JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
12 January 1995 *

In Case T-102/92,

Viho Europe BV, a company incorporated under Netherlands law whose registered office is in Maastricht (Netherlands), represented by Werner Kleinmann, Rechtsanwalt, Stuttgart, with an address for service in Luxembourg at the Chambers of Dupong et Associés, 14A Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Bernd Langeheine and Berend Jan Drijber, of its Legal Service, acting as Agents, assisted by H. J. Freund, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: German.

Parker Pen Ltd, a company incorporated under English law whose registered office is in Newhaven (United Kingdom), represented by Carla Hamburger, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

intervener,

APPLICATION for the annulment of the Commission decision of 30 September 1992 rejecting the complaint of Viho Europe BV that Parker Pen Ltd and its subsidiaries infringed Article 85(1) of the EEC Treaty (IV/32.725 — Viho/Parker Pen II),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: R. Schintgen, President, R. García-Valdecasas, H. Kirschner, B. Vesterdorf and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 3 May 1994,

gives the following

Judgment

Facts and procedure

1 The applicant, Viho Europe BV (hereafter 'Viho'), a company incorporated under Netherlands law, markets office equipment on a wholesale basis and imports and exports that equipment.

2 API SpA (hereafter 'API'), a company incorporated under Italian law, sells office equipment and has a distribution network situated mainly in Italy. Since 1949 it has been distributing in Italy products manufactured by Parker Pen Ltd.

3 Herlitz AG (hereafter 'Herlitz'), a company incorporated under German law, produces a wide range of office equipment and associated products and also distributes the products of other manufacturers, in particular products manufactured by Parker Pen Ltd.

4 Parker Pen Ltd (hereafter '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, hereafter '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, hereafter '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, however, 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 (Case T-66/92 *Herlitz* v *Commission* and Case T-77/92 *Parker* v *Commission*, [1994] ECR II-531 anal II-549), 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.

14 It was in those circumstances that Viho brought this action by application lodged at the Registry of the Court of First Instance on 30 November 1992.

15 By letter of 21 April 1993, the applicant, which had failed to lodge its reply within the period allowed by the Court, requested a new time-limit to be fixed for the lodging of its reply.

16 By order of the Court of 12 May 1993 the written procedure was re-opened.

17 By order of 16 September 1993 Parker was given leave to intervene in support of the form of order sought by the Commission.

18 Upon hearing the Report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

19 At the hearing on 3 May 1994 the parties presented oral argument and gave their replies to the questions put by the Court.

Forms of order sought

20 The applicant claims that the Court should:

(i) annul the Commission's decision of 30 September 1992;

(ii) order the Commission to prohibit Parker from requiring its subsidiaries in the various Member States of the Community to restrict the distribution of Parker products to their own territories, and from requiring them to refer requests for information concerning supplies or orders from customers in other Member States to the Parker subsidiary established in the State in which the customer is established;

(iii) order the Commission to require Parker to supply the applicant at the prices and terms applied to its independent exclusive distributors or its subsidiaries in the various Member States.

21 At the hearing the applicant's representative pleaded that the defendant should be ordered to bear the costs.

22 The defendant contends that the Court should:

(i) dismiss the action;

(ii) order the applicant to bear the costs of the proceedings.

23 Parker contends that the Court should:

(i) dismiss the applicant's action as inadmissible or, as the case may be, unfounded;

(ii) order the applicant to bear the costs of the intervention.

Admissibility

Arguments of the parties

24 The Commission raises a plea of inadmissibility on the ground that the second and third heads of the claim set out in the application seek an order by the Court requiring the Commission to prohibit Parker from limiting its subsidiaries' business activities to their national markets and to oblige Parker to supply the applicant at the same prices and conditions as its independent exclusive distributors or subsidiaries.

25 Basing itself on the case-law of the Court of Justice and the Court of First Instance (judgment of the Court of Justice in Case 53/85 *AKZO* v *Commission* [1986] ECR 1965, paragraph 23, and the judgment of the Court of First Instance in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 77), the Commission contends that the Court of First Instance has no jurisdiction to make such orders in the context of a review, under Article 173 of the Treaty, of the legality of an act of the Community institutions, the Commission being obliged in any event to take the necessary measures to comply with the judgment of the Court in accordance with Article 176 of the Treaty, if the contested decision were to be annulled.

26 The applicant, which points out that in its application it expressly seeks the annulment of the contested decision, argues that all its claims are admissible on the ground that the measures which it seeks from the Commission are lawful and do not constitute a decision in respect of which the Commission enjoys any discretion. Consequently, it considers that its claims fall within the review of legality which the Court of First Instance must undertake.

27 The intervener, which supports the form of order sought by the Commission, considers that the second and third heads of the claim formulated by the applicant are inadmissible on the ground that the only consequence which an infringement of Article 85(1) of the Treaty may have at a civil level is the nullity of the agreement as laid down in Article 85(2) (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 50).

Findings of the Court

28 The Court of First Instance has consistently held that it has no jurisdiction to issue directions to the Community institutions in connection with an action for annulment under Article 173 of the Treaty (see, most recently, the order of the Court in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 18).

29 It follows that the second and third heads of claim in the application, namely that the Court order the Commission to prohibit Parker from requiring each of its subsidiaries to limit the distribution of its products to the subsidiary's national territory and to require Parker to supply the applicant at the same prices and terms as its independent exclusive distributors or its subsidiaries, do not come within the jurisdiction of the Community judicature and must therefore be declared inadmissible.

Substance

30 In support of its action the applicant puts forward three pleas in law. The first plea alleges infringement of Article 85(1) of the Treaty, the second infringement of Article 86 of the Treaty and the third infringement of Article 190 of the Treaty.

First plea: infringement of Article 85(1) of the Treaty

31 The plea alleging infringement of Article 85(1) of the Treaty is in two parts. First, the applicant claims that Parker's distribution system, which consists in requiring its subsidiaries to refer orders from customers in other Member States to the subsidiary established in the same State as the customer, pursues the same objective as express export bans imposed on exclusive distributors, namely the preservation of national markets and their partitioning from each other in order to prevent, restrict or distort competition within the common market. It also claims that that system constitutes discrimination against all trading parties because, contrary to Article 85(1)(d), it applies dissimilar conditions to equivalent transactions.

Prohibition on Parker subsidiaries from supplying Parker products to customers established in Member States other than that of the subsidiary

— Arguments of the parties

32 The applicant observes that the Court of Justice has consistently held that, by way of exception, Article 85(1) of the Treaty does not apply to agreements or concerted practices between undertakings belonging to the same group which have the status of parent company and subsidiary, where two conditions are concurrently satisfied. First, the undertakings concerned must form an economic unit within which the subsidiary has no real freedom to determine its course of action in the market because the parent company permanently supervises the making of decisions by, and the administration of, its subsidiary. Secondly, the agreements must be solely intended to carry out an internal allocation of tasks as between the undertakings (judgment of the Court of Justice in Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 19). In this case, the system implemented by Parker does not fulfil either of the two conditions enabling it to avoid the application of Article 85(1) of the Treaty.

33 As regards the lack of freedom of Parker's subsidiaries vis-à-vis their parent company, the applicant claims that the Parker subsidiaries, as independent units from a legal point of view, in fact enjoy a certain autonomy and freedom of action with regard to the distribution of Parker products in their respective territories. It observes that the Court of Justice has held that legally independent companies within one and the same group constitute different undertakings within the meaning of Article 85(1) of the Treaty (see judgment in *Bodson* v *Pompes Funèbres des Régions Libérées*, cited above, paragraph 20).

34 The economic independence of Parker subsidiaries is confirmed by the fact that they charge different sales prices, apply different terms of warranty, undertake

different sales promotions at different times and in respect of different products, sell identical products in different forms, in different packaging and selections, using different distribution methods and following different delivery criteria. That disparity between national offers is not the result of centralized instructions from the parent company and the Commission has not adduced evidence of Parker's alleged absolute control over its subsidiaries.

35 With regard to the internal allocation of tasks between the undertakings in the group, the applicant claims that the condition that there be an internal allocation of tasks is a necessary independent element if a restriction on competition is to avoid the prohibition laid down in Article 85(1). It argues that that condition does not follow automatically from the condition as to the parent company's control of the subsidiary and the subsidiary's lack of freedom, but must be satisfied in addition. According to the applicant, it follows that, even within a group of companies in which the parent company has extensive powers to issue instructions, an agreement which restricts competition is not authorized if it goes beyond an internal allocation of tasks.

