

JUDGMENT OF THE COURT
27 September 1988 *

In Joined Cases 'wood pulp'

89/85,

- (1) **A. Åhlström Osakeyhtiö**, Helsinki,
- (2) **Joutseno-Pulp Osakeyhtiö**, Joutseno,
- (3) **Kymmene Oy**, Helsinki, successor in title to **Oy Kaukas AB**, Lappeenranta,
- (4) **Kemi Oy**, Kemi,
- (5) **Oy Metsä-Botnia AB**, Kaskinen,
- (6) **Metsäliiton Teollisuus Oy**, Espoo,
- (7) **Veitsiluoto Oy**, successor in title to **Oulu Oy**, Oulu,
- (8) **Oy Wilh. Schaumann AB**, Helsinki,
- (9) **Sunilä Osakeyhtiö**, Sunila,
- (10) **Veitsiluoto Oy**, Kemi,
- (11) **Finncell**, Helsinki,
- (12) **Enso-Gutzeit Oy**, Helsinki,

all Finnish undertakings, represented by A. von Winterfeld, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt, 4 avenue Marie-Thérèse,

applicants,

v

Commission of the European Communities, represented by its Legal Advisers, A. McClellan and G. zur Hausen, and by P. J. Kuyper, a member of its Legal Department, acting as Agents, assisted by S. Böse of the Belmont European Community Law Office in Brussels, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant;

* Languages of the Case: German and English.

104/85,

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

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant;

114/85,

The Pulp, Paper and Paperboard Export Association, Bethlehem (Pennsylvania, USA), comprising the United States undertakings:

The Chesapeake Corporation,

Crown Zellerbach Corporation,

Federal Paper Board Company Inc.,

Georgia-Pacific Corporation,

The Mead Corporation,

Scott Paper Company, and

Weyerhaeuser Company,

represented by M. Waelbroeck and A. Vandencastele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 4 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

116/85,

St Anne-Nackawic Pulp and Paper Company Ltd, Nackawic (New Brunswick, Canada), represented by D. Voillemot, avocat at the cour d'appel, Paris, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant;

117/85,

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

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant;

125/85,

Westar Timber Ltd, Canada, represented by C. Stanbrook (Barrister-at-law, London) of Stanbrook and Hooper, Brussels, and by M. Siragusa (of the Rome Bar) of Cleary, Gottlieb, Steen and Hamilton, 23 rue de la Loi, Brussels, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by K. Banks and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

126/85,

Weldwood of Canada Ltd, Canada, represented by Christopher Prout of the Middle Temple, Barrister-at-law, and Miss Alice Robinson of Gray's Inn, Barrister-at-law, instructed by J. M. Cochran III of Wilkie Farr and Gallagher, Paris, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

127/85,

MacMillan Bloedel Ltd, Canada, represented by C. Stanbrook (Barrister-at-law, London) of Stanbrook and Hooper, Brussels, by P. Sambuc of Boden, Oppenhoff and Schneider and by Cleary, Gottlieb, Steen and Hamilton, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

128/85,

Canadian Forest Products Ltd, Canada, represented by C. Stanbrook (Barrister-at-law, London) of Stanbrook and Hooper, Brussels, and by M. Siragusa (of the Rome Bar) of Cleary, Gottlieb, Steen and Hamilton, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-Law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

129/85,

British Columbia Forest Products Ltd, Canada, represented by C. Stanbrook (Barrister-at-Law, London) of Stanbrook and Hooper, Brussels, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

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

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, J. C. Moitinho de Almeida, and G. C. Rodríguez Iglesias, (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. N. Kakouris, R. Joliet, T. F. O'Higgins and F. A. Schockweiler, Judges,

Advocate General: M. Darmon

Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing, as amended, and further to the hearing on 12 January 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 May 1988,

gives the following:

