JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
14 July 1994 *

In Case T-77/92,

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

applicant,

v

Commission of the European Communities, represented by Berend-Jan Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 92/426/EEC of 15 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case

* Language of the case: English.

IV/32.725 — *Vibo/Parker Pen* — OJ 1992 L 233, p. 27) or, in the alternative, the annulment or reduction of the fine imposed on the applicant,

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

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

Registrar: H. Jung,

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

gives the following

Judgment

Facts and procedure

1 Parker Pen Ltd (hereinafter 'Parker'), a company incorporated under English law, produces a wide range of writing utensils, which it sells throughout Europe, where it is represented by subsidiary companies or independent distributors.

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

3 Viho Europe BV (hereinafter 'Viho'), a company incorporated under Netherlands law, imports and exports office equipment and cinematographic productions, particularly in the Member States.

4 In 1986 Parker and Herlitz concluded a distribution agreement, signed by Parker on 29 July and by Herlitz on 18 August, clause 7 of which states as follows: 'Herlitz wird Parker-Artikel ausschließlich in der Bundesrepublik Deutschland vertreiben. Jeglicher Vertrieb über die Landesgrenzen hinaus ist Herlitz untersagt bzw. nur mit schriftlicher Erlaubnis durch Parker gestattet'. ('Herlitz will distribute Parker articles solely in the Federal Republic of Germany. Any distribution by Herlitz outside Germany is prohibited and may take place only with Parker's written consent'.)

5 On 19 May 1988 Viho lodged a complaint against Parker under Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), in which it complained that Parker was prohibiting the export of its products by its distributors, dividing the common market into national markets of the Member States, and maintaining artificially high prices for its products on those national markets.

6 In reply to a request for supply of Parker products sent to it by Viho on 20 April 1989, Herlitz GmbH&Co KG, a wholly-owned German subsidiary of Herlitz, replied by fax on 24 April 1989: 'Unfortunately we must inform you that we are not allowed to export any of the abovementioned products. We regret not being able to reply positively'.

7 Viho replied on the same day to the Export Sales Manager of Herlitz in the following terms: 'As we understand from your fax, Herlitz GmbH is not allowed by the manufacturers, distributors of products that are not own "Herlitz" products, to export those products to any other country. Not that Herlitz is not willing to export, but only because Herlitz is bound [by] these restrictions from others than [them] selves. If above is rightly understood, please confirm by return telex or fax. If not, please explain further'.

8 On 25 April 1989 the Export Sales Manager of Herlitz replied to Viho by fax: 'Herlitz produces approximately 80% of the products which they sell themselves. Out of the 20% manufactured by other companies, we can sell quite a number of items abroad but not the product that you had asked for. Most European suppliers of brand name products have exclusive sales agreements in each country and thus prohibit export of their particular product into a country where they already have an agreement. It is not that Herlitz does not want to sell, but it is bound to a contract. We count on your understanding'.

9 During an investigation carried out at Herlitz's offices on 19 and 20 September 1989, Commission officials found the distribution agreement concluded in 1986.

10 On 28 September 1989 Parker informed Herlitz that clause 7 of the agreement had been deleted and on 18 December 1989 Parker sent to Herlitz a revised draft of the contract governing their relationship and explained that for legal reasons some amendments were necessary.

11 On 21 January 1991 the Commission sent a Statement of Objections to Parker.

12 On 22 May 1991 Viho lodged another complaint against Parker, which was registered at the Commission on 29 May 1991, in which it claimed that the distribution policy pursued by Parker whereby it required its subsidiaries to restrict the distribution of Parker products to their allocated territories, constituted an infringement of Article 85(1) of the Treaty. The Commission rejected that complaint by its decision of 30 September 1992.

13 Following Parker's observations on 16 April and 31 May 1991 in response to the Statement of Objections, a hearing took place in Brussels on 4 June 1991.

14 On 15 November 1991 Parker's legal adviser asked the Commission for an English translation of the minutes of the hearing of 4 June 1991.

15 On 15 July 1992 the Commission adopted Decision 92/426/EEC relating to a proceeding under Article 85 of the EEC Treaty (Case IV/32.725 — *Viho/Parker Pen* — OJ 1992 L 233, p. 27), the operative part of which is as follows:

'*Article 1*

Parker Pen Ltd and Herlitz AG have infringed Article 85(1) of the EEC Treaty by including an export ban in an agreement concluded between them.

