JUDGMENT OF THE COURT (Sixth Chamber)
24 October 1996 *

In Case C-73/95 P,

Viho Europe BV, a company incorporated under Netherlands law, with its registered office in Maastricht (Netherlands), represented by Werner Kleinmann, Rechtsanwalt, Stuttgart, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) in Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Bernd Langeheine, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: German.

supported by

Parker Pen Ltd, a company incorporated under English law, with its registered office in Newhaven (United Kingdom),

intervener,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, C. N. Kakouris and H. Ragnemalm (Rapporteur), Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 April 1996,

gives the following

Judgment

By application lodged at the Registry of the Court of Justice on 14 March 1995, Viho Europe BV brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment in Case T-102/92 *Viho* v *Commission* [1995] ECR II-17 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed its application for annulment of the Commission decision of 30 September 1992 rejecting its complaint of 22 May 1991 (hereinafter 'the decision').

2 According to the findings of the Court of First Instance in the contested judgment:

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

...

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

5. Having attempted without success to enter into business relations with Parker and to obtain Parker products on conditions equivalent to those granted to Parker's subsidiaries and independent distributors, Viho lodged a complaint on 19 May 1988 under Article 3 of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87, hereinafter "Regulation No 17"), in which it complained that Parker was prohibiting the export of its products by its distributors, dividing the common market into national markets of the Member States, and maintaining artificially high prices for Parker products on those national markets.

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

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

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

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

10. On 5 March 1992 the Commission informed Viho, pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), that it intended to reject the complaint of 22 May 1991 on the ground that Parker's subsidiary companies were wholly dependent on Parker Pen UK and enjoyed no real autonomy. The Commission considered that the distribution system implemented by Parker remained within the limits which the Court of Justice defined as excluding the applicability of Article 85(1) of the Treaty, and stated that it did not see how that distribution

system went beyond a normal allocation of tasks within a group of undertakings. It also stated that before any other conclusion could be reached, it would be necessary to carry out fresh inquiries and investigations.

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

12. On 15 July 1992 the Commission, in response to a complaint lodged by Viho on 19 May 1988, adopted Decision 92/426/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/32.725 — Viho/Parker Pen, OJ 1992 L 233, p. 27) in which it found that Parker and Herlitz had infringed Article 85(1) of the Treaty by including an export ban in an agreement concluded between them and also imposed a fine of ECU 700 000 on Parker and a fine of ECU 40 000 on Herlitz. The actions contesting that decision brought by Herlitz and Parker on 16 and 24 September 1992 respectively were the subject of two judgments delivered by the Court of First Instance on 14 July 1994 (Case T-66/92 *Herlitz* v *Commission* and Case T-77/92 *Parker* v *Commission* [1994] ECR II-531 and II-549), which have in the meantime become final.

The contested decision

13. On 30 September 1992 the Commission rejected Viho's complaint of 22 May 1991. In its decision the Commission found that the integrated distribution system set up by Parker to sell its products in Germany, France, Belgium,

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

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

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

5 As to the first plea, alleging infringement of Article 85(1) of the Treaty, the Court of First Instance made the following preliminary point:

'31. The plea alleging infringement of Article 85(1) of the Treaty is in two parts. First, the applicant claims that Parker's distribution system, which consists in requiring its subsidiaries to refer orders from customers in other Member States to the subsidiary established in the same State as the customer, pursues the same objective as express export bans imposed on exclusive distributors, namely the preservation of national markets and their partitioning from each other in order to

prevent, restrict or distort competition within the common market. It also claims that that system constitutes discrimination against all trading parties because, contrary to Article 85(1)(d), it applies dissimilar conditions to equivalent transactions.'

6 As regards the first part of the first plea, concerning the ban on Parker's subsidiaries from supplying Parker products to customers established in Member States other than that where the subsidiary is, the Court of First Instance held as follows:

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

48. It is not disputed in this case that Parker owns 100% of the capital of its subsidiaries established in Germany, France, Belgium and the Netherlands. It is

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

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

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

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

indirectly by the parent company by which it is wholly controlled, Article 85(1) does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit.

52. While, admittedly, it cannot be excluded that the distribution policy applied by Parker, which consists of prohibiting its subsidiaries from supplying Parker products to customers established in Member States other than that of the subsidiary, may contribute to preserving and partitioning the various national markets and, in so doing, thwart one of the fundamental objectives to be achieved by the common market, it nevertheless follows from the abovementioned case-law that such a policy, followed by an economic unit such as the Parker group within which the subsidiaries do not enjoy any freedom to determine their conduct in the market, does not fall within the scope of Article 85(1) of the Treaty.

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

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

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

7 As to the second part of the first plea, concerning discriminatory treatment of the appellant in regard to prices and conditions of sale, the Court held as follows:

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

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

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

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

8 As to the second plea, alleging infringement of Article 86 of the Treaty, the Court of First Instance held as follows:

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

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

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

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

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

9 Finally, as to the third plea, alleging infringement of Article 190 of the Treaty, the Court of First Instance held as follows:

'75. It is settled case-law of the Court of Justice and of the Court of First Instance (judgments in Case 110/81 *Roquette Frères* v *Council* [1982] ECR 3159, paragraph 24, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30) that the statement of the reasons on which a decision is based must enable the addressee to recognize the reasons for the measure adopted, so that it may, if necessary, enforce its rights and verify whether or not the decision is well founded, and must enable the Community judicature to exercise its power of review.

