

JUDGMENT OF THE COURT (Fifth Chamber)

31 March 1993 \*

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In Joined Cases:

C-89/85,

- (1) **A. Ahlström Osakeyhtiö, Helsinki,**
- (2) **United Paper Mills Ltd, Valkeakoski, successor in title to Jutseno-Pulp Osakeyhtiö, Joutseno,**
- (3) **Kaukas Oy, Lappeenranta, successor in title to Oy Kaukas AB, Lappeenranta,**
- (4) **Oy Metsä-Botnia AB, Espoo, successor in title to Kemi Oy, Kemi,**
- (5) **Oy Metsä-Botnia AB, Espoo,**
- (6) **Metsä-Serla Oy, Helsinki, successor in title to Metsäliiton Teollisuus Oy, Espoo,**
- (7) **Veitsiluoto Oy, Kemi, successor in title to Oulu Oy, Oulu,**
- (8) **Wisaforest Oy AB, Pietarsaari, successor in title to Oy Wilh. Schauman AB, Helsinki,**

(9) **Sunilà Osakeyhtiö, Sunila,**

(10) **Veitsiluoto Oy, Kemi,**

(11) **Finncell, Helsinki,**

(12) **Enso-Gutzeit Oy, Helsinki,**

all undertakings governed by Finnish law, represented by A. von Winterfeld, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt, 8-10 Rue Mathias Hardt,

v

applicants,

Commission of the European Communities, represented by A. McClellan and G. zur Hausen, Legal Advisers, and by P. J. Kuyper, a member of its Legal Service, acting as Agents, assisted by S. Böse, of the Belmont European Community Law Office in Brussels, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

C-104/85,

**Bowater Incorporated**, Darien, Connecticut, USA, represented by D. Vaughan QC and by D. F. Hall, Solicitor, of Linklaters & Paines, London, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

v

applicant,

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

C-114/85,

**The Pulp, Paper and Paperboard Export Association of the United States, Bethlehem, Pennsylvania, USA, comprising the United States undertakings**

- (1) **The Chesapeake Corporation, West Point, Virginia,**
- (2) **Crown Zellerbach Corporation, San Francisco, California,**
- (3) **Federal Paper Board Company Inc., Montvale, New Jersey,**
- (4) **Georgia-Pacific Corporation, Atlanta, Georgia,**
- (5) **Scott Paper Company, Delaware County, Pennsylvania, and**
- (6) **Weyerhaeuser Company, Tacoma, Washington,**

represented by M. Waelbroeck and A. Vandencastele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 8-10 Rue Mathias Hardt,

v

applicants,

**Commission of the European Communities, represented by A. McClellan, Legal Adviser, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,**

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland, represented by Timothy Pratt, Principal Assistant Treasury Solicitor, and by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agents, assisted by Professor Rosalyn**

Higgins QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

C-116/85,

**St Anne-Nackawic Pulp and Paper Company Limited**, Nackawic, New Brunswick, Canada, represented by D. Voillemot, of the Paris Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 Rue Zithe,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

C-117/85,

**International Pulp Sales Company**, New York, represented by I. Van Bael and J. F. Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

C-125/85,

**Westar Timber Limited**, Canada, represented by C. Stanbrook QC and by M. Siragusa, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by K. Banks and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland**, represented by Timothy Pratt, Principal Assistant Treasury Solicitor, and by Lucinda Hudson of the Treasury Solicitor's Department, acting as Agents, assisted by Professor Rosalyn Higgins QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

C-126/85,

**Weldwood of Canada Limited**, Canada, represented by Christopher Prout and Alice Robinson, Barristers, and by J. M. Cochran, of Wilkie Farr and Gallagher, Paris, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by K. Banks and P. J. Kuyper, members of its Legal Service, acting as

Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland**, represented by Timothy Pratt, Principal Assistant Treasury Solicitor, and by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agents, assisted by Professor Rosalyn Higgins QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

C-127/85,

**MacMillan Bloedel Limited**, Canada, represented by C. Stanbrook QC and by P. Sambuc and Dr D. Schroeder, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by K. Banks and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland**, represented by Timothy Pratt, Principal Assistant Treasury Solicitor, and by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agents, assisted by Professor Rosalyn



Higgins QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

C-128/85,

**Canadian Forest Products Limited**, Canada, represented by C. Stanbrook QC and by M. Siragusa, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by K. Banks and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland**, represented by Timothy Pratt, Principal Assistant Treasury Solicitor, and by Lucinda Hudson of the Treasury Solicitor's Department, acting as Agents, assisted by Professor Rosalyn Higgins QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

C-129/85,

**Fletcher Challenge Canada Limited**, Canada, represented by C. Stanbrook QC, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

applicant,

v

**Commission of the European Communities**, represented by A. McClellan, Legal Adviser, by K. Banks and P. J. Kuyper, members of its Legal Service, acting as Agents, and by N. Forwood QC, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland**, represented by Timothy Pratt, Principal Assistant Treasury Solicitor, and by Lucinda Hudson of the Treasury Solicitor's Department, acting as Agents, assisted by Professor Rosalyn Higgins QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for a declaration that the Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.725-Wood pulp) (OJ 1985 L 85, p. 1) is void,

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida, F. Grévisse, Judges,

Advocate General: M. Darmon,  
Registrar: H. A. Rühl, Principal Administrator,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 July 1992,

gives the following

## Judgment

### I — Introduction

- 1 By different applications lodged at the Court Registry between 4 and 30 April 1985, the Finnish undertakings A. Ahlström Osakeyhtiö, United Paper Mills Ltd, successor in title to Joutseno-Pulp Osakeyhtiö, Kaukas Oy, successor in title to Oy Kaukas AB, Oy Metsä-Botnia AB, successor in title to Kemi Oy, Oy Metsä-Botnia AB, Metsä-Serla Oy, successor in title to Metsäliiton Teollisuus Oy, Veitsiluoto Oy, successor in title to Oulu Oy, Wisaforest Oy AB, successor in title to Oy Wilh. Schauman AB, Sunilä Osakeyhtiö, 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 85/202/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1985 L 85, p. 1) 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*

- 30 In the first judgment of 27 September 1988 (Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193), the Court rejected the submission relating to the incorrect assessment of the territorial scope of Article 85 of the Treaty and the incompatibility of the Commission’s decision with public international law, and the submission relating to the exclusive application of the competition rules in the free trade agreement between the Community and Finland. The Court also declared the Commission’s decision void in so far as it concerned the Pulp, Paper and Paperboard Export Association of the United States.

- 31 By order of 25 November 1988 the Court decided to obtain an expert's report on parallelism of prices. The experts charged with drawing it up were appointed by order of 16 March 1989. They were asked whether the documents used by the Commission in drawing up Tables 6 and 7 annexed to the decision justified the conclusion as to parallelism of announced prices and transaction prices. With regard to transaction prices, the Court asked the experts to draw a distinction between the documents gathered in the investigation and those obtained after the statement of objections. The expert's report containing the answers to those questions was submitted to the Court on 10 April 1990.
- 32 By order of 25 October 1990, the Court decided to obtain a second expert's report. The experts, who were appointed by the same order, which was confirmed on that point by an order of 14 March 1991, were requested to describe and analyse the characteristics of the market during the period covered by the decision and to state whether, in the light of those characteristics, the natural operation of the market should lead to a differential price structure or to a uniform price structure. Finally, the experts were asked whether the characteristics and functioning of the market during the period covered by the decision had differed from its characteristics and functioning prior to that period and subsequent to the decision, and whether 1977 and 1978 were to be distinguished from the rest of the period from 1975 to 1981. The experts submitted their report on 11 April 1991.
- 33 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 34 Since the part of the decision relating to general concertation on transaction prices, which is referred to in Article 1(2) of the operative part, is challenged on procedural grounds, it is necessary to examine that infringement first. The Court will then proceed to examine the infringement relating to concertation on announced prices, the infringement relating to concertation within KEA, the infringement relating to the exchange of information within Fides and, finally, the infringement involving the insertion in contracts or general conditions of sale of clauses prohibiting export or resale.

## II — The infringement relating to general concertation on transaction prices

### 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).

*C. The infringement relating to concertation on transaction prices is not referred to in the statement of objections*

40 The applicants argue first that the statement of objections referred only to concertation on announced prices. By embodying in its decision a second infringement relating to concertation on transaction prices, the Commission disregarded Article 19(1) of Regulation No 17 and Article 4 of Regulation No 99, which require it to deal in its final decision only with objections in respect of which the undertakings concerned have been given an opportunity of making their views known.

41 The Commission, on the other hand, considers that the statement of objections related both to concertation on transaction prices and to concertation on announced prices. In that regard, it refers to various passages in that document and to the replies given by the producers in writing or at the hearing. It is clear from those replies, the Commission argues, that the parties concerned had understood the statement of objections as relating to both types of concertation.

42 In the light of those arguments, it is necessary to ascertain whether in this instance the statement of objections was couched in terms that, albeit succinct, were sufficiently clear to enable the parties concerned properly to take cognizance of the conduct complained of by the Commission. It is only on that condition that the statement of objections could have fulfilled its function under the Community regulations of giving undertakings all the information necessary to enable them

to defend themselves properly, before the Commission adopts a final decision (see, on that point, the judgments in Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769, Case 52/69 *Geigy v Commission* [1972] ECR 787, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663, Case 27/76 *United Brands v Commission* [1978] ECR 207 and Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461).

- 43 In this case, the statement of objections is divided into two main parts, one entitled 'The Facts', and the other 'Applicability of Article 85(1) of the EEC Treaty', and it does not contain an operative part. In view of the absence of an operative part, reference must be made to the second part of the statement of objections in order to ascertain the conduct of the producers to which objection was taken.
- 44 Perusal of the part entitled 'Applicability of Article 85(1) of the EEC Treaty' reveals that only one passage could be interpreted as referring specifically to transaction prices. That is paragraph 66 which states that 'the North American producers charged until 1978, i. e. for three and a half years, the same price as the Scandinavian producers, except during the first half of 1977, when they granted rebates and increased their market share'. The other passages indicated by the Commission refer, in one case, to 'price-fixing ... pursued *inter alia* through the system of price announcements', and in others to 'the prices' in general and without further qualification.
- 45 As so drafted, the statement of objections cannot be regarded as satisfying the requirement of clarity referred to earlier.
- 46 Against that finding, the Commission cannot argue that there was no distinct reference to the infringement relating to transaction prices in the statement of objections because, during the investigations which preceded it, the Commission had asked the undertakings to produce representative invoices and those invoices had shown that the announced prices and the transaction prices coincided.

- 47 It must be noted that in the decision the two infringements do not coincide.
- 48 First of all, some producers — such as Chesapeake Corporation — have been penalized for participating in concertation on transaction prices and not on announced prices, whereas other producers — such as St Anne — are in the converse situation.
- 49 Secondly, there are differences as regards the periods of the infringements: the infringement relating to concertation on transaction prices does not relate to the period from 1977 to 1978 which is, on the other hand, covered by the complaint relating to announced prices. In that regard, it is highly significant that, whilst the statement of objections is accompanied by a single table entitled 'Price trends based on prices announced and confirmed by producers' and covering the whole of the period from 1974 to 1980, the decision is accompanied by three separate tables, one on announced prices (Table 6) which reproduces the contents of the table annexed to the statement of objections, the other two on transaction prices and headed 'Regular transaction prices' (Table 7) and 'Deviations from regular transaction prices in Table 7' (Table 8). Table 7 does not cover 1977 and 1978.
- 50 Since, in the decision, the two infringements have their own characteristics which relate to factors as crucial as the participants in the concertation or the period of the infringement, they should have been set out distinctly as from the time of the statement of objections. That was all the more necessary in this case as the two infringements gave rise to the imposition of different fines.
- 51 Contrary to the Commission's contention, the replies to the statement of objections are not such as to show that the applicants had understood the statement of objections as covering the infringement relating to transaction prices. The various passages referred to in the rejoinder in support of that contention are open to a twofold interpretation. In so far as, at the administrative hearing or in their written observations, the producers made several references to the transaction prices, the

purpose may have been to demonstrate that, since those prices were different, concertation on announced prices had not had any effect on the market and that, accordingly, the conditions laid down by Article 85(1) were not fulfilled, rather than to show that they had not concerted on transaction prices contrary to what had appeared from the statement of objections.

52 It follows from the foregoing that the complaint regarding concertation on transaction prices was not clearly set out in the statement of objections and, therefore, that the applicants were not given an opportunity to defend themselves effectively during the administrative procedure.

53 Consequently, without there being any need to consider the other pleas, Article 1(2) of the contested decision, which relates to concertation on transaction prices, must be annulled.

54 Accordingly, the objection to the effect that the Court should exclude from the proceedings certain documents relating to that infringement must be held to be devoid of purpose.

### **III — The infringement relating to general concertation on announced prices**

55 The Finnish, United States and Canadian applicants have sought the annulment of Article 1(1) of the decision, according to which they, and other Swedish, United States and Norwegian producers, concerted '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.

56 By letters of 6 March and 2 May 1990, the Court requested the Commission to clarify Article 1(1).

- 57 In its first question, the Court asked whether the system of quarterly price announcements called in question by the Commission was to be regarded as constituting in itself an infringement of the Treaty or whether that system was merely evidence of concertation on announced prices which took place at an earlier stage. The Commission's replies did not make it possible to choose between those two interpretations and so both must be considered.
- 58 Since Article 1(1) does not specify either the parties between whom or the quarters in respect of which the infringement took place, the Court, in its second question, asked the Commission to give those details. In its reply, the Commission stated that all the data at its disposal were set out in Table 6 annexed to the decision. That table, entitled 'Announced prices', specifies for each quarter of the period concerned the prices announced by various producers and the date of the announcements. As the Commission explained, all the producers who, according to the data in that table, announced the same price for a given quarter must be deemed to have engaged in concertation during that period.

*A. The system of quarterly price announcements constitutes in itself the infringement of Article 85 of the Treaty*

- 59 According to the Commission's first hypothesis, it is the system of quarterly price announcements in itself which constitutes the infringement of Article 85 of the Treaty.
- 60 First, the Commission considers that that system was deliberately introduced by the pulp producers in order to enable them to ascertain the prices that would be charged by their competitors in the following quarters. The disclosure of prices to third parties, especially to the press and agents working for several producers, well before their application at the beginning of a new quarter gave the other producers sufficient time to announce their own, corresponding, new prices before that quarter and to apply them from the commencement of that quarter.



