JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2000 *

In Case C-294/98 P,

Metsä-Serla Oyj, formerly Metsä-Serla Oy, established in Espoo (Finland),

UPM-Kymmene Oyj, formerly United Paper Mills Ltd, established in Helsinki (Finland),

Tamrock Oy, formerly Tampella Corporation, established in Tampere (Finland),

Kyro Oyj Abp, formerly Oy Kyro Ab, established in Tampere,

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,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 14 May 1998 in Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, seeking to have that judgment set aside,

* Language of the case: German.

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 an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same department, 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 Oyj, UPM-Kymmene Oyj, Tamrock Oy and Kyro Oyj Abp brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed the actions 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) (OJ 1994 L 243, p. 1, hereinafter 'the Decision').

Facts

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

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

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

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

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

'*Article 1*

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

(UK) Ltd), Stora Kopparbergs Bergslags AB, Enso Española SA (formerly Tampella Española SA) and Moritz J. Weig GmbH & Co. KG have infringed Article 85(1) of the EC Treaty by participating,

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

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

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

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

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

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

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

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

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

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

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

...

Article 3

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

...

(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:

'9 The applicants are Finnish cartonboard producers and were addressees of the Decision. They market their products in the Community and on other markets through Finnish Board Mills Association — Finnboard (hereinafter "Finnboard"). Finnboard is a trade association governed by Finnish law which, in 1991, had six member companies, including the applicants.

10 As is apparent from point 174 of the Decision, the Commission imposed a fine on Finnboard on the ground that it was Finnboard itself rather than the member companies which actively and directly participated in the cartel. However, it also decided that each of the applicant companies should be jointly and severally liable with Finnboard for that part of the total fine which is approximately proportionate to the cartonboard sales made on its behalf by Finnboard.'

7 The Decision has been the subject of 17 other applications (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-338/94, T-347/94, T-348/94, T-352/94 and T-354/94),

brought by all but two of the other addressees of the Decision. The applicant in Case T-301/94, Laakmann Karton GmbH, withdrew its action by letter lodged at the Registry of this Court on 10 June 1996 and the case was removed from the Register by order of 18 July 1996.

The contested judgment

The application for annulment of the Decision

8 Before the Court of First Instance the appellants had submitted a single plea alleging infringement of Article 15(2) of Regulation No 17 and Article 85(1) of the Treaty.

9 They submitted, in essence, that Article 15(2) of Regulation No 17 did not empower the Commission to adopt a decision making one undertaking liable for payment of a fine which had been imposed on another. That provision allows fines to be imposed only on the undertakings which themselves committed the infringement of the competition rules. The Commission based its arguments on vicarious liability, which is not the same concept as liability for one's own acts.

10 The appellants also disputed that the Commission was entitled to hold them jointly and severally liable for payment of the fine on the ground that an economic unit existed and to assert that Finnboard had acted 'as the *alter ego* and in the interest of' the appellants.

11 In response the Court of First Instance stated as follows:

'42 [Article 15(2) of Regulation No 17] does not expressly state whether an undertaking which has not been specifically and formally held liable for an infringement found by the Commission may be declared jointly and severally liable with another undertaking for payment of a fine imposed on that other undertaking, which has committed and been penalised for the infringement.

43 However, this provision must be interpreted as meaning that an undertaking may be declared jointly and severally liable with another undertaking for payment of a fine imposed on the latter undertaking, which has committed an infringement intentionally or negligently, provided that the Commission demonstrates, in the same decision, that the infringement could also have been found to have been committed by the undertaking held jointly and severally liable.

44 In the present case, whilst Finnboard is the undertaking held specifically and formally liable for the infringement of Article 85(1) of the Treaty (Article 1 of the Decision), and whilst the fine provided for by Article 3(v) of the Decision is therefore imposed on it, each of the applicants is none the less declared jointly and severally liable with Finnboard for payment of part of that fine, because the Commission took the view that Finnboard had acted as their "alter ego" and in their interest (point 174, second paragraph, of the Decision).