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

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

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

10 In its appeal the appellant claims that the Court of Justice should set aside the contested judgment, annul the decision at issue and order the Commission to pay

the costs including those of Parker. The Commission contends that the Court should dismiss the appeal and, apparently in the alternative, dismiss the action as unfounded. Finally, the Commission contends that the appellant should be ordered to pay the costs.

11 In support of its appeal the appellant relies on three pleas in law. The first alleges infringement of Article 2, Article 3(c) and (g) and Article 85(1) of the EC Treaty, the second plea alleges infringement of Article 86 of the EC Treaty and the third plea infringement of Article 190 of the EC Treaty.

The first plea in the appeal

12 The plea alleging infringement of Article 85(1) of the Treaty is in two parts. The appellant claims, first of all, that the Court of First Instance wrongly held that Parker's distribution system, prohibiting its subsidiaries from supplying Parker products to customers established in Member States other than that of the subsidiary and requiring them to refer their orders to the local subsidiary with responsibility for that State, does not fall within the scope of Article 85(1) of the Treaty. It claims, secondly, that the Court was also wrong in holding that the discriminatory treatment of the appellant by Parker and its independent distributors was not contrary to Article 85(1)(d) of the Treaty either.

The first part of the first plea

13 The appellant claims that the fact that the conduct in question occurs within a group of companies does not preclude the application of Article 85(1), since the division of responsibilities between the companies in the Parker group aims to maintain and partition national markets by means of absolute territorial protec-

tion. The evaluation of such conduct, which has harmful effects on competition, should not therefore depend on whether it takes place within a group or between Parker and its independent distributors. The appellant points out that such territorial protection prevents third parties such as itself from obtaining supplies freely within the Community from the subsidiary which offers the best commercial terms, so as to be able to pass such benefits on to the consumer.

14 Consequently, the appellant considers that Article 85(1), interpreted in the light of Articles 2 and 3(c) and (g) [formerly Article 3(f) of the EEC Treaty] , of the EC Treaty must apply, since the referral policy in question goes far beyond a mere internal allocation of tasks within the Parker group.

15 It should be noted, first of all, that it is established that Parker holds 100% of the shares of its subsidiaries in Germany, Belgium, Spain, France and the Netherlands and that the sales and marketing activities of its subsidiaries are directed by an area team appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. The area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts.

16 Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 133 and 134; Case 15/74 *Centrafarm* v *Sterling Drug* [1974] ECR 1147, paragraph 41; Case 16/74 *Centrafarm* v *Winthrop* [1974] ECR 1183, paragraph 32; Case 30/87 *Bodson* v *Pompes Funèbres* [1988] ECR 2479, paragraph 19; and Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, paragraph 35).

17 In those circumstances, the fact that Parker's policy of referral, which consists essentially in dividing various national markets between its subsidiaries, might produce effects outside the ambit of the Parker group which are capable of affecting the competitive position of third parties cannot make Article 85(1) applicable, even when it is read in conjunction with Article 2 and Article 3(c) and (g) of the Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application, as laid down in that article, were fulfilled.

18 The Court of First Instance was therefore fully entitled to base its decision solely on the existence of a single economic unit in order to rule out the application of Article 85(1) to the Parker group.

The second part of the first plea

19 The appellant considers that the Court of First Instance also wrongly held that Parker's distribution system was not contrary to Article 85(1)(d), since it did not constitute discrimination against the appellant either by the Parker group or by its independent distributors with respect to prices and conditions of sale.

20 As to the alleged discrimination by the Parker group, this Court has already held above that even if such conduct were to be proved, it could not be covered by the prohibition in Article 85(1).

21 As to the alleged discriminatory treatment of the appellant by Parker and its independent distributors, the appellant takes issue with the finding by the Court of

First Instance that the relations between Parker and its independent distributors were irrelevant to the outcome of the present dispute.

22 It should be noted that in paragraph 62 of the contested judgment the appellant's argument was dismissed on two grounds. In its appeal the appellant contests only the first ground, based on the relevance of Parker's relations with its independent distributors. It does not contest the second ground, namely that it had in any event been unable to show which agreement, decision or concerted practice between Parker and its independent distributors discriminated against it. Consequently, it is not necessary to examine whether this argument is well founded.

23 It follows that the first plea must be rejected.

The second and third pleas in the appeal

24 The appellant claims essentially that the Court of First Instance infringed Articles 86 and 190 of the Treaty, but does not indicate the grounds on which it challenges the contested judgment in that regard, merely referring to its application and the annexes lodged with that court.

25 Under Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must contain the pleas in law and legal arguments relied on to support the form of order which the appellant seeks from the Court of Justice. It follows that an appeal must specify the alleged flaws in the judgment which it applies to have set aside and the legal arguments which specifically support that application.

26 That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that court; in reality, such an appeal amounts to no more than a request for a re-examination of the application submitted to the Court of First Instance, a matter which falls outside the jurisdiction of the Court of Justice by virtue of Article 49 of the EC Statute of the Court of Justice (see, *inter alia*, the order of 26 September 1994 in Case C-26/94 P *Mrs X* v *Commission* [1994] ECR I-4379, paragraphs 10 to 13).

27 In the present case, the two pleas submitted by the appellant merely refer to the pleas submitted at first instance and dismissed by the Court of First Instance.

28 In those circumstances, the second and third pleas must be rejected as inadmissible.

29 Since no plea has been successful, the appeal must be dismissed in its entirety.

Costs

30 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful, it must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Mancini Kakouris Ragnemalm

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber