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**IN THE COMPETITION**

Case 1077/5/7/07

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A 2EB

10 December 2010

B e f o r e:

THE HONOURABLE MR. JUSTICE BARLING  
(President)  
DR ADAM SCOTT OBE TD  
DRVINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

B e t w e e n:

**(1) EMERSON ELECTRIC Co.**  
**(2) VALEO SA**  
**(3) ROBERT BOSCH GmbH**

Claimants

- v -

**(1) MORGAN CRUCIBLE COMPANY Plc**  
**(2) SCHUNK GmbH**  
**(3) SCHUNK KOHLENSTOFFTECHNIK GmbH**  
**(4) SGL CARBON AG**  
**(5) MERSEN SA**  
**(6) MERSEN UK PORTSLADE LIMITED**

Defendants

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**HEARING**

## APPEARANCES

Mr. Jon Turner Q.C. and Ms Laura Elizabeth John (instructed by Crowell & Moring LLP) appeared for the Claimants.

Mr. Daniel Beard (instructed by Hogan Lovells International LLP) appeared for the sixth defendant, Mersen UK Portslade Limited.

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1 THE PRESIDENT: Mr. Turner, Mr. Beard, just a couple of points before we start. First, just to  
2 say we have read the very helpful submissions and therefore please do not feel that you  
3 need to go through everything you have written; it may just be helpful to take us to some  
4 pointers and so on.

5 The second matter is can we arrange in advance, for the shorthand writers' benefit, what we  
6 are going to call the parent and the subsidiaries because there has been a change of names?  
7 Is it Carbon or Carbone?

8 MR. BEARD: It is "Carbone" because it is French – it is "Le Carbone Lorraine".

9 THE PRESIDENT: Well one suggestion is "Carbon", we called them "Carbon GB" which I think  
10 was roughly what it was, and the other one would be "Carbon SA". Do you have a better  
11 suggestion?

12 MR. BEARD: We were going to refer to the sixth defendant as Mersen UK because that is the  
13 name that it currently has, that is the same as "Carbon GB2, but I was going to refer to  
14 "Mersen UK" throughout. Actually, I was going to refer to "LCL" for Le Carbone Lorraine  
15 as the parent.

16 THE PRESIDENT: I think we will try and have something a bit simpler that we can all use.

17 MR. BEARD: I am happy to use "Carbon SA", if that would assist the Tribunal.

18 THE PRESIDENT: I am just thinking that all documents, presumably, that we are looking at will  
19 be Carbone and if we start to use "Mersen" I just wonder if it is just going to be ----

20 MR. BEARD: I am happy to use "GB" and "SA" and the word "Carbon" preceding them, if that  
21 assists, and if I trip myself and my notes refer to Merson UK I apologise.

22 THE PRESIDENT: Mr. Turner, any thoughts on that?

23 MR. TURNER: In the interests of ease of readership, we would suggest "Carbon SA" and  
24 "Carbon UK".

25 THE PRESIDENT: Carbon UK, it is probably more accurate to say Carbon GB, is it not?

26 MR. BEARD: The difficulty is that "SA" is actually the name that is referred to in the  
27 documents, "GB" is then the name in the documents. "Merson UK" is a new name. I think  
28 it is better to refer to it as "Carbon SA" and "Carbon GB".

29 THE PRESIDENT: Done! That is fine.

30 MR. BEARD: Thank you. (Laughter)

31 THE PRESIDENT: We will not go back on that!

32 MR. BEARD: Mr. President, members of the Tribunal, you are well aware that in this matter I  
33 appear for the sixth defendant, to use a neutral term, and Mr. Turner and Miss Laura John  
34 appear for the claimants. In terms of housekeeping, there should be a substantive bundle,

1 which no doubt the Tribunal has had an opportunity to read. Then there are six authorities'  
2 bundles and a supplementary bundle. We are not quite sure how it was that it came to be  
3 that the whole of the *Cimenteries* decision is reproduced in volumes 3 and 4, but  
4 nonetheless there are more volumes than perhaps would be ideal, but we carry on.  
5 It is the position of Carbon GB, the sixth defendant, that in this application there is a single  
6 simple question that falls to be determined: did the Commission make a finding of  
7 infringement under Article 101 against Carbon GB in its decision? If it did not do so there  
8 is no basis for the claim against Carbon GB in this Tribunal and it must be struck out.  
9 Carbon GB says it is absolutely clear that there is no such finding of infringement made.  
10 We have set out in our application and reply our arguments, and broadly there are two  
11 arguments, either of which suffice to dispose of the claimant's claim against Carbon GB.  
12 The first argument is that as a matter of European Union law a decision only has effect in  
13 relation to the persons to whom it is addressed. The fact that Articles 101 and 102 refer to  
14 infringements by undertakings and the fact that the notion of an undertaking can cover a  
15 number of legal persons does not alter this. It is a fundamental part of EU law that a  
16 decision is only binding in relation to those persons to whom it is addressed. The decision  
17 is not addressed to Carbon GB, therefore there is no binding finding of infringement against  
18 it. If there is no binding finding of infringement, you cannot bring a follow on claim in this  
19 Tribunal. That is an end of the matter, there is no need to go on to the second argument at  
20 all.

21 The second argument then, which only arises if there is any ambiguity about to whom the  
22 decision is addressed, is even if you ignore various parts of Treaty and case law of the EU  
23 that I will come to and you say that a decision can be binding on all legal persons who  
24 might form part of an undertaking, even where they are not specified as addressees in the  
25 decision, in this case there was no binding finding that Carbon GB formed part of an  
26 undertaking found to have infringed.

27 So the second argument is that even on the basis that the binding effect of a Commission  
28 decision is wider than upon those to whom it is addressed that is of no assistance to the  
29 claimants here.

30 Turning directly to argument one ----

31 DR. SCOTT: Can I just interrupt you in this sense, you are using the words "binding finding" as  
32 a single concept, whereas in fact there seem to me to be two concepts, one of which is  
33 "finding" and the other of which is "binding". In your written pleadings what you point out  
34 is that, even if there is a finding, it cannot be binding on the grounds that GB was not an

1 addressee and had no opportunity of defending itself. It just seemed to me that we may be  
2 told that there was a finding in due course of GB being part of the undertaking, but that  
3 would still leave you with the question of whether it was binding.

4 MR. BEARD: We drew the two things together. In simple terms it does not make any sense to  
5 suggest that this Tribunal has jurisdiction in relation to non-binding findings, so it has to be  
6 binding. Therefore, for the purposes of our submissions we treat the two matters together  
7 because even if one as a matter of interest or a matter of language, can say: "This amounts  
8 to a finding" it does not take you anywhere in terms of the jurisdiction of this Tribunal  
9 therefore it has to be binding; I emphasise the term, I use it in conjunction with "finding".

10 THE PRESIDENT: Is your second point dependent on your first point? Do you say that even if  
11 there is a finding it is not binding because of your first point, namely because it was not the  
12 addressee, so is this the same point?

13 MR. BEARD: No, because I think one needs to recognise that the term "finding" as an ordinary  
14 language term can be used in all sorts of contexts. What we are talking about here is  
15 whether or not there is a relevant finding of infringement, that must be a binding finding of  
16 infringement in relation to Carbon GB in order to give the basis for this Tribunal's  
17 jurisdiction. Our first argument is where you are relying on a Commission decision it must  
18 be addressed to a particular person in order to amount to a binding finding of infringement.

19 THE PRESIDENT: Yes.

20 MR. BEARD: So the addressing of the decision is key. The second argument in the alternative is  
21 if there is any ambiguity about to whom it is addressed, in fact in this case when you look at  
22 the entirety of the decision there is no finding that this legal entity is part of an undertaking  
23 which is subject to any binding finding of infringement by the Commission, so they are  
24 separate arguments.

25 Perhaps it is just easiest if I unroll them, there are going to be points that will arise in  
26 relation to both, particularly in relation to the interrelationship between companies and so  
27 on.

28 First, it is necessary to consider the very basic provisions which govern all Commission  
29 decisions, not just competition decisions.

30 THE PRESIDENT: You are on point 1 now?

31 MR. BEARD: I am, I am on argument 1 – Carbon GB is not an addressee, that is an end of the  
32 matter.

33 THE PRESIDENT: Yes.

1 MR. BEARD: The relevant provisions of the Treaty are found in vol.1 of the authorities at tab 7.  
2 This is Article 288 of the Treaty on the Functioning of the European Union. It is re-  
3 numbered by reason of the operation of the Lisbon Treaty which took effect in December  
4 2009. What we emphasise in relation to Article 288 is that this is the provision which sets  
5 out what are the legal acts.

6 THE PRESIDENT: “A decision which specifies those to whom it is addressed shall be binding  
7 only on them.” That is the point, is it not?

8 MR. BEARD: It is, emphatically so. It could not be clearer language in the Treaty. It is crucially  
9 important because if it is only binding upon those to whom it is addressed the converse is  
10 also true, a decision is not legally binding upon those to whom it is not addressed.

11 THE PRESIDENT: Well it says is “only on them”, so subject to any gloss in the case law that  
12 is ----

13 MR. BEARD: Pretty clear, I think is the summary. If one then turns on to tab 8 and Article 297  
14 there you have more detail about the procedure by which various legal instruments can be  
15 adopted by the Union, including legislative acts in the forms of regulations directed, or  
16 decisions, and the key provision of Article 297 that we rely upon is the last paragraph of  
17 “2”:

18 “Other directives, and decisions which specify to whom they are addressed, shall  
19 be notified to those to whom they are addressed and shall take effect upon such  
20 notification.”

21 In other words, a decision does not take effect until it is notified to the relevant addressee.  
22 So the position in relation to non-addressees is very clear, if they are not notified as  
23 addressees then there cannot be any legal binding effect on them, and these provisions are  
24 important because they are the means by which the right of challenge to a decision is  
25 ensured. The time for any challenge will not run until the decision takes effect in relation to  
26 you.

27 In a way those two provisions are to some extent the end of the first argument and the end  
28 of this case because it is without doubt that Carbon GB is not specified as an addressee of  
29 the Commission decision and in those circumstances it has no binding effect on it. So under  
30 these most fundamental provisions there is no basis for the claim that is being brought. In  
31 any event, it is appropriate to deal with some of the authorities and the points raised by the  
32 claimants in this regard.

33 First, the claimants say that we have mixed up the requirement of standing to bring an  
34 appeal with the nature of potential findings in a competition decision. They cite Article 263

1 of the Treaty and suggest that points about the nature of addressees are all really to do with  
2 standing.

3 Notwithstanding the fact that the bundles are voluminous, 263 had not crept into any of  
4 them, I have therefore got some copies. It might be easiest if it is just slotted in front of tab  
5 7 because obviously it numerically proceeds 288. If we look at Article 263 what you see is  
6 that this is the provision of the Treaty that is conferring the fundamental competence of  
7 judicial review upon the Union judicature. So the Court of Justice of the European Union  
8 shall review the legality of legislative Acts, of Acts of the Council, the Commission and the  
9 Central Bank. Then it goes on to indicate the fundamental basis of review:

10 “It shall for this purpose have jurisdiction in actions brought by a Member State,  
11 the European Parliament, the Council or the Commission on grounds of lack of  
12 competence, infringement of an essential procedural requirement, infringement of  
13 the Treaties or any rule of law ...”

14 - all very familiar. And then there is a provision about EU Bodies, and then the fourth  
15 indent:

16 “Any natural or legal person may, under the conditions laid down in the first and  
17 second paragraphs, institute proceedings against an act addressed to that person or  
18 which is of direct and individual concern to them, and against a regulatory act  
19 which is of direct concern to them and does not entail implementing measures”

20 - which is a strange species which academics are fascinated by. But it is worth pausing  
21 there just for a moment. What this provision of the Treaty is saying is that if you are an  
22 addressee of a decision you have standing to appeal as of right. So when it comes to the  
23 ability to challenge the Commission decision, which makes a finding of infringement,  
24 addressees are in a particular and advantageous position. Of course, this is entirely  
25 consistent with the approach in Articles 288 and 297, an addressee is bound by the decision.  
26 He is only bound by its effect if he is notified of it, then he has the opportunity to know of it  
27 and challenge it and 263 guarantees the opportunity to challenge.

28 The claimant’s approach, quite apart from seeking to gloss 288 and 297 does not give that  
29 guarantee of challenge. So the claimant’s approach leaves a person, who the claimant says  
30 is bound by a decision in a position where they may not be able to challenge that decision in  
31 any judicial forum, because of course they cannot challenge an infringement decision made  
32 by a European Body in domestic courts, so it is plainly a wrong interpretation of those  
33 Treaty provisions.

1 The response may come back: “Ah, but the matter will be of direct and individual concern  
2 to a party such as Carbon GB” so they could challenge under that part of Article 263.

3 They are not addressees, but they have direct and individual concerns.

4 THE PRESIDENT: The *Wegon* (whatever it is) case seems to deal with that, does it?

5 MR. BEARD: Yes, I was going to *Dutch Bitumen*, yes. *Heijmans*, I am going to refer to it as, I  
6 struggle with the first of the Dutch terms.

7 THE PRESIDENT: Yes, I struggle too.

8 MR. BEARD: Just before I turn to that case, which I am going to do, two broad points. First, as  
9 a matter of principle, it cannot be correct that a person who, on the claimant’s interpretation,  
10 is bound by a potentially wide ranging infringement decision does not have the absolute  
11 right to challenge the decision which affects him. That would be plainly be a fundamental  
12 abrogation of his rights and not something contemplated by the EU. Secondly, as a matter  
13 of fact, because the concept of direct and individual concern is one which needs to be  
14 considered on the facts of each case, there remains the possibility that on the claimant’s  
15 approach you would be left with no remedy, and that is precisely what was considered in  
16 the *Dutch Bitumen* case. There the order related to an application by a company which was  
17 not an addressee of the Commission’s decision in relation to the *Dutch Bitumen* cartel, but  
18 in fact had been an addressee of the statement of objections – in other words, the prior step  
19 before the decision, it had got a full account of what was proposed to be said against it. It  
20 was a 100 per cent owned subsidiary of the company which was an addressee and it was  
21 mentioned in the statement of reasons as being one of a number of companies within the  
22 undertaking, so-called.

23 THE PRESIDENT: That was one of the reasons in the decision.

24 MR. BEARD: Yes. It is in a particular position which is different from the position of the  
25 Carbon GB entity here. Nonetheless, as we will see, what the court there said was, “No,  
26 you cannot challenge” ----

27 THE PRESIDENT: Not as a direct and individual concern.

28 MR. BEARD: Can I just take the Tribunal to this case, it is in bundle 5 at tab 17. The front page  
29 of this, just to explain, so far as we are the only original language versions of this case are in  
30 French and Dutch. It is referred to in English language textbooks, but we have had a  
31 translation prepared. This is a certified translation, but it is not a translation done by the  
32 Union itself.

33 THE PRESIDENT: It is not official, no.



1 MR. BEARD: I say that particularly because it is rather beautifully laid out and looks precisely  
2 like the ----

3 THE PRESIDENT: Yes, it looks very impressive, does it not.

4 MR. BEARD: We do not want to presume, just because it is laid out like that, it is an official  
5 translation. Could I just start at para.1 which summarises the position in relation to the facts  
6 of the dispute:

7 “The company Heijmans manages the entire Heijmans construction group, which  
8 consists in particular of its subsidiary Heijmans Infrastructuur BV, which  
9 specialises in the construction of infrastructures, which itself fully own ...  
10 Heijmans BV ...”

11 which is how I will refer to the applicant in this case –

12 “... an operating subsidiary responsible for road construction ...”

13 If one turns over what one sees is that a leniency application was made by British  
14 Petroleum, that is para.2, about the:

15 “... existence of an agreement relating to the road bitumen market ...”

16 So it is an allegation of a cartel in relation to bitumen for use in road construction, precisely  
17 what the applicant’s business was. There were raids carried out, para.3. Just for  
18 completeness, para.4:

19 “On 18 October 2004, the Commission initiated proceedings and adopted a  
20 statement of objections which was sent to several companies, including the  
21 applicant.”

22 There were various points in the statement of objections that are referred to in para.4 about  
23 the involvement of the applicant’s director in matters that were of concern to the  
24 Commission.

25 Then 5, there was an adoption of the *Dutch Bitumen* cartel decision. Then 7:

26 “The contested decision does not identify the applicant among the companies  
27 having infringed Article 81 EC ...”

28 Just for reference, that is obviously the old number for 101 –

29 “... in contrast to the companies Heijmans and Heijmans Infrastructuur which were  
30 jointly and severally ordered to pay a fine ...”

31 THE PRESIDENT: Heijmans Infrastructuur, would that have been another subsidiary?

32 MR. BEARD: Yes, I am sorry, just to turn back, para.1, it is a hierarchy. Heijmans Infrastructuur  
33 is effectively the intermediary company.

1 THE PRESIDENT: Yes, so it is the indirect parent. Heijmans is the direct parent for the  
2 applicant?

3 MR. BEARD: Yes. The members of the Tribunal might start having flashbacks to some of the  
4 construction litigation where various of these points were explored. Yes, it was the  
5 intermediate.

6 So parent and intermediate were penalised. They were named. They were the addressees  
7 and they were made jointly and severally liable. I will take the Tribunal briefly to the  
8 decision directly after I have been through this judgment.

9 “Point 18 of the contested decision, the applicant is mentioned among the ‘road  
10 builder subject to the proceeding’, as a company belonging to the Heijmans  
11 construction group. However, Recital 278 of the contested decision, relating to the  
12 determination of the legal entities to be held liable, only mentions the companies  
13 Heijmans and Heijmans Infrastructuur.”

14 Then what happens, as is clear from paras.8, 9, 10 and 11, is that the applicant comes along  
15 and says, “I want to challenge this decision because I fear national proceedings being  
16 brought against me on the basis of this decision and seeks annulment of the contested  
17 decision. What one can see immediately at para.14 is that the Commission’s response to  
18 that is that the action is inadmissible on the grounds that the applicant holds no direct and  
19 individual interest. The first thing to note about this is that, of course, the Commission does  
20 not even consider that there is any issue to arise as to whether or not the applicant is an  
21 addressee of the decision. So there is no discussion required as to whether or not the  
22 applicant was in fact an addressee for the purposes of Article 263, the first limb of  
23 challenge. What this is all about is whether or not, notwithstanding that it is not named as  
24 an addressee, it is directly and individually concerned. What the applicant was arguing was,  
25 “Look, I was the addressee of the statement of objections and the contested decision is  
26 ambiguous in its recitals as to the participation of the infringement”. One can see that from  
27 para.16 of the judgment. The Commission says, “No, it is a preparatory act, the statement  
28 of objections, that does not make you an addressee of the decision even if you received the  
29 statement of objections”.

30 Then at para.18:

31 “Secondly, the applicant argues that it would be deprived of its essential rights if it  
32 were unable to contest the existence of an infringement under Article 81 EC before  
33 the Court, insofar as its liability could be invoked before national courts based on  
34 the contested decision.”

1 THE PRESIDENT: Its concern was that it could be sued in a follow-on action?

2 MR. BEARD: Precisely. I am sorry, I should be clear, the precise mode in which it could be  
3 sued in the national courts in the Netherlands is not spelled out.

4 THE PRESIDENT: No, but it says “based on”.

5 MR. BEARD: It would be based on, so at least part of the claim would be follow-on relying on  
6 the decision. What I do not want to suggest is that a Tribunal in the Netherlands has the  
7 same circumscribed jurisdiction as this Tribunal. It might be more equivalent to a High  
8 Court action where ----

9 THE PRESIDENT: It could be bits of it.

10 MR. BEARD: You could bring in bits, you could engage in an investigation, draw in other  
11 evidence, but it would be based around the binding finding that, of course, a national court  
12 has to comply with when considering any decision, whatever its jurisdiction.

13 Lower down in para.18:

14 “The applicant considers that the contested decision will be taken into  
15 consideration in its entirety by the national courts, and not only its operative part,  
16 and that the national courts will only agree to suspend proceedings brought before  
17 it on the condition that the applicant has filed an action before the Community  
18 Judge ...”

19 Then 19:

20 “The Commission responds that the applicant has no interest in challenging the  
21 contested decision since the Commission did not make any findings against it.”

22 Then there is a discussion of the way in which the court is to deal with this under the  
23 heading “Discretion of the Court”. Article 230, which is referred to in para.20, that is the  
24 old numbering for 263, just for clarity. You will see the test there is the same. There is no  
25 change there.

26 Paragraph 21:

27 “In the present case, since the Commission did not consider in the contested  
28 decision that the applicant had committed an infringement under Article 81 EC. the  
29 applicant was not made an addressee of the decision.”

30 So that confirms the position that obviously the Commission had implicitly recognised.

31 “Consequently, it is necessary to examine whether the applicant is directly and  
32 individually affected by this decision.”

33 Then 22:

1 “Firstly, the applicant’s argument according to which the fact that the applicant is  
2 presented in point 18 of the contested decision is a company subject to the  
3 proceeding in question gives it an interest to bring these proceedings must be  
4 examined. According to case law only the operative part of a decision may  
5 produce legal effects and modify a person’s legal position and the consideration  
6 stated in the statement of reasons cannot be the subject of an action for annulment  
7 except if these form the necessary basis for the operative part of this decision. The  
8 court has also stated that in the event that no infringement has been attributed to a  
9 company in the operative part of the decision the company does not have an  
10 interest to bring proceedings against this decision even if the Commission had  
11 noted the existence of an infringement attributable to a company in the reasoning  
12 of the decision.”

13 So that is a fundamental confirmation of the points that the sixth defendant makes in  
14 relation to this first argument. The court then goes on in para.23, which is dealing with  
15 whether or not being the addressee of a statement of objections means that you would have  
16 direct and individual concern. 23, 24 they reject that, in particular in 23:

17 “In accordance with well-established case law, acts that may give rise to an action  
18 for annulment within the meaning of 230 EC [now 263] are measures that produce  
19 mandatory legal effects capable of affecting the interests of the applicant by  
20 materially modifying the legal situation of the applicant.”

21 So it is a repetition of that summary I have already taken the Tribunal to.

22 THE PRESIDENT: Sorry, I was reading something else, which paragraph ----

23 MR. BEARD: I was just highlighting the second paragraph of para. 23 because there the court is  
24 essentially reiterating the points I have already taken the Tribunal to in para. 22, but it is  
25 focusing specifically on the argument that was being brought by the applicant which was:  
26 “Look, we were part of the group and we received the statement of objections and we  
27 responded to the statement of objections, and then there are bits in this decision that refer to  
28 us. We have a direct and individual interest, we want to overturn it because otherwise that  
29 stuff will be relied upon against us in national proceedings”, and the court said “No, that  
30 does not give you direct and individual concern for the purposes of Article 263 challenges”,  
31 As I say, it refers to Article 230, that is the old numbering but the same provision.

32 THE PRESIDENT: The court in 22 distinguishes between having the decision addressed to you  
33 and the Commission, as it were, noting the existence of an infringement in the statement of  
34 reasons.

1 MR. BEARD: Yes.

2 THE PRESIDENT: But that distinction does not make any difference as far as standing is  
3 concerned in what was Article 230.

4 MR. BEARD: Yes, but the point is that the basis upon which the court is rejecting the ability to  
5 appeal is that whatever is said by the Commission in the Recitals does not have a legal  
6 effect. If it had a legal effect they would clearly need to be able to challenge it because you  
7 can only challenge Commission decisions before the Union Courts, otherwise it would be  
8 grotesquely unfair.

9 THE PRESIDENT: There is no effect in EU law anyway.

10 MR. BEARD: Well since we are talking about an EU decision applying an EU principle then I  
11 think that probably takes us well far enough for these purposes, so we do not have any  
12 finding of infringement that gives the basis for any challenge here.

13 THE PRESIDENT: You say there is no finding of infringement anyway?

14 MR. BEARD: Yes, we say that anyway, but I am focusing just on the first argument here because  
15 this case is re-emphasising why those strict requirements of the Treaties must apply  
16 because, of course, if you were to read those Treaty provisions more broadly you would  
17 need to have the ability to bring a challenge to a decision that affected your legal position.  
18 Whilst we are on this decision I would direct the Tribunal to para. 25:

19 “Secondly, regarding the argument that the contested decision is ambiguous as to  
20 the applicant’s involvement in the agreement and that the Commission did not  
21 give sufficient grounds for its decision not to hold the applicant liable for the  
22 infringement and not to impose any fine, these circumstances do not constitute  
23 relevant arguments for ascertaining the admissibility of the action, since these  
24 arguments are relevant for ascertaining the legality of the contested decision and  
25 not the admissibility of the action.”

26 So what is being said there is that you can argue the toss about what the recitals say, but  
27 because it has no legal impact on you, you do not get any standing to challenge the matter.

28 That reasoning carries on through para.26 and 27 and then there is a sub-heading under 27

29 “On the deprivation of the right of action and on the existence of national and  
30 judicial and extrajudicial procedures.”

31 “28. By way of introduction it must be emphasised that the applicant has not  
32 provided any details or evidence regarding the existence of any national legal  
33 proceedings ...”

1 So this was not on the basis of an actual proceeding necessarily, it was on the basis of fears  
2 about proceedings.

3 “29 In any case, the applicant cannot maintain that, in the present case, the  
4 absence of the possibility to institute proceedings against the contested decision  
5 would undermine what it refers to as its ‘essential rights’.

6 30 Indeed, it must first be pointed out that neither the statement of objections nor  
7 the statement of reasons of the contested decision constitutes elements on which a  
8 national court could directly rely in order to invoke the liability of the applicant,  
9 since the final decision does not hold it liable for an infringement under Article  
10 81EC in the operative part.”

11 So that is an emphatic re-emphasis by the Community court that in this regard where you  
12 are concerned with an EU decision, it does not in any way provide a national court,  
13 whatever the scope of its jurisdiction a basis to rely on to invoke liability. So it is re-  
14 emphasising no infringement here. Then there is further reasoning and then:

15 “33 As a result of all these elements, due to the absence of an interest to bring  
16 proceedings, the action must be dismissed in its entirety as inadmissible.”

17 We have included in the authorities’ bundle just the analysis of this case from **Van Bael**  
18 **and Bellis**, which states at p.134, footnote 16, there is a comment on this judgment, just for  
19 your notes the extract from **Van Bael and Bellis** is in bundle 6, tab 30, but you do not need  
20 to turn it up. It is a brief comment. It says:

21 “It follows that companies that are not addressees of the Commission decision are  
22 sheltered from damages claims at least in case of follow on actions.”

23 Why do they say that? It simply flows from the analysis already put forward. If you are not  
24 an addressee you are not bound by the decision in question. This *Dutch Bitumen* cartel  
25 judgment says that you cannot appeal if you are not an addressee, even if you have been  
26 specifically referred to and this conclusion is emphatic in the context of follow-on claims  
27 based on EU law decisions.

28 THE PRESIDENT: What tab again was that, Mr. Beard.

29 MR. BEARD: It is tab 30 of bundle 6 of the authorities and the reference is p.1234 footnote 16.

30 We have included reference to it in our reply submissions.

31 Just to read across to this case, the claimant is arguing that Carbon GB is bound by the  
32 finding of infringement made in the EU decision even though it is not addressed to it. Well  
33 Carbone GB did not protest to the EU against that decision, it cannot protest to the CAT  
34 about that decision because the CAT does not have jurisdiction to consider whether or not

1           there has been an EU infringement and, indeed, it would not have the power to do so in the  
2           High court either for that matter. Therefore, it would be left in a situation ----

3 THE PRESIDENT: It would have to somehow bring a judicial review and challenge it indirectly,  
4           would it not.

5 MR. BEARD: It would be some sort of collateral challenge but the collateral challenge  
6           mechanism in these circumstances, it is unclear on what basis you could possibly have a  
7           collateral challenge in circumstances if you could not possibly have brought a direct  
8           challenge in those circumstances. It all becomes incredibly circuitous.

9           Just to emphasise, since we are in the context of considering the *Dutch Bitumen Cartel*  
10          judgment, it is just worth noting the terms of the decision that were being relied on there,  
11          because they are instructive. These are points I will re-emphasise in relation to the second  
12          argument, but since we are dealing with that case at the moment it is worth just turning it  
13          up, it is at vol.6 of the authorities, tab 25.

14 THE PRESIDENT: I suppose what you would have to do is wait until you start proceedings for a  
15          declaration in the national court or wait until you were sued in the national court and then  
16          try and raise it on a review.

17 MR. BEARD: Yes, but the difficulty there underlying that is even if that procedural avenue were  
18          open the natural response would be: "Hang on a second, this is all acte clair, because what  
19          you have is a situation where you were not an addressee of the decision. We have got clear  
20          findings that you cannot be legally bound unless you are an addressee.

21 THE PRESIDENT: "Directly" it says.

22 MR. BEARD: I am sorry.

23 THE PRESIDENT: There is that interesting word "directement", in the French, "directly", so you  
24          cannot be relied upon directly, so one wonders whether they were ----

25 MR. BEARD: It is difficult to see how that can do the relevant leg work to suddenly create a  
26          fundamental change of a legal position that alters your position vis-à-vis national  
27          proceedings, in circumstances where the Treaty and the court have made absolutely clear  
28          that it does not affect you otherwise. I should leave to one side questions of the extent to  
29          which materials can be deployed in evidence in other proceedings, that is a separate  
30          question entirely.

31 THE PRESIDENT: I suppose if in Holland they had had something like s.58, could it be said  
32          "There might be some findings we can rely on", if they made findings against the subsidiary  
33          then ----

34 MR. BEARD: Yes, one can see that that does not ----

1 THE PRESIDENT: The European Court was not necessarily excluding – I do not know ----

2 MR. BEARD: You do not need to travel across the water. One would be hypothesising the  
3 situation in the High Court, where you would be saying: “Hang on a second, there are  
4 various bits in this Commission decision which we would like to rely on as claimants in  
5 evidence against these defendants, they will be jolly helpful to us because we want to bring  
6 the claim, we recognise there is no binding infringement decision, no particular decision”  
7 but the jurisdiction of the High Court is unlimited for these purposes, indeed if there was no  
8 Commission decision, no Commission inquiry we could still bring a claim, a standalone  
9 claim in these circumstances. Then a difficult question arises: what force do those findings  
10 have in circumstances where you could not have brought a direct appeal against them?  
11 Then you get into the question of whether or not a reference would be the appropriate  
12 means for determining whether or not ----

13 THE PRESIDENT: Yes.

14 MR. BEARD: -- and so on. But you are in a different world down the road, under a different  
15 jurisdiction in those circumstances, and whether or not a similar situation arises in Holland  
16 is neither here nor there. We can recognise that as an entirely different situation.  
17 Tab 25 of vol. 6.

18 THE PRESIDENT: Which part of that do you want us to look at?

19 MR. BEARD: I am just going to quickly take you through it, if I may. Page 8 the sub-heading is  
20 “Undertakings”, this is pretty standard form for Commission decisions, and then it goes  
21 through the parties that it considers are culpable in the sense of those that are involved in  
22 facts that are of concern to the Commission in its investigation. It looks at p.12, point (18)  
23 at *Heijmans* itself, and it is worth just dwelling on this for a moment:

24 “Heijmans is a major group of companies active in the Dutch construction industry. The  
25 group is headed by Heijmans NV ...” that is the parent company that was an addressee.  
26 “Road construction activities are performed through Heijmans Infrastructuur BV”, that is  
27 the intermediary, also an addressee, also fined, “... and its operational subsidiary ...  
28 Heijmans BV” which was the applicant in the litigation we have just seen. “Both of these  
29 companies”, that is Infrastructuur and BV “... are directly or indirectly 100% owned by  
30 Heijmans NV.” So there is a consideration of the ownership structure.

31 “Heijmans NV Infrastructuur and BV are all part of the Heijmans Group of  
32 Companies. This group is hereafter referred to as ‘Hiejmans’. In 2005, the  
33 consolidated worldwide turnover of Heijmans was [X]. Heijmans purchase of  
34 road pavement bitumen in 2001 were [Y].”



1 So throughout the remainder of the decision the reference to Heijmans is to those  
2 specifically identified subsidiaries in those circumstances.

3 THE PRESIDENT: Including the applicant.

4 MR. BEARD: Including the applicant, and then if we turn on to recital (276) on p.85, this is just  
5 picking up one or two points highlighted by the applicant in the proceedings in the court  
6 that we have just seen. Heijmans, Infrastructuur and BV:

7 “... argue in their joint response to the Statement of Objections that the  
8 Commission failed to prove that that [Infrastructuur] and its subsidiary are not  
9 autonomous in their conduct on the market.”

10 So there we have a situation where specific delineation of the companies, description of  
11 their business, description of the construction of control, which is re-emphasised in footnote  
12 464, and then when one turns on to the end of the decision, to the operative part of the  
13 decision on p.117.

14 THE PRESIDENT: (277) is quite interesting: “The undertaking that committed the infringement  
15 is Heijmans, including Heijmans NV and Heijmans Infrastructuur”.

16 MR. BEARD: Yes.

17 THE PRESIDENT: So they seem to be excluding the BV at that point do they not.

18 MR. BEARD: That is true, and they continue with that because they make that manifest on p.117  
19 because when it comes to the delineation of the undertaking in Article 1, it says: “The  
20 following undertakings infringed Article 81 of the Treaty by regularly fixing collectively,  
21 for the periods indicated ... road pavement bitumen.” Then one sees at (g) Heijmans being:  
22 Heijmans NV and Heijmans Infrastructuur BV.

23 DR. SCOTT: Which reflects para. 278.

24 MR. BEARD: Yes.

25 THE PRESIDENT: They decide there that this is the undertaking that they want to convict.

26 MR. BEARD: Yes: “The following undertaking”, that is the operative part of the decision, and it  
27 varies as between the various groups whether or not there is a single legal entity that is the  
28 subject of the finding. In other words, a single legal entity is the undertaking for the  
29 purposes of Article 1, or more than one legal entity, and they are specified in Article 1.  
30 Then it goes on, and what one also sees is that in Article 2: “For the infringements referred  
31 to in Article 1, the following fines are imposed”, and what one there sees is that the same  
32 legal entities that have been identified as the relevant undertaking for the purposes of a  
33 finding of infringement in Article 1, are also those that have the penalties imposed upon

1 them. It is not just “the parent”, it is in each case all of those legal entities that have been  
2 specifically identified.

3 So here you have a situation where there was specific consideration of the relevant  
4 applicant’s subsidiary, that there was specific consideration of its interrelationship and the  
5 levels of control between it and other companies in the group. At a very basic level it is  
6 specifically named and yet nonetheless, even given all of those findings the court took a  
7 strict approach focusing on what was actually in the operative part of the decision when it  
8 came to consider the question of whether any appeal could be brought.

9 So how does the claimant seek to distinguish these Treaty provisions and, indeed, the  
10 authority referred to? It says that we are confused and that there are two principles we have  
11 overlooked. The first principle which is found in its supplementary submissions at para. 7A  
12 is that the Commission has a discretion formally to address its decision only to the ultimate  
13 parent company within a wider undertaking that has been found to have infringed. Well  
14 with respect “yes” and “no”. We can accept the general proposition of competition law  
15 that an undertaking can be constituted by more than a single legal entity. No issue there,  
16 indeed in the *Dutch Bitumen* cartel case in relation to Heijmans we saw the undertaking  
17 being constituted by two legal entities.

18 We can also accept that the parent company within an undertaking can be made the  
19 addressee of an infringement decision in appropriate circumstances, but we can of course  
20 say that it has to be specified in the operative part of the decision that it is being found as  
21 such.

22 We can also accept that the Commission could make a finding of infringement against a  
23 number of legal entities which constitute an undertaking and then not impose financial  
24 penalties on all of them, although that does not seem to be what the Commission ever does.  
25 Indeed, when it is delineating the legal entities for the purposes of the operative parts of the  
26 decision what you see in almost all of these decisions so far as we can identify, is a match  
27 up between the equivalent of Article 1, the finding of infringement directed at specified  
28 undertakings – and the equivalent of Article 2, which is the imposition of penalties which  
29 go to the same legal entities.

30 But we cannot accept that if a parent company is the addressee there is a binding finding of  
31 infringement on other legal entity within a corporate group if they are not addressees of the  
32 finding of infringement.

33 In this connection the claimants rely on *Cartonboard* in particular and I will come back to  
34 dealing with *Cartonboard* in relation to the second argument, but suffice to say at this point

1 it does not take matters further and it does not assist the claimants in saying that the analysis  
2 that we have put forward of the Treaty or the *Dutch Bitumen* cartel case or the fundamental  
3 principles at issue here are in any way wrong.

4 So turning to the second principle that they raise in the supplementary submissions at para.  
5 7B, if you construe the operative part of the Commission decision in the light of the  
6 reasoning then you can say that the finding that is binding on this Tribunal and on relevant  
7 legal entities can be wider than those specifically addressed. This is really a different  
8 species of the argument that you do not just have to look at the operative part of the  
9 decision. Of course, as I say, I will deal with that in the context of the second argument.

10 But in relation our first argument these principles are just irrelevant. The specification of  
11 the addressees of the decision in the operative part is as clear and plain as day. You do not  
12 need any assistance from elsewhere to understand to whom the decision is addressed – no  
13 ambiguity and we all agree Carbon GB was not specified as an addressee.

14 The third line that the claimants take is to refer to Carbone SA, the addressee company  
15 specifically named as such, and say it is a representative addressee. This is para. 8 of the  
16 supplementary submissions, and they say the decision is addressed to the parent company as  
17 representing the undertaking.

18 First, let us just consider that proposition for a moment, the notion of a representative  
19 addressee to a decision. It is not what is said in the operative part of any of these decisions  
20 and, in particular, not in the operative part of this decision which, for your notes, is at tab 1  
21 of the bundle at p.106 and I will come to that in due course. But more than the fact that  
22 there is no basis for this suggestion on wording, the idea that a decision is binding on a  
23 putative representative addressee and it is binding on all of those legal entities, those  
24 persons whom the representative addressee represents is highly problematic in terms of the  
25 Treaty provisions. The idea of a representative addressee is not what Article 288 talks  
26 about. Indeed, the focused nature of that provision does not make sense unless you know  
27 clearly who the addressee referred to in the provision is. You are either addressed or you  
28 are not for the purposes of Article 288 of the Treaty. It is clearly not what was  
29 contemplated in the context of Article 297.

30 It is very hard to see how Article 297 really works for putative representative addressees.  
31 Are the claimants really contending that the decision takes effect against a represented  
32 person who is not notified in circumstances where the representative addressee is notified?  
33 Does that count as notification of the represented person? Why should that be? The very  
34 purpose of that treaty provision is to preserve a person's rights to challenge. That is why

1 the individual person themselves needs to be notified of a decision directed to them so that  
2 they have the opportunity to consider and challenge it, it is fundamental to the operation of  
3 the rule of law in the EU, you are not to be subject to decisions you do not know about or  
4 have the opportunity to challenge. It is worth just noting, as we have done in our  
5 submissions, that in *JFE Engineering* which, for your notes, is found in bundle 5 of the  
6 authorities at tab 16, p.2655, para. 413 – a decision the Commission “must be seen as a  
7 bundle of individual decisions.”

8 The third Treaty provision we have referred to, 263, how does it fit with the ability to  
9 challenge? How does the notion of a representative addressee work here? Is it only the  
10 representative covered by 263 and not the others who can challenge? If so it is plainly  
11 unfair. If it is that the representative addressees are covered by 263 and have rights of  
12 challenge, then really they are in the position of being addressees for the purposes of Article  
13 263, but of course the whole reason we got into this analysis about representative addressee  
14 is because the represented persons were not addressees of the Commission decision. So you  
15 seem to end up with being an addressee for the purposes of Article 263 effectively but not  
16 for other purposes, and that just does not make any sense either.

17 Perhaps most importantly, this analysis that is being put forward is plainly at odds with the  
18 terms of the *Dutch Bitumen* cartel judgment. If the parent there was the representative  
19 addressee and the subsidiary was therefore bound, it would make no sense for the subsidiary  
20 to have been precluded from challenging the relevant decision. So the notion of being a  
21 representative addressee has no basis in the clear terms of the relevant parts of Commission  
22 decisions. It is not consistent with the Treaty provisions, or indeed the *Dutch Bitumen*  
23 cartel authority, but there is also another reason why this sort of construction is wrong, and  
24 that reason flows from how you assess whether or not a legal person is part of an  
25 undertaking. It is not something that simply can be assumed. It is well recognised in the  
26 case that has been articulated in the *Akzo Nobel* decision, that this is a matter of assessment  
27 of fact in all the circumstances, and if I could just take you to that, it is bundle 5 of the  
28 authorities, tab 20.

29 On the first page of this judgment one can see that the appeal was brought by five  
30 companies, and the reason perhaps that these five companies are worth mentioning is  
31 because effectively there were four subsidiaries and a parent company which were  
32 implicated in the Vitamins cartel, and the appeal was essentially on the basis that the parent  
33 should not be found to have infringed, and this is spelt out at para. 8 of the decision on p.3.

1 “The appellants are five companies belonging to the Akzo Nobel group and they  
2 are among the producers of choline chloride . In the period concerned by the  
3 Commission investigation, Akzo Nobel the parent company of the group, held,  
4 directly or indirectly, all the shares in the other appellants. Akzo Nobel was the  
5 owner of all the shares in its subsidiaries Akzo Nobel Netherland and Akzo Noble  
6 Chemicals International. Akzo Nobel Nederland owned all the shares in its  
7 subsidiary Akzo Nobel Chemicals, which itself held all the shares in Akzo Nobel  
8 Functional Chemicals.”

9 They are all part of a group with the Akzo Nobel parent company at the top. Then at  
10 para.14:

11 “As regards the Akzo Nobel group, the Commission decided to address the  
12 contested [Vitamins] decision jointly and severally to all the appellants.”

13 So each of these companies was specifically named and made subject to a finding of  
14 infringement as part of the *Akzo Nobel* undertaking. The *Akzo Nobel* undertaking was  
15 defined as those five legal entities.

16 “[They were found to have] directly participated in the infringement. Akzo Nobel  
17 Functional Chemicals was created as a subsidiary ... Therefore, the Commission  
18 found that Akzo Nobel Functional Chemicals was the legal successor to its parent  
19 company as regards the majority of the activities in the choline chloride sector  
20 previously carried out by the latter and should, therefore, be an addressee of the  
21 decision.”

22 Then there was a challenge as to whether or not the parent company should part of the  
23 finding of infringement, or whether actually it was the subsidiaries that were the only legal  
24 entities that should have been made subject of the decision.

25 The findings of the court begin on p.14. It talks about the nature of undertakings in 54 and  
26 the concept of an undertaking in 55:

27 “56 When such an economic entity infringes the competition rules, it falls,  
28 according to the principle of personal responsibility, to that entity to answer for  
29 that infringement ...

30 57 The infringement of Community competition law must be imputed  
31 unequivocally to a legal person on whom fines may be imposed and the statement  
32 of objections must be addressed to that person ... It is also necessary that the  
33 statement of objections indicate in which capacity a legal person is called on to  
34 answer the allegations.

1           58     It is clear from settled case-law that the conduct of a subsidiary may be  
2     imputed to the parent company in particular where, although having a separate  
3     legal personality, that subsidiary does not decide independently upon its own  
4     conduct on the market, but carries out, in all material respects, the instructions  
5     given to it by the parent company (...) having regard in particular to the economic,  
6     organisational and legal links between those two legal entities.”

7     Then the part I particularly wanted to take the Tribunal to is para.73, p.17:

8           “As noted in paragraph 58 of this judgment, the conduct of a subsidiary may be  
9     imputed to the parent company ...”

10    and then 73:

11           “It is clear, as the Advocate General pointed out in paragraphs 87 to 94 of her  
12    Opinion, that the conduct of the subsidiary on the market cannot be the only factor  
13    which enables the liability of the parent company to be established, but is only one  
14    of the signs of the existence of an economic unit.

15           It also follows from paragraph 58 of this judgment that, in order to ascertain  
16    whether a subsidiary determines its conduct on the market independently, account  
17    must be taken not only of the factors set out in paragraph 64 of the judgment under  
18    appeal, but also of all the relevant factors relating to economic, organisational and  
19    legal links which tie the subsidiary to the parent company, which may vary from  
20    case to case and cannot therefore be set out in an exhaustive list.”

21           Just for reference, the Advocate General’s Opinion that is referred to in para.73 is in the  
22    preceding tab, tab 19, and if the Tribunal turns to p.21 of that tab, you will see there a sub-  
23    heading midway down the page “The subject matter of the parent company’s decisive  
24    influence”, and sidelined, and I will not go through it all, paras.86 through to 97, which  
25    were referred to by the court. In particular I would highlight to the Tribunal paras.92 and  
26    93 where what the Advocate General is emphasising and what the ECJ is accepting by  
27    reference to this Opinion is that you have to consider all of the facts in the round in order to  
28    determine whether or not two legal entities form part of the same undertaking.

29           It is true that there are certain presumptions that may apply depending on the level of  
30    shareholding between a parent and subsidiary. That is not denied in the slightest, but they  
31    are presumptions. Still one needs to consider all the facts and circumstances. In other  
32    words, you cannot just assume what the nature of any particular undertaking is in terms of  
33    its membership by legal undertaking, legal entities within a particular corporate group. You

1 have to actually carry out the analysis. You may benefit from presumptions but you still  
2 have to do that analysis. You still have to identify the particular legal entities.

3 This is not a radical suggestion. It is, of course, one that has been adopted by the Tribunal  
4 in *Sepia Logistics*, which I will not take the Tribunal to, but just for your notes that is in  
5 authorities bundle 1, tab 4, and the relevant paragraphs are paras.70 to 80, and in particular  
6 para.79 where the Tribunal emphasise the need for “careful analysis of facts” in relation to  
7 these matters. So you cannot just assume that a subsidiary is part of an undertaking, you  
8 have to make a specific finding to that effect. Just as you cannot assume who is part of an  
9 undertaking, you cannot assume who a notional representative addressee is representing.  
10 You would need a specific and binding finding even on the claimant’s own account that  
11 such beasts can properly exist and be addressed by binding findings of Commission  
12 decisions.

13 So the claimant’s case is fundamentally flawed. There is well established law that decisions  
14 are only binding on addressees. There is a good reason for that. It ensures legal certainty  
15 and protects the rights of those affected. Carbon GB is not an addressee. There is no  
16 binding infringement decision against in the Commission decision in question, and that is an  
17 end of the matter so far as far Carbon GB is concerned, and that is the submission of Carbon  
18 GB is concerned and that is the submission of Carbon GB in relation to its first argument.

19 I am going to move on to the second argument and submissions in relation to that. I know  
20 that on occasion the Tribunal sometimes wishes to take a break mid-morning. I do not  
21 know whether or not you want to do that today.

22 THE PRESIDENT: Are you inviting us to?

23 MR. BEARD: I am perfectly happy to carry on.

24 THE PRESIDENT: I think we are okay.

25 MR. BEARD: In dealing with our second argument, we need to consider the terminology that I  
26 have already been using in terms of the description of Commission decisions. The  
27 operative part, which is the actual decision which makes, for example, a finding of  
28 infringement, or sets out penalties imposed, if any, and requires the relevant undertakings  
29 listed to bring the infringement to the end and, of course, sets out the addressee to the  
30 decision, and the statement of reasons that precedes that, what are referred to as the recitals  
31 in the decision, setting out the facts and legal assessment of the Commission in reaching its  
32 decision. Commission decisions in the competition field are broadly all structured in the  
33 same way, having a very clear end operative part and sometimes a lengthy statement of  
34 reasons preceding it.

1 The Court of Justice of the European Union has held that only the operative part of the  
2 Commission decision is relevant in identifying the persons to whom an infringement  
3 decision applies. It is only where there is any lack of clarity in that operative part that the  
4 statement of reasons may be referred to for guidance in order to interpret the operative part.  
5 That principle was set out very clearly in the case of *Suiker Unie*, which is in authorities’  
6 bundle 1 at tab 10. This is a case before the ECJ relating to an appeal against the  
7 Commission’s finding that a number of producers and sellers of sugar had infringed the  
8 relevant competition provisions of the Treaty. Although it is an epic judgment I am only  
9 going to take the Tribunal to a couple of passages. Could you turn on to p.1678. What we  
10 see here is a summary of the decision in question. What you can see under (a) is “Summary  
11 of the operative part of the decision”, and then various heads, and (4) says:

12 “SZAG and Franken, on the one hand, and Béghin and Sucre-Union, on the other  
13 hand, ‘have, from 1970/71 marketing year onwards, committed infringements of  
14 Article 85(1) by engaging in a concerted practice having as its object and effect the  
15 control of deliveries of French sugar on the market of the Southern part of  
16 Germany ...”

17 So it is four parties that are mentioned there in the operative part of the decision. This is  
18 concerned with the infringement in the southern part of Germany.

19 If one turns on to p.1686 you will see you will see on the bottom left of the page 4, and this  
20 is the relating to the (4) as given in the summary of the operative part of the decision:

21 “Complaint that SZAG and Béghin have engaged in a concerted practice having as  
22 its object the protection of the market in the Southern part of the Federal Republic  
23 of Germany.”

24 Then one sees various paragraphs describing what is going on here that are drawn from the  
25 terms of the decision in question. In particular, what one can see just by skimming through  
26 is that, apart from the parties SZAG, Franken, Béghin and Sucre-Union, there is also  
27 reference to, particularly in the second paragraph of the right hand column:

28 “The deliveries other than those from producer to producer on SZV’s sales  
29 territory ...”

30 There are various references to SZV in the decision generally, but in particular in relation to  
31 this finding of infringement.

32 One can then jump on rather a long way to p.1966 in the judgment. The first paragraph on  
33 that page is 309. You will see from the sub-heading “Chapter 4”:



1                    “*The complaint of a concerted practice having as its object the protection of the*  
2                    *market of the southern part of the Federal Republic of Germany*”

3                    At the hearing what has happened is that the Commission has stated that one of the  
4                    undertakings against which the complaint was directed was, in fact, SZV, and it had dealt  
5                    with that in the recitals, i.e. the reasoning preceding the operative part of the decision, but it  
6                    had inadvertently not mentioned it in relation to the infringement which I have shown you  
7                    was dealt with in the operative part of the decision at Article.1.1(4). What one sees at  
8                    para.313:

9                    “The Commission has stated that this complaint is also directed against SZV and  
10                    also said at the hearing that it was only through inadvertence that this company  
11                    was not mentioned in the beforementioned subparagraph.

12                    The Commission argues that its intention to make this complaint also against SZV  
13                    is indicated, on the one hand, in the statement of the reasons upon which the  
14                    decision was based and, on the other hand, in the introductory part of Article 1(2)  
15                    of the decision.

16                    For the purpose of determining the persons to whom a decision, which finds that  
17                    there has been an infringement, applies, only the operative part of this decision  
18                    must be considered, provided that it is not open to more than one interpretation.”

19                    So if the terms of the operative part of the decision are clear specifying the addressees of the  
20                    decision, you do not look at the recitals, you do not need to do that.

21                    As I have already indicated, in terms of the recitals, clearly in relation to the fourth  
22                    infringement finding there were references to SZV in the decision. The court is clearly  
23                    saying here that that is not what you do when you look at the operative part, you do not go  
24                    back and look at the relevant recitals, you just say, “To whom was the operative part of the  
25                    decision directed?”

26                    Then at 317:

27                    “Therefore there are grounds for finding that this subparagraph does not apply to  
28                    SZV.”

29                    So the court confirms that it is not relevant to SZV.

30                    This is clearly in line with the *Dutch Bitumen* cartel case, to which I have already referred,  
31                    and it is worth mentioning the case of *Adriatica Navigazione*, which is at tab 15 in bundle 5.

32                    DR. SCOTT: Just thinking through what you are saying, to take the *Heijman* case, if the  
33                    Commission had been unwise enough at the end to say Heijman, rather than a specific  
34                    company name or names, then what you are saying is that one could go back into the

1 recitals to understand who was embraced in *Heijman*. I realise that they had the same  
2 address, so you could have been faced with that if they had used the word “defined” for the  
3 group with the address of those companies.

4 MR. BEARD: Certainly the thrust of *Suiker Unie* is that it is clear on the face that you do not go  
5 further. The possibilities of ambiguity are many and multifarious and it might be right,  
6 depending on the nature of the ambiguity, that if you have not specified a legal entity then I  
7 can see that an ambiguity might arise and it may be relevant then to consider recitals. That  
8 is the thrust of what the *Suiker Unie* is saying.

9 DR. SCOTT: What you are saying is that in each of the decisions contained in the bundles there  
10 are definitive and legal entities in each case.

11 MR. BEARD: The specific legal entity’s name was set out and specified, though, as I say, for the  
12 finding of infringement, it is described as being “the following undertakings are found to  
13 have infringed”, and then it is either one or more legal entities that are specifically set out  
14 there.

15 DR. SCOTT: From your point of view what you would say to us is the fact that the Commission  
16 does on occasion select quite a wide variety of companies within groups of companies, and  
17 indeed in the decision which we are considering, in one case they do take more than one  
18 company, and yet in *Carbone* they do not, that adds force to what you are saying.

19 MR. BEARD: Yes, absolutely. One can see the *Akzo Nobel* situation. You have five specific  
20 legal entities being named, they are analysed in the decision, they are interconnections, the  
21 degrees of control are analysed. They are then defined together as the “undertaking” and  
22 they are then specified in the decision. *Schunk* is the same, but with only two. It happens  
23 in relation to almost all of the decisions that one will find in this bundle and indeed many  
24 others.

25 DR. SCOTT: It occurs in several forms in the *Dow* decisions, there are lots of Dow companies.

26 MR. BEARD: That is right, and it will depend. The Commission undoubtedly can take different  
27 views about who it is going to treat as part of an undertaking. When it does that it carries  
28 out the analysis and sets out its reasoning as to how it is going to treat people.

29 DR. SCOTT: Thank you.

30 THE PRESIDENT: Which tab are we looking at.

31 MR. BEARD: I am sorry, I was in tab 15, bundle 5, the *Adriatica* case. This is an appeal  
32 following a Commission decision in *Greek Ferries*, where the CFI, now the General Court,  
33 was required to consider whether the infringement identified in the relevant decision related  
34 to two separate infringements or a single continuous infringement of EU competition law.

1 If we go to the decision itself and turn over to the first page, which is 5356 in my copy, it  
2 says:

3 “The applicant, Adriatica, is a publicly owned shipping company ... which  
4 provides a roll-on roll-off ferry service of this kind between Greece and Italy.”

5 Then if one turns to 5357, para.5:

6 “The Decision contains the following provisions:

7 ‘Article 1

8 1. Minoan Lines, Anek Lines, Karageorgis Lines, Marlines SA and Strintzis  
9 Lines have infringed Article 85(1) [now 101] of the EC Treaty by agreeing prices  
10 to be applied to the roll-on roll-off ferry services between Patras and Ancona.

11 The duration of these infringements is as follows ...”

12 What is notable about that is that there is no reference to Adriatica there.

13 If one then turns over the page:

14 “2. Minoan Lines, Anek Lines, Karageorgis Lines, Adriatica di Navigazione  
15 SpA, Ventouris Group Enterprises SA and Strintzis Lines have infringed Article  
16 85(1) of the EC Treaty by agreeing on the levels of fares for trucks to be applied on  
17 the Patras to Bari and Brindisi routes.”

18 Then there is a consideration and then it sets out Article 2 of the decision.

19 Various challenges were brought by Adriatica in relation to these matters. The particular  
20 paragraph I wanted to take the Tribunal to is at p.5373. One of the things that was being  
21 raised, as can be seen at para.37:

22 “In the present case, the applicant maintains that a contradiction between the  
23 statement of reasons and the operative part of the Decision has led the Commission  
24 to err in its attribution of liability to the applicant ...”

25 Then the court considers these issues and says:

26 Then the court considers these issues and says:

27 “It is clear from the wording of the Decision that the Commission sanctioned two  
28 infringements in this case. Article 1(1) refers to an agreement on the prices for  
29 various roll-on roll-off ferry services (goods vehicles, passengers, passenger  
30 vehicles etc) between Patras and Ancona. Article 1(2) refers to an agreement on  
31 the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes.  
32 In so far as concerns the first infringement, which allegedly went on from July  
33 1987 to July 1994, only the companies operating on [that] route are implicated ...

1 The Commission submits that the Decision does not relate to two separate  
2 infringements, but to a single continuous infringement. It maintains that Article 1  
3 of the Decision should be read in light of the statement of reasons given for the  
4 Decisions and maintains that the reasons always refer to a single agreement on  
5 three routes (from Ancona or Bari or Brindisi to Patras), which it treats as forming  
6 a single market. It cites in particular paragraph 144 of the Decision in which it  
7 stated ...”

8 and you will note the final sentence:

9 ““These agreements formed part of a broader scheme of collusion in the setting of  
10 fares for the ferry services’.”

11 Then 42, and this is the court again:

12 “Undeniably, paragraph 144, which speaks of a single infringement, does not  
13 reflect the same thinking as in the operative part.

14 It should be borne in mind that it is in the operative part of a decision that the  
15 Commission must indicate the nature and extent of the infringements which it  
16 sanctions. It should be noted that, in principle, as regards in particular the scope  
17 and nature of the infringements sanctioned, it is the operative part, rather than the  
18 statement of reasons, that is important. Only where there is a lack of clarity in the  
19 terms used in the operative part should reference be made, for the purposes of  
20 interpretation, to the statement of reasons contained in a decision. As the Court of  
21 Justice has already held, for the purpose of determining the persons to whom a  
22 decision, which finds that there has been an infringement, applies, only the  
23 operative part of the decision must be considered, provided that it is not open to  
24 more than one interpretation.”

25 So referring to *Suiker Unie*, and I have already shown the Tribunal those paragraphs.

26 Then in 44 it says:

27 “In the present case, the wording of the operative part of the Decision presents no  
28 ambiguity. On the contrary, it is clear and precise, stating plainly that the  
29 Commission regards as established a cartel between the companies operating on  
30 the northern route ... [and] the southerly routes.

31 46 In view of the foregoing, the Court rejects the first limb of the first plea.”

32 What this is saying effectively is that you can run a bootstraps argument on ambiguity of an  
33 operative part of a decision. In other words, you cannot say something is ambiguous in the  
34 operative part of the decision because there are comments in the reasoning and in the

1 recitals which are intention, or even, as in this case, contradict the operative part. You read  
2 the operative part. If it is clear, that is it, no need to go any further.

3 If we then turn to the operative part of the decision with which we are concerned, which is  
4 at substantive bundle, tab 1, p.106, what we see is language which will be familiar and it  
5 echoes what we have already seen in relation to the *Dutch Bitumen* decision, which I have  
6 already taken the Tribunal to. At the top of the page, the Commission “has adopted this  
7 decision”, because, of course, the recitals are all “Whereas” findings that are being made as  
8 part of the reasoning. So “has adopted this decision”:

9 “Article 1

10 The following undertakings have infringed Article 81(1) of the Treaty ... for the  
11 periods indicated, in a complex of agreements ...

12 (a) C. Conradt Nürnberg GmbH [a specific company name]

13 (b) Hoffmann & Co. Elektrokohle AG [a specific company name]

14 (c) Le Carbone Lorraine SA [a specific company name] ...”

15 Then we move down, and, as Dr. Scott has already indicated, at (e) we have a slight  
16 different situation:

17 “Schunk GmbH and Schunk Kohlenstofftechnik GmbH, jointly and severally ...”

18 So two specific legal entities identified as the undertaking that has infringed.

19 “Article 2

20 For the infringements referred to in Article 1 ...”

21 So the infringements by those undertakings, what do we get? We get precisely the same  
22 identification of companies, including at (e) two companies in the Schunk Group, GmbH  
23 and Kohlenstofftechnik GmbH. So we get that precise symmetry between the two  
24 provisions.

25 THE PRESIDENT: Then they address it consistently throughout.

26 MR. BEARD: Yes, they go on, Article 3 is the cease and desist. Article 4 then actually specifies  
27 the addresses of the relevant legal undertakings, including, for these purposes, separately  
28 the Schunk entities. There is no presumption that it is only one address that is relevant here.  
29 That is on p108.

30 The first point to make is that it is just not ambiguous at all, it is absolutely clear. There is  
31 no basis for any contention that the Commission have found Carbon GB was there.

32 THE PRESIDENT: Right.

33 MR. BEARD: If it wants to include a subsidiary as part of an undertaking, we have seen that the  
34 Commission takes steps to specify that subsidiary, to identify why it is part of the

1 undertaking, and then it actually specifies the legal entity's name in the decision so as to  
2 make it subject of the binding operative part of the decision.

3 In the bundles you have got the decisions in relation to choline chloride, the *Vitamins*  
4 decision, *Speciality Graphite* and *Dutch Bitumen*, to which I have already taken the  
5 Tribunal. I will not go through the points made in relation to all them.

6 So if you have got no ambiguity there is no need to go back to the recitals. The case law on  
7 this is absolutely clear.

8 As I say, it is only by going down the claimants' route of pulling yourself up on your own  
9 bootstraps that you could ever begin to suggest that there was any ambiguity in this  
10 operative part of the decision. As I will go on to say, actually there is not any ambiguity,  
11 even on that basis, in any event.

12 I have already referred the Tribunal to the *Akzo* and *Sepia* case law, which indicates how,  
13 actually, in order to decide which legal entities are to form part of an undertaking, the  
14 Regulator has to direct their mind to that issue and carry out a factual finding.

15 Just turning to *Cartonboard*, which the claimants rely on in the supplemental submissions  
16 as somehow undermining this very clear position in case law and in the way that the  
17 Commission deals with its decisions. That is in the supplemental bundle. It is an HTML  
18 print out, so it is in a slightly different form from those that we have seen already in terms  
19 of layout. Part 1, summary of the infringement, and if one turns on through this decision to  
20 p.29 of 50. Obviously, if the Tribunal wishes to read the background to this decision,  
21 cartonboard and paperboard is always an entertaining subject, I realise, and I do not want to  
22 suggest that there is no concern about the prior findings. If one turns on to 29 of 50, top  
23 right hand corner, you will see half way down the page, recital 116, "Involvement of the  
24 individual producers". Here it is talking about how the various producers were involved in  
25 various matters. I have not taken you through the introductory sections which discuss the  
26 company groups. I think that may be something for leisure time.

27 One then turns on to p.31, "Legal Assessment", and then the relevant part I think probably  
28 starts at p.34 of 50, "6 Jurisdiction":

29 "Article 85 prohibits restrictive agreements which may affect between Member  
30 States ... irrespective of where the headquarters of the participants are located.  
31 The fact that many of the largest cartonboard producers have their head office  
32 outside the Community does not therefore affect their liability."

33 That is the extra-territorial effects. There is a wood pulp determination that indicated that  
34 previously.

1 Then one turns over the page, “Undertakings”:

2 “(140) The subject of Community competition rules is the ‘undertaking’, which is  
3 not the same concept as that of the incorporated company possessing separate legal  
4 personality. The term ‘undertaking’ is not defined in the Treaty. It may however  
5 refer to any entity engaged in a commercial activity. In the context of large  
6 corporate groups, any of the following may, depending upon the circumstances, be  
7 treated as an ‘undertaking’:

- 8 - the parent or holding company of the group [on its own],
- 9 - the whole group consisting of the parent and its direct and indirect subsidiaries  
10 ...”

11 so multiple legal entities in a complex corporate structure.

12 “- intermediate holding companies ...”

13 they can be undertakings in and of themselves .

14 “- the subgroups or divisions formed by the subholding companies and their  
15 subsidiaries ...”

16 So it is possible that you can have mere divisions that do not necessarily have a separate  
17 legal personality being treated as an undertaking.

18 “- the individual subsidiary companies.

19 In the cartonboard industry many of the major operators are broad-based ‘forest  
20 product’ groups whose activities range from forestry and timber products through  
21 pulp to paper ...

22 “In most cases these groups have a complicated corporate and management  
23 structure. It might therefore be possible to address a statement of objections either  
24 to the group, to the appropriate division or even to the individual subsidiaries.”

25 So the Commission is considering how it is going to actually address the decision in this  
26 case. It recognises that there are only two ways of doing it.

27 “While in theory incorporation is not relevant, in practice for the purposes of  
28 collecting any penalty imposed, the ‘undertaking’ to which the decision is  
29 addressed has normally to possess legal personality so that if necessary  
30 enforcement proceedings can be taken ...

31 (142) The corporate structure of a group may well be determined by  
32 considerations of fiscal and company law ...”

33 Then it talks about the top company may be acting as a pure holding company, there may be  
34 several separate businesses, divisional head offices:

1 “In some groups, the various business areas or divisions are designated in such a  
2 way that their membership of the group and their uniformity of corporate identity  
3 is explicitly demonstrated. In other groups, their ‘independence’ from the parent is  
4 stressed. Indeed, in some cases the links of ownership between companies in the  
5 group are deliberately played down.”

6 So this is arguments about those factual issues that fall to be considered, as referred in the  
7 context of *Akzo*, and so on.

8 “In the present case, the members of the PG Paperboard ...”

9 which is the forum through which the nefarious activities were carried out –

10 “... were usually identified in its records as the individual operating companies  
11 rather than the group itself.”

12 Then it gives an example.

13 “Normally, however, the Commission would have been entitled to address the  
14 decision to the group, particularly in the case of an integrated forest product  
15 undertaking. In order, however, to avoid the argument (which tends to blur the  
16 distinction between a ‘company’ and an ‘undertaking’) as to whether the parent  
17 company of the group ought to be held responsible for the action of what are said  
18 to be autonomous subsidiaries, the Commission has in principle treated the entity  
19 named in the membership lists of the PG Paperboard as the appropriate  
20 ‘undertaking’ for the purposes of addressing the present proceedings ...”

21 So, just pausing there, what they are saying is effectively, “We want to avoid the possibility  
22 of the argument that then arose in *Akzo* about imputing liability to parents, so we are going  
23 to focus on the legal entities. The basic rule is that we are going to focus on the legal  
24 entities who were part of the cartel arrangements”.

25 “... subject to the following exceptions:

- 26 1. where more than company in a group participated in the infringement; or
- 27 2. where there is express evidence implicating the parent company of the  
28 group in the participation of the subsidiary in the cartel,  
29 the proceedings have been addressed to the group (represented by the parent  
30 company).”

31 So here the Commission appears to be saying that it is looking at groups which are then  
32 represented by a parent company.

33 Then 144 talks about the reorganisation of the cartonboard industry:



1 “(145) The application of the principles set out above ... in cases where, but the  
2 acquisition, proceedings would normally have been addressed to the subsidiary ...  
3 conduct prior to the transfer passes with it.”

4 So it is talking about different acquisitions at different times of different legal groups, and  
5 so on. That is also covered in 146.

6 Then in 147 under (a), Cascades SA, you can see that it is appropriate, final sentence:

7 “... to address this Decision to the Cascades group represented by Cascades SA in  
8 respect of the participation in the infringement of all of the Cascades cartonboard  
9 operations.”

10 I will go down to (e) which is Mo Och Domsjoe, which is usually referred to as “MoDo”,  
11 and here we have a situation where:

12 “Thames Board Limited (TBM), the largest United Kingdom producer of  
13 cartonboard was an active participant in the cartel as of 1986 and a member of the  
14 Paperboard Working Group. TBM was acquired by AB Iggesund Bruk with  
15 effect from 1 January 1988 and was renamed Iggesund Paperboard (Workington)  
16 Ltd.

17 At that time AB Iggesund Bruk was an associate company of the Swedish forest  
18 group MoDo which held 49.9% ...

19 Up to the acquisition of TBM, Iggesund Bruk’s main cartonboard product had  
20 been SUBMITS; it was the only important Swedish producer of this grade.

21 Despite the claim made in answer to Article 11 that it was not a member of the PG  
22 Paperboard, representatives of AB Iggesund Bruk had in fact participated in the  
23 President Conferences (but not the PWG).

24 After the acquisition of TBM, Iggesund Bruk on 1 January 1988, representatives  
25 from Workington continued as before to attend the meetings of the PG Paperboard.  
26 MoDo acquired full control of Iggesund Bruk at the beginning of 1989 . . . As from  
27 the middle of 1989, the managing director of Iggesund Paperboard AB (as the  
28 division was known) from Sweden attended meetings of the PWG ...

29 The Iggesund representation at the JMC also continued ...”

30 Then in 152 and 153 it describes:

31 “During the administrative procedure in the present case, MoDo argued that the  
32 statement of objections should be addressed not to it but to Iggesund Paperboard  
33 AB which it claimed was an entirely separate undertaking’ ...

1 It is of course true that, as with any large industrial group, MoDo is organised  
2 operationally in several business areas ... Indeed, it might well be that Iggesund  
3 Paperboard AB as a subgroup or division could be treated as an undertaking for the  
4 purposes of Community competition proceedings, as could other entities inside the  
5 group. This does not, however, mean that any proceedings must be addressed to it  
6 or that the MoDo group itself is freed from all responsibility.”

7 Then 153, practical point first:

8 “... there might be difficulties in collecting the fine were a decision to be  
9 addressed to Iggesund Paperboard AB ...”

10 because it has only got nominal capital.

11 “Secondly (and in so far as the ‘autonomy’ argument might be relevant) Iggesund  
12 Paperboard AB is not as functionally independent of the group, as MoDo has  
13 claimed.”

14 So for the reasons it goes through then, the inter-relationship, the detailed analysis of the  
15 relationship between MoDo and Iggesund Paperboard, and then concludes at the end of that  
16 paragraph:

17 “For the reasons set out earlier the top holding company is taken to represent the  
18 group.”

19 Then one turns on to p.42 of 50 and you have the Commission “has adopted this decision”.  
20 Just because of the way it has been printed out it is slightly less clear, but the first paragraph  
21 includes reference to all the specific legal entities to whom the decision is addressed, and  
22 through that one can see that MoDo, Mo Och Domsjoe AB is specifically referred to.  
23 This decision is slightly differently structured, because what one then has to turn on to is  
24 Article 5, over the page, p.43, where you see “This Decision is addressed to”, and the  
25 MoDo AB, whose address is provided”.

26 Just to complete the analysis, Article 3, going back a page:

27 “The following fines are hereby imposed on the undertakings named herein in  
28 respect of the infringement found in Article 1 ...”

29 Then half way down there at (xii) you have got MoDo being fined, a specifically named  
30 legal entity.

31 DR. SCOTT: Just to say, if you turn on to p.44 you see some of the dangers of downloading  
32 things in this way. We found these tables very uninformative!

33 MR. BEARD: Unless you can read and visualise code it is something of a struggle!

1 THE PRESIDENT: They are saying, as far as one can see, are they not, “For these reasons, we  
2 are just going to go straight for the parent”?

3 MR. BEARD: Yes, that is undoubtedly right.

4 DR. SCOTT: I think the difficulty, if I think back to my days of corporate structures, is that quite  
5 often you structure things in a management way which contain companies which are  
6 essentially companies of straw, they are there for convenience and they also enable you to  
7 give managers positions – the parent importance. The assets and therefore the way you get  
8 hold of a fine is contained in specific companies rather than a plethora of smaller legal  
9 entities which exist in a corporate structure.

10 MR. BEARD: Yes.

11 DR. SCOTT: The Commission, having regard to getting their hands on the money, identify what  
12 they describe as “representatives”. No doubt we will come on to in what sense that word is  
13 used later on.

14 MR. BEARD: I think that is right. Certainly it is one of the considerations. I took you through  
15 the way in which the Commission articulated that it was dealing *Cartonboard*. Actually it  
16 was saying, “We take the subsidiary that was named in the PG Paperboard documentation,  
17 or was found to have been involved, as the primary focus, and then there are these  
18 exceptional rules where we will name the parent if actually other group members are  
19 involved or the parent itself is specifically implicated in our reasoning”. Furthermore, they  
20 do make explicit that they consider to whom the fine can be imposed. They do that  
21 particularly in relation to MoDo because they say that one of the companies involved is  
22 merely a paper company. All of that is accepted.  
23 The way in which the Commission goes about deciding who it is going to make a finding of  
24 infringement in relation to and to whom it is going to address the decision and impose a  
25 fine, we accept that there may be a range of ways in which the Commission can think about  
26 and do that. What it does not alter is to whom the decision is eventually addressed, and that  
27 is the key point for our purposes.

28 THE PRESIDENT: Presumably, if the Cascades subsidiaries had wanted to challenge this, as  
29 Heijman did, they would be told they could not?

30 MR. BEARD: Yes, that seems to be the position. Indeed, there is something of a question about  
31 this notion of a representative entity that is articulated in the Commission’s decision, but we  
32 do not suggest that the Tribunal needs to trouble with that because here, in our case, there  
33 was no equivalent finding to start with. That is plain and obvious. Indeed, to that extent  
34 *Cartonboard* is positively unhelpful to the claimants because when you compare and

1 contrast the two decisions we say you should not be looking at the recitals anyway, but if  
2 you do go on and look at the recitals what you see in *Cartonboard* is the Commission going  
3 through a very detailed analysis of the inter-relationship of the different entities, the  
4 different specific named legal entities and the reasons why they are doing what they are  
5 doing, and then specifically concluding that in this case they are going to paint the parent as  
6 the representative. If that could change the way in which an analysis of an application  
7 under 263 was to be considered, we do not see it, but we are not precluding the possibility  
8 that someone might argue it.

9 That is very different from the present case. As we say, if you were to go to the recitals and  
10 do a compare and contrast with *Cartonboard* actually it does not assist the claimant, it  
11 shows just how in this case there was no equivalent finding. You do not need to go there  
12 anyway, but actually there was nothing even close to this.

13 THE PRESIDENT: We will see how Mr. Turner puts it any.

14 MR. BEARD: Yes. Before I sum up on *Cartonboard*, could I just go to the *MoDo* appeal,  
15 because MoDo felt a little aggrieved, as did a number of other of the *Cartonboard*  
16 companies that were penalised. It turned up before the court and you have the CFI  
17 judgment at tab 3. Again, it is an HTML download, so the format is slightly different.  
18 Unfortunately it does not have page numbers. The relevant paragraphs, or the ones that I  
19 understand are being relied on by the claimants, start around para.83.

20 THE PRESIDENT: We have got 85 as being sidelined.

21 MR. BEARD: Yes, 85 is sidelined:

22 “Several companies in the same group, acting under the same management and  
23 control, may be considered to be part of the same undertaking.”

24 As we have said, referring to *Akzo*, that is possible, we do not dispute that.

25 “In that regard the Commission has a discretion in determining the level such a  
26 structure to which it is most appropriate to address a decision. Consequently, even  
27 if it had been possible for the Commission to address the Decision to Iggesund  
28 Paperboard, that would not have meant that it was obliged to do so.”

29 We are recognising that there are different methods that the Commission can adopt, we are  
30 not trying to challenge all of those issues at all here.

31 “Two of the applicant’s subsidiary companies, Iggesund Paperboard (Workington)  
32 Ltd, and Iggesunds Bruk, were indeed involved in the cartel.”

33 That is actually a reference back to the fact that those two entities are mentioned and  
34 referred to in the prior description in the recitals that are talked about.

1 Then “Findings of the Court”:

2 “In prohibiting undertakings *inter alia* ...”

3 I should say that 85 is not a finding of the court, that is a submission by the Commission,  
4 but we are not taking issue with that.

5 THE PRESIDENT: “The Commission contends”, yes.

6 MR. BEARD: Yes, “The Commission contends” is set out in 84. This is just standard structure  
7 for a judgment.

8 THE PRESIDENT: Yes, that is part of the submission.

9 MR. BEARD: We are not taking issue with that.

10 “Findings of the Court” then run from 87. Again, we take no issue with this.

11 THE PRESIDENT: 95 is the business one, I think.

12 MR. BEARD: The reasoning comes from the basic articulation of undertakings, discussion of the  
13 structures that had been considered by the Commission, so that detailed account that had  
14 been undertaken. Indeed it quotes from 153 in paras.89 and 90. The applicant has not  
15 disputed any of those statements. Then further inquiries by the Court in 92. Then one  
16 comes on to 93, “according to the applicant’s annual accounts”, so they considered further  
17 matters there. Then 95:

18 “Contrary to the applicant’s assertion that only Iggesund Paperboard participated  
19 in the infringement, Iggesund Paperboard (Workington) Ltd was also in the list of  
20 the members of the PG Paperboard, and employees of that company took part in  
21 JMC meetings ...”

22 which were relevant cartel meetings.

23 “In addressing the Decision to the applicant, the Commission therefore acted in  
24 conformity with the criterion set out in point 143 of the Decision ...”

25 which are the criteria that I was just articulating to Dr. Scott –

26 “... according to which that decision was to be addressed to the parent company of  
27 the group where more than one company in that group had participated in the  
28 infringement.”

29 We understand that that is the case here, but it does not take you any further forward in  
30 relation to the basic propositions that are set out in the case law that you look at the  
31 operative part of the decision to determine whether or not it is ambiguous and to whom the  
32 relevant finding was addressed.

33 First of all, it is worth noting that there is nothing in relation to this appeal about the  
34 position of any of the subsidiaries, particularly in the context of national litigation or the

1 threat of national litigation. There is no issue being raised here about whether any of those  
2 subsidiaries were, in fact, bound, even in circumstances where the recitals talked about this  
3 concept of a representing parent company. It has not been tested, and it is not accepted that  
4 any of this means that the ----

5 THE PRESIDENT: This is the parent company wanting to get off, is it not?

6 MR. BEARD: Yes, it is the parent company, it is nothing to do with the subsidiary here. The  
7 parent company is saying, “It was not us, it was them”, pointing downwards and saying,  
8 “You should not have named us, you should not have applied the 143 criteria to implicate  
9 us, you should have been penalising our subsidiaries”. This does not test the question of  
10 whether or not the subsidiary is in some way bound by the decision.

11 Furthermore, none of this considers or in any way abrogates or deprecates the interpretation  
12 of the Treaty, *Suiker Unie*, *Adriatica*, the *Dutch Bitumen* cartel case, to which I have  
13 referred, in terms of emphasising the importance of focusing on who is the addressee in the  
14 operative part of the decision.

15 In order to argue that you could sue a subsidiary in *Cartonboard*, you would at least have  
16 had to have engaged in that bootstraps argument that was deprecated and rejected in  
17 *Adriatica*. In other words, you would have to be saying that the operative part of the  
18 decision was unclear because of the terms that were used in the recitals. We say you cannot  
19 do that, and so you certainly should not treat this and the CFI decision as good authority for  
20 the proposition which is relied upon – in other words, that somehow a decision is binding  
21 on a subsidiary that is not named. Secondly, as I have already emphasised, you have a  
22 vastly different set of findings here. There is a detailed consideration of the precise legal  
23 entities at issue, structural inter-relationships, shareholdings, individual involvement in the  
24 activities, and particularly a clear and specific finding in the recitals that the parent is to be  
25 taken to represent the group.

26 The claimant seeks to say that because of *Cartonboard* you can read across this notion of a  
27 representative addressee to the position of Carbone SA. Nothing can be further from the  
28 truth. It shows precisely the opposite. If, and we say this is a huge “if”, you could read  
29 down the operative part of the *Cartonboard* decision concerned with identifying addressees,  
30 the *Cartonboard* decision illustrates the detailed and specific analysis that would be  
31 required before you got to a point of being able to say that there was any possible binding  
32 finding of infringement in relation to a subsidiary.

33 THE PRESIDENT: I think we had better wait and see what Mr. Turner says about that.

1 MR. BEARD: Yes. As I say, none of that analysis is present in the decision with which we are  
2 concerned. Instead, in relation to the decision with which we are concerned, and focusing  
3 on the points that have been emphasised in the supplementary submissions, the claimants  
4 have only pointed to two parts of the decision in question. They identify them at para.12 of  
5 their supplementary submissions. They are recital 145 and annex 1. Before turning to  
6 them, I just want to emphasise the position as articulated in *Enron*, which I know this  
7 Tribunal is familiar with. It is bundle 1, tab 5. I know that earlier this week even a different  
8 composition of this Tribunal was actually citing various parts of *Enron*, and I know that the  
9 Tribunal is familiar with it. The passages that I would emphasise are found, first, at para.31  
10 in the judgment of Lord Justice Patten. One needs to para.30:

11 “The jurisdiction of the Tribunal is therefore limited ...”

12 THE PRESIDENT: We have read all this, Mr. Beard.

13 MR. BEARD: The key point to emphasise here is that what Lord Justice Patten is emphasising  
14 clearly is that you do not engage in a fact finding exercise in identifying an infringement.  
15 That is reiterated at para.59 of his judgment:

16 “The issues raised in paragraphs 42 and 52 of the Tribunal’s decision neatly  
17 illustrate the dangers of not taking a sufficiently strict approach as to what findings  
18 of infringement the regulator has in fact made.”

19 It deprecates the Tribunal’s decision that because one could arguably spell out of the  
20 paragraphs of the decision a finding of overcharge that there was, in fact, an infringement.  
21 Then I would also refer the Tribunal to para.64, the brief addition by Lord Justice Carnwath,  
22 and in particular the third sentence:

23 “It is not enough to be able to point to findings in the decision from which an  
24 infringement might arguably be inferred.”

25 DR. SCOTT: Just in case it is going to arise in a moment or two, one of the questions in our  
26 minds is what encompasses the decision where you have a decision, as we have in this case,  
27 which incorporates a lot of references, both in its text and its footnotes. In other words, not  
28 going into a fact finding exercise, but in terms of understanding the decision, to what extent  
29 do you believe we are expected to consider those documents that the decision incorporates  
30 by reference?

31 MR. BEARD: One needs to take it in stages obviously. The principal submission is that the  
32 decision is the operative part of the decision. That means you do not go anywhere near the  
33 rest of it. The question does not arise. The position is entirely clear.

1 The next question is, if there were ambiguity in terms of the operative part of the decision,  
2 how does one begin to deal with that? It has to be on the basis of the reasoning set out in  
3 those recitals, and what you are not involved in is carrying out some sort of detailed  
4 analysis of any documentary material, even if it is referred to. It does not form part of the  
5 recitals in so far as there is an articulation of reasons and what could be challenged is the  
6 reasoning in relation to those matters. For example, in relation to the characterisation of an  
7 infringement – because one complaint that was actually made earlier on in *Suiker Unie* was,  
8 “We cannot tell what we are being told we should cease and desist from, because the  
9 infringement, as characterised in the operative part of the decision is obviously a summary  
10 of conduct”. At that point the court said, “Yes, the summary is set out there, you can have  
11 reference to what was referred to in the findings”, but there it was plainly just referring to  
12 the recitals, i.e. the reasoning of the decision maker that was directly set out in all of the  
13 relevant recitals that could be used in order to assist in understanding the problem, albeit  
14 that the court was rather sceptical that this level of bemusement arose on the part of the  
15 party raising it.

16 DR. SCOTT: To give you the specific, it is going to be suggested that you were disingenuous in  
17 saying that GB was not mentioned specifically in the course of the decision. As the  
18 pleadings have developed, it has become clear that there is a view that the decision contains  
19 references to a company in the UK.

20 MR. BEARD: Yes, it does refer to a subsidiary in the UK. We do not accept that that is a  
21 reference to Carbon GB. It does not set that out. It does not name the company. It is  
22 recognised that the Carbone Lorraine Group involved a lot of companies. For the avoidance  
23 of doubt, it is not accepted that during the period of the cartel there was only one subsidiary  
24 in the UK. So in those circumstances, where you have not even got the entity named in the  
25 decision, it is very difficult to understand how you could even begin to start this  
26 interpretative process that is being suggested.

27 Just for passing reference, it is not that the name of Carbon GB was unknown to the  
28 Commission, it is actually specifically referred to in the *Speciality Graphite* decision. There  
29 is no mystery about that.

30 It may actually answer your question more fully if I turn now to the two sections of the  
31 decision that the claimants specifically refer to and rely upon as their springboard for what  
32 they say is a finding that should bind Carbon GB, and the first of those is para. 145, p.49.  
33 The statement there is simply that Morgan faxed its 1995 price list for brushes supplied to



1 Boss, a UK client, to Carbone Lorraine's UK subsidiary. As I have already said that does  
2 not name Carbon GB.

3 THE PRESIDENT: But even if it did, would it amount to much more than evidence upon which,  
4 whether with or without other evidence, an infringement finding could have been made?

5 MR. BEARD: No, it would not have added anything, simply the absence of the name simply  
6 further subtracts from the weight of any evidence.

7 DR. SCOTT: My point, and it is really anticipating the argument against you, is how far one  
8 should consider the submission that has been made, which is presumably the leniency  
9 application in terms of what it identified.

10 MR. BEARD: But it was not a matter of evidential inquiry. This is precisely what the Court of  
11 Appeal in *Enron* was saying do not do. This is not part of your jurisdiction. You are not  
12 supposed to go around trying to hunt for little threads to see if you could pull them and see  
13 if you could get something else from which you could weave an infringement. That is  
14 precisely the role of this Tribunal.

15 THE PRESIDENT: Is there anything else you want to say about 145.

16 MR. BEARD: Well I have already emphasised that we do not accept that the only subsidiary of  
17 Carbone SA during the period of the cartel was Carbon GB.

18 THE PRESIDENT: So you do not accept that 145 is a reference to Carbon GB.

19 MR. BEARD: On its face it is not accepted that that is what that says. The Commission nowhere  
20 states in fact that there was only one subsidiary in the UK. The Commission does not say  
21 whether it considers the subsidiary that it is referring to falls under the *Akzo* test as a  
22 subsidiary, which should be treated as part of a wider undertaking and, of course, as I have  
23 already emphasised it is not a matter which can be the subject of evidential inquiry, and  
24 nowhere is it asserted in the decision that the subsidiary in question, in 145 is in fact Carbon  
25 GB, and yet the claimant is still saying that it is bound – now at one point the claimants say  
26 a little half-heartedly, I think it is para. 12(a) of their supplementary submissions, that that  
27 the willing receipt of a competitor's price list is a basis for the finding of infringement. Well  
28 it can be, is the answer. The receiving of a pricing fax is not in fact an infringement, and  
29 obviously there is no finding here, we need evidence.

30 THE PRESIDENT: It could be evidence, but that requires an assessment.

31 MR. BEARD: The whole saga of roofing and construction, bid rigging cases where there was all  
32 sorts of faxing of information going on. Those cases, in particular Apex and Makers,  
33 illustrate that it is a fact sensitive issue as to whether or not a transfer of prices from one

1 person to another amounts to an infringement, but that is not the infringement we are talking  
2 about here in any event.

3 So then one goes on to the second part of the decision to which the claimants refer and rely  
4 upon, and that is Annex 1 found at p.109, and it is quite right that Annex 1 in setting out the  
5 list of reported cartel meetings does refer to various meetings in the UK, but nowhere does  
6 it refer to Carbon GB or who was attending these meetings.

7 There is a slightly strange point in the supplementary submissions from the claimants at  
8 para. 12B where they seek to say that we do not dispute that Annex 1 lists out meetings  
9 Mersen UK attended. I am sorry, we do and we always have done; we have no idea where  
10 they got that impression from, the idea that we had agreed that Annex 1 referred to Carbon  
11 GB.

12 Indeed, it is just worth noting in this regard that tab 5 of the substantive bundle, in the  
13 course of *inter partes* correspondence, p.191, the claimants said we want you to confirm  
14 various points – “We now ask you to confirm simply and straightforwardly”, this is  
15 effectively a request for evidence by way of concession on the part of Carbon GB, and  
16 strangely enough Carbon GB did not answer the questions. Just looking at (d):

17 “We now ask you to confirm ....

18 (d) that one or more of the cartel meetings listed in Annex of the Decision  
19 as forming part of the cartel behaviour sanctioned in the Decision  
20 involved a representative from Le Carbon GB.”

21 So they were specifically asking us whether or not there were representatives of Carbon GB  
22 at these meetings, so to say that we had agreed to it is very odd, particularly when the  
23 response to that letter is found at pp. 196, 197 under tab 8 of that bundle, and you do not  
24 need to look it up but it is a response that does not accede to the request.

25 So Annex 1 really just takes the claimants nowhere further. Recital 145, Annex 1, we say  
26 you do not need to look at them, but if that is the best that they can refer to it does not take  
27 them anywhere anyway.

28 Just compare and contrast the language and detail in *Cartonboard* or *Akzo*, the sort of  
29 decisions that we have already referred to. So in relation to the material that they are  
30 seeking to use as the bootstraps they do not even get any traction even on this hypothetical  
31 argument.

32 Just for completeness, in the supplementary submissions there is a reference to the Carbone  
33 judgment in the CFI, I will obviously wait to see what Mr. Turner says but that also takes  
34 the claimants nowhere. There it was the parent, Carbone SA contending that it was passive

1 and it should have had a reduction in penalty because that is a mitigating circumstance  
2 under the Commission penalty guidelines. One of the pleas was that the German subsidiary  
3 was not implementing the cartel. That, in no way is contrary to anything that is being said,  
4 this is just for your notes at paras. 207 and 208 of that judgment, there the was no basis for  
5 saying “Actually the German subsidiary was found in the decision to be part of the  
6 infringement but did not do anything”, it was simply saying as part of the mitigating  
7 circumstances relating to the parent, there was never any suggestion that the German  
8 subsidiary was bound by the decision. Indeed, if the German subsidiary was somehow  
9 bound by the decision you might have expected the court in that judgment to have referred  
10 to it as such.

11 As I say, we have a situation where the bootstraps argument should not be applied, but even  
12 if those bootstraps are to be pulled they get no traction. I have emphasised already the  
13 importance of the *Akzo* test, that you cannot just assume parties are part of an undertaking  
14 and the need for actual findings by the Commission or a regulator are crucial. This is  
15 important. It is important because it determines how this Tribunal is supposed to decide  
16 these matters.

17 What if, for example, a subsidiary was engaged in an entirely different sort of business?  
18 What if the subsidiary was operating in a country where there is no finding in the  
19 Commission’s decision? The approach adopted by the claimants simply does not  
20 adequately distinguish these matters and, indeed, this creates a collateral problem for them  
21 which we have highlighted in our reply submissions about the determination of the Court of  
22 Appeal in *Cooper Tire*. I will not repeat those submissions now because they are set out in  
23 those reply submissions at tab 10 of the substantive bundle. But the point that is made there  
24 is that the suggestion by the Court of Appeal that a reference would be appropriate in  
25 circumstances where one was looking at a standalone claim being brought against a  
26 subsidiary, because if the subsidiary did not now about what was going on in the cartel, then  
27 it should not be imputed with liability, even on a standalone basis. That consideration by  
28 the Court of Appeal makes no sense if effectively an infringement by a parent binds all the  
29 subsidiaries. Just for your notes, that is at para.7.7 through to 7.9 pp 221 to 222 in the  
30 bundle.

31 I have set out the first argument, not addressed, you cannot be bound unless you are directly  
32 addressed – sorry, I will not use the adjective “directly” – unless you are addressed in the  
33 operative part of the decision. I have articulated the second argument that, in any event,

1 here there is no lack of clarity, there is no basis for suggesting that Carbon GB has  
2 identified as part of the relevant undertaking which is bound by the decision.

3 So finally turning then to s.47A we have already set out in both the application, which is to  
4 be found at tab 4 in the bundle, in particular at s.4, the relevant provisions of s.47A and we  
5 simply emphasise the position as articulated by Lord Justice Patten in particular in para. 31  
6 of *Enron*.

7 Here we have a situation where the decision being relied upon is the decision in s.47A  
8 (6)(d) which is a decision of the European Commission that the prohibition in Article 81 at  
9 101 has been infringed. The claim is against a particular person who has not been the  
10 subject of a binding infringement decision by the Commission, the claim for damages  
11 against that person cannot therefore succeed. No infringement decision against Carbon GB  
12 that binds it. Of course it is true there is an infringement decision directed at Carbon GB's  
13 parent company but that decision does not bind Carbon GB and therefore you cannot fulfil  
14 the requirements of a claim against Carbon GB in this Tribunal.

15 In simple terms if you say that in order to secure damages you need infringement causation  
16 and quantum. In the case of Carbon GB you do not have a finding of infringement, so you  
17 do not have that first component, and you need to have a finding of infringement against the  
18 person in question where you are suing them in this Tribunal.

19 I have emphasised that an inquiry into the evidence surrounding these matters is not for this  
20 Tribunal, it is not for this Tribunal to make findings of infringement, this is not the High  
21 Court with a broader jurisdiction, it cannot hear evidence on these matters. The whole  
22 notion of a follow-on claim, which is what this Tribunal can hear under the Competition Act  
23 is dependent on this prior finding of infringement.

24 In the context of EU findings of infringement you do not have that finding unless it is  
25 addressed to the relevant legal person. You sue a legal entity, the legal entity must have  
26 been bound.

27 One final observation: why are we here? Why are these claimants seeking to engage in  
28 these contortions? We know the reason why the claimants have now included the sixth  
29 defendant three years after the claim commenced, it is an attempt to secure jurisdiction  
30 against defendants domiciled elsewhere. That is actually very clear from the pleading at  
31 para. 111.

32 THE PRESIDENT: It does not really matter, does it because if they are right they are right, and  
33 if they are wrong they are wrong, it does not matter why they are doing it.

1 MR. BEARD: If they are right they are right. But initially in their response there was a degree of  
2 indignation about the notion of injustice that was being served here, and it is important to  
3 remember that if proper jurisdiction rules which focus on the domicile of defendants say:  
4 “Actually they should be sued in other courts elsewhere in Europe, then that is perfectly just  
5 and fair. The contortion is being performed by the claimants, the whole exercise is  
6 artificial. If the claimants want to bring a claim against Carbone SA, who is the addressee  
7 of the decision they must pursue that claim against that entity, if they end up having to do so  
8 in other courts, so be it, those are the fair and proper rules on jurisdiction. That is a matter  
9 for another day. For today, focusing on a UK entity and then pretending it is fixed with a  
10 decision in which it has never even been named is a wholly unmeritorious approach. In all  
11 the circumstances it is right for the Tribunal to declare it has no jurisdiction to hear the  
12 claim against the sixth defendant.

13 Unless I can assist the Tribunal further at this stage, those are the submissions of Carbon  
14 GB.

15 THE PRESIDENT: Thank you very much. Mr. Turner, do you want to have 15 minutes at us or  
16 do you want to start at quarter to two? We are happy to do either.

17 MR. TURNER: I am happy to start now to crack on.

18 THE PRESIDENT: Of course.

19 MR. TURNER: Sir, members of the Tribunal, I propose to structure my submissions as follows,  
20 having heard what Mr. Beard says. I will begin by outlining the essential propositions on  
21 which we, the claimants, rely in this application and then I will turn to address in a logical  
22 sequence strands of Mr. Beard’s argument that the Tribunal does not have jurisdiction and  
23 that you should reject the claim brought against Carbon GB.

24 I will begin with our essential propositions. The overriding one is one that was anticipated  
25 at the outset of Mr. Beard’s address, it is that they look at the case through the wrong end of  
26 the telescope. This is not a case about whether there is a finding of infringement which has  
27 a binding quality for the purposes of the EC Rules and which can be appealed under the EU  
28 system. This is a case in which the Tribunal is being asked whether there is a relevant  
29 finding of infringement, therefore (second point) the correct starting point for the Tribunal  
30 today in its analysis is the UK Statute, because it is that which confers the jurisdiction on  
31 the Tribunal to hear these monetary claims. I will not turn it up, Mr. Beard has referred to  
32 it, but this Tribunal is well aware that it refers to a decision (the relevant part) of the  
33 European Commission that the prohibition has been infringed. (S.47A(d)(6)) and you are

1 concerned with what that means in this context. So rather than taking that after two hours  
2 and ten minutes of submissions I start with it.

3 Third point: If the operative part of a Commission decision read together with a statement  
4 of reasons shows you that the undertaking found to have infringed includes a particular  
5 subsidiary then we say that is sufficient for the purposes of s.47A and for the Tribunal. I  
6 will be coming on to show you that that is the case; we say it is the case here.

7 Fourthly, you can therefore leave open the question of what happens if you have a finding  
8 of infringement made in the reasoning of a Commission decision which has not, in any way  
9 travelled into or been reflected in the operative part of the decision because again it would  
10 be our submission that that is not the case here. Were that to arise on the facts, then we  
11 would contend that the Tribunal would equally have jurisdiction in relation to the finding of  
12 infringement which you would find in the statement of reasoning. But, as I say, our primary  
13 case is that here the operative part of this decision, properly understood, contains the  
14 necessary finding of infringement for the Tribunal to have jurisdiction in relation to the  
15 claim against Carbon GB.

16 That is the bones of our case. I will then turn to the planks of Mr. Beard's argument in this  
17 application as I have tried to assemble them as he has been talking. His main argument is  
18 based on European law and on his reading of the Commission decision in this case, and it  
19 breaks down, I believe into four propositions and I would like to spell them out and deal  
20 with them each in turn.

21 The first concerns his address about the nature of a Commission infringement decision. He  
22 asserts that where the Commission intends to include the subsidiary as a part of the  
23 undertaking found to have infringed, then you will see the Commission taking specific steps  
24 to identify that subsidiary in the operative part of its decision. He said it, he developed it,  
25 for your note it is in para. 5.4 of his reply, and we are going to contest that.

26 His second point was that only the operative part of a Commission decision is relevant at all  
27 to identifying the persons found to have infringed the competition rules and if there is no  
28 apparent lack of clarity in the operative part of the decision then you are not free to inspect  
29 the reasoning in the body of the decision in order to interpret the meaning of the operative  
30 part – that was developed in his reply at paras. 3.2 and 5.3 and in some detail orally today.  
31 For those reasons he says that you do not get even get into looking at the body of the  
32 decision, you can stop dead at the operative part, which does not refer to Carbon GB.

33 However, he says if, contrary to his primary submission, it is permissible to have regard to  
34 the reasoning in the decision to interpret the operative part, or more generally, nonetheless

1 the reasoning in this decision shows that the Commission considered only the parent  
2 company, Carbone SA, was the relevant undertaking. It was the addressee. You will find  
3 that in his reply at para. 6.3 and in his main application at 5.5.

4 Fourthly, he says that Carbon GB cannot be found to have infringed the competition rule  
5 because the Commission never sent it a statement of objections, or gave it a separate right to  
6 be heard – that is both in his main application and in the reply. The point was developed  
7 today, although slightly more generally, about the rules of fairness and how they would be  
8 defeated if we are right.

9 Those are the main planks of his case. He advanced also a separate strand of argument  
10 based on English law, towards the end of the morning and this is that our claim involves in  
11 any case an impermissible reliance on facts and evidence outside the four corners of the  
12 Commission decision to make it good. He says that even if there is a finding of  
13 infringement which extends to the behaviour of, let us say, Carbone Lorraine’s UK  
14 subsidiary, whatever that may be, it is impermissible for us to refer to any extraneous  
15 sources to confirm that that company, which the Commission was referring to, is Carbon  
16 GB. He says that this is impermissible because of the rule articulated by the Court of  
17 Appeal in the *Enron* case, and that is developed in his main application at paras. 6.1 to 6.6.  
18 What I am going to do now is take in turn the elements of Mr. Beard’s argument and show  
19 you why each one of those is wrong. I am happy to start now or equally happy to break,  
20 but the problem is that if I begin with the first proposition we may run on a bit over 1  
21 o’clock.

22 THE PRESIDENT: Well, shall we break now and start again at 2 o’clock? Thank you very  
23 much.

24 (Adjourned for a short time)

25 THE PRESIDENT: Mr. Turner?

26 MR. TURNER: Sir, members of the Tribunal, I was about to start by addressing Mr. Beard’s first  
27 proposition, taking them in the logical sequence, and this is that where there is a finding of  
28 infringement in a Commission’s decision for the Tribunal’s purposes it is located in the  
29 operative part alone. As I say, the way this is expressed in my friend’s reply at para. 5.4 is  
30 as follows:

31 “... where the Commission intends to include a subsidiary as part of an  
32 undertaking [found to have infringed] it takes specific steps to identify that  
33 subsidiary”

1 in the operative part of the decision. So the necessary first step for us is to understand  
2 context, structure and the content of a Commission infringement decision. Before turning  
3 to that the Commission is, of course, applying a Treaty prohibition now Article 101 of the  
4 TFEU against anti-competitive behaviour which is not directed against legal entities, but  
5 against undertakings. What is outlawed is anti-competitive agreements and concerted  
6 practices between undertakings. It is common ground, and Mr. Beard confirmed, that an  
7 undertaking is an economic concept and this can, for example, include a number of  
8 companies in the group which act in conjunction with each other as a single unit. But, for  
9 the purpose of enforcing the competition rules where you find there to have been an  
10 infringement by this undertaking, it is necessary for the operative part of a decision to  
11 identify a particular legal person or persons who then become liable in particular for paying  
12 any fine. Within that context the Commission's practice in its cartel decisions is not always  
13 to specify in the operative part of its decisions all the legal entities which form the  
14 undertaking which has been found to infringe by it. Mr. Beard is fundamentally wrong  
15 about that.

16 In the case where you have a large corporate group where, let us say, numerous subsidiaries  
17 have been party to the infringement as part of a single undertaking, the Commission's  
18 practice has been to specify what we may call "TopCo", the ultimate parent company, rather  
19 than to list out exhaustively each and every one of the subsidiaries involved in the unlawful  
20 behaviour, and this is a practice which is permitted as a matter of the Commission's  
21 discretion in drafting its decisions, and which the court has expressly recognised. What it  
22 means, therefore, is that the legal person named in the operative part of the Commission's  
23 decision as "the undertaking" will, on such occasions as these, be a shorthand. The finding  
24 of infringement therefore is not the same as and not limited to the entity which is named.

25 In a case such as the one with which we are concerned today, the operative part refers to the  
26 parent company as representing the undertaking which has been found to have infringed the  
27 competition rules in its decision.

28 What I would like to do, because it is such an important point, is revisit to an extent  
29 *Cartonboard* which Mr. Beard took you to with his own emphasis, but before doing so take  
30 you to one of his authorities, *Dutch Bitumen*, which is in the sixth volume at tab 25. If you  
31 turn in that to p.63 you have a very important couple of paragraphs under the heading  
32 "Addressees of this Decision", and those are paras. 189 and 190. Paragraph 189, if you cast  
33 an eye over that, you will see refers to precisely what I have said, namely that the  
34 prohibition is concerned with undertakings and that the undertaking that participated in the



1 infringement is not necessarily the same entity as the precise legal entity within a group  
2 whose representatives actually took part in the cartel meetings. The undertaking is not  
3 defined, but that it is essentially an economic concept and the law is set out. In 190 the  
4 Commission goes on and says:

5 “Despite the fact that Article 81 of the Treaty is applicable to undertaking and that  
6 the concept of undertaking has an economic scope, only entities with legal  
7 personality can be held liable for infringements. This Decision should therefore  
8 be addressed to legal entities. It is accordingly necessary for each undertaking that  
9 is to be held accountable for its infringement of Article 81 of the Treaty in this  
10 case to identify one or more legal entities that represent the undertaking.”

11 And that is what the Commission does in cases of the kind with which we are concerned.  
12 So if you put that away and now pick up *Cartonboard* again, which is in the supplemental  
13 bundle at tab 2. You see this point with stark clarity and also the appreciation of it by the  
14 court in the appeal. If one begins on the first page, one sees under “PART 1 THE FACTS”  
15 the summary of the infringement. Just before the list of companies there is a reference to  
16 having shown that an infringement of Article 85 (which was the old numbering for the  
17 prohibition) had been committed by the following undertakings. Then they are listed, and  
18 you will see that the second is “Cascades SA”, the parent company in that group. Three  
19 from the bottom is “Mo Och” (or MoDo) which is the parent company in that group.  
20 If you go forward back to the paragraphs that we were looking at this morning on p.35 – I  
21 shall only take the Tribunal to the points which I want to emphasise – we saw at para. 141  
22 the reference to these groups having complicated corporate and management structures and  
23 therefore the different possibilities for who the target, the addressee of a statement of  
24 objections might be.

25 In para. 143 what the Commission is saying is that they will generally, to avoid argument  
26 about the autonomy of an operating subsidiary, choose to address its decision to the  
27 subsidiary which was involved except in certain circumstances, and the first of those is:  
28 “1. where more than one company in a group participated in the infringement”, and where  
29 that is the case the Commission, in its discretion, simply identifies in the operative part of  
30 its decision TopCo. They say (just under “2” in that paragraph) that in that sort of case the  
31 proceedings have been addressed to the group represented by the parent company. Again,  
32 that is the way that they conceptualise this.

33 Then if you turn to Cascades over the page at 147, we know that the supposed undertaking  
34 which has been addressed in the operative part is Cascades SA. The Commission refers to

1 the actual participants in the cartel which continue to exist as subsidiaries in the group. So  
2 those are the ones found to have infringed, but says:

3 “... it is appropriate to address this decision to the Cascades represented by  
4 Cascades SA in respect of the participation in the infringement of all of Cascades  
5 cartonboard operations.”

6 Again, a very clear distinction between the finding that they have made which relates to  
7 Cascades cartonboard operations and the implicated companies and the entity which you  
8 find in the operative part described as the undertaking which is only Cascades SA.

9 Finally, to reinforce it over the page again you have MoDo at paras. 152 and 153 and you  
10 see in the second full paragraph of 152 that it might well be:

11 “that Iggesund Paperboard AB as a subgroup or division could be treated as an  
12 undertaking for the purpose of Community competition proceedings as could other  
13 entities inside the group”.

14 They see it as a matter of discretion.

15 “This does not, however, mean that any proceedings must be addressed to it or  
16 that the MoDo Group itself is freed from all responsibility.”

17 And the reason that they give for having addressed it as they do, you see the first sentence  
18 of para. 153: “In the first place there might be difficulties in collecting the fine were a  
19 decision to be addressed to Iggesund Paperboard AB which is a so-called Commission  
20 company of the MoDo Group had itself a nominal capital.

21 So you could not have a clearer case of the Commission saying: “Our findings relate to this  
22 area, these subsidiaries, we will address our decision for particular reasons, administrative  
23 reasons, to TopCo. That is what they did here, and that is, you see, also from *Dutch*  
24 *Bitumen*, the way that they express themselves.

25 You then had this case going an appeal to the court and that is the next tab – Mo Och. If  
26 you start at para. 79 merely to frame the point, you see the argument that is made, this is  
27 unnumbered, para. 79 is at the bottom of the page. It says:

28 “Substance

29 - Arguments of the parties

30 79 According to the applicant, the Decision was addressed to the parent company  
31 of a group of companies where more than one company had participated in the  
32 infringement or where there was specific evidence implicating the parent company  
33 in the infringement.”

1 And then it says that neither of those features was made out in its case, and that was the  
2 basis for its appeal, but it is reciting the way in which the Commission has behaved. You  
3 then have the Commission's riposte, which we looked at earlier at 84 and 85, and I point out  
4 that in 85, in the second sentence, you see the Commission saying:

5 "In that regard the Commission has a discretion in determining the level of such a  
6 structure to which it is most appropriate to address a decision."

7 And it points out that two of the applicant's subsidiary companies, which do not end up in  
8 the operative part at all, were indeed involved in the cartel. So it says: "our findings relate  
9 to different companies from the ones named as the undertaking in the decision.

10 You then have the court itself, over the page at 95 – 95 is a particularly interesting finding  
11 for this reason. The court does not disagree with or cavil at what the Commission has done.  
12 On the contrary, implicitly at any rate it accepts the way that the Commission has  
13 undertaken its job of notifying a particular addressee as TopCo in those circumstances. But  
14 what it does do is itself say that:

15 "Contrary to the applicant's assertion that only Iggesund Paperboard participated  
16 in the infringement [one of the subsidiaries an English company] Iggesund  
17 Paperboard (Workington) Ltd was also in the list of members of PG Paperboard  
18 [cartel organisation] and employees of that company took part in JMC meetings.  
19 In addressing the Decision to the applicant, the Commission therefore acted in  
20 conformity with the criterion set out in point 143 of the Decision, according to  
21 which that decision was to be addressed to the parent company of the group where  
22 more than one company in that group had participated in the infringement."

23 What is striking for your purposes is that the court has no trouble here identifying a finding  
24 of infringement from the Commission's decision which is made against a legal person,  
25 Workington Ltd, which is certainly not the addressee of the Commission's decision or  
26 named in the operative part.

27 It is inescapable from this that Mr. Beard is wrong, that although in these decisions, and by  
28 the way I should also point out, if you would turn briefly back to the *Cartonboard* decision  
29 at tab 2, and look at the operative part on p.42, it is very clear that if you look at Article 2, it  
30 calls them "The undertakings". So although in the operative parts of these decisions it is  
31 referring to these named entities as "the undertakings" it does not mean that they are to be  
32 equated with the entities against which the findings of infringement in the Commission's  
33 decision have been made and there is no suggestion that the court disagrees with that. On  
34 the contrary you will have seen that the court implicitly is endorsing that. What that means,

1 to draw the strands together is that the operative part of these cartel decisions, although  
2 referring to parent companies as the undertakings, is using shorthand, it is referring to them  
3 as representing the undertakings found in the decision to have infringed.

4 THE PRESIDENT: Therefore it follows from that, does it not, that all those undertakings such as  
5 the Workington one could have challenged the decision if they had wished to.

6 MR. TURNER: It may be the case. That is a point of Community law as to whether they  
7 have ----

8 THE PRESIDENT: Well it is a point of Community law, I agree, on standing, but I think the way  
9 it was put in one of the cases, I cannot remember whether it was *Suiker* or the other one.

10 MR. TURNER: *Wegenbou*.

11 THE PRESIDENT: Yes, where it said that the decision does not actually apply to companies, and  
12 that is one of the reasons why you do not have standing because the decision simply does  
13 not apply to you unless you are in the operative part.

14 MR. TURNER: Or unless you are directly and individually concerned, even though not  
15 addressed.

16 THE PRESIDENT: No, but it does not apply to you if you are not in the operative part is what  
17 they seem to be saying there, and therefore you are not directly and individually concerned,  
18 it seems to be the other way around, and I am just trying to see how that ties in with this.  
19 This was the other end, was it not? This is the parent company trying to say “We are not  
20 liable” because someone else was. Although it is Community law, as you rightly say – or  
21 whatever we have to call that now – as to whether you had standing can ----

22 MR. TURNER: How does it all fit together?

23 THE PRESIDENT: -- can we say that where a decision is a Community decision or a Union  
24 decision and therefore Community law applies to it, and to its status and under that the  
25 decision has no binding effect on and does not apply to an undertaking not named, and not  
26 addressed in the operative part, nevertheless as a matter of national law it said it does apply  
27 to it.

28 MR. TURNER: Let me address that in two comments, and then I would like to deal with it more  
29 fully because it is an interesting point in relation to what I am going to call *Wegenbou* for  
30 want of being able to express the last syllables of that name.  
31 First, we are concerned here with identifying the findings of infringement made in the  
32 Commission decision under the Statute, and that is the exercise which I am endeavouring to  
33 show is satisfied.

1 Second, in relation, sir, to your question, it may be the case – I am merely leaving it open  
2 and I am not denying this – that if, in a situation where, let us say, the Tribunal relies on a  
3 finding of infringement against Carbon GB for the purpose of assuming jurisdiction that  
4 would involve it being directly and individually concerned, sufficiently to have standing to  
5 appeal, that may be the case.

6 Alternatively, and it is to some extent a mystery from the *Wegenbou* decision itself, the  
7 Community Rules are concerned with undertakings and their rights, hence a point I am  
8 going to come on to, the statement of objections, for example, is addressed to (given to) the  
9 undertaking, the representative of the undertaking. It is not necessary to give a statement of  
10 objection to each and every subsidiary in a large group for example.

11 Similarly here, although in the *Weganbou* case you had an operating subsidiary that was  
12 attempting to challenge the Commission’s decision, presumably the addressee of the  
13 decision also had an interest, it had the legal ability to bring its own application to annul,  
14 and it could have done so.

15 DR. SCOTT: In *Wegenbou* there was no national action and we do not know what the law is in  
16 The Netherlands. Here we have in s.47A a section which is unhelpful in relation to  
17 defendants because it does not mention defendants, or potential defendants, but presumably  
18 we have to think of the interaction when we work out whether or not s.60 applies to 47A,  
19 and what are the implications of our interpretation of 47A of the issues you are discussing  
20 now in relation to EU jurisprudence?

21 MR. TURNER: Yes, in relation to s.60 of the Act I would say that is not directly in issue here  
22 because we are not interpreting a parallel provision or acting in accordance with EU law. I  
23 would actually like to develop this point because I think it would be helpful in relation to  
24 *Wegenbou* itself, and perhaps I will come on to that in just a moment

25 THE PRESIDENT: You take your own course.

26 MR. TURNER: For present purposes where we have got to on the journey is to address, and I  
27 trust knock down the first pillar of my friend’s argument about the way in which these  
28 Commission decisions are actually written, which is to say that the findings of infringement  
29 cannot be equated to people who are identified in the operative parts of the decisions.  
30 You then come on to the second proposition and it is a legal one. He says only the  
31 operative part of the Commission decision is legally relevant to identifying the persons  
32 found to have infringed the competition rules. It is a matter of authority of Court of Justice  
33 jurisprudence, and if there is not a lack of clarity because the operative part simply says the

1 following undertakings, and names TopCo, you cannot look into the reasoning in the  
2 decision as an aid to interpreting it, and that is para. 3.2 of his reply.

3 Let me address that. Once one appreciates that Carbon GB is wrong at step 1 concerning  
4 the way in which these Commission decisions actually work, it is easy to see in my  
5 submission that they are also wrong at Step 2. You cannot look at the operative part of a  
6 cartel infringement decision in isolation, which names TopCo and stop reading if it refers  
7 to the parent company as the infringing undertaking, drawing the conclusion that the  
8 contours and parameters of the undertaking are equal to no greater than TopCo. The court  
9 itself has not taken that approach as you saw from *Mo Och*. You have to interpret in these  
10 sorts of cases the operative part in the context of the decision as a whole, and this is fully in  
11 line with the jurisprudence.

12 If I may go to *Suiker Unie* which is the case that Mr. Beard referred to, in authorities'  
13 bundle 1, tab 10. If I may, I will go to another part of the decision, which is the one which  
14 is more generally cited in this context, on p.1931. If you have that you will see a title: "3  
15 Lack of clarity in the operative part of the decision." This was another instance of the same  
16 point being considered in the same case. You will see there that three parties:

17 "SU, CSM and RT submit respectively that the Commission has infringed an  
18 essential procedural requirement, the principle of legal certainty or Regulation No  
19 17(3) in that, either ..."

20 - the relevant bit of the operative part of the decision –

21 "... does not accurately describe the courses of conduct which constitute the  
22 infringement and which the applicants are called upon to put an end to under  
23 Article 2 of the decision, or that it is impossible to ascertain from this latter  
24 provision, even if it is considered in the light of the statement of reasons on which  
25 the decision is based, whether sales from producer to producer, owing to the fact  
26 that they have been treated as being unlawful *per se* must be discontinued."

27 So the claim is, at least in part, we are looking at this operative part and we say it does not  
28 accurately describe the course of conduct which constitutes the infringement, and the  
29 court's response is instructive at the bottom of the page:

30 "In order to evaluate this submission it is advisable to refer not only to the  
31 operative part of the decision which is of necessity concise but also to the  
32 statement of the reasons upon which the decision is based."

33 Then over the page:

1 “If the operative part of the decision, which is criticised, is considered in the light  
2 of the statement of reasons, it shows with sufficient clarity conduct for which the  
3 applicants are blamed and which they must put an end to pursuant to Article 2 of  
4 the decision.”

5 THE PRESIDENT: It is a short, sharp treatment of the argument, is it not?

6 MR. TURNER: It is a short, sharp treatment of the argument, but they say the operative part of  
7 the decision is, of necessity, concise, and in that case, and in those circumstances you just  
8 have to look at the statement of reasons to ascertain the scope of the finding of  
9 infringement. Our point is that is equally true in a case of the present kind given the  
10 practice which I have described. The operative part, where these decisions refer to the  
11 following undertakings, is, of necessity, concise. So it will fall to be interpreted together  
12 with the statement of reasons ----

13 THE PRESIDENT: Where is the lack of clarity in it. Here there was a clearly held argument that  
14 it was not clear because you could not marry up the conduct with what you were required to  
15 stop doing, and they said that when you look at the reasons it becomes clear. How do you  
16 get into that situation in your case?

17 MR. TURNER: Well here it is because the way in which the operative part needs to be read is  
18 that it is referring to the addressee as representing the language which is used by the  
19 Commission and referred to by the court as representing the undertaking to which it  
20 belongs, and the question is, if you like, the point that is not clear because that point is clear,  
21 is the ambit of the undertaking, and if you want to know which legal entities within the  
22 undertaking found to have infringed, were themselves implicated you have to look at the  
23 statement of reasons as well.

24 THE PRESIDENT: You had a lot of reference in *Cartonboard* did you not, to representative  
25 roles and I am not sure you have that here, have you? Are you saying it is always implicit?

26 MR. TURNER: With respect I will go to it because I will say when you look at the decision,  
27 which has not properly been done yet, you will see that that is certainly implicit and, in fact,  
28 a compelling conclusion. But the point here is that what is not clear is not the interpretation  
29 to be given, because the interpretation to be given to the operative part in accordance with  
30 the Commission’s practice is that they are identifying a party which may or may not be the  
31 whole undertaking but it is at any rate representing the undertaking.  
32 If you wish to know against which entities the finding was made it is necessary also to look  
33 at the statement of reasons as well as the operative part.

1 THE PRESIDENT: Does that only apply where you have the absolute parent of a group or does it  
2 apply where you have a company which is part of a group, for example, and which has  
3 some subsidiaries of its own, does it always apply?

4 MR. TURNER: The answer to that is “no”. In our case, for example – again we will come on to  
5 this but you will see that with Schunk you have both TopCo and then the subsidiary  
6 underneath.

7 THE PRESIDENT: Yes.

8 MR. TURNER: And there is a part of the decision which tells us that those are the undertaking.  
9 You can actually see it.

10 THE PRESIDENT: So for them there is no implied representative role?

11 MR. TURNER: No.

12 THE PRESIDENT: Because Schunk did have other subsidiaries.

13 MR. TURNER: Well for them, when you read the statement of reasons together with the  
14 operative part it is absolutely clear, if you look at that that those are the two legal entities  
15 which are involved. In some other cases, Lord Justice Longmore in *Cooper Tire* refers to  
16 this obliquely in one part of his judgment. Sometimes he refers to the Commission’s  
17 practice – I do not have it directly in front of me – either “TopCo” or “the undertakings  
18 primarily responsible” (I think were his words) for the infringement, so that sometimes they  
19 might, again for the reasons of enforcement of the fine, identify TopCo and a major  
20 implicated subsidiary, although when you read the decision as a whole, unlike the case of  
21 Schunk it may not mean that those are the only undertakings involved. The point is that  
22 when we look at our decision I will endeavour to show you that this is the interpretation to  
23 be given here as well.

24 So that is the first part of *Suiker Unie*. You then go to the part that is relied on by my friend  
25 at 1966 and the material wording is in 315:

26 “For the purpose of determining the persons to whom a decision, which finds that  
27 there has been an infringement, applies, only the operative part of this decision  
28 must be considered, provided that it is not open to more than one interpretation.”

29 So in answer to your question, sir, we say that in cases of this kind it is open to more than  
30 one interpretation.

31 THE PRESIDENT: Wherever you have a parent company?

32 MR. TURNER: In a cartel infringement decision where there are large groups involved then  
33 where you have a description of the undertaking being TopCo, the ultimate parent company  
34 these decisions are open to more than one interpretation concerning the precise scope of the



1 undertaking. My friend's argument is a black letter approach to this, which is to say: "I  
2 look at Article 1, Article 1 says the following undertakings, because that wording is in no  
3 way unclear I must stop there", and I say that what the Court of Justice requires is that you  
4 consider the context of the decision as a whole, that in these sorts of cases the question is, as  
5 set out in 315, whether you have something open to more than one interpretation. There is  
6 certainly no ambiguity that the addressee of the decision is TopCo alone, on that it is  
7 perfectly clear, that that is the only undertaking mentioned. But on the separate question of  
8 the scope of the wider undertaking that is not clear from the operative part; that is the  
9 mistake that is made on the other side.

10 THE PRESIDENT: I am sorry, you have probably dealt with this, on the facts of *Suiker* it did not  
11 help the Commission because – which company had they mentioned, I have forgotten.

12 MR. TURNER: Let me deal with that straight away. It begins at 311 and you will see there that  
13 the operative part mentions four companies: "SZAG and Franken on the one hand, and  
14 Béghin and Sucre-Union, on the other hand" but what it did not do at all is mention this  
15 different entity SZV.

16 THE PRESIDENT: Was that not a subsidiary of any of those?

17 MR. TURNER: No, that is the key point, if we go back to the passage that Mr. Beard took you to,  
18 which is 1686, and you look at the right hand column of 1686, the second paragraph you see  
19 that SZV is a marketing organisation of which these two others are members. It is a  
20 separate entity.

21 THE PRESIDENT: Yes, it is not just a separate entity; it is not part of the same group.

22 MR. TURNER: I am sorry, yes, that is what I mean. In other words, it is a separate organisation  
23 altogether, and what you are faced with, therefore, in this case is a different question from  
24 the one we are confronted with because there, the operative part of the decision by  
25 inadvertent error does not even refer to the relevant entity SZV at all. It is not part of the  
26 same group as any of the undertakings which are named in the operative part.  
27 To conclude on this second proposition of my friend, we say that there is not a rule of  
28 European law which prevents you from interpreting the operative part of the decision of this  
29 kind in the light of the statement of reasons to identify against which entities in an  
30 undertaking the findings of infringement extend. We entirely agree that there is no  
31 ambiguity about who the addressee of the decision is fixed with liability for enforcing the  
32 fine, but on this question these authorities do not say that you are not entitled to look into  
33 the decision in order to discover whether findings of infringement are made against anyone  
34 other than TopCo. On the contrary, the jurisprudence which includes *Mo'Och* tells us that

1 in a case such as ours you should inspect the reasoning in the decision which will inform  
2 one on which legal companies have been found to be party to the infringement. This may  
3 be an opportune point to make one issue clear. At various times my friend was saying that  
4 our argument was that if we are right any Tom, Dick or Harry company in the group, even if  
5 it is an entirely different area of the business is caught up as part of the undertaking and that  
6 that would have an absurd and unacceptable consequence. We are not saying that. What  
7 we are saying is that in the Commission decision there are other entities which are found to  
8 be party, or may be found to be party to the infringement, and where that is the case there is  
9 a finding of infringement in relation to those companies. We are not saying, for example, in  
10 relation to Carbone Lorraine, that if it has subsidiaries making blood pressure pumps – or  
11 something of that kind –that it would be an appropriate target for a damages claim in the  
12 Tribunal.

13 DR. SCOTT: Can I put to you then the point that I put to Mr. Beard earlier on, which is the  
14 distinction between a finding and a binding finding, because I imagine he is going to come  
15 back in due course and explain that even if there is a finding then because of the right of  
16 defence point, to which you will come later, and also the points made in the Treaty ----

17 MR. TURNER: Yes.

18 DR. SCOTT: -- it may be a finding but it is not a finding that has any impact on ----

19 MR. TURNER: D6.

20 DR. SCOTT: Yes.

21 MR. TURNER: Well my answer to that is going to be twofold again, and then I will help to try to  
22 illustrate it by looking at *Wegenbou*, which is perhaps the most helpful authority on that  
23 point. It is that the jurisdiction of this Tribunal depends on identifying where there has  
24 been a finding of infringement, it does not talk about a binding finding for the purpose of  
25 the European system at all. Therefore, the only reason for you even to consider that  
26 separate question must be if, by some implication, it is necessary to do so because otherwise  
27 there would be some injustice, or some problem, and that therefore this could not have been  
28 Parliament's intention. I say that there is not such a problem and perhaps with that we  
29 could look at *Wegenbou*.

30 *Wegenbou* is referred to by Carbon GB as authority for the proposition that a national court,  
31 or this Tribunal can only refer to the operative part to locate a relevant finding of  
32 infringement – a binding finding of infringement. In fact *Wegenbou* does not say this –  
33 perhaps we should just get it ready, it is bundle 5, tab 17. If you could just have it open I  
34 will just make one or two introductory points about it.

1 The first is, of course, that this was a case about whether a party has standing to appeal  
2 against a Commission infringement decision, even though it has not been found to have  
3 participated in the infringement. The court said that in that situation the party is not directly  
4 and individually concerned, which is the phrase used in the relevant treaty provision to  
5 enable it to have standing to appeal to the Court of First Instance.

6 The party asserted that it would be prejudiced by national court proceedings which were  
7 pending, but it gave the European Court no specific details about what was going on at all,  
8 and in the circumstances the court rules that there is no standing on the part of *Wegenbou*. I  
9 am going to suggest that there are two important points of distinction with the present case.  
10 In *Wegenbou* the operative part of the Commission decision and, indeed, the decision as a  
11 whole do not involve a finding of infringement against the application.

12 THE PRESIDENT: Which – the operative?

13 MR. TURNER: Neither the operative part in the *Dutch Bitumen* case, nor the decision as a whole  
14 which merely refers to *Wegenbou* in the group as a group company, involve a finding of  
15 infringement against *Wegenbou*.

16 THE PRESIDENT: A finding of infringement against the subsidiary.

17 MR. TURNER: Yes, and we say that when you understand the operative part as well as the  
18 findings, the operative part should be taken as referring to TopCo as representing the  
19 undertakings concerned, and you go to the statement of reasons, and you see from them that  
20 Carbon GB is one of those undertakings.

21 The second point is this, in *Wegenbou* the European Court is given no details about the  
22 national court proceedings which are alleged to be based on the Commission's infringement  
23 decision.

24 THE PRESIDENT: Can we just go back to your first point before you finish on that – or are you  
25 coming back to?

26 MR. TURNER: Yes, I am just going to outline it and then I am going to go into the recitals.

27 THE PRESIDENT: I am sorry.

28 MR. TURNER: I will take only half a minute on this.

29 THE PRESIDENT: That is fine.

30 MR. TURNER: The court has given no details in that case of these mystery national court  
31 proceedings alleged to be based on its infringement decision, and there is no reason given to  
32 the European Court to suppose that the decision is going to be treated by the national court  
33 as showing an infringement by the applicant, proving it or whatever, but by contrast in our  
34 case you have s.47A of the Competition Act. It does confer a specific statutory basis for

1 you to assume jurisdiction when, under English law (it is a matter of interpreting the  
2 Statute) you have a sufficient finding of infringement. It is perhaps obvious but this  
3 question of English law, concerning whether under s.47A you have a sufficient finding was  
4 not an issue before the European Court in that case.