45 The Court should therefore consider whether the economic and legal links between Finnboard and the applicants were such that the Commission was entitled to hold each of them specifically and formally liable for the infringement.

46 It is clear from the Decision that the Commission took the view that the applicants were liable for the acts of Finnboard (point 174, second paragraph).

47 To assess the merits of that claim, the principal information, as contained in the documents before the Court, must be examined and, in particular, the applicants' reply to the written questions of the Court regarding the organisation of Finnboard and its legal and factual relations with its member companies and the applicants in particular.

48 According to its statutes of 1 January 1987 (paragraph 2), Finnboard is an association which markets the cartonboard produced by the applicants and paper goods produced by other members.

49 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".

50 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."

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

52 The applicants also explain that, in the case of individual sales, customers placed their orders with Finnboard and generally indicated which mill they preferred. Such preferences are attributable, *inter alia*, to differences in quality between the products of each of the applicants. Where no preference was expressed, orders were divided amongst the members of Finnboard, 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."

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

54 The procedures for individual sales and the accounting principles applied for such sales are described in a statement of 4 June 1997 by Finnboard'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 1990/91). 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."

55 It is thus clear, first, that, even though Finnboard was authorised to negotiate prices and other conditions of sale with the end customer in accordance with the guidelines set by the applicants, a sale could not be made unless the applicant company concerned had first approved the price and the other conditions of sale.

56 Second, it is common ground that title passed directly from the applicant company to the end customer.

57 Finally, the commission received by Finnboard, 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 Finnboard 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, the applicants had a direct economic interest in Finnboard's participation in such collusion.

58 In the circumstances of the present case, the economic and legal links between Finnboard and each of the applicants were thus such that, in marketing cartonboard for the benefit of the applicants, Finnboard merely

acted as an auxiliary organ of each of those companies. In the light of those links and the fact that it was bound to follow the instructions issued by each of the applicants and could not adopt conduct on the market independently of any of them, Finnboard in practice formed an economic unit with each of its cartonboard-producing member companies (see, by analogy, *Suiker Unie and Others* v *Commission*, cited above, paragraphs 538 to 540).

59 Accordingly, the Commission correctly considered, in the statement of reasons for the Decision, that the applicants were liable for the anti-competitive actions of Finnboard, with the result that it would have been possible to find that each of them had intentionally infringed Article 85(1) of the Treaty. It was thus entitled, instead of imposing a fine directly on each of the applicant companies, to decide to hold each of them jointly and severally liable with Finnboard for payment of part of the fine imposed on that trade association.

60 In the light of the foregoing, the plea must be dismissed.'

The applications for reduction of the amount of the fines

12 The Court of First Instance declared inadmissible the appellants' applications for reduction of the fine on the ground that they had not raised any plea in support of those applications.

13 The Court of First Instance therefore dismissed the applications.

The appeal

The allegation that the bringing of the appeal is flawed

14 As a preliminary point, the Commission expresses doubts as to the admissibility of the appeal and submits that, apart from the case of Kyro Oyj Abp, the extracts from the commercial register were produced only in the form of a translation, that the authority granted by Kyro Oyj Abp bears, amongst other signatures, the signature of a person who, according to the extract from the commercial register produced, is not authorised to sign and that the other signatory under that authority does not have power to represent the company on his own.

15 It need merely be observed in that regard that, by virtue of Article 112(1) of the Rules of Procedure of the Court of Justice, which refers solely to Article 38(2) and (3), Article 38(5)(b) of those rules, under which a legal person governed by private law must annex to his application 'proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorised for the purpose', is not applicable to appeals.

16 The complaint of inadmissibility raised by the Commission must therefore be rejected.

Substance

17 In support of their appeal, the appellants rely on two pleas in law. First, they complain that the Court of First Instance did not hold that Article 15(2) of Regulation No 17 could not serve as a legal basis for rendering them jointly and severally liable for payment of a fine imposed on another undertaking. Second,

they submit that the Court of First Instance was wrong to refer to the principles laid down by the Court of Justice for determining the amount of fines to be imposed on undertakings forming an economic unit, since, according to them, the Court of Justice did not infer from those principles any liability to pay a fine imposed on a third person.

The first plea

18 The appellants claim that the decision to impose fines on them, when neither the Commission nor the Court of First Instance has established that they had infringed, intentionally or negligently, Article 85(1) of the Treaty, has no legal basis. On the contrary, it is apparent from Article 1 of the Decision that the appellants did not infringe Article 85(1) of the Treaty.

19 The appellants point out that in paragraph 43 of the contested judgment the Court of First Instance held that an undertaking may be declared jointly and severally liable with another undertaking for payment of a fine imposed on that undertaking, which has committed an infringement intentionally or negligently, 'provided that the Commission demonstrates, in the same decision, that the infringement could also have been found to have been committed by the undertaking held jointly and severally liable'. That interpretation is contrary to the clear wording of Article 15(2) of Regulation No 17, which requires a finding that the addressee of the decision has infringed Article 85(1) of the Treaty. It is also contrary to the fundamental principle of legality and would effectively allow the Commission to impose penalties under Article 15(2) of Regulation No 17 on undertakings without either having to assume the burden of proving an infringement of Article 85(1) of the Treaty or having to take into account the specific case of each undertaking (and in particular the mitigating circumstances) when assessing the gravity or duration of the infringement in order to fix the amount of the fine. Lastly, the interpretation of the Court of First Instance infringes the principle of the presumption of innocence, a recognised principle of Community law (see Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 30 to 35).

20 The Commission submits that the first plea is inadmissible because it merely repeats, to a large extent, the factual and legal arguments relied on at first instance.

21 On the substance, the Commission submits that the interpretation of Article 15(2) of Regulation No 17 made by the Court of First Instance in paragraph 43 of the contested judgment is in conformity with the wording of that provision. An undertaking infringes Article 85(1) of the Treaty where the conduct of another undertaking, which infringes that same provision, may in fact be imputed to it (see, in particular, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 132 et seq.; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44 et seq., and Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 49 et seq.).

22 Moreover, it is not true that, by applying the interpretation of the Court of First Instance, the specific circumstances of undertakings which can be held jointly and severally liable are not taken into consideration. Those undertakings can be held jointly and severally liable only if the infringement could be found also to have been committed by them individually, which means that the circumstances peculiar to them are taken into consideration. That was so in the present case, since the appellants were each held jointly and severally liable for the fine imposed on Finnboard in respect of a different amount. Furthermore, the appellants do not refer to the existence of any individual circumstances which the Commission or the Court of First Instance did not take into account.

23 Nor, lastly, has the principle of the presumption of innocence been infringed. The Commission made findings which justified the imposition of fines directly on the appellants, which were addressees of the statement of objections and thus able to defend themselves without any restriction.

24 It is first necessary to reject the plea of inadmissibility raised by the Commission. It is clear from the arguments set out above that the appellants are disputing the correctness of paragraph 43 of the contested judgment in that they allege that it is vitiated by an error of law.

25 Next, it must be observed that in the present case Finnboard received a fine of ECU 20 000 000, for which each of the appellants was considered to be jointly and severally liable up to a particular amount between ECU 3 000 000 and ECU 7 000 000 which was approximately proportionate to the cartonboard sales made on behalf of each of them by Finnboard (paragraph 10 of the contested judgment).

26 That means, as the Court of First Instance held in paragraph 44 of the contested judgment, that Finnboard was held directly responsible for the infringement of Article 85(1) of the Treaty. However, as the Commission took the view that Finnboard had acted on behalf of and in the interest of the appellants, so that its anti-competitive conduct could be imputed to them, each of the appellants was declared jointly and severally liable for payment of part of the fine.

27 In paragraphs 45 to 59 of the contested judgment the Court of First Instance examined whether, and confirmed that, the conduct of Finnboard could be attributed to the appellants. The reasoning following by the Court of First Instance in that regard cannot be regarded as defective, since it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (see, *inter alia*, *AEG* v *Commission*, cited above, paragraph 49).

