment, Finnboard claims that the Court of Justice should:

I —set aside the contested judgment, except for the declaration annulling paragraphs one to four of Article 2 of the Decision, which corresponds to the form of order sought by the appellant, and give a final ruling

(1) annulling the Decision notified to the appellant on 5 August 1994 and published in the *Official Journal of the European Communities* on 19 September 1994, in so far as it concerns the appellant,

in the alternative,

reducing the amount of the fine;

(2) ordering the respondent to pay the costs.

II — In the further alternative

set aside the contested judgment and refer the case back to the Court of First Instance.

6. The Commission, the respondent in the appeal and defendant at first instance, contends that the Court should:

— reject the appeal;

— order the appellant to pay the costs of the appeal,

and, furthermore, seeks the form of order at first instance, namely that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

7. In support of the form of order sought, Finnboard puts forward five pleas:

— the first plea: inadequate statement of reasons for the Decision in so far as concerns the fixing of the fine imposed on the appellant;

— the second plea: infringement of Article 15(2) of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty, [3] as regards the Commission's use of its discretion in reducing the fines imposed on some members of the cartel;

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

— the fourth plea: infringement of Article 15(2) of Regulation No 17 as regards the failure to take into account, in determining the fine, the fact that the cartel had no impact on prices;

— the fifth plea: abuse of power and infringement of the principle of non-discrimination committed by the Commission when it rounded up the amount of the fine imposed on the appellant.

8. In order to avoid needless repetition, these pleas will be set out in detail as necessary, as and when I come to examine them.

The first plea: inadequate statement of reasons for the Decision in so far as concerns the fixing of the fine

9. The appellant claims that the Court of First Instance could not, without infringing Article 190 of the EC Treaty (now Article 253 EC), hold that the Decision did not contain an adequate statement of reasons as regards the fixing of the amount of the fine and, at the same time, refuse to annul it on that point.

10. As this criticism is the same as that made by Mo och Domsjö AB in Case C-283/98 P, I refer, for a statement of the grounds justifying rejection of this plea, to the Opinion which I am delivering today in that case.

3 — OJ, English Special Edition 1959-1962, p. 87.

The second plea: the reductions made in the fines imposed on some members of the cartel

11. By this plea the appellant is complaining that the Court of First Instance did not censure the Commission's exercise of its discretion to reduce the fines imposed on some of the companies for their participation in a cartel in the cartonboard sector.

12. As the Commission itself stated, it granted groups of undertakings significant reductions in the fine, determined as a percentage, according to criteria defined in general terms, namely, the extent of the cooperation afforded to the Commission during the administrative procedure and the stage at which it was given.

13. Consequently, two undertakings received a reduction of two thirds because they conceded very early on that the competition rules were being infringed and provided significant information, whereas other undertakings, which had acknowledged that the facts alleged against them in the statement of objections were correct, received a reduction of one third.

14. This practice was subsequently codified, so to speak, by the Commission in a notice setting out guidelines for calculating fines imposed for infringement of the competition rules.

15. The appellant maintains that, by acting in that way, the Commission, without any legal justification, adopted general and abstract rules, when it should have exercised its discretion in each specific case, and seriously prejudiced the rights of the defence, thus committing a double infringement of Community law which the Court of First Instance should have censured.

16. With regard to the first of these complaints, I should first draw attention to the fact that Article 15(2) of Regulation No 17 does not prescribe an exhaustive list of the criteria to be taken into consideration for fixing the amount of the fine [4] and that the Court of Justice held, in its judgment in *Sandoz prodotti farmaceutici* v *Commission*, [5] that the conduct of the undertaking during the administrative procedure forms part of the matters which must be taken into account when the fine is fixed.

17. It should also be pointed out that the adoption by the Commission of guidelines on the fixing of the fines, since it occurred after the decision which Finnboard was contesting before the Court of First Instance, is irrelevant to the case before that court.

4 — See Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 32 and 33.

5 — Case C-277/87 [1990] ECR I-45, summary publication.

18. However, it will be noted, in particular, that the appellant's attitude is paradoxical. It criticises the Commission for having, as it were, laid down scales for the grant of reductions justified by the attitude of the various members of the cartel during the administrative procedure, and having thereby substituted a general rule for the individual assessment which ought to characterise the exercise of its power to impose fines under Regulation No 17.

19. However, without a doubt, if the Commission had not clearly linked the different levels of reduction in fine to the different attitudes adopted by the undertakings during the administrative procedure, the appellant would have criticised it for taking an arbitrary course of action or, at least, for not having satisfied all the requirements of the principle of equal treatment.

20. In my view, Finnboard is wrong — when the Commission is merely trying to develop a practice which is both clear and consistent, in which assessment of the individual coexists with recourse to criteria designed to ensure equal treatment — to criticise it for the unauthorised exercise of a legislative power which has indeed not been granted to it, but which it has never claimed.

21. Does the second complaint stand up any better to examination than the first? I do not think so.

22. According to the appellant, giving a discount to undertakings which adopt a cooperative attitude not only penalises those undertakings which intend to put in a defence and which, ultimately, will have to pay higher fines than those imposed on the undertakings which admitted the infringement straightaway, but dissuades even those which had intended to put in a defence from doing so, because of the price to be paid for exercising that fundamental right.

23. I think it is impossible to endorse this view of the situation created by the taking into account of the degree of cooperation given by undertakings.

24. First of all, an undertaking which, as it is entitled to do, gives no more cooperation than it is required to do under Regulation No 17, will not receive an increased fine. It will be fined according to the gravity of the infringement, assessed according to the criteria which the Court of Justice has held could reasonably be taken into account.

25. It is difficult to imagine that an undertaking which has not committed any infringement, contrary to what the Commission suspects, would admit to a non-existent infringement so as to be sure of receiving a reduction in the fine which it fears will nevertheless be imposed on it.

26. There would be justification for that attitude only if it had been established that the Commission does not hesitate to fine undertakings solely on the basis of a firm belief and does not take the trouble to prove an infringement and ascertain who is answerable for it.

27. The attitude would be all the more irrational in that it would presuppose a total loss of confidence in the Community judicature, which would be considered incapable or unwilling to censure any misuse of powers by the Commission.

28. Let us remember, finally, that the granting of reductions can be supported by the case-law of the Court of Justice to which I have referred above. [6] For the sake of completeness, I should point out that Finnboard, in its second plea, also claims that the Court of First Instance should have found that there was an inadequate statement of reasons for granting a reduction to certain undertakings. However, this criticism does not stand up to examination. In fact, the Decision is very well reasoned in respect of this point since, in points 171 and 172 of its statement of reasons, we read:

'171 As regards the cooperation of the different producers with the Commission's investigations in this case, it is clear that Stora and Rena are in a separate category from the others.

Although there was already strong documentary evidence to prove the existence of a cartel, Stora's spontaneous admission of the infringement and the detailed evidence which it provided to the Commission has contributed materially to the establishment of the truth, reduced the need to rely upon circumstantial evidence and no doubt influenced other producers who might otherwise have continued to deny all wrongdoing. Rena for its part provided important documentary evidence to the Commission on a voluntary basis.

There will therefore be a very substantial reduction in the fine which would otherwise have been imposed upon Stora and the minor producer Rena.

172 The producers which at an early stage after the opening of proceedings, i.e. in their replies to the statement of objections, did not contest the essential factual allegations relied upon by the Commission against them are also entitled to recognition of this attitude by a reduction in the fine to be imposed upon them although this cannot be of the same order as that which is appropriate for Stora and Rena.

These producers are Buchmann, Europa Carton, Fiskeby, KNP, Papeteries de Lancey, Sarrió, Enso Española and Weig.'

6 — See footnote 1.

29. These reasons cannot be criticised in the light of the requirements laid down in the relevant case-law of the Court of Justice on the basis of which I reached the conclusion that Finnboard's first plea should be rejected.

30. For these different reasons, Finnboard's second plea must be rejected.

The third plea: the turnover figure taken into consideration in order to fix the amount of the fine imposed on the appellant

31. By its third plea, submitted in the alternative since it seeks to obtain a reduction in the amount of the fine whose very validity the appellant is contesting, the appellant complains that the Commission, when determining the turnover to be taken into consideration for fixing the amount of the fine imposed on it, took into account the turnovers of the four undertakings which sell their cartonboard productions through the appellant and also wrongly determined the turnover figures of those four undertakings.

