OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 26 June 2001 [1]

Facts and procedure

1. As they are set out in the order of the Court of First Instance of 29 September 1999, [2] the relevant facts for the purposes of this appeal may be summarised as follows:

2. The South Wales Small Mines Association ('the Association') is an unincorporated association founded to represent the interests of small coal producers in South Wales.

3. Some of those producers submitted to the Commission, in the Association's name, a complaint dated 5 June 1990 concerning the application of discriminatory business terms contrary to the relevant provisions of the ECSC Treaty.

4. By Decision No 15656 ('the Decision'), contained in a letter dated 30 July 1998, the Commission decided not to act upon the complaint.

5. The Decision was notified to the Association on 5 August 1998 by registered post accompanied by a form for acknowledgement of receipt.

6. By letter of 18 August 1998, confirmed on 26 August 1998, a number of the producers requested the Commission to notify them formally of the Decision but the Commission, by letter of 24 August 1998, refused to do so.

7. After learning on 16 September 1998 that the Association had not challenged the Decision within the prescribed period, those producers brought an action under the second paragraph of Article 33 and Article 35 of the ECSC Treaty, which was lodged at the Registry of the Court of First Instance on 21 September 1998 (Case

1 — Original language: Spanish.

2 — Joined Cases T-148/98 and T-162/98 *J.G. Evans and Others and South Wales Small Mines Association* v *Commission* [1999] ECR II-1837.

T-148/98). The applicants stated that a copy of the Decision was annexed to their application. The present case is concerned with that action.

8. A further application was lodged at the Court Registry on 6 October 1998, by which the Association brought on its own behalf an action for annulment of the Decision under the second paragraph of Article 33, cited above (Case T-162/98).

9. Relying on the provisions of Article 114(1) of the Rules of Procedure of the Court of First Instance, the Commission raised objections of inadmissibility in each of the cases.

The applicants submitted their observations thereon and the Court of First Instance considered that it had sufficient information before it to decide, in accordance with Article 114(3) of those Rules, to dispense with the oral part of the procedure.

10. The Court of First Instance, pursuant to Article 50 of its Rules of Procedure, also considered that it was appropriate to join the two cases for the purposes of the order which it made on 29 September 1999.

11. The appeal was brought on 20 December 1999.

The contested order

12. The contested order declared that the application in Case T-162/98 was inadmissible on account of its being out of time. The applicant in that case had submitted, *inter alia*, that in his affidavit of 4 January 1999, Mr Bernard John Llewellyn, in his capacity as Secretary of the Association, stated that he had taken no further action at all following receipt of the Commission's letter. [3]

13. The applicants — to whom the Decision was not notified — asserted that they did not become aware of its existence until 10 August 1998, the date on which, 'by chance', one of them received a copy of the letter containing it from a third party. The application in Case T-148/98 could be deemed to have been brought in time only if that assertion was accepted.

14. For the purposes of checking the veracity of the applicants' assertions, the Court of First Instance asked them (i) to identify that third party; (ii) to identify the applicant who had received the letter and (iii) to describe the exact circumstances in which the document was received and how the other applicants learned of the Decision.

3 — Paragraph 21 of the contested order.

15. The applicants gave the following answers to the questions:

To the first question: '[t]he Applicant Mr Mostyn Jones he (sic) cannot recall who the third party was, he thinks he obtained it from one of the persons who Sarah Llewellyn Jones [the Association's lawyer] represents.'

To the second question: 'Mr Mostyn Jones'.

To the third question: 'The Applicant Mr Jones cannot recall the exact circumstances. The Other Applicants became aware of it by Mr Jones informing some of them of the decision and the Applicants communicating directly with one another.' [4]

16. The Court of First Instance assessed the evidence before it as follows:

'Given that the Commission notified the Decision only to SWSMA and that the Decision was not even sent to SWSMA's solicitors, who did not learn of it until 8 September 1998, it seems unlikely that, as has been asserted, one of the applicants received a copy of the Decision on 10 August 1998 from an unidentified third party.

The answers given to the questions put by the Court make that lack of credibility only more apparent. What emerges from the laconic and evasive terms in which those answers are couched is that, whilst Mr Mostyn Jones remembers the exact date on which he received a copy of the Decision, that date being the alleged starting point of the period prescribed for bringing the action, he has forgotten both the identity of the person from whom, and the circumstances in which, he received it.

The only piece of information provided by Mr Mostyn Jones is that he thinks he obtained the document from one of the persons represented by Sarah Llewellyn Jones, SWSMA's adviser. That, however, runs counter to the statements of Bernard John Llewellyn, who says that he took no further action following the receipt by him of the letter containing the Decision, and to the fact that the Decision did not come to the attention of SWSMA's solicitors until 8 September 1998.

It follows that the applicants have been unable to make out a sufficiently detailed and convincing case for their claim that the starting point of the period prescribed for initiating proceedings was such as to enable the Court to hold that their action was brought in time.

4 — Paragraph 43 of the contested order.

