Antitrust Cases 3 (Articles 101 & 102 TFEU)

Case 1

Note: Article 85(1) of the EC Treaty is now Article 101(1) TFEU; Article 86 of the EC Treaty is now Article 102 TFEU.

4 Parker Pen Ltd (hereinafter 'Parker'), a company incorporated under English law, produces a wide range of writing utensils, which it sells throughout Europe through subsidiary companies or independent distributors. The sale and marketing of Parker products through its subsidiaries, and the staff policy of its subsidiaries, are controlled by an area team of three directors, namely an Area Director, a Finance Director and a Marketing Director. The Area Director is a member of the board of the parent company.

5 Having attempted without success to enter into business relations with Parker and to obtain Parker products on conditions equivalent to those granted to Parker' s subsidiaries and independent distributors, Viho lodged a complaint on 19 May 1988 under Article 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, hereinafter 'Regulation No 17'), in which it complained that Parker was prohibiting the export of its products by its distributors, dividing the common market into national markets of the Member States, and maintaining artificially high prices for Parker products on those national markets.

6 Following that complaint the Commission initiated an administrative procedure to examine the agreements between Parker and its independent distributors.

7 On 22 May 1991 Viho lodged another complaint against Parker, which was registered at the Commission on 29 May 1991, in which it claimed that the distribution policy pursued by Parker whereby it required its subsidiaries to restrict the distribution of Parker products to their allocated territories constituted an infringement of Article 85(1) of the EEC Treaty (now the EC Treaty, hereinafter 'the Treaty').

8 Following Parker' s observations submitted on 16 April and 31 May 1991 in response to the Statement of Objections sent to it by the Commission on 21 January 1991 in connection with the investigation of the agreements between Parker and its independent distributors, a hearing took place in Brussels on 4 June 1991 at which the representatives of Viho, API, Herlitz and Parker took part.

9 In its additional observations submitted on 21 June 1991 at the request of the Commission, Parker accepted that, within the Parker group, requests for supplies from local customers were referred to the local Parker subsidiary, because that company was best placed to meet such requests. That is why a request by Viho, a Netherlands company, for supplies from Parker' s German subsidiary would have been referred by the latter to Parker' s Netherlands subsidiary, whose task it was to provide the supplies requested.

10 On 5 March 1992 the Commission informed Viho, pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), that it intended to reject the complaint of 22 May 1991 on the ground that Parker' s subsidiary companies were wholly dependent on Parker Pen UK and enjoyed no real autonomy. The Commission considered that the distribution system implemented by Parker remained within the limits which the Court of Justice defined as excluding the applicability of Article 85(1) of the Treaty, and stated that it did not see how that distribution system went beyond a normal allocation of tasks within a group of undertakings. It also stated that before any other conclusion could be reached, it would be necessary to carry out fresh inquiries and investigations.

11 In its observations sent to the Commission on 6 April 1992 Viho disputed that the Parker group' s policy of referring inquiries could constitute a purely internal measure, since it deprived third parties of the freedom to obtain supplies from where they wished within the common market and it obliged them to obtain supplies exclusively from the subsidiary in the place where they were established. Although nothing prevented a group from freely organizing its distribution by entrusting a subsidiary company with the marketing of its products in a Member State, it could not ... lawfully compel purchasers to obtain supplies exclusively from a given subsidiary.

12 On 15 July 1992 the Commission, in response to a complaint lodged by Viho on 19 May 1988, adopted Decision 92/426/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/32.725 ° Viho/Parker Pen, OJ 1992 L 233, p. 27) in which it found that Parker and Herlitz had infringed Article 85(1) of the Treaty by including an export ban in an agreement concluded between them and also imposed a fine of ECU 700 000 on Parker and a fine of ECU 40 000 on Herlitz. The actions contesting that decision brought by Herlitz and Parker on 16 and 24 September 1992 respectively were the subject of two judgments delivered by the Court of First Instance on 14 July 1994, which have in the meantime become final.

The contested decision

13 On 30 September 1992 the Commission rejected Viho' s complaint of 22 May 1991. In its decision the Commission found that the integrated distribution system set up by Parker to sell its products in Germany, France, Belgium, Spain and the Netherlands through subsidiary companies established there fulfilled the conditions laid down by the Court of Justice for the non-applicability of Article 85(1) of the Treaty on the grounds that 'the subsidiaries and the parent company form one economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market' and moreover that 'the assignment of a specific distribution area to each of the Parker subsidiaries does not exceed the limits of what can normally be regarded as necessary for the purpose of a proper distribution of tasks within a group' . The Commission also found that Parker was entitled to deny Viho similar prices and terms to those granted to its independent distributors without thereby infringing the ban on restrictive practices."

3 The appellant claimed that the Court of First Instance should, inter alia, annul the decision at issue, while the Commission contended that the Court should dismiss the action.

4 In support of its submissions the appellant relied on three pleas in law. The first plea alleged infringement of Article 85(1) of the Treaty, the second alleged infringement of Article 86 of the Treaty and the third alleged infringement of Article 190 of the Treaty.

Case 2

Note: Article 81(1) of the EC Treaty is now Article 101(1) TFEU; Article 82 of the EC Treaty is now Article 102 TFEU.

The applicants are companies governed by German and Austrian law operating in the district heating sector and are regarded by the Commission as belonging to the Henss/Isoplus group.

8 On 21 October 1998, the Commission adopted Decision relating to a proceeding under Article 85 of the EC Treaty (the Decision or the contested decision) finding that various undertakings and, in particular, certain of the applicants had participated in a series of agreements and concerted practices within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC) (hereinafter the cartel).