The turnover figure to be taken into consideration

32. In support of the first of these complaints, Finnboard argues that, although its members had received the statement of objections and had been informed in it that the Commission intended imposing a fine on them, the Decision does not state that they committed any infringement. That precludes their turnovers being taken into account in order to fix the fine, since, according to the wording of Article 15(2) of Regulation No 17, it is the turnovers of the undertakings which have participated in the infringement which are to be taken into account.

33. The appellant does not deny that the Court has held, in the case of associations of undertakings, that the turnover of the member undertakings may be taken into consideration, but submits that, according to the Court of First Instance, that presupposes that the association can bind its members, that is to say, according to the appellant, that the members played a part in the infringement.

34. The Court of First Instance, it alleges, was wrong to take the view that Finnboard could bind its members by concluding sales agreements on their behalf.

35. Moreover, the Court of First Instance could not, without contradicting itself, hold, in order to justify the imposition of

a fine on Finnboard, that Finnboard was acting autonomously and also hold, in its judgment in *Metsä-Serla and Others* v *Commission*, [7] as a ground for the joint and several liability of the members for payment of the fine imposed on Finnboard, that Finnboard acted only as an auxiliary organ of those members.

36. I consider the Commission's reply to these assertions to be wholly satisfactory.

37. It points out that, in the case of an association of undertakings, which is what the appellant in fact constitutes, the taking into account of the turnovers of the member undertakings, which alone allows the imposition of a fine in keeping with its size and power on the market, is not made conditional on participation of those undertakings in the infringement; all the case-law requires is that it should be possible for the association to bind its members.

38. In support of this interpretation of Article 15(2) of Regulation No 17, the Commission refers to the judgment of the Court of First Instance in *CB and Europay* v *Commission*, [8] in which it states:

'The Court considers 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, suggests that the ceilings specified by that provision apply in the same manner to agreements and concerted practices, and also to decisions of associations of undertakings. It follows that the ceiling of 10% of turnover must be calculated by reference to the turnover of each of the undertakings which were parties to those agreements and concerted practices or of the undertakings, as a whole, which were members of the said associations of undertakings, at least where, by virtue of its internal rules, the association is able to bind its members.

The soundness of this analysis is borne out by the fact that, in fixing the amount of fines, account may be taken, *inter alia*, of the influence which the undertaking was able to exert on the market, in particular by reason of its size and economic power of which the undertaking's turnover gives an indication (judgment of the Court of Justice in Joined Cases 100/83 to 103/83 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 121) and by reason of the dissuasive effect which those fines must have (judgment of the Court of First Instance in Case T-12/89 *Solvay* v *Commission* [1992]

7 — Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, which is also subject to an appeal in Case C-294/98 P, in which I am also delivering an Opinion today.

8 — Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49.

ECR II-907, paragraph 309). 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 on the turnover of its members, which constitutes an indication of its size and economic power.'

39. The Commission also refers to the judgment of the Court of First Instance in *SPO and Others* v *Commission*,[9] which confirms the earlier judgment on all points.

40. With regard to whether Finnboard could, in fact, bind its members, the Commission rightly rebuts the appellant's objection by stating that the issue cannot be debated before the Court of Justice sitting in an appellate capacity, since it relates to an assessment of the facts, which is — within limits not alleged to have been exceeded in this case — within the exclusive jurisdiction of the Court of First Instance.

41. As far as concerns an alleged contradiction between the judgment of the Court of First Instance in Finnboard's action and its judgment in the action brought by Finnboard's members in Joined Cases T-339/94 to T-342/94, referred to above, the Commission argues that the second judgment, far from contradicting the first one, reinforces it, since the finding that Finnboard was authorised to negotiate with customers the prices and other conditions of sale in compliance with the guidelines set by its members, on which the Court relies, reveals the existence of an economic unity which provides a reason, if one were needed, for fixing the fine imposed on Finnboard by reference to the turnover of its members.

42. In the same complaint the appellant also disputes the Court's finding that Finnboard had no economic interest of its own in participating in a concerted price increase. It maintains that any increase in the prices charged to the purchasers of cartonboard automatically increased the amount of the commission Finnboard could claim.

43. However, as the Commission points out, apart from this being a finding of fact, the variation in absolute value in commissions, since it represents only a small percentage of the selling price, could, in any event, be only of minimal interest to Finnboard, and the attainment of any profits by the appellant would in fact have benefited its members.

44. If Finnboard therefore protests in vain against the taking into account of the turnover of its members, can we, on the other hand, agree with its criticism of the way, approved by the Court of First Instance, in which the Commission determined those turnover figures?