- 61 Secondly, the Commission considers that the implementation of that mechanism had the effect of making the market artificially transparent by enabling producers to obtain a rapid and accurate picture of the prices quoted by their competitors.
- 62 In deciding on that point, it must be borne in mind that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market.
- 63 According to the Court's judgment in *Suiker Unie* (cited above, at paragraphs 26 and 173), a concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them. In the same judgment, the Court added that the criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market.
- 64 In this case, the communications arise from the price announcements made to users. They constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.
- 65 Accordingly, the system of quarterly price announcements on the pulp market is not to be regarded as constituting in itself an infringement of Article 85(1) of the Treaty.

*B. The infringement arises from concertation on announced prices*

66 In the second hypothesis, the Commission considers that the system of price announcements constitutes evidence of concertation at an earlier stage. In paragraph 82 of its decision, the Commission states that, as proof of such concertation, it relied on the parallel conduct of the pulp producers in the period from 1975 to 1981 and on different kinds of direct or indirect exchange of information.

67 It follows from paragraphs 82 and 107 to 110 of the decision that the parallel conduct consists essentially in the system of quarterly price announcements, in the simultaneity or near-simultaneity of the announcements and in the fact that announced prices were identical. It is also apparent from the various telexes and documents referred to in paragraph 61 et seq. of the decision that meetings and contacts took place between certain producers with a view to exchanging information on their respective prices.

*1. The telexes referred to in paragraph 61 et seq. of the decision*

68 In its questions of 6 March and 2 May 1990, the Court requested the Commission to specify what precise conclusions it drew from the telexes and documents referred to in paragraph 61 et seq. of its decision, that is to say to state between which producers the concertation established by each telex or document took place and for what period. In reply to that question, the Commission stated that those documents merely substantiated the evidence based on parallel conduct and that, accordingly, they were relevant not only as regards the undertakings and the period specifically mentioned therein but also as regards all the undertakings and the entire duration of the parallel conduct.

69 In the light of that reply, those documents must be excluded from consideration. Since the identity of the persons taking part in concertation is one of the constituents of the infringement, it is impossible to rely as evidence of that infringement on documents whose probative value in that respect the Commission has been unable to specify.

2. *The other evidence adduced by the Commission*

70 Since the Commission has no documents which directly establish the existence of concertation between the producers concerned, it is necessary to ascertain whether the system of quarterly price announcements, the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements as found during the period from 1975 to 1981 constitute a firm, precise and consistent body of evidence of prior concertation.

71 In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see the judgment in *Suiker Unie*, cited above, paragraph 174).

72 Accordingly, it is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation.

(a) The system of price announcements

73 As stated above, the Commission regards the system of quarterly price announcements as evidence of concertation at an earlier stage.

74 In their pleadings, on the other hand, the applicants maintain that the system is ascribable to the particular commercial requirements of the pulp market.

- 75 By orders of 25 October 1990 and 14 March 1991, the Court requested two experts to examine the characteristics of the market for bleached sulphate pulp during the period covered by the contested decision. Their report sets out the following considerations.
- 76 The experts observe first that the system of announcements at issue must be viewed in the context of the long-term relationships which existed between producers and their customers and which were a result both of the method of manufacturing the pulp and of the cyclical nature of the market. In view of the fact that each type of paper was the result of a particular mixture of pulps having their own characteristics and that the mixture was difficult to change, a relationship based on close cooperation was established between the pulp producers and the paper manufacturers. Such relations were all the closer since they also had the advantage of protecting both sides against the uncertainties inherent in the cyclical nature of the market: they guaranteed security of supply to buyers and at the same time security of demand to producers.
- 77 The experts point out that it is in the context of those long-term relationships that, after the Second World War, purchasers demanded the introduction of that system of announcements. Since pulp accounts for between 50% and 75% of the cost of paper, those purchasers wished to ascertain as soon as possible the prices which they might be charged in order to estimate their costs and to fix the prices of their own products. However, as those purchasers did not wish to be bound by a high fixed price in the event of the market weakening, the announced price was regarded as a ceiling price below which the transaction price could always be renegotiated.
- 78 The explanation given for the use of a quarterly cycle is that it is the result of a compromise between the paper manufacturers' desire for a degree of foreseeability as regards the price of pulp and the producers' desire not to miss any opportunities to make a profit in the event of a strengthening of the market.

79 The US dollar was, according to the experts, introduced on the market by the North American producers during the 1960s. That development was generally welcomed by purchasers who regarded it as a means of ensuring that they did not pay a higher price than their competitors.

(b) The simultaneity or near-simultaneity of announcements

80 In paragraph 107 of its decision, the Commission claims that the close succession or even simultaneity of price announcements would not have been possible without a constant flow of information between the undertakings concerned.

81 According to the applicants, the simultaneity or near-simultaneity of the announcements — even if it were established — must instead be regarded as a direct result of the very high degree of transparency of the market. Such transparency, far from being artificial, can be explained by the extremely well-developed network of relations which, in view of the nature and the structure of the market, have been established between the various traders.

82 The experts have confirmed that analysis in their report and at the hearing which followed.

83 First, they pointed out, a buyer was always in contact with several pulp producers. One reason for that was connected with the paper-making process, but another was that, in order to avoid becoming overdependent on one producer, pulp buyers took the precaution of diversifying their sources of supply. With a view to obtaining the lowest possible prices, they were in the habit, especially in times of falling prices, of disclosing to their suppliers the prices announced by their competitors.

- 84 Secondly, it should be noted that most of the pulp was sold to a relatively small number of large paper manufacturers. Those few buyers maintained very close links with each other and exchanged information on changes in prices of which they were aware.
- 85 Thirdly, several producers who made paper themselves purchased pulp from other producers and were thus informed, in times of both rising prices and falling prices, of the prices charged by their competitors. That information was also accessible to producers who did not themselves manufacture paper but were linked to groups that did.
- 86 Fourthly, that high degree of transparency in the pulp market resulting from the links between traders or groups of traders was further reinforced by the existence of agents established in the Community who worked for several producers and by the existence of a very dynamic trade press.
- 87 In connection with the latter point, it should be noted that most of the applicants deny having communicated to the trade press any information on their prices and that the few producers who acknowledged having done so point out that such communications were sporadic and were made at the request of the press itself.
- 88 Finally, it is necessary to add that the use of rapid means of communication, such as the telephone and telex, and the very frequent recourse by the paper manufacturers to very well-informed trade buyers meant that, notwithstanding the number of stages involved — producer, agent, buyer, agent, producer — information on the level of the announced prices spreads within a matter of days, if not within a matter of hours on the pulp market.

## (c) Parallelism of announced prices

- 89 The parallelism of announced prices on which the Commission relies as evidence of concertation is described in paragraph 22 of its decision. In that paragraph, the Commission, relying on Table 6 annexed to the decision, finds that the prices announced by the Canadian and United States producers were the same from the first quarter of 1975 to the third quarter of 1977 and from the first quarter of 1978 to the third quarter of 1981, that the prices announced by the Swedish and Finnish producers were the same from the first quarter of 1975 to the second quarter of 1977 and from the third quarter of 1978 to the third quarter of 1981 and, finally, that the prices of all the producers were the same from the first quarter of 1976 to the second quarter of 1977 and from the third quarter of 1979 to the third quarter of 1981.
- 90 According to the Commission, the only explanation for such parallelism of prices is concertation between the producers. That contention is essentially based on the considerations that follow.
- 91 In the first place, the single price charged by the producers during the period at issue cannot be regarded as an equilibrium price, that is to say a price resulting from the natural operation of the law of supply and demand. The Commission emphasizes that there was no testing of the market 'by trial and error', as evidenced by the stability of prices established between the first quarter of 1975 and the fourth quarter of 1976, and the fact that, generally in the case of softwood from the third quarter of 1979 to the second quarter of 1980, the first higher price demanded was always followed by the other producers.
- 92 Nor can the argument concerning 'price leadership' be accepted: the similarity of announced prices, and that of transaction prices moreover, cannot be explained by the existence of a market leader whose prices were adopted by its competitors. The order in which the announcements were made continued to change from quarter to quarter and no one producer held a strong enough position to act as leader.