Article 2

The following fines are hereby imposed on the undertakings specified below:

— a fine of ECU 700 000 on Parker Pen Ltd,

— a fine of ECU 40 000 on Herlitz AG.

(Omissis)

Article 3

Parker Pen Ltd shall not adopt any measures having the same object or the same effect as the Treaty infringements established.'

16 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 24 September 1992, Parker brought the present action.

17 In its application Parker requested that confidential treatment be accorded to the data concerning its turnover and market shares and that they should not be divulged at the hearing or in the published version of the Court's judgment, or to any intervener or third party.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. However, it invited the Commission to produce the authenticated original version of the contested decision. The Court also granted Parker's request for confidential treatment.

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

Forms of order sought

20 The applicant claims that the Court should:

(i) annul the Commission's decision of 15 July 1992 concerning a procedure under Article 85 of the EEC Treaty (IV/32.725 — *Viho/Parker Pen*) which is addressed to Parker and was received by it on the same date;

(ii) in the alternative, annul the contested decision to the extent that it imposes on Parker a fine of ECU 700 000;

(iii) in the alternative, fix the fine at a token amount or, at least, reduce it substantially and equitably;

(iv) order the Commission to pay the costs of the proceedings;

(v) order the Commission to reimburse Parker all its expenses incurred in providing security for payment of the fine.

21 The defendant contends that the Court should:

(i) dismiss as inadmissible the request for an order that the Commission reimburse Parker the expenses incurred in providing security for payment of the fine;

(ii) dismiss the rest of the application as unfounded;

(iii) order Parker to pay the costs of the proceedings.

The claim for annulment of the decision, or in the alternative a reduction of the fine

22 Parker relies in substance on four pleas in support of this claim. The first plea is based on infringement of Article 85(1) of the Treaty; the second plea alleges that the contested decision contains an inadequate statement of reasons; the third alleges that rules governing form and procedure have been infringed, since the decision was not adopted in the prescribed manner and an English version of the minutes of the hearing was also not sent to it; the fourth plea alleges an infringement of Article 15(2) of Regulation No 17.

23 Having seen the original authenticated version of the contested decision produced by the Commission at the Court's request, Parker's representative declared at the hearing that it withdrew its plea alleging infringement of the procedural rules governing the adoption of Commission decisions.

The alleged infringement of Article 85(1) of the Treaty

24 The plea alleging infringement of Article 85(1) of the Treaty is in two parts. First, although Parker does not deny the existence of the clause prohibiting exports, it complains that the Commission has failed to prove that it affects trade between Member States. Secondly, Parker considers that in any event the Commission had no legal interest in bringing the proceedings against it.

The effect on trade between Member States

Appreciable effect on trade

— Summary of the parties' arguments

26 Parker observes that, according to the case-law of the Court of Justice, an agreement which by its very nature restricts competition falls outside the prohibition in Article 85(1) if it has only an insignificant effect on the markets (judgments in Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7, and Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 7).

27 Parker claims that in order to come to a decision regarding its anti-competitive conduct, the Commission ought to have made a detailed examination of the structure and operation of the relevant market (judgment of the Court of First Instance in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 159). It complains that in the decision the Commission failed to identify the relevant geographical market and merely listed Parker's market shares in various Member States and referred to its 'Community market share'. The Commission appears to have assumed that Germany was the relevant geographical market.

28 Parker observes that according to the Commission Notice on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2, hereinafter 'the notice'), the relevant geographical market is the area within the Community in which the agreement produces its effects. Consequently, it considers that the Commission ought to have taken the whole Community to be the relevant geographical market, because its writing utensils are purchased and sold on a regular basis in all the Member States.

29 The market share of its distributor Herlitz in the relevant market, which Parker claims is the market share which ought to be taken into consideration in this case in accordance with the judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 58, is approximately (...)% [1] in the Community. Observing that according to the judgment in the *Miller* case (cited above, paragraph 9), an undertaking which has a share of the relevant market of approximately 5% is of sufficient importance for its conduct to be, in principle, capable of affecting trade, Parker concludes that the agreement at issue could not have affected trade between Member States to an appreciable extent.

1 — Figures appearing between brackets have been omitted from the non-confidential version of this judgment.

30 Parker then claims that the Commission ought to have taken into account not only the market share of Herlitz, but also the level of turnover concerned. Between 1 March 1987 and 28 September 1989, the period during which the export ban was included in the agreement, Parker's average annual turnover in the Member States was approximately ECU (...) and its sales to Herlitz during the same period were for an average annual amount of ECU (...). Consequently, sales by Herlitz of Parker products were less than (...)% of Parker's total annual sales in the Community for the relevant period.

31 Finally, Parker denies that it holds a strong position on the market. It points out that its worldwide turnover during 1989 did not exceed ECU (...), that its turnover in the Community in 1991 amounted to only ECU (...) and that the independent distributors which distribute its products in the Community are mainly small family companies.

32 Parker accepts that this case does not fall within the scope of the notice, but nevertheless observes that the notice expressly states that the quantitative definition of 'appreciable' given by the Commission is no absolute yardstick and that it is quite possible that in individual cases agreements between undertakings may still only have a negligible effect on trade between Member States or on competition, and are therefore not caught by Article 85(1) of the Treaty, even where the products or services forming the subject-matter of those agreements represent more than 5% of the total market for those goods or services, and where the aggregate annual turnover of the participating undertakings exceeds ECU 200 million.

33 Parker concludes that the agreement at issue was not capable of affecting trade between Member States to an appreciable extent: its potential effect on intra-Community trade was practically nil because the wholesale prices charged by

Parker were similar in the various Member States, Herlitz held an insignificant market share, and the relevant turnover was very small.

34 The Commission, which points out that Parker does not deny the existence of the clause prohibiting exports, contends that, according to the notice, the figure to be taken into consideration is 'the aggregate annual turnover of all the participating parties', that is to say, the supplier and the distributor, since that turnover is the only element capable of revealing the economic strength of the parties concerned. In 1988 Parker's worldwide turnover was ECU (...) whilst Herlitz's total turnover was ECU (...). Taken together, those turnover figures are such as to prevent the agreement from falling within the scope of the notice.

35 The Commission contends that the notice also does not apply in this case because Parker has an average share in the market for writing utensils in the medium and upper price ranges of (...)% in the Community and approximately (...)% in the German market. It considers that it was not necessary to establish separately Herlitz's market share in Germany since Herlitz achieves almost (...)% of sales of Parker products in the Community, which is sufficient to show that it was a major customer of Parker on the German market.

36 The Commission believes that it is appropriate to regard the Parker group as holding a strong position, taking into account its size and its average share on the Community market. The statement in point 4 of the decision that it had not been possible to establish that Parker holds a dominant position does not adversely affect Parker's legal position.

— Appraisal of the Court

37 It is not disputed in this case that in 1986 Parker concluded an agreement with Herlitz which included a clause prohibiting exports. The Court of Justice has consistently held that 'by its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer, since the agreed purpose of the contracting parties is to endeavour to isolate a part of the market' (see the judgments of the Court of Justice in *Miller* v *Commission*, cited above, paragraph 7, and, most recently, in Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 176 ('Woodpulp')).

38 However, the Commission may not penalize anti-competitive conduct under Article 85(1) of the Treaty unless it affects trade between Member States.

39 To be capable of affecting trade between Member States, a decision, an agreement or a concerted practice must make it possible to foresee with a sufficient degree of probability, on the basis of a set of objective elements of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of hindering the attainment of the objectives of a single market between States. That influence must also be appreciable (*Völk*, cited above, paragraph 5, and, most recently, the judgment of the Court of First Instance in Case T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995, paragraph 55). Accordingly, even an agreement according absolute territorial protection escapes the prohibition laid down in Article 85 of the Treaty where it affects the market only insignificantly, regard being had to the weak position of those concerned on the market for the products in question (judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 85).

40 The influence which an agreement may have on trade between Member States is to be determined by taking into account in particular the position and importance of the parties on the market for the products concerned (judgment of the Court of Justice in Case 99/79 *Lancôme* v *ETOS* [1980] ECR 2511, paragraph 24).

41 In order to determine the importance of the position occupied by the undertakings on the relevant market, it is first necessary to define that market. In the present case, the products concerned are described in point 4 of the decision as follows: 'The relevant product market comprises writing utensils in the medium and upper price ranges'.

42 At the hearing Parker confirmed that it did not contest the definition of the relevant product market. However, it complains that the Commission has failed to identify the geographical market. In that respect, the Court finds that in point 4 of its decision the Commission indicated Parker's market shares in the various Member States and that in points 11 and 18 of its decision it observed that in the case of the relevant products there were price differences between the Member States which might give rise to a parallel trade, and that Parker products had a substantial share of the Community market.

43 It follows that the Commission defined the market appropriately and referred to the markets of all the Member States and not merely the German market.

44 The Court of Justice has held that when it is evident that the sales of at least one of the parties to an anti-competitive agreement constitute a not inconsiderable proportion of the relevant market, Article 85(1) of the Treaty should be applied (see the judgment in *Miller*, cited above, paragraph 10).

45 In this case it is not disputed that Parker has a market share of (...)% on the relevant product market in Germany and a market share of (...)% on that market in the Community, and that the turnover of Parker and Herlitz in 1989 exceeded ECU (...). Those figures show that Parker and Herlitz are undertakings of sufficient importance for their conduct to be, in principle, capable of affecting intra-Community trade. Moreover, it is not disputed that Herlitz is a major client of Parker on the German market.

46 Having regard to the importance of the position which Parker holds, the size of its production, its sales in the Member States and the proportion of sales of Parker products made by Herlitz, the Court therefore considers that the clause at issue, which sought to prevent exports and, accordingly, parallel imports into the other Member States and thus to partition national markets, is capable of affecting appreciably patterns of trade between Member States in such a way as to jeopardize the attainment of the objectives of the common market. Consequently, the Commission was correct in considering in point 18 of the contested decision that, by restricting parallel imports and exports, the agreement between Parker and Herlitz was such as to affect trade between Member States appreciably.

The implementation of the clause prohibiting exports

— Summary of the parties' arguments

47 Parker states that Parker Pen GmbH, its German subsidiary, supplies wholesalers and retailers established in Germany, the major German retailers being represented by the Großeinkaufsvereinigung Deutscher Bürobedarfsgeschäfte (GDB) and Büro Aktuell (BA), which represent 80% of all sales of office supplies in Germany. In order to broaden its distribution channels and reduce its dependence on traditional

specialist retailers, Parker linked up with Herlitz, which has developed in Germany the concept of 'all out of one hand'. According to that concept, self-service and department stores make available to Herlitz 50 to 100 m^2 of floor space on which Herlitz installs display fittings, supplies stock and, where necessary, varies it, while Parker delivers the products ordered by Herlitz in special German-language blister packs.

48 Parker argues that the refusal by Herlitz to supply Viho is the result not of implementing the agreement, but of Herlitz's internal policy, which is to refuse to supply wholesalers such as Viho because they do not operate self-service shops and do not therefore fit into its business concept. In fact, Viho's complaint to the Commission in 1988 is explained by Parker's refusal to give Viho preferential prices.

49 Parker also states that Herlitz exported products covered by the agreement to Austria and Switzerland. It points out that at the hearing on 4 June 1991 Herlitz admitted that it exported Parker products whenever its customers operated internationally, which also applied with respect to France.

50 According to Parker, it follows that the Commission misinterpreted the facts of this case when it stated, in the eighth paragraph of point 16 of its decision, that the two faxes sent by Herlitz to Viho show that Herlitz implemented the distribution agreement concluded between it and Parker.

51 Finally, Parker points out that the fax sent to Viho on 24 April 1989 was sent by Herlitz GmbH&Co KG, a legal entity which is distinct from Herlitz AG, the company which was a party to the agreement and to the proceedings before the Commission.

52 The Commission states that for Article 85(1) of the Treaty to apply it is sufficient that an agreement has an anti-competitive object, no actual effect on the market being necessary (see the judgments of the Court of Justice in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 341, and in Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 22).

53 Without prejudice to that observation, the Commission nevertheless contends that the export ban was actually applied. It points out that Herlitz's export sales manager informed Viho on two occasions that Herlitz was not authorized to sell Parker products outside Germany. The correspondence exchanged with Herlitz was adequate proof that Herlitz justified its refusal by reference to a contract, which was, therefore, implemented.

54 Finally, the Commission alleges that the prohibition on exports agreed between Parker and Herlitz was capable of preventing sales by Herlitz to wholesalers established in other Member States. It contends that Herlitz assumes the role of wholesaler because it sells Parker products not directly to consumers, but to department stores which resell them to their customers. That is illustrated by the fact that Herlitz exported products not of its own manufacture to Switzerland and Austria and also by the fact, admitted by Herlitz at the hearing, that it had started to sell Parker products to major customers operating abroad, including France.

— Appraisal of the Court

55 The fact that a clause prohibiting exports, which by its very nature constitutes a restriction of competition, has not been implemented by the distributor with which it has been agreed does not prove that it has had no effect, because according to the judgment in *Miller* (cited above, paragraph 7) its existence may create a

'visual and psychological' effect which contributes to a partitioning of the market, and accordingly the fact that a clause which is 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 (see the judgments of the Court of Justice in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 46, and, most recently, *Ahlström Osakeyhtiö*, cited above, paragraph 175).

56 Furthermore, the Court finds that in this case Herlitz used the export ban to justify its refusal to sell Parker products to Viho.

57 The Court cannot accept Parker's attempt to argue that it was not Herlitz AG, but Herlitz GmbH&Co KG which sent the faxes refusing to deliver Parker products to Viho. It is not disputed that the agreement in question was the result of a contract concluded between Parker and Herlitz AG. It is also not contested that Herlitz GmbH&Co KG is a wholly-owned subsidiary of Herlitz AG and entirely dependent on that company. Accordingly, the conduct of the subsidiary must be regarded as being attributable to the parent company (see the judgments of the Court of Justice in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 136 to 141, and Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41).

58 Moreover, it is apparent from the arguments presented at the hearing that the inclusion of the clause prohibiting exports in the agreement at issue had the advantage for Parker of restricting to Germany the distribution of Parker products under the business concept implemented by Herlitz. Despite the special features of that concept, in particular as regards language, it does not therefore appear to have excluded the possibility of exports by Herlitz, since the parties, or at least Parker, considered it necessary to insert in the distribution agreement an express clause prohibiting exports.

59 In any event, arguments based on the current situation, even if they were to prove correct, cannot suffice to establish that clauses prohibiting exports are not capable of affecting trade between Member States. The situation may vary from one year to the next as changes in the conditions or composition of the market occur, both in the common market as a whole and in the various national markets (see the judgment in *Miller*, cited above, paragraph 14). Accordingly, the claim that the clause at issue was not implemented must be rejected.

— *The Community interest in bringing the proceedings*

Summary of the parties' arguments

60 Parker claims that the Commission had no interest in bringing proceedings against it, particularly in view of the fact that the Commission had rejected Viho's complaint concerning its policy of referring orders from customers in another Member State to its local subsidiaries in that Member State. It observes that in the *Automec* case the Commission discontinued the proceedings on the ground that its duty to safeguard the public interest required it to take action primarily against activities which, as a result of their scope, seriousness and duration, constituted a very serious restriction of competition, and that the Court confirmed that its decision was correct (judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 77).

61 The Commission states that Parker raises the argument that the Commission ought to have rejected Viho's complaint on the grounds of lack of Community interest for the first time in the reply. The Commission believes that, although it may reject a complaint in cases with limited economic impact or little legal significance, it is not legally obliged to do so. It points out, moreover, that the judgment in *Automec*, cited above, was delivered after the adoption of the contested decision

in the present action and that it cannot therefore be accused of having disregarded it.

Appraisal of the Court

62 Parker supports the argument concerning lack of Community interest, which was raised only in the reply, by referring essentially to the fact that on 30 September 1992 the Commission rejected the complaint in which Viho challenged Parker's policy of referring orders from customers in a Member State to its local subsidiary based in that Member State. Since that decision was adopted after 24 September 1992, the date on which this action was brought, it may be considered to be a matter of law or of fact which has come to light in the course of the procedure, within the meaning of Article 48(2) of the Rules of Procedure.

63 The extent of the Commission's obligations in matters of competition law must be considered in the light of Article 89(1) of the Treaty, which constitutes, with regard to those matters, the specific expression of the general supervisory role conferred on the Commission by Article 155 of the EEC Treaty. In addition, in order to assess the Community's interest in pursuing the investigation of a case, the Commission must take account of the circumstances of the individual case and the matters of fact and of law contained in the complaint submitted to it.

64 In this case, it is sufficient to find that the Commission was correct to describe, in the eighth paragraph of point 16 of its decision, the clause prohibiting exports as an agreement within the meaning of Article 85(1) of the Treaty and to hold that it was capable of affecting trade between Member States to an appreciable extent.

65 It follows that, in deciding to continue the proceedings after discovering a document which at first sight indicated an infringement of Article 85(1), the Commission made correct use of its discretion and did not commit an error of law. The claim alleging a lack of Community interest must therefore be rejected.