9 — Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385.

The determination of the turnover figures which were taken into account

45. Finnboard complains that the Court of First Instance did not declare unlawful the Commission's refusal to take into account, for calculating the amount of the fine, the turnover figures of its members which the appellant had supplied to the Commission and, in any event, that it did not state the grounds on which it had rejected the appellant's argument on this point.

46. This last criticism does not seem wholly unfounded, since one might have expected the Court of First Instance to explain why the different treatment of the appellant seemed justified, bearing in mind that, for the other members of the cartel, it was the turnover figures submitted by them which had been used.

47. However, I do not think that the criticism is such as to justify setting aside the contested judgment because, in fact, the appellant was well aware of the reasons why the Commission had taken the view that it could not use the figures supplied by the appellant and thought it necessary to proceed on the basis of an assessment.

48. In fact, taking into account the tonnage sold, about which, after a misunderstanding was cleared up, there is no longer any dispute, it seemed to the Commission that the turnover figures submitted presupposed a selling price nearly 15% lower than the amount announced by Finnboard in the terms offered to its largest customers in the United Kingdom, a figure which appears in a confidential note discovered at the appellant's premises.

49. In the light of this information, it was perfectly natural for the Commission not to give any credit to the statements of accountants adduced by the appellant until explanations were given for the discrepancies found.

50. Since a request from the Commission to that effect had remained unanswered, the appellant could not complain that the Court of Justice had reversed the burden of proof.

51. The appellant's third plea should therefore be rejected in its entirety.

The fourth plea: refusal to take into account the fact that the infringement had no impact on price levels on the market

52. Given that the arguments put forward in this plea to show that, after establishing

that the cartel had not produced all the effects which the Commission claimed to have identified, the Court of First Instance could not but hold that the infringement was less serious than the Commission maintained and reduce the fine accordingly, are no different from the arguments put forward by the appellant Mo och Domsjö AB in Case C-283/98 P, referred to above, in which I am today delivering my Opinion, I refer to that Opinion for an explanation of why it should be rejected.

The fifth plea: abuse of powers committed by the Commission by arbitrarily rounding up the amount of the fine imposed on the appellant

53. Finnboard maintains that the Commission, after calculating the amount of the fine to be imposed on it using the method which it had disclosed at the request of the Court of First Instance, rounded up that figure in order to fix the actual amount of the fine. That approach, for which the Commission gave no explanation, constitutes an abuse of power and discriminated against the appellant, since, for other members of the cartel, a rounded figure had the opposite effect and led to a reduction in the fine.

54. The Commission does not deny rounding up the figures obtained from its calculation, but points out that this plea was not put forward by the appellant in its application before the Court of First Instance and emerged only at the hearing. It also claims that, in the appellant's case, recourse to a rounded-up figure altered the amount of the fine by only 1%, which is a very small change, and that other undertakings fined suffered a similar increase.

55. According to the Commission, the plea should therefore be rejected as inadmissible or, in any event, as unfounded.

56. I consider that the plea is admissible, because when the appellant brought its action before the Court of First Instance, it did not know how the fine had been calculated, so it was entitled to introduce the plea for the first time at the hearing before that Court.

57. I think, however, that it is unfounded, but not for the reasons put forward by the Commission. In fact, it seems to me rather cavalier to say that a 1% variation is negligible when the amount of the fine is ECU 20 000 000, and unconvincing to claim that discrimination ceases to be discrimination when suffered by several undertakings.

58. I believe the response it calls for is more straightforward. I can simply point out that the amount of the fines is not the crude result of an arithmetical calculation. In the exercise of its unlimited jurisdiction, the Court of First Instance was entitled to take the view that, as the fixing of the amount of a fine does not require the use of an apothecary's scales, the figure determined by the Commission, even if rounded up from the figures resulting from a calculation, was quite appropriate.

59. Having examined the five pleas put forward by Finnboard, I have no alternative but to find that none of them is well founded and to conclude that the appeal should be dismissed and that the appellant should pay all the costs of the appeal.

Conclusion

60. I propose that the Court should:

— dismiss the appeal brought by Metsä-Serla Sales Oy against the judgment of the Court of First Instance of 14 May 1998 in Case T-338/94 *Finnboard* v *Commission*;

— order Metsä-Serla Sales Oy to pay the costs of the appeal.