Judgment

- 1 By applications lodged at the Court Registry between 4 and 30 April 1985, wood pulp producers and two associations of wood pulp producers, all having their registered offices outside the Community, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Decision IV/29.725 of 19 December 1984 (Official Journal 1985, L 85, p. 1), in which the Commission had established that they had committed infringements of Article 85 of the Treaty and imposed fines on them.
- 2 The alleged infringements consisted of: concertation between those producers on prices announced each quarter to customers in the Community and on actual transaction prices charged to such customers (Article 1 (1) and (2) of the decision); price recommendations addressed to its members by the Pulp, Paper and Paperboard Export Association of the United States (formerly named Kraft Export Association and hereinafter referred to as 'KEA'), an association of a number of United States producers (Article 1 (3)); and, as regards Fincell, the common sales organization of some 10 Finnish producers, the exchange of individualized data concerning prices with certain other wood pulp producers within the framework of the Research and Information Centre for the European Pulp and Paper Industry which is run by the trust company Fides of Switzerland (Article 1 (4)).
- 3 In paragraph 79 of the contested decision the Commission set out the grounds which in its view justify the Community's jurisdiction to apply Article 85 of the Treaty to the concertation in question. It stated first that all the addressees of the decision were either exporting directly to purchasers within the Community or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community. It further pointed out that the concertation applied to the vast majority of the sales of those undertakings to and in the Community. Finally it stated that two-thirds of total shipments and 60% of consumption of the product in question in the Community had been affected by such concertation. The Commission concluded that: 'The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.'

- 4 As regards specifically the Finnish undertakings and their association, Fincell, the Commission stated in paragraph 80 of the decision that the Free Trade Agreement between the Community and Finland (Official Journal 1973, L 328, p. 1) contains 'no provision which prevents the Commission from immediately applying Article 85 (1) of the EEC Treaty where trade between Member States is affected'.
- 5 A number of applicants have raised submissions regarding the Community's jurisdiction to apply its competition rules to them. On 8 July 1987 the Court decided in the first instance to hear the parties' submissions on this point. By order of 16 December 1987 the Court joined the cases for the purposes of the oral procedure and the judgment.
- 6 All the applicants which have made submissions regarding jurisdiction maintain first of all that by applying the competition rules of the Treaty to them the Commission has misconstrued the territorial scope of Article 85. They note that in its judgment of 14 July 1972 in Case 48/69 (*ICI v Commission* [1972] ECR 619) the Court did not adopt the 'effects doctrine' but emphasized that the case involved conduct restricting competition within the common market because of the activities of subsidiaries which could be imputed to the parent companies. The applicants add that even if there is a basis in Community law for applying Article 85 to them, the action of applying the rule interpreted in that way would be contrary to public international law which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community.
- 7 The applicants which are members of the KEA further submit that the application of Community competition rules to them is contrary to public international law in so far as it is in breach of the principle of non-interference. They maintain that in this case the application of Article 85 harmed the interest of the United States in promoting exports by United States undertakings as recognized in the Webb Pomerene Act of 1918 under which export associations, like the KEA, are exempt from United States anti-trust laws.

- 8 Certain Canadian applicants also maintain that by imposing fines on them and making reduction of those fines conditional on the producers giving undertakings as to their future conduct the Commission has infringed Canada's sovereignty and thus breached the principle of international comity.
- 9 The Finnish applicants consider that in any event it is only the rules on competition contained in the Free Trade Agreement between the Community and Finland that may be applied to their conduct, to the exclusion of Article 85 of the EEC Treaty, and that the Community should therefore have consulted Finland on the measures which it envisaged adopting regarding the agreement in question in accordance with the procedure provided for in Article 27 of that agreement.
- 10 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Incorrect assessment of the territorial scope of Article 85 of the Treaty and incompatibility of the decision with public international law

(a) The individual undertakings

- 11 In so far as the submission concerning the infringement of Article 85 of the Treaty itself is concerned, it should be recalled that that provision prohibits all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market.
- 12 It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.

- 13 It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.
- 14 Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.
- 15 The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the Community.
- 16 It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.
- 17 The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.
- 18 Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.

- 19 As regards the argument based on the infringement of the principle of non-interference, it should be pointed out that the applicants who are members of KEA have referred to a rule according to which where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. The applicants have concluded that by disregarding that rule in applying its competition rules the Community has infringed the principle of non-interference.
- 20 There is no need to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded.
- 21 It should further be pointed out that the United States authorities raised no objections regarding any conflict of jurisdiction when consulted by the Commission pursuant to the OECD Council Recommendation of 25 October 1979 concerning cooperation between member countries on restrictive business practices affecting international trade (*Acts of the organization*, Vol. 19, p. 376).
- 22 As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.
- 23 Accordingly it must be concluded that the Commission's decision is not contrary to Article 85 of the Treaty or to the rules of public international law relied on by the applicants.