93 Secondly, the Commission considers that, since economic conditions varied from one producer to another or from one group of producers to another, they should have charged different prices. Pulp manufacturers with low costs should have lowered their prices in order to increase their market shares to the detriment of their least efficient competitors. According to the Commission, the divergences in question related to production and transport costs, the relationship between those costs (determined in the national currencies: Canadian dollar, Swedish krona or Finnish mark) and selling prices (fixed in US dollars), size of orders, variations in demand for pulp in the various importing countries, the relative importance of the European market, which was greater for Scandinavian producers than for United States and Canadian producers, and the production capacity utilization ratios which, generally speaking, were higher in the United States and Canada than in Sweden and Finland.

94 So far as the size of orders is concerned, the Commission considers that since the sale of large quantities enabled producers to cut their costs substantially, the price records should have shown significant price differences between purchasers of large quantities and purchasers of small quantities. In practice, those differences rarely amounted to more than 3%.

95 Thirdly, the Commission claims that, at any rate for a time in 1976, 1977 and 1981, announced prices for pulp stood at an artificially high level which differed widely from that which might have been expected under normal competitive conditions. For example, it is inconceivable, without concertation, for a single unchanged price of US\$ 415 to have been announced for northern softwood from the first quarter of 1975 to the third quarter of 1977 and, especially during the second and third quarters of 1977, for the announced price to have stood at US\$ 100 above the selling price actually obtainable on the market. The contention that prices stood at an abnormally high level is borne out by the fact that in 1977 and 1982 the fall in prices was particularly abrupt.

96 Finally, the Commission relies on the grant of secret rebates and on changes in market shares.



- 97 So far as concerns the grant of secret rebates, it should be noted that there is a contradiction between the decision and what has been said subsequently. In paragraph 112 of its decision, the Commission refers to the exclusion of secret competition but then states in its pleadings that, if the rebates were secret, it was because they undermined concertation and therefore had to remain concealed from the other producers.
- 98 So far as concerns the shifts in market shares established between 1975 and 1981, the Commission considers that they do not justify the finding that there was no concertation. Those shifts were much less marked between 1975 and 1976 and between 1980 and 1981 than the shifts between 1978 and 1979 and between 1979 and 1980.
- 99 The applicants disputed the view that parallelism of prices was attributable to concertation.
- 100 In commissioning the second expert's report, the Court requested the experts to specify whether, in their opinion, the natural operation of the wood pulp market should lead to a differential price structure or to a uniform price structure.
- 101 It is apparent from the expert's report, together with the ensuing discussion, that the experts regard the normal operation of the market as a more plausible explanation for the uniformity of prices than concertation. The main thrust of their analysis may be summarized as follows:

*(i) Description of the market*

- 102 The experts describe the market as a group of oligopolies-oligopsonies consisting of certain producers and of certain buyers and each corresponding to a given kind of pulp. That market structure results largely from the method of manufacturing paper pulp: since paper is the result of a characteristic mixture of pulps, each paper manufacturer can deal only with a limited number of pulp producers and,

conversely, each pulp producer can supply only a limited number of customers. Within the groupings so constituted, cooperation was further consolidated by the finding that it offered both buyers and sellers of pulp security against the uncertainties of the market.

- 103 That organization of the market, in conjunction with its very high degree of transparency, leads in the short-term to a situation where prices are slow to react. The producers know that, if they were to increase their prices, their competitors would no doubt refrain from following suit and thus lure their customers away. Similarly, they would be reluctant to reduce their prices in the knowledge that, if they did so, the other producers would follow suit, assuming that they had spare production capacity. Such a fall in prices would be all the less desirable in that it would be detrimental to the sector as a whole: since overall demand for pulp is inelastic, the loss of revenue resulting from the reduction in prices could not be offset by the profits made as a result of the increased sales and there would be a decline in the producers' overall profits.
- 104 In the long-term, the possibility for buyers to turn, at the price of some investment, to other types of pulp and the existence of substitute products, such as Brazilian pulp or pulp from recycled paper, have the effect of mitigating oligopolistic trends on the market. That explains why, over a period of several years, fluctuations in prices have been relatively contained.
- 105 Finally, the transparency of the market could be responsible for certain overall price increases recorded in the short-term: when demand exceeds supply, producers who are aware — as was the case on the pulp market — that the level of their competitors' stocks is low and that their production capacity utilization rate is high would not be afraid to increase their prices. There would then be a serious likelihood of their being followed by their competitors.

(ii) *Market trends from 1975 to 1981*

- 106 The various mechanisms described above offer explanations for some of the stages in the sequence of price changes regarded by the Commission as 'abnormal', particularly the stability of prices observed during the period from 1975 to 1976, the collapse of the market in 1977 and the fresh fall in prices at the end of 1981.

*The period from 1975 to 1976*

- 107 In 1974 demand for pulp was very strong. Since production capacity utilization rates were very high and inventory levels were extremely low, excess demand led to an increase in prices.
- 108 In 1975 and 1976, circumstances changed: there was an increase in inventory levels and a general decline in the production capacity utilization rate. Notwithstanding those changes, no producer took the initiative of reducing its prices, in the knowledge that, had it done so, its competitors would have followed suit. Conversely, had it decided to increase its prices, it would have remained isolated on the market and would have lost some, if not all, its customers.
- 109 According to the experts, the oligopolistic characteristics of the market and its very high degree of transparency are not the only factors responsible for the price stability observed during the period from 1975 to 1977. A further explanation lies in the particular circumstances prevailing at the time.
- 110 First, at the general level, it should be noted that in 1976 world demand for paper had recovered, which gave rise to optimistic forecasts. In addition, the rate of inflation was high, the real value of prices had fallen and interest rates were low. Furthermore, the Swedish producers qualified for a tax rebate on stock-building which was related to the value of inventories. Finally, the North American producers had an outlet on the United States market, which at the time was very buoyant, and for their part were operating close to capacity.

1977

- 111 The price collapse in 1977 was the result of the massive increase in supply and the stagnant demand which characterized that period. The Swedish Government had ended the storage subsidy scheme, thereby generating a massive increase in supply at a time when inventory levels in the other producer countries were relatively high. The producers then found that the expected growth in demand had not materialized and that, consequently, an increase in prices was less likely. In those circumstances, if an undertaking decided to lower its prices, it could be sure that its competitors would follow suit provided, however, that they had spare production capacity.

*The period from 1978 to 1981*

- 112 As from the fourth quarter of 1978, demand recovered and came to exceed supply. The transparency of the market accordingly led to a rapid upward adjustment in prices. Undertakings which were aware that their competitors did not have any spare production capacity were then able to increase their prices without fear of remaining isolated and thus losing their share of the market.
- 113 That period of rising prices was followed by a period of stability from mid-1980 to the end of 1981. That stability was attributable to the fact that inventory levels were low, production capacity utilization rates were high and demand, influenced by the appearance of new types of pulp on the market, was static.
- 114 In the fourth quarter of 1981, the market again went into recession as a result of swollen inventories, the fall in production capacity utilization rates and the fall in world demand for paper. The absence of the special factors prevailing in 1975 — 1977, namely the higher rate of inflation and the existence in Sweden of a storage subsidy scheme, accounts for the more rapid fall in prices.