66 It follows from the foregoing that the plea of infringement of Article 85(1) of the Treaty must be rejected.

The plea alleging an inadequate statement of reasons

67 Parker considers that all the complaints made against the Commission's decision suffice to show that the decision does not satisfy the requirement that the reasons on which it is based be stated, as provided for in Article 190 of the EEC Treaty.

68 The Commission considers that it has correctly stated the reasons for which it rejected Parker's arguments and has adequately shown that the agreement was capable of affecting trade between Member States to an appreciable extent.

69 The Court finds that it follows from its appraisal of the proof of the infringement under Article 85(1) of the Treaty set out in the contested decision that the Commission has adequately taken into account Parker's arguments on the matters of fundamental importance in this case, and that there has therefore been no infringement of the duty to state the reasons on which the decision was based. Accordingly, the plea alleging an inadequate statement of reasons must be rejected.

The plea alleging infringement of the procedural rules

Summary of the parties' arguments

70 Parker complains that the Commission failed to provide it with a full English translation of the complete text of the minutes of the hearing on 4 June 1991, which it is was entitled to receive pursuant to Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59, hereinafter 'Regulation No 1') and Articles 217 and 248 of the EEC Treaty.

71 The Commission argues that Parker was represented at the hearing and that its representatives could have listened to the simultaneous interpretation of the hearing. It contends that under Article 9(4) of its Regulation No 99/63/EEC 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, hereinafter 'Regulation No 99/63') it sends a copy of the minutes to the parties in order to enable them to check that their own statements have been recorded correctly, but there is no provision requiring it to ensure that statements made by the other parties are translated.

Appraisal of the Court

72 Under Article 9(4) of Regulation No 99/63 the essential content of the statements made by each person is to be recorded in minutes which are to be read and approved by him.

73 In this case, Parker was able to ascertain the contents of the minutes sufficiently since they were signed by its lawyer and its president, the latter having added by

way of reserve '(signed) for those parts reported in English and French only and subject to the minor amendments marked on pages 12, 33 and 37'.

74 Furthermore, Parker, which does not deny that it was possible for it to follow what was said during the hearing owing to the simultaneous interpretation provided, does not allege that the lack of a translation of the parts written in German resulted in the minutes' containing substantial inaccuracies or omissions in its regard which could have had harmful consequences capable of vitiating the administrative procedure (judgment of the Court of Justice in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 52).

75 It follows that this plea must be rejected.

Infringement of Article 15(2) of Regulation No 17

76 Parker complains that in imposing the fine the Commission failed to take into account its lack of deliberate intention and infringed the principles of equal treatment and proportionality.

Lack of deliberate intent

77 Parker states that the Commission was able to establish only one infringement of Article 85(1) of the Treaty, an unintentional one, namely the export ban in clause 7 of the agreement. It claims that it did not intend, and could not indeed have intended, to restrict exports by Herlitz to other Member States, since Parker prod-

ucts, because of their packaging, were not suitable for distribution in those countries. However, it was envisaged that products would be offered for sale in the Swiss and Austrian markets.

78 Parker also claims that it was Herlitz which prepared the initial draft agreement and sent it in July 1986 to Parker's director in the United Kingdom with responsibility for Europe, who signed it, contrary to company policy, without seeking legal advice and without making any amendments to it. Parker observes that Herlitz does not dispute that fact and states that at the hearing the representative of Herlitz declared with respect to the agreement at issue: 'No one now knows any more where it came from. It could also have come from Herlitz. We no longer know'. Parker complains that the Commission failed to investigate the precise circumstances in which the clause at issue was included in the agreement.

79 Furthermore, Parker states that it expressly withdrew the export ban from the agreement immediately after its board of directors became aware of it and that a compliance programme had been introduced by it to ensure full observance of the competition rules. That programme, completed in 1987, could not have been applied to clauses which were neither known to exist nor implemented.

80 The Commission accepts that the decision finds only one infringement, namely an agreement or a concerted practice aimed at preventing parallel imports of Parker products, and that Parker's competition law compliance programme and its extremely cooperative attitude are to Parker's credit; nevertheless, it points out that the clause at issue was in force from 1 March 1987 to 28 September 1989, and that it had therefore eluded Parker's efforts to observe the competition rules.

81 The Court points out that, for an infringement of the Treaty's competition rules to be considered to have been committed intentionally, it is not necessary for the undertaking to have been aware that it was infringing a prohibition laid down by those rules; it is sufficient that it was aware that the object of the offending conduct was to restrict competition.

