manufacturer may impede intra-Community trade, since the situation may change from one year to another in terms of alterations in the conditions or composition of the market both in the common market as a whole and in the individual national markets.

11. A distribution policy motivated by a desire both to guarantee a high profit margin for approved resellers and to impede, so far as at all possible, the admission of new forms of trade, which are regarded *a priori* as being incapable of satisfying the specialist trade conditions, exhibits characteristics which cannot be reconciled with a correct application of a selective distribution system.

12. An undertaking on which a fine has been imposed under Article 15 of Regulation No 17 is required to pay default interest up to the date of actual payment of the fine.

In Case 107/82

ALLGEMEINE ELEKTRICITÄTS-GESELLSCHAFT AEG-TELEFUNKEN AG, Frankfurt am Main, represented by Martin Hirsch and Fritz Oesterle, of the firm of Rechtsanwälte Gleiss, Lutz, Hootz, Hirsch and Partners, Stuttgart, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Christoph Bail and Götz zur Hauzen, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision No 82/267/EEC of 6 January 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.748 — AEG-Telefunken; Official Journal, L 117, p. 15) is void,

THE COURT,

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann, Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and O. Due, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. The AEG-Telefunken Group

The Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken (hereinafter referred to as "AEG"), a limited liability company incorporated under German law, having its registered office at Frankfurt am Main, is engaged, amongst other things, in developing, manufacturing and marketing consumer electronic products (television sets, radios, tape-recorders, record-players and audio-visual equipment).

Since 1 January 1970 this sector has been entrusted to the AEG subsidiary Telefunken Fernseh- und Rundfunk-GmbH (hereinafter referred to as "TFR"), which, since 1 June 1979, has been an independent branch of AEG. TFR manufactures and markets those products. In marketing them it uses the AEG marketing organization — that is, in Germany, the AEG sales offices or branches and, in the other Member States of the European Economic Community, the AEG subsidiaries responsible for marketing, namely, in France AEG-Telefunken SA, Clichy, (hereinafter referred to as "ATF") and, in Belgium, AEG-Telefunken SA Belge, Brussels, (hereinafter referred to as "ATBG").

Those sales offices are controlled by, and receive instructions from, TFR. They supply wholesalers and sometimes even retailers if they are large-scale retailers whose turnover is comparable to that of a wholesaler.

2. The AEG-Telefunken selective distribution system for consumer electronic products

For the implementation in the common market of the "five-point" programme involving the marketing of a part of the products entrusted to TFR, AEG notified the Commission on 6 November 1973 of a system for the selective distribution of Telefunken brand products ("Vertriebsbindung für Telefunken-Marken waren" — "EG Verpflichtungsschein"). The system is based on standard contracts with selected resellers at the various stages of marketing. Until the end of 1978 it was AEG, acting at the same time on behalf of TFR, which concluded distribution contracts with dealers; since then AEG-Telefunken Konsumgüter Aktiengesellschaft, Frankfurt am Main, acting on behalf of and for the account of AEG and at the same time for TFR as a joint contracting party, has done so.

In 1981 AEG introduced a new distribution system in Germany, based on so-called "partner contracts", but the former type of selective distribution contracts continues to exist in the other Member States.

According to the wording of the European Community standard-type selective distribution contract wholesalers are selected who regularly buy the contract goods for their own account for resale to retailers and undertake to keep a strict record of serial numbers and not to infringe the provisions of competition law; in addition retailers are selected who satisfy objective conditions as to their technical qualifications, have qualified staff and technically appropriate installations for the sale of consumer electronic products and who also undertake to keep a strict record of serial numbers and not to supply contract goods to dealers not subject to the selective distribution system. In notifying its selective distribution system to the Commission, AEG indicated that the system was open to all specialist dealers who satisfied the conditions of the standard contract.

By letter of 17 May 1976 the Director General for Competition informed AEG that he had no objection under Article 85 (1) of the EEC Treaty to the use of the version of the selective distribution agreement for Telefunken brand products notified on 16 March 1976.

3. Procedure within the meaning of Article 9 (3) of Regulation No 17

In the course of time the Commission became convinced that the actual application by AEG of the distribution system did not correspond to the scheme notified to it.

By decision of 29 May 1980 it therefore initiated the procedure laid down by Article 9 (3) of Regulation No 17.

After hearing the undertaking concerned in pursuance of Article 19 of Regulation No 17 in conjunction with Regulation No 99/63/EEC of the Commission of 25 July 1963 and after receiving the opinion delivered on 28 October 1981 by the Advisory Committee on Restrictive Practices and Dominant Positions in pursuance of Article 10 of Regulation No 17, the Commission on 6 January 1982 adopted Decision No 82/267/EEC, which forms the subject of this case.

4. The Commission decision of 6 January 1982

Decision No 82/267/EEC is based on the view that from the beginning AEG

intended to apply the selective distribution system in such a way as to pursue aims incompatible with the Community rules on competition, such as the exclusion in principle of certain forms of marketing and the maintenance of certain prices.

According to the decision, those aims were realized, in the practical application of the system, both by means of discriminating against certain dealers and by influencing directly or indirectly the prices to be applied by dealers.

The decision makes it clear that this improper use of the selective distribution system took place in Germany, France and Belgium. It lists, for each of those countries, both documents demonstrating the existence of a general distribution and price policy and documents relating to a series of specific cases in which, it states, that general policy was applied.

The decision states that by the application in practice of its selective distribution system AEG has infringed Article 85 (1) of the EEC Treaty, requires AEG to terminate without delay the infringement found and imposes on it a fine of one million European currency units.

5. Written procedure before the Court of Justice

By application lodged at the Court Registry on 24 March 1982 AEG brought an action for a declaration that the Commission's decision was void.

By a further document lodged on the same date AEG applied, in pursuance of the fourth paragraph of Article 192 of the EEC Treaty and Article 89 in conjunction with Article 83 et seq. of the Rules of Procedure, for an order of the Court of Justice suspending the operation of the decision without the applicant's being required to lodge security.

By order of 6 May 1982 the President of the Court of Justice ordered that the operation of Article 3 of the Commission's decision of 6 January 1982 (relating to payment of the fine) was to be suspended subject to the maintenance of the security already furnished by AEG on 17 March 1982 in favour of the Commission.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the parties to supply certain details and the Commission to produce a number of documents in its possession.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare void the Commission Decision of 6 January 1982 (IV/28.748 — AEG-Telefunken);

2. Declare that the Commission of the European Communities is required to reimburse to the applicant the costs arising from the proceedings.

The *defendant* contends that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs, including those of the proceedings for the adoption of an interim measure.

III — Submissions and arguments of the parties

A — The criticisms made by AEG relating to the manner in which the Commission conducted the inquiry under Regulation No 17

AEG complains that the Commission has insufficiently investigated the facts of the case, has not interpreted market conditions objectively or in their entirety, has selected and used the documents in its possession in accordance with arbitrary criteria, has not mentioned in its decision the results of other inquiries carried out by it in the past into the applicant's selective distribution system and has infringed the rights of the defence.

The Commission rejects all those complaints.

1. Insufficient investigation of the facts

AEG maintains that the Commission has neglected all the factors capable of explaining the specific details of the application of the selective distribution system on a European Community scale. In fact, on the occasion of the inspections carried out on 26 and 27 June 1979 on the premises of TFR, ATBG and ATF the Commission merely impounded some 500 documents having a bearing of some sort or another on problems of selective distribution and then drew from the file so constituted, arbitrarily and completely ignoring their context, a number of passages taken from, at most, 40 documents which seemed to support its point of view.

The Commission replies that that complaint is entirely unfounded. The large-scale inquriy carried out from June 1979 into the selective distribution systems operated by five large undertakings, including the applicant, in the field of consumer electronic products reveals that the problems affecting the application of such systems in the common market were examined with close attention. As regards, in particular, the investigations carried out on the premises of the applicant or its Belgian and French subsidiaries, the Commission remarks that it is by no means required to impound or copy for the purposes of an inquiry all the documents with a bearing on the application of a distribution system. It is only the "problem" cases which are of interest in showing whether a selective distribution system is correctly applied. Such cases are naturally few in number as the majority of specialist dealers normally do not "disturb the market" or operate an "aggressive" price policy.

2. Incorrect interpretation of actual market conditions

According to AEG a further shortcoming on the part of the Commission involved the failure to interpret objectively or in their entirety the facts known to it. For example, the Commission neither considered the consumer electronics market as such nor took into account factual matters exculpating TFR, ATF and ATBG.

AEG therefore considers it necessary to put at the Court's disposal:

All the data demonstrating, in all the countries of the Community, the existence in the consumer electronics sector of fierce competition as regards both manufacture and distribution and hence the fact that it is impossible for a manufacturer, on his own, to maintain

high retail prices for his products and high profit margins for the trade and that there is absolutely no incentive for a producer to restrict the network of his distributors;

A comparative study of the prices and profit margins of TFR and its competitors, demonstrating that TFR by no means applied high retail prices or high profit margins.

It adds that the keen competition between manufacturers would mean that a restrictive policy for admission to the selective distribution system, of which the Commission accuses the applicant, would be suicidal.

In this context AEG first puts forward some general data as to the position affecting competition in the market for consumer electronic products for the period ending in 1979/80, the period to which the Commission's objections relate.

Broadly speaking the position as regards competition in the field of consumer electronics has been characterized since the middle of the 1960s first by the increasingly dynamic presence in the European market of manufacturers from the Far East and secondly by the creation amongst dealers of very powerful purchasing groups at both national and international level.

These two phenomena, accompanied by the progressive saturation of the market at the level of the ultimate consumer, made competition between manufacturers ever fiercer and meant that German manufacturers, like their European counterparts and competitors, now have their backs to the wall in the struggle for survival.

The intensity and persistence of competition on the market have greatly influenced price trends for consumer electronic products.

In this connection AEG puts forward a series of data showing that of recent years, particularly between 1975 and 1979, price trends for consumer electronic products have been downwards in all Community countries.

Other evidence showing the keenness of competition in the consumer electronics market is provided by the short-term fluctuations in the share of the market occupied by the various undertakings (for which AEG produces figures resulting from a survey conducted by the Gesellschaft für Konsummarkt und Absatzforschung, Nuremberg).

The increase in the average period for which goods were held in stock between 1973 and 1979 is another factor calculated to increase the pressure of competition. Because of their relatively high price, colour television sets tie up a high proportion of business capital. Hence high levels of stock normally lead to competition between manufacturers, all of whom try to keep their stock levels as low as possible.

According to AEG, the Commission itself has in the past recognized in its SABA decision of 15 December 1975 how keen competition is in the consumer electronics market. In order to make even slightly plausible its objections as to improper refusal of admission to the distribution system and unlawful influence brought to bear on prices, the Commission would therefore have had to explain exactly how and why it came about that TFR, despite the intense and wide-spread nature of such competition, had the room for manoeuvre essential for such conduct. If the Commission had tried to analyse the problem — which it did not — it would have been forced to

acknowledge that TFR did not have the room for manoeuvre necessary for it to act as the Commission claims it did.

Having thus examined the situation on the market as regards competition, AEG observes that TFR could not in any case have carried out the machinations of which the Commission complains as there is a further reason, namely that TFR at no time had a dominant or even a strong position on the market, either within a single Member State or in the Community as a whole. AEG attempts to show by statistics that TFR has always had a small share of the market in Community countries for all items of consumer electronic equipment, but on the other hand has always had to face, both in the Federal Republic of Germany and the other Member States, competitors having a considerably larger share of the market.

TFR's altogether modest position on the market puts it also in a special situation with regard to new forms of distribution, both wholesalers and specialist retailers, both of whom have larger shares of the market at their own stage than TFR at the manufacturing stage.

The Commission, which of course ought to know TFR's position on the market, has not explained how TFR, in spite of its small share of the market, could have exerted any influence on the formation of trade prices.

AEG observes that, regard being had to the facts mentioned above, TFR has never been in a position to contain the pressure exerted by competition and customers occupying a strong position on the market, and that in fact there is no trace on the market of a high level of prices for TFR products.

By means of a synthesis of several comparative price surveys carried out by the Institut für angewandte Verbraucherforschung, Cologne, AEG shows that from 1977 to 1979 prices of TFR equipment were never the highest for equipment of that type sold in Germany. The wide margins of fluctuation recorded for TFR equipment disprove the Commission's opinion to the effect that TFR, by the indirect means of the selective distribution system, ensured a uniformly high level of prices for its products.

Various soundings by the Stiftung Warentest show, furthermore, that that price situation was not peculiar to the years 1977 to 1979 but subsisted during the whole of the period during which the selective distribution system was applied.

Purchasing groups and chains of specialist retailers normally passed on to the ultimate consumer almost the whole of the price advantages which they had succeeded in extracting from TFR thanks to their strong position on the market. Neither TFR nor the distributing companies, for their part, ever made the least attempt to restrain or prohibit such sales at low prices which, moreover, are perfectly legal under competition law. Even though it is, of course, hardly possible to provide direct proof, that conclusion is inescapable when it is realized that in all cases "cut-price" dealers were supplied — and still are — with TFR equipment subject to the selective distribution system.

