FINES (POWER): THE ASEA BROWN BOVERI CASE

Subject: Fines
Rights of defence
Statement of reasons

Industry: Power generation, transmission and distribution; construction; transport
(Implications for all industries)

Parties: ABB Asea Brown Boveri Ltd, (Switzerland)
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 20 March 2002. in Case T-31/99 (*ABB Asea Brown Boveri Ltd (Switzerland), v Commission of the European Communities*)

(Note. This case is important for its thorough and extensive coverage of the many considerations determining the levels of fines imposed by the Commission in cases of infringement of the rules on competition. With the overall increase in the levels of fines in recent years, big money is involved; and, in the present case, the applicant succeeded in having the fine, which had been imposed by the Commission, reduced by €5m, a substantial sum by any standard, though only a fraction of the total fine ultimately thought appropriate by the Court, namely €65m.

As the judgment ran to well over two hundred paragraphs, the report below has been drastically curtailed. In any event, the applicant lost on almost all pleas, except the one reported in full in paragraphs 234 to 245: this concerns the principle of "equal treatment". According to the Court, the Commission should have differentiated the reduction for cooperation to be granted to the applicant from the reductions granted to other parties: the Commission incorrectly set at 30% the reduction to be granted to the applicant for its cooperation during the administrative procedure. This justified the lowering of the total fine.

Among many other matters covered by the judgment, in which the case law is cited at length, are the rights of the defence, the right to be heard and the need for the Commission's investigation to be "careful and impartial". But the Court goes out of its way to emphasise the Commission's discretion in setting the level of the fine; supports the Commission's general assessment in the present case; and takes the view that the applicant's subsequent introduction of a compliance programme is not necessarily a mitigating factor: the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in a specific case. As to the applicant's plea that the Commission did not give an adequate statement of the reasons for its decision, the Court reiterates the principle that the Commission cannot cover everything

and adds that there is no exhaustive list of the criteria to be applied in cases involving comparative fines imposed on different parties.)

Facts of the case

1. The applicant is a multinational group active in the power generation sector, the power transmission and distribution sector, the industrial and building systems sector and the transportation sector. In the ABB Asea Brown Boveri Ltd group ('the ABB group), the district heating business involves the Danish undertaking ABB IC Møller A/S ('ABB IC Møller), located in Fredericia (Denmark), and other production and/or distribution undertakings in Germany, Finland, Poland and Sweden.

2. In district heating systems, water heated in a central site is taken by underground pipes to the premises to be heated. Since the temperature of the water (or steam) carried in the pipes is very high, the pipes must be insulated in order to ensure an economic, risk-free distribution. The pipes used are pre-insulated and, for that purpose, generally consist of a steel tube surrounded by a plastic tube with a layer of insulating foam between them.

3. There is a substantial trade in district heating pipes between Member States. The largest national markets in the European Union are Germany, with 40% of Community consumption, and Denmark, with 20%. Denmark has 50% of the manufacturing capacity in the European Union and is the main production centre in the Union, supplying all Member States in which district heating is used.

4. By a complaint dated 18 January 1995, the Swedish undertaking Powerpipe AB informed the Commission that the other manufacturers and suppliers of district heating pipes had shared the European market in a cartel and that they had adopted concerted measures to harm its activities or to confine those activities to the Swedish market, or simply to force it out of the sector.

The Commission's Decision

15. ... the operative part of the [Commission's] decision is as follows:

Article 1

ABB Asea Brown Boveri Ltd, Brugg Rohrsysteme GmbH, Dansk Rørindustri A/S, Henss/Isoplus Group, Ke Kelit Kunststoffwerk GmbH, Oy KWH Tech AB, Løgstør Rør A/S, Pan-Isovit GmbH, Sigma Tecnologie Di Rivestimento S.r.L. and Tarco Energie A/S have infringed Article 85(1) of the Treaty by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the pre-insulated pipes sector which originated in about November/December 1990 among the four Danish producers, was subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market.