*(iii) Several factors established on the market are incompatible with the explanation that there was concertation*

- 115 The experts analyse the structures of the market and price trends over the period at issue and maintain that several factors or mechanisms specific to that market are incompatible with an explanation based on concertation. Those factors are the existence of actual and potential outsiders not belonging to the group of undertakings alleged to have colluded, changing market shares and the absence of production quotas and the finding that producers did not take advantage of the differences between the various importing countries as regards elasticity of demand.
- 116 So far as concerns the first point, it should be noted that in paragraph 137 of its decision, the Commission assesses production by outsiders at 40% of total consumption of pulp in the Community. In view of the size of that market share, it would have been difficult for a cartel to operate only as between the undertakings found to have committed an infringement by engaging in concertation.
- 117 The Commission's counterargument is that it refrained from initiating a proceeding against those other producers because, in its view, they had acted as followers during the period at issue.
- 118 That argument cannot be accepted. It is wholly inconsistent with the reasoning adopted by the Commission as regards Table 6 in identifying the producers taking part in the concertation. If, in that regard, as already pointed out in paragraph 58 above, the mere fact of announcing the same price as another producer for the same period does indeed constitute sufficient evidence of concertation, the infringement procedure under Article 85 should clearly have been extended to those outsiders which, as the Commission acknowledges by its use of the term 'follower', announced the same price as the producers penalized in the context of Article 1(1) of the operative part of the decision.

119 With regard to the second factor, the experts find that, having regard to Table 2 annexed to the decision, there were shifts in market shares between 1975 and 1981. Such changes reveal the existence of competition between the producers and the absence of quotas.

120 Finally, so far as concerns the absence of differences in price between the various Member States, the experts consider that it is wrong to contend, as the Commission does in paragraphs 136 to 140 of the decision, that the pulp producers should have exploited the differences in price-elasticity in the different Member States. According to the experts, in order to do so, the undertakings would have had to be in a position to divide up the market, which would have been possible only if there had been an effective cartel embracing all existing and potential suppliers and capable of ensuring compliance with barriers to resale and to transfer between Member States. In those circumstances, price uniformity constitutes on the contrary an argument militating in favour of the explanation based on the normal operation of the market.

*(iv) Specific criticisms of the Commission's explanation made by the experts*

121 A number of specific criticisms are directed by the experts against the Commission's explanation. Those criticisms concern the impact on prices of transport costs, the size of orders and, in general, differences in costs and the grant of secret rebates.

122 In the first place, in response to the Commission's contention that prices should have varied according to the destination, the experts state that the destination of the pulp — whether Atlantic ports or Baltic ports — had only a minor influence on transport costs. At most, it could have led to a difference in cost of US\$ 10 a tonne. Contrary to what the Commission states, that difference is too small to affect prices within each of the two zones.

123 Secondly, the experts explain why, in their view, very large orders for pulp did not lead to sharp price cuts. Such orders do not enable significant cost savings to be made for various reasons: first, wood pulp is normally a standard product

delivered from anonymous stock; secondly, producers are in the habit of installing storage capacity at the great receiving ports; finally, because they use a wide range of pulps, the paper manufacturers prefer, when placing orders for large quantities, to have the pulp delivered in several consignments. Ultimately, the economies of scale associated with very large orders are confined to overheads and administrative costs.

- 124 Thirdly, the experts consider that, even if there were real economies of scale, the differences in costs to which they led between the producers did not affect prices but the undertakings' profits.
- 125 Finally, if the rebates granted were secret, that was for various reasons outside the pulp producers' control: to begin with, in some countries, such as France, rebates not justified by cost-savings are illegal; next, as rebates generally relate to annual tonnage, they cannot be calculated until the end of the financial year. Lastly, it is the buyers who ask for rebates to be kept confidential, partly in order to secure an advantage over their competitors by obtaining better prices, and partly in order to prevent paper buyers from seeking a reduction in price themselves.

### 3. Conclusions

- 126 Following that analysis, it must be stated that, in this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

- 127 In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission. Article 1(1) of the contested decision must therefore be annulled.

#### IV — Concertation within KEA

- 128 The United States applicants, with the exception of Bowater, have sought the annulment of Article 1(3) of the operative part of the decision, in which the members of KEA were found to have concerted on announced prices and on transaction prices for deliveries to the Community and to have exchanged individualized data concerning those prices and KEA was found to have recommended prices for the deliveries in question.
- 129 By the judgment of 27 September 1988, cited above, that provision was declared void in so far as it concerned KEA.

##### *A. Concertation on announced prices and the exchange of information on transaction prices*

- 130 So far as concerns concertation on announced prices and the exchange of information on transaction prices, reference must be made first of all to Article IIa of the Policy Statement of the Pulp Group. According to that provision, the members of the group are to meet from time to time in order to fix unanimously prices for sales of pulp, known as 'KEA recommended prices', and they agree to announce those prices to their customers. If, subsequently, the members of the association deviate from those prices-as they continue to be free to do-they are required to give advance notification to the manager of the group, who may decide, if necessary, to convene a further meeting of the group in order to discuss appropriate action.
- 131 Since the producers met from time to time in order to agree the 'KEA recommended price', it is clear that the producers belonging to KEA concerted within that association on announced prices for wood pulp. Similarly, it should be noted



that, by undertaking to notify in advance any price deviating from that which they had fixed by common agreement, they established a system for the exchange of information on their future conduct that was such as to restrict competition.

132 That much is self-evident and the applicants' objection that in practice the 'KEA recommended price' fixed by the group was not always adhered to by its members is to no avail. That argument implicitly concedes that, at least some of the time, the applicants announced KEA recommended prices and therefore concerted on those prices.

*B. Concertation on transaction prices*

133 In Article 1(3) of its decision, the Commission also found that the applicants who were members of KEA concerted on transaction prices within that association.

134 Even though Article 1(3) does not provide any indication in that regard, that infringement must be regarded as having been committed during 1975 and 1976. In paragraphs 120 and 121 of the decision, the Commission states that the KEA recommended prices were observed 'at least during the years 1975 and 1976', whilst 'in 1977 and 1978, there might have been a discrepancy between the recommended price and the price charged'. In response to the inference drawn by some applicants from those allegations that the Commission's view was that the prices recommended by KEA had not been observed during 1979, 1980 and 1981, the Commission replied that if 'it had to restrict its finding to the years 1975 and 1976', that was because 'it was not in possession of the necessary information as to KEA recommended prices in the years 1979 to 1981'. It is clear from those allegations that the period of the infringement must be limited to 1975 and 1976.

135 In adjudicating on that infringement, it must be borne in mind that, according to the case-law of the Court (see the judgment in *Hoffman-La Roche*, cited above), in order to comply with the rights of the defence, the undertakings concerned must have been afforded the opportunity, before the Commission adopts its decision, to make known their views on the allegations made against them and on the documents on which those allegations are based.

136 By orders of 25 November 1988 and 16 March 1989, the Commission appointed two experts to ascertain, in particular, that the documents gathered by the Commission in the investigation and, consequently, prior to the statement of objections, justify the conclusion drawn by the Commission that the prices charged by the producers were the same as those they had announced.