5 The European Court was therefore not called on to consider the question whether if, let us  
6 say, the Tribunal assumes jurisdiction in our case over Carbon GB, or a case like the  
7 present, this means in turn that the decision is of direct and individual concern to the party  
8 concerned and can be challenged on appeal. In other words, the court there did not have a  
9 situation where someone could turn up and say: “I am faced with national court proceedings  
10 which are treating this as essentially binding on me. In these circumstances, although the  
11 decision is not addressed to me, it is of sufficient direct and individual concern that I have  
12 standing to appeal in my own right.”

13 DR. SCOTT: So had you rushed around here and sought permission much earlier on in relation to  
14 D6, while there was still time for an appeal, you are suggesting they would have had  
15 standing as GB?

16 MR. TURNER: I am suggesting that is a question which is open, but one can readily see that it  
17 makes an important difference as to whether someone has a position of direct and individual  
18 concern if they draw to the court’s attention the fact that they are essentially framed with a  
19 finding which they have to live with in the national court, under the national court rules.  
20 May I just illustrate these points, you have *Wegenbou* there. Mr. Beard has taken you to  
21 most of the relevant paragraphs so I can be very quick. For the first points about there  
22 being no finding of infringement in the decision, that was certainly the perspective of the  
23 court. You see first in para.4 – do you have the English translation there?

24 THE PRESIDENT: We do, yes.

25 MR. TURNER:

26 “... the Commission initiated proceedings and adopted a statement of objections  
27 which was sent ... to several companies, including the applicant. Point 332 of the  
28 ... statement states that, at the time of the infringement, the person having  
29 participated directly in the collusive agreement was the Director of the applicant  
30 and of the company Hijmans Infrastructuur ...”

31 and so on. Then it goes on to state that the applicant participated directly in collusive  
32 agreements and that the three companies are jointly and severally liable for the agreement.  
33 That is the statement of objections. Drop down to para. 7:

1 “The contested decision does not identify the applicant among the companies  
2 having infringed Article 81 EC, in contrast to the companies Heijmans and  
3 Heijmans Infrastructuur which were jointly and severally ordered to pay a fine.”

4 So the court notes that the decision does not identify the applicants although it is part of the  
5 group as among the companies having infringed in contrast to these two others. If you go  
6 then to para. 21:

7 “In the present case, since the Commission did not consider in the contested  
8 decision that the applicant had committed an infringement under Article 81 EC,  
9 the applicant was not made an addressee of the decision.”

10 Consequently, they had to go on to consider the test of direct and individual effect or  
11 concern. The fact is that in the statement of objections it is a target. It is removed from  
12 being a target in the decision and contrary to what my friend says it is not, in fact, clear that  
13 the other non-TopCo company, Infrastructuur, is merely an intermediate company without  
14 an operational role of its own, so that is why that I say we have a different situation from  
15 ours where there is, and I will come to it directly, findings made against Carbon GB.

16 THE PRESIDENT: Paragraph 22 seems to go slightly further, because the reasoning did not say  
17 there was an infringement by an applicant; it seemed to go a bit further in para.22:

18 “According to case-law, only the operative part of a decision may produce legal  
19 effects and modify a person’s legal position, and the considerations stated in the  
20 statement of reasons cannot be the subject of an action for annulment, except if  
21 these form the necessary basis for the operative part ...”

22 MR. TURNER: I can deal with that quite quickly as well. The first of those cases, certainly  
23 NBV, I will be corrected if I have misremembered this, is a case where a company is found  
24 to have engaged in conduct which is restrictive but which does not have an effect on trade  
25 between Member States, and so because of that no infringement.

26 If you translate that to the present context in the Tribunal you are in an Enron situation  
27 because there is no finding of infringement and an element of that is missing the effect on  
28 trade between Member States.

29 THE PRESIDENT: I am sorry, Mr. Turner, it is really the next sentence that I was thinking about  
30 more:

31 “The court has also stated that in the event that no infringement has been  
32 attributed to a company in the operative part of a decision, the company does not  
33 have an interest to bring proceedings against this decision, even if the Commission

1 had noted the existence of an infringement attributable to a company in the  
2 reasoning ...”

3 So in other words it seems to be postulating an example which is not actually the example  
4 that the case is dealing with. It seems to be postulating a case where there is, contrary to  
5 this case – contrary to the *Wegenbou* case – there is a finding in the reasoning but not in the  
6 operative part, in saying that even in those circumstances it is not good enough for standing,  
7 it cannot affect the company?

8 MR. TURNER: Yes, that is a rather different situation from our present case. I will be told again  
9 if I am misremembering this one, but what was going on there was that you had one of these  
10 cases where there are many companies involved in a big infringement, one of them is found  
11 to have had a walk-on part, let us say for a number of months or a year or something in a  
12 very, very long infringement, in which other companies were really the big players. The  
13 Commission notes that that company attends certain meetings, but ultimately and this is a  
14 reasonably common event, it does not find it necessary to reach conclusions of infringement  
15 which it then reflects in the operative part of the decision against that group.

16 THE PRESIDENT: It is in the reasoning ----

17 MR. TURNER: Oh, I am sorry.

18 THE PRESIDENT: -- but not in the operative part.

19 MR. TURNER: Oh, I am sorry, yes, because I do not have this directly with me. I am told that  
20 they were not fined because they were out of time for the fine, because of the time when the  
21 events involving this little company took place.

22 THE PRESIDENT: When you say “they” do you mean in the *Prozesse* case?

23 MR. TURNER: Yes.

24 THE PRESIDENT: The case that they are referring to?

25 MR. TURNER: That is correct and Mr. Bailey seems to have read this as well.

26 THE PRESIDENT: So they found an infringement but did not bother to find them, or could not  
27 find them.

28 MR. TURNER: They could not find them in that case. So those are the facts in that case.

29 THE PRESIDENT: They are saying that even in that case the company which was actually found  
30 to have infringed but could not be fined could not bring a direct action to challenge it  
31 because they had no interest.

32 MR. TURNER: That is from the European point of view, and one can entirely understand that  
33 because there is absolutely nothing that it needs to complain about.

1 THE PRESIDENT: Well there might be, because it might be sued for damages, depending on  
2 what position in whatever national court it was being sued in, it has been found to be an  
3 infringer, at least in the reasoning but the reasoning here seems to be that has no legal effect  
4 on it as a matter of EU law.

5 MR. TURNER: Community law, yes. That takes us back to two points, the first is that they are  
6 talking there about the appeal upwards to the European Court the second is the point of  
7 distinction with our case which is that here you have the undertaking which is able on any  
8 view to appeal, Carbon SA as representing the wider undertaking including our company,  
9 Carbon GB so that that in itself may be a sufficient security.

10 THE PRESIDENT: Is that a corollary of your argument. It follows from your argument, does it,  
11 that where it is in a representative capacity it has been fined and found to have infringed in  
12 the operative part, in a representative capacity ----

13 MR. TURNER: That takes care of it.

14 THE PRESIDENT: -- it can appeal for anybody. In other words, if, say, in the reasoning there  
15 had been a finding of infringement as in this case the parent company can encompass in its  
16 appeal also any infringement said to have been committed by the subsidiary.

17 MR. TURNER: Yes, that is, as I say, why there was somewhat of a mystery in *Wegenbou* itself,  
18 we do not know why this emanation in the group is bringing an application in its own  
19 capacity when the group is able to do that and to address this point.

20 THE PRESIDENT: That is in a sense assuming the group is able to do that, that is assuming your  
21 argument is right.

22 MR. TURNER: It certainly must be the case that the addressee, TopCo, can bring an application  
23 to annul in relation to the infringements which have been found which are relevant to it and,  
24 yes, it does therefore depend on whether those findings of infringement relevant to it  
25 include the behaviour of the subsidiary, and I am going to argue in a moment that in our  
26 case that certainly is true. But if you assume that for the moment to be the case then, yes,  
27 you do have one clear point of distinction with the *Prozesse* case where that was not the  
28 situation.

29 THE PRESIDENT: Can it be fined in respect of an infringement of a subsidiary where the  
30 subsidiary, as it were, has done it itself, it is not actually participated in that bit of it?

31 MR. TURNER: Yes, and in fact in this very case – and I am just going to show it to you – you  
32 have that because Carbone Lorraine, Carbon SA does appeal against its fine to the Court of  
33 First Instance – I do not know whether you have seen this in our joint submissions.

34 THE PRESIDENT: Yes, certainly.

1 MR. TURNER: It does appeal and one of the points it takes is that “our fine should be lower  
2 because, do you know what, one of our subsidiaries ----”

3 THE PRESIDENT: On a frolic of their own, sort of thing.

4 MR. TURNER: “-- was not involved that much”, that is what they were saying and so they are  
5 assuming we are here complaining about our fine in relation to the behaviour of all the  
6 relevant subsidiaries found to have infringed. So actually when you think about it, this does  
7 work, it does work, but behind that there is also this procedural point – I hope it is not  
8 sounding too cautious, it is simply that the court in *Wegenbou* is not considering a case such  
9 as ours in part because it says – and this was the only other observation I was going to make  
10 about it, that it does not know about these national proceedings which have been referred to.  
11 If you go to para. 18 of the English translation, you will see that what the applicant is  
12 arguing is that there are pending proceedings:

13 “It thus argues that the press releases relating to the contested decision have  
14 already been invoked in pending civil disputes to which it is a party and that  
15 community case-law prohibits a national court from accepting a plea based on the  
16 objection of illegality of a Commission decision, which is subject to an action  
17 before the Community judge.”

18 And it goes on after the brackets to say:

19 “The applicant considers that the contested decision will be taken into  
20 consideration ...”

21 It looks like an evidential issue there,

22 in its entirety by the national courts, and not only its operative part, and that the  
23 national courts will only agree to suspend proceedings brought before it on  
24 condition that the applicant has filed an action before the Community judge.”

25 Then in para. 28 you have the court saying on this point:

26 “By way of introduction it must be emphasised that the applicant has not provided any  
27 details or evidence regarding the existence of any national legal proceedings relating to the  
28 contested decision.”

29 In a sense what I am saying is that that actually should give you caution before saying:

30 “What we have here is some rule which you can apply directly to the facts of our case”

31 because in *Wegenbou* the court was not looking at our sort of situation at all, it was given no  
32 specificity about what the national situation might involve at all.

33 THE PRESIDENT: They do rather seem to kill off most of this then in para. 30, do they not?



1 “Indeed, it must first be pointed out that neither the statement of objections nor the  
2 statement of reasons of the contested decision constitute elements on which a  
3 national court could directly rely in order to invoke the liability of the applicant,  
4 since the final decision does not hold it liable for an infringement.”

5 MR. TURNER: In the operative part.

6 DR. SCOTT: It does seem to me that you have got a situation here where they have and you  
7 mentioned para. 4 and that is where it is, they have gone down to look at the individual level  
8 of who was doing what, where in these companies, so there is a very specific background to  
9 them being in the statement of objections and then out again.

10 MR. TURNER: Then it comes out.

11 DR. SCOTT: So it is a much more deliberate exclusion here than one might have ----

12 MR. TURNER: Yes, that is our case, and that is a very important difference. So that when you  
13 come to para. 30 – and by the way, far from me to do this but we do have a French speaker  
14 on our team, if I could just draw attention to one infelicity in the translation. You have the  
15 French which is just behind it, it is p.5 of 6, you have para. 30 in the French and you will  
16 see that it ends:

17 “...dès lors que la décision finale ne la tient pas pour responsable d’une infraction  
18 à l’article 81 CE, ainsi qu’il ressort de son dispositif.”

19 Insofar as it emerges from, or comes out of the *dispositif*, the operative part, and then you  
20 go back to how it has been translated and the translation simply says “in the operative part”.  
21 The reason why that may be significant as an error is because one is talking about reading in  
22 our case the operative part of the decision in context, and we say, of course, that the correct  
23 interpretation of the operative part in our case is that it is referring to the parent, TopCo, as  
24 representing the undertaking which has infringed, and so you do have the condition satisfied  
25 in para. 30. You do have the final decision which holds it liable for an infringement.

26 THE PRESIDENT: Because of the representative point?

27 MR. TURNER: Because of that point, yes – “*ainsi qu’il ressort*”. So in summary, you can see  
28 where we have got to in the thinking. Mr. Beard is wrong to start with the binding finding  
29 because you are concerned with a finding of infringement. The issue then is whether that  
30 needs to be cut down or read down to refer only to a binding finding in order to avoid some  
31 problem that you might be proceeding only against a company that has not had a right of  
32 appeal at the European level, but in our case you have a situation where the group, as  
33 represented by the parent undertaking has been found to have infringed. I am going to show  
34 in a moment that findings of infringement do relate to Carbon GB, and there is no problem

1 because TopCo can appeal to the Court of First Instance, the General Court, and in any  
2 event that *Wegenbou*, when you read what it is finding there, you must bear in mind that it  
3 was not considering a situation similar to that of the present kind in two material respects:  
4 (i) because in our case unlike that one there is a finding of infringement in the decision I  
5 will say and, in that case, the court is very clear that there is not; and (ii) because in that  
6 case the court did not have regard to the national court proceedings as imposing some rule  
7 akin to s.47A, it had no visibility of what was happening at the national level and did not  
8 consider it in any detail. That is as far as I think we can go on *Wegenbou* for the moment –  
9 we can perhaps return to it if necessary

10 In the interests of time if I then move on to the third important proposition, proposition 3.  
11 What is said is this: assuming that the dam is breached and we are into Mr. Beard’s central  
12 compound with our army, it is permissible to have regard to the reasoning in the  
13 Commission’s decision, to interpret the operative part or, in any event more generally as  
14 showing the findings of infringement. Nonetheless, he says the reasoning in the decision  
15 shows that the Commission considered that only the parent company, Carbon SA was the  
16 relevant undertaking. I want to take you to the way that he puts it in his written case. If you  
17 have the main bundle, and you need to go to para. 5.5, p.178. It says:

18 “It is noted that the Commission considered the issue of which entities should be  
19 addressees of its Decision in some detail at Section 13.8 of its Decision.”

20 - just for your note that is paras. 254 to 266. Then if you turn on in the reply, which is at the  
21 end, tab 10, p.219, he comes back to that point again more strongly at para. 6.3:

22 “Moreover, even if the underlying reasoning were to be considered ...”, even if it were,  
23 “... it is clear that the Commission understood that factual analysis is required (see Recitals  
24 255-264)”.

25 Then he refers to the fact that:

26 “Whilst the Commission decided that two legal entities in Schunk should  
27 constitute the relevant undertaking it undertook no such similar analysis in relation  
28 to the Mersen group. It simply identified Le Carbone Lorraine SA as the relevant  
29 undertaking for the purposes of [the infringement] and the sole legal entity to  
30 which the Decision was to be addressed. The Commission did not identify  
31 [Carbon GB] as a part of an undertaking with [SA] against which a finding of  
32 infringement was made.”

33 Then he returns to the question of addressing the decision again.

1 Our submission is this: the decision does not conform to that, the decision shows first,  
2 beyond peradventure that the undertaking is not to be equated to TopCo (Carbon SA); and  
3 secondly, that Carbon GB is most certainly found to be part of the infringement.  
4 So if you have the decision I can go through that at a pace. It is tab 1 in that bundle. Just to  
5 go to the section that Mr. Beard relies on, that is at p.81 under the heading “Addressees of  
6 this Decision”. You will see the way that this is expressed:

7 “(254) For the reasons mentioned in sections 10 and 13.3, the Commission  
8 considers that Conradty, Hoffmann, Carobone Lorraine, Morgan, Schunk  
9 and SGL should bear responsibility for their respective infringements.”

10 So the first point is it is telling you that it is for the reasons mentioned in those previous  
11 sections and that is therefore what we are going to look at in a moment. (255) is the point  
12 that undertakings are not the same as companies, and (257) is the point that I referred to,  
13 Sir, in argument a little while ago about Schunk. Schunk is a case where you will see that  
14 the Commission has identified the two bodies which together comprise the undertaking.

15 “(257) In the case of Schunk, the Commission has chosen to address this Decision  
16 to Schunk GmbH and Schunk Kohlenstofftechnik GmbH, jointly and  
17 severally. Together those entities form the economic unit that is responsible  
18 for the sale and production of [the relevant products] and which participated  
19 in the cartel during [the relevant period]”

20 That is why, in the Schunk case you identify those two entities. There is nothing about the  
21 parameters of Carbone Lorraine as an undertaking apart from the pointer in 254, to go back  
22 and look at the reasons given earlier in sections 10 and 13.3 which you must do.

23 DR. SCOTT: Just to clarify in my own mind what you are saying is that the SA was both the  
24 parent and a participant, whereas in Schunk’s case it was the subsidiary that was the  
25 participant and the parent that was the parent?

26 MR. TURNER: What I am saying is that in the Schunk case, as we see here, the subsidiary is the  
27 one which was selling and producing the goods, and it goes on in the bit after where I  
28 stopped reading: “Although Schunk Kohlenstofftechnik GmbH was the legal entity that  
29 directly participated in the cartel, as a 100% parent company...” [TopCo] comes in.  
30 What I am saying in relation to the Carbone situation is not that the parent company was  
31 necessarily itself directly involved as opposed to being in the same position as Schunk  
32 TopCo. What I am going to be saying is that it was clear that it was acting unlawfully  
33 through a whole number of subsidiaries in the group.

1 The paragraphs which are referred to as being the reasons mentioned in s.10 and 13.3 for  
2 why Carbone Lorraine should bear responsibility are – and I believe these will be the only  
3 relevant ones. On p.62, para. 192:

4 “Carbone Lorraine, Morgan, Schunk and SGL

5 (192) These four producers were all very active members of the cartel throughout  
6 its period of operation, each participating in all the activities described in  
7 Chapter IV [the facts] and most of the meetings listed in Annex 1.”

8 Then you will see in the footnote 278:

9 “Instances of participation by each of the four companies in the cartel’s activities  
10 during the period of its operation are too numerous to list individually.”

11 And Annex 1 is a complete list of reported cartel meetings. That is the first point. I am  
12 going to address these after, if you will indulge me, just taking me to a few more paragraphs  
13 – that is s.10. If you go into s.13.3, p.76, para. 229 is the only relevant paragraph:

14 “In this case, the Commission considers that the behaviour of Carbone Lorraine,  
15 Morgan, Schunk and SGL, all of which regularly participated in most or all of the  
16 Summit, Technical Committee and local meetings listed in Annex 1, as well as in  
17 the other contacts described in [the facts’ chapter] during the entire period for  
18 which each undertaking is held responsible, constitutes a single and continuous  
19 infringement.”

20 So to sum up what we have is that the Commission’s finding as to what leads to the  
21 infringement on behalf of the Carbone Lorraine undertaking, whatever that is, is stated here,  
22 it is the participation in all of these meetings and a reference back to what was in the facts.  
23 Now, to understand that, if I may ask you, please, to start from the front, I am just going to  
24 take you rapidly through key paragraphs in the decision.

25 One starts on p.7 at para. (22), do you have that?

26 “(22) Carbone Lorraine is a global company. Forty percent of its staff and more  
27 than half of its industrial sites are located outside of Europe. For all  
28 products together, it has 19 industrial sites in Europe ...”

29 - and so on. Pausing there, that is a reference, according to my friend, to the parent having  
30 these 19 industrial sites in Europe, but it is plain that that is a reference in fact to the group.  
31 Then if you go forward into the facts’ chapter, and go to para. 69 you will see that this is a  
32 case where essentially the parties came clean to the Commission. All of the relevant ones,  
33 including Carbone Lorraine provide a lot of material which is listed in this para.69,  
34 including leniency materials, and you will see Carbone Lorraine itself on p.19 mentioned at

1 the fourth, fifth and so on indents, as having given lots of leniency material. That means  
2 lots of material in which it is setting out: “This is what we did, this is what our infringement  
3 consisted of”, so they themselves have given the Commission all of that material.

4 Now we go to para. 74 – “The Organisation of the Cartel”, and what you see is as follows:  
5 the Cartel contacts happened at several different levels (74). First, there were so-called  
6 “Summit meetings” (75) where the big people got together and talked about the major  
7 issues. At (76) there is a reference to “Technical Committee meetings” being held twice a  
8 year in spring and autumn. Then (77), which is important, refers to a third level of “Local  
9 meetings” held in Italy, France, the United Kingdom, Benelux, Germany and Spain.

10 “These meetings discussed price increases in the country concerned, as well as the  
11 accounts of single local customers. In these meetings, representatives of the local  
12 subsidiaries of cartel members participated as well.”

13 Now, how that is compatible with my friend’s proposition that the only infringer for  
14 Carbone Lorraine and the others was the ultimate parent companies is difficult to  
15 understand.

16 (78) tells us that there were regular contacts as well between representatives of the cartel  
17 members. (79) refers to the list of the cartel meetings that participants reported to the  
18 Commission for the whole period, and those are found to be cartel meetings – these  
19 incidents that are reported by the cartelists to the Commission.

20 If you go to Annex 1, starting on p.109 we can look at almost any of these pages, but if you  
21 go to p.111 you will see seven entries down, 27/28 September 1994, Maidenhead UK,  
22 Frederick’s Hotel, local mechanical carbon meeting, five entries down from that, 21<sup>st</sup>  
23 December 1994, UK, local electronic carbon meeting, and you will see from the source, CL,  
24 this has come from a Carbone Lorraine submission. Underneath that, 12<sup>th</sup> January 1995,  
25 United Kingdom, local electrical carbon, again drawn from a Carbone Lorraine submission.  
26 There are many more such instances.

27 If you go back in the text, I will just show you a few more paragraphs and then make my  
28 points, para.80 is a table showing the participants in the meetings. If you turn to that table  
29 on p.24, you will notice a difficulty with seeing who those participants were. That is  
30 because it is redacted in line with requests for confidentiality from Carbone SA,  
31 presumably, and the parties to the case. But for their action in seeking to redact this, that  
32 information would be there detailing the participants at these local meetings.

33 Paragraph 100 refers to part of the way in which the cartel works, which was the circulation  
34 of price lists. You will see three lines from the bottom in para.100 on p.30, Morgan (that is

1 Morgan Crucible) would calculate the new prices for the United Kingdom, Carbone  
2 Lorraine for France, SGL for Spain and Schunk for Germany. They would circulate their  
3 revised price lists or announcements of price increases to each other to show that they were  
4 complying with the agreed price increases and to ensure that the other cartel members sold  
5 at the same prices in the country concerned. You will see from the footnote, footnote 103,  
6 that certain examples of price lists of competitors and announcements of price changes by  
7 competitors received by Carbone Lorraine are given in a CL submission.

8 So we know that Morgan in the United Kingdom is giving out its price list, including to the  
9 Carbone Lorraine organisation, and that Carbone Lorraine has explained that this is the case  
10 to the Commission, and that this is part of the findings of fact which lead to the finding of  
11 infringement.

12 Then you go to para.140 where we see that there is the local meeting between Morgan and  
13 Carbone Lorraine in March 1991 in the United Kingdom exchanging pricing information.  
14 You can see from the footnote that again this has come from a Carbone Lorraine  
15 submission, and referring to other Carbone Lorraine meetings that they refer to. It is a local  
16 meeting so it is involving representatives of the local subsidiaries.

17 At 145 in that context, rather than taken in isolation, on p.49, in January 1995 Morgan faxed  
18 its 1995 price list for brushes supplied to Boss, a UK client, to Carbone Lorraine's UK  
19 subsidiary. What is the source of that? Footnote 203 tells us that it is a submission by  
20 Carbone Lorraine.

21 Reading that in its context, we know that this is part of the sort of activity which they were  
22 engaged in which was the infringement, namely Morgan in the UK handing out its price list  
23 to its competitors; and we know that it is part of the submission by Carbone Lorraine  
24 talking about unlawful contacts it has had in its application to the Commission.

25 From all of that, which is the factual part of this case, you come back to 192 with new eyes,  
26 because you see in 192 that these four producers were all very active members of the cartel  
27 throughout its period of operation, each participating in all the activities, and then the  
28 reference to the meetings in annex 1. We can now see that this cannot possibly refer only to  
29 Topco, to Carbone SA, and when you go forward again to 229 ----

30 THE PRESIDENT: When it says in para.77 that in these meetings "representatives of the local  
31 subsidiaries of cartel members participated as well", do you understand that to mean as well  
32 as the top people coming?

33 MR. TURNER: It means from the previous sentence, as well as the representatives of the  
34 technical committee meetings.

1 THE PRESIDENT: I see.

2 MR. TURNER: So whoever was at the Technical Committee meetings, they are joined at the  
3 local meetings by representatives of the local subsidiaries of the cartel members.

4 THE PRESIDENT: I am just going to your 192:  
5 “These four producers were all very active members of the cartel throughout its  
6 period of operation, each participating in all the activities ... and most of the  
7 meetings ...”

8 MR. TURNER: So that is all the activities.

9 THE PRESIDENT: You are not suggesting that that means that in relation to, say, Carbone  
10 Lorraine, you treat Carbone Lorraine’s participation in local meetings only because they  
11 had local participants. It sounds as though they are saying from the very top they were all  
12 thee.

13 MR. TURNER: No, not at all. What I am saying is that it included as well ----

14 THE PRESIDENT: It says that in 77.

15 MR. TURNER: From 192 I have referred to the findings which Mr. Beard takes as showing that  
16 only Topco is involved in 299, because that is s.13.3, and 192 is s.10, both of which he is  
17 saying tell us that only the parent company found to have infringed. That is incoherent and  
18 it is clearly wrong.

19 DR. SCOTT: Just to go back to 78, which talks about:  
20 “Representatives also kept regular contact to co-ordinate specific bids made to  
21 large customers.”

22 Presumably what you are saying is that that would have been in each of the markets?

23 MR. TURNER: I am not able to say that that would have been universally. For my purposes,  
24 what I am saying is as follows: that it is said against us that this decision, when properly  
25 read, and my friend refers to ss.10 and 13.3, coming back from the paragraphs he relies on,  
26 show that the Commission has found that only Topco, Carbone SA, was involved in the  
27 infringement. What I have endeavoured to do is to show that that cannot possibly be right.  
28 At the very least, what you do see is findings of infringement, the granularity of which we  
29 cannot go into precisely, because all we have is the same as the Tribunal, this decision, but  
30 we see that, for reasons of economy, in an absolutely massive cartel extending over the  
31 many years where you cannot expect the decision to refer to each and every act, or the  
32 decision would be longer than all of these bundles put together, the Commission has plainly  
33 found that the infringement by Carbone Lorraine, the undertaking, includes, as well the  
34 summaries from the technical meetings, local meetings, and says what they involve. We

1 see that these local meetings are UK meetings. We see that there is a reference to Carbone  
2 Lorraine's UK subsidiary having received the price list on at least one occasion, sourced  
3 from a Carbone Lorraine submission to the Commission, and you see that these cartel  
4 meetings listed in annex 1 include an enormous number of cartel meetings as well.

5 DR. SCOTT: You will understand the point that I made earlier on to Mr. Beard about what  
6 comprises the decision comes up in two senses now: one is that were this an OFT decision  
7 we would be in possession of an unredacted copy; and secondly, of course, you have made  
8 the point that this refers to a number of Carbone Lorraine documents, which we have not  
9 seen.

10 MR. TURNER: Yes, I am going to make this point good in just a moment. What I would say,  
11 picking that up is as follows: you say that were this an OFT decision you are in a better  
12 situation – a much better situation – with a Commission decision than with an OFT  
13 decision. With an OFT decision you might have the sort of problem that the Court of  
14 Appeal referred to in the *Enron* case, where counsel are asked by the court, “If a decision is  
15 unclear is there a way in which we can ask the authors of it to clarify it?” They were told  
16 there was no way. For a Commission decision, there is a right and a duty in the  
17 Commission to answer your request and give you any information that you ----

18 THE PRESIDENT: What would ask them?

19 MR. TURNER: The question is twofold: first, whether, as they say, the finding of infringement  
20 against Carbone Lorraine includes only the parent company and not any of the subsidiaries,  
21 which is of course my friend's submission because he says that the undertaking listed in the  
22 operative part is all there is; and secondly, whether the Carbone Lorraine UK subsidiary  
23 was part of the infringements, and whether that is the predecessor to Mersen UK,  
24 Carbone GB. They will tell you that.

25 THE PRESIDENT: If they yes to both, we say, “Fine, that is great”.

26 MR. TURNER: If they say yes to both, you have a very clear – I say you do not need to do that  
27 because it is actually clear from all of this that Carbone GB is included. Otherwise, you  
28 then have without any doubt a clear unequivocal finding of infringement, as clarified by the  
29 Commission. I am going to say that it is a different situation from *Enron* where you are  
30 being asked to investigate new or different infringements of any kind. This is merely  
31 clarifying by the Commission the scope of their decision.

32 THE PRESIDENT: Then D6 will come along and say, “That is very interesting because we never  
33 took part in any of these meetings”, and the whole thing gets reopened. You cannot go to



1 the Commission and ask them, can you, to put a gloss on what they have said. What they  
2 have said, they have said, and have we not got to make the best we can of that?

3 MR. TURNER: My primary submission is that that is absolutely fine.

4 THE PRESIDENT: Yes.

5 MR. TURNER: I would urge you, Sir, also to consider that if there was any doubt, no, I would  
6 not apprehend that there would be any difficulty about it. Perhaps if I just run through to  
7 the end you will see exactly why, but basically it cannot be said that we are now going to  
8 contest that we were involved in these meetings, particularly where the information is based  
9 on Carbone Lorraine's information given to the Commission. That is what it says it is  
10 referring to ----

11 THE PRESIDENT: Yes, that is Carbone SA, is it not? There is no suggestion that the  
12 information given to the Commission was by anyone other than the parent company.

13 MR. TURNER: Representing the undertaking which includes the relevant actors, yes, that is the  
14 point.

15 THE PRESIDENT: There is not a hint of that anywhere, is there, as there was in *Plasterboard*?

16 MR. TURNER: I am sorry?

17 THE PRESIDENT: There is no hint that that is how the Commission understood it in this  
18 decision as a representative submission.

19 MR. TURNER: Perhaps if I just come to the end of the points on the decision. What I would say  
20 about that is that you have a decision which is plainly a large decision relating to a very  
21 long cartel where the players give the information to the Commission and say, "Here are our  
22 leniency applications, volumes of what we actually did". Rather than actually writing it all  
23 down the Commission says, and we can find the paragraph, "These findings are based on  
24 these documents which we obtained from the parties". They say in the footnote, as you  
25 have seen, "We cannot possibly list each and every act, but that is where it has come from".  
26 That is the decision.

27 I would pick up from that one particular point, which is that we say that Carbone Lorraine,  
28 the undertaking, has a Janus-faced approach in this application.

29 In relation to Carbone GB's proposition that only the ultimate parent company in the group  
30 has been found to have infringed by the Commission in this decision, we emphatically draw  
31 your attention to one fundamental thought line in this argument. If they are right that the  
32 only findings of infringement relate to the ultimate parent company in the group, and I  
33 adverted to this before, then the parent company should not be in a position to refer to the  
34 cartel activity, or lack of it, of its subsidiaries in mitigation of the seriousness of its

1 infringement, yet that is exactly what Carbone SA has done in this case in its appeal to the  
2 general court.

3 May I show you that? If you have the decision still open, p.91, you have at the foot of p.91,  
4 tab 1, so called attenuating circumstances, and within that, over the page, under the heading  
5 “Non-implementation”, you have paras.306 and 307, and essentially Carbone Lorraine you  
6 see there saying essentially, “We cheated a lot and so we should have a lower fine”. The  
7 Commission has a tart response to that, but in the last sentence of 307 it says in particular:

8 “As for Carbone Lorraine, there seem to be no serious complaints from fellow  
9 cartel members about alleged instances of low pricing until the first half of 1999,  
10 when Carbone Lorraine prepared to leave the cartel.”

11 Then over two pages at para.316 they concluded that there are neither aggravating nor  
12 attenuating circumstances applicable in this case, and they leave the fine where it is.

13 It is against that context that you have Carbone Lorraine going up to the court and  
14 complaining about the level of its fine. Could you go to bundle 5, tab 18, p.27 of 43, 194 is  
15 merely saying that they are entitled to challenge the findings in the paragraph we have just  
16 looked at, recital 316. That is the cheating non-implementation point.

17 At 197 over the page they refer to four specific circumstances which should lead to them  
18 having a lower fine.

19 Then over the page at 207 and 208 you have the important bit. They draw to the court’s  
20 attention in their appeal a statement of the other members of the cartel minuted in a report in  
21 1996 about the German subsidiary of Carbone Lorraine. They say, “There you are, at least  
22 that subsidiary was not doing very much and we should have a lower fine”. Then 208:

23 “That document is therefore referring to the initial activities of a subsidiary of the  
24 applicant, and gives no indication as to the attitude that the applicant could have  
25 adopted after that meeting. The applicant provides no additional document  
26 showing genuine independent and competitive conduct from its German subsidiary  
27 after the report in question, and the continued discontent of the other members of  
28 the cartel on that issue.”

29 The point I get from that is obviously that is not about the Great Britain company, but it  
30 does deal with their point that the undertaking found by the Commission to have infringed  
31 is limited in its ambit to Topco, because it is a clear recognition, and accepted as so by the  
32 court, that the activities which were unlawful involved subsidiaries – here the German  
33 subsidiary – and that those subsidiaries, the ones which were carrying out the infringement,  
34 are therefore part of the infringing undertaking.

1 If there were no findings of infringement involving the participation in the cartel of any  
2 subsidiary, which is Mr. Beard's case, how can Carbone Lorraine refer to the lack of  
3 activity of the German subsidiary as a mitigating factor?

4 Along exactly the same lines, we have pointed out, and I say again that in the decision the  
5 Commission refers to Carbone Lorraine's application for leniency in which Carbone  
6 Lorraine provided a volume of important information about the cartel. You have the  
7 decision, it is p.96, para.324, and I will show you one significant fact. That is p.96,  
8 para.324. To summarise, because you will read it for yourselves, they say that Carbone  
9 Lorraine provides a considerable number of contemporaneous documents and reports of  
10 cartel meetings not identified in the Commission's letter, and so on. At the end:

11 "Nevertheless, the Commission considers that the voluntary evidence provided by  
12 Carbone Lorraine as a whole did materially contribute to establishing the existence  
13 of the infringement."

14 You will see from the evidence that the most useful provided by Carbone Lorraine is found  
15 in various items – items 20 to 25. What you will then see if you go back to annex 1 is that  
16 those are the very findings on which the Commission relies in its decision. If you go to  
17 annex 1, the page we were on, 111, and if you look half way down, 21 December 1994, you  
18 have the Carbone Lorraine annex 7, item 22, item 23, and over the page, the second entry,  
19 item 24.

20 THE PRESIDENT: Yes.

21 MR. TURNER: You can already see, and there can be no doubt, that Carbone Lorraine's  
22 information is the source for these findings of cartel meetings in the United Kingdom where  
23 the sixth defendant is carrying out its relevant business. In short, Carbone Lorraine is  
24 referring to the unlawful infringement on the part of a subsidiary in the UK, and the  
25 Commission's findings of infringement include and rely upon it.

26 Mr. Beard says, "How do you know which subsidiary it was?" We did not say it was the  
27 only subsidiary they had in the UK. What we have said, and which is true and which is  
28 immediately clear, is that they are the only subsidiary in this market carrying on this  
29 business.

30 THE PRESIDENT: I appreciate that your submission is that there is an infringement finding – a  
31 finding of infringement – there has to be that?

32 MR. TURNER: Absolutely.

1 THE PRESIDENT: Under *Enron* it is not good enough for us to say, “There is a lot of evidence  
2 here that the Commission could have used to make a finding”. We cannot do that obviously  
3 in the light of *Enron*. It has got to be a finding, has it not?

4 MR. TURNER: Yes, and what I say is as follows: in the operative part you see the undertaking  
5 referred to as Carbone Lorraine. What I have shown is that that refers to the Carbone  
6 Lorraine undertaking as represented by the parent company. For the ambit of the finding of  
7 the infringement against the Carbone Lorraine undertaking, Mr. Beard says that there is  
8 nothing in the decision. In fact, the findings in the decision, and paras.255 and back to what  
9 it refers to as the “basis for its determination” involve these very facts concerning  
10 Carbone GB. That is why we are not saying merely there is evidence here from which it  
11 might arguably be inferred as an independent person that there was an infringement, the  
12 Commission itself says, “We have reached findings of infringement, this is what we based  
13 our findings on”, and when you look at it you see that they refer to this situation and this  
14 subsidiary.

15 I will be very quick then on the final point. Mr. Beard did not press with any great vigour  
16 the statement of objections point, but I will deal with it quickly. He says, “We cannot have  
17 been found to have infringed because the Commission did not send to us a statement of  
18 objections or give us a separate right to be heard”. That is para.5.9 of his application. Our  
19 response is that that is circular reasoning because the rules for the right to be heard, and so  
20 forth, safeguard the rights of defence for undertakings, because undertakings are the object  
21 of the Community competition rules, and it is undertakings which have the right to be  
22 heard.

23 If you have the first authorities, could you go quickly to tab 9, I am hopeful that that should  
24 now contain a full copy of the main Regulation, the modernisation Regulation. You will  
25 see on p.19, Article 27.1, and you will be entirely familiar with this:

26 “Before taking decisions as provided for ...”

27 That includes this sort of decision –

28 “... the Commission shall give the undertakings ...”

29 It is a straightforward point, that the rights of defence which the Community Rules are  
30 concerned with relate to the undertakings. You see here in Article 27.1, a Rule that the  
31 Commission must give the undertakings, or associations of undertakings, which are the  
32 subject of the proceedings the opportunity of being heard, and so on.

33 So for this subsidiary to say, “You know we did not get a separate statement of objections,  
34 so we cannot have been found to have infringed” is circular reasoning. If we are right that

1 the undertaking was found to have infringed and that the undertaking includes Carbone GB  
2 then this is a non-point.

3 I will deal then finally with the English law point. The English law point is ----

4 THE PRESIDENT: I am sorry, it is probably the hour of the day, I am getting a bit confused.

5 The reason that *Wegenbouw* does not affect any of this is because of what, the subsidiary  
6 there was not part of the undertaking?

7 MR. TURNER: When you say “does not affect any of this”, let me just try to see where I am on  
8 this.

9 THE PRESIDENT: What I am really asking to remind me is whether you accept or not that on  
10 the basis of your submission, assuming your submissions are correct – whether it matters or  
11 not is another matter – the subsidiary in our case could not have challenged? In other words  
12 the *Wegenbouw* would have prevented challenging?

13 MR. TURNER: No, I do not accept that, because *Wegenbouw*, and it comes back to this first  
14 point of distinction again, is a case where paras.4, 7 and 21 of the court’s judgment tell us  
15 that the Commission’s did not find an infringement on the part of the applicant.

16 THE PRESIDENT: Yes, but you are forgetting about para.30.

17 MR. TURNER: I do not believe so. Paragraph 30 refers then to ----

18 THE PRESIDENT: Where there is a finding of infringement with the reasoning.

19 MR. TURNER: Where there is a finding of infringement, but what it refers to is that there has to  
20 be a finding as reflected in the operative part, or “*ainsi qu’il ressort*” from the operative  
21 part. We say that the correct interpretation of the operative provision in this case, in our  
22 case, is precisely that you have a finding against the undertaking represented by the parent  
23 in the operative part. There is no problem therefore, because that paragraph is satisfied and  
24 similarly, along the lines that we were discussing a little while earlier, the parent or the  
25 undertaking, taking into account the rights of defence in the European system, has the right  
26 to appeal – the undertaking there represented by the parent company.

27 The point is that in the European system, the undertaking is the object of the procedure.

28 The undertaking has the right of the appeal, but because the decision needs to be addressed  
29 to legal persons, that is the person with carriage of the right of appeal.

30 The English law point: the way in which it has been expressed today is that even if  
31 everything I have said so far is correct, still we face this difficulty that they will not accept,  
32 do not accept, do not agree, that Mersen UK, for example, which has changed its name, was  
33 the UK subsidiary which is named in the decision, and matters of that sort. They say that  
34 the only way you are going to be able to get at that sort of information is by doing a bit

1 more investigation. You have to ask people. You would have to go to Companies House  
2 and get the certificate showing the change of name, and so forth. All of this is something  
3 which is outside the scope of the decision, because the only artefact which you, the  
4 Tribunal, can refer to is that decision.

5 They rely on *Enron* and, very simply, *Enron* is not authority for anything like that  
6 proposition. It is authority for a much more confined proposition with which we have no  
7 argument whatsoever, namely that the Tribunal cannot adjudicate on a claim that there has  
8 been different or additional infringements from those found in the Commission's decision.  
9 That is why in, for example, the recent *Albion Water* case, as in *Enron*, that is the basis of  
10 the inquiry. Is it the case that one party is claiming damages on the basis of what they claim  
11 to be an infringement, which is not something found to have been an infringement in the  
12 decision? That is very different from what we have here.

13 If you have the *Enron* case perhaps we should turn up para.31. It is bundle 1, tab 5. I am  
14 sure I do not need to go back into the facts of this case at all, but the point is that in each of  
15 the references that Mr. Beard gave, and para.31 is perhaps the most convenient, the point is  
16 that the Tribunal should not be looking into new or different infringements. That is a  
17 different question from simply understanding the scope of the infringement in this particular  
18 decision. We rely on the findings in this decision that the Carbone Lorraine undertaking  
19 infringed the competition rules and that the UK subsidiary was a party to this infringement.  
20 There is nothing in s.47A of the Act which stands in the way, if it were necessary, of getting  
21 confirmation about such matters as the identity of that subsidiary – for example, if the  
22 Commission were to answer your request by saying, “Yes, that is the subsidiary which is  
23 the predecessor in title to Carbone GB”, you have your answer.

24 As regards Lord Justice Patten's remark in this paragraph that the Tribunal should reject  
25 cases – this is at the end of 31:

26 “... where there is no clearly identifiable finding of infringement and where they  
27 are in effect being asked to make their own judgment on that issue.”

28 First, you are not being asked to make a judgment on any issue as to infringement at all;  
29 and secondly, that is in the context of the previous sentence:

30 “We were not referred to any procedure for seeking clarification of any points of  
31 uncertainty from the decision maker.”

32 As I say, in the case of a Commission decision that is most certainly not the case because  
33 Article 15 of Regulation 1 says in terms that the national court may ask the Commission for  
34 information in its possession when it is applying what was Article 81.

1 Just for that point in case it is picked up in reply, in the same bundle, authorities bundle 1, if  
2 you could go to tab 9, which is the modernisation Regulation, if you look at Article 15,  
3 p.12, under the heading “Cooperation with national courts”, 15.1 says:

4 “In proceedings for the application of Article 81 or Article 82 of the Treaty ...”  
5 which does encompass this case –

6 “... courts of the Member States ...”  
7 which does include the Tribunal –

8 “... may ask the Commission to transmit to them information in its possession or  
9 its opinion on questions concerning the application of the Community competition  
10 rules.”

11 It is well established that there is a duty on the Commission to provide such information.  
12 The cleanest or shortest summary of that is actually in the Ombudsman report that we put in  
13 the sixth volume of the authorities, if you have that, at tab 31. This was a case where the  
14 Commission was saying that they did not want to give underlying documents to a court  
15 which was dealing with a follow on action in *Bitumen* case. You will see on p.12 of 21,  
16 para.89:

17 “The Commission pointed out that using Article 15 of Regulation 1/2003 is the  
18 only appropriate legal basis on which to obtain access to the documents, provided  
19 that there are no exceptions that would justify a refusal ...”

20 which will not be the case here. Then they go on:

21 “Article 15 of Regulation 1/2003, in principle, allows documents to be obtained for  
22 a damages action before a national court, without there being a risk of the  
23 documents entering the public domain.”

24 Finally, if you turn to p.16, you will see in the “Further Remark” at the bottom the  
25 Ombudsman picking up that point and pointing out:

26 “... the Commission could promote the public interest in private enforcement  
27 through the mechanism of Article 15 of Regulation 1/2003 by indicated, when  
28 replying to a request for access under [the public regulation] (i) that, under Article  
29 15 of Regulation 1/2003, national courts are empowered to request documents  
30 from the Commission for the purposes of applying [the Treaty Rules] and (ii)  
31 whether the documents in question might be relevant for damages actions before  
32 national courts.”

33 That relates to documents. Article 15 itself refers to information. It is possible, therefore,  
34 for this court to ask the Commission, if there were any doubt, which there is not, whether

1 the findings of infringement apply to the UK subsidiary. That is ultimately the end of the  
2 case.

3 Finally, Sir, to conclude, I can summarise the entire matter, as follows: first, your role is to  
4 see whether there is a finding of infringement for the purpose of the statute. Second, that  
5 there is a finding of infringement in this case against the Carbone Lorraine undertaking, and  
6 the entity identified in the operative part of the decision is not necessarily the whole of the  
7 relevant undertaking. We have seen that from *Cartonboard*. Third, to find what the  
8 findings of infringement extend to, you do have to look therefore (it is necessary) at the  
9 whole decision. Fourth, in this decision it is clear from the findings, by which I mean not  
10 merely the operative part but the parts which say, "These findings are based on", and then  
11 refer to certain findings of fact, it is clear from those that the sixth defendant, or the UK  
12 subsidiary, is covered. Fifth, if there were any ambiguity on that issue it can be referred to  
13 the European Commission to clarify, and it is not an *Enron* case.

14 Finally, only this: this is an issue of quite great importance in terms of the jurisdiction of  
15 this Tribunal. The Tribunal will know that there are a significant number of follow on  
16 actions starting based on a series of Commission decisions involving international cartels.  
17 Where you have wrongdoers which are international groups of companies and their  
18 subsidiaries in different territories, they may be party to the cartel. In the High Court one  
19 can bring actions for damages, at least after *Cooper Tyres*, against subsidiaries which are  
20 parties to the cartel in which the parent has been named as the addressee for the purpose of  
21 enforcing the fine. In this Tribunal, it has never hitherto been contested that precisely the  
22 same position applies.

23 The *Vitamins* case, *BCL Old*, which we have referred to, is a case where the only parent is  
24 referred to in exactly the same way as the undertakings in the operative part. They were  
25 bitterly contested proceedings, as you know, under s.47A in the Tribunal, but it has never  
26 been contested that the claims were wrongly including claims made against the operating  
27 subsidiaries who are not expressly referred to as addressees in the operative part of the  
28 *Vitamins* decision.

29 If they are right in this application then although Parliament has created a special regime in  
30 the Tribunal to hear follow-on damages actions arising from exactly this sort of  
31 Commission decision then the Tribunal's jurisdiction will be very severely diminished  
32 because the scope to proceed in this forum against a wrongdoer based in the UK is going to  
33 depend on whether one of the ultimate parent companies identified in the operative part  
34 happens to be UK based.



1 Moreover, their further submission that the *Enron* case means that the Tribunal cannot look  
2 at any other material apart from the text of a description, written in the shorthand way in  
3 which it is, simply to confirm that the relevant subsidiary has been found by the  
4 Commission to be one of the infringing entities has equally severe consequences for the  
5 effectiveness of the Tribunal's jurisdiction. We gave the extreme example that if they  
6 changed their name they would then say, "We are not going to admit to anything and you  
7 will have to look to some source outside the decision to see that we are the same party".  
8 Mr. Beard accuses us of a contortion to obtain jurisdiction. We reply with equal vehemence  
9 and with far more justice, that this is a contortion to avoid the consequences of jurisdiction.  
10 The fact is that their application is misconceived as a matter of both authority and principle  
11 and it should be dismissed.

12 Unless you have anything further, Sir, those are our submissions.

13 THE PRESIDENT: Thank you.

14 MR. BEARD: Sir, I will try to deal with points in reply relatively briefly. Starting, I suppose, at  
15 the highest and broadest level, at points during Mr. Turner's submissions, in particular at  
16 the outset, he talked about some sort of dichotomy between national interpretation and  
17 binding affecting national law and binding affecting European law. Frankly, we struggled a  
18 little to understand quite how that works, or what is being said there. Here we have a  
19 European Union decision. It must be interpreted in line with European Union law. There  
20 can be no doubt about that. Therefore, the case law to which I have already referred at  
21 some length – the cases of *Suiker Unie*, *Adriatica* and *Akzo*, which notably Mr. Turner did  
22 not touch upon at all – are the relevant law which apply to the Commission and apply when  
23 considering this decision. Of course, as has been adverted to by the Tribunal already, we  
24 have s.60 governing this Tribunal. You would end up in quite a bizarre situation if you  
25 somehow were interpreting a Commission decision and concluding that it did not have a  
26 binding effect in the European law but somehow did have a binding effect in national law.  
27 Just to reinforce that point, it is worth recalling precisely what is said in s.47A. We are  
28 dealing here with s.47A(6). The decisions which may be relied upon – "the decisions which  
29 may be relied upon" – for the purposes of proceedings under this section are, "(d) a decision  
30 of the European Commission". So it is the decision of the European Commission which is  
31 to be relied upon and, by virtue of sub-section (9), is binding in determination this claim.  
32 So there we have the relevant identification of the instrument which gives this Tribunal its  
33 jurisdiction to go on and deal with questions of causation and quantification. You need that  
34 infringement to have been found in the decision, to be found where you are talking about

1 47A, 60, to have been found in the decision of the European Commission. Plainly it is a  
2 decision that the Treaty has been infringed in relation to the defendant in question. There is  
3 no issue there.

4 In those circumstances the idea that somehow one can sidestep *Suiker Unie*, *Adriatica*, the  
5 clear terms of the operative part of this decision, is simply a construct, a desperate construct,  
6 in order to hold this UK entity as being a person that can be sued in order to get jurisdiction  
7 against companies domiciled elsewhere.

8 As to the suggestion that somehow *Enron* can be distinguished in this regard, here we have  
9 a situation where the Court of Appeal in *Enron* was concerned about the scope of an  
10 infringement. There was an infringement finding by the ORR of abusive dominance. What  
11 *Enron* came along and said was that there are two aspects to that abuse. One was it affected  
12 the way in which we conducted our business in terms of contracting; the other was the  
13 prices we were being offered that we could use for that contracting meant that we suffered a  
14 competitive disadvantage and that was, therefore, part of the infringement. So what at issue  
15 in *Enron* was the scope of infringement, and it was in that context that the Court of Appeal  
16 said, no, you do not go hunting around looking for loose threads in factual documents of  
17 great length, seeing whether or not you might or might not construe an infringement more  
18 broadly. That was not what the approach was that was accepted by the Court of Appeal.  
19 Instead, what the Court of Appeal said was, you must focus on what is a clear decision of  
20 infringement. That is what gives the follow on jurisdiction.