The duration of the infringements was as follows:

- in the case of ABB, ... from about November/December 1990 to at least March or April 1996,.

...
The principal characteristics of the infringement consisted in:
- dividing national markets and eventually the whole European market amongst themselves on the basis of quotas,
- allocating national markets to particular producers and arranging the withdrawal of other producers,
- agreeing prices for the product and for individual projects,
- allocating individual projects to designated producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question,
- in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to hinder its commercial activity, damage its business or drive it out of the market altogether.
...

Article 3

The following fines are hereby imposed on the undertakings named in Article 1 in respect of the infringements found therein:
(a) ABB Asea Brown Boveri Ltd, a fine of ECU 70 000 000;
...

The Applicant's five pleas in law

23. The applicant relies in essence on five pleas in law. The first plea alleges factual errors in applying Article 85(1) [now 81(1)] of the EC Treaty. The second alleges infringement of the rights of defence. The third alleges infringement of the principle of sound administration. The fourth alleges infringement of general principles and factual errors in determining the fine. The fifth alleges that the obligation to state reasons was infringed in connection with the determination of the fine.

Rights of the Defence

53. Observance of the rights of the defence, which constitutes a fundamental principle of Community law and which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure, requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76, *Hoffman-La Roche v Commission*, paragraph 11, and Case T-11/89, *Shell v Commission*, paragraph 39).

54. According to the case law, the statement of objections must set out the objections in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to take cognisance of the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision

(Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v Commission*, paragraph 42, and Case T-352/94, *Mo och Domsjö v Commission*, paragraph 63).

Right to be heard

78. It is settled case-law that, where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (Joined Cases 100/80 to 103/80, *Musique Diffusion Française and Others v Commission*, paragraph 21).

79. It follows that, so far as concerns the determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make their submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. Moreover, the undertakings have an additional guarantee, as regards the setting of that amount, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (Case T-83/91, Tetra Pak v Commission, paragraph 235).

Careful and impartial examination

99. The guarantees conferred by the Community legal order in administrative proceedings include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case T-44/90, *La Cinq v Commission*, paragraph 86; Case T-7/92, *Asia Motor France and Others v Commission*, paragraph 34; and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision v Commission*, paragraph 93).

Commission's discretion in setting fines

122. As regards the setting of fines for infringements of the competition rules, the Commission enjoys a discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89, *Martinelli v Commission*, paragraph 59; Case T-49/95, *Van Megen Sports v Commission*, paragraph 53; and Case T-229/94, *Deutsche Bahn v Commission*, paragraph 127). It is settled case law that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained (see Case 245/81, *Edeka*, paragraph 27, and Case C-350/88, *Delacre and Others v Commission*, paragraph 33).

123. On the contrary, the Commission is entitled to raise the general level of fines, within the limits laid down in Regulation No 17, if that is necessary to ensure the implementation of the Community competition policy. According to the case-law, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy (*Musique Diffusion Française and Others v Commission*, cited above, paragraph 109; Case T-12/89, *Solvay v Commission*, paragraph 309, and Case T-304/94, *Europa Carton v Commission*, paragraph 89).

124. It follows that undertakings involved in an administrative procedure which may lead to a fine cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously applied.

125. Furthermore, the dissuasive effect of fines is one of the factors which the Commission may take into account in assessing the gravity of the infringement and, consequently, in determining the level of the fine, since the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P, *SPO and Others v Commission*, paragraph 54, and judgments in Case C-219/95 P, *Ferriere Nord v Commission*, paragraph 33, and Case T-295/94, *Buchmann v Commission*, paragraph 163).

Correct assessment of the fine

205. The Commission did not commit an error of assessment vis-à-vis the applicant by increasing the basic amount of €70m taken to correspond with the gravity of the infringement by 50% on account of a number of circumstances, including, first, [the applicant's] role as the ringleader and instigator of the cartel and its bringing pressure on other undertakings to persuade them to enter the cartel, second, its systematic orchestration of retaliatory measures against Powerpipe, aimed at its elimination from the market and, third, its continuation of such a clear-cut and indisputable infringement after the investigations despite having been warned at high level by the Directorate-General for Competition of the consequences of such conduct (point 171 of the decision).

