

# Ahlström Osakeyhtiö and Others v Commission

## Judgment of the Court (Fifth Chamber)

31 March 1993

### III – The infringement relating to general concertation on announced prices

55 The Finnish, United States and Canadian applicants have sought the annulment of Article 1(1) of the decision, according to which they, and other Swedish, United States and Norwegian producers, concerted on prices for bleached sulphate wood pulp announced for deliveries to the European Economic Community' during the whole or part of the period from 1975 to 1981.

56 By letters of 6 March and 2 May 1990, the Court requested the Commission to clarify Article 1(1).

57 In its first question, the Court asked whether the system of quarterly price announcements called in question by the Commission was to be regarded as constituting in itself an infringement of the Treaty or whether that system was merely evidence of concertation on announced prices which took place at an earlier stage. The Commission's replies did not make it possible to choose between those two interpretations and so both must be considered.

58 Since Article 1(1) does not specify either the parties between whom or the quarters in respect of which the infringement took place, the Court, in its second question, asked the Commission to give those details. In its reply, the Commission stated that all the data at its disposal were set out in Table 6 annexed to the decision. That table, entitled 'Announced prices', specifies for each quarter of the period concerned the prices announced by various producers and the date of the announcements. As the Commission explained, all the producers who, according to the data in that table, announced the same price for a given quarter must be deemed to have engaged in concertation during that period.

#### *A. The system of quarterly price announcements constitutes in itself the infringement of Article 85 of the Treaty*

59 According to the Commission's first hypothesis, it is the system of quarterly price announcements in itself which constitutes the infringement of Article 85 of the Treaty.

60 First, the Commission considers that that system was deliberately introduced by the pulp producers in order to enable them to ascertain the prices that would be charged by their competitors in the following quarters. The disclosure of prices to third parties, especially to the press and agents working for several producers, well before their application at the beginning of a new quarter gave the other producers sufficient time to announce their own, corresponding, new prices before that quarter and to apply them from the commencement of that quarter.

61 Secondly, the Commission considers that the implementation of that mechanism had the effect of making the market artificially transparent by enabling producers to obtain a rapid and accurate picture of the prices quoted by their competitors.

62 In deciding on that point, it must be borne in mind that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market

63 According to the Court's judgment in *Suiker Unie* (cited above, at paragraphs 26 and 173), a concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them. In the same judgment, the Court added that the criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market.

64 In this case, the communications arise from the price announcements made to users. They constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.

65 Accordingly, the system of quarterly price announcements on the pulp market is not to be regarded as constituting in itself an infringement of Article 85(1) of the Treaty.

*B. The infringement arises from concertation on announced prices*

66 In the second hypothesis, the Commission considers that the system of price announcements constitutes evidence of concertation at an earlier stage. In paragraph 82 of its decision, the Commission states that, as proof of such concertation, it relied on the parallel conduct of the pulp producers in the period from 1975 to 1981 and on different kinds of direct or indirect exchange of information.

67 It follows from paragraphs 82 and 107 to 110 of the decision that the parallel conduct consists essentially in the system of quarterly price announcements, in the simultaneity or near-simultaneity of the announcements and in the fact that announced prices were identical. It is also apparent from the various telexes and documents referred to in paragraph 61 et seq. of the decision that meetings and contacts took place between certain producers with a view to exchanging information on their respective prices.

*1. The telexes referred to in paragraph 61 et seq. of the decision*

68 In its questions of 6 March and 2 May 1990, the Court requested the Commission to specify what precise conclusions it drew from the telexes and documents referred to in paragraph 61 et seq. of its decision, that is to say to state between which producers the concertation established by each telex or document took place and for what period. In reply to that question, the Commission stated that those documents merely substantiated the evidence based on parallel conduct and that, accordingly, they were relevant not only as regards the undertakings and the period specifically mentioned therein but also as regards all the undertakings and the entire duration of the parallel conduct.

69 In the light of that reply, those documents must be excluded from consideration. Since the identity of the persons taking part in concertation is one of the constituents of the infringement, it is impossible to rely as evidence of that infringement on documents whose probative value in that respect the Commission has been unable to specify.

*2. The other evidence adduced by the Commission*

70 Since the Commission has no documents which directly establish the existence of concertation between the producers concerned, it is necessary to ascertain whether the system of quarterly price announcements, the simultaneity or nearsimultaneity of the price announcements and the parallelism of price announcements as found during the period from 1975 to 1981 constitute a firm, precise and consistent body of evidence of prior concertation.

71 In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see the judgment in *Suiker Unie*, cited above, paragraph 174).

72 Accordingly, it is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation.

*(a) The system of price announcements*

73 As stated above, the Commission regards the system of quarterly price announcements as evidence of concertation at an earlier stage.

74 In their pleadings, on the other hand, the applicants maintain that the system is ascribable to the particular commercial requirements of the pulp market.

75 By orders of 25 October 1990 and 14 March 1991, the Court requested two experts to examine the characteristics of the market for bleached sulphate pulp during the period covered by the contested decision. Their report sets out the following considerations.

76 The experts observe first that the system of announcements at issue must be viewed in the context of the long-term relationships which existed between producers and their customers and which were a result both of the method of manufacturing the pulp and of the cyclical nature of the market. In view of the fact that each type of paper was the result of a particular mixture of pulps having their own characteristics and that the mixture was difficult to change, a relationship based on close cooperation was established between the pulp producers and the paper manufacturers. Such relations were all the closer since they also had the advantage of protecting both sides against the uncertainties inherent in the cyclical nature of the market: they guaranteed security of supply to buyers and at the same time security of demand to producers.

77 The experts point out that it is in the context of those long-term relationships that, after the Second World War, purchasers demanded the introduction of that system of announcements. Since pulp accounts for between 50% and 75% of the cost of paper, those purchasers wished to ascertain as soon as possible the prices which they might be charged in order to estimate their costs and to fix the prices of their own products. However, as those purchasers did not wish to be bound by a high fixed price in the event of the market weakening, the announced price was regarded as a ceiling price below which the transaction price could always be renegotiated.

78 The explanation given for the use of a quarterly cycle is that it is the result of a compromise between the paper manufacturers' desire for a degree of foreseeability as regards the price of pulp and the producers' desire not to miss any opportunities to make a profit in the event of a strengthening of the market.

79 The US dollar was, according to the experts, introduced on the market by the North American producers during the 1960s. That development was generally welcomed by purchasers who regarded it as a means of ensuring that they did not pay a higher price than their competitors.

(b) The simultaneity or near-simultaneity of announcements

80 In paragraph 107 of its decision, the Commission claims that the close succession or even simultaneity of price announcements would not have been possible without a constant flow of information between the undertakings concerned.

81 According to the applicants, the simultaneity or near-simultaneity of the announcements – even if it were established – must instead be regarded as a direct result of the very high degree of transparency of the market. Such transparency, far from being artificial, can be explained by the extremely well-developed network of relations which, in view of the nature and the structure of the market, have been established between the various traders.

82 The experts have confirmed that analysis in their report and at the hearing which followed.

83 First, they pointed out, a buyer was always in contact with several pulp producers. One reason for that was connected with the paper-making process, but another was that, in order to avoid becoming overdependent on one producer, pulp buyers took the precaution of diversifying their sources of supply. With a view to obtaining the lowest possible prices, they were in the habit, especially in times of falling prices, of disclosing to their suppliers the prices announced by their competitors.

84 Secondly, it should be noted that most of the pulp was sold to a relatively small number of large paper manufacturers. Those few buyers maintained very close links with each other and exchanged information on changes in prices of which they were aware.

85 Thirdly, several producers who made paper themselves purchased pulp from other producers and were thus informed, in times of both rising prices and falling prices, of the prices charged by their competitors. That information was also accessible to producers who did not themselves manufacture paper but were linked to groups that did.

86 Fourthly, that high degree of transparency in the pulp market resulting from the links between traders or groups of traders was further reinforced by the existence of agents established in the Community who worked for several producers and by the existence of a very dynamic trade press.

87 In connection with the latter point, it should be noted that most of the applicants deny having communicated to the trade press any information on their prices and that the few producers who acknowledged having done so point out that such communications were sporadic and were made at the request of the press itself.

88 Finally, it is necessary to add that the use of rapid means of communication, such as the telephone and telex, and the very frequent recourse by the paper manufacturers to very well-informed trade buyers meant that, notwithstanding the number of stages involved – producer, agent, buyer, agent, producer – information on the level of the announced prices spreads within a matter of days, if not within a matter of hours on the pulp market.

(c) Parallelism of announced prices

89 The parallelism of announced prices on which the Commission relies as evidence of concertation is described in paragraph 22 of its decision. In that paragraph, the Commission, relying on Table 6 annexed to the decision, finds that the prices announced by the Canadian and United States producers were the same from the first quarter of 1975 to the third quarter of 1977 and from the first quarter of 1978 to the third quarter of 1981, that the prices announced by the Swedish and Finnish producers were the same from the first quarter of 1975 to the second quarter of 1977 and from the third quarter of 1978 to the third quarter of 1981 and, finally, that the prices of all the producers were the same from the first quarter of 1976 to the second quarter of 1977 and from the third quarter of 1979 to the third quarter of 1981.

90 According to the Commission, the only explanation for such parallelism of prices is concertation between the producers. That contention is essentially based on the considerations that follow.

91 In the first place, the single price charged by the producers during the period at issue cannot be regarded as an equilibrium price, that is to say a price resulting from the natural operation of the law of supply and demand. The Commission emphasizes that there was no testing of the market 'by trial and error', as evidenced by the stability of prices established between the first quarter of 1975 and the fourth quarter of 1976, and the fact that, generally in the case of softwood from the third quarter of 1979 to the second quarter of 1980, the first higher price demanded was always followed by the other producers.

92 Nor can the argument concerning 'price leadership' be accepted: the similarity of announced prices, and that of transaction prices moreover, cannot be explained by the existence of a market leader whose prices were adopted by its competitors. The order in which the announcements were made continued to change from quarter to quarter and no one producer held a strong enough position to act as leader.

93 Secondly, the Commission considers that, since economic conditions varied from one producer to another or from one group of producers to another, they should have charged different prices. Pulp manufacturers with low costs should have lowered their prices in order to increase their market shares to the detriment of their least efficient competitors. According to the Commission, the divergences in question related to production and transport costs, the relationship between those costs (determined in the national currencies: Canadian dollar, Swedish krona or Finnish

mark) and selling prices (fixed in US dollars), size of orders, variations in demand for pulp in the various importing countries, the relative importance of the European market, which was greater for Scandinavian producers than for United States and Canadian producers, and the production capacity utilization ratios which, generally speaking, were higher in the United States and Canada than in Sweden and Finland.

94 So far as the size of orders is concerned, the Commission considers that since the sale of large quantities enabled producers to cut their costs substantially, the price records should have shown significant price differences between purchasers of large quantities and purchasers of small quantities. In practice, those differences rarely amounted to more than 3%.

95 Thirdly, the Commission claims that, at any rate for a time in 1976, 1977 and 1981, announced prices for pulp stood at an artificially high level which differed widely from that which might have been expected under normal competitive conditions. For example, it is inconceivable, without concertation, for a single unchanged price of US\$ 415 to have been announced for northern softwood from the first quarter of 1975 to the third quarter of 1977 and, especially during the second and third quarters of 1977, for the announced price to have stood at US\$ 100 above the selling price actually obtainable on the market. The contention that prices stood at an abnormally high level is borne out by the fact that in 1977 and 1982 the fall in prices was particularly abrupt.

96 Finally, the Commission relies on the grant of secret rebates and on changes in market shares.

97 So far as concerns the grant of secret rebates, it should be noted that there is a contradiction between the decision and what has been said subsequently. In paragraph 112 of its decision, the Commission refers to the exclusion of secret competition but then states in its pleadings that, if the rebates were secret, it was because they undermined concertation and therefore had to remain concealed from the other producers.

98 So far as concerns the shifts in market shares established between 1975 and 1981, the Commission considers that they do not justify the finding that there was no concertation. Those shifts were much less marked between 1975 and 1976 and between 1980 and 1981 than the shifts between 1978 and 1979 and between 1979 and 1980.

99 The applicants disputed the view that parallelism of prices was attributable to concertation.

100 In commissioning the second expert's report, the Court requested the experts to specify whether, in their opinion, the natural operation of the wood pulp market should lead to a differential price structure or to a uniform price structure.

101 It is apparent from the expert's report, together with the ensuing discussion, that the experts regard the normal operation of the market as a more plausible explanation for the uniformity of prices than concertation. The main thrust of their analysis may be summarized as follows:

(i) Description of the market

102 The experts describe the market as a group of oligopolies-oligopsonies consisting of certain producers and of certain buyers and each corresponding to a given kind of pulp. That market structure results largely from the method of manufacturing paper pulp: since paper is the result of a characteristic mixture of pulps, each paper manufacturer can deal only with a limited number of pulp producers and, conversely, each pulp producer can supply only a limited number of customers. Within the groupings so constituted, cooperation was further consolidated by the finding that it offered both buyers and sellers of pulp security against the uncertainties of the market.

103 That organization of the market, in conjunction with its very high degree of transparency, leads in the short-term to a situation where prices are slow to react. The producers know that, if they were to increase their prices, their competitors would no doubt refrain from following suit and thus lure their customers away. Similarly, they would be reluctant to reduce their prices in the knowledge that, if they did so, the other producers would follow suit, assuming that they had spare production capacity. Such a fall in prices would be all the less desirable in that it would be detrimental to the sector as a whole: since overall demand for pulp is inelastic, the loss of revenue resulting from the reduction in prices could not be offset by the profits made as a result of the increased sales and there would be a decline in the producers' overall profits.

104 In the long-term, the possibility for buyers to turn, at the price of some investment, to other types of pulp and the existence of substitute products, such as Brazilian pulp or pulp from recycled paper, have the effect of mitigating oligopolistic trends on the market. That explains why, over a period of several years, fluctuations in prices have been relatively contained.

105 Finally, the transparency of the market could be responsible for certain overall price increases recorded in the short-term: when demand exceeds supply, producers who are aware – as was the case on the pulp market – that the level of their competitors' stocks is low and that their production capacity utilisation rate is high would not be afraid to increase their prices. There would then be a serious likelihood of their being followed by their competitors.

(ii) Market trends from 1975 to 1981

106 The various mechanisms described above offer explanations for some of the stages in the sequence of price changes regarded by the Commission as 'abnormal', particularly the stability of prices observed during the period from 1975 to 1976, the collapse of the market in 1977 and the fresh fall in prices at the end of 1981.

*The period from 1975 to 1976*

107 In 1974 demand for pulp was very strong. Since production capacity utilization rates were very high and inventory levels were extremely low, excess demand led to an increase in prices.

108 In 1975 and 1976, circumstances changed: there was an increase in inventory levels and a general decline in the production capacity utilization rate. Notwithstanding those changes, no producer took the initiative of reducing its

prices, in the knowledge that, had it done so, its competitors would have followed suit. Conversely, had it decided to increase its prices, it would have remained isolated on the market and would have lost some, if not all, its customers.

109 According to the experts, the oligopolistic characteristics of the market and its very high degree of transparency are not the only factors responsible for the price stability observed during the period from 1975 to 1977. A further explanation lies in the particular circumstances prevailing at the time.

110 First, at the general level, it should be noted that in 1976 world demand for paper had recovered, which gave rise to optimistic forecasts. In addition, the rate of inflation was high, the real value of prices had fallen and interest rates were low. Furthermore, the Swedish producers qualified for a tax rebate on stock-building which was related to the value of inventories. Finally, the North American producers had an outlet on the United States market, which at the time was very buoyant, and for their part were operating close to capacity.

1977 111 The price collapse in 1977 was the result of the massive increase in supply and the stagnant demand which characterised that period. The Swedish Government had ended the storage subsidy scheme, thereby generating a massive increase in supply at a time when inventory levels in the other producer countries were relatively high. The producers then found that the expected growth in demand had not materialised and that, consequently, an increase in prices was less likely. In those circumstances, if an undertaking decided to lower its prices, it could be sure that its competitors would follow suit provided, however, that they had spare production capacity.

*The period from 1978 to 1981*

112 As from the fourth quarter of 1978, demand recovered and came to exceed supply. The transparency of the market accordingly led to a rapid upward adjustment in prices. Undertakings which were aware that their competitors did not have any spare production capacity were then able to increase their prices without fear of remaining isolated and thus losing their share of the market.

113 That period of rising prices was followed by a period of stability from mid-1980 to the end of 1981. That stability was attributable to the fact that inventory levels were low, production capacity utilisation rates were high and demand, influenced by the appearance of new types of pulp on the market, was static.