9 According to the Decision, at the end of 1990 an agreement was reached between the four Danish producers of district heating pipes on the principle of general cooperation on their domestic market. The parties to the agreement were ABB IC Møller A/S, the Danish subsidiary of the Swiss/Swedish group ABB Asea Brown Boveri Ltd (ABB), Dansk Rørindustri A/S, also known as Starpipe (Dansk Rørindustri), Løgstør Rør A/S (Løgstør) and Tarco Energi A/S (Tarco) (the four together being hereinafter referred to as the Danish producers). One of the first measures was to coordinate a price increase both for the Danish market and the export markets. For the purpose of sharing the Danish market, quotas were agreed upon and then implemented and monitored by a contact group consisting of the sales managers of the undertakings concerned. For each commercial project (project), the undertaking to which the contact group had assigned the project informed the other participants of the price it intended to quote and they then submitted tenders at a higher price in order to protect the supplier designated by the cartel.

10 According to the Decision, two German producers, the Henss/Isoplus group and Pan-Isovit GmbH, joined in the regular meetings of the Danish producers from the autumn of 1991. In these meetings negotiations took place with a view to sharing the German market. In August 1993, these negotiations led to agreements fixing sales quotas for each participating undertaking.

11 Still according to the Decision, an agreement was reached between all these producers in 1994 to fix quotas for the whole of the European market. This European cartel involved a two-tier structure. The directors' club, consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each of these undertakings both in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, contact groups consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 With regard to the German market, the Decision states that following a meeting between the six main European producers (ABB, Dansk Rørindustri, the Henss/Isoplus group, Løgstør, Pan-Isovit and Tarco) and Brugg Rohrsysteme GmbH (Brugg) on 18 August 1994, a first meeting of the contact group for Germany was held on 7 October 1994. Meetings of this group continued long after the Commission carried out its investigations at the end of June 1995 although, from that time on, they were held outside the European Union, in Zurich. The Zurich meetings continued until 25 March 1996, i.e. several days after some of the undertakings had received the requests for information sent by the Commission.

13 As a characteristic feature of the cartel, the Decision refers in particular to the adoption and implementation of concerted measures to eliminate Powerpipe, the only major undertaking which was not a member. The Commission states that certain members of the cartel recruited key employees of Powerpipe and gave Powerpipe to understand that it should withdraw from the German market. Following the award to Powerpipe of an important German project, a meeting is said to have taken place in Düsseldorf in March 1995, attended by the six abovementioned producers and Brugg. According to the Commission, it was decided at that meeting to organise a collective boycott of Powerpipe's customers and suppliers. The boycott was subsequently implemented.

14 In the Decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an agreement prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the Danish and European cartels were merely the manifestation of a single cartel

which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

15 On those grounds, the operative part of the Decision is as follows:

Article 1

ABB Asea Brown Boveri Ltd, Brugg Rohrsysteme GmbH, Dansk Rørindustri A/S, Henss/Isoplus Group, Ke-Kelit Kunststoffwerk Ges mbH, 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 [the] Henss/Isoplus [group], from about October 1991 up 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:

(d) [the] Henss/Isoplus group, a fine of ECU 4 950 000, for which the following companies are jointly and severally liable:
- HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG,
- HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft,
- Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH (formerly Dipl-Kfm Walter Henss GmbH Rosenheim),
- Isoplus Fernwärmetechnik GmbH, Sondershausen,
- Isoplus Fernwärmetechnik Gesellschaft mbH - stille Gesellschaft,
- Isoplus Fernwärmetechnik Ges. mbH, Hohenberg;

Article 5

This Decision is addressed to:
(d) [The] Henss/Isoplus group, represented by:
- HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG,

- HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft,
- Isoplus Fernwärmetechnik GmbH,
- Isoplus Fernwärmetechnik Ges. mbH,
- Isoplus Fernwärmetechnik Ges. mbH - stille Gesellschaft,
- Isoplus Fernwärmetechnik GmbH,

Relations between the undertakings regarded as belonging to the Henss/Isoplus group

25 Among the undertakings regarded by the Commission as belonging to the Henss/Isoplus group and involved in the present proceedings, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG (HFB KG) is a limited partnership governed by German law, formed on 15 January 1997. The partner with unlimited personal liability for the partnership's debts is HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft (HFB GmbH), a limited liability company also formed on 15 January 1997. The limited partners of HFB KG, who are liable up to a certain amount, are Mr and Mrs Henss and Mr and Mrs Papsdorf. Mr Henss is the major partner of HFB KG and also holds the majority of the shares in HFB GmbH.

26 The applicant Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH (Isoplus Rosenheim), formerly Dipl.-Kfm. Walter Henss GmbH (Henss Rosenheim) until 1 January 1997, is a company governed by German law. Following the transfer to HFB KG of the shares which Mr and Mrs Henss held in Isoplus Rosenheim and of the shares which Mr and Mrs Papsdorf held in Dipl.-Kfm. Walter Henss Fernwärmerohrleitungsbau GmbH, Berlin (Henss Berlin), HFB KG held 100% of the shares in those two companies and Henss Berlin was taken over by Isoplus Rosenheim on 3 December 1997.

27 Isoplus Fernwärmetechnik Ges. mbH, Hohenberg (Isoplus Hohenberg) is an Austrian company the majority of whose shares are owned, through a trustee, by Mr Henss.

28 Isoplus Fernwärmetechnik GmbH, Sondershausen (Isoplus Sondershausen) is a German company all of whose shares are held, nominally, by Isoplus Hohenberg, which to a certain extent holds them as a trustee on behalf of third parties.

29 In the district heating market, Isoplus Rosenheim acts mainly as a distributor. Isoplus Hohenberg and Isoplus Sondershausen are production companies. HFB KG and HFB GmbH act only as shareholding companies.