AEG next explains TFR's marketing structure. In that connection it reproduces a table showing the approximate number of wholesalers and retailers of consumer electronic products in the various Member States and the number of wholesalers and retailers belonging to TFR's distribution network.

The figures in the table show, it claims, that:

Regard being had to the considerable number of distributors who participated

in its selective distribution system (some 12 000) throughout the Community, it is impossible for TFR, its subsidiaries or distribution companies to have the slightest influence on the formation of trade prices or thus to exert any appreciable effect on the level of prices throughout the Community market;

More than a quarter of distributors of radio and television equipment in Germany and almost three-quarters in the other Member States do not deal in Telefunken brand products and in such circumstances no pressure could be brought to bear on a Telefunken distributor to require him to adhere to certain prices;

If the Telefunken brand is to improve its position on the market, which is relatively weak, clearly it must expand its distribution network and it would be absurd for it to follow a restrictive policy as regards admission and to refuse to admit dealers to the selective distribution system. On the contrary TFR can survive on the market only if it has as many distributors as possible. Admission has been refused only in very few cases, in which the dealers concerned did not satisfy the specialist trade criteria.

The contractual obligations entered into by TFR towards the specialist distributors belonging to the system require it to ensure strictly that all the specific criteria for the specialist trade are adhered to. Those are the only obligations which take precedence over the essential aim of perpetually widening the network of specialist TFR distributors.

The Commission rejects the applicant's statements regarding its alleged inability, in view of the situation as regards competition in the consumer electronics sector and its own position on the market, to maintain high consumer prices for its products and high profit margins for traders and to operate a restrictive admission policy which would be absurd from an economic point of view.

It points out, first of all, that the contested decision does not accuse the applicant of imposing consumer prices and profit margins which are improper in absolute terms or of operating a restrictive admission policy in general, but of seeking to guarantee dealers "a minimum profit margin" and to keep prices as high as possible in spite of "market disturbances" and of attempting not to agree to certain types of sale or to accept certain traders who applied bargain prices — which is not in conflict with a policy of attracting the maximum number of suppliers who would observe the recommended price level.

The Commission does not in general dispute either the applicant's evidence with regard to market conditions or its statement to the effect that the consumer electronics sector is characterized by keen competition amongst both manufacturers and dealers and the Commission restricts itself to certain comments on individual points.

Thus it feels that it must contradict AEG's statement to the effect that almost all the products in respect of which Japanese manufacturers' share of the market is particularly large and competition is fierce (for example radios, record-players and television sets) form part of Telefunken's "five-point" programme, pointing out that that programme does not include car-radios or alarm-radios and includes only a single example of the Hi-Fi compact group.

The fact that the Commission acknowledges that the picture of the market painted by AEG is basically

correct by no means implies that it is content to draw therefrom the same conclusions as the applicant, namely that from the economic point of view it was unable to exert an influence on prices charged by resellers.

In its opinion, although the applicant's share of the market is not very large, nevertheless that share and the demand for Telefunken brand products are sufficient to give traders a keen interest in offering Telefunken products in their range of goods and thus to make them to a certain extent dependent on supplies from the applicant. Moreover the interest of the great majority of dealers in being protected from the aggressive price policy pursued by some of them and by certain forms of distribution naturally coincides with the producer's interest in maintaining the price levels of his products and in making the sale of his products attractive to as great a number as possible of traders thanks to an enticing profit margin.

As to competition from traders from the Far East, particularly Japan, the data supplied by the applicant refer most frequently to categories of products not covered by its selective distribution system. Moreover for certain products in the "five-point" programme too the position of such traders was relatively weak (for example in the colour television sector Japanese manufacturers in 1979 and 1980 occupied the lowest position in Germany and France and no position at all in Belgium). Moreover price stagnation and even the occasional fall in the price of certain articles cannot be imputed solely to fierce competition; the major cause is technological progress and in particular the use of new and more economical techniques in the production of electronic equipment.

Similarly, a comparison of profit margins on AEG products with those on other manufacturers' products is irrelevant. The decision does not state that the applicant offered its products at prices higher than other manufacturers but simply that it made an illegal use of the selective distribution system so as to protect the level of prices and traders' profit margin.

Finally the Commission takes the view that the applicant, possessing a large and highly rationalized distribution organization, is in a position to intervene rapidly at the appropriate time when necessary to regularize prices and is not impeded in doing so by the great majority of specialist traders.

In the Commission's view the applicant has therefore by no means succeeded in proving that it was theoretically impossible for it to make an illegal application of its distribution system by reason of the structure of competition.

3. Selection and use of documents in accordance with arbitrary criteria

According to AEG, those of the documents acquired by the Commission during the inspections on 26 and 27 June 1979 which might have served to exculpate it were not considered. The other scant results achieved by the Commission were also either brushed aside or used according to altogether arbitrary criteria, which shows that the Commission had made up its mind to the prejudice of the applicant.

Thus as regards the objection of concerted action on prices, referred to in point (28) of the decision, the

Commission based its view on information furnished by the proprietor of a chain of supermarkets, Mr Iffli, who is normally opposed to any system of selective distribution and the Commission in no way took account of the fact that Mr Iffli had not been requested to supply information in terms of Article 11 of Regulation No 17 and was thus incurring no risk of a fine if he made an untruthful declaration. Nor did the Commission attach any importance to the fact that, although he had been invited to appear at the hearing arranged by the Commission in Brussels on 19 August 1980, Mr Iffli absented himself.

As regards the case of the Ratio store in Kassel, mentioned in point (14) of the decision as an example of discrimination on TFR's part, the Commission failed to take into account the fact that Terfloth & Snoek GmbH, which manages the chain of Ratio shops, itself admitted that its Kassel shop did not satisfy the specific specialist trade criteria — a basic condition for admission to the selective distribution system.

Similarly the documents in the file on the case do not make it possible to draw the conclusion, contrary to the view taken by the Commission, that the Belgian retailer Verbinnen declared that he had been subjected to pressure from ATBG requiring him to charge higher prices. What is more, after asking seven Belgian traders for information under Article 11 of Regulation No 17 on the conduct of ATBG with regard to parallel imports and price recommendations, the Commission thought itself in a position to state that ATBG was making an improper use of the selective distribution system to fix market prices on the basis of a single reply, Mr Verbinnen's, which, moreover, it distorted in order to adjust it to its purposes.

In its decision the Commission took into account only one of the numerous documents and none of the evidence which the applicant had presented or offered during the procedure with a view to showing the application in practice of the selective distribution system. The only document taken into consideration (TFR Special Memorandum No 44 of 8 October 1973) was morover not taken into account in its entirety but was used solely to extract fragments of sentences which were supposed to corroborate the Commission's preconceived view.

As regards the case of the Suma discount store in Munich, referred to in points (40), (48) and (49) of the decision, the Commission did not take account of a correction by a responsible officer of the company making it clear that Suma was entirely at liberty to define its prices and that it drew no special bonus arising from any price control.

Finally the Commission did not record in its decision certain documents which it had thought sufficient, in the statement of objections, to form the basis for allegations to the effect that TFR was administering the selective distribution system improperly.

According to AEG, all these factors constitute so many proofs of a subjective and arbitrary selection and interpretation of facts or circumstances alleged to show the applicant's or its subsidiaries' guilt.

The Commission thinks it appropriate to specify first of all that the purpose of the contested decision is not, as the applicant seeks to think, to etablish and penalize a number of individual infringements of Article 85 (1) of the EEC Treaty, but to establish that the distribution system for Telefunken brand products, as notified to the Commission on 6 November 1973, does not correspond, as at present applied, to the requirements laid down by the rules of Community competition law.

Further, the Commission rejects all the criticisms made by AEG. As regards the complaint about the use of information supplied by Mr Iffli, the Commission calls attention first to the fact that the passages in the decision regarding the relationship between ATF and Iffli were largely based on ATF's own memoranda and secondly to the fact that the Commission is not bound to have recourse exclusively to information obtained as a result of a formal request within the meaning of Article 11 of Regulation No 17. As regards the fact that certain objections listed in the statement of objections were not maintained in the decision, it emphasizes that that is precisely what proves that those conducting the inquiry had no preconceived ideas.

4. Failure to mention the results of previous inquiries

AEG states that in the case of numerous complaints made by dealers to the Commission as regards the conduct of AEG and its subsidiaries after the introduction in 1973 of the system of selective distribution for Telefunken products, the Commission, contrary to what it now claims, initiated inquiries which it subsequently abandoned. That shows that at that time the Commission had felt that the distribution contract was being applied entirely in conformity with the European Community Agreement. The fact that no mention is made in the decision of the outcome of these inquiries is only one more proof of the Commission's preconceived ideas in this case.

The Commission's reply is that although it did not pursue the complaints mentioned above, it nevertheless did not formally declare that the cases in respect of which the complaints were made represented an acceptable application of the Telefunken selective distribution system. As it did not feel that it should carry out an inquiry into all possible complaints which might be made to it in matters of competition, it decided, after a preliminary investigation, not to act in the cases referred to. That attitude does not justify the conclusions drawn by AEG but simply implies that in the cases in question the Commission did not clarify all the facts or come to any clear decision.

As regards the comprehensive criticism put forward on several occasions by the applicant to the effect that the Commission did not take account of a number of facts exculpating it, the Commission remarks that it was not bound to express a view in its decision with regard to every argument put forward by the applicant at the hearing or to give precise reasons for not using certain documents which had come to its notice. It points out that according to the case-law of the Court of Justice the Commission is not required to deal with all the matters of fact and of law which may have been raised by each party during the administrative procedure. By referring to the matters of fact and of law on which, in the Commission's view, an appraisal of the legality of the distribution system as applied by the applicant depends, and by setting forth the considerations which led it to adopt its decision, the Commission has satisfied all its obligations in that respect.

5. Infringement of the rights of the defence

AEG takes the view that the rights of the defence have been infringed inasmuch as the Commission:

(a) did not provide it with the full text of a letter of 12 August 1980 from Mr Iffli, setting out what was alleged to be improper conduct on the part of the applicant, so that it might make known its views on this matter;

(b) used in the contested decision documents which had not been mentioned in the statement of objections, although they were already at that time in the Commission's possession;

(c) adopted a decision based, *inter alia*, on a series of "cases" which were not mentioned in the statement of objections — Mammouth, referred to in point (25) of the decision, Verbinnen (point (39)) and Gruoner and Südschall (point (52)).

The infringement of the rights of the defence is demonstrated by the fact that the Commission arrogates to itself the right to decide, as it did in the Iffli case, which are the parts of a document to be used as the basis of a decision to be adopted in relation to an undertaking although they are necessary or useful for the defence of the undertaking. The fact that the applicant was given the opportunity to consult the whole of the file after the decision was taken cannot alter the fact that the applicant was prevented from defending itself properly before the adoption of the decision.

As regards points (b) and (c), AEG observes that, whilst it is true that the Commission did not formulate in its decision any new objection as compared with those contained in the statement of objections, the fact is, nevertheless, that each of the objections raised by the Commission is based on "individual cases", so that the inclusion in the decision of individual cases not figuring in the statement of objections is a clear infringement of the rights of the defence.

The fact that the new cases are based on internal memoranda of the applicant is of no significance. The applicant cannot guess the conclusions which the Commission imagines itself able to draw from isolated passages from the documents which have come into its possession.

The Commission replies as follows:

The part of Mr Iffli's letter which was not communicated had no connection with the procedure in question and moreover the applicant's lawyers were given the right to inspect that part of the letter too and to take copies.

The documents which were mentioned in the decision but not expressly referred to in the statement of objections (letter from the Münster sales office of 29 June 1976, ATF memorandum of 7 July 1977 and ATF memorandum of 20 October 1978) were not used to found fresh objections but simply to justify objections already formulated. These were, moreover, documents emanating from one of the applicant's sales office or its subsidiary in France and the applicant was therefore necessarily acquainted with them.

Three cases (Verbinnen, Gruoner, Südschall), allegedly not mentioned in the statement of objections, do not concern fresh objections but are only

documentary evidence intended to support objections already formulated and some of them were moreover mentioned in other passages in the statement of objections.

As regards the letter from Mr Iffli, the Commission further refers to its duty to guarantee confidentiality and trade secrecy and states that the passages in the letter which it did not communicate to the applicant had nothing to do with the subject-matter of the inquiry and therefore had no effect on the decision.

As to the documents mentioned for the first time in the decision, they do not constitute "fresh facts", still less "fresh objections". In fact the Commission simply took the opportunity to a very modest extent of making a factual rearrangement of the objections set out during the administrative procedure and of supplementing them on certain points.

B — The Commission's objections

1. The presentation of the objections

In Article 1 of the contested decision the Commission stated: "Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken has infringed Article 85 (1) of the Treaty establishing the European Economic Community by applying the distribution agreement for Telefunken products, which was introduced in the European Community on 1 November 1973, in such a way that:

(a) dealers, although satisfying the conditions for authorization, could not obtain the contract goods; and

(b) the selling prices of contracted dealers were directly or indirectly determined by AEG."

2. The link between AEG's general policy and the individual cases

In the statement of the grounds on which the decision is based the Commission lists numerous documents some of which prove, in its view, the existence of a general policy on the part of AEG and its subsidiaries as regards distribution and price fixing, whilst others relate to several "individual cases" in which dealers were improperly refused access to the AEG-Telefunken selective distribution system or were subject to pressure intended to make them adhere to certain prices.