36 The applicant adds that, even assuming it were established that there was central control by the parent company and detailed instructions by the parent company existed regarding the conduct to be adopted by its subsidiaries in the market, a control whose sole purpose is to confer absolute territorial protection and therefore to ensure the preservation of isolated national markets is, as such, an abuse of rights since it infringes the fundamental principles of the common market, and the undertaking cannot by virtue of such control benefit from the non-application of Article 85(1). In this case, the absolute territorial protection consists in the fact that the Parker parent company not only undertakes to supply only one contractual partner in each Member State, namely an independent exclusive distributor or its own subsidiary company, but it also assigns national territories to its subsidiaries. Such partitioning of national markets produces harmful effects on third parties by preventing them from making use of the range of offers from across national borders.

37 Finally, the applicant contests Parker's contention that it could have achieved the same result through its own staff, by claiming that, since Parker has chosen a particular distribution system, namely a system based on subsidiary companies, it cannot enjoy only the advantages of such a system, but must also accept the disadvantages. Furthermore, it points out that in its judgment in Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraph 32, the Court of Justice held that, by preventing its German distributors from actively promoting sales activity outside Germany and from delivering Ford vehicles to resellers in other countries which did not belong to the Ford distribution system, Ford had infringed Article 85(1).

38 The Commission contends that the distribution policy implemented by Parker does not infringe Article 85(1) of the Treaty, since in this case the case-law of the Court of Justice on intra-group agreements is applicable. It observes that it is not clear from the case-law whether the second of the two conditions referred to in that context is in itself significant and must exist concurrently with the first condition, or whether that second condition is merely the logical consequence of the first, and observes that in its judgment in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, paragraphs 35 and 36, the Court of Justice no longer referred to the criterion of allocation of tasks. In any event, in this case it is not necessary to decide the question whether that condition is an independent one, since Parker satisfies the condition of the internal allocation of tasks.

39 The Commission contends that it is the actual control exercised by the parent company which determines whether or not Article 85(1) of the Treaty applies; differences between the conditions of sale of each subsidiary may be explained by differences between the national markets or between consumer habits. In this case, Parker's wholly owned subsidiaries necessarily follow the policy laid down by Parker (see the judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 50).

40 Furthermore, the Commission refers to a letter of 21 June 1991 in which Parker describes, at the Commission's request, the way in which its subsidiaries are controlled. It points out that according to that letter Parker directs the manufacture of its products and fixes its subsidiaries' purchase prices and that the subsidiaries' sales and marketing activities are controlled by an 'area team' from the parent company, which approves and monitors the annual sales plan, fixes sales targets, gross margins, sales expenses and cash flow, dictates the range of products to be sold, and controls promotional activities and price discounts. It is furthermore responsible for allocating management posts within the subsidiaries and exercises rigorous financial control.

41 The Commission adds that, by contrast with the independent distributors, it is not the subsidiary companies, but the Parker parent company which meets all the distribution costs and bears the risk of a change in economic conditions, in particular fluctuations in exchange rates between Member States.

42 With regard to the criterion of the internal allocation of tasks, the Commission contends, without prejudice to its observation regarding the question whether that criterion constitutes an independent element, that the fact of restricting the business activity of each subsidiary to its national market is a permissible internal allocation of tasks within the meaning of the case-law of the Court of Justice.

43 Furthermore, the Commission observes that it is only the subsidiaries which have raised any objections to supplying Viho, and not the independent distributors, from whom Viho has not had any difficulty in obtaining supplies at the Community level. After receiving an offer from the Italian firm API, Viho merely replied that it could itself supply API with all the Parker products, since it held the whole range of those products. Viho therefore wrongly alleges that it has been restricted to a single source of supply, or even been excluded from the relevant market.

44 In any event, the territorial protection of subsidiaries within a group must be assessed in a different manner from that resulting from an agreement concluded between undertakings whose purpose is to divide national markets between them. According to the Commission, the judgments of the Court of Justice in Case 15/74 *Centrafarm and De Peijper* v *Sterling Drug* [1974] ECR 1147, and Case 16/74 *Centrafarm and De Peijper* v *Winthrop* [1974] ECR 1183, which are concerned precisely with market partitioning, cannot support the argument that Article 85(1) of the Treaty must apply to a case where the object of the parent company's instructions is to partition national markets and their effect is to place third parties at a disadvantage.

