# JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

16 December 1999 *

In Case T-198/98,

**Micro Leader Business**, a company incorporated under French law, established in Aulnay-sous-Bois, France, represented by Silvestre Tandeau de Marsac, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Brucher and Seimetz, 10 Rue de Vianden,

applicant,

v

**Commission of the European Communities**, represented initially by José Crespo Carrillo, of its Legal Service, and Loïc Guérin, national expert on secondment to the Commission, and, subsequently, by Giuliano Marenco, Principal Legal Adviser, and Loïc Guérin, acting as Agents, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 15 October 1998 (Case IV/36.219 Micro Leader/Microsoft) definitively rejecting the applicant's

* Language of the case: French.

complaint that the actions of Microsoft France and Microsoft Corporation in seeking to prevent French-language editions of Microsoft software packages marketed in Canada from being imported into France are contrary to Articles 85 and 86 of the EC Treaty (now Articles 81 and 82 EC),

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

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 2 July 1999,

gives the following

## Judgment

1 Micro Leader Business (hereinafter 'the applicant') is a company engaged in the wholesale marketing of office and computer equipment. In particular, it sells

several Microsoft products manufactured by Microsoft Corporation (hereinafter 'MC'), a company incorporated in the United States of America. Until it was prohibited from exporting copies of the software marketed in Canada, the applicant sold, in France in particular, French-language products marketed by MC in Canada, identical or similar to products marketed in France by Microsoft France (hereinafter 'MF').

2 In an information bulletin of 27 September 1995 entitled 'Flash Microsoft News', MF informed its dealers in France that a number of measures had been taken to reinforce the ban on the marketing of Canadian products outside Canada. One of the passages in that information bulletin, headed 'The importation of French-language Canadian products will in future be illegal' reads:

'For 18 months certain distributors had been bringing Canadian French-language Microsoft products on to the French market through importers. Those products were distorting our market because they were marketed at markedly lower prices than those generally found and adversely affected distributors who used the usual Microsoft sales network. In the face of this unfair competition and to stem such illegal imports, Microsoft has introduced a number of measures intended to reinforce the ban on the sale of Canadian products outside Canada ...'

3 The intention announced by MF in its information bulletin of 27 September 1995 was confirmed in the editions of that bulletin of 20 March and 12 June 1996.

4 As a result of that prohibition on importing into France French-language versions of Microsoft products marketed in Canada, the applicant alleges that it lost significant orders for Microsoft products in October 1995.

5 On 24 September 1996 the applicant lodged a complaint with the Commission, registered as Case IV/36.219, under Article 3 of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty) (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), alleging that the conduct of MF and MC, which, in reaching agreements with French and Canadian distributors had created obstacles to the freedom to set prices within the Community, was contrary to Article 85 of the EC Treaty (now Article 81 EC).

6 On 20 February 1997 the applicant amplified its complaint, pointing out that the conduct complained of also constituted a breach of Article 86 of the EC Treaty (now Article 82 EC).

7 On 27 January 1998, the Commission informed the applicant, in accordance with Article 6 of Commission 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 1963-64, p. 47), that the information obtained was insufficient for the Commission to uphold its complaint.

8 On 23 February and 3 April 1998, in response to that letter from the Commission, the applicant submitted further observations in support of its complaint.

9 On 15 October 1998, the Commission sent the applicant its decision rejecting the latter's complaint, expressing the view that there had been no breach of Articles 85 and 86 of the Treaty (hereinafter 'the contested decision').

10 It is against that background that, by application lodged at the Registry of the Court of First Instance on 15 December 1998, the applicant brought this action.

11 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

12 The parties presented oral argument and replied to the Court's questions at the hearing on 2 July 1999.

**Forms of order sought**

13 The applicant claims that the Court should:

— annul the Commission's decision of 15 October 1998 (Case IV/36.219—Micro Leader/Microsoft) rejecting its complaint;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

**Substance**

15 The applicant relies on two pleas in support of its action. The first alleges breach by the Commission of Article 85 of the EC Treaty and Article 190 of the EC Treaty (now Article 253 EC). The second alleges breach by the Commission of Article 86 of the EC Treaty.

*The first plea, alleging breach of Articles 85 and 190 of the Treaty*

Arguments of the parties

16 The applicant pointed out that the provisions of Article 85 of the Treaty prohibit agreements which directly or indirectly fix purchase or selling prices or any other trading conditions and apply even where the undertakings in question have their registered offices outside the Community (Joined Cases 89/85, 104/85, 114/85,

116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193) and stressed that copyright cannot entitle those who hold it to evade the application of those provisions. In that connection it cited previous decisions of the Commission regarding market sharing practices [E. Benn decision, *Ninth Report on Competition Policy*, 1979, No 118-119, and Commission Decision 76/915/EEC of 1 December 1976 relating to a procedure under Article 85 of the EEC Treaty (Case IV/29.018 — Miller International Schallplatten GmbH) (OJ 1976 L 357, p. 40)], and Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, from which it is clear that the imposition of fixed prices is not covered by the specific purpose of copyright.

17 In its reply, the applicant stresses that the exercise by their holder of the rights of an author as defined by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42, hereinafter 'Directive 91/250'), cannot allow the author, by restricting trade between States or imposing a fixed price, to undermine the rules relating to freedom of competition and freedom to fix prices.

18 The applicant also submits that, as is clear from the various information bulletins published by MF in 1995 and 1996, MF coordinates its activities with MC and distributors of Microsoft software in both France and Canada. It alleges that they directly or indirectly fix purchase or selling prices or other trading conditions of such software within the Community, particularly in France. In that connection it stresses that the French-language versions of the software marketed in France and in Canada are identical. It maintains that it is clear from the information bulletin of 27 September 1995 that MC's intention is to keep prices artificially high on the French market for its products so as not to harm its distributors.

19 It also explains that the arrangement made between MC and the Canadian distributors was that the latter would, in accordance with the former's instructions, refuse to sell software to non-approved distributors in France.

20 Finally, the applicant considers that the Commission breached its obligation to state reasons and made an error of assessment in stating in the contested decision that there was neither an agreement nor a concerted practice between MC and its dealers for the purpose of fixing resale prices and that there was no attempt to influence those resale prices. It argues that it is clear from the information bulletin of 27 September 1995 that MC and its dealers were attempting to keep prices artificially high by prohibiting imports from Canada.

21 The Commission rejects the applicant's arguments.

22 It contends, first, that MC and MF cannot be accused of concertation in breach of Article 85 of the Treaty since they form a single economic unit (Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457).

23 It points out, second, that all the information supplied by the applicant indicates that measures were taken by the Microsoft group, only without any intervention by the Canadian distributors.

24 It points out, finally, that, under Article 4(c) of Directive 91/250, the first sale of a copy of a computer program by MC to Canada does not exhaust the distribution right within the common market of that copy. Consequently, the importation into France, without the authorisation of MC, of Microsoft software marketed in Canada constitutes a usurpation of Microsoft's rights. The measures taken by Microsoft are, therefore, merely a lawful means of protecting its rights.

25 Moreover, the Commission contends that the content of MF's information bulletins cited by the applicant offers no proof whatsoever that there is a mechanism for fixing resale prices for Microsoft software.

26 In any event, the Commission disputes that there has been any breach of the obligation to state reasons. It points out that, in the contested decision, it stressed that the applicant had furnished no evidence that Microsoft was restricting the freedom of its dealers to fix their own resale prices.

Findings of the Court

27 As a preliminary matter, it must be observed that whilst the Commission is not under a duty to carry out an investigation when a complaint under Article 3(2) of Regulation No 17 is submitted to it, it is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to distort competition within the common market and affect trade between Member States. Where the Commission has decided to reject the complaint without holding an investigation, the purpose of judicial review of legality by the Court of First Instance is to determine whether the contested decision is based on a correct assessment of the facts and is not vitiated by any error of law, manifest error of assessment or misuse of power (Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 45).

28 In both its complaint of 24 September 1996 and its letter of 23 February 1998, the applicant claims that MF's information bulletins and, in particular, the passage cited above in paragraph 2, indicate that MF coordinates its action with MC and the distributors of Microsoft software established in Canada and in France so as directly or indirectly to fix purchase or selling prices or any other trading conditions of such software within the Community and, in particular, in France, in breach of Article 85(1) of the Treaty.

29 In paragraphs 11 and 12 of the contested decision, the Commission rejected the applicant's allegations as follows:

'11. As regards the alleged breach of Article 85, it does not appear that the actions of Microsoft intended to prevent the importation of copies of its products from Canada can be considered to have been taken under an agreement or a concerted practice between Microsoft and its dealers for the purpose of fixing resale prices. Computer programs are protected by copyright in the European Union under the terms of Directive 91/250. That directive states that the first sale in the Community of a copy of a program by the rightholder or with his consent exhausts the distribution right within the Community of that copy. The cases you mention in your letter of 3 April 1998 (Benn and VBVB) concern the exhaustion of copyright over a copy of a protected work by the marketing of that copy within the common market. They therefore do not call into question the appraisal set out in the letter from DG IV of 27 January 1998. The purchase of a copy of a computer program in Canada does not exhaust the legal protection provided for by Directive 91/250. Thus, any attempt to use or sell such a copy in the Community would represent a breach of copyright and any action taken by Microsoft to prevent the importation of such copies would constitute an attempt to ensure respect for its lawful rights rather than an agreement or concerted practice between Microsoft and its dealers, whether they are in Canada or in the Community.

12. Moreover, it is not clear that the effect of such actions by Microsoft can be construed as an attempt to influence resale prices. You have furnished no evidence that Microsoft is restricting in any way the freedom of its dealers to fix their own resale prices. A dealer must, of course, sell at a higher price than that at which he can legitimately obtain copies of Microsoft products if he wishes to make a profit, but that is implicit in any distribution agreement.'

30 It is, therefore, apparent from the contested decision, first, that the Commission takes the view that the applicant has not put forward any evidence in its

complaint that Microsoft's measures to prevent the importation into France of French-language products marketed in Canada were taken under an agreement with Canadian and/or French dealers. The Commission essentially takes the view that such measures must in fact be considered to be unilateral inasmuch as they constitute the enforcement by MC of the copyright it holds over its products marketed in Canada under Article 4(c) of Directive 91/250. Nor, second, has it furnished evidence that there was an agreement to fix resale prices on the French market.

31 An infringement of Article 85(1) of the Treaty necessarily results from collaboration by several undertakings (Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 79). The Commission cannot, therefore, be accused of having committed an error of law or a manifest error of assessment in taking the view that, in the absence of proof of the existence of an agreement or a concerted practice between two or more undertakings, the actions of the Microsoft group impugned in the applicant's complaint did not constitute an infringement of Article 85(1) of the Treaty.

32 In the present case, it must be ascertained whether, in taking the view that the applicant had furnished no evidence of an agreement or a concerted practice, the Commission committed an error of law or a manifest error of assessment.

33 As regards, first, the applicant's allegations concerning an agreement between MC and its dealers in Canada on partitioning the markets, it must be held that no passage in MF's information bulletins highlighted by the applicant both in its complaint and in its application, in particular the information bulletin of 27 September 1995 cited above in paragraph 2, indicates that the distributors of Microsoft software in Canada refuse to sell their products to non-approved distributors in France. Moreover, the applicant has not furnished any proof of these allegations. It cannot, therefore, be inferred from the evidence set out by the applicant in its initial complaint of 24 September 1996 and in correspondence of

23 February and 3 April 1998 that MC took its decision to prohibit the importation and resale in France of French-language software marketed in Canada under an agreement or concerted practice with its distributors in Canada on partitioning the markets. The Commission, therefore, has in no way failed to fulfil its obligations in taking the view, at paragraph 11 of the contested decision, that the applicant had furnished no evidence of such an agreement or concerted practice.

34 Furthermore, as the Commission itself points out at paragraph 11 of the contested decision, even if MC did in fact restrict in that way the opportunities for Canadian distributors to sell their products outside Canada, MC would merely have been enforcing the copyright it holds over its products under Community law. Under Article 4(c) of Directive 91/250, the marketing in Canada of copies of MC software does not exhaust MC's copyright over its products since that right is exhausted only when the products have been put on the market in the Community by the owner of that right or with his consent (see, by analogy, Case C-355/96 *Silhouette International Schmied* [1998] ECR I-4799 and Case C-173/98 *Sebago and Maison Dubois* [1999] ECR I-4103). Subject to the application of Article 86 of the Treaty (see the findings of the Court on the second plea below), this was an instance involving the lawful enforcement by Microsoft of its copyright.