82 In this case, it must be pointed out that Parker has accepted from the beginning of the administrative procedure that a clause prohibiting exports is contrary to Article 85(1) of the Treaty. The Court considers that Parker was aware that the object of the clause at issue was to restrict, and even prohibit, exports and thereby to partition the market; Parker must therefore be considered to have acted intentionally (see the judgment of the Court of Justice in Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 45 to 47).

Infringement of the principle of equal treatment

83 Parker claims that the decision infringes the principle of equal treatment by treating Parker differently from other companies accused of maintaining barriers to exports. In accordance with the Commission's approach in Decision 92/427/EEC of 27 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.800 and 33.335 — *Quantel International — Continuum/Quantel SA*, OJ 1992 L 235, p. 9, hereinafter 'the Quantel decision') and in the *AKZO Coatings* case (Nineteenth Report on Competition Policy, paragraph 45), where it refrained from imposing a fine, in the first case because of the limited effect on trade in the products concerned and in the second case because of the competition law compliance programme implemented by the undertaking in question, the Commission ought to have refrained in this case from imposing a fine and terminated the procedure at an earlier stage, because the agreement with Herlitz was the only example of a barrier to exports, it was not the result of a general policy aimed at restricting competition, and Parker has implemented a competition law compliance programme.

84 The Commission observes that the argument alleging that the principle of equal treatment has been infringed relates to the Commission's continuance of the procedure rather than to the fine which it imposed. It refers to the Opinion of Advocate General Darmon in *Ahlström Osakeyhtiö*, cited above ([1993] ECR I-1307, I-1445, paragraph 527), with which it fully agrees: 'Where an undertaking which has brought an action against a Commission decision has infringed the rules of competition law, it cannot, in my view, escape any of the consequences resulting therefrom by arguing that another trader has also behaved unlawfully'.

85 The Commission also contends that the reference to the Quantel decision is irrelevant, since in that decision the Commission based its conclusion that Article 85(1) was applicable on the fact that the effect on competition and the effect on trade between Member States were appreciable. The fact that in that decision the Commission did not consider it appropriate to impose a fine cannot support Parker's assertion that the agreement concluded with Herlitz has a negligible effect on trade.

86 The Court considers that when an undertaking's conduct has infringed Article 85(1) of the Treaty it cannot escape without penalty on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Community judicature (see the judgment in *Ahlström Osakeyhtiö*, cited above, paragraph 197). Consequently, Parker's argument alleging that in similar circumstances other traders have not been fined must be rejected.

Disproportionate nature of the fine

87 Parker claims, lastly, that the decision infringes the principle of proportionality by imposing on it a fine which is out of proportion to the volume of sales affected by the infringement. It points out that, as the Court of Justice held in *Musique diffusion française* (cited above, paragraphs 120 and 121), for the purpose of fixing the fine, the Commission is free to take into account the volume and value of the goods to which the infringement relates rather than the total turnover of the company, in particular when the relevant goods account for only a small part of that turnover.

88 Pointing out that average annual sales of Parker products by Herlitz between 1 March 1987 and 28 September 1989 amounted to approximately ECU (...), Parker states that the fine imposed represents (...)% of that amount. It considers that that percentage is disproportionate in view of the fact in 1987 that it implemented a wide-ranging competition law compliance programme, which it has continued to pursue since then.

89 The Commission considers that the fine imposed is not out of proportion to the infringement found to have been committed. It observes that Parker's worldwide turnover amounted to slightly more than ECU (...), so that the maximum fine was therefore ECU (...). The fine of ECU 700 000 imposed on Parker represents (...)% of Parker's turnover in the Community (ECU (...)) and (...)% of its turnover on the German market (ECU (...)). Compared with other similar cases involving export bans (*Pioneer, Toshiba, Dunlop*), the fine imposed represents a considerably lower percentage of the turnover in the products to which the infringement relates.

90 Furthermore, the Commission observes that point 24 of the decision sets out reasons for which Parker was treated more leniently: first, Parker took steps to remove the export ban almost immediately after Commission officials discovered it; secondly, Parker was extremely cooperative during the investigations; finally, Parker has set up a detailed competition law compliance programme.

91 Consequently, the Commission considers that it cannot be criticized for acting arbitrarily or excessively when fixing the amount of the fine, since it took into account the mitigating factors in the case.

92 The Court observes that the Court of Justice has held that the amount of the fine must be fixed at a level which takes account of the circumstances and the gravity of the infringement (judgment of the Court of Justice in Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 40) and, in order to fix the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (judgments of the Court of Justice in *ACF Chemiefarma* v *Commission*, cited above, paragraph 176, and in Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraph 53).