(b) *KEA*

- 24 According to its Articles of Association, KEA is a non-profit-making association whose purpose is the promotion of the commercial interests of its members in the exportation of their products and it serves primarily as a clearing-house for its members for information regarding their export markets. KEA does not itself engage in manufacture, selling or distribution.
- 25 It should further be pointed out that within KEA a number of groups have been formed, including the Pulp Group, to cover the different sectors of the pulp and paper industry. Under Article 1 of the by-laws of KEA, undertakings may only join KEA by becoming a member of one of those groups. Article 2 of the by-laws provides that the groups enjoy full independence in the management of their affairs.
- 26 It should lastly be noted that according to a policy statement adopted by the Pulp Group, referred to in paragraph 32 of the contested decision, the members of the group may conclude price agreements at meetings which they hold from time to time provided that each member is informed in advance that prices will be discussed and that the meeting is quorate. The unanimous agreement of the members present is also binding on members who are absent when the decision is adopted.
- 27 It is apparent from the foregoing that KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements.
- 28 In those circumstances the decision should be declared void in so far as it concerns KEA.

The question whether or not the competition rules in the Free Trade Agreement between the Community and Finland are exclusively applicable

- 29 It is necessary to determine whether, as the applicants maintain, Articles 23 and 27 of the Free Trade Agreement have the effect of precluding the application of Article 85 of the EEC Treaty in so far as trade between the Community and Finland is concerned.
- 30 It should be noted first of all that, under Article 23 (1) of the Free Trade Agreement, in particular, agreements and concerted practices which have as their object or effect the restriction of competition are incompatible with the proper functioning of the agreement in so far as they may affect trade between the Community and Finland. Under Article 23 (2), if a Contracting Party considers that a given practice is incompatible with Article 23 (1), it may take appropriate measures in accordance with the procedures laid down in Article 27. In the context of those procedures it is to consult the other Contracting Party within the Joint Committee in order to reach agreement on the measures which it proposes to adopt in order to put a stop to the offending practices. If no agreement can be reached, the Contracting Party concerned may adopt safeguard measures.
- 31 It should also be observed that Articles 23 and 27 of the Free Trade Agreement presuppose that the Contracting Parties have rules which enable them to take action against agreements which they regard as being incompatible with that agreement. As far as the Community is concerned, those rules can only be the provisions of Articles 85 and 86 of the Treaty. The application of those articles is therefore not precluded by the Free Trade Agreement.
- 32 It should be pointed out finally that in this case the Community applied its competition rules to the Finnish applicants not because they had concerted with each other but because they took part in a very much larger concertation with United States, Canadian and Swedish undertakings which restricted competition within the Community. It was thus not just trade with Finland that was affected. In that situation reference of the matter to the Joint Committee could not have led to the adoption of appropriate measures.

- 33 Consequently the submission relating to the exclusive application of the competition rules in the Free Trade Agreement between the Community and Finland must be rejected.

On those grounds,

THE COURT,

before giving judgment on all the applicants' submissions, hereby:

- (1) Rejects the submission relating to the incorrect assessment of the territorial scope of Article 85 of the Treaty and the incompatibility of Commission Decision IV/29.725 of 19 December 1984 with public international law;
- (2) Declares Commission Decision IV/29.725 of 19 December 1984 void in so far as it concerns the Pulp, Paper and Paperboard Export Association of the United States;
- (3) Rejects the submission relating to the exclusive application of the competition rules in the Free Trade Agreement between the Community and Finland;
- (4) Assigns the case to the Fifth Chamber for consideration of the other submissions;
- (5) Reserves the costs.

Mackenzie Stuart	Bosco	Due	Moitinho de Almeida	
Rodríguez Iglesias	Koopmans	Everling	Bahlmann	
Galmot	Kakouris	Joliet	O'Higgins	Schockweiler

Delivered in open court in Luxembourg on 27 September 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President