45 The intervener contends that, having regard to the relationship between the Parker parent company and its subsidiaries, which are wholly owned by it, the Parker group constitutes a real economic unit within the meaning of the case-law (see judgments in *Centrafarm and De Peijper*, cited above, paragraphs 41 and 32) and that, accordingly, there cannot be, as between the parent company and its subsidiaries, an agreement, concerted practice or decision by an association of undertakings within the meaning of Article 85(1) of the Treaty. Parker could have achieved the same result through its own sales staff operating in each of the Member States.

46 With regard to the condition that there be an internal allocation of tasks, Parker claims that its distribution system is based exclusively on internal considerations aimed at preventing competition between its subsidiaries. The organization of sales according to national frontiers is the result of an economic assessment intended to avoid duplication of efforts and take account as far as possible of national particularities, in particular language and culture.

— Findings of the Court

47 As regards the appraisal under Article 85(1) of the Treaty of agreements concluded within a group of companies, the Court of Justice has held that 'where a subsidiary

does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit' (judgment in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 134). Similarly, in its judgment in *Ahmed Saeed Flugreisen and Others*, cited above, paragraph 35, the Court of Justice held that 'Article 85 does not apply where the concerted practice in question is between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market' and added that '[h] owever, the conduct of such a unit on the market is liable to come within the ambit of Article 86'. It also follows from the case-law of the Court of First Instance that Article 85(1) of the Treaty refers only to relations between economic entities which are capable of competing with one another and does not cover agreements or concerted practices between undertakings belonging to the same group if the undertakings form an economic unit (judgment in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 357).

48 It is not disputed in this case that Parker owns 100% of the capital of its subsidiaries established in Germany, France, Belgium and the Netherlands. It is also apparent from the description given by Parker of the operation of its subsidiary companies, which the applicant has not disputed, that the sales and marketing activities of the subsidiaries are directed by an area team which is appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. That area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts.

49 Consequently, the Court concludes that, in point 2 of its decision, the Commission correctly classifies the Parker group as 'one economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market'.

50 The Court of Justice has also held that 'in competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal' (judgment in Case 170/83 *Hydrotherm* v *Compact* [1984] ECR 2999, paragraph 11). Similarly, the Court of First Instance has held that 'Article 85(1) of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision' (judgment in Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311). Therefore, for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities.

51 It follows that, where there is no agreement between economically independent entities, relations within an economic unit cannot amount to an agreement or concerted practice between undertakings which restricts competition within the meaning of Article 85(1) of the Treaty. Where, as in this case, the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, Article 85(1) does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit.

52 While, admittedly, it cannot be excluded that the distribution policy applied by Parker, which consists of prohibiting its subsidiaries from supplying Parker products to customers established in Member States other than that of the subsidiary, may contribute to preserving and partitioning the various national markets and, in so doing, thwart one of the fundamental objectives to be achieved by the common market, it nevertheless follows from the abovementioned case-law that such a policy, followed by an economic unit such as the Parker group within which the

subsidiaries do not enjoy any freedom to determine their conduct in the market, does not fall within the scope of Article 85(1) of the Treaty.

53 The Court therefore concludes that the Commission was correct in deciding that 'the subsidiaries' conduct is therefore to be imputed to the parent company' and that 'the integrated distribution system which ensures the sale of Parker products in Spain, France, Germany, Belgium and the Netherlands via the wholly-owned subsidiaries located there fulfils the conditions established by the European Court of Justice with regard to the non-applicability of Article 85'.

54 It does not therefore avail the applicant to argue that the agreements at issue infringe Article 85(1) on the ground that they exceed an internal allocation of tasks within the group. It is apparent from its very terms that Article 85(1) does not apply to conduct which is in reality performed by an economic unit. It is not for the Court, on the pretext that certain conduct, such as that to which the applicant objects, may fall outside the competition rules, to apply Article 85 to circumstances for which it is not intended in order to fill a gap which may exist in the system of regulation laid down by the Treaty.

