OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. By application lodged on 23 July 1998 Moritz J. Weig GmbH & Co. KG (hereinafter 'Weig') appealed against the judgment of the Court of First Instance of 14 May 1998 in *Weig* v *Commission* [1] (hereinafter 'the contested judgment').

2. By that judgment the Court upheld the application in part, reducing the fine imposed on the appellant from ECU 3 000 000 to ECU 2 500 000, but dismissed the remainder. The action had been brought by Weig 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'), 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).

3. Weig asked the Court of First Instance to annul the Decision in whole or in part or, alternatively, to reduce the amount of the fine.

4. For the full statement of the complaints formulated by Weig 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.

5. In its appeal, Weig claims that the Court of Justice should:

— set aside the contested judgment and annul Article 3 of the Decision, and order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice;

— in the alternative, set aside the contested judgment and reduce the fine imposed on the appellant by Article 3 of the Decision to ECU 1 000 000, and order the Commission to pay two-thirds of the appellant's costs in the proceedings before the Court of First Instance and all the appellant's costs in

* Original language: French.

1 — Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235.

2 — OJ 1994 L 243, p. 1.

the proceedings before the Court of Justice.

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

— dismiss the appeal;

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

7. In support of the form of order sought, Weig submits two pleas.

— the first plea: inadequacy of the statement of reasons for the Decision as regards the fixing of the fine imposed on the appellant;

— the second plea: infringement of the principle of equal treatment, of Article 15(2) of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty, [3] and of Article 172 of the EC Treaty (now Article 229 EC), owing to an insufficient reduction in the fine.

8. In order to avoid needless repetition, 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 for the Decision as regards 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), state that the statement of reasons for the Decision was inadequate in so far as concerns the fixing of the amount of the fine imposed on the appellant and, at the same time, refuse to annul it in that regard.

10. Since this criticism is the same as that 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.

3 — OJ, English Special Edition 1962, 13, p. 204.

The second plea: insufficient reduction made in the fine by the Court of First Instance

11. This plea, which alleges that the Court of First Instance infringed the principle of equal treatment, Article 15(2) of Regulation No 17 and Article 172 of the Treaty by fixing the fine at ECU 2 500 000, is presented by the appellant in four parts.

12. Firstly, the appellant complains that the Court of First Instance did not apply the Commission's method of calculation when it fixed the amount of the fine.

13. Secondly, it claims that it was subject to discrimination on the part of the Court of First Instance because, in other proceedings, the Court applied the Commission's method of calculating the fines.

14. Thirdly, it alleges that the Court of First Instance erred when assessing the gravity of the infringement, since the fact that the infringement had no economic consequences was not held to mitigate its gravity.

15. Fourthly, it maintains that the cooperation it gave during the proceedings conducted by the Commission was not properly taken into account.

16. Since the third part of the plea is based on a line of argument whose relevance I examine in the Opinion I am delivering in Case C-283/98 P, mentioned above, I refer you once again to that Opinion for a statement of the reasons which lead me to reject it.

17. The fourth part will not detain us any longer. Indeed, even if we were to consider it admissible, in spite of the fact that it mainly repeats arguments put forward before the Court of First Instance, it must be regarded as a criticism of the Court's assessment of the value of the appellant's collaboration, and it is not for the Court of Justice, ruling on appeal, to evaluate its merits.

18. In any event, contrary to what it claims, Weig has not established in its appeal that, once the Commission's investigations had commenced it displayed particular enthusiasm or provided evidence as useful as that supplied by Stora Kopparsbergs Bergslags AB. It follows from this that paragraphs 280 to 289 of the contested judgment do not contain any error of assessment regarding either the intensity

and intrinsic value of the cooperation given by the appellant or the value of the appellant's cooperation compared with that given by Stora Kopparbergs Bergslags AB.

19. The fourth part of the second plea in law must therefore be rejected.

20. It is true that the first and second parts are separate: demanding application of the method of calculation used, on its own admission, by the Commission to determine the amount of the fines imposed on the various members of the cartel is not exactly the same as criticising the Court of First Instance for having discriminated between various undertakings for which it found that the Commission had fixed the amount of the fine on the basis of information which was incorrect or, at least, not proved. However, they raise fundamentally the same issue.

21. Did the Court of First Instance observe the principle of equal treatment between the various undertakings which were members of the same cartel when, having established that the appellant had participated in the cartel for only 38 months, and not 60 as claimed by the Commission, it reduced the fine imposed on Weig from ECU 3 000 000 to ECU 2 500 000?

22. I shall begin by pointing out that, if Weig were merely asserting that the Court of First Instance committed an error of assessment by fixing the amount of the fine the appellant had to pay at ECU 2 500 000, its claim would be manifestly inadmissible.

23. It would be defeated by the fact that an appeal brought before the Court of Justice, which can relate only to questions of law, cannot have the sole aim of providing a procedural framework within which to challenge the assessments of the validity and quantum of a fine made by the Court of First Instance in the exercise of its unlimited jurisdiction.