On the other hand AEG maintains that the Commission has not succeeded in any single case in proving that access to the distribution system was arranged in a discriminatory manner or that the distribution system was used to influence prices.

The complaint of an infringement of Article 85 (1) cannot therefore be upheld either generally or within the restricted context of the individual cases.

The "individual cases" play an important part in the structure of the decision since it is on them that the complaint of an improper application in practice of the system of selective distribution is based.

AEG takes the view that even if they were proved the individual cases mentioned by the Commission by no means demonstrate systematic improper use of selective distribution.

As regards the objection of discrimination against certain dealers, AEG asserts that in only one of the nine cases

mentioned in the decision, namely Ratio store, does the Commission state — and moreover wrongly according to AEG — that the dealer concerned satisfied the preliminary conditions for admission to the selective distribution system. In the other cases the Commission has not even attempted to show that those concerned fulfilled the conditions and therefore has no reason for questioning the lawful nature of a refusal based on the fact that the party in question was not a specialist trader.

Even on the supposition that there had been an unjustified refusal and quite apart from the fact that such conduct took place in only three of the eight Member States in which Telefunken products are marketed, it must be remembered that these were nine cases found over a period of six years at Community level out of roughly 12 000 authorized specialist dealers, which corresponds to 0.08% of all applications for admission to the selective distribution system.

In AEG's view such ridiculously low figures can at most serve as an indication as to the practical application of the system only on condition that it is shown at the same time they form part of an unlawful objective on TFR's part. The Commission has in fact attempted to attribute such an intention to TFR but its assertions are not corroborated by a single document in the file. They are on the contrary unacceptable generalizations inferred from a few rare individual cases which the Commission imagines it has proved.

As to the second objection put forward by the Commission, which relates to the determination of prices, AEG maintains that the Commission does not show a single case in which TFR or one of its sales branches has attempted to impose its idea of selling prices and threatened those concerned with a refusal to supply.

The Commission has founded its decision on 16 cases, three of which were not even listed in the statement of objections. In view of the fact that the 16 cases referred to are spread over six years and that the number of authorized TFR distributors is roughly 12 000 it may be seen that there were on average 2.6 alleged infringements a year or, to put it another way, that TFR attempted (once!) to influence prices with roughly 0.01% of dealers in the system. In those circumstances, even if the 16 cases cited were proved they could in no way provide an indication of a generally improper application of the distribution system. Their exceptional nature is clear since logically attempts to influence prices must be made on a permanent basis as regards every dealer and not in isolated cases.

3. The objection of discrimination

(a) AEG's general policy for admission

The contested decision states in point (61) that it may be seen from an internal memorandum of 7 September 1973 and guide-lines on the distribution system dated 8 October 1973 that: "AEG was at any time unwilling to make the authorization of dealers subject solely to objective technical criteria".

The passage from the internal memorandum of 7 September 1973 mentioned in the decision is as follows:

"There are two possible ways of ensuring this: either the industry supplies these products at prices which guarantee

the trade its margin or the industry makes sure that the goods do not flow into channels which do not need this high margin. These channels are cash-and-carry stores which disrupt price levels. . .".

The extracts from the guide-lines of 8 October 1973 mentioned in the decision state that "some branches of chain stores may carry out all the required specialist trade functions, but not the whole undertaking" and that supplies should theoretically be refused even to such branches and that where the TFR sales office considers it appropriate to supply the specialist departments of such firms with goods covered by the agreement, negotiations may be carried out only by prior agreement with TFR.

AEG takes the view that these documents, which are not linked to specific cases of the application of the selective distribution system, are of no significance for the purpose of showing whether AEG has infringed Article 85 (1) of the EEC Treaty. It states, however, that it will consider them so as to demonstrate that the Commission's conclusions are wrong in this part of the decision also.

After remarking that conduct on the part of AEG cannot be inferred, as is done by the Commission, from conduct on the part of TFR, AEG states that the documents quoted by the Commission do not reflect conduct, but at the most intentions, on the part of TFR and that only if the authors of the documents are agencies of TFR under its statutes. The Commission passes over these latter points.

The memorandum of 7 September 1973 correctly distinguishes between the specialist trade and other commercial channels such as cash-and-carry stores, discount stores, self-service stores and cut-price shops, none of which satisfy the conditions normally required of a specialist retailer.

The distinctions made in that memorandum are fundamentally correct. Nowhere is it stated that such types of large-scale distributor are not to be admitted even if they satisfy the specialist trade criteria in each case.

Similarly the extracts from TFR Special Memorandum No 44 of 8 October 1973, quoted by the Commission in point (11) of the decision, are incompletely reproduced. The Commission has omitted to quote the passage in which it is stated that: "In this respect there must be a scrupulous check as to whether all the criteria of our selective distribution system (applicable to retailers) are indeed fulfilled". Only when placed in the context of the memorandum as a whole does the isolated passage quoted by the Commission assume its true meaning. It is impossible to supply branches satisfying the specialist trade criteria but forming part of an undertaking which, as a whole, does not satisfy those criteria, unless it is possible to check that the products supplied to an authorized branch are not delivered to unqualified branches. Only TFR's head office, with its supra-regional view of the position, is capable of assessing this point with full knowledge of all the facts, and this justifies the "prior agreement" to which the Commission takes exception.

Finally, the letter of 22 September 1975 from the Münster sales office, which is mentioned in point (9) of the decision, in which it is pointed out that the distribution agreement was being used to try to exclude large supermarkets although "there seems to be a trend towards specialized departments even in discount

stores", cannot, simply because it emanates from a TFR employee, provide proof of improper conduct on the part of the company, whilst letters from the actual management of TFR (which AEG has appended to the application) show that it was maintaining a correct interpretation of the conditions laid down by Community law.

The Commission's reply is that the memorandum of 7 September 1973, from which it may be seen that there are two ways of guaranteeing a minimum profit margin for traders, namely that "either the industry supplies these products at prices which guarantee the trade its margin or the industry makes sure that the goods do not flow into channels which do not need this high margin", shows clearly that the purpose is to prevent goods from being supplied to undertakings which disrupt price levels. The Commission emphasizes that the memorandum expressly mentions by way of example the cash-and-carry stores. However, the exclusion of certain undertakings simply because they form part of a particular channel of distribution is unjustified. Access to the selective distribution system can be arranged only on the basis of special criteria for admission. To take into account only the form of distribution, the nature or description of an undertaking must therefore be considered as unlawful discrimination.

Special Memorandum No 44 only confirms the restrictive admission policy with regard to chain stores. The guidelines set out in it do not mention the principle — taken from the case-law of the Bundesgerichtshof — of the non-supply of chain stores where not all the branches satisfy all the conditions required by the specialist trade.

As to the letter from the Münster sales office, the Commission feels that there is nothing to show that the management of the company opposed the policy set out in that document or that it pursued a different policy. As regards the letters from the TFR management to which AEG refers, their purpose was to inform certain large stores that they could not be supplied as they did not satisfy the specific specialist trade conditions. It is natural in such circumstances that the applicant should have attempted to give a correct interpretation of its selective distribution system in order not to be taken to court, but that has little significance as regards its distribution policy as a whole.

A final argument advanced by AEG consists in a statement that even if it were to be proved that it attempted by its distribution policy to maintain a given level of prices, its conduct was justified by the need to ensure the survival of its specialist trade, which, as distinct from the new forms of distribution, involve great expense and cannot therefore subsist without an appropriate margin of profit. In its *Metro* judgment of 25 October 1977 the Court of Justice expressly acknowledged that the interests of consumers require the existence of specialist trade and this, in the light of Article 85 (1), means that conduct aimed at safeguarding that channel of distribution is permissible.

The Commission replies that in the *Metro* judgment the Court laid down precisely the conditions in which the application of a selective distribution system is compatible with Article 85 (1) and that those conditions exclude any selection effected in a discriminatory manner and not based on objective criteria of a qualitative nature relative to the technical qualifications of the reseller.

(b) The admission policy in the Federal Republic of Germany

Point (13) of the decision states that in Germany the specialist dealer groups had a "right to state their opinion" regarding the approval of discount stores even where they satisfied the specialist trade criteria.

In AEG's view the document cited in support of that statement (a TFR minute of 25 May 1976) does not demonstrate the existence of a "right to state their opinion" but simply an intention to keep specialist dealer groups informed of the steps to be taken with regard to discount stores. There can be no criticism in law of a manufacturer's informing certain customers of decisions of such a nature, which are liable to affect their interests.

The sentence: "If the talks to be held show a lack of agreement on the part of the groups, legal action will have to be brought to protect the distribution agreement" covers conduct which would have been entirely proper even if it had been put into operation, which it was not.

According to the Commission, the fact that at the meeting to which the minute of 25 May 1976 refers TFR's sales managers agreed (and did not merely propose) to inform the main specialist dealer groups concerned in case of plans to approve discount stores and recognized that if the groups rejected such plans it would have been necessary to risk legal action can only be interpreted as meaning that TFR granted those groups "a right to state their opinion", which required it to refuse authorization (and thus to face the risk of legal action) if the opinion was negative.

The "individual cases" relating to the admission policy in Germany

— Ratio store in Kassel

With reference to this case, which is mentioned in points (14) to (16) of the contested decision, AEG stresses that in the Ratio store at Kassel the consumer electronics branch was spatially separate but was not divided by partitions from the other branches.

According to point II 1 C of the selective distribution agreement (approved by the Commission) only traders who made possible a suitable display of the contract goods in a representative sale-room open to the public might be considered specialist retailers.

However, a suitable display of high-fidelity stereophonic equipment for example is possible only in premises acoustically isolated from any other sales or access areas.

At the time of the inspections by Telefunken employees it also emerged that the equipment was displayed in the original packing and that there was no qualified or adequate sales information.

Under paragraph II 1 of the selective distribution agreement authorization may moreover be granted only to persons satisfying the whole of the conditions set out in the agreement and not to those who "broadly" satisfy them or even who undertake to observe them in the future. AEG adds that under point II 1 (f) of the selective distribution agreement only persons complying with the rules of fair competition may be considered specialist distributors and that that condition is not complied with by Terfloth & Snoek GmbH, which manages the chain of Ratio shops, as is shown by the numerous interim orders

made in Germany against that company. The refusal to approve the Ratio store in Kassel was therefore nothing but an entirely correct application of the selective distribution criteria.

The fact that Terfloth & Snoek never tried to force TFR by legal proceedings to supply it legally with TFR equipment proves that that company was itself convinced that it did not meet the specialist trade criteria.

In the Commission's view the case of the Ratio store in Kassel demonstrates an admission policy on the part of the applicant which is in principle directed against the admission of discount stores even if they satisfy the conditions for authorization or are ready to do so. It may be seen from the file that before the shop in Kassel was opened the applicant and the management of Ratio had not been able to agree on the prices at which Ratio was to sell Telefunken brand products. After the opening an inspection took place but in its refusal to supply, communicated to Ratio by letter 29 June 1976, the applicant made no mention of unfulfilled conditions relating to the specialist trade, which meant that Ratio had no opportunity to remedy any shortcomings. All this leads to the conclusion that Ratio was refused supplies because of the price policy which the applicant feared it would pursue.

The fact that Ratio did not attempt legal proceedings to obtain supplies in no way proves that the refusal of authorization was objectively justified, since a decision not to bring an action may well depend on the costs or on the consideration that in German law Ratio could have demanded supplies only if it was entirely dependent on AEG, at least for the supply of colour television sets.

— Harder in Villingen

It is stated in point (17) of the decision that the "wholesaler Harder (Villingen), who had been banned from the distribution network for infringing the distribution agreement but whose custom the AEG sales office in Freiburg did not wish to lose, was required, as an additional condition of its re-acceptance into the network, to make an express declaration that it would not supply discount stores or similar undertakings with AEG products and would not export such products to other countries of the European Community".

AEG maintains that it never suggested that Harder should impose an absolute prohibition on supplies to discount stores. In actual fact Harder became subject to a prohibition of supplies because it had several times supplied considerable quantities of equipment covered by the selective distribution system to retailers not subject to the system. In talks between TFR and Harder, TFR made a resumption of supplies subject to a complete clarification with regard to infringements of the distribution system. It is clear from a letter from TFR to Harder dated 28 April 1977 that the ban on supplies was lifted by TFR without further condition as soon as Harder gave a true description of the facts of its infringements of the distribution system and declared that it would refrain in future.

As to the suspension of supplies in case of a breach of the conditions of the selective distribution agreement, that is a penalty expressly laid down in point VI (a) of the agreement.

According to the Commission, the TFR report of 15 December 1976 leaves no doubt that the resumption of supplies was subject to conditions going beyond the obligations resulting from a selective distribution agreement.

(c) The admission policy in France

Point (63) of the decision states that in France the same sales policy as in Germany may be seen in the implementation of the distribution system, from which the new forms of sales outlet were also excluded.

That statement is based on an ATF minute of 5 January 1978, on a TFR internal memorandum of 1 September 1978 and on a letter from ATF dated 12 January 1979, certain passages from which are reproduced in points (20), (21) and (22) of the decision.