35 As regards, second, the applicant's allegations of an agreement between MC and its dealers in France to fix resale prices at a high level, it must be held that the applicant has not put forward evidence that there was such an agreement.

36 Thus, the reference, in the passage from MF's information bulletin of 27 September 1995, cited above at paragraph 2, to the difference between the price at which French software was marketed and that of French-language

software imported from Canada, and the effect of that difference on distributors using Microsoft's usual sales network in France, cannot, contrary to the applicant's claims, be considered to be an admission that MC's decision to prohibit the importation into and resale in France of software marketed in Canada was made under an agreement between MC and the French distributors to keep resale prices on the French market at a high level. Indeed, it is clear from other passages of that information bulletin of 27 September 1995 that MF advises its trading partners in France of practical measures taken to combat imports and sales of Canadian French-language software, such as placing yellow labels on products and amending the licence for the use of the Canadian product, and of the civil and criminal penalties incurred by those of its partners who import or resell in France Microsoft software intended exclusively for marketing in Canada. The editions of the MF information bulletin of 20 March and 12 June 1996 follow the same approach. The Commission was, therefore, entitled to take the view that the above reference was intended to highlight the disadvantages for Microsoft's partners of the breach of its copyright.

37 All the evidence compiled by the applicant in fact demonstrates that the prohibition it complains of is a measure taken by the Microsoft group alone, at times in the shape of MC and at others in that of MF.

38 In that regard, the evidence put forward by the applicant shows that MC and MF form a single economic unit within which MF does not enjoy real autonomy in determining its course of action in the market (*Viho* v *Commission*, cited above, paragraph 16). The prohibition laid down by Article 85(1) of the Treaty cannot apply to decisions taken within a corporate group with a view to organising relations between the different parts of the group. Accordingly, even if the prohibition on imports must be considered to be the result of a decision adopted jointly by MF and MC, in the circumstances that cannot constitute an infringement of Article 85(1) of the Treaty.

39 Accordingly, the applicant cannot accuse the Commission of having committed an error of law or a manifest error of assessment in taking the view that the former had put forward no evidence that there was an agreement or a concerted practice with a view to partitioning the markets or fixing prices between Microsoft and its dealers in Canada and/or in France.

40 Finally, it must be observed that, according to settled case-law, the statement of reasons required by Article 190 of the Treaty must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63). In the present case, the Commission expressly stated, in paragraphs 11 and 12 of the contested decision, that it was of the opinion that the evidence put forward by the applicant in its complaint and further correspondence, that is to say the passage from MF's information bulletin of 27 September 1995 cited above at paragraph 2, did not show either that the prohibition on importing into and reselling in France Microsoft French-language software marketed in Canada was imposed under an agreement between Microsoft and its distributors, or that its actions could be considered to be an attempt to influence resale prices. In those circumstances, it must be held that the applicant had all the information it needed to ascertain the reasons for the measure taken and that the Court of First Instance was able to exercise its power of review. The applicant, therefore, cannot argue that the reasons stated in the contested decision are insufficient in that regard.

41 It follows from the foregoing that the first plea raised in the application must be rejected.

*The second plea, alleging breach of Article 86 of the Treaty*

Arguments of the parties

42 The applicant submits, first of all, that the Commission erred in not accepting that it had put forward evidence of a dominant position in its complaint and further observations. In that connection the applicant pointed to a number of articles published in the French press in 1995 and 1996 to illustrate the discrepancy between the market share of the Microsoft group and that of its competitors, and the independence of the group from its dealers and users of its products. The applicant also submits that the structure of the Microsoft group, with its marked vertical integration, shows that it holds a dominant position (Case 27/76 *United Brands* v *Commission* [1978] ECR 207).

43 In its reply, the applicant claims to have defined the relevant market, contrary to the contentions of the Commission in its defence. Thus, it is clear from its letters of 20 February 1997 and 23 February 1998 that the principal market concerned is that in software. To a lesser extent, the market sectors dealing with word processing, spreadsheets and operating systems are relevant. As to the geographical market, the applicant has referred consistently to the French market.

44 Second, the Commission is alleged to have made an error of assessment by failing to recognise that there was an abuse of a dominant position in that Microsoft unilaterally fixed resale prices for its products in France. The applicant bases this allegation on the content of MF's information bulletins published in 1995 and 1996. It submits that the prohibition on importing such software is an indirect means of imposing on its dealers significantly higher resale prices in France. Moreover, a prohibition of that kind is unlawful under Canadian law. In so doing, Microsoft was applying dissimilar conditions to equivalent transactions with its

Canadian and French trading partners, thereby placing its French dealers at a competitive disadvantage which rebounds on their customers (*United Brands* v *Commission*, cited above, and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). Furthermore, trade between the Member States has been affected by this, since the structure of competition in the common market has been undermined.

45 In its reply, the applicant points out, further, that the enforcement of copyright does not justify the circumvention of the binding provisions of Article 86 of the Treaty. Therefore, the Commission's arguments based on Directive 91/250 must purely and simply be dismissed.

46 The Commission rejects the various arguments put forward by the applicant in its second plea.

47 First, it contends that the applicant nowhere puts forward a coherent definition of the relevant market, which is indispensable in order to ascertain whether Microsoft holds a dominant position. The applicant did not, in any event, put forward any evidence that Microsoft holds a dominant position within the meaning of Article 86 of the Treaty on any market at issue. The Commission also contends that, in the contested decision, it did not categorically reject the possibility that Microsoft might hold a dominant position on one or more software markets but was of the opinion that this question was of no relevance in the present case since the conduct impugned was not abusive.

48 Second, the Commission argues that the prohibition by Microsoft on illegally importing copies of its software from Canada is not an abuse within the meaning of Article 86 of the Treaty, since that prohibition constitutes a lawful enforcement of its copyright under Article 4(c) of Directive 91/250.

Findings of the Court

49 In its letter of 20 February 1997, supplementing its complaint of 24 September 1996, the applicant alleged that there was an abuse of a dominant position within the meaning of Article 86 of the Treaty in that the resale prices of Microsoft products on the French market were influenced by means of a prohibition on importing French-language versions of products marketed by MC on the Canadian market. The applicant based its allegation *inter alia* on the passage from MF's information bulletin of 27 September 1995, cited above at paragraph 2.

50 In paragraph 13 of the contested decision the Commission rejects the applicant's allegations as to breach of Article 86 of the Treaty in the following terms:

'13. You also claim that the conduct of Microsoft may be in breach of Article 86 of the Treaty in that it constitutes an abuse of a dominant position. You have provided very little information to back up your position that Microsoft might hold a dominant position on the markets in question; moreover, the Microsoft products which are the subject of your complaint are not clearly defined. Your letter of 23 February 1998 contained extracts from press reports concerning the pre-eminent position of Microsoft on the software market and in particular its significant share of the market in operating systems for microprocessors. Such evidence, although more detailed than your initial complaint, is not sufficient to prove that Microsoft held a dominant position on a relevant market within the meaning of Article 86 of the EC Treaty. It cannot be ruled out that an inquiry conducted by DG IV might be able to establish that Microsoft holds a dominant position on one or more software markets. However, that is not the question which falls to be answered in this case, given that the conduct of which you complain does not appear to be abusive, even if the dominant position of Microsoft on the relevant market were to be established. As stated above, Microsoft's action to prevent the importation of copies of its software for which no licence was granted in the Community and which therefore enjoy legal protection in the Community constitutes the lawful enforcement of its copyright. As also stated above, this does not constitute an attempt to influence resale prices.

Moreover, there is no evidence that Microsoft refused to supply you or sold you its products at different prices from those offered to similar clients in the Community. For Microsoft to be guilty of having imposed resale prices, it would have to be shown that it was seeking to influence the prices at which its products were sold by its distributors. For Microsoft to be guilty of having unlawfully maintained prices at a higher level on the EEA market than on the Canadian market, it would have to be shown that Microsoft was charging lower prices on the Canadian market than on the European market for equivalent transactions and that the European prices were excessive. Since there is no evidence of such practices or any other abuses, it does not appear necessary to pursue that aspect of your complaint.'