It necessarily follows that the action in Case T-148/98 must be held to have been brought out of time.' [5]

17. The Court of First Instance held that the action was inadmissible without considering the other grounds of inadmissibility pleaded by the Commission.

The grounds of appeal

18. The appellants' action is founded on three grounds of appeal, based respectively on a manifest error of law, a breach of their rights of defence and a distortion or incorrect assessment of the evidence.

19. The Commission, for its part, maintains that the appeal is wholly inadmissible, since the contested order was confined to declaring, on the basis of a purely factual assessment, that the action for annulment had been brought out of time. It contends, in the alternative, that each of the grounds of appeal advanced should be rejected.

5 — Paragraphs 44 to 48 of the contested order.

20. As a preliminary point, it should be borne in mind that, although the Court of First Instance's reasoning was based on factual matters, its finding of inadmissibility is of a legal nature and, as such, may be challenged in proceedings on appeal. Therefore, the Commission's objection that the appeal is wholly inadmissible cannot be accepted.

The first ground of appeal: manifest error of law

21. The appellants claim that the Court of First Instance, while appearing to have accepted implicitly that the applicants could consider themselves concerned by the Decision for the purposes of the second paragraph of Article 33 CS, did not expressly rule on that question. Had it done so, it would have been led to conclude that the Commission was required to notify them of the Decision and, in the absence of such notification, should have calculated the period for bringing proceedings from the time when one of the parties concerned became aware of the measure. By failing to act in that way, the Court of First Instance committed a manifest error of law.

22. Without there being any need to inquire further into either the implications, for procedural purposes, of the absence of a distinction in the ECSC Treaty between the person to whom a decision is addressed and any third party concerned by it, or the

consequences of the scope for bringing proceedings being wider under the second paragraph of Article 33 CS than under the fourth paragraph of Article 230 EC, this ground of appeal seems to me to be clearly ineffective.

In fact, irrespective of whether the Court of First Instance declared that the Decision concerned the applicants, the fact remains that it assessed the issue of whether the proceedings were commenced in time *as if* the applicants were concerned, considering — and then rejecting — the submission that they learned of the measure only after its notification to the Association. The applicants would not have merited any more favourable treatment had the fact that they were concerned by the Decision been expressly recognised.

23. In so far as the error of law complained of consists in the Court of First Instance's failure to recognise the right of the current appellants to be notified of the Decision by the Commission, the plea in law is new. Essentially, the appellants would no longer be bringing a claim by virtue of being concerned by the Decision but by virtue of being addressees thereof.

24. Finally, the appellants add that the Commission, when it responded to their claim, did not call in question that they had learned of the Decision on 10 August 1998. That argument is clearly unfounded since issues relating to the calculation of periods for bringing proceedings may be considered by the Court of its own motion and therefore may not be dispensed with by the parties. The procedure followed by the Commission is irrelevant.

25. The first ground of appeal must, therefore, be rejected.

The second ground of appeal: breach of the rights of defence

26. The appellants submit that the Court of First Instance based its assessment as to whether the action was out of time on evidence of which it became aware in the context of the case brought by the Association (Case T-162/98). They were not given an opportunity either to consider that evidence or to reply to it. Hence, the Court of First Instance acted in breach of an elementary principle of natural justice and a rule inherent in the right to procedural fairness.

27. The Commission considers that this ground of appeal is inadmissible since it seeks a re-examination of the facts. In any event, it points out that the Court of First Instance found the applicants' answers to the questions that it put to them to be 'laconic and evasive' and adds that the

pleadings in the appeal give no indication of the observations that the appellants might have made had they been given the opportunity to comment.

28. It is clear that, when considering the evidence that presumably led it to rule that the action was out of time, the Court of First Instance did not observe the requirements of the adversarial process.

29. It must be recalled that two separate actions were brought and that, at the Commission's request, the Court of First Instance ordered the opening of a procedure for the determination of both objections of inadmissibility, in which the various applicants would have an opportunity to make observations. Since it was the order itself which resolved that the two cases should be joined and since the oral part of the procedure was dispensed with, the Court considering that it had sufficient information before it, the Association did not have the opportunity to consider the documents in the action brought by Gerry Plant and others. Nor were the latter able to have access to the case-file in the other action.

30. However, in order to establish the accuracy of the date on which the applicants claimed to have learned for the first time of the Decision, the Court of First Instance asked them the questions set out above. Having completed its analysis, the Court of First Instance found that the answers lacked credibility, stating that the applicants had not succeeded in making out a sufficiently detailed and convincing case in support of their claims, and held the action to be inadmissible.

31. As regards those answers, the Court of First Instance began by finding, first, that the assertion that one of the applicants received a copy of the Decision from an unidentified third party on 10 August 1998 appeared to be lacking in credibility, since the Commission notified the Decision only to the Association and that the Decision was not even sent to the Association's solicitors, who did not learn of it until 8 September 1998.

The Court of First Instance had evidence as to those circumstances only as a result of the submissions made in the course of Case T-162/98. [6]

32. The Court of First Instance went on to state that the laconic and evasive nature of Mr Mostyn Jones' answers were in contrast to his exactitude when it came to recalling the date on which he allegedly received a copy of the Decision. That resulted in their credibility being further undermined.