24. It seems to me that the first two parts of Weig's second plea in law are not inadmissible on that ground.

25. Firstly, the appellant has been careful to allege that the Court of First Instance infringed a rule of law, in this case the principle of equal treatment, not that it fixed the amount of the fine at an inappropriate level.

26. Secondly, it puts forward an argument which is directed specifically against the contested judgment. It does not, therefore, lay itself open to the criticism that it has merely repeated the argument it put for-

ward before the Court of First Instance to challenge the Decision.

27. Can the first two parts of the second plea therefore succeed?

28. Let us bear in mind that Weig maintains that, from reading the various judgments given by the Court of First Instance on 14 May 1998 in the actions brought by undertakings which had participated in the cartel on the cartonboard market, it emerges that the Court approved the method for calculating the fines which the Commission used and which it revealed in response to a question from the Court.

29. That approval was apparent in the fact that when the Court reduced a fine it used the same method, after amending the various parameters involved in the calculation in the light of the errors made by the Commission, for example regarding the duration of the undertaking's participation in the infringement or regarding its turnover.

30. However, according to the appellant, in its case the Court of First Instance clearly departed from that method, since it held that a fine of ECU 2 500 000 should be imposed on it. This was a very different sum from the ECU 1 909 000 which the Court should have reached if it had used the method, taking account of the fact that the duration of the appellant's participation was 22 months less than the Commission stated.

31. Since the fines imposed on all the other undertakings, both those whose actions were upheld by the Court of First Instance and those whose actions were dismissed, were fixed according to a single method which was established by the Commission and approved by the Court of First Instance, Weig, to whom that method was not applied, is entitled to complain that it had received discriminatory treatment.

32. To that discrimination, arising from the refusal to apply to the appellant the method of calculation used for all the other parties to the cartel, which is in a way a matter of principle, was added another, which related very specifically to the fixing of the fines by the Court of First Instance in the various cases in which it reduced the fine originally fixed by the Commission. The amount of the reduction obtained by Weig was not comparable, *mutatis mutandis*, to that of the reductions granted to other members of the cartel.

33. Intellectually speaking, this second element of discrimination is, in fact, different from the first, even though it is difficult to imagine by what magic the fine imposed on the appellant could not have been discriminatory in its amount when it was not

calculated, if we are to believe Weig, according to the same method as for the other undertakings.

34. May the Court of Justice, without exceeding its role when sitting in an appellate capacity, follow the appellant along this path? I very much doubt it. Even if the relatively complex calculations made by Weig in its application turned out, on inspection, to be correct, the Court could hold that there had been discrimination only at the cost of denying the degree of latitude which the Court of First Instance enjoys when hearing and determining a case in exercise of its unlimited jurisdiction.

35. The Court of Justice could establish and penalise discrimination only after holding, by implication or expressly, that everything was otherwise equal. The fact that it may appear, as Weig maintains, that the amount of the various fines fixed for other appellants can be explained by the application of a single method of calculation still does not prove that that method was used. At this stage of the argument, it is not inconceivable that the fact that the amounts fixed by the Court of First Instance are consistent with those which would have resulted from application of the method used by the Commission is purely accidental.

36. In fact, Weig relies on appearances, but has still not shown that in the various judgments of the Court of First Instance the Court expressly acknowledged the validity of the method used by the Commission, let alone that it evinced an intention to follow the method itself.

37. In exercising its discretion in the matter, the Court may have taken a different approach from the Commission when weighing up the various factors to be taken into account for fixing the fines, but ended up, for all the appellants except Weig, with the same result as it would have obtained by applying the Commission's method.

38. In that case, there would be a difference but not discrimination, and, if the Court of Justice sought to censure a non-existent discrimination, it would be interfering in the jurisdiction of the Court of First Instance.

39. I am therefore of the opinion that there are no grounds for the Court of Justice to hold that the discrimination to which the appellant refers has been proved. Does that mean that, since all its other arguments have been rejected, its action must be dismissed? I do not think so.

40. Indeed, such a dismissal would not, in my view, accord with a party's right to know the reasons why his action has not been upheld by the court, a right which has its corollary in the duty of the court to state the grounds for its judgments.

41. Let us, for a moment, put ourselves in Weig's position. Reading the contested judgment, it was pleased to note that the Court of First Instance had acknowledged the validity of its challenge with regard to the duration of its participation in the cartel. Although the Commission maintained that it had participated in the cartel for 60 months, the Court held that it had not been involved for more than 38 months. However, it was also disappointed to note that, although the replacement of the figure 60 by the figure 38 in the arithmetical calculations made by the Commission to fix the amount of the fine should have reduced it to ECU 1 909 000, the Court fixed the amount at ECU 2 500 000, and gave the following explanation:

'As regards the amount of the fine imposed, it is necessary to take into account the fact that the applicant can be held responsible for infringement of Article 85(1) of the Treaty only in respect of the period from March 1988 until April 1991.

As the other pleas relied upon by the applicant in support of its application for annulment or reduction of the fine have been rejected, the Court, exercising its unlimited jurisdiction, will set the fine at ECU 2 500 000' (paragraphs 305 and 306 of the contested judgment).