137 It is apparent from the expert's report which was submitted to the Court on 10 April 1990 that, at the time when the statement of objections was drawn up, the Commission did not have sufficient invoices to substantiate the allegation that the members of KEA had committed an infringement by concerting on transaction prices. Annex 15-1 to that report clearly revealed that, in the case of three members of the association — Chesapeake Corporation, Mead Corporation and Scott Paper — the Commission had no invoices at all, whereas, in the case of Crown Zellerbach and IPS, it had only three and four invoices respectively. Furthermore, in the case of IPS, those documents related to the years 1977 to 1978, which are not covered by the infringement.

138 It follows that, in establishing the infringement relating to transaction prices, the Commission must have relied essentially on documents gathered after the statement of objections was drawn up. Since the members of KEA had no opportunity to make their views known on those documents, Article 1(3) of the contested decision must be annulled for disregard of the rights of the defence in so far as it concerns that infringement.

### *C. Effect on trade between Member States*

139 Pursuant to Article 85 of the Treaty, anticompetitive conduct may not be penalized by the Commission unless it may also affect trade between Member States.

140 In paragraphs 136 et seq. of its decision, the Commission considers that that is so in the present case. The uniform price level resulting from the practices at issue impeded trade which would otherwise have arisen by reason of the differences in demand, exchange rates and transport costs. Such trade would have been carried

out through independent intermediaries and paper makers reselling their pulp surpluses on the more buoyant market of another Member State.

141 The applicants belonging to KEA challenged that contention on three fundamental grounds. To begin with, their activities are limited to exportation to the Community and do not affect trade between Member States. Next, there is practically no trade in the product between Member States: the few pulp mills in the Community use virtually their entire output in their own paper plants. Furthermore, having regard to storage costs, paper makers generally buy pulp only for their own consumption. Finally, the applicants consider that their market share was too small to have an appreciable impact on trade between Member States.

142 The first objection to the first two arguments is that, as the Court has held (see the judgment in Case 123/83 *BNIC v Clair* [1985] ECR 391), any agreement whose object or effect is to restrict competition by fixing prices for an intermediate product is capable of affecting intra-Community trade, even if there is no trade in that intermediary product between Member States, where the product constitutes the raw material for another product marketed elsewhere in the Community. In this case, it should be noted that wood pulp accounts for 50% to 75% of the cost of paper and, consequently, there is no doubt that the concertation which took place on prices for pulp affected trade in paper between the Member States.

143 Similarly, the third argument advanced by the members of KEA, based on their narrow market share, must be rejected. In that regard, it must be borne in mind that, as the Court has held on several occasions (see, for example, the judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825), if an agreement is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States.

144 In this case, it is apparent from Table 2 annexed to the decision that the exports of the United States producers varied between 14.10% and 17.67% of total consumption of pulp in the Community during the period at issue. Since market shares of that size are not insignificant, it must be held that concertation on announced prices and the exchanges of information which took place within KEA were capable of affecting trade between Member States.

*D. Application of the principle of non-discrimination*

145 Finally, the members of KEA criticize Article 1(3) of the decision on the ground that they have been discriminated against by comparison with Finncell. In paragraph 135 of the decision, the Commission expresses the intention of dealing with the compatibility of Finncell with Article 85 of the Treaty in a separate decision. The members of KEA claim that Finncell has more customers in the Community than KEA and that Finncell's rules, which require pulp to be marketed through that organization, are more constricting.

146 That argument is not material to the assessment of this infringement. The fact that a trader who was in a position similar to that of an applicant was not found by the Commission to have committed any infringement cannot in any event constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established.

147 In the light of all the foregoing considerations, Article 1(3) of the decision must be annulled for breach of the rights of the defence in so far as it establishes that there was concertation between the members of KEA regarding transaction prices.

**V — Concertation within Fides**

148 In Article 1(4) of the decision, St Anne, Finncell and various Swedish, Norwegian, Spanish and Portuguese producers were found to have exchanged within the framework of Fides individualized data concerning prices for deliveries of hard-wood pulp in the period from 1973 to 1977.

149 According to the decision, it was the Finnish producers, together with the Swedish producers, which took the initiative in convening the meetings in question and sought the imposition of some discipline, namely that producers should agree a selling price and each undertake in relation to the others to justify any differences between their prices and the prices fixed by common agreement. The Canadian producer St Anne, for its part, confined itself to participating in the exchange of information on selling prices, without accepting any kind of discipline.

150 The Commission bases its finding regarding this infringement on the various documents and telex messages referred to in paragraphs 44 to 60 of the decision. The documents in question are the minutes of certain meetings, letters in which the producers informed their subsidiaries or sales representatives of the outcome of the meetings in question, and internal notes of certain producers relating to those meetings.

151 The Canadian producer St Anne and the Finnish association Finncell have sought the annulment of that part of the decision.

*A. Participation of St Anne in Fides meetings*

152 St Anne maintains that, so far as concerns it, the infringement involving participation in the meetings within Fides was not set out in the statement of objections.

153 It should be noted, first of all, in that regard that whenever the statement of objections refers to meetings within Fides, it mentions only the Scandinavian and European producers. That is the case, in particular, of paragraphs 61 and 80 in the part entitled 'Applicability of Article 85(1) of the EEC Treaty'. The only exception to that finding is paragraph 32 of the statement of objections which refers to a telex dated 28 March 1977 in which the Spanish producer Empresa informed its agent Becelco of the prices which the Scandinavian producers, on the one hand, and the producers St Anne, Portucel and Celbi, on the other, were charging. However, that document cannot be taken into consideration. Since it is set out in the factual part of the statement of objections and no conclusion was drawn from it in the legal assessment, it cannot serve to determine the conduct with which the applicants are

charged. Next, it should be noted that Annex VII to the statement of objections which, according to the heading, lists the 'Principal members of the Hardwood Pulp Section of Fides', makes no mention of St Anne.

- 154 In those circumstances, it must be held that at the stage of the statement of objections the applicant St Anne could not have taken cognizance of the complaint relating to its participation in the Fides meetings or, consequently, have defended itself in that regard. Accordingly, since the rules set out in Article 2(1) and Article 4 of Regulation No 99 have been disregarded, Article 1(4) of the decision must be annulled in so far as it concerns St Anne.

*B. Finncell's participation in the Fides meetings*

- 155 So far as concerns participation in the Fides meetings, Finncell claims in the first place that the information and documents referred to in paragraphs 57 to 60 of the decision were gathered after the statement of objections and that it was not given the opportunity to state its views on those documents prior to the decision.
- 156 As is clear from the actual wording of the decision, the information at issue stems from the replies given by other undertakings to the statement of objections. Since the applicant was unable to submit its observations on those documents prior to the decision, those documents must be excluded from the proceedings if the rights of the defence are not to be infringed.
- 157 Finncell also expresses a number of criticisms of the other statements set out in paragraphs 44 to 56 of the decision. First, they serve to substantiate concertation by Finncell with Canadian, Swedish, Norwegian, Spanish and Portuguese producers, whereas in the statement of objections Finncell was alleged only to have exchanged information with GEC, a French economic interest grouping. Secondly, some of those documents refer only to Scandinavian producers, which does not include Finnish producers. Thirdly, the discussions referred to in some of those documents related not to the price of pulp but to other matters such as the state of

the market or the utilization of production capacity. Fourthly, Finncell emphasizes that it had fixed its prices prior to those meetings, which therefore did not have any effect on its prices.