30 In the Decision, the Commission regarded Isoplus Rosenheim, Henss Berlin, Isoplus Hohenberg and Isoplus Sondershausen as a de facto Henss/Isoplus group. The Commission sent the statement of objections to those four undertakings, having established that they were all linked to Mr Henss, who had attended the meetings of the directors' club. According to the Decision, it was only after sending the statement of objections that the Commission learnt of the existence of a partnership agreement (Einbringungsvertrag) of 15 January 1997 lodged at the commercial registry, which showed that Mr and Mrs Henss and Mr and Mrs Papsdorf had transferred their shareholdings to HFB KG in January 1997.

31 The Commission learnt from the same partnership agreement that Mr Henss was also the owner of a limited partnership, Isoplus Fernwärmetechnik Ges. mbH - stille Gesellschaft (Isoplus stille Gesellschaft), whose shares were held by a trustee.

32 As regards Isoplus Hohenberg, the Commission learnt from the partnership agreement that Mr Henss owned shares in that company through trustees, although the applicants' legal advisers denied that throughout the administrative procedure. During the present proceedings, the parties no longer disagree as to whether Mr Henss actually held the majority of the share capital in Isoplus Hohenberg.

33 As regards the shares in Isoplus Sondershausen held by Isoplus Hohenberg, the Commission learnt from the partnership agreement that one third of the capital of Isoplus Sondershausen, which was held by Isoplus Hohenberg as trustee for Mr and Mrs Papsdorf, was transferred to HFB KG. In the present proceedings, the applicants confirm that a further third of the capital of Isoplus Sondershausen was also held by Isoplus Hohenberg as trustee. The applicants accept

that that information was not communicated to the Commission during the administrative procedure.

The application for annulment of the Decision

42 The pleas in law put forward by the applicants may be arranged according to their subject-matter: first, the pleas relating to the Henss/Isoplus group; second, the pleas relating to HFB KG and HFB GmbH; third, the pleas relating to Isoplus stille Gesellschaft; and, fourth, the pleas which concern all the applicants.

I - The pleas in law relating to the Henss/Isoplus group

43 As regards the Henss/Isoplus group, the applicants put forward three pleas in law alleging, first, misapplication of Article 85(1) of the Treaty, second, infringement of essential procedural forms and, third, breach of the obligation to state reasons.

A - First plea in law, alleging misapplication of Article 85(1) of the Treaty in identifying the applicants as belonging to the Henss/Isoplus group

1. Arguments of the parties

44 The applicants claim that the Commission misapplied Article 85(1) of the Treaty, in so far as it regarded them as belonging to the Henss/Isoplus group, which, for having participated in an anti-competitive practice, has been ordered to pay a fine for which all the applicants are jointly and severally liable.

45 The applicants submit that an undertaking within the meaning of Article 85 of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) can be formed only by natural or legal persons or by companies which must be treated as though they had their own legal personality (persons said to be quasi-legal). However, what the Commission presumes to be the Henss/Isoplus group does not have its own legal or quasi-legal personality.

46 In the absence of a parent company or a financing company with legal personality, the applicants can no longer be regarded as a group within the meaning of company law, or as a de facto group, as the Commission presumes in points 15 and 157 of the Decision, in the sense of legally autonomous undertakings whose economic conduct may be determined by another undertaking.

47 As regards the financing companies HFB GmbH and HFB KG, the applicants state, first, that the former acts exclusively as a sleeping partner to the latter. As regards the latter, although at the time of adoption of the Decision it held 100% of the share capital of Isoplus Rosenheim, it held only one third of the share capital of Isoplus Sondershausen. Furthermore, it has never been associated, even through a trustee, with Isoplus Hohenberg, contrary to what is stated in point 159 of the Decision, and it was not a secret associate, even through a trustee, of a silent partnership of which Isoplus Hohenberg was the operating owner.

48 In asserting that these undertakings regarded as belonging to the Henss/Isoplus group were all subject to the same uniform control, exercised by Mr Henss, the Commission disregarded the fact that, although Mr Henss had been the majority shareholder in Henss Rosenheim (now Isoplus Rosenheim) and, through trust companies, the majority shareholder in Isoplus Hohenberg, he had not been a partner in Henss Berlin or in Isoplus Sondershausen. Nor could Mr Henss, as a shareholder, be classified as an undertaking within the meaning of Article 85 of the Treaty.

49 As regards Isoplus Sondershausen, it is inconceivable that it was controlled by Isoplus Hohenberg, since the latter was a trustee. Until 21 October 1998, Isoplus Hohenberg held only one third of the shares in Isoplus Sondershausen on its own behalf, having held a further third as trustee. It was for reasons to do with business secrecy that Isoplus Hohenberg and Isoplus Sondershausen did not inform the Commission that Isoplus Hohenberg was a trustee. Furthermore, Isoplus Hohenberg and Isoplus Sondershausen supplied the same markets, in part, which is not generally the case within a group.

50 Nor can the nature of a group be inferred, as the Commission claims, from the reference to the Henss GmbH firm, Isoplus group in a memorandum of 21 April 1995 from Mr Henss (additional document No 17 to the statement of objections), since this was a statement on behalf

of Henss Rosenheim in which the comma before the words Isoplus group merely meant that the undertaking Henss Rosenheim belonged to the spontaneous group in which the other parties to the cartel had placed the applicants owing to the commercial agency contracts between them. The existence of an agent or spokesman for such a spontaneous group does not suffice to make them into a group within the meaning of company law.

51 Furthermore, the Decision does not refer to any evidence on the basis of which the applicants, in the absence of at the very least a de facto group, are mutually liable for the anti-competitive practices of each of them.