55 It follows that the first part of the plea alleging infringement of Article 85(1) of the Treaty is not well founded.

Alleged discriminatory treatment of Viho with respect to prices and conditions of sale

— Arguments of the parties

56 The applicant claims that, by applying dissimilar conditions to equivalent transactions which Viho was in a position to undertake, Parker infringed Article 85(1)(d) of the Treaty. Noting that, unlike Article 4(b) of the ECSC Treaty, that article does not prohibit individual instances of discrimination on the part of an undertaking acting independently, but prohibits so-called 'collective' discrimination resulting from agreements or concerted practices between undertakings, the applicant claims that the dissimilar treatment is not the result of an isolated act by Parker, but is an inextricable part of the overall distribution system established by Parker in the common market. The applicant classifies that system as an agreement between undertakings or, at least, a concerted practice whose object or effect is to distort competition within the common market, since it applies dissimilar conditions to equivalent transactions with other trading parties.

57 The applicant claims that, by refusing to grant to it the prices and conditions of sale applied by Parker to its own subsidiaries and/or independent exclusive distributors in the various Member States, Parker treats it as a dealer supplied by one of its subsidiaries or by an independent exclusive distributor. It states that, both with regard to the function which it fulfils and the quantities which it sells, it can undertake transactions comparable to those of Parker's subsidiaries and independent exclusive distributors and that it may therefore be compared directly to them. By not obtaining the same conditions as Parker's subsidiaries or independent exclusive distributors, Viho is prevented from effectively competing with them.

58 The defendant contends that there is no agreement restricting competition within the meaning of Article 85(1) of the Treaty in relations between Parker and its subsidiaries. It states that the application does not identify either the exclusive dealers with which Parker dealt or the type of agreement concluded. Nor does it refer to any precise conduct, the applicant merely referring in general terms to Parker's sales system or pricing policy.

59 In the defendant's view, the applicant appears to consider that the mere fact of not receiving the same prices and conditions as the subsidiaries or independent exclusive distributors constitutes an unlawful barrier. However, a manufacturer is not obliged to accord each wholesaler the prices and conditions allowed to its subsidiaries or independent exclusive distributors. Such an obligation to supply any customer on the same conditions as its subsidiaries or independent exclusive distributors could at the very most arise under Article 86 of the Treaty.

60 The defendant adds that the differences in prices are justified by the fact that the subsidiaries and the independent exclusive distributors fulfil other functions than those of a normal wholesaler and are in general subject to competitive restrictions regarding the sale of other manufacturers' products. Furthermore, those undertakings may, in certain cases, have to bear advertising costs for the manufacturers' products. According to the defendant, it is therefore incorrect for Viho to assert that it has been the subject of discriminatory treatment.

— Findings of the Court

61 Article 85(1)(d) of the Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which apply dissimilar

conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The discrimination at which Article 85(1) is aimed must therefore be the result of an agreement, a decision or a concerted practice between separate and autonomous economic entities and not the result of unilateral conduct by a single undertaking.

62 The Court observes, first of all, that Parker's relations with its independent distributors are irrelevant to the outcome of this case. In any event, the Court finds that in this case the applicant has not indicated which agreement, decision or concerted practice between Parker and its independent distributors is said to have discriminated against it.

63 Moreover, the Court has held above (see paragraph 51) that Parker and its subsidiaries form a single economic unit whose unilateral conduct is not prohibited by Article 85(1)(d) of the Treaty. Consequently, in this case there is no discrimination against Viho which is capable of being the subject of sanctions for breach of Article 85(1)(d).

64 It follows that the second part of the plea alleging infringement of Article 85(1) of the Treaty must also be rejected.

Second plea: infringement of Article 86 of the Treaty

Arguments of the parties

65 The applicant claims that the majority of major suppliers in the stationery business operate distribution systems similar to that of Parker. It claims that on the market, from the point of view of supply, both distributors and consumers are faced with the manufacturer's rigid conduct together with reduced competition. In such a case it should be ascertained whether Article 86 of the Treaty applies as a result of the collective dominant position held by the major manufacturers on the market.

66 The applicant refers to Mont Blanc, Pentel, Edding, Pilot and Henkel as other major suppliers in the pencil and pen sector, and Canon, Minolta, Toshiba, NEC and Mita in the office machine sector. It states that they each have a policy of referring orders. It declares that, if the Court should so request, it is prepared to submit appropriate documents by way of evidence.