51 It is thus clear from the contested decision that the Commission took the view, first, that the prohibition by the Microsoft group on the importation into the European market of copies of French-language software marketed in Canada, fell within the lawful enforcement of its copyright under Article 4(c) of Directive 91/250 and, second, that the applicant had furnished no evidence of the wrongful exercise of that right. The Commission has even stated that such exercise could consist in Microsoft's charging lower prices on the Canadian market than on the European market for equivalent transactions, if European prices were, in addition, excessive.

52 At the hearing, the Commission reiterated that the arguments put forward in the contested decision were well founded. In reply to a question from the Court, the Commission's representatives specified, furthermore, that, in the absence of evidence of any abuse, no particular measure of inquiry had been taken to ascertain whether there was a genuine difference between the prices charged by Microsoft on the Canadian market and those charged on the Community market or to analyse the reasons for this.

53 On this last point, however, it must be held that the contested decision contains a manifest error of assessment.

54 Whilst it is true that, under Article 4(c) of Directive 91/250, the marketing by MC of copies of software in Canada does not, in itself, exhaust MC's copyright over its products in the Community (see above, paragraph 34), the factual evidence put forward by the applicant constitutes, at the very least, an indication that, for equivalent transactions, Microsoft applied lower prices on the Canadian market than on the Community market and that the Community prices were excessive.

55 The extract from MF's information bulletin of 27 September 1995, set out above at paragraph 2, suggests that the products imported from Canada were in direct competition with the products marketed in France and that their resale price in France was significantly lower, despite the expense of importing them into the Community from a third country. The information contained in that bulletin cannot be considered to be of no relevance whatsoever since it comes from an undertaking, MF, which belongs to the group holding the copyright over the products at issue. The Commission had, moreover, been in possession of that information since the lodging of the initial complaint of 24 September 1996, because the bulletin of 27 September 1995 was attached to it as appendix 3. The applicant expressly mentioned the relevant passage of that information bulletin on several occasions, both in its initial complaint of 24 September 1996 and in the further information supplied on 20 February 1997. Moreover, the Commission had full knowledge of it, since, at paragraph 6 of the contested decision which contains a summary of the facts, it observes that, in MF's information bulletins, 'Microsoft states that the software imported illegally is sold at a lower price and that if the French distributors had to sell at such prices, it would adversely affect their profit margins'.

56 It is clear from the case-law that whilst, as a rule, the enforcement of copyright by its holder, as in the case of the prohibition on importing certain products from outside the Community in to a Member State of the Community, is not in itself a breach of Article 86 of the Treaty, such enforcement may, in exceptional circumstances, involve abusive conduct (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraphs 49 and 50).

57 In the present case, therefore, the Commission could not argue, without undertaking further investigation into the complaint, that the information in its possession at the time it adopted the contested decision did not constitute evidence of abusive conduct by Microsoft. In view of the obligations incumbent on it when responding to a complaint under Article 3(2) of Regulation No 17 (see above, paragraph 27), it ought, at the very least, to have ascertained whether or not the information put forward by the applicant on the basis of documents not devoid of probative value, was substantiated or not and checked, where appropriate, whether the particular circumstances of the case pointed to a breach of Article 86 of the Treaty.

58 The contested decision is, therefore, vitiated by a manifest error of assessment.

59 It follows from the foregoing that the second plea must be upheld, the application must be declared to be well founded and the contested decision rejecting the applicant's complaint must be annulled.

## Costs

60 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must, in accordance with the form of order sought by the applicant, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Annuls the Commission's decision of 15 October 1998 (Case IV/36.219 Micro Leader/Microsoft) definitively rejecting the applicant's complaint that the actions of Microsoft France and Microsoft Corporation in seeking to prevent French-language editions of Microsoft software packages marketed in Canada from being imported into France are contrary to Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).**

2. **Orders the Commission to pay the costs.**

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 16 December 1999.

H. Jung K. Lenaerts

Registrar President