114 In the fourth quarter of 1981, the market again went into recession as a result of swollen inventories, the fall in production capacity utilisation rates and the fall in world demand for paper. The absence of the special factors prevailing in 1975 – 1977, namely the higher rate of inflation and the existence in Sweden of a storage subsidy scheme, accounts for the more rapid fall in prices.

(iii) Several factors established on the market are incompatible with the explanation that there was concentration

115 The experts analyse the structures of the market and price trends over the period at issue and maintain that several factors or mechanisms specific to that market are incompatible with an explanation based on concertation. Those factors are the existence of actual and potential outsiders not belonging to the group of undertakings alleged to have colluded, changing market shares and the absence of production quotas and the finding that producers did not take advantage of the differences between the various importing countries as regards elasticity of demand.

116 So far as concerns the first point, it should be noted that in paragraph 137 of its decision, the Commission assesses production by outsiders at 40% of total consumption of pulp in the Community. In view of the size of that market share, it would have been difficult for a cartel to operate only as between the undertakings found to have committed an infringement by engaging in concertation.

117 The Commission's counterargument is that it refrained from initiating a proceeding against those other producers because, in its view, they had acted as followers during the period at issue. 118 That argument cannot be accepted. It is wholly inconsistent with the reasoning adopted by the Commission as regards Table 6 in identifying the producers taking part in the concertation. If, in that regard, as already pointed out in paragraph 58 above, the mere fact of announcing the same price as another producer for the same period does indeed constitute sufficient evidence of concertation, the infringement procedure under Article 85 should clearly have been extended to those outsiders which, as the Commission acknowledges by its use of the term 'follower', announced the same price as the producers penalised in the context of Article 1(1) of the operative part of the decision.

119 With regard to the second factor, the experts find that, having regard to Table 2 annexed to the decision, there were shifts in market shares between 1975 and 1981. Such changes reveal the existence of competition between the producers and the absence of quotas.

120 Finally, so far as concerns the absence of differences in price between the various Member States, the experts consider that it is wrong to contend, as the Commission does in paragraphs 136 to 140 of the decision, that the pulp producers should have exploited the differences in price-elasticity in the different Member States. According to the experts, in order to do so, the undertakings would have had to be in a position to divide up the market, which would have been possible only if there had been an effective cartel embracing all existing and potential suppliers and capable of ensuring compliance with barriers to resale and to transfer between Member States. In those circumstances, price uniformity constitutes on the contrary an argument militating in favour of the explanation based on the normal operation of the market.

(iv) Specific criticisms of the Commission's explanation made by the experts

121 A number of specific criticisms are directed by the experts against the Commission's explanation. Those criticisms concern the impact on prices of transport costs, the size of orders and, in general, differences in costs and the grant of secret rebates.

122 In the first place, in response to the Commission's contention that prices should have varied according to the

destination, the experts state that the destination of the pulp – whether Atlantic ports or Baltic ports – had only a minor influence on transport costs. At most, it could have led to a difference in cost of US\$ 10 a tonne. Contrary to what the Commission states, that difference is too small to affect prices within each of the two zones.

123 Secondly, the experts explain why, in their view, very large orders for pulp did not lead to sharp price cuts. Such orders do not enable significant cost savings to be made for various reasons: first, wood pulp is normally a standard product delivered from anonymous stock; secondly, producers are in the habit of installing storage capacity at the great receiving ports; finally, because they use a wide range of pulps, the paper manufacturers prefer, when placing orders for large quantities, to have the pulp delivered in several consignments. Ultimately, the economies of scale associated with very large orders are confined to overheads and administrative costs.

124 Thirdly, the experts consider that, even if there were real economies of scale, the differences in costs to which they led between the producers did not affect prices but the undertakings' profits.

125 Finally, if the rebates granted were secret, that was for various reasons outside the pulp producers' control: to begin with, in some countries, such as France, rebates not justified by cost-savings are illegal; next, as rebates generally relate to annual tonnage, they cannot be calculated until the end of the financial year. Lastly, it is the buyers who ask for rebates to be kept confidential, partly in order to secure an advantage over their competitors by obtaining better prices, and partly in order to prevent paper buyers from seeking a reduction in price themselves.

### *3. Conclusions*

126 Following that analysis, it must be stated that, in this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

127 In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission. Article 1(1) of the contested decision must therefore be annulled.