OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. By application lodged on 23 July 1998 Enso Española SA (hereinafter 'Enso') appealed against the judgment of the Court of First Instance of 14 May 1998 in *Enso Española* v *Commission* [1] (hereinafter 'the contested judgment'), which had ruled on its action 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').

2. In that decision fines were imposed 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).

3. In its action before the Court of First Instance, Enso claimed that the Court should annul the Decision in whole or in part or, alternatively, reduce the amount of the fine and order the Commission to pay the costs, including the expenses and interest arising from the provision of a bank guarantee or from the possible payment of the whole or part of the fine.

4. By the contested judgment the Court of First Instance upheld Enso's application in part, in that it annulled the Decision in so far as found that Enso had participated in the infringement for longer than had in fact been the case and had colluded in maintaining market shares, and reduced the amount of the fine from ECU 3 250 000 to ECU 1 200 000, but dismissed the remainder of the action.

5. For the full statement of the complaints formulated by Enso against the Decision and the grounds on which the Court considered it should uphold them in part only, I refer you to the contested judgment.

6. In its appeal, Enso claims that the Court of Justice should:

I — set aside the contested judgment in so far as concerns the grounds stated and give due legal effect to the setting aside of that judgment, and give an express ruling on the merits or refer the case

* Original language: French.

1 — Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875.

2 — OJ 1994 L 243, p. 1.

back to the Court of First Instance and, in particular,

(1) set aside the contested judgment in so far as the Court of First Instance holds that the Decision does not infringe Article 190 of the EC Treaty (now Article 253 EC) as regards the fine and, accordingly, annul the fine on the ground that the statement of reasons for the Decision is defective or, in the alternative, reduce it significantly on the ground that the statement of reasons is inadequate;

(2) in the alternative, set aside the contested judgment in so far as the Court of First Instance considers that the Commission's failure to take into account the effects of the devaluation of the peseta against the ecu does not constitute an infringement of the principle of equal treatment or, failing that, reduce the fine in such a way that the devaluation is taken into account;

(3) in the alternative, set aside the contested judgment in so far as the Court of First Instance did not order the Commission to pay all the expenses and interest incurred by the applicant at first instance in respect of the provision of a bank guarantee or the possible payment of the whole or part of the fine; declare that the interest on the fine starts to accrue only from the date on which the contested judgment takes effect and, accordingly, order the Commission to pay the expenses and interest payable in respect of the provision of the bank guarantee or the payment of the fine.

II — order the respondent to pay the costs of the proceedings before the Court of Justice, and also rule on the order for costs against the defendant in the proceedings at first instance, in the event that the arguments put forward in this appeal are upheld in whole or in part.

7. The Commission, the respondent in the appeal and defendant in the proceedings before the Court of First Instance, contends that the Court should:

— dismiss 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;

8. In support of the form of order sought, Enso submits the following three pleas:

(1) infringement of Community law owing to the misapplication and misinterpretation of Article 190 of the Treaty so far as concerns the lack of a statement of reasons for the Decision;

(2) infringement of the principle of equal treatment, since the devaluation of the peseta against the ecu was not taken into account;

(3) infringement of Community law because of the inconsistency of the reasons given by the Court for not ordering the Commission to pay the costs and interest payable in respect of the provision of a bank guarantee or the payment of the fine.

9. The details of those pleas will be set out as necessary as and when I examine them.

The first plea: inadequacy of the statement of reasons of the Decision as regards the fixing of the fine

10. Since the complaints formulated under this plea are the same as those made by the appellant Mo och Domsjö AB in Case C-283/98 P, I refer, for a statement of the grounds for rejecting this plea, to the Opinion which I am delivering today in that matter.

The second plea: infringement of the principle of equal treatment owing to the failure to take into account fluctuations in exchange rates

11. Since the criticisms levelled at the contested judgment under this plea are the same as those made by the appellant Sarrio SA in Case C-291/98 P, I refer, for a statement of the reasons why they appear to me to be unfounded and, consequently, unable to warrant the setting aside of the contested judgment, to the Opinion which I am delivering today in that matter.

The third plea: refusal of the Court of First Instance to order the Commission to pay certain expenses incurred by the appellant

12. This plea cannot possibly succeed, for reasons which are explained by the Commission and which I fully endorse.

13. Firstly, it clearly does not satisfy the requirements of Article 112(1)(c) of the Rules of Procedure of the Court of Justice in that it does not set out the provisions or principles of Community law allegedly infringed by the Court of First Instance.

14. Secondly, it must be regarded as a change to the application brought before the Court of First Instance; such a change is prohibited under Article 113(2) of the Rules of Procedure of the Court of Justice.

15. Before the Court of First Instance the appellant requested that the Commission be ordered to pay the expenses by way of costs.

16. The Court was right in holding that those expenses were not covered by the definition of costs, within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance.

17. The appellant, which has probably acknowledged the validity of this point in the contested judgment but persists in trying to make the Commission pay the expenses, requests in the appeal that it be ordered to pay them under another name. Such a request must inevitably be declared inadmissible.

18. Thirdly, even if it were not declared inadmissible, this plea is manifestly unfounded.

19. Indeed, if the Court of Justice were to uphold the plea, it would call in question the non-suspensory effect of actions as stated in Article 185 of the EC Treaty (now Article 242 EC) and the enforceability of Commission decisions imposing a pecuniary obligation on a private individual, as established in Article 192 of the EC Treaty (now Article 256 EC), and the last thing I would do is to suggest that the Court should do so.

Costs

20. If, as I propose, the appellant should fail in all its pleas, Article 69(2) of the Rules of Procedure of the Court of Justice would be applicable.

Conclusion

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

— dismiss the appeal;

— order the appellant to pay the costs.