52 The defendant observes that group designates the economic entity formed by the four undertakings participating in the cartel, namely Henss Rosenheim (now Isoplus Rosenheim), Henss Berlin, Isoplus Hohenberg and Isoplus Sondershausen, which were subject to the same uniform control, in particular as regards participation in the cartel. Mr Henss was Managing Director of Henss Berlin and Henss Rosenheim and controlled the latter company as well as Isoplus Hohenberg and Isoplus Sondershausen through direct or indirect shareholding. Furthermore, at the meetings of the directors' club, where the undertakings in the group received a single quota, Mr Henss defined and at the same time represented the interests of each of the undertakings in the group.

53 Since all the personal, tangible and intangible elements which, from a technical point of view, were connected with the undertakings belonging to the Henss/Isoplus group formed part of a larger entity whose economic objectives were determined in one and the same way, there was, for the purposes of competition law, a single undertaking in the form of a group. That conclusion cannot be called into question by the fact that that entity was not directed by a financing company. Nor is it relevant whether the natural or legal person directing the group also acted as an undertaking on its own behalf.

Case 3

Note: Article 85(1) of the EC Treaty is now Article 101(1) TFEU; Article 86 of the EC Treaty is now Article 102 TFEU.

By different applications lodged at the Court Registry between 4 and 30 April 1985, the Finnish undertakings A. Ahlstroem Osakeyhtioe, United Paper Mills Ltd, successor in title to Joutseno-Pulp Osakeyhtioe, Kaukas Oy, successor in title to Oy Kaukas AB, Oy Metsae-Botnia AB, successor in title to Kemi Oy, Oy Metsae-Botnia AB, Metsae-Serla Oy, successor in title to Metsaeliiton Teollisuus Oy, Veitsiluoto Oy, successor in title to Oulu Oy, Wisaforest Oy AB, successor in title to Oy Wilh. Schauman AB, Sunilà Osakeyhtioe, Veitsiluoto Oy, Finncell and Enso-Gutzeit Oy (hereinafter "the Finnish applicants"), the United States producer Bowater Incorporated (hereinafter "Bowater"), the United States undertakings The Chesapeake Corporation, Crown Zellerbach Corporation, Federal Paper Board Company Inc., Georgia-Pacific Corporation, Scott Paper Company and Weyerhaeuser Company (hereinafter "the members of KEA"), the Canadian undertaking St Anne-Nackawic Pulp and Paper Company Ltd (hereinafter "St Anne"), the United States undertaking International Pulp Sales Company (hereinafter "IPS"), the Canadian undertaking Westar Timber Ltd (hereinafter "Westar"), the Canadian undertaking Welwood of Canada Ltd (hereinafter referred to as "Welwood"), the Canadian undertaking MacMillan Bloedel Ltd (hereinafter "MacMillan"), the Canadian undertaking Canadian Forest Products Ltd (hereinafter "Canfor") and British Columbia Forest Products Ltd, now Fletcher Challenge Canada Limited (hereinafter "British Columbia"), brought actions under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision of 19 December 1984 was void.

2 By order of 16 December 1987 the Court decided to join the ten cases for the purposes of the procedure and the judgment.

3 In the contested decision, the Commission found that forty wood pulp producers and three of their trade associations had infringed Article 85(1) of the Treaty by concerting on prices. Fines of between ECU 50 000 and 500 000 were imposed on thirty six of the forty three addressees of the decision.

A. The product

4 The product which gave rise to the alleged concertation was bleached sulphate pulp, obtained by the chemical processing of cellulose and used for the production of high-quality papers.

5 Bleached sulphate pulp is manufactured from both softwoods and hardwoods. Since softwood has longer and stronger fibres, softwood pulp is of better quality. Within those two categories, pulps are further subdivided into two sub-groups: pulps made from wood produced in northern countries, which has grown relatively slowly, and pulps made from wood produced in southern countries. That grading has led to four price levels which correspond, in decreasing order, to northern softwood, southern softwood, northern hardwood and southern hardwood.

6 Paper is manufactured from a mixture of pulps whose composition is determined by the grades and properties which the manufacturer wishes the paper to have, and by the equipment at his disposal. Within any product category, pulps are very largely interchangeable but, once the mixture has been determined, the manufacturer is reluctant to alter it for fear of having to make adjustments to his equipment and to carry out time-consuming and costly trials.

7 From the manufacturer' s point of view, the price of the pulp accounts for 50% to 75% of the cost of the paper.

B. The producers

8 At the material time, there were more than fifty undertakings selling pulp in the Community. Most were established in Canada, the United States of America, Sweden and Finland. Sales were made through subsidiaries, agents or branches established in the Community. Frequently, the same agent represented several producers.

9 All the Finnish undertakings were members of Finncell, with the exception of Enso-Gutzeit, which withdrew on 31 December 1979. The object of Finncell, which was founded in 1918, is to sell, both on the domestic market and abroad, in its own name and for its own account the

pulp produced by its members. To that end, it fixes the prices and divides amongst its members the orders it receives.

10 The United States applicants, with the exception of Bowater, were members of the Pulp, Paper and Paperboard Export Association of the United States, formerly named Kraft Export Association (hereinafter "KEA"). KEA was established under the Webb Pomerene Act of 10 April 1918 under which United States companies may, without infringing United States anti-trust legislation, form associations for the joint promotion of their exports. That Act permits producers inter alia to exchange information on the marketing of their products abroad and to agree on export prices. IPS withdrew from KEA on 13 March 1979.

11 Most pulp producers manufacture paper or form part of groups which manufacture paper and accordingly themselves process a substantial part of the pulp which they produce. However, the contested decision is concerned exclusively with market pulp, that is to say the pulp offered for sale on the European market by the aforesaid producers.

C. The customers and commercial practices

12 During the period in question, a single producer generally had fifty or so customers in the Community, with the exception of Finncell which had 290.

