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

In Case T-66/92,

Herlitz AG, a company incorporated under German law and established in Berlin, represented by Kay Jacobsen and, during the oral procedure, by Ulrich Quack, Rechtsanwälte, Berlin, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented initially by Mr Bernd-Langeheine, and then by Berend-Jan Drijber, of its Legal Service, acting as Agents, and H. A. Freund, Rechtsanwalt, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

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 IV/32.725 — *Viho/Parker Pen* — OJ 1992 L 233, p. 27),

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 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.

2 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.

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: '7. 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 12 February 1991 the Commission sent a Statement of Objections to Herlitz.

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 written observations submitted by Herlitz on 3 April 1991 in reply to the Statement of Objections, a hearing took place in Brussels on 4 June 1991, concerning which Herlitz made further comments on 13 June 1991.

14 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.'

15 It was in those circumstances that by an application lodged at the Registry of the Court of First Instance on 16 September 1992 Herlitz brought this action.

16 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.

17 At the hearing on 3 May 1994 the parties presented oral arguments and replied to the questions put by the Court.

Forms of order sought

18 The applicant, Herlitz, claims that the Court should:

— annul the Commission's decision of 15 July 1992 in Case IV/32.725 (*Viho/Parker Pen*) in so far as it concerns Herlitz.

19 The defendant contends that the Court should:

(i) dismiss the application;

(ii) order Herlitz to pay the costs of the proceedings.

20 At the hearing the representative of Herlitz claimed that the Court should order the Commission to pay the costs. The Commission opposed that claim.

Substance

21 Herlitz submits two pleas in support of its action. The first plea alleges infringement of Article 85(1) of the Treaty. The second plea alleges infringement of Article 15(2) of Regulation No 17.

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

22 The plea alleging an infringement of Article 85(1) of the Treaty is divided into two parts. First, Herlitz denies that the object of the agreement was anti-competitive, referring to the specific purpose for which it reserves Parker products. Secondly, it claims that it has never actually implemented the prohibition laid down in the agreement.

The anti-competitive purpose of the agreement

— Summary of the main arguments of the parties

23 Herlitz claims that it does not act as wholesaler within the classical meaning of the term when purchasing Parker products. It explains that it merely supplies its own retail shops, which operate under the name 'McPaper', and the floorspace made available to it by self-service and department stores and other large retail outlets, with a complete range of office equipment covering all the requirements which the final consumer may have. It is therefore solely in order to complete its own product range that it purchases other products, such as Parker products, from other manufacturers. Herlitz stresses that it has never intended to trade in those articles. It stresses that it does not merely supply stores with goods suitable for selling by way of self-service, but offers them a bundle of services whereby it equips and

stocks the floorspace placed at its disposal for office equipment (the 'shop within the shop' system). It adds that, since some department stores and large retail outlets have also opened branches in neighbouring countries, it has 'followed' them in order to exploit the floorspace placed at its disposal in those branches using the same system as in Germany. It is in that context that it exported Parker products and other brand name 'guest' products to those countries. Herlitz offers to prove by witness the nature and extent of its business activity.

24 According to Herlitz, it therefore follows that the clause prohibiting exports of Parker products was of no significance to it. It had no interest in preventing parallel imports by means of such a clause since it acquired Parker products purely and simply in order to complete its range of office equipment for its own business needs.

25 At the hearing its representative added that, even assuming that the export ban in the agreement between Parker and Herlitz could have prevented Herlitz, in the event of exports being made, from including Parker products in the general range of office equipment offered for sale by it, the clause at issue in any case had not had any practical effects because the range of goods marketed by Herlitz was intended only for German-speaking customers. Moreover, Herlitz had delivered Parker products to Austria and Switzerland. In reply to a question by the Court, the representative confirmed that Herlitz had also made such exports to France, but solely as part of its general range of products.

26 The Commission states, first, that Herlitz does not deny that it concluded with Parker a written agreement containing an export ban.

27 The Commission then observes that the extract from the commercial register included in the Court file by Herlitz shows that its activities are the manufacture and marketing of products processed from all types of paper, wood and plastics, in particular articles of stationery, office supplies and school stationery. It deduces from it that the commercial activities of Herlitz include, in principle, trading on a wholesale basis, that is to say selling to purchasers other than the final consumer, and that Herlitz could also pursue that activity in other Member States. It claims that since the clause prohibiting exports restricted Herlitz's freedom to compete, it is irrelevant whether, and if so to what extent, Herlitz actually pursued such an activity or whether it intended to do so.

28 Whilst admitting that in certain circumstances it might be true that Herlitz does not act as a wholesaler and sells directly to the final consumer, the Commission nevertheless considers that that is not so in the case of supplies to department stores and self-service stores. The sales to the final consumer are not made in the name and on behalf of Herlitz, but in the name and on behalf of the department stores or self-service stores, which are therefore themselves purchasers of the products in question. It follows, according to the Commission, that Herlitz does market Parker products and pursues the typical activities of a wholesaler when it sells to department stores and self-service stores.

— Appraisal of the Court

29 It is not disputed in this case that in 1986 Herlitz concluded an agreement with Parker 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 Case 19/77 *Miller* v *Commission* [1978] ECR 131, 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').