93 In this case, the Court considers that the Commission took into account in point 24 of its decision the mitigating factors in favour of Parker, in particular the fact that it cooperated from the beginning of the administrative procedure and also that it implemented a compliance programme intended to ensure compliance by its distributors and subsidiaries with the competition rules.

94 On the other hand, it is apparent from the decision that the Commission did not take into account the fact that the turnover accounted for by the products to which the infringement relates was relatively low in comparison with the turnover resulting from Parker's total sales. It is permissible to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the turnover accounted for by the goods in respect of which the infringement was comitted, which gives an indication of the scale of the infringement. It follows that it is important not to attribute to any of those figures a significance which is disproportionate in relation to the other factors relevant to an assessment and, consequently, that an appropriate fine cannot be fixed merely by a simple calculation based on the total turnover (judgments of the Court of Justice in *Musique diffusion française*, cited above, paragraph 121 and in *Krupp*, cited above, paragraph 37).

95 In the light of those considerations, the Court considers that the fine of ECU 700 000 imposed on Parker is inappropriate, having regard in particular to the low turnover to which the infringement relates, and that it is justified in the exercise of its unlimited jurisdiction to reduce to ECU 400 000 the amount of the fine imposed on Parker.

The claim for reimbursement of expenses incurred in providing security for payment of the fine

Arguments of the parties

96 The Commission submits that the claim for reimbursement of Parker's expenses incurred in providing security for payment of the fine is inadmissible on the ground that the Court of First Instance has no jurisdiction to rule on that claim when reviewing the legality of an act under Article 173 of the EEC Treaty (see the judgment of the Court of Justice in Case 53/85 *AKZO* v *Commission* [1986] ECR 1965).

97 In its reply Parker states that the Court of First Instance must give a decision as to costs in accordance with Article 87(1) of the Rules of Procedure, and that under Article 91(b) of those Rules expenses necessarily incurred by the parties for the purpose of the proceedings are regarded as recoverable costs. It claims that those expenses include expenses incurred by it in providing security for payment of the fine by way of bank guarantee, and rejects the argument that a party whose action contests a fine can avoid additional expenses by opting not to provide a bank guarantee.

98 In its rejoinder the Commission states that the question whether or not the expenses incurred by an applicant in providing security for payment of the fine are recoverable costs need not be answered in the context of an action for annulment of a decision imposing a fine, since it may have to be answered in a subsequent dispute concerning the amount of the costs. The Commission adds that it follows from the Order of the Court of Justice of 20 November 1987 in Case 183/83 *Krupp* v *Commission* [1987] ECR 4611 that in any event the expenses in question cannot be regarded as expenses incurred 'for the purpose of the proceedings' within the meaning of Article 91(b) of the Rules of Procedure.

Appraisal of the Court

99 The application does not indicate the pleas in law on which Parker bases its claim for reimbursement of the expenses of providing the bank guarantee.

100 It follows that with regard to that claim the application does not satisfy the minimum requirements for the admissibility of an application laid down in Article 19 of the Statute of the Court of Justice of the EEC and Article 44(1)(c) of the Rules of Procedure. Accordingly, that claim must be rejected as inadmissible.

101 Moreover, in accordance with the case-law of the Court of Justice (see the Order in *Krupp*, cited above), the expenses incurred by the applicant in this case in providing a bank guarantee cannot be regarded as expenses incurred for the purpose of the proceedings. Accordingly, it is sufficient to find that in any event the claim by Parker for reimbursement of expenses incurred by it in providing a bank guarantee are unfounded in so far as they are based on the provisions of Article 91(b).

Costs

102 Under the first subparagraph of Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may order the costs to be shared or each party to bear its own costs, where each party succeeds on some and fails on other heads. In this case, since each of the parties has succeeded in part, the Court considers that it would be equitable in the circumstances to order each party to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Reduces to ECU 400 000 the amount of the fine imposed on the applicant by Article 2 of Commission Decision 92/426/EEC of 15 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case IV/32.725 — *Viho/Parker Pen*).**

2. **Dismisses the remainder of the application.**

3. **Orders each party to bear its own costs.**

Schintgen García-Valdecasas Kirschner

Vesterdorf Bellamy

Delivered in open court in Luxembourg on 14 July 1994.

H. Jung

Registrar

R. Schintgen

President