AEG finds fault both with the way in which the Commission has cited those documents and with the conclusions it has drawn from them. Thus, contrary to what is stated in the decision, the minute of 5 January 1978 in fact mentioned the need to protect the "brand image" and not the "profit margin with the specialist trade". What is more, the statement in that document to the effect that, "as may be seen from the survey, the discount stores' market share is extremely low with ATF" is a mere statement of fact which by no means permits it to be concluded that there was an ATF policy to the effect that discount stores as such should be refused admission.

ATF policy, moreover, was quite different, as may be seen from a letter from ATF dated 26 October 1978 in which it is stated that: "The state of the law requires us to conclude agreements with all contractual partners who fulfil the objective criteria". That policy was also followed in practice, as is proved by the admission of discount stores such as Auchan and Iffli.

The TFR memorandum of 1 September 1978, which states that: "Discounters have so far deliberately not been supplied for reasons of pricing policy", does not reveal any discrimination against that form of distribution.

Similarly the passage in the letter from ATF dated 12 January 1979, mentioned in point (22) of the decision, the exact wording of which is: "... to accelerate the gradual opening up of our distribution policy" and not, as the Commission has translated it: "... gradually to relax its policy towards modern sales outlets", proves only that ATF, far from discriminating against discount stores, was intending thenceforth to address itself to such of those stores as met the specialist trade conditions.

In answer to AEG's allegations the Commission puts forward an ATF internal memorandum of 7 July 1977, from which it appears that ATF required the wholesaler SEDIF not to supply Telefunken products to the discount stores Hyper, Carrefour and Conforama. That memorandum, it states, shows the existence of a distribution policy consisting, in general, of not supplying discount stores.

It maintains that ATF did indeed intend to guarantee a high profit margin for its distributors, as may be seen from the statement in an ATF memorandum of 30 June 1978 in which there is a reference to "Telefunken's trading policy, which succeeds in keeping retail prices stable

and thus in maintaining an appropriate profit margin for retailers".

As to point (20) of the decision, the Commission maintains that, even if the minute of 5 January 1978 does not expressly mention the "favourable effects" of a marketing policy directed towards excluding discount stores, that is undoubtedly the sense of the passage, in which it is stated that the particularly low share of discount stores in ATF's trading structure has enabled it to maintain a uniformly high price level which is viewed favourably by the specialist trade.

As to point (21), the Commission remarks that the sentence: "Discounters have ... not been supplied" in TFR's memorandum of 1 September 1978 can in no way mean, as the applicant maintains, that discount stores had not been actively invited to adhere to the selective distribution system.

Finally the Commission maintains that, contrary to the impression which the applicant would like to give, there is no question of an active approach in the letter from ATF of 12 January 1979. What is in fact the decisive point about that letter is the connection between the question of the admission of modern large-scale distributors and the problems of the preservation of the "high price policy" resulting therefrom.

The "individual cases" relating to admission policy in France

— Auchan, France

AEG denies that ATF admitted Auchan into the distribution network for Telefunken products only after Auchan had agreed to adhere to the prices recommended by ATF and to withdraw all advertisements for Telefunken products.

On the contrary, it states that to begin with Auchan did not satisfy the conditions prescribed by the selective distribution agreement for the European Community and that it was only in 1978 that ATF was able to satisfy itself that those conditions were thenceforth satisfied.

It is untrue that ATF required Auchan to give an undertaking to follow its price recommendations. Auchan was known as one of the most agressive "discounters" and its advertisements went to the limit of what was permissible under French competition law, so that doubts subsisted as to whether it could be approved — in particular under point II 1 (f) of the European Community Agreement according to which only those who comply with the (national) rules of competition law may be considered specialist distributors. Auchan made it possible for ATF to resolve the dilemma by undertaking for its part not to charge any lower prices than those of any other shop in the town for the same TFR product.

As soon as Auchan had undertaken not to charge prices contrary to the rules of competition law it was admitted at once to the distribution system without any request to adhere to certain prices. It is doubtful whether Auchan, before giving that undertaking, ever clearly fulfilled the objective conditions for authorization.

According to the Commission, ATF withheld supplies from Auchan as long as it could and admitted it to its distribution system only as a result of a threat of legal action and after Auchan had agreed to follow the applicant's recommendations as to prices and to observe the existing level of prices.

None of ATF's internal memoranda in the file makes it possible to doubt that Auchan satisfied the objective conditions for supply (the memorandum of 20 October 1978 in fact expressly confirms this). Nor is there any ground for supposing that Auchan infringed national provisions with regard to unfair competition. Furthermore, even if it is accepted that a duly established failure to comply with national competition rules may justify the termination of a contractual relationship, the suspicion of such a failure harboured by one of the parties involved but not corroborated either by the decision of a court or by undeniable substantive factors can in any way justify a refusal of supplies, even less exclusion from the distribution system. Finally, a promise to adhere to "prices generally charged in the town" can in no way be interpreted as a promise not to charge prices which are actually unlawful.

— Mammouth (Toulouse)

In this case, as in the preceding case, AEG maintains that the undertaking not to charge less than the lowest prices charged by any competitor in the same town relates to a price policy compatible with competition rules, whereas for the Commission this amounts to a requirement over and above those set out in the standard European Community selective distribution agreement.

— Iffli (Metz)

AEG maintains that the sentence: "Mr Iffli undertakes to adhere to our prices and gives an assurance that his purpose in choosing Telefunken is not to smash the brand" in the ATF memorandum of 30 June 1978, can have no sense unless the words "our prices" are to be understood as meaning ATF sale prices to traders and not prices to the ultimate consumer.

Iffli was known in the trade for his practice of making loss-leading offers, that is, selling his equipment at prices which, in ATF's view, were less than his cost prices, and he had to undertake not to sell Telefunken sets at a price below that at which he had bought them, that is to say, not to cut prices of Telefunken brand products by loss-leading offers contrary to competition rules.

AEG also disputes point (27) of the decision in which it is stated that ATF intended to reach an agreement on retail prices in Metz between the retailers Iffli, Darty and Le Roi de la Télé and that it assured Iffli that in that case its admission would be approved by Darty and Le Roi de la Télé. In reality the memorandum of 30 June 1978, which moreover was never put into effect, simply showed that ATF did not wish its distributors to disrupt prices.

According to the Commission, the expression "adhere to our prices" cannot in fact, in normal usage, mean anything other than adhering to recommended retail selling prices.

Iffli's declaration that his choice of Telefunken was not intended to "smash the brand" and ATF's report that: "We thought it would be better to arrange a fixed-price policy agreement for Metz" is moreover, beyond any possible doubt,

an expression of the intention to arrange a local price agreement.

A final argument advanced by AEG is to stress that Iffli, like Auchan and Mammouth, after his admission followed a price policy which can in no way justify the statement that he "would follow the applicant's price recommendations and adhere to the existing level of prices". The Commission replies that, in all these cases, what must be taken into account is not the price policies actually followed by the undertakings after their admission but simply the conditions to which their admission was made subject.

Territorial protection granted to certain dealers in France

Point (29) of the decision states that: "ATF allocated to each of the dealers it had recruited ... a specified sales territory, thereby ensuring that these dealers would face no competition as regards Telefunken products within the area allocated. If other dealers from this area applied to be accepted into the distribution network, ATF refused to admit them".

In support of that statement the decision refers to certain cases in which territorial protection was, it claims, granted to the wholesalers Le Roi de la Télé, Radio du Centre, Lama and Schadroff.

— Le Roi de la Télé

According to AEG Le Roi de la Télé enjoyed no territorial protection, in the legal sense of the word, for Telefunken products in Metz.

In actual fact ATF restricted itself to not seeking on its own account the admission of fresh specialist retailers in the Metz area but always admitted any trader who satisfied the prescribed conditions and sought admission to the system, as happened with Darty, FNAC, Atlas and Iffli. The mere fact of not seeking the admission of fresh distributors in a given area cannot constitute an infringement of Article 85 of the EEC Treaty.

The Commission maintains on the other hand that the applicant felt obliged as a reward for Le Roi de la Télé's special long-standing fidelity "not to conclude fresh agreements with other specialist dealers in Metz", which explains its conduct with regard to Iffli.

The fact that Darty, FNAC and Atlas were admitted before Iffli does not prove the contrary, for these were not local retailers but chains of shops whose admission probably implied that of all their establishments.

AEG replies that the chains of shops referred to were not admitted *en bloc* to the selective distribution system but only when, and to the extent to which, their various establishments satisfied the specialist trade criteria.

— Radio du Centre, Lama and Schadroff

As regards these cases AEG contends that, as in the case of Le Roi de la Télé, no question ever arose of a trader applying for admission in a zone where there were "*de facto* exclusive rights" and that in the absence of any specific conduct the conclusions which the Commission draws from certain letters sent to the above-mentioned companies by ATF are quite improper. The Chapel case mentioned by the Commission has nothing to do with the protection of exclusive ritghts supposed to have been granted.

The Commission maintains that ATF's policy did find expression in specific acts. Thus the first refusal to admit Chapel was explained by ATF by reference to an exclusive distribution agreement with Schadroff and ATF's negative attitude was abandoned only after a threat of legal proceedings.

The Commission adds that in any event the documents on the file in this case prove that there was a policy of territorial protection and that agreements were made with certain dealers for that purpose; such agreements are contrary to Article 85 even though they were made in a form which was not legally binding. In these circumstances there is no need to demand in addition proof that specialist traders were refused admission on grounds of territorial protection.

(d) The admission policy in Belgium

As regards Belgium, the Commission relies on a single case: ATBG's refusal to admit the wholesaler Diederichs to its distribution network.

Point (64) of the disputed decision states that: "In Belgium the case of Diederichs shows that, when it came to authorizing dealers, ATBG too was not primarily concerned with technical criteria, but with the dealer's pricing policy and his attitude towards parallel imports".

AEG contends that the Commission has made a bad choice of the only case which was meant to prove ATBG's admission policy. As regards Diederichs, he was a wholesaler who flagrantly failed to satisfy the specialist trade criteria laid down by the selective distribution agreement, whereby a specialist wholesaler has "a duty to assist both the manufacturer and the retail trade by regularly canvassing and supplying specialist distributors". Diederichs possessed neither the facilities nor the staff to permit him to provide suitable storage or a regular supply of spares. Nor was he in a position to carry out for TFR or ATBG any after-sales or guarantee service. He had no external service organization, which would have prevented him from carrying out regular and suitable canvassing of the retail trade and from providing other types of assistence. What is more, he could not have advised retailers at the time of the presentation of the goods or of delivery or publicity campaigns and he could not keep a strict record of serial numbers, as required by the agreement. Finally, he continually infringed Belgian competition law. In these circumstances it must be stated that Diederichs did not fulfil a single one of the basic criteria for a specialist wholesaler. Moreover, ATBG had received unsatisfactory reports as to his solvency.

As Diederichs was never admitted to the distribution scheme it is hard to understand the Commission's statement in point (66) of the decision that ATBG fixed market prices in his case.

The Commission on the other hand takes the view that the documents in the file show clearly that the price policy practised by Diederichs and his tendency to make parallel imports played a decisive rôle in the refusal to admit him to the applicant's distribution network.

In view of the fact that ATBG refused to admit Diederichs because he would not agree to concerted action on prices it is pointless to carry out at this late stage an inquiry into the objective conditions for admission, which ATBG omitted to do at the proper time in order to state the reasons for its refusal.

None the less, the Commission's view is that Diederichs did satisfy the specialist trade conditions. For example, it cannot be claimed that Diederichs was not in a position to provide servicing or deal with guarantees, whereas according to Clause II 2 (b) of the standard selective distribution agreement the duties of a specialist wholesaler are simply "regularly canvassing and supplying specialist distributors". Similarly there is no provision to be found in the standard agreement concerning any requirement that a specialist wholesaler shall have an external service organization. Finally it is not clear why Diederichs, with a staff of 32, could not have kept a strict record of serial numbers which consists for the most part simply of keeping an account of the equipment sold to each customer.

With regard to alleged infringements of competition law, the Commission remarks that that does not necessarily justify the manufacturer in refusing admission.

4. The objection of improper influence brought to bear on prices

(a) Direct influence

(i) Influence brought to bear on prices in Germany

— Suma (Munich)

In point (40) of the decision it is stated that in 1977 the Suma stores in Munich had promised the AEG sales office in Munich "not to act as a price leader but, at most, to take the lowest price on the market and, if possible, to adopt a position somewhere between average shop prices and the lowest prices . . .".

AEG states that that statement is incorrect. The conversation with Suma on which that passage in the decision is based was an altogether normal discussion on prices, such as takes place every day in countless cases between manufacturers and dealers, irrespective of whether the dealer in question is or is not subject to a distribution system. During the conversation the Munich sales office did not attempt in any way to encourage Suma to adopt any particular course as regards prices.

Suma itself subsequently confirmed through its manager, Mr Waltenberger, that it was entirely free as regards prices. The fact that the Commission took no notice of Mr Waltenberger's correction is another indication that its mind was made up.