67 The defendant observes that the applicant has not adduced any matter of law or of fact concerning the relevant undertakings' position on the market, any uniform conduct, or even the existence of economic links between those firms (see the judgment in *SIV and Others* v *Commission*, cited above, paragraphs 361 to 366). Furthermore, it states that the applicant also does not explain how the Commission's files disclose a collective dominant position of the undertakings concerned on the relevant market. Finally, it observes that during the administrative procedure no substantial evidence to that effect was put forward, so that it was not obliged to examine whether or not there was a collective dominant position on the market. The defendant concludes from this that the complaint must be rejected.

Findings of the Court

68 The Court observes that under the first paragraph of Article 19 of the Protocol on the Statute of the Court of Justice of the EEC, which applies to the Court of First Instance pursuant to the first paragraph of Article 46 and Article 44(1) of the Rules of Procedure of the Court of First Instance, the application must contain a summary of the pleas in law on which it is based. It must accordingly specify the nature of the grounds on which the action is based, so that a mere abstract statement of the grounds does not satisfy the requirements of the Statute or the Rules of Procedure (judgment in *Rendo and Others* v *Commission*, cited above, paragraph 130).

69 The Court notes that in this case the applicant, which merely claims without giving any other particulars that the other major suppliers of pencils and pens and other office equipment operate the same distribution policy as Parker, argues that it should be inquired whether Article 86 of the Treaty ought to apply as a result of the collective dominant position held by the main manufacturers on the relevant market.

70 In the absence of precise submissions as to the market position of the undertakings concerned, their uniform conduct or economic links, the mere reference to Article 86 of the Treaty in the application cannot be regarded as sufficient for the purposes of the Statute and the Rules of Procedure.

71 Furthermore, the Court considers that the Commission was not obliged to carry out an investigation regarding a possible collective dominant position of manufacturers of office equipment, since the applicant's complaint of 22 May 1991 does not contain anything which would require the Commission to conduct such an investigation.

72 It follows that the second plea, alleging infringement of Article 86 of the Treaty, must be rejected.

Third plea: infringement of Article 190 of the Treaty

Arguments of the parties

73 The applicant complains that the Commission has failed to provide a sufficient statement of reasons for its decision since it failed to give a sufficient account of the factors and reasons which caused it to exclude Parker's distribution system from the scope of Article 85(1) of the Treaty.

74 The defendant rejects the complaint that it failed to provide a sufficient statement of reasons and contends that the decision enables the applicant to follow the Commission's reasoning and the Court to exercise its supervisory jurisdiction (judgment in Case 203/85 *Nicolet Instrument* v *Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049, paragraphs 10 and 11). The defendant considers that pages 3 to 5 of the decision clearly show the reasons which caused it to refrain from applying Article 85(1) and those which ruled out an obligation on Parker to accord the applicant the same prices and conditions as its subsidiaries and independent distributors. The Commission adds that it is not required to discuss all the issues of law raised by the applicant during the administrative procedure (Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 332).

Findings of the Court

75 It is settled case-law of the Court of Justice and of the Court of First Instance (judgments in Case 110/81 *Roquette Frères* v *Council* [1982] ECR 3159, paragraph 24, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30) that the statement of the reasons on which a decision is based

must enable the addressee to recognize the reasons for the measure adopted, so that it may, if necessary, enforce its rights and verify whether or not the decision is well founded, and must enable the Community judicature to exercise its power of review.

76 Furthermore, when stating the reasons for the decision which it is required to take in order to ensure the application of the competition rules, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request. It is sufficient if the Commission sets out the facts and the legal considerations having decisive importance in the context of the decision (judgments in Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 35, and *Asia Motor France and Others* v *Commission*, cited above, paragraph 31).

77 From its reading of the contested decision the Court finds that the decision sets out the essential matters of fact and of law on which its rejection of the applicant's complaint is based, thereby enabling the applicant to contest its validity and the Court to review its legality. It follows that the statement of the reasons on which the contested decision is based is not in any way defective.

78 It follows that the application must be dismissed in its entirety.

Costs

79 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

80 With regard to the costs of the intervener, the Court considers that in the circumstances of this case Article 87(4) of the Rules of Procedure should not be applied so as to order the intervener to bear its own costs. The applicant must therefore also bear the costs of the intervener, Parker.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) Dismisses the application;

2) Orders the applicant to bear the whole of the costs, including those incurred by the intervener, Parker Pen Ltd.

Schintgen García-Valdecasas Kirschner

Vesterdorf Bellamy

Delivered in open court in Luxembourg on 12 January 1995.

H. Jung
Registrar

R. Schintgen
President