13 Pulp producers commonly concluded with their customers long-term supply contracts which could last for up to five years. Under such contracts, the producer guaranteed his customers the possibility of purchasing each quarter a minimum quantity of pulp at a price which was not to exceed the price announced by him at the beginning of the quarter. The customer was free to purchase more or less than the quantity reserved for him and could negotiate reductions in the announced price.

14 "Quarterly announcements" constituted a well-established trading practice on the European pulp market. Under that system, some weeks or, at times, some days before the beginning of each quarter, producers communicated to their customers and agents the prices, generally fixed in dollars, which they wished to obtain in the quarter in question for each type of pulp. The

prices varied according to whether the pulp was to be delivered to ports in northwest Europe (Zone 1) or to Mediterranean ports (Zone 2). The prices were generally published in the trade press.

15 The definitive prices invoiced to customers (hereinafter "the transaction prices") could be either identical to the announced prices or lower where rebates or different kinds of payment concessions were granted to purchasers.

D. The administrative procedure

16 In 1977, after carrying out investigations under Article 14 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission stated that it had discovered the existence in the pulp industry of a number of restrictive practices and agreements which had not been notified under Articles 4 and 5 of that regulation.

17 On completion of those investigations, the Commission decided to commence on its own initiative a proceeding under Article 3(1) of Regulation No 17 against fifty seven pulp producers or associations established in the United States, Canada, Finland, Norway, Sweden, the United Kingdom, Spain and Portugal. Accordingly, on 4 September 1981, the Commission served a statement of objections on those producers. According to the letter accompanying that document, they were alleged to have participated in price-fixing by way of concerted practices, in decisions by associations, in common organizations, in agreements on sales conditions and in exchanges of information.

18 The Commission heard the parties in March and April 1982.

19 Since the answers to the statement of objections suggested that the transaction prices were different from the announced prices, in September 1982 the Commission requested the parties concerned to furnish proof thereof, as it is empowered to do under Article 11 of Regulation No 17. Over 100 000 invoices and credit notes were thereupon forwarded to the Commission.

E. The decision

20 On 19 December 1984 the Commission adopted the contested decision. As stated earlier, that decision is addressed to forty three of the addressees of the statement of objections. Six of the addressees of the decision have their registered offices in Canada, eleven in the United States, twelve in Finland, eleven in Sweden, one in Norway, one in Portugal and one in Spain. Fines of between ECU 50 000 and 500 000 were imposed on only thirty six of those addressees. The Norwegian, Portuguese and Spanish addressees, as well as one of the Swedish producers, two Finnish producers and one United States producer, were not fined.

21 Article 1 of the decision, which sets out the various infringements of Article 85(1) of the Treaty, contains five paragraphs.

22 According to Article 1(1), all the Finnish applicants with the exception of Finncell, the United States applicants with the exception of Chesapeake Corporation and Scott Paper Company, and the Canadian applicants concerted, as did one of their United States competitors and some of their Swedish and Norwegian competitors, "on prices for bleached sulphate wood pulp announced for deliveries to the European Economic Community" during the whole or part of the period from 1975 to 1981.

23 According to Article 1(2), all the Finnish applicants with the exception of Finncell, the United States applicants, and the Canadian applicants with the exception of St Anne participated with some of their United States and Swedish competitors in concertation on actual transaction prices charged in the Community, at least to customers in Belgium, France, the Federal Republic of Germany, the Netherlands and the United Kingdom during the whole or part of 1975, 1976 and 1979 to 1981.

24 According to Article 1(3), all the United States applicants who were members of KEA concerted on announced and actual transaction prices for deliveries of wood pulp and exchanged individualized data concerning prices for those deliveries. KEA itself was found, in particular, to have recommended prices for those deliveries. However, no fine was imposed in respect of those infringements.

25 According to Article 1(4), Finncell and the Canadian producer St Anne exchanged, within the framework of Fides, with a number of other Swedish, Norwegian, Spanish and Portuguese producers individualized data concerning prices for deliveries of hardwood pulp to the European Economic Community from 1973 to 1977. It is apparent from the grounds of the decision that Fides is a Swiss trust company which operates the research and information centre for the European pulp and paper industry. Within Fides there is a smaller group initially called the "mini-Fides club", now the "Bristol Club". The exchanges of information in question took place either within Fides itself, or within the Bristol Club.

26 In Article 1(5) the Commission found that the Canadian applicants Canfor, MacMillan, St Anne and Westar, as well as a United States producer, a Norwegian producer and several Swedish producers, had applied, in contracts for the sale of wood pulp to customers in the European Economic Community, clauses prohibiting export or resale of wood pulp purchased by the latter.

27 An undertaking which all the applicants ° with the exception of St Anne, Bowater and IPS ° gave to the Commission is annexed to the decision. In that undertaking, the parties concerned undertook to quote and invoice at least 50% of their sales to the Community in the currency of the buyer, to cease quoting their prices on a quarterly basis but to maintain them "until further notice", to communicate their prices only to those persons specified in the undertaking, to cease concertation within the framework of KEA and Fides and no longer to impose export or resale bans on buyers.

28 In their application, the applicants request the Court to annul the Commission' s decision in whole or in part or, failing that, to reduce the amount of the fine imposed on them. In addition, some of the applicants request the Court to annul the undertaking described above, in whole or in part, or to discharge them from it.

29 Finally, at the same time as they instituted these proceedings, the Canadian applicants British Columbia, Canfor, MacMillan, Welwood and Westar, and the United States applicants who were members of KEA, submitted an interlocutory application to the Court pursuant to Article 91 of the Rules of Procedure for an order restraining the Commission from using in

these proceedings either the documents communicated to the latter by the undertakings after they were heard or any analysis of those documents which the Commission may have made with regard to transaction prices. By order of 10 July 1985, the Court decided to reserve the decision on that application on a procedural issue for the final judgment and to reserve the costs.