158 Those arguments cannot be accepted.

159 To begin with, the concertation established in the aforesaid paragraphs of the decision is no different, so far as the participants therein are concerned, from that described in the statement of objections. Paragraph 80 of the legal assessment in the statement of objections, which is entitled 'Exchange of information within Fides', does indeed refer only to concertation between GEC and Finncell. However, paragraph 61 of the statement of objections, which is also part of the legal assessment, also refers to cooperation on prices within Fides under the heading 'Cooperation between Scandinavian producers and other European producers' and refers to paragraph 30 of the same document. Paragraph 30 states that Fides had 'a section for hardwood pulp within which the major Scandinavian producers and other European undertakings exchange market information' and refers to the list of participants in Annex VII.

160 Secondly, it is common ground that the term 'Scandinavian' as used in the documents referred to in paragraphs 48, 49, 51, 52 and 53 of the decision covers Finnish producers as well as Swedish producers. Even if that were not the case, it should be pointed out, in addition, that the documents referred to in paragraphs 45 and 54 mention the Finnish producers by name, while paragraph 53 refers to a trip by GEC's manager to Helsinki in order to 'study the possibility of raising prices as from the second half of 1977'. Contrary to Finncell's contention, that step cannot be described as unilateral. The documents set out in paragraphs 51, 53 and 54 show that the aim of the trip was to justify GEC's behaviour with regard to prices in the face of criticism from, in particular, the Scandinavian producers.

161 In response to the third argument, it should be noted that most of the documents considered clearly refer to discussions on prices. That is the case, in particular, of the documents referred to in paragraphs 48, 49, 52 and 53.

162 Finally, the argument to the effect that Finncell's prices were fixed before the Fides meetings is not relevant since the conduct which the Commission complains of in Article 1(4) of the operative part of the decision is not only the producers' participation in meetings at which those prices were fixed but also the fact that a producer imposed on his competitors prices which he had fixed in advance.

163 It follows from the foregoing that, taken together, the documents referred to in paragraphs 44 to 56 of the decision substantiate Finncell's participation in the Fides meetings.

### *C. Effect on trade between Member States*

164 The Finnish applicants consider that, in general, the infringements purportedly established by the Commission cannot have had any effect on trade in pulp between the Member States.

165 They claim that the decision relates exclusively to the patterns of trade between non-member countries and the Member States and that no conclusions may be drawn therefrom as regards intra-Community trade. Furthermore, there is practically no trade in pulp between Member States. Finally, in view of the method of manufacturing pulp and their close links with their suppliers, the paper manufacturers had no interest in seeing the development of parallel imports.

166 Those arguments are similar to those put forward by the members of KEA and call for the same answer as that given in paragraph 143. They must therefore be rejected.

167 In the light of the foregoing, Article 1(4) is annulled for breach of the rights of the defence in so far as it concerns the producer St Anne.



**VI — The clauses prohibiting export and resale**

- 168 The Canadian applicants St Anne, Westar, MacMillan and Canfor seek the annulment of Article 1(5) of the decision, in which they, with other United States, Swedish and Norwegian producers, are charged with applying in contracts for the sale of wood pulp clauses prohibiting buyers from exporting and reselling pulp.
- 169 Without disputing the existence of those clauses, the applicants put forward three lines of argument.
- 170 First, they say, those clauses were inadvertently copied from older contracts and through an oversight had not been removed from the contracts.
- 171 Secondly, they had not had any effect on the other contracting parties: the buyers had never considered themselves to be bound by the obligations stipulated therein and the sellers had never sought to enforce those clauses. Moreover, those clauses were generally removed from the contracts as soon as the statement of objections was received.
- 172 Finally, the contested clauses had not had any effect on trade between the Member States. In view of their close links with the pulp producers, the paper manufacturers were reluctant to deal with competitors in other Member States. That was particularly the case since prices were uniform throughout the Community and such transactions, if they had taken place, would have entailed additional transport, loading and unloading costs. On that point, some producers also emphasize the fact that only a few contracts contained such clauses; for its part, St Anne points out, in particular, that the annual volume of pulp which it sold in the Community during the period in question accounted for only 3% of the total quantity used in the Community.

- 173 Those arguments are not such as to negate the infringement established by the Commission.
- 174 To begin with, it must be pointed out that Article 15(2) of Regulation No 17 authorizes the Commission to impose fines on undertakings where 'either intentionally or negligently' they have infringed Article 85(1) of the Treaty. Accordingly, the fact that the clauses were inserted in the contracts through negligence cannot be taken into account.
- 175 Secondly, it must be borne in mind that, as the Court has consistently held (see, for example, the judgments in Case 86/82 *Hasselblad v Commission* [1984] ECR 883, and in Case C-277/87 *Sandoz v Commission* [1990] ECR I-45), the fact that a clause intended to restrict competition has not been implemented by the contracting parties is not sufficient to remove it from the prohibition in Article 85(1) of the Treaty.
- 176 Finally, in response to the third argument advanced by the applicants, it should be noted that, by its nature, a clause designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets and consequently to affect trade between Member States, a requirement which — it should be recalled (see the judgment in Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299) — is merely intended to define which agreements are covered by Community law.
- 177 Accordingly, it must be held that, by inserting clauses prohibiting export and resale in their contracts or general conditions of sale, the applicants St Anne, Westar, MacMillan and Canfor have infringed Article 85(1) of the Treaty.

## VII — The undertaking

- 178 The United States applicants — including Bowater but excluding IPS — and the Canadian applicants Westar, Welwood, MacMillan, Canfor and British Columbia have sought the annulment of the undertaking annexed to the decision, in whole or in part.
- 179 In giving that undertaking, those applicants — with the exception of Bowater — have committed themselves to quoting and invoicing at least 50% of their sales to the Community in the currency of the buyer, to quoting prices to remain effective 'until further notice', to communicating them only to the traders specified in that document, to terminating the concertation and exchanges of information which have taken place within KEA and Fides and to ceasing to impose export and resale bans on buyers. The parties which signed that undertaking obtained a substantial reduction in the fine.
- 180 The Commission has asked the Court to declare this claim inadmissible. In its view, the undertaking constitutes a unilateral act by the aforesaid applicants — with the exception of Bowater which did not sign it — and it cannot therefore be the subject of an action for annulment under Article 173 of the Treaty.
- 181 That point of view cannot be accepted. The obligations imposed on the applicants by the undertaking must be regarded in the same way as orders requiring an infringement to be brought to an end, as provided for by Article 3 of Regulation No 17. It follows from the Court's judgment in Joined Cases 6 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223 that that provision authorizes the Commission to take any measures which are necessary to terminate the infringement which has been established and may include both orders to act and injunctions to refrain from acting. In giving that undertaking, the applicants thus merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally.
- 182 The provisions of the undertaking must be divided into two separate categories: the first category embraces the rules, such as the undertakings to terminate the

concertation and exchanges of information which took place within KEA and Fides or the undertaking to remove the clauses prohibiting export or resale, which require the applicants to bring to an end the unlawful conduct complained of in Article 1(3), (4) and (5) of the decision, and the second category comprises the rules designed to break up the system of price announcements and to reduce the transparency of the market. The obligation to quote prices for pulp to remain effective until further notice, the obligation to quote and invoice prices, as regards 50% of sales, in the currency of the buyer, and the delimitation of the traders to whom prices may henceforth be disclosed, fall in the second group.