According to the Commission, the memorandum of the Munich sales office dated 20 April 1977 shows clearly that a price agreement had been entered into with Suma. The fact that the applicant regards that only as an altogether normal consultation on prices shows simply that it does not know the difference between influence brought to bear on prices or concerted action on prices — both of which amount to a restriction on competition — and a non-binding price recommendation. The fact that this agreement did in fact exist was confirmed by Mr Waltenberger, Suma's manager, in a conversation with an officer of the Commission in September 1980. The correction which Mr Walt-

enberger subsequently sent to counsel for the applicant cannot show his earlier statement in a different light — all the more because as far as the Commission is concerned Mr Waltenberger never withdrew his declaration.

— Holder (Günzburg)

Point (41) of the decision states that influence was brought to bear on the prices charged by the retailer Holder in Günzburg since the Munich sales office explained to him in detail the pricing policy to be adopted, as may be seen from a sales office memorandum of 30 November 1976.

AEG contends that the above-mentioned memorandum contains nothing enabling the conclusion to be drawn that influence was brought to bear on prices and even less that influence was brought to bear by the use of the distribution system as a means of exerting pressure.

The Commission, on the other hand, claims that the uncontested fact that the Munich sales office explained to Holder "in detail" how he was to fix his prices allows the conclusion to be drawn that improper influence was brought to bear on this retailer's determination of prices.

(ii) Fixing and application of a market price in Belgium

According to point (66) of the decision, "In Belgium one of the means used to influence dealers' selling prices was the fixing of a market price by ATBG, to which contracted dealers had to align themselves ... and which allowed deviations only between an upper and a lower price-limit".

AEG states that Belgian distributors were and are entirely free to fix their selling prices. Furthermore, no provision of law prevents ATBG from indicating to its specialist dealers the market prices which it regards as "possible". The great majority of traders are in reality content to be able to count on a recommended (but not binding) average price in order to calculate selling prices.

The Commission replies that the existence of a policy directed towards influencing prices in Belgium may be seen from an ATBG minute of 19 December 1978, which shows that the applicant allowed only a very restricted margin of fluctuation of retail prices, as in the case of the retailer Verbinnen.

— Verbinnen (Lubbeek)

In AEG's view the facts mentioned by the Commission in no way allow the conclusion to be drawn that ATBG exerted pressure on Mr Verbinnen.

Neither the reply given by Mr Verbinnen on 3 November 1980 to a first request for information from the Commission on 14 October 1980 nor that given on 27 November 1980 to fresh questions from the Commission indicates that Mr Verbinnen had been subjected to pressure to induce him to charge prices fixed by ATBG. In actual fact, although he refused to accept the price recommendations put forward by ATBG, Mr Verbinnen is still part of the AEG-Telefunken distribution system. It is therefore incorrect to state that ATBG imposed a given market price on Verbinnen.

The Commission claims, on the other hand, that the fact that ATBG employees called personally on Verbinnen to induce him to follow the price recommendations constitutes pressure.

(iii) Influence brought to bear on prices in France

In points (42) to (47) and (67) of the contested decision it is stated that AEG's French subsidiary, ATF, also interfered with the freedom of specialist distributors subject to the distribution system to fix their prices (Darty, Camif, FNAC, Cart and Capoferm) suggesting that they should make price agreements and not engage in price competition.

Before considering each case AEG states in general that of course there were conversations between ATF and the various dealers on buying and selling prices but that such conversations are indispensable to allow distributors to form an idea of the sale price obtainable on the market, regard being had to the average selling prices practicable for a given piece of equipment and that no legal objection may be made either within or outside a distribution system.

— Darty and FNAC

AEG stresses that the Darty chain of retail shops had launched a promotional campaign in May 1978 and had itself fixed the final date as 31 May 1978, after which it had decided to revert to the former prices.

ATF's letter of 26 May 1978, mentioned in point (42) of the decision, simply refers to that situation; in that context the expression "increase ... prices" indicates simply that Darty was intending, after the end of its promotional campaign, to revert to its earlier prices and not that it had undertaken "to increase its retail prices for Telefunken products to the levels agreed with TFR".

The same reasoning applies to FNAC, also a chain of stores, which had aligned its prices with Darty's during the special campaign referred to.

According to the Commission the fact that Darty had undertaken "to increase ... prices" shows, on the contrary, that there was an agreement.

— Camif and Cart

As regards Camif and Cart, mail order agents which publish catalogues for their members, ATF merely informed them in summer 1978 that purchase prices would be going up as from 1 September 1978 so that they might take account of it in drawing up their winter catalogues.

It was with that in view that ATF, noticing that the two undertakings had not taken that expected increase in prices into account, suggested that they should increase the prices in their catalogues.

The Commission states that in the ATF internal memoranda relating to these cases there is simply no question of a price increase on the part of the manufacturer or of a mistake in fixing prices on the part of the customer.

(b) Indirect influence on prices in the Federal Republic of Germany

Point (49) of the contested decision states that: "During the talks with the firm Suma, the AEG sales office in Munich granted Suma a 'good conduct bonus' of 2% on sales" and that before the bonus was granted "it had been brought to its attention how important market pricing was in its shops".

AEG contends that the Commission's statement that there was a link between the "good conduct bonus" granted to Suma and its adherence to the prices indicated by TFR is baseless. Nowhere in the memorandum from TFR Munich of 20 April 1977, mentioned by the Commission in support of its statement, is reference made to good conduct as regards prices and the absence of any link between the conversation on prices and the bonus is moreover proved by the fact that the conversation is mentioned on page 1 (point 2) of the memorandum, whereas the bonus is mentioned only on page 3 (point 12). In actual fact the good conduct bonus is only an extra discount not provided for in the conditions of the distribution agreement and was so named by the Munich sales office only so as to be able to justify it internally to TFR.

As regards the proposal of 22 December 1976 from the Munich sales office, in which the Commission sees an indication of the policy actually followed, particularly in the Suma case, AEG stresses that this was simply a proposal from Mr John, an associate of TFR. TFR never followed the proposal up and it therefore plays no part in this case.

(c) Other individual cases

Point (67) of the decision states, *inter alia,* that: "The action taken by TFR against dealers who failed to adhere to the price level laid down by TFR and so caused 'price unrest' . . . demonstrate the great efforts which TFR made to maintain the retail price level it desired". In that connection the decision refers to the cases of Wilhelm, Schlembach, Gruoner, Südschall, Massa-Märkte, Kaufhof and Hertie.

According to AEG the fact that that statement is incorrect may be seen even from the documents mentioned in the decision, none of which refers to "action taken by TFR against dealers". Those documents on the contrary record only internal reflections within a sales organization with regard to the various market trends and therefore cannot be contested from the point of view of the legislation on agreements, decisions and concerted practices. Moreover it is indispensable from the point of view of any reasonable sales policy for the manufacturer to be constantly kept in touch with the prices for his own products noted on the market by his distribution network. Furthermore a scrupulous watch on prices is particularly necessary for a manufacturer such as TFR, dependent on the specialist trade; in such a case abnormally low prices may mean that the cut-price vendor is no longer providing the costly after-sales and counselling services which typify the specialist trade. In carrying out the necessary checks, TFR was therefore doing no more than performing its duty of not exercising discrimination against specialist dealers complying with the distribution agreement.

In the Commission's view the above-mentioned cases show that in the Federal Republic of Germany too the applicant attempted to maintain the level of retail prices which it desired and that on certain occasions it applied or attempted to apply various means to discipline dealers who operated an aggressive price policy.

The arguments relied on by the applicant confirm that it felt itself bound, in the interests of its selective distribution system, to supervise the conduct of its distributors in the matter of prices and their profit margins. However, it is not for a manufacturer to trespass on the freedom of dealers to fix their own

prices and to determine their own cost margins. Nevertheless, under German legislation on unfair competition a sale at no profit is not regarded as unlawful, even at a price below the purchase price. The fact that such sales are made does not allow the general conclusion to be drawn that the distributor is not properly complying with his obligations under the selective distribution agreement. The applicant's practice, which is always to check the specialist trade criteria when — and almost only when — it is noted that prices charged by a trader are disturbing the market so as to have at his disposal means of applying pressure to force the trader to raise his prices are generally at the root of the infringement of the rules of competition applicable to the selective distribution system.

In reply to the Commission's observations about German legislation AEG states that German law regards as lawful purely temporary or occasional sales at below the cost price or purchase price but not consistent or repeated sales below such prices.

— Wilhelm

According to AEG the company Wilhelm, which in 1976 had been offering goods at minimum prices, was well known at that time to be in a very poor financial situation. It was therefore perfectly natural for TFR to check whether Wilhelm's prices were only the result of normal price competition or were in fact "liquidation sales".

The Commission points out that TFR's letter of 22 July 1976 mentioned in point (50) of the decision criticizes Wilhelm's disturbing prices and indirectly asks that steps be taken to deal with that state of affairs but altogether fails to mention doubts about Wilhelm's solvency.

— Schlembach

On the subject of this company AEG explains that the "at times heated discussion" which took place between Schlembach and TFR did not relate to prices but to the legality of an advertising campaign which in TFR's view did not comply with German competition law.

The Commission's opinion is that TFR has not been able to prove that Schlembach's advertisements constituted a special initiative prohibited by German competition law. Moreover the file shows that TFR exerted direct pressure on Schlembach and made threats as to their future collaboration.

The memorandum of 30 September 1977 from the Dortmund sales office, which is mentioned in point (51) of the decision, proves at least that the applicant's employees asked the Cologne sales office to take action in connection with the prices charged by Schlembach and to "keep the customer in order".

— Gruoner and Südschall, Massa-Märkte, Kaufhof (Kassel) and Hertie (Frankfurt)

AEG observes first of all that the names of Gruoner and Südschall appear for the first time in the decision and were not mentioned in the statement of objections. As far as these cases are concerned it should be pointed out in addition that the models offered by Gruoner and Südschall did not come under the selective distribution system and that in stating that the offers made by these two wholesalers were disruptive the TFR sales office was saying no more than the truth.

The Commission remarks that the report of the Mannheim sales office dated 31 October 1978, which is mentioned in point (52) of the decision, expressly describes the offers made by the above-mentioned wholesalers as disruptive and states that, as regards Massa-Märkte, Kaufhof (Kassel) and Hertie (Frankfurt) at any rate, considerable efforts were needed before order could be restored.

C — AEG's statements as regards the existence of the conditions laid down for the application of Article 85 of the EEC Treaty and the Commission's replies

1. Unilateral nature of AEG's actions

AEG remarks first of all that even if the Commission had correctly presented the so-called "individual" cases — which it has not — the facts constituting the agreements, decisions or concerted practices referred to in Article 85 (1) of the Treaty would still not be present in this case.

What lies at the base of these individual cases is at the most nothing more than unilateral actions on the part of the applicant or its subsidiaries, which, being unilateral, cannot fall within Article 85 (1). The same reasoning applies to the price recommendations as unilateral acts.

If isolated acts are permissible under Article 85 (1) they cannot amount to proof of an improper application of the selective distribution agreement. In so far as the "individual cases" invented by the Commission involve no infringement of Article 85 (1) they are totally without significance for a legal appraisal of the selective distribution agreement.

In default of bilateral or multilateral agreement or of a decision or conduct which is the subject of a prior agreement, decision or concerted practice there can at most be an abuse of an exemption under Article 8 (3) of Regulation No 17, which may as such be prohibited but cannot be penalized by a fine.

In reply to that argument the Commission objects that it has never stated that the individual cases constitute infringements of Article 85 (1). It explains that its objection amounts in fact to stating that these various unilateral acts constitute factors which, taken as a whole, mean that the selective distribution system does not comply with Community law. The infringement of Article 85 is therefore constituted not by the individual cases but by the improper application of the selective distribution system as a whole.

If the applicant's idea that the conditions of Article 85 (1) are not met because or in so far as the acts were unilateral were to be accepted it would be necessary to conclude that a discriminatory admission policy in the context of a selective distribution system is compatible with Article 85 and that the principle established by the Court of Justice in the *Metro* judgment of 25 October 1977 of the selection of re-sellers on the basis of objective criteria of a qualitative nature and of the non-discriminatory application of the admission conditions has no legal value.

The Commission moreover feels it appropriate to observe that, at least in the matter of price fixing, the applicant's policy frequently found expression in agreements with traders or in concerted action capable of falling directly under Article 85.

2. The atypical nature of the conduct to which the complaints relate

Another argument advanced by AEG is to state that even on the supposition that AEG or one of its subsidiaries has infringed Article 85 (1) only an isolated case is in any event involved amounting to an error of decision-making. Such objective errors committed here and there are inevitable and do not call in question the correct application of the system. To impose fines for a small number of isolated infringements which are thus atypical would amount to demanding from the applicant an altogether excessive standard of care.

The Commission replies that the individual cases mentioned in the decision, far from being isolated errors of judgment which are practically inevitable in any system of selective distribution affecting a large number of distributors, are actually the result of the distribution policy operated by the applicant. The relatively small number of such cases does not justify any different conclusion since a manufacturer, by adopting *ad hoc* measures in respect of large-scale distributors who, in his view, are "disrupting the market", may very well cause a system which is permissible in itself to degenerate into an improper system harmful to competition. That is exactly what has happened in this case.