F. The procedure before the Court

A. The contested provision

35 As mentioned earlier, Article 1(2) of the contested decision found that certain Canadian, United States, Finnish and Swedish producers had concerted on the transaction prices for bleached sulphate wood pulp.

36 That provision does not specify between whom such concertation allegedly took place, nor in respect of which quarters. In response to a request from the Court for further particulars on that point, the Commission replied that all the details were set out in Table 7 annexed to the decision, which refers to the prices charged by each of the producers for each type of pulp and for each quarter.

37 According to the Commission, whenever a producer has charged the same price as another producer for a given product, in a given region and during a given quarter, it must, in principle, be regarded as having concerted with the other producer. Hence Table 7 makes it possible to identify various types of concertation which took place either between all addressees of the decision, or between addressees located in the same country or continent, or between other addressees (see paragraph 81 of the decision). That table was communicated to the parties concerned with only their own name being indicated.

B. The applicants' pleas in law

38 The Canadian applicants, with the exception of St Anne, the United States applicants and the Finnish applicants have sought the annulment of Article 1(2). The various pleas on which

they rely fall into three main groups. They claim, first, that the rights of the defence have been infringed. Secondly, the parallelism of transaction prices, on which the Commission relies in establishing concertation, does not exist. Finally, even if there was such parallelism, it was attributable not to concertation but to the normal operation of the market.

39 According to the applicants, the rights of the defence have been infringed essentially in three ways. First of all, the complaint of concertation on transaction prices was not referred to in the statement of objections which was transmitted to the applicants. Secondly, that part of the decision was based on documents which were gathered by the Commission subsequently to the statement of objections and on which the applicants therefore had no opportunity to express their views. Thirdly, the Commission should have organized a joint hearing of the producers concerned, as it is empowered to do under Article 9(3) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963 ° 1964, p. 47).

Case 4

Note: Article 85(1) of the EC Treaty is now Article 101(1) TFEU; Article 86 of the EC Treaty is now Article 102 TFEU.

Microsoft Corp., a company established in Redmond, Washington (United States), designs, develops and markets a wide variety of software products for different kinds of computing devices. Those software products include, in particular, operating systems for client personal computers (‘client PCs’), operating systems for work group servers and streaming media players. Microsoft also provides technical assistance for its various products.

2 On 15 September 1998, Mr Green, a Vice-President of Sun Microsystems, Inc. (‘Sun’), a company established in Palo Alto, California (United States) which supplies, in particular, servers and server operating systems, wrote to Mr Maritz, a Vice-President of Microsoft, as follows:

‘We are writing to you to request that Microsoft provide [Sun] with the complete information required to allow Sun to provide native support for COM objects on Solaris.

We also request that Microsoft provide [Sun] with the complete information required to allow [Sun] to provide native support for the complete set of Active Directory technologies on Solaris.

We believe it is in the industry's best interest that applications written to execute on Solaris be able to seamlessly communicate via COM and/or Active Directory with the Windows operating systems and/or with Windows-based software.

We believe that Microsoft should include a reference implementation and such other information as is necessary to insure, without reverse engineering, that COM objects and the complete set of Active Directory technologies will run in full compatible fashion on Solaris. We think it necessary that such information be provided for the full range of COM objects as well as for the full set of Active Directory technologies currently on the market. We also think it necessary that such information be provided in a timely manner and on a continuing basis for COM objects and Active Directory technologies which are to be released to the market in the future.'

3 That letter will be referred to below as 'the letter of 15 September 1998'.

4 By letter of 6 October 1998, Mr Maritz replied to the letter of 15 September 1998. In his letter, he said:

'Thank you for your interest in working with Windows. We have some mutual customers using our products, and I think it is great you are interested in opening up your system to interoperate with Windows. Microsoft has always believed in helping software developers, including [its] competitors, build the best possible products and interoperability for [its] platform.

You may not realise that the information you requested on how to interoperate with COM and the Active Directory technologies is already published and available to you and every other software developer in the world via the Microsoft Developer Network (MSDN) Universal product. MSDN contains comprehensive information about the services and interfaces of the

Windows platform and is a great source of information for developers interested in writing to or interoperating with Windows. In fact, Sun currently has 32 active licenses for the MSDN Universal subscription. Furthermore, as your company has done in the past, I assume you will be sending a significant number of people to attend our Professional Developers Conference in Denver October 11 – October 15, 1998. This will be another venue to get the technical information you are seeking in order to work with our systems technologies. Some of the 23 Sun employees that attend[ed] last year[']s conference should be able to provide you with their comments on the quality and depth of information discussed at these Professional Developers Conferences.

You will be pleased to know that there is already a reference implementation of COM on Solaris. This implementation of COM on Solaris is a fully supported binary available from Microsoft. Source code for COM can be licensed from other sources including Software AG. …

Regarding the Active Directory, we have no plans to "port" [it] to Solaris. However, to satisfy our mutual customers there are many methods with varying levels of functionality in order to interoperate with the Active Directory. For example, you can use the standard LDAP to access the Windows NT Server Active Directory from Solaris.

If after attending [the Professional Developers Conference] and reading through all the public MSDN content you should require some additional support, our Developer Relations Group has account managers who strive to help developers who need additional support for Microsoft's platforms. I have asked Marshall Goldberg, the Lead Program Manager, to make himself available should you need it …'

5 Mr Maritz's letter of 6 October 1998 will be referred to below as 'the letter of 6 October 1998'.

6 On 10 December 1998, Sun lodged a complaint with the Commission pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87).

7 Sun's complaint related to Microsoft's refusal to give it the information and technology necessary to allow its work group server operating systems to interoperate with the Windows client PC operating system.

8 On 2 August 2000, the Commission sent Microsoft a first statement of objections ('the first statement of objections'), which related in effect to questions concerning the interoperability of Windows client PC operating systems and other suppliers' server operating systems (client/server interoperability).