6 — See paragraph 22 of the contested order.

33. Lastly, the Court of First Instance discounted Mr Mostyn Jones' explanation that the person from whom he received the document was one of the clients of the Association's lawyer by looking at it in the light of Mr Bernard John Llewellyn's affidavit, which stated that he had not taken any further action following receipt of the notification and that the Association's lawyers had not learned of the Decision until 8 September 1998.

Mr Bernard John Llewellyn's affidavit was adduced only in the proceedings in Case T-162/98.

34. By its very nature, the submission of the parties' arguments and their evidence to an adversarial process does not involve requirements of a mandatory nature. It may be no more than a means of facilitating the administration of justice and dealing with the questions, both of fact and law, that the court has to resolve. That is typical of the way Anglo-Saxon legal systems operate, in which adversarial proceedings demonstrate great resistance to anything deemed 'inquisitorial', which might affect the outcome of the proceedings and which is not instigated by the parties. In continental legal systems the scope of adversarial proceedings is more limited. First, the maxim *iura novit curia* prevails, which enables questions relating purely to the application of the law to be excluded from the adversarial process: second, the presumed impartiality of judicial bodies extends to measures such as a request for an internal report or the adducing of specific evidence, thus reducing the need for the parties to be heard.

35. In my opinion, the requirements of an adversarial process only call for particular judicial attention when a failure to observe them results in the breach of a fundamental right, that is to say, when it causes a breach of the rights of defence.

36. However, the European Court of Human Rights has adopted the Anglo-Saxon notion of an adversarial process stating, in its judgment of 20 February 1996 in Vermeulen v Belgium,[7] that it meant 'the opportunity for the parties in civil or criminal proceedings to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision'. That case-law has been approved on many occasions,[8] without the utter impartiality and independence of the

7 — Eur. Court H.R., Vermeuelen v Belgium judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I. See also the judgment of the same date in Lobo Machado v Portugal.

8 — See, *inter alia*, Eur. Court H.R., Bulut v Austria judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II; Niederöst-Huber v Switzerland judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I; Van Orshoven v Belgium judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III; J.J. v Netherlands and K.D.B. v Netherlands judgments of 27 June 1998, *Reports of Judgments and Decisions* 1998-II. See also the judgment of 7 June 2001 in Kress v France, in which a more flexible approach to the principle is adopted, which admits that other procedures also safeguard the right of reply.

various judicial figures concerned (an impartiality and independence which permeates their acts) having made the least impression on that line of argument.

It appears that what is sought is a uniform approach to the administration of justice without any explanation, beyond the 'doctrine of appearances',[9] as to why that is necessary.

37. The requirements of an adversarial process typically come into play in relation to evidence submitted by one party for scrutiny by a judicial body. Such evidence, which is by definition external to the court, cannot be presumed to be impartial and independent. If such evidence is taken into account, without the parties first being heard in connection therewith, it may be assumed that the rights of defence have not been observed.

38. That is the case in the present action. The Court of First Instance based its assessment of the case on evidence adduced by one party in one set of proceedings in order to determine a question concerning another set of proceedings, without affording the parties to the second set of proceedings the opportunity to consider the evidence and without, therefore, allowing them to reply to it.

39. Of the three considerations which led the Court of First Instance to reject the applicants' submission concerning the date on which they claimed to have learned about the Decision, at least two display the defect described. Since it is not for the Court of Justice to weigh up the relative probative value to be attributed to each of the various items of evidence, this being something which depends on an assessment of the facts, the second ground of appeal must be upheld.

Third ground of appeal: distortion or incorrect assessment of the evidence

40. Under this heading the appellants confine themselves to listing various matters of fact, without even attempting to explain in what respect the Court of First Instance distorted the evidence or in what respect its assessment thereof was manifestly incorrect.

41. Since it merely seeks a further examination of matters of fact, the third ground of appeal must be declared inadmissible.

9 — A theory developed by the European Court of Human Rights which consists in attaching decisive legal importance to the impression that a layman may have of the fairness of a hearing. It has rightly been severely criticised even by members of the Court itself. See, for example, the brilliant opinion of Judge Martens annexed to Borgers v Belgium, judgment of 30 October 1991, Series A No 214-B.

The further course of the proceedings

42. My proposal to uphold the second ground of appeal will result in the contested order being set aside and thereby in a reassessment of the facts on which it was based. Since that task is under no circumstances a matter for the Court of Justice, final judgment cannot be given in the action, which must be referred back to the Court of First Instance for re-examination.

Costs

43. Pursuant to the first paragraph of Article 122 of the Rules of Procedure, it is not appropriate to make an order as to costs.

Conclusion

44. For the foregoing reasons, I propose that the Court should set aside the order of the Court of First Instance of 29 September 1999 in Joined Cases T-148/98 and T-162/98, referring the cases back to that Court for further determination and reserving the costs.