3. The fact that the conduct to which the objections relate cannot be ascribed to AEG

AEG takes the view that it is not permissible to ascribe some infringement or other which may have been committed to AEG-Telefunken, which has never played an independent part in the application of the TFR, ATF or ATBG selective distribution scheme. The selective distribution agreements are concluded between the applicant and the distributors only because Telefunken sells its products through the intermediary of the applicant's sales organization. The distribution policy for consumer electronics and its conduct are, in the AEG-Telefunken group, the responsibility of Telefunken alone.

The Commission rejects that argument, pointing out that the applicant and its subsidiaries constitute a single economic unit. The applicant, as the parent company, must accept responsibility for the conduct of its subsidiaries despite their separate legal personality. That conclusion applies all the more because TFR, for example, is a wholly-owned subsidiary of AEG-Telefunken.

4. Absence of obstacles to intra-Community trade

AEG contends that there is no basis for any criticism that it has created obstacles to intra-Community trade. The selective distribution system involves no obstacles to such trade and the Commission has not succeeded in proving that the traders allegedly discriminated against engaged in intra-Community trade or were in a position to do so. What is more, as regards the colour television sector any deleterious effect on intra-Community trade, in particular "parallel imports", may be largely excluded from the outset by reason of the use of different systems in the countries concerned (the Secam system in France and the PAL system in Germany) which constitutes a major obstacle to trade between those countries.

The Commission contests the applicant's argument, stating that it is not the selective distribution system which impedes intra-Community trade but the

improper application of it which was made in practice, by the elimination from the system of distributors who had already engaged in such trade or were entirely in a position to do so. As to technical difficulties, the Commission remarks that although they may make trade between Member States less easy, they by no means have the effect of making it impossible. Moreover no technical problem of any significance at all affects "five-point" programme products other than colour television sets.

D — The amount of the fine and interest

Finally, AEG contends that, even if in certain isolated instances it is possible to demonstrate wrongful conduct on the part of the applicant, the fine imposed is clearly grossly excessive, regard being had to the few trifling matters involved in the case.

It adds that the fine should not in any case bear interest since in Community law there is no legal basis for any such obligation to pay interest.

The Commission states in reply that the amount of the fine is not disproportionate, regard being had to the fact that, contrary to the applicant's view, it is not the penalty for a series of individual cases but for a systematic application in an important sector, contrary to competition rules, of a selective distribution system in several Member States of the Community. Nor is the amount of the fine excessive in relation to AEG-Telefunken's turnover, since it amounts to less than 0.5% of the annual intra-Community turnover of the company on goods subject to the selective distribution system.

Finally the Commission's view is that the application of interest to the amount of the fine is justified by the need to avoid injustice towards those undertakings which pay their fines when they fall due, as against those which obtain a stay of execution; in this way any incentive to have recourse unnecessarily to legal proceedings will be removed.

IV — Oral procedure

The parties presented oral argument at the sitting on 22 February 1983.

The Advocate General delivered his opinion at the sitting on 1 June 1983.

Decision

1 By application lodged at the Court Registry on 24 March 1982 Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG (hereinafter referred to as "AEG"), Frankfurt am Main, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 82/267/EEC of 6 January 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.748 — AEG-Telefunken) was void.

2 The applicant, a limited liability company incorporated under German law, is engaged, *inter alia,* in developing, manufacturing and marketing consumer electronic products (television sets, radios, tape-recorders, record-players and audio-visual equipment). Since 1970 those products have been manufactured and marketed by Telefunken Fernseh- und Rundfunk-GmbH (hereinafter referred to as "TFR"), a subsidiary of AEG, which since 1 June 1979 has been an independent division of AEG. The marketing of Telefunken products is carried out in Germany by AEG sales offices or branches and in the other Member States of the Community by AEG subsidiaries responsible in each of the countries for marketing activities, that is, as far as this case is concerned, AEG-Telefunken France (hereinafter referred to as "ATF") in France and AEG-Telefunken Belge (hereinafter referred to as "ATBG") in Belgium.

3 For the marketing in the common market of a number of Telefunken products coming under a so-called "five-point" programme, which covers the above-mentioned consumer electronic products, AEG notified the Commission on 6 November 1973 of a system of selective distribution for Telefunken brand products (Vertriebsbindung für Telefunken-Markenwaren) based on standard agreements (EG-Verpflichtungsscheine) concluded with qualified re-sellers at various stages of marketing. At the request of the Commission AEG subsequently made certain amendments to the system. By letter of 17 May 1976 the Director General for Competition informed AEG that he saw no objection to the use of the version of the standard selective distribution agreement notified on 16 March 1976 from the point of view of Article 85 (1) of the EEC Treaty.

4 As time passed the Commission, which had received numerous complaints with regard to AEG from traders in the consumer electronics sector, gained the impression that the actual application of the selective distribution system by AEG and its subsidiaries did not correspond to the scheme notified to it. Consequently on 26 and 27 June 1979 it carried out inspections on the premises of TFR, ATBG and ATF and, taking the view that the documents of which it took cognizance on that occasion were such as to confirm its suspicions, by decision of 29 May 1980 it initiated a procedure under Article 9 (3) of Regulation No 17 against AEG.

Following that procedure, on 6 January 1982 the Commission adopted the disputed decision in which it found that AEG had improperly applied its selective distribution system by discriminating against certain distributors and by influencing directly or indirectly dealers' resale prices and that that had been done with a view to excluding in principle certain forms of distribution and maintaining prices at a given level. The decision states that AEG has infringed Article 85 (1) of the EEC Treaty by the way in which it has applied its selective distribution agreement, requires it to terminate without delay the infringements found and imposes on it a fine of one million European currency units or DM 2 445 780.

6 In the submissions which it puts forward in support of its application the applicant claims that:

I. The procedure leading up to the adoption of the contested decision was irregular inasmuch as, in AEG's view:

A. the facts were insufficiently investigated;

B. documents were selected and used in accordance with arbitrary criteria;

C. the actual market conditions were misinterpreted;

D. the results of previous inquiries were not mentioned;

E. the rights of the defence were infringed;

II. The conditions laid down for the application of Article 85 (1) of the EEC Treaty were lacking by reason of factors such as:

A. the unilateral nature of the acts for which AEG and its subsidiaries are criticized;

B. the lawful nature of acts directed towards guaranteeing the maintenance of a minimum profit margin in the context of a selective distribution system;

C. the atypical nature of the conduct to which the objections relate;

D. the fact that the conduct to which the objections relate cannot be ascribed to AEG;

E. the absence of obstacles to intra-Community trade;

III. The objections on which the contested decision is based are unfounded since in particular;

There was no distribution policy contrary to the system and there were no individual cases in which that policy was applied;

There was no policy of influencing selling prices in a way incompatible with the selective distribution system and there were no individual cases in which that policy was applied.

7 A dispute has also arisen between the parties as to the default interest which, in the Commission's view, AEG should pay if, in the final outcome of the proceedings, it remains subject to pay a fine. The Commission had declared itself disposed to suspend the provisional enforcement of the decision on condition that the applicant undertook to pay such interest in the event of the Court's judgment being unfavourable to it and AEG agreed subject to the reservation that the Court should declare that such interest was in fact payable.

8 By order of 6 May 1982 made on an application lodged by AEG at the same time as the main action was brought, the President of the Court suspended execution subject to the maintenance of the security furnished on 17 March 1982 in favour of the Commission. The order moreover emphasized that AEG's reservation was lawful and must be accepted and that the question whether or not interest was due did indeed fall within the jurisdiction of the Court seised of the main proceedings.

I — The submissions challenging the regularity of the proceedings which led to the adoption of the disputed decision

A — Insufficient investigation of the facts

9 AEG claims that the Commission ignored all the factors capable of explaining the specific details of the application of the selective distribution system at the European Community level and that it restricted itself to impounding some 500 documents and to using at the most passages drawn from some 40 of such documents.

10 In that connection it must be observed, as the Commission rightly claims, that the Commission is by no means required to impound or copy for the purposes of an inquiry all the documents relating to a selective distribution system. In fact only those documents relating to the improper application of the system need be considered.

B — Selection and use of documents according to arbitrary criteria

11 According to AEG those of the documents taken by the Commission during the inspections on 26 and 27 June 1979 which might have served to exculpate it were not considered. Equally the Commission discarded certain conclusions which it arrived at during its inquiry and which were favourable to AEG, and used other evidence according to entirely arbitrary criteria.

12 In support of this submission AEG advances the following allegations:

(i) To support its objection with regard to price concertation, in point (28) of the decision, the Commission relied on information supplied, in response to a mere request for information, by Mr Iffli without taking into account the fact that he was habitually opposed to any system of selective distribution.

(ii) In the case of the Ratio store the Commission ignored the fact that the managers of Ratio themselves acknowledged that their shop in Kassel did not satisfy the specialist trade conditions.

(iii) The trader Verbinnen never stated that he had been subjected to pressure by ATBG.

(iv) Requests for information about an improper use of the system by ATBG, addressed to Belgian traders, received negative answers. However, neither the questions nor the answers were mentioned in the decision.

(v) The Commission took into consideration only a single one of the many documents produced by AEG — which it moreover used arbitrarily — but none of the evidence which AEG had presented or offered during the procedure.

13 In this connection it should be stressed that the cases in respect of which no objection has been raised do not necessarily prove the correct application of the system in as much as an improper application would have required the intervention of AEG only in comparatively rare cases where AEG felt that there was a risk of parallel imports or of very keen price competition. In these circumstances the Commission was not therefore required to take into consideration the cases in which no infringement was under discussion.

14 On the other hand AEG's allegations must be examined in detail as regards the cases of Iffli, Ratio and Verbinnen, inasmuch as they amount to a claim that the Commission found that an infringement had occurred after it had arbitrarily brushed aside factors which would necessarily have led it to another conclusion.

15 These allegations, viewed in that light, are tantamount to a statement that, when it came to establishing whether certain cases constituted an improper application of the selective distribution system, the Commission misinterpreted the evidence relating to those cases. It is therefore in reality a question of the appraisal of the substance of the individual cases — which will be dealt with separately when matters of substance are considered — and not of the regularity of the procedure followed by the Commission.

C — Incorrect interpretation of actual market conditions

16 AEG claims that the Commission did not take account of the market situation as regards consumer electronic products as a whole and ignored factors such as the fierce competition in the sector, which meant that a distribution policy aimed at limiting the number of approved distributors and maintaining high selling prices would have been unreasonable.

17 As regards this submission, it should be stated at the outset that to establish the existence of a situation which ought to have made it inadvisable for an undertaking to engage in certain conduct cannot by itself prove that such conduct did not take place, since it may well be conceived that the under-

taking in question may have relied upon an incorrect appreciation of the actual market situation or, whilst being well aware of the situation, have taken too optimistic a view of the advantages resulting from a price maintenance policy, thinking that they would outweigh the disadvantages involved in the loss of competitive positions.

18 Thus, as the Commission has pertinently observed, the view may be taken that AEG was not taking excessive risks, even in a situation of very keen competition, by adopting a high price policy, since distributors were in any event anxious to supplement their range by Telefunken brand products and were generally willing to accept a high trade margin.

D — The failure to mention the results of previous inquiries

19 AEG states that the Commission, having received, after the introduction of the selective distribution system in 1973, numerous complaints calling in question the conduct of AEG and its subsidiaries, had initiated proceedings which it had subsequently abandoned. That indicates, it is claimed, that the Commission had not, in the course of its inquiries, established an improper application of the selective distribution system. The failure to mention those precedents, which were incompatible with the disputed decision, proves, it is alleged, that the Commission embarked on the present case with its mind made up.

20 The Commission correctly denies that the fact that the complaints in question were not pursued may be interpreted as a favourable judgment on the application by AEG of the selective distribution system. It should be stated that, even if the Commission takes the view that an isolated case does not represent a correct application of the selective distribution system, it is not required to pursue a large-scale inquiry such as that provided for by Article 9 of Regulation No 17 in the absence of grounds for suspecting that that case indicates a policy on the part of the undertaking. It is therefore natural that the Commission should have decided to initiate a procedure within the meaning of Regulation No 17 only after numerous complaints and reports had convinced it that the selective distribution system was in fact being improperly applied.

E — Infringement of the rights of the defence

21 AEG claims that the rights of the defence were infringed inasmuch as the Commission:

(a) did not provide it with the complete text of a letter of 12 August 1980 from Mr Iffli referring to alleged improper conduct on the part of the applicant, which was therefore prevented from making its views on the matter known;

(b) used in the contested decision documents which had not been mentioned in the statement of objections of 2 June 1980, even though they were already in the Commission's possession at that time;

(c) adopted a decision based, *inter alia*, on individual cases not mentioned in the statement of objections (Mammouth, Verbinnen).

22 As regards the letter from Mr Iffli, AEG contends that the fact that it was able to consult it in its entirety only after the decision was adopted shows that obviously the applicant had no opportunity to use it in replying to the statement of objections.

23 The Commission claims that Mr Iffli's letter could not at first be communicated to the applicant in its entirety for reasons of confidentiality and the protection of trade secrecy.

24 In this respect it must be observed that such considerations ought to have caused the Commission to abstain from using that document as evidence. AEG is justified in taking the view that it could not allow to be used against it a document part of which had not been communicated to it and that it was not for the defendant to judge whether a document or a part thereof was or was not of use for the defence of the undertaking concerned.