21 In this case, in a case involving the Commission, the Commission assists by spelling out the  
22 operative part of its decision, and that is what is then recognised by the court in the various  
23 judgments to which I have referred, in particular *Suiker Unie*. Mr. Turner took you back to  
24 part of the *Suiker Unie* decision. I had taken you explicitly to the part which said, “Look,  
25 where you have got a clear operative part of a decision specifying the entities in respect of  
26 which you have findings of infringement you cannot gloss it”. It fits with *Adriatica*, you  
27 cannot use bootstraps of reading the recitals to create ambiguity, and then say that because  
28 there is ambiguity in the recitals there must be ambiguity in the operative part.

29 He then referred to an issue earlier on in the decision at paras.121 to 124. Indeed, that was a  
30 matter I touched upon earlier in an exchange with Dr. Scott. That was a section of the  
31 decision in the *Suiker Unie* where what was being said was, “We cannot tell from the  
32 summary what sort of conduct we should not engage in”. At that point it might be said that  
33 there would be ambiguity in the expression “in the operative part of the decision”. The  
34 court said, “Yes, you can go back and look at the terms of the recitals in order to understand

1 that, what the scope of cease and desist means in these circumstances”. That is fine because  
2 there was ambiguity in the operative part. It was not in any way qualifying the broader  
3 statement that was being made at the end that where you have no ambiguity you cannot  
4 revisit it.

5 What Mr. Turner is doing, elegantly, is trying to do precisely what the *Adriatica* decision  
6 said should not be done. He is trying to go through the recitals and say, “Look, it looks like  
7 here it is talking about local meetings, it looks like here you are talking about UK  
8 subsidiaries, it is looks like here you are talking about the nature of the Carbone Lorraine  
9 group that must include a lot of subsidiaries that have factories around the place, in those  
10 circumstances it looks like you must be talking about more than just that parent entity, and  
11 in those circumstances if you must be talking about more than just the parent entity, you  
12 must be talking about the UK subsidiary, and that means you must be talking about  
13 Carbone GB, or at least it is arguable that that is what you are talking about”. Somehow  
14 there is a notion of Community practice which suggests that where a parent company is  
15 named in a decision then in those circumstances that practice means the parent company  
16 and all those that fall under its aegis, whatever that may be, because of course Mr. Turner  
17 did not dabble with *Akzo*, he did not deal with the issue that you need to have specific  
18 findings to see who actually fits under that umbrella for the purposes of defining a broader  
19 concept of undertaking covering multiple entities. He just says, “It is Topco and some  
20 others, and this one here, that is another one, so we can pretty confidently say that that is  
21 what is being covered and that Topco is merely a representative entity here”. It is a  
22 representative of broader undertaking, and that undertaking includes Carbone GB.

23 If we turn to the decision itself, and we turn to the operative part, which is at p.106, really  
24 the wording of the Commission decision could not be clearer, “The following undertakings  
25 have infringed Article 81”, not, “These legal entities are representatives”, “The following  
26 undertakings”, and it is accepted by all that an undertaking can be constituted by a single  
27 legal entity, and that is what is the case in relation to Conrady, in relation to Hoffmann, in  
28 relation to Carbone Lorraine SA, in relation to Morgan, not in relation to Schunk. In  
29 relation to Schunk they decide there are two. That does not render each of those individual  
30 companies representatives of any other legal entities. The term “undertaking” is  
31 specifically used, and it is used unambiguously to refer to a single specified named legal  
32 entity.

33 Indeed, although we say you do not need to look at the recitals, Mr. Turner spent a great  
34 deal of time going through the recitals here. If one turns right back to p.2 of the decision,

1 “This Decision is addressed to the following undertakings”, recital (1), Le Carbone Lorraine  
2 S.A.

3 What is also instructive is that that specific legal name is defined there to be used in the  
4 term Carbone Lorraine throughout the remainder of the decision.

5 So when Mr. Turner comes on to paras.192 and talks about, “Ah, well, Carbone Lorraine,  
6 that must be talking about the group”, no, the term Carbone Lorraine has a specific defined  
7 throughout the remainder.

8 DR. SCOTT: He mentions para.22.

9 MR. TURNER: Sir, I hesitate to interrupt, it was pointed out to me that I missed something, and  
10 before my friend continues with his reply perhaps I could just give the reference?

11 THE PRESIDENT: Yes.

12 MR. TURNER: In relation to these findings, I had mentioned 254 and 229. I am just mentioning  
13 for your note, I should also have referred, which is along the same lines, to 219. It is in our  
14 written submissions.

15 THE PRESIDENT: I have got that sidelined, so I must have taken it from your submissions.

16 MR. BEARD: I will come back to 219.

17 Paragraph 20, Dr. Scott, you raise a question ----

18 DR. SCOTT: No, it is para.22. It seems to me that part of the difficulty that we face is that the  
19 Commission was not operating with that degree of precision in relation to legal entities  
20 when it writes para.22, that you are now ascribing to it.

21 MR. BEARD: I quite accept that where it talks about industrial sites in Europe and around the  
22 world it may well ----

23 DR. SCOTT: Let us just start with the global company. Carbone Lorraine SA is a national  
24 company.

25 MR. BEARD: I am sorry, I can see the point in relation to the remainder of the paragraph, but in  
26 relation to the phrase, “Carbone Lorraine is a global company”, there is no such thing as an  
27 international companies registry. You have to register within a Member State. To that  
28 extent, every company is a national company. One can see that the language of “global  
29 company” means that you operate worldwide. I do not think there is any dispute that  
30 Carbone Lorraine SA operates worldwide. That description creates no difficulty. I think  
31 the point that you rightly make is that when one goes on and talks about industrial sites, and  
32 so on, it may well be very loose language because it may well be that some of those sites are  
33 operated by subsidiaries or not. We do not make any point about that, but we accept that  
34 there is a degree of looseness in that paragraph. When you talk about what is being dealt

1 with in the remainder of this decision, it is the defined legal entity that was defined in recital  
2 1 and is thereafter referred to as such.

3 If there are anomalies like this, that makes no difference because what you do not have is a  
4 situation where there is a description of Carbone Lorraine, the terms that is then used  
5 thereafter, as being a company that has various specified subsidiaries, for example, as we  
6 have seen in *Akzo* and *Dutch Bitumen*, and so on. You are in a very, very different position.  
7 I accept looseness of language in 22, I do not think that that is the tail that could wag the  
8 dog of the general point that is being made here, which is unambiguous in relation to the  
9 definition being used in the operative part of the decision. It is an undertaking, it is  
10 specified by a full legal name. It is not actually using the Carbone Lorraine abbreviation.  
11 That is the same point that is being made in recital 1, and then references throughout the rest  
12 of the document must be treated as being to Le Carbone Lorraine SA, and I accept that in  
13 relation to 22 there is a degree of looseness.

14 I cannot take it further than that, but in terms of the ambiguity that is being talked about in  
15 respect of the terms of the decision, it is important to bear in mind that the terms of the  
16 decision here actually did canvass whether or not a wider concept of undertaking was being  
17 referred to, particularly in relation to this entity.

18 If one turns on to 254, “Addressees of this Decision”:

19 “For the reasons mentioned in sections 10 and 13.3, the Commission considers that  
20 ... Carbone Lorraine ...”

21 i.e. La Carbone Lorraine SA, because that is how it is defined in recital 1 –

22 “... should bear responsibility for their respective infringements.”

23 Then in 255, what is being said here is that where you are talking about the concept of an  
24 undertaking, which is the term which is used in relation to competition law infringement:

25 “The term ‘undertaking’ is not defined in the Treaty. It may, however, refer to any  
26 entity engaged in a commercial activity. According to the circumstances, it may be  
27 possible to treat as the relevant ‘undertaking’ for the purposes of Article 81 ... the  
28 whole group of companies or individual subgroups or individual subsidiary  
29 companies.”

30 it is possible to do that, of course. We accept that, we have always accepted that the notion  
31 of an undertaking can encompass more than a single legal entity. The simple point here is  
32 that when the Commission comes to decide what entity or entities are to be made subject of  
33 this decision, and in particular when it comes to decide what is the undertaking in relation to  
34 the Carbone Lorraine group it specifies the individual company and nowhere, nowhere,

1 does it talk about the idea that the parent company is a representative. Of course, that is in  
2 stark contrast to the case upon which Mr. Turner placed great weight, which is the  
3 *Cartonboard* case, because in *Cartonboard* there you had a detailed analysis where the  
4 Commission was specifically saying, “Actually in this case we are going to apply a rubric,  
5 we have discretion and we are going to apply a rubric as to how we are going to address  
6 decisions and in some cases we are going to address it to the directly involved subsidiary we  
7 have identified, and in other cases where there are multiple companies within a group that  
8 we have identified, we will pick a parent company as a representative”.

9 The point there is that the Commission does have discretion – there is no doubt about it – in  
10 deciding who it is going to address a decision to. Our point is simply that if you exercise  
11 that discretion in a particular way it has legal consequences. If the Commission exercises  
12 its discretion to address the decision to multiple legal entities, then multiple legal entities  
13 will be bound by the decision. If it decides not to, they will not be. It is only those that are  
14 specified which are bound.

15 So we do not dispute the discretion, we are not trying to suggest that it cannot do these  
16 things in different ways, but the idea that somehow there is not only a shorthand but  
17 effectively a code in all of these decisions, that in the operative part where the words say  
18 that the undertaking that committed the infringement is Xco, actually Xco is to be treated as  
19 representative, and then when pressed by you, Mr. President, he said that actually will only  
20 work when you are talking about parents. As soon as one begins to think about the  
21 complexities and sub-divisions within groups of companies, one can immediately see that  
22 the shorthand that he refers to, the code which he is trying to interpolate into the simple  
23 clear words of these Commission decisions begins to become unintelligible. As I say, that  
24 leaves to one side the fact that he has not engaged at all with the fact that in order to identify  
25 whom you are representing you would need to make specific findings of fact in line with the  
26 requirements of *Akzo*. You cannot just assume these things.

27 In those circumstances, the broad propositions that are being relied upon, this notion of a  
28 representative nature of a particular legal entity that is named not as such but as the relevant  
29 undertaking to which a decision is quite wrong. The case law which says you should not go  
30 back to the recitals to try and interpolate this code are all sound.

31 Furthermore, the points about the operation of the Treaty that were made at the outset by  
32 Carbone GB are still sound.

33 When one looks at the point that is made in Article 297, that it is only when a decision is  
34 notified to you that you are able to say that the decision has effect. When you ask yourself,

1 to whom, Mr. Turner is driven back to the proposition you notify it to the undertaking, the  
2 representative body. There is no reason why Treaty provisions, Treaty provisions that are  
3 of universal application across all EU decisions, should somehow be read in a special way  
4 when you are talking about Commission matters. Of course, what you can get are disputes  
5 between legal entities as to whether or not they should be included within the definition of  
6 an undertaking. Because of the way fine guidelines work you can get all sorts of situations.  
7 You can get situations where intermediaries are saying that they are no part of the relevant  
8 undertaking, you can get situations where parents are saying they are not part of the relevant  
9 undertaking, you get situations where subsidiaries are saying that they are not part of the  
10 relevant undertaking. You get all sorts of situations. A range of them were raised in the  
11 construction appeals. Those have yet to be determined. The point is that it is does not  
12 matter how they are determined. Different legal entities can have fundamentally different  
13 interests. It is, therefore, imperative that they have the right to challenge a decision that is  
14 binding upon them and affects their legal position.

15 In that regard, Mr. Turner is unable properly to articulate how it is that a party is not an  
16 addressee of a decision, is still bound by the Commission decision and still has this right of  
17 challenge. He ends up driven back to a position where he said it a direct and individual  
18 concern. When faced with the terms of *Wegenbouw Heijman* decision he ends up saying,  
19 “Actually, the point is that the undertaking can appeal”, not good enough for the reason I  
20 have already articulated, “and anyway the subsidiary could appeal, because when a national  
21 claim is brought against it, if a national claim is brought then it is bound to direct and  
22 individual concern, or it is very likely to, because at that point it is facing the national  
23 proceedings, and of course in *Wegenbouw* it was not clear that they really faced national  
24 proceedings”.

25 First of all, nothing in the *Wegenbouw* judgment turns on the nature of the national  
26 proceedings. Secondly, let us pause for a moment, a decision is issued by the Commission,  
27 it names as the addressee a parent company. A subsidiary sits there and thinks, “I do not  
28 know what is going on with this, I am a subsidiary of this parent that is named, I actually  
29 operate in the same market, but I am not named, I am slightly worried about some of the  
30 points that are raised in recitals, I guess I could be sued, shall I go off to the courts in  
31 Luxembourg, I have got two months and ten days to lodge an appeal because that is the time  
32 limit under the rules of procedure”. The chances are there is going to be national  
33 proceedings before you have had to lodge your appeal, if you are going to do it. So you end  
34 up in the situation that Mr. Turner posits does not give you the direct and individual

1 concern. You have to somehow engineer the situation that the rules of procedure time limit  
2 suddenly kick in at some later date when a national proceeding is brought against you. That  
3 just cannot be right. What is more, it does not give you the universal and absolute right to  
4 challenge which is imperative if the legal position of an individual company is to have been  
5 changed by a Commission decision.

6 THE PRESIDENT: At some point I meant to ask you, and I will give Mr. Turner the opportunity  
7 to respond, I have got a feeling that there is a simple answer to this and I have forgotten  
8 what it is, but in s.47A(8), when it is dealing with the periods in respect of which claims can  
9 be made under that section, it refers to:

10 “... in respect of a claim made in reliance on a decision or finding of the European  
11 Commission may not be brought without permission ...”

12 so it appears to be putting a slight extension on the concept of a decision in sub-section (6).  
13 I know I have thought about this before and there may be a simple answer to it, then it goes  
14 on in sub-para.(a) of sub-section (8):

15 “the period during which proceedings against the decision or finding may be  
16 instituted in the European Court ...”

17 So it is thereby saying that you can appeal either against a decision or a finding. That is  
18 perhaps being just a belt and braces type of approach. It does imply that you could rely  
19 upon a finding.

20 MR. BEARD: I do not think we would accept that. I do not understand how one gloss (6) with  
21 (8).

22 THE PRESIDENT: They are in the same section, are they not?

23 MR. BEARD: Yes, but (6) is absolutely clear:

24 “The decisions which may be relied on for the purposes of proceedings under this  
25 section are:

26 (d) a decision of the European Commission ...”

27 THE PRESIDENT: (8) seems to imply that decision – Mr. Bailey has the answer, (6)(e), a  
28 decision of the European Commission”. That is the explanation.

29 MR. BEARD: That would certainly do the job and I am grateful to Mr. Bailey.

30 THE PRESIDENT: I think that is almost certainly right. I knew there was a reason and I had  
31 forgotten it. I did not want you to disappear without dealing with it

32 MR. BEARD: Without looking at this further that does appear to show why it is that you might  
33 have a reference to “finding” in (8) without in any way glossing what is the fundamental  
34 proposition in 6(d). I am most grateful.



1 In those circumstances, we are dealing with a decision. I have re-emphasised the points in  
2 relation to the key parts of the decision of the CFI in the *Dutch Bitumen* cartel.

3 I would ask the Tribunal just to turn up volume 6, tab 25, the decision in that case again,  
4 and go to p.62. It is just in passing looking at 188. You can actually see why there were  
5 concerns about the interpretation of the scope of the decision on the part of the applicant  
6 because there it talks about the duration of the infringement referring to *Heijmans*.  
7 “Heijmans” in those circumstances, there is a defined term covering all of the relevant  
8 companies.

9 More importantly at 189, what you have is the description of whether or not something is  
10 that an undertaking that has participated in the infringement that Mr. Turner has referred to:

11 “The ‘undertaking’ that participated in the infringement is therefore not necessarily  
12 the same entity as the precise legal entity within a group of companies whose  
13 representatives actually took part in the cartel meetings.”

14 Then there is a quote from *Shell*, which is not disputed. Then 190:

15 “Despite the fact that Article 81 of the Treaty is applicable to undertakings and that  
16 the concept of undertaking has an economic scope, only entities with legal  
17 personality can be held liable for infringements. This Decision should therefore be  
18 addressed to legal entities. It is accordingly necessary for each undertaking that is  
19 to be held accountable for its infringement [in this case] to identify one or more  
20 legal entities that represent the undertaking.”

21 Here was actually the language of representation used in passing. I thought it was important  
22 that the Tribunal was aware of the fact. Of course, when one comes on later to the  
23 conclusions and the operative part of the decision, what is made absolutely clear is that the  
24 applicant company is dropped from this, and it is only Heijmans NV and Infrastructuur BV  
25 which are the relevant legal entities which are defined as the undertakings.

26 So although in the decision there was language of representation, when it actually comes to  
27 it is plain that these legal entities are not representative of a broader diaspora of  
28 subsidiaries. Of course, we know that because the CFI said, “You have not got sufficient  
29 interest and you are not an addressee”. So even in decisions where the language of  
30 representation is used ----

31 DR. SCOTT: In 277 what they are saying is that the undertaking is just those two companies.

32 They are very specific here to knock out everybody else.

33 MR. BEARD: I entirely accept that. In 277 and 278 there is a specific analysis. The simple point

34 I was making was that this fixation upon using the language of representative does not take

1 Mr. Turner, even on his own case, as far as he would say. You can get references to the  
2 notion of someone being representative, as is set out here, and actually when it comes to it  
3 the individual entities are not representative at all. They are specific legal entities that are  
4 being dealt with. There is no reason why you should treat the position in relation to the  
5 *Heijmans* entities any differently from the position of any other of the legal entities that are  
6 named in Article 1. Of course, the governing words of Article 1 are “the following  
7 undertakings”. So again, it just reinforces that this notion of a shorthand being deployed in  
8 the operative part of the decision is untenable.

9 I have also, I think, covered our broad observations in *Cartonboard*, similar sorts of points,  
10 that here you have a situation where the court might decide that it can cover wider numbers  
11 of legal entities but you have to look at the particular circumstances of our case. In relation  
12 to para.95 of the decision, to which Mr. Turner has referred, that does not in any way  
13 suggest either that the Commission’s approach to identifying the key person that is going to  
14 be addressing a decision to is changed, nor that by doing so it is using some sort of  
15 shorthand that captures a wider group of persons.

16 THE PRESIDENT: “Representative” can mean a number of things, can it not? It can mean, “It is  
17 going to be terribly complicated for us to indict and convict every single company in this  
18 huge group so we are going to only indict the top man as representing the naughtiness of  
19 everybody”.

20 MR. BEARD: Yes, exactly.

21 THE PRESIDENT: That is not necessarily the same as an exact finding that everyone else is in  
22 the undertaking.

23 MR. BEARD: We would take no issue with that. If you are using the term “representative” in the  
24 sense of, “It is a symbol of an infringement, we are going to make an infringement finding  
25 against X”, that is fine. What we are saying is that there is a legal repercussion to the  
26 choice. However, you describe it, there is a legal repercussion to that choice, it limits the  
27 impact of the decision. It is not some kind of code and shorthand.

28 Sir, in those circumstances, I emphasised the absence of comment on *Akzo*, I have talked  
29 about the particular judgments to which Mr. Turner has referred, and in particular why it is  
30 that the *Heijman* decision still is important and is, it should be emphasised, simply  
31 confirming the reasons why those basic Treaty provisions should be read clearly on their  
32 face and not glossed. When you address a decision it must be to a person, you do not talk  
33 about some sort of broader addressing of decisions.

1 In relation to the accusations that Carbone Lorraine has Janus-faced, it is worth emphasising  
2 that today I wear only one hat, it is for the sixth defendant. In those circumstances, I do not  
3 understand, other than some sort of general forensic criticism, why it is suggested that the  
4 fact that the parent company, Carbone Lorraine, went in for leniency, co-operated with the  
5 Commission, provided documents that were relied upon, is somehow to be used against the  
6 sixth defendant. Indeed, if it were the case that the Commission were going through that  
7 material, which, as Mr. Turner rightly said, the Commission did find very helpful, and  
8 decided, actually, there were particular individual subsidiaries that it was concerned about  
9 and wanted to indict and address a decision to, it did not do so. Not only did it not do so,  
10 but in his tour of the various provisions and the various recitals, Mr. Turner was nowhere  
11 able to point to any reference to D6, it was all a matter of inference, inference that was built  
12 upon speculation, precisely what Lord Justice Carnwath said it was not the role of this  
13 Tribunal to engage with. Therefore, his comments about the Carbone Lorraine appeal, and  
14 in particular paras.207 and 208, do not take him anywhere. It is worth noting that in  
15 para.208, and I do not ask you to turn up the decision, what was being talked about was the  
16 attitude of the applicant – in other words, Carbone Lorraine SA, and what was being said  
17 was: “We did not implement the decision, and this is evidence of it because no one involved  
18 in our group was doing anything untoward.” So it was evidence being deployed in support  
19 of Carbone Lorraine’s parent’s position in relation to the penalty imposed on it. It does not  
20 take matters any further at all; there is no suggestion at all that the German subsidiary was  
21 subject to a binding infringement.

22 Just for reference in relation to the Schunk position, Mr. Turner tried to somehow  
23 distinguish Schunk and say that Schunk was not a problem, the fact that there were two  
24 legal entities being referred to. Actually there is quite a detailed analysis of what is going  
25 on with Schunk at recitals (256) onwards in the Commission decision, none of which  
26 supports the speculation which Mr. Turner brought to bear.

27 In relation to the absences of bits of material that were redacted in para. 80 that is the first  
28 time this has been relied upon as some sort of basis; it is highly speculative and takes Mr.  
29 Turner no further.

30 Finally, in relation to Article 15, Mr. President, you already indicated some degree of  
31 concern or scepticism about the power of this Tribunal to use Article 15 ----

32 THE PRESIDENT: It is not so much the power as much as the usefulness of any answers we get.

33 MR. BEARD: I think it may go further than that with all due respect to Mr. Turner. Here we  
34 have a situation where there is an extant decision, a Community legal Act in respect of

1 which the Commission is now *functus*; it has done its job. The idea that the Commission is  
2 then the body that can carry out glossing and interpretation of a legal instrument is not  
3 something that we accept is possible, nor do we accept that Article 15 provides the vehicle t  
4 through which that sort of thing can be done. In fact, of course, if you have a situation  
5 where a Community legal instrument does give rise to interpretative doubt, there is a  
6 mechanism by which that is dealt with, that is the Article 267 preliminary reference  
7 procedure.

8 THE PRESIDENT: I knew about that, yes.

9 DR. SCOTT: Just to pick up the redaction point. I do not think that can really be described as a  
10 speculative point because there is presumably an unredacted decision in the hands of the  
11 Commission, so there is speculation about it, it is there, it is just that the copy we have  
12 before us is unredacted.

13 MR. BEARD: The point being made now is speculative. It is said that somehow it is pregnant  
14 with potential. Well that is not the basis on which any of this claim has been brought, this is  
15 not something that has been raised previously at all. In those circumstances for that to be  
16 relied on now is speculative, that is the point I make, not that the material within it could  
17 somehow change in the meantime, that plainly would not be possible.  
18 There is a further point in relation to Article 15. It is proceedings for the application of  
19 Article 81 – query whether or not that is actually what is going on here. But leave that to  
20 one side for a moment we certainly do not concede that. “Courts in the Member States may  
21 ask the Commission to transmit to them information ...” now we do not accept that the  
22 Commission being able to transmit information means that it can actually reinterpret its own  
23 decision. We do not think that is covered there. “Furthermore, information in its  
24 possession or its opinion on questions concerning the application of Community  
25 Competition laws.” Actually here glossing your own decision, we do not consider that that  
26 is an opinion on the application of the Community competition laws, so in those  
27 circumstances we actually do say there is a real issue as to whether or not Article 16 gives  
28 that power. References to *Zwartveld* do not help; *Zwartveld* was all about documents, it  
29 was fishing – black market reports as I recall – they were documents being held by the  
30 Commission. So it cannot gloss its own decision. It is now *functus*. If Mr. Turner really is  
31 asking for a preliminary reference, obviously that has not been put  
32 forward ----

33 THE PRESIDENT: Well he has not asked for a preliminary reference.

1 MR. BEARD: That really is the end of the matter in relation to Article 15. This decision is clear,  
2 it does not name D6, it would be a remarkable conclusion that somehow in a follow-on  
3 claim an unnamed person in a decision was bound by that decision for the purposes of this  
4 Tribunal's jurisdiction, and it would be quite wrong for this Tribunal to conclude so.  
5 Unless I can assist the Tribunal further, and I am grateful for trespassing on your time.

6 THE PRESIDENT: Mr. Turner, I do not know whether you wanted to leap up. I do not think  
7 there is anything in the finding versus decision point, is there? I think we have got to the  
8 bottom of that?

9 MR. TURNER: I think Mr. Bailey gave an immediate, compelling answer to that.

10 THE PRESIDENT: We accept it for present purposes anyway. Thank you very much indeed,  
11 both of you. We will obviously have to think about the answers.

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