- 183 The grounds for annulling the rules forming part of the second group follow logically from what the Court has already held. Since it has not been established that the system of price announcements did not respond to the requirements of the market or that the transparency which it had created was to be regarded as artificial, it is apparent that the provisions aimed at altering that system are devoid of purpose.
- 184 The rules which require the applicants to bring to an end certain conduct found to have been carried out within KEA and to refrain from exchanging information within Fides and from inserting clauses prohibiting export and resale in contracts or general conditions of sale merely set out the future consequences which must be drawn by the addressees from Article 1(3), (4) and (5) of the decision. Those rules continue to apply in so far as they relate to findings of infringements which have not been declared void by the Court.
- 185 Accordingly, the provisions of the undertaking must be annulled in so far as they impose obligations other than those resulting from findings of infringements made by the Commission which have not been declared void by the Court.

### VIII — The fines

- 186 It follows from the foregoing that only the infringements or part of the infringements set out in Article 1(3), (4) and (5) of the operative part of the decision must

be upheld. Those infringements are, it will be recalled, in the first place, in the case of the members of KEA, concertation on announced prices and the exchange of individualized data on prices within that association, secondly, in the case of Finncell, the exchange of individualized data on prices with other producers within Fides and, thirdly, in the case of the Canadian applicants St Anne, Westar, MacMillan and Canfor, the insertion of clauses prohibiting export or resale in contracts or general conditions of sale.

*A. The infringements relating to KEA*

187 It is apparent from paragraph 146 of the decision that no fine was imposed on the United States producers in respect of their participation in KEA's activities. Since this action is the first in which the Webb Pomerene Act is in issue, the defendant has acknowledged that the producers concerned were unaware that their conduct was contrary to the EEC Treaty.

*B. The infringement relating to Fides*

188 Under Article 3 of the decision the applicant Finncell was ordered to pay a fine of ECU 100 000 for exchanging information on prices with other producers within Fides.

189 In that regard, it should be borne in mind that Finncell played a predominant role within the association and that the infringement lasted from 1973 to 1977. In view of the gravity and the duration of the infringement, the fine imposed by the Commission should be maintained.

*C. The infringement relating to the clauses prohibiting export and resale*

190 By Article 3 of the decision, fines of ECU 125 000, ECU 150 000, ECU 200 000 and ECU 150 000 were imposed on the applicants Canfor, MacMillan, St Anne and Westar respectively.

- 191 Those fines were imposed for the application of export and resale bans and, in the case of Canfor, MacMillan and Westar, for the infringements involving participation in general concertation on announced prices and transaction prices and, in the case of St Anne, for the infringements involving participation in general concertation on announced prices and in Fides meetings.
- 192 Since only the infringement relating to the clauses prohibiting export and resale has been upheld against those applicants, it is necessary to review the amount of the fines imposed.
- 193 The clauses prohibiting export and resale do indeed directly jeopardize freedom of trade between Member States and, consequently, constitute serious infringements of the Treaty.
- 194 However, it should be noted that the parties concerned rapidly brought that infringement to an end. The only contract concluded by Westar which contained the contested clause ceased to have effect as from 31 December 1978, that is to say well before the statement of objections, which is dated 4 September 1981. The applicants Canfor and St Anne removed the contested clauses from their contracts or general conditions of sale as soon as the statement of objections was received. MacMillan, for its part, maintains, without being contradicted by the Commission, that it removed the clause from all of its contracts at the end of 1981.
- 195 Furthermore, it should be pointed out that in their defence all the applicants state, without being contradicted by the Commission, that the insertion of the contested clause in contracts or general conditions of sale was solely the result of their negligence.

- 196 Finally, it should be noted that, so far as this penalty is concerned, the applicants Canfor and Westar claim to have been discriminated against by comparison with the producer ITT Rayonier. Although that producer had also inserted clauses prohibiting export and resale in its general conditions of sale, no penalty at all was imposed on it by the Commission. Westar, which was found by the Commission to have only one contract containing the contested clause, claims to have been discriminated against in a particularly flagrant manner.
- 197 That argument cannot be upheld. Where an undertaking has acted in breach of Article 85(1) of the Treaty, it cannot escape being penalized altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court.
- 198 In the light of the foregoing considerations, the fine imposed on each of the parties concerned must be fixed at ECU 20 000.

### Costs

- 199 By order of 20 March 1990, the action brought by Mead Corporation, a member of KEA, was removed from the register and the costs were reserved.
- 200 Under the first subparagraph of Article 69(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs, if they have been applied for by the opposite party. Since the Commission has asked for Mead Corporation to be ordered to bear its own costs, such an order must be made.
- 201 For the rest, under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs and, where there are several unsuccessful parties, the Court is to decide how the costs are to be shared.

- 202 For the purpose of apportioning the costs in this case, it is necessary to make a distinction between the costs of the two expert's reports and the other costs.
- 203 The costs of the expert's reports must be borne by the Commission as those reports relate to the infringements established by the Commission in Article 1(1) and (2) of the decision, which have been declared void by the Court.
- 204 As regards the other costs, two-thirds must be borne by the Commission, one-ninth by the applicants who are members of KEA, one-ninth by Finncell and one-ninth by the Canadian applicants St Anne, Westar, MacMillan and Canfor.
- 205 That apportionment takes account of the fact that the Commission has been unsuccessful in its pleas on the infringement regarding general concertation on announced prices, the infringement regarding general concertation on transaction prices, the infringement regarding concertation on transaction prices within KEA and the infringement regarding the exchange of information within Fides so far as concerns St Anne, whilst the applicants who are members of KEA have been unsuccessful in their pleas on the infringements regarding concertation on announced prices and the exchange of information within that association, Finncell has been unsuccessful in its pleas on the infringement regarding the exchange of individualized data on prices within Fides and the aforesaid Canadian applicants have been unsuccessful in their pleas on the infringement regarding the clauses prohibiting export and resale.
- 206 Finally, under Article 69(4) of the Rules of Procedure, the United Kingdom, which has intervened in support of the Commission in several of the cases, is to bear its own costs.



On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls Article 1(1) of Commission Decision 85/202/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty;**
2. **Annuls Article 1(2) of the aforesaid decision;**
3. **Annuls Article 1(3) of the aforesaid decision, in so far as it establishes concertation on transaction prices;**
4. **Annuls Article 1(4) of the aforesaid decision, in so far as it concerns the applicant St Anne;**
5. **Dismisses the applications against Article 1(5) of the aforesaid decision as unfounded;**
6. **Annuls the provisions of the undertaking annexed to the decision in so far as they impose obligations other than those resulting from the findings of infringements made by the Commission which have not been declared void by the Court;**
7. **Annuls the fines imposed on the applicants, with the exception of that imposed on Finncell and with the further exception of those imposed on Canfor, MacMillan, St Anne and Westar, which are reduced to ECU 20 000;**
8. **Orders Mead Corporation to bear its own costs;**
9. **Orders the Commission to bear the costs of the two expert's reports commissioned by the Court;**

**10. Orders the Commission to pay two-thirds of the remaining costs and the members of KEA to pay one-ninth, Finncell to pay one-ninth and the Canadian applicants St Anne, Westar, MacMillan and Canfor to pay one-ninth of those costs;**

**11. Orders the United Kingdom, the intervener, to bear its own costs.**

Rodríguez Iglesias

Zuleeg

Joliet

Moitinho de Almeida

Grévisse

Delivered in open court in Luxembourg on 31 March 1993.

J.-G. Giraud

G. C. Rodríguez Iglesias

Registrar

President of the Fifth Chamber