25 It follows that Mr Iffli's letter of 12 August 1980 cannot be regarded as admissible evidence for the purposes of this case.

26 As regards the documents mentioned only in the decision (letter of 29 June 1976 from TFR's Münster sales office; ATF memorandum of 7 July 1977; ATF memorandum of 20 October 1978), the Commission contends that these were documents with which the applicant was already familiar as they came from its own offices and that they were used only to confirm objections already raised.

27 In this connection it must be observed that the important point is not the documents as such but the conclusions which the Commission has drawn from them. Since these documents were not mentioned in the statement of objections AEG was entitled to take the view that they were of no importance for the purposes of the case. By not informing the applicant that these documents would be used in the decision, the Commission prevented AEG from putting forward at the appropriate time its view of the probative value of such documents. It follows that these documents cannot be regarded as admissible evidence for the purposes of this case.

28 For the same reasons the Mammouth case cannot be considered as it was not mentioned in the statement of objections.

29 As regards the Verbinnen case, on the other hand, it must be observed that, whilst it was not mentioned in the statement of objections, it was communicated to AEG in sufficient time to allow it to prepare its observations before the contested decision was adopted.

30 In conclusion it must be stated that AEG's submissions to the effect that the procedure which led up to the adoption of the contested decision was irregular have proved to be groundless except that relating to the infringement of the rights of the defence. However, that submission is not of general scope as it is restricted to alleging infringements with regard to certain individual cases and cannot therefore imply that the procedure as a whole was irregular. It thus follows that the exclusion of certain documents used by the Commission in infringement of the rights of the defence is of no significance except to the extent to which the Commission's objections can be proved only by reference to those documents.

II — The submissions disputing the existence of the conditions laid down for the application of Article 85 (1) of the EEC Treaty

A — The unilateral nature of the acts attributed to AEG and its subsidiaries

31 AEG contends that the acts complained of in the contested decision, namely the failure to admit certain traders and steps taken to exert an influence on prices, are unilateral acts and do not therefore, as such, fall within Article 85 (1), which relates only to agreements between undertakings, decisions by associations of undertakings and concerted practices.

32 In order properly to appreciate that argument it is appropriate to consider the legal significance of selective distribution systems.

33 It is common ground that agreements constituting a selective system necessarily affect competition in the common market. However, it has always been recognized in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 85 (1).

34 The limitations inherent in a selective distribution system are however acceptable only on condition that their aim is in fact an improvement in competition in the sense above mentioned. Otherwise they would have no justification inasmuch as their sole effect would be to reduce price competition.

35 So as to guarantee that selective distribution systems may be based on that aim alone and cannot be set up and used with a view to the attainment of objectives which are not in conformity with Community law, the Court

specified in its judgment of 25 October 1977 *(Metro* v *Commission,* [1977] ECR 1875) that such systems are permissible, provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

36 It follows that the operation of a selective distribution system based on criteria other than those mentioned above constitutes an infringement of Article 85 (1). The position is the same where a system which is in principle in conformity with Community law is applied in practice in a manner incompatible therewith.

37 Such a practice must be considered unlawful where the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refuses to approve distributors who satisfy the qualitative criteria of the system.

38 Such an attitude on the part of the manufacturer does not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempt from the prohibition contained in Article 85 (1) of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers. Indeed, in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires *inter alia* the exclusion from the network of all distributors who are qualified for admission but are not prepared to adhere to that policy.

39 The view must therefore be taken that even refusals of approval are acts performed in the context of the contractual relations with authorized distributors inasmuch as their purpose is to guarantee observance of the agreements in restraint of competition which form the basis of contracts between manufacturers and approved distributors. Refusals to approve distributors who satisfy the qualitative criteria mentioned above therefore supply proof of an unlawful application of the system if their number is sufficient to

preclude the possibility that they are isolated cases not forming part of systematic conduct.

B — The lawful nature of actions intended to guarantee the maintenance of a minimum profit margin with a selective distribution system

40 AEG claims that the conduct to which objection is made is designed to maintain a level of prices indispensable for the survival of the specialist trade and that, if selective distribution systems are justified by the need to guarantee the existence of that trade, whose costs are much higher than those of the non-specialist trade, such systems cannot be considered contrary to Community law in so far as they are structured or applied in such a way as to guarantee to approved dealers the enjoyment of a minimum margin. In that connection it mentions the fifth subparagraph of paragraph 21 of the aforementioned *Metro* judgment, according to which: "For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Article 85 (1), and, if it does fall thereunder, either wholly or in part, coming within the framework of Article 85 (3)".

41 However, it should be emphasized that, in the *Metro* case, there was no question of conduct designed to prevent the admission to the distribution network of traders who were not ready to charge certain prices. The applicant *Metro* was not objecting to the selection criteria chosen for the admission of traders to the company *SABA*'s selective distribution system, for which the Commission had given negative clearance under Article 2 of Regulation No 17, but was only claiming that the system led to a congealing of the price structure at the level of the retail trade and thus to the elimination of price competition.

42 A restriction of price competition must however be regarded as being inherent in any selective distribution system in view of the fact that prices charged by specialist traders necessarily remain within a much narrower span than that which might be envisaged in the case of competition between

specialist and non-specialist traders. That restriction is counterbalanced by competition as regards the quality of the services supplied to customers, which would not normally be possible in the absence of an appropriate profit margin making it possible to support the higher expenses connected with those services. The maintenance of a certain level of prices is therefore lawful, but only to the extent to which it is strictly justified by the requirements of a system within which competition must continue to perform the functions assigned to it by the Treaty. In fact the object of such a system is solely the improvement of competition in so far as it relates to factors other than prices and not the guarantee of a high profit margin for approved re-sellers.

43 AEG was therefore not justified in taking the view that the acceptance of an undertaking to charge prices making possible a sufficiently high profit margin constituted a lawful condition for admission to a selective distribution system. By the very fact that it was authorized not to admit to and not to keep in its distribution network traders who were not, or were no longer, in a position to provide services typical of the specialist trade, it had at its disposal all the means necessary to enable it to ensure the effective application of the system. In such circumstances the existence of a price undertaking constitutes a condition which is manifestly foreign to the requirements of a selective distribution system and thus also affects freedom of competition.

C — The non-systematic nature of the conduct to which the objections relate

44 By this submission AEG denies that it normally and intentionally made an improper use of its selective distribution system. If account is taken of the thousands of distributors who apply to be admitted to the system or who are already active within it, it is easy to understand, according to AEG, that vagaries are inevitable. Even on the supposition that they were intentional, a few infrequent cases of infringement cannot in any case call in question a correct application of the system.

45 Before those arguments are considered, it must first be stated that, as the Commission has pertinently observed, the small number of infringements with which AEG is charged in comparison with the whole of the cases in

which the system is applied does not by itself prove the non-systematic nature of the infringements. Indeed, the great majority of distributors are already habitually opposed to a low price policy and normally willingly accept any initiative designed to maintain a high profit margin, so that a producer who wishes to make an improper application of the system would be forced to refuse admission or to threaten reprisals only in the case of traders operating a very aggressive price policy.

46 It follows that the non-systematic nature of the infringements is not necessarily proved by their relatively restricted number and the possibility that there has been a systematic use of the conditions for admission in a manner incompatible with Community law can be ruled out only after it has been established that there was no general policy on the part of AEG or its subsidiaries designed to exclude re-sellers who were too aggressive or to influence prices.

D — The submission that the conduct to which the objections relate cannot be ascribed to AEG

47 AEG states that it is impossible for any infringements which may be established to be ascribed to it as it never played an independent part in the application of the selective distribution system as effected by TFR, ATF or ATBG. Indeed, it is impossible to ascribe a "general distribution policy" to AEG on the basis of documents in a file which were drawn up exclusively by its subsidiaries and in which it played no part. Still less can it be held responsible for individual infringements alleged by the Commission to have been committed by its subsidiaries.

48 The Commission replies that the system introduced by AEG was implemented in the various Member States concerned by its subsidiaries TFR, ATF and ATBG, which are controlled by the applicant, are made responsible by it for the application of the system and are required in this respect to carry out AEG's instructions. It observes that TFR, ATF and ATBG form part of the AEG-Telefunken group and that TFR, for example, is a wholly-owned subsidiary of AEG-Telefunken.

49 As the Court has already emphasized, particularly in its judgment of 14 July 1972 *International Chemical Industries*, Case 48/69 ([1972] ECR 619) "The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company . . . in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company."

50 As AEG has not disputed that it was in a position to exert a decisive influence on the distribution and pricing policy of its subsidiaries, consideration must still be given to the question whether it actually made use of this power. However, such a check appears superfluous in the case of TFR which, as a wholly-owned subsidiary of AEG, necessarily follows a policy laid down by the same bodies as, under its statutes, determine AEG's policy.

51 AEG's influence on ATF emerges indirectly from an internal memorandum of ATF dated 30 June 1978, where it is stated that a distributor with whom ATF was negotiating with a view to his acceptance was aware of "Telefunken's policy, which succeeds in keeping retail prices stable and thus in maintaining an appropriate profit margin for retailers". The word "Telefunken" shows that in fact ATF was referring to commercial policy perceived as being the result of an initiative on the part of AEG which alone was in a position to draw up a unitary policy to be followed by its various subsidiaries responsible for distributing Telefunken products.

52 As to ATBG, it may be seen from the documents relating to the case of the Belgian wholesaler Diederichs that ATBG constantly informed TFR about its negotiations with Diederichs (see ATBG's letters of 19 and 24 October 1977). Furthermore, it emerges from those documents that TFR made direct contact with Diederichs to consider the possibility of regularizing his activities, although they did not involve the German market (see TFR's memorandum of 29 September 1977), that it raised within its organization problems raised by Diederichs's application for admission (see TFR's telex message of 11 October 1977) and that it finally stated that: "At present there is no reason to pursue the discussions initiated with Mr Diederichs" (see

TFR memorandum of 28 October 1977). These matters show clearly that there was no question of ATBG's having any independent power of decision-making as against AEG and TFR.

53 It must therefore be concluded that the conduct of TFR, ATF and ATBG in restraint of competition are to be ascribed to AEG.

E — The absence of obstacles to intra-Community trade

54 By this submission AEG claims that the application of its selective distribution system is not in itself capable of affecting trade between Member States or thus of falling within Article 85 (1) of the Treaty. That remains true, it alleges, even if it were to be established that the system had been improperly applied.

55 The Commission acknowledges that the selective distribution system established by AEG does not in itself contain provisions forming an obstacle to trade between approved distributors in the different Member States and cannot therefore as such affect intra-Community trade. It claims however that it is precisely the improper application of the system alleged against AEG which has made it possible to eliminate large-scale traders from the distribution network, in a discriminatory manner, and which has thus prevented considerable trade which those dealers might have effected between Member States.

56 According to AEG the absence of perceptible obstacles, actual or potential, to trade between the Member States, may be seen first from the very modest share of the market belonging to TFR, ATF and ATBG, secondly from the fact that the traders concerned did not carry out trade between Member States or were not in a position to do so and thirdly from the fact that as regards colour television sets all intra-Community trade is to a large extent impeded by serious technical difficulties.

57 In this connection it must be observed that whereas the first two arguments relate to all the products comprised in the "five-point" programme, which covers products such as television sets, radios, tape-recorders, record-players and audio-visual material, the third refers only to colour television sets.

58 AEG's argument relating to the modest share of the market belonging to TFR, ATF and ATBG cannot be upheld in view of the fact that each of those companies had, in its own country during the years 1973 to 1980, at least 50% of the consumer electronics market. As the Court has already stated in its judgment of 1 February 1978 *(Miller,* Case 19/77, [1978] ECR 131), an undertaking possessing roughly 5% of the market concerned is "an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade".

59 As regards the second argument put forward by AEG, it must be pointed out that the risk of obstacles to potential trade cannot be ruled out on the basis of a mere allegation that the traders did not or were not in a position to carry on trade between Member States. In that connection it is important to stress that several of the undertakings mentioned in the decision (for example, Diederichs in Belgium and the Auchan, Darty, FNAC and Conforama shops in France) actually undertook or were prepared to undertake parallel imports. The Ratio chain of stores in the Federal Republic of Germany on several occasions effected re-imports of Telefunken products from Austria and would no doubt have done so from Member States of the EEC if the re-importation from those States had brought it the same advantages.

60 In any case it must be recalled that, according to the *Miller* judgment to which reference has already been made, the mere fact at a certain time traders applying for admission to a distribution network or who have already been admitted are not engaged in intra-Community trade cannot suffice to exclude the possibility that restrictions on their freedom of action may impede intra-Community trade, since the situation may change from one year to another in terms of alterations in the conditions or composition of the market both in the common market as a whole and in the individual national markets.

61 As regards colour television sets AEG has claimed that in any event the application of its distribution system could not have affected parallel imports into France, which were not practicable by reason of the difference between the standards used in Germany (PAL) and in France (Secam) and of the considerable cost of converting sets.

62 The Commission has contended that, whilst differences of a technical nature were liable to make trade between Member States more difficult, they nevertheless did not have the effect of making such trade impossible between the Federal Republic of Germany and France.