30 With regard to the alleged lack of interest which the parties had in implementing the clause at issue, a fact relied on by Herlitz to argue that Article 85(1) of the Treaty does not apply, the Court finds that 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. Since a clause must be interpreted according to the interests and intentions of all the contracting parties, it must be held in this case that, far from being superfluous, the clause prohibiting exports was a significant part of the reciprocal obligations assumed by the two parties to the contract. Accordingly, it is not necessary to examine the evidence offered by Herlitz regarding the nature and extent of its business activities.

31 Furthermore, Herlitz's allegation that its conduct could not have affected trade between Member States because the general range of products marketed by it, which includes Parker products, could be of interest only to a limited circle of customers in the non-German-speaking Member States, is disproved by the fact, which it accepts, that it has made such exports to France.

32 It should be added that Article 85(1) of the Treaty, which concerns trade between Member States, must be given a wide interpretation and applies to any form of economic activity. It concerns both the production sector and the distribution and service sector, which, moreover, clearly follows from the reference to the various types of agreements, decisions and concerted practices prohibited under Article 85(1)(b), (c) and (d).

33 In the present case, Herlitz cannot deny that it has pursued an economic activity, since it has imported and sold Parker products. It has therefore marketed both products of its own manufacture and products manufactured by other producers. The fact that Herlitz, in part, offers a bundle of services whereby it equips and supplies itself the floorspace placed at its disposal for office equipment and, in part, makes retail sales cannot preclude that being an economic activity falling within the scope of Article 85 of the Treaty.

34 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).

Implementation of the clause at issue

— Summary of the main arguments of the parties

35 Herlitz observes first that the clause at issue was of such slight interest for it that it merely accepted it without attributing any particular significance to it.

36 Herlitz then claims that it used the clause as a polite reason for the refusal to deliver to Viho, which Herlitz offers in its reply to prove by evidence from its

employee, Mrs A. It accepts that the answer was without doubt foolish, since anyone with the slightest experience could easily have discerned the intention behind Viho's request, namely to gather evidence in support of its complaint.

37 With regard to Parker, Herlitz alleges that those responsible at Parker quite clearly neither wished nor required the inclusion of the clause prohibiting exports, the existence of which, according to Parker, was discovered only when the procedure in this dispute was initiated. The parties then confirmed to each other that the clause ought to be considered as null and void.

38 The Commission considers that the mere fact that Herlitz referred to the ban on exporting is sufficient to show the significance which it attributed to the clause and confirms that it was actually implemented. It considers that if the reason for Herlitz's refusal to supply Viho was in reality Herlitz's unwillingness to supply wholesalers, it could have been justified otherwise than by reference to the clause prohibiting exports.

39 Furthermore, the Commission considers the circumstances in which the clause at issue was included in the agreement to be irrelevant. It also considers to be irrelevant the argument that the clause did not produce any effect since it was neither applied nor implemented. It observes that the Court of Justice has held that the fact that exports have never been impeded is not sufficient to remove a clear prohibition of exports from the scope of Article 85(1) of the Treaty (judgment in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 46). Moreover, the Commission states that Herlitz does not deny that the clause prohibiting exports has been applied at least with regard to Viho.

— Appraisal of the Court

40 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 psychologial' 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 *Hasselblad*, cited above, paragraph 46, and, most recently, *Ahlström Osakeyhtiö*, cited above, paragraph 175).

41 The Court finds furthermore that the claim by Herlitz that its employee, Mrs A, used the clause only as the 'most simple way of politely refusing' cannot be accepted, since it was only in its reply that Herlitz offered to prove those facts by evidence from Mrs A and it did not give reasons for the delay in offering that evidence in accordance with Article 48(1) of the Rules of Procedure.

42 Moreover, Herlitz actually justified its refusal to supply Viho on the grounds of the clause at issue, which proves to the requisite legal standard that Herlitz relied on that clause to support its refusal, the motives which might have driven its employee in that respect being irrelevant. There is therefore no need to hear the evidence of Mrs A proposed by Herlitz.

43 It follows from all the foregoing considerations that the plea alleging infringement of Article 85(1) of the Treaty must be rejected.

The plea alleging infringement of Article 15(2)(a) of Regulation No 17

44 Herlitz claims in substance that it was pursuing no particular purpose by means of that clause and had absolutely no intention of preventing any parallel imports.

45 The Court considers, first, that Herlitz's allegation that the clause at issue was inserted in the contract without any particular aim is irrelevant. 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 (see the judgment of the Court of Justice in Joined Cases 96 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 45).

46 Next, in view of the clear and unequivocal wording of the clause at issue, Herlitz could not have been mistaken about its implications. Since Herlitz was aware that the object of the clause at issue was to restrict, and even prohibit, exports, and thereby to partition the market, Herlitz must be considered to have acted intentionally.

47 Furthermore, the Court considers that the fine imposed is appropriate in relation to the infringement.

48 It follows from the foregoing, and without it being necessary to consider Herlitz's offers to produce evidence, that the action must be dismissed.

Costs

49 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 Herlitz has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application.

2. Orders the applicant to pay the costs.

Schintgen García-Valdecasas Kirschner

Vesterdorf Bellamy

Delivered in open court in Luxembourg on 14 July 1994.

H. Jung R. Schintgen

Registrar President