PRICING POLICY (CARTONBOARD): THE CASCADES AND OTHER CASES

Subject: Pricing policy
Market sharing
Supply restrictions

Industry: Cartonboard
(Implications for most other industries)

Parties: 13 Manufacturers listed in the judgment
The Commission

Source: Court of Justice Press Release 84/00, dated 16 November 2000; Judgment of the Court of Justice in Cases C-248/98P, C-279/98P, C-280/98P, C-282/98P, C-283/98P, C-286/98P, C-291/98P, C-294/98P, C-297/98P and C-298/98P

(Note. This is nearly the last chapter in the saga of the Cartonboard Cartel. For some of the members of the cartel, the end of the story will be written by the Court of First Instance, to whom several of the cases have been remitted. Originally, 19 members were fined by the Commission; 17 applied to the Court of First Instance; 13 appealed to the Court of Justice. The general report below gives the results of the 10 appeals to which the 13 companies were parties. A specific report on the KNP case follows, with a detailed examination of the principal arguments.)

On 13 July 1994 the Commission imposed fines totalling €131,750,000 on 19 producers of cartonboard on the ground that they had infringed Community competition law. The British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and the Fédération Française du Cartonnage had complained to the Commission in 1990. The Commission had concluded that, from mid-1986 until at least April 1991, those undertakings had infringed Community competition law by participating in an agreement and concerted practice (implementation of simultaneous and uniform price increases, maintenance of market shares at constant levels, concerted measures to control supply to the Community market).

17 undertakings and four Finnish firms (members of a trade association, "Finnboard", held responsible by the Commission) brought actions to contest that Decision before the Court of First Instance, which delivered its judgments on 14 May 1998 and reduced the total amount of fines to €120,330,000. 10 appeals were brought before the Court of Justice of the European Communities by 13 undertakings seeking annulment or reduction of the fines as fixed by the Court of First Instance.

In its judgments on the appeals the Court of Justice points out that the Court of First Instance has jurisdiction in two respects to review Commission decisions

imposing fines on undertakings for infringement of the competition rules. It reviews the legality of, and in particular the statement of reasons for, those decisions. The Court of First Instance also has jurisdiction to assess the appropriateness of the amount of the fines. With regard more specifically to review of compliance with the duty to state reasons, the Court of Justice explains that in that context the Commission does not have to indicate in its Decision the figures relating to the method of calculating the fines, even if that may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its review of the legality of the Decision.

In Case C-279/98 P, Cascades SA (France), the fine imposed by the Commission, which was not annulled by the Court of First Instance, amounted to €16,200,000. The Court of Justice has referred the case back to the Court of First Instance for a fresh assessment of the fine: it considers that Djupafors and Duffel participated in the infringement independently from mid-1986 until their acquisition by Cascades SA in March 1989. They pursued their activities as subsidiaries and must therefore, in the Court's view, themselves answer for their infringements prior to their acquisition. The judgment has therefore been annulled on the ground that it contains an error of law; in order to fix the fine, the Court of First Instance will have to assess the participation of those two subsidiaries in the infringement found.

In Case C-280/98 P, Moritz J. Weig GmbH & Co Kg (Germany), the Commission imposed a fine of €3,000,000 which was reduced by the Court of First Instance to €2,500,000 in order to take account of the actual duration of its participation in the infringement. According to the Court of First Instance, Weig had not participated during the first 22 months of the infringement (out of a total duration of 60 months). The Court of Justice has reduced the amount of the fine to €1,900,000; it held that that Court of First Instance had violated the principle of equal treatment by not applying to the company concerned the same method of calculating the fine as adopted by the Court of First Instance in order to fix the amount of the fine imposed on the other undertakings which had cooperated with the Commission (relevant turnover x percentage in respect of the gravity of the infringement x percentage in respect of duration = total, less reduction for cooperation).

In Case C-286/98 P, Stora Kopparbergs Bergslags AB (Sweden), the Commission imposed a fine of €11,250,000. The Court has referred the case back to the Court of First Instance for re-assessment of the amount of the fine. The Court of Justice points out that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. On the other hand, the Court considers that the unlawful conduct of subsidiaries acquired during the infringement cannot be attributed to the parent company prior to their acquisition by it: Stora acquired Feldmühle and CBC only in September 1990 and responsibility for their actions therefore had to be attributed to the legal person that directed the operation of their businesses in the period preceding their acquisition.

In Case C-291/98 P, Sarrió SA (Spain), the Commission had imposed a fine of €15,500,000. The Court of First Instance reduced the fine to €14,000,000, as Prat Carton, a subsidiary company of Sarrió, had participated in only some aspects of the infringement. The Court of Justice has reduced the fine to €13,750,000. The Court considers that the method adopted in order to calculate the fines of all the other undertakings involved had been departed from without explanation. The amount of the fine must therefore be reduced by €250,000.

In Case C-248/98 P, NV Koninklijke Knp Bt (Netherlands). the Commission had imposed a fine of €3,000,000, which was reduced by the Court of First Instance to €2,700,000. The Court has reduced the amount of the fine to €2,600,000. The Court has done so because the Court of First Instance failed to deal with KNP's argument that it should have been responsible for the conduct of its subsidiary company, Badische, only with effect from its acquisition, that is to say from 1 January 1987.

The appeals brought by Enso Española Sa (Spain; Case C-282/98 P), Mo Och Domsjö Ab (Sweden; Case C-283/98 P), Metsä-Serla Sales Oy (Finland; C-298/98 P), Metsä-Serla Oyj, Upm-Kymmene Oyj, Tamrock Oy, Kyro Oyj Abp (Finland; Case C-294/98 P), Sca Holding Ltd (United Kingdom; Case C-297/98 P) have on the other hand been dismissed, since they have not succeeded in showing that the reasoning of the Court of First Instance was faulty. The amounts of their fines are therefore unchanged. ■

The Telefonica / Sogecable Case

The Commission has decided to end a procedure which might have led to fines against Telefónica and Sogecable because of the sheer size of football rights acquired and exploited jointly by the two largest pay-television platforms in Spain. Following the Commission's warning in April, the companies agreed to give rivals access to the football rights, which are a key ingredient for a successful pay-TV operation, and allowed them to set their own prices triggering a healthy competition for consumers. The case relates to the notification by Telefónica and Sogecable, which is owned by Canal+ of France and the Spanish media group Prisa, of an agreement whereby they jointly acquire and exploit the broadcasting rights to Spanish First League football matches for 11 seasons ending in 2009 through their joint venture Audiovisual Sport. The Commission took the view that the agreement presented serious breaches of competition law since it would have had the effect of foreclosing the Spanish pay-TV market whose success depends heavily on the broadcasting of football matches like in many other countries. Even if the threat of fines has been withdrawn, a number of remaining issues need careful consideration before concluding whether or not the Audiovisual system can benefit from an exemption to the Community anti-trust rules. The common exploitation in Audiovisual Sport of the football rights could lead to a powerful joint buying arrangement between Telefónica and Sogecable which could reduce the price paid to the football clubs. The parties have strongly contested this alleged anti-competitive effect. The Commission will also consider the duration of the notified agreements. It intends to take a final decision in 2001. (Source: Commission Statement IP/00/1352, dated 23 November 2000.)