9 Microsoft responded to the first statement of objections on 17 November 2000.

10 In the meantime, in February 2000, the Commission, acting on its own initiative, launched an investigation relating, particularly, to Microsoft's Windows 2000 generation of client PC and work group server operating systems and to the integration by Microsoft of its Windows Media Player in its Windows client PC operating system. The client PC operating system in the Windows 2000 range was intended for professional use and was called 'Windows 2000 Professional', whereas the server operating systems in that range were presented under the three following versions: Windows 2000 Server, Windows 2000 Advanced Server and Windows 2000 Datacenter Server.

11 That investigation concluded on 29 August 2001, when the Commission sent Microsoft a second statement of objections ('the second statement of objections'), in which it reiterated its previous objections concerning client/server interoperability. The Commission also addressed certain questions relating to interoperability between work group servers (server/server interoperability). In addition, the Commission raised a number of questions concerning the integration of Windows Media Player in the Windows client PC operating system.

The contested decision

21 In the contested decision, the Commission finds that Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area (EEA) by twice abusing a dominant position.

22 The Commission first identifies three separate worldwide product markets and considers that Microsoft had a dominant position on two of them. It then finds that Microsoft had engaged in two kinds of abusive conduct. As a result it imposes a fine and a number of remedies on Microsoft.

I – Relevant product markets and geographic market

23 The contested decision identifies three separate product markets, namely the markets for, respectively, client PC operating systems (recitals 324 to 342 to the contested decision), work group server operating systems (recitals 343 to 401 to the contested decision) and streaming media players (recitals 402 to 425 to the contested decision).

24 The first market defined in the contested decision is the market for client PC operating systems. Operating systems are defined as 'system software' which controls the basic functions of the computer and enables the user to make use of the computer and run application software on it (recital 37 to the contested decision). Client PCs are defined as general-purpose computers designed for use by one person at a time and capable of being connected to a network (recital 45 to the contested decision).

25 As regards the second market, the contested decision defines work group server operating systems as operating systems designed and marketed to deliver collectively 'basic infrastructure services' to relatively small numbers of client PCs connected to small or medium-sized networks (recitals 53 and 345 to the contested decision).

26 The contested decision identifies, more particularly, three types of services. These are, first, the sharing of files stored on servers, second, the sharing of printers and, third, the administration of groups and users, that is to say, the administration of the means whereby those concerned can access network services (recitals 53 and 345 to the contested decision).

This last type of services is that of ensuring that users have access to and make use of the network resources in a secure manner, first, by authenticating users and second, by checking that they are authorised to perform a particular action (recital 54 to the contested decision). The contested decision states that, in order to provide for the efficient storing and checking of group and user administration information, work group server operating systems rely extensively on 'directory service' technologies (recital 55 to the contested decision). The directory service included in Microsoft's Windows 2000 Server operating system is called 'Active Directory' (recital 149 to the contested decision).

27 According to the contested decision, the three types of services described above are closely interrelated in work group server operating systems. They may be broadly described as a 'single service', but viewed from two different perspectives, namely that of the user (file and print services) and that of the network administrator (group and user administration services) (recital 56 to the contested decision). The contested decision characterises those different services as 'work group services'.

28 The third market identified in the contested decision is the streaming media player market. Media players are defined as software products capable of reading audio and video content in digital form, that is to say, of decoding the corresponding data and translating them into instructions for the hardware (for example, loudspeakers or a display) (recital 60 to the contested decision). Streaming media players are capable of reading audio and video content 'streamed' across the Internet (recital 63 to the contested decision).

29 As regards the relevant geographic market, the Commission finds in the contested decision, as stated at paragraph 22 above, that it has a worldwide dimension for each of the three product markets (recital 427 to the contested decision).

II – Dominant position

30 In the contested decision, the Commission finds that Microsoft has had a dominant position on the client PC operating systems market since at least 1996 and also on the work group server operating systems market since 2002 (recitals 429 to 541 to the contested decision).

31 As regards the client PC operating systems market, the Commission relies essentially on the following factors to arrive at that conclusion:

– Microsoft's market shares are over 90% (recitals 430 to 435 to the contested decision);

– Microsoft's market power has 'enjoyed an enduring stability and continuity' (recital 436 to the contested decision);

– there are significant barriers to market entry, owing to indirect network effects (recitals 448 to 464 to the contested decision);

– those network effects derive, first, from the fact that users like platforms on which they can use a large number of applications and, second, from the fact that software designers write applications for the client PC operating systems that are the most popular among users (recitals 449 and 450 to the contested decision).

32 The Commission states at recital 472 to the contested decision that that dominant position presents 'extraordinary features' in that Windows is not only a dominant product on the market for client PC operating systems but, in addition, is the 'de facto standard' for those systems.

33 As regards the work group server operating systems market, the Commission relies, in substance, on the following factors:

– Microsoft's market share is, at a conservative estimate, at least 60% (recitals 473 to 499 to the contested decision);

– the position of Microsoft's three main competitors on that market is as follows: Novell, with its NetWare software, has 10 to 25%; vendors of Linux products have a market share of 5 to 15%; and vendors of UNIX products have a market share of 5 to 15% (recitals 503, 507 and 512 to the contested decision);

– the work group server operating systems market is characterised by the existence of significant entry barriers, owing in particular to network effects and to Microsoft's refusal to disclose interoperability information (recitals 515 to 525 to the contested decision);

– there are close commercial and technological links between the latter market and the client PC operating systems market (recitals 526 to 540 to the contested decision).