Importance of Applicant's compliance policy

220. First of all, the Commission cannot be criticised for not having regarded the applicant's strengthening of its Community law compliance policy as a mitigating circumstance.

221. Although it is indeed important that the applicant took measures to prevent future infringements of Community competition law by its personnel, that fact does not alter the reality of the infringement found in the present case (Case T-7/89, *Hercules Chemicals v Commission*, paragraph 357). Furthermore, it

follows from the case law that, although the implementation of a compliance programme demonstrates the intention of the undertaking in question to prevent future infringements and therefore constitutes a factor which better enables the Commission to accomplish its task of, inter alia, applying the principles laid down by the Treaty in competition matters and influencing undertakings in that direction, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in a specific case (Case T-319/94, *Fiskeby Board v Commission*, paragraph 83, and *Mo och Domsjö v Commission*, cited above, paragraph 417). That is all the more so when, as here, the infringement in question constitutes a manifest violation of Article 85(1)(a) and (c) of the Treaty.

Cooperation with the Commission during investigation

234. It should be observed at the outset that in the leniency notice the Commission defined the conditions in which undertakings which cooperate with it during the investigation into a cartel may be exempt from a fine or receive a reduction in the fine which they would otherwise have had to pay (see Section A 3 of the leniency notice).

235. It is not disputed that the applicant's case does not fall within the scope of Section B of that notice, which refers to cases where an undertaking has informed the Commission about a secret cartel before the Commission has undertaken an investigation (in which case the fine may be reduced by at least 75%), or within that of Section C of that notice, which concerns an undertaking which has disclosed the secret cartel after the Commission has undertaken an investigation which has failed to provide sufficient grounds for initiating the procedure leading to a decision (in which case the fine may be reduced by between 50% and 75%).

236. The applicant's case comes under section D of the leniency notice, which states that '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would had been imposed if it had not cooperated. The notice specifies that:

> Such cases may include the following:
> - before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;
> - after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

237. In that context, it should be observed, first, that the Commission cannot be criticised for having refused to grant the applicant the full 50% reduction available under section D of the leniency notice by relying, in particular, on the fact that it was necessary to wait until the requests for information had been sent out before the applicant cooperated (third and fourth paragraphs of point 174 of the decision).

238. It is settled case law that a reduction in the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (Case C-297/98 P, *SCA Holding v Commission*, paragraph 36; Case T-13/89, *ICI v Commission*, paragraph 393; Case T-310/94, *Gruber + Weber v Commission*, paragraph 271; and Case T-311/94, *BPB de Eendracht v Commission*, paragraph 325). Since, even outside the situations coming under section C of the notice, cooperation on the part of an undertaking before the Commission has issued a request for information may make the Commission's investigation easier, it was perfectly permissible for the Commission not to grant the maximum reduction envisaged by section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information on 13 March 1996, although the investigations at ABB IC Møller's premises had commenced on 29 June 1995.

239. As regards a comparison between the present case and the Commission's previous practice, the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (Case T-347/94, *Mayr-Melnhof v Commission*, paragraph 368).

240. However, it is appropriate to consider whether the Commission, in granting the applicant the same 30% reduction as the reduction granted to Løgstør and Tarco, observed the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified (Case 106/83, *Sermide*, paragraph 28; Case C-174/89, *Hoche*, paragraph 25; and *BPB de Eendracht v Commission*, cited above, paragraph 309).