42. Seeking to understand the reasons for this difference, Weig looked at the treatment given to the other appellants in respect of whom the Court had also found that the Commission had committed errors in calculating the fine, and found, to its astonishment, that, in their case, the new amount of the fine seemed to result from the application of the Commission's method of calculation. The appellant was obviously very confused, especially in view of the fact that the Court, although it observed that the fixing of a fine depends on a large number of factors and does not obey the laws of arithmetic, did not at anytime expressly rule out or even criticise the method used by the Commission.

43. In my view, a judgment of the Court of First Instance cannot cause an appellant such confusion. I have no intention of calling in question the wide degree of latitude enjoyed by the Court of First Instance in the exercise of its unlimited jurisdiction, and far be it from me to seek to compel it to explain, with detailed figures, how it fixed the amount of a fine, particularly since, according to the case-law of the Court of Justice, the Commission, whose decisions are reviewed by the Court of First Instance, is under no such compulsion.

44. However, when, as in this case, the result obtained by the Court of First Instance may give rise to questions regarding the existence of possible discrimination towards the appellant, I consider that the Court has a duty to answer such questions in advance, by providing the minimum explanations of the way in which it has reviewed the amount of the fine, if only in

order that the undertaking concerned may have information enabling it to weigh up the pros and cons of bringing an appeal before the Court of Justice.

45. I cannot, for my part, see any incompatibility between the exercise of unlimited jurisdiction and the need for transparency since, by definition, the court has nothing to hide. Since the infringement of the duty to state reasons, which weighs at least as heavily on the court as on those who wield political power, may be raised by the Court of Justice of its own motion, I suggest that the Court set aside the contested judgment in so far as it fixed at ECU 2 500 000 the fine imposed on Weig in respect of its involvement in the cartonboard sector.

46. Does the state of the proceedings allow for a ruling be given or should the case be referred back to the Court of First Instance?

47. The fact is that nowhere did the Court of First Instance expressly acknowledge the validity of the Commission's method, even less evince an intention to adopt the method itself. As I pointed out in point 37 above, it may be for other reasons than the application of the Commission's method of calculation that the Court of First Instance obtained, for all the appellants except Weig, a result identical to that which it would have obtained if it had used the method. These considerations tend to suggest that the contested judgment simply be set aside. The Court of First Instance would then have the opportunity either to reveal the criteria by which, having regard to Weig's rights of defence, it was reasonable for it to fix a fine of ECU 2 500 000, or to reduce that amount.

48. However, after reading the whole file, I am left with the very clear impression that the only difference between the Court of First Instance and the Commission regarding the factors to be taken into account for fixing the amount of the fine concerned the duration of the infringement. Neither the appellant's turnover for the relevant financial year nor the significance of the role it played in the cartel were disputed, and the Court of First Instance found nothing to criticise regarding the general level of fines fixed by the Commission.

49. Nor did the Court expressly rule out or even criticise the method of calculation used by the Commission. Furthermore, in the contested judgment there is not the slightest indication that, in the case of the appellant, the reduction in the duration of participation in the infringement was partly offset by factors relating to the seriousness of its conduct compared with that of the other members of the cartel. All these aspects are reasons for the Court of Justice to dispose of the case and exercise the unlimited jurisdiction conferred on the relevant Community Court by Article 172 of the Treaty and Article 17 of Regulation No 17. In the exercise of that jurisdiction, the Court of Justice should therefore reduce the amount of the fine taking account of the actual duration of the infringement compared with the duration found by the Commission, and fix it at EUR 2 000 000, an amount which Weig itself considers, in

its appeal, would remove any discrimination against it.

50. All things considered, I suggest that the Court take this second approach.

Costs

51. It is clear that if the contested judgment is set aside, even in only one respect, this must be reflected in the costs. In the judgment, the Court of First Instance decided that each party should bear its own costs.

52. I propose that this distribution should be slightly amended, so that the appellant bears only four fifths of its own costs and the Commission pays, in addition to its own costs, one fifth of those incurred by the appellant.

53. As regards the costs relating to the appeal proceedings, I consider, in view of the fact that the appellant has failed in most of its pleas, that it should bear its own costs and pay two thirds of the costs incurred by the Commission.

Conclusion

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

— set aside the judgment of the Court of First Instance of 14 May 1998 in Case T-317/94 *Weig* v *Commission* in so far as it fixed the amount of the fine imposed on the appellant at ECU 2 500 000 and in so far as it ordered the appellant to pay its own costs;

— set the fine at EUR 2 000 000;

— order the appellant to bear, in respect of the proceedings before the Court of First Instance, four fifths of its own costs and, in respect of the proceedings before the Court of Justice, to bear its own costs and also to pay two thirds of the costs incurred by the Commission of the European Communities;

— order the Commission of the European Communities to bear, in respect of the proceedings before the Court of First Instance, its own costs and to pay one fifth of the costs incurred by the appellant and, in respect of the proceedings before the Court of Justice, to bear one third of its own costs;

— dismiss the remainder of the appeal.