28 In those circumstances, the interpretation by the Court of First Instance of Article 15(2) of Regulation No 17 cannot be regarded as contrary to the principle

of legality, because the appellants, to which the anti-competitive actions of Finnboard were attributed, received a fine under that article for an infringement which, as a result of that attribution of liability, they themselves are deemed to have committed. That explains why, contrary to the appellants' submissions, the circumstances peculiar to them were taken into consideration by the Commission, as the Court of First Instance moreover found in paragraph 10 of the contested judgment. It also explains why the appellants were addressees of the statement of objections, and it has not been established that they were unable to defend themselves against those objections.

29 For that reason too, it is necessary to reject the complaint alleging infringement of the principle of the presumption of innocence.

30 Lastly, as regards the question whether the conditions for attributing liability were in fact satisfied in the present case, the examination of that question, which is based on an assessment of the facts, cannot as such be contested in appeal proceedings.

31 It follows from the foregoing that the first plea must be rejected as partly unfounded and partly inadmissible.

The second plea

32 According to the appellants, before a finding can be made that a parent company is liable for an infringement committed by its subsidiary, the Court of Justice always requires that it must have been established that the parent company has itself committed an infringement of the competition rules and has had a fine imposed on it (see, to that effect, Case 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 37 and 41; *ICI* v *Commission*, cited above, paragraphs 132 to 141; *Geigy* v

Commission, cited above, paragraph 45, and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 149 and 153). According to the case-law of the Court of Justice, the existence of an economic unit cannot therefore be invoked to support a finding that the appellants are vicariously liable for payment of a fine imposed on Finnboard, when no infringement has been found to have been committed by them.

33 The appellants also submit that the position for which the Commission argues is not supported by its own administrative practice, which recognises only two cases of joint and several liability, which are fundamentally different, in law and in fact, from the present case, since the undertakings which had committed an infringement jointly were preceded against as co-authors and received a single fine (see Commission Decision 72/457/EEC of 14 December 1972, relating to a proceeding under Article 86 of the Treaty establishing the European Community (IV/26.911 — ZOJA/CSC — ICI) (OJ 1972 L 299, p. 51) and Commission Decision 80/1283/EEC of 25 November 1980 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.702: Johnson & Johnson) (OJ 1980 L 377, p. 16, in particular p. 25)).

34 It need merely be observed in that regard that the appellants' line of argument is based on an erroneous premiss, namely that no infringement was found to have been committed by them and no fine imposed on them individually. To the contrary, it is clear from paragraphs 27 to 30 of this judgment that the appellants were held individually liable for an infringement which they are deemed to have committed themselves on account of their legal and economic links with Finnboard and by which they were able to determine Finnboard's conduct on the market.

35 In the alternative, the appellants submit that the conditions for establishing the existence of an economic unit were not satisfied in the present case.

36 It must be found in that regard that paragraphs 45 to 58 of the contested judgment set out the grounds in support of the conclusion that, during its negotiations with purchasers of cartonboard, Finnboard was obliged to follow the instructions issued by each of the appellants and could not conduct on the market a course of conduct that was independent of each of them, so that effectively it formed an economic unit with each of its members producing cartonboard.

37 Conclusions of that kind are based on a series of findings of fact which cannot be questioned in appeal proceedings, save where there is a distortion of the clear sense of the evidence or infringement of general principles and procedural rules applicable in regard to the burden of proof and the taking of evidence, matters which the appellants have not sought to establish.

38 The second plea must therefore be rejected.

39 It follows from the foregoing that the appeal must be dismissed in its entirety.

Costs

40 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 applied for in the successful party's pleadings. Since the Commission has asked for costs to be awarded against the appellants and the latter have been unsuccessful in all their 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 Oyj, UPM-Kymmene Oyj, Tamrock Oy and Kyro Oyj Abp 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