241. In that regard, the Commission cannot be criticised for having failed to differentiate the extent to which the applicant cooperated from that to which Løgstør and Tarco cooperated in submitting evidence to the Commission. Although it is true that the information provided by ABB did assist materially in the establishment of the relevant facts, in particular as regards the origins of the cartel in Denmark in late 1990, Tarco was the first to provide evidence (Tarco's reply of 26 April 1996 to the request for information of 13 March 1996). Otherwise, it is apparent from the case-file that the information provided by the applicant in its replies to the request for information was considerable but, as regards its contribution to establishing the infringement, no greater than that given by other undertakings, having regard to the evidence available to the Commission after the investigations. Thus, as regards the continuation of the cartel after the investigations, evidence was provided by Løgstør (Løgstør's reply of 25 April 1996 to the request for information of 13 March 1996), while the applicant, after acknowledging in its reply of 4 June 1996 that the infringement was continuing, did not provide more detailed information until its reply of 13 August 1996. As regards the measures against Powerpipe, the Commission was unable to rely on information provided by ABB, but had to rely on the

information provided by Powerpipe and on other documents evidencing the approval and implementation of such an arrangement. It follows that the Commission was correct not to differentiate between the reductions for cooperation granted to the applicant, to Løgstør and to Tarco in so far as their communication of evidence to the Commission was concerned.

242. However, the Commission should have differentiated the reduction for cooperation to be granted to the applicant from the reductions granted to Løgstør and to Tarco on the ground that the applicant, after receiving the statement of objections, no longer disputed the findings of fact or their interpretation by the Commission. Having regard to the finding that, on the one hand, the applicant's cooperation in communicating evidence was not significantly different from that given by Løgstør or by Tarco and, on the other hand, the Commission made no further reference, when assessing the applicant's cooperation in point 174 of the decision, to the fact that the applicant did not contest the truth of the facts, the latter circumstance was not taken into account in calculating the reduction to be granted to the applicant for cooperation.

243. In that regard, the Commission expressly acknowledged, in point 26 of the decision, that, on the basis of its observations on the statement of objections, the applicant distinguished itself from the other undertakings in so far as the majority of the undertakings minimised the duration of the infringement and the role they had played and denied having participated in any scheme to damage Powerpipe, with the exception of the applicant, which did not dispute the main facts described by the Commission or the conclusions which it drew. The Commission also stated that, in their observations on the statement of objections, Løgstør and Tarco claimed that there had been no cartel outside the Danish market before 1994 and that, in addition, there had been no continuous cartel, and they denied having participated in or implemented any action designed to eliminate Powerpipe (second paragraph of point 26 and fifth paragraph of point 27 of the decision).

244. Since the Commission did not observe the principle of equal treatment in so far as it should have taken into consideration, when assessing the applicant's cooperation, the fact that the applicant did not dispute the main facts, it must be held that the Commission incorrectly set at 30% the reduction to be granted to the applicant for its cooperation during the administrative procedure.

245. The plea must therefore be upheld in so far as it criticises the Commission for not having granted a reduction greater than 30% of the fine.

Statement of reasons for Decision

251. It is settled case law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253) must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of

reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P, *Commission v Sytraval and Brink's France*, paragraph 63).

252. Where a decision imposes fines on a number of undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be determined, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others v Commission*, cited above, paragraph 54).

Court's Ruling

The Court hereby:

1. Orders that the fine imposed on the applicant by Article 3(a) of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel) be reduced to €65,000,000;

2. Dismisses the remainder of the application;

3. Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;

4. Orders the Commission to pay 10% of its own costs. ■

The Berlin Banking Company (Bankgesellschaft Berlin) Case

The Commission has decided to carry out a detailed investigation of restructuring aid granted to Bankgesellschaft Berlin AG by the Province of Berlin. The volume of aid is large; and there is at present some doubt whether it is compatible with the common market. The Bank, whose majority shareholder is the Province of Berlin, is one of the ten biggest banks in Germany, and easily the leading credit institution in the Berlin and Brandenburg area. As a result of high-risk real estate transactions, in particular generous rent and repurchase guarantees given to investors in real estate funds, it has found itself in serious trouble as market prices have fallen. The Province has already provided aid, but plans further measures, which appear to the Commission to be incompatible with the common market.

Commission Statement IP/02/518, dated 9 April 2002