34 Linux is an 'open source' operating system released under the 'GNU GPL (General Public Licence)'. Strictly speaking, it is only a code base, called the 'kernel', which performs a limited number of services specific to an operating system. It may, however, be linked to other layers of software to form a 'Linux operating system' (recital 87 to the contested decision). Linux is used in particular as the basis for work group server operating systems (recital 101 to the contested decision) and is thus present on the work group server operating systems market in conjunction with Samba software, which is also released under the 'GNU GPL' licence (recitals 506 and 598 to the contested decision).

35 'UNIX' designates a number of operating systems that share certain common features (recital 42 to the contested decision). Sun has developed a UNIX-based work group server operating system called 'Solaris' (recital 97 to the contested decision).

III – Abuse of a dominant position

A – Refusal to supply and authorise the use of interoperability information

36 The first abusive conduct in which Microsoft is found to have engaged consists in its refusal to supply its competitors with 'interoperability information' and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating systems market, between October 1998 and the date of notification of the contested decision (Article 2(a) of the contested decision). That conduct is described at recitals 546 to 791 to the contested decision.

37 For the purposes of the contested decision, ‘interoperability information’ is the ‘complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems and … used by Windows work group servers to deliver file and print services and group and user administrative services, including the Windows domain controller services, Active Directory services and “group Policy” services to Windows work group networks’ (Article 1(1) of the contested decision).

38 ‘Windows work group network’ is defined as ‘any group of Windows client PCs and Windows work group servers linked together via a computer network’ (Article 1(7) of the contested decision).

39 A ‘protocol’ is defined as ‘a set of rules of interconnection and interaction between various instances of Windows work group server operating systems and Windows client PC operating systems running on different computers in a Windows work group network’ (Article 1(2) of the contested decision).

40 In the contested decision, the Commission emphasises that the refusal in question does not relate to Microsoft’s ‘source code’, but only to specifications of the protocols concerned, that is to say, to a detailed description of what the software in question must achieve, in contrast to the implementations, consisting in the implementation of the code on the computer (recitals 24 and 569 to the contested decision). It states, in particular, that it ‘does not contemplate ordering Microsoft to allow copying of Windows by third parties’ (recital 572 to the contested decision).

41 The Commission further considers that Microsoft’s refusal to Sun is part of a general pattern of conduct (recitals 573 to 577 to the contested decision). It also asserts that Microsoft’s conduct involves a disruption of previous, higher levels of supply (recitals 578 to 584 to the contested decision), causes a risk of elimination of competition on the work group server operating systems (recitals 585 to 692 to the contested decision) and has a negative effect on technical development and on consumer welfare (recitals 693 to 708 to the contested decision).

42 Last, the Commission rejects Microsoft’s arguments that its refusal is objectively justified (recitals 709 to 778 to the contested decision).

B – Tying of the Windows client PC operating system and Windows Media Player

43 The second abusive conduct in which Microsoft is found to have engaged consists in the fact that from May 1999 to the date of notification of the contested decision Microsoft made the availability of the Windows client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software (Article 2(b) of the contested decision). That conduct is described at recitals 792 to 989 to the contested decision.

44 In the contested decision, the Commission considers that that conduct satisfies the conditions for a finding of a tying abuse for the purposes of Article 82 EC (recitals 794 to 954 to the contested decision). First, it reiterates that Microsoft has a dominant position on the client PC operating systems market (recital 799 to the contested decision). Second, it considers that streaming media players and client PC operating systems constitute separate products (recitals 800 to 825 to the contested decision). Third, it asserts that Microsoft does not give consumers the opportunity to buy Windows without Windows Media Player (recitals 826 to 834 to the contested decision). Fourth, it contends that the tying in question restricts competition on the media players market (recitals 835 to 954 to the contested decision).

45 Last, the Commission rejects Microsoft's arguments to the effect that, first, the tying in question produces efficiency gains capable of offsetting the anti-competitive effects identified in the contested decision (recitals 955 to 970 to the contested decision) and, second, Microsoft had no interest in 'anti-competitive' tying (recitals 971 to 977 to the contested decision).

IV – Fine and remedies

46 In respect of the two abuses identified in the contested decision, a fine of EUR 497 196 304 is imposed (Article 3 of the contested decision).

47 Furthermore, the first paragraph of Article 4 of the contested decision requires that Microsoft bring an end to the infringement referred to in Article 2, in accordance with Articles 5 and 6 of that decision. Microsoft must also refrain from repeating any act or conduct that

might have the same or equivalent object or effect to those abuses (second paragraph of Article 4 of the contested decision).

48 By way of remedy for the abusive refusal referred to in Article 2(a) of the contested decision, Article 5 of that decision provides as follows:

‘(a) Microsoft … shall, within 120 days of the date of notification of [the contested decision], make the interoperability information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the interoperability information by such undertakings for the purpose of developing and distributing work group server operating system products;

(b) Microsoft … shall ensure that the interoperability information made available is kept updated on an ongoing basis and in a timely manner;

(c) Microsoft … shall, within 120 days of the date of notification of [the contested decision], set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the interoperability information; as regards this evaluation mechanism, Microsoft … may impose reasonable and non-discriminatory conditions to ensure that access to the interoperability information is granted for evaluation purposes only;

49 By way of remedy for the abusive tying referred to in Article 2(b) of the contested decision, Article 6 of that decision orders Microsoft to offer, within 90 days of the date of notification of that decision, a full-functioning version of the Windows client PC operating system which does not incorporate Windows Media Player, although Microsoft retains the right to offer a bundle of the Windows client PC operating system and Windows Media Player.

50 Last, Article 7 of the contested decision provides:

‘Within 30 days of the date of notification of [the contested decision], Microsoft … shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring [Microsoft’s] compliance with [the contested decision]. That mechanism shall include a monitoring trustee who shall be independent from Microsoft …

In case the Commission considers [Microsoft’s] proposed monitoring mechanism not suitable it retains the right to impose such a mechanism by way of a decision.’