63 In reply to a question put by the Court, AEG stated, in a letter of 28 January 1983, that until September 1981 Secam television standards were compulsory in France and that "there was no practicable possibility therefore of overcoming the obstacles to trade resulting from different standards in France and the Federal Republic". Insurmountable difficulties also existed in relation to imports from the Federal Republic into Belgium, because sets intended for Belgium had to be equipped for the cable television system which is widespread there but on the other hand does not exist in the Federal Republic of Germany.

64 During the oral procedure the Commission pointed out that the fact that Verbinnen sold in Belgium colour television sets bought in Germany is a clear demonstration that there are no insurmountable technical problems in marketing such sets in Belgium. It may also be seen from the file that Diederichs too imported into Belgium television sets originating in the Federal Republic of Germany.

65 As regards imports of colour television sets into France, even though it may be admitted that they were limited because of the difference in broadcasting systems (Secam in France and PAL in Germany) it must nevertheless be observed that, as the Commission made clear at the hearing without being contradicted by the applicant, TFR also manufactured during the period under review sets which could operate with both systems, which are in special demand in the frontier regions of Germany and France. That fact is sufficient for the conclusion to be drawn that AEG's policy was capable of affecting also the export of colour television sets from the Federal Republic of Germany to France.

66 It follows from the foregoing considerations that the arguments intended to show that trade between Member States could not have been affected by the disputed conduct cannot be upheld.

III — The submissions to the effect that the Commission's objections raised against AEG are unfounded

67 The Commission complains that AEG, by an improper application of its selective distribution system for Telefunken brand products, refused to admit to its distribution network certain distributors who nevertheless satisfied the conditions for admission and that it fixed directly or indirectly the selling prices to be applied by approved distributors, thus infringing Article 85 (1) of the EEC Treaty.

68 According to the Commission, that discrimination and that fixing of selling prices were not isolated mistakes committed by overzealous members of the external staff but infringements deliberately and systematically committed. The existence of a policy designed to apply the selective distribution system in such a way as to attain objects not in conformity with Community law emerges clearly, it is alleged, from the documents of the TFR, ATF and ATBG sales directorates.

69 AEG denies both the existence of a general policy designed to make an improper application of the system and the infringements alleged by the Commission in the individual cases mentioned.

70 Although the contested decision relates exclusively to the practical application of the system, it is appropriate to consider first the nature and characteristics of the general distribution policy pursued by AEG.

71 The Commission's objection regarding the distribution policy is based on numerous documents impounded by the Commission's inspectors on the occasion of the inspections on the premises of TFR, ATF and ATBG. It is sufficiently clear from those documents, taken as a whole, that it was AEG's view that the maintenance of a high profit margin was absolutely essential for the survival of the specialist trade and that undertakings dispensing with a high profit margin must automatically be regarded as incapable of providing the very expensive services associated with the specialist trade.

72 That attitude cannot be regarded as being in keeping with a correct application of the selective distribution system, since the maintenance of a minimum profit margin for traders cannot in any case be, as such, one of the objects pursued by means of such a system.

73 The *Metro* judgment referred to above, on which AEG relies to justify its attitude, established in reality a causal link between the maintenance of a certain price level and the possibility of the survival of the specialist trade in conjunction with an improvement in competition and permits a restriction of price competition only to the extent to which such a restriction appears necessary to ensure competition at the level of the services provided by the specialist trade. However, if such services were provided also by the specialist departments of discount stores or other new forms of distribution which, thanks to their type of organization, would be in a position to provide them at a lesser price, the maintenance of a minimum profit margin would be deprived of any justification inasmuch as such a margin would no longer serve to guarantee competition affecting factors other than price.

74 Nor is the attitude which is revealed by the documents mentioned in the decision acceptable either in so far as, quite apart from the problem of the maintenance of a high level of prices, it presupposes that the new forms of distribution are not, by their very nature and type of organization, capable of satisfying the specialist trade conditions.

75 Such a generalized appraisal cannot be accepted, since there is nothing to prevent a discount store from organizing its consumer electronics department in such a way as to satisfy the qualitative specialist trade conditions. A manufacturer who has introduced a selective distribution system cannot therefore absolve himself, on the basis of an *a priori* evaluation of the characteristics of the various forms of distribution, from the duty of checking in each case whether a candidate for admission satisfies the specialist trade conditions. Moreover it may be seen from the file that AEG was compelled to acknowledge that there was a tendency to create specialist departments even in the discount stores and even to admit that in certain cases the selective distribution conditions were satisfied.

76 It must therefore be concluded that the documents mentioned by the Commission do in fact demonstrate the existence of a distribution policy motivated both by a desire to guarantee a high profit margin for approved resellers and to impede, so far as at all possible, the admission of new forms of trade, which are regarded *a priori* as being incapable of satisfying the specialist trade conditions. That policy therefore exhibits characteristics which cannot be reconciled with a correct application of the selective distribution system.

77 The improper application of the system by AEG is moreover confirmed by a number of individual cases mentioned by the Commission.

78 The individual cases in which AEG has arbitrarily applied its selective distribution system have been subdivided by the Commission into three categories according to the type of conduct which it alleges gave rise to the infringement:

AEG made admission subject to a price undertaking and excluded automatically all those who were not prepared to give that undertaking.

AEG applied the system on the basis of a territorial criterion and not of a check on the required conditions.

AEG attempted to require its distributors, directly or indirectly, to maintain certain prices.

A — The cases of improper refusal of admission

1. In the Federal Republic of Germany

(a) Ratio store

79 In point (16) of the decision of 6 January 1982 the Commission stated that: "The refusal to accept Ratio was not due to the alleged absence of a specialist department, but to the fact that Ratio was a discount store". AEG claims that the refusal to admit Ratio was due solely to the fact that that undertaking, particularly its shop in Kassel, at no time satisfied the specialist trade conditions.

80 It may be seen from the correspondence between TFR and Ratio that the refusal to supply Ratio with Telefunken products included in the "five-point" programme was never explained by reference to the failure to comply with precise conditions of the selective distribution scheme. The letter of refusal of 29 June 1976 contains only a very vague reference to the effect that TFR had taken its decision "after weighing up all the questions involved" in the context of Article 85 (1). That explanation in no way clarifies in what respect Ratio failed to fulfil the specialist trade conditions.

81 A letter of 22 December 1976 from Ratio, in which it disputed certain oral observations made by TFR employees on the occasion of a visit to the Ratio store in Kassel on 20 May 1976 received no reply from TFR which, moreover, never explained whether or to what extent those oral observations had been taken into account as a basis for the refusal.

82 It must therefore be stated that TFR not only never gave any reasons for its refusal to supply, unless an altogether general and indeterminate reference to the competition rules of the Treaty may be regarded as a statement of reasons, but did not enter either into any discussion of the remarks recalled and disputed by Ratio which might have been regarded by TFR as reasons justifying a refusal to supply.

83 In these circumstances it is impossible to maintain that the Ratio case does not constitute an example of improper application of the selective distribution system.The fact that Ratio abstained from bringing an action to obtain supplies of Telefunken products cannot be interpreted as meaning that Ratio acknowledged that TFR's refusal was well founded. In fact the bringing of an action may well not have been in Ratio's interests because either of the fairly heavy costs which would have been incurred or of the fact that under German law a right to receive supplies can be established only if the undertaking in question proves that it is not in a position to obtain supplies of the product concerned from other manufacturers.

(b) Harder

84 In point (17) of the decision the Commission states that the wholesaler Harder, who had been banned from the distribution network, was required as a condition of re-acceptance to undertake not to supply discount stores or similar undertakings with AEG products and not to export those products to other Community countries.

85 AEG claims that those conditions are mentioned only in a letter of 15 December 1976 from the Freiburg sales office and are merely the result of an initiative taken by the employee in charge of that office; they show, furthermore, that it was for TFR head office to take a decision on Harder's re-admission. It may be seen, it is claimed, from two letters from TFR's lawyers of 29 August and 7 September 1977 that the suspension of supplies to Harder, decided upon by TFR by reason of numerous infringements of the agreement committed by him, could be terminated only when Harder had helped to explain the infringements as provided by the standard selective distribution agreement. Supplies were not resumed because Harder never complied with those conditions. In those circumstances there is no reason for taking into account the proposal from the Freiburg sales office, which TFR never followed up.

86 It must be agreed that in the light of the documents in the file the failure to re-admit Harder appears to have been due solely to Harder's not having complied with the obligations laid down by the standard agreement so as to expunge the consequences of an infringement thereof and that in the absence of any expression of opinion on the part of the competent officers of TFR there is no evidence justifying the supposition that if Harder had satisfied the above-mentioned conditions additional undertakings would have been required of him over and above the obligations resulting from the selective distribution system. The case of Harder cannot therefore be regarded as adequately proved.

2. In France

(a) Auchan

87 According to the Commission (point (23) of the decision), ATF, AEG's subsidiary for France, was by no means disposed to admit Auchan to its distri-

bution network. Auchan's admission, it is alleged, took place only after Auchan had undertaken to adhere to the prices recommended by ATF and to terminate all press advertisements for Telefunken products.

88 AEG claims that it could not have admitted Auchan before it had undertaken not to infringe competition rules.

89 AEG's assertion is by no means supported by the documents in the file, which, like the ATF memorandum of 21 March 1978, show only that Auchan was "one of the keenest discounters" charging extremely low prices but provide no evidence which would justify a statement that such prices were contrary to national legislation on competition.

90 On the other hand it appears from an ATF memorandum of 20 October 1978 that an agreement between ATF and Auchan was possible on the following conditions, namely that Auchan "would be willing, in exchange for our deliveries, which it claims are urgent as it is no longer prepared to work with Grundig, to withdraw all press advertisements featuring our television sets and to adhere to our recommended prices on condition that in the town where the products are sold no shop of any kind charges lower prices, in which case it would have to bring its own into line". Auchan was admitted to the AEG distribution system on 3 November 1978.

91 It may be seen from the foregoing that, to obtain supplies of Telefunken contract goods, Auchan was prepared to impose its own limitations on its freedom to engage in price competition by refraining from charging prices below the lowest prices charged by traders in the town where the products were sold. Such an undertaking is clearly not in conformity with the conditions of the standard agreement.

(b) Iffli

92 In an ATF memorandum of 30 June 1978, referred to in point (26) of the decision, it is actually stated that: "Mr Iffli undertakes to adhere to our prices and gives an assurance that his purpose in choosing Telefunken is not to smash the brand".

93 AEG's explanations, according to which the expression "our prices" refers to ATF selling prices to Iffli and the undertaking "not to smash the brand" amounts to an undertaking not to sell at prices contrary to competition rules, do not ring true. In fact the expression "our prices" used by ATF could not be immediately understood if it referred to anything other than retail selling prices and the expression "smash the brand" would generally imply nothing other than a sale at prices which a manufacturer might regard as prejudicial to the well-established reputation of his products. That point of view, which is asserted by the Commission, moreover finds additional support in the same memorandum of 30 June, in which it is stated that Iffli had asked ATF for its conditions for purchase and that ATF had explained to him its price policy, in particular the criteria to be adopted in order to calculate "the retail selling price including all taxes with a 25% margin".

94 ATF's concern to avoid price competition may be seen moreover from another passage in the same memorandum in which it is stated that: "We thought it would be better to arrange a fixed price policy agreement for Metz between Le Roi de la Télé, Iffli and Darty than to leave Iffli on the sidelines. The latter would in any case manage to obtain Telefunken equipment and we should then no longer be able to ensure compliance with our price policy".

3. In Belgium

(a) Diederichs

95 AEG asserts that the refusal to admit the wholesaler Diederichs (points (36) to (39) of the disputed decision) was based on considerations relating to Diederichs's inability to satisfy the specialist trade conditions.

96 That argument cannot be upheld. In actual fast it is impossible to find in the correspondence between ATBG and Diederichs or in the TFR or ATBG internal documents any mention of the conditions which Diederichs is supposed not to have met, except for a reference to the fact that Diederichs had acted contrary to competition rules in importing Telefunken contract

goods from Germany and that, to be admitted as an approved distributor, he would have to undertake to abstain from such conduct in future. However, effecting parallel imports cannot be regarded as an infringement of the rules of competition, whereas an undertaking no longer to effect such imports is manifestly an infringement of Community law since it would allow a manufacturer to wall off national markets and thus to circumvent the principle of the free movement of goods.

97 It must thus be concluded that the only reasons for the refusal to admit Diederichs were reasons relating to the maintenance of a specific distribution structure over the various national markets, as emerges moreover very clearly from the statement in a TFR memorandum of 28 October 1977 that AEG-Brussels was "opposed to the inclusion of Diederichs in the interests of distribution policy".

B — The cases of territorial protection

98 Point (29) of the decision states that ATF allocated to the distributors whom it had recruited a specified sales territory in which it promised them a total absence of competitors in the distribution of Telefunken products. ATF is said to have refused all applications for admission from other dealers within that area.

99 AEG claims that a correct application of the selective distribution system required from ATF only a negative obligation consisting in not refusing to accept into the system applicants who satisfied the specialist trade conditions, but not a positive obligation consisting in canvassing all distributors who satisfied those conditions so as to persuade them to join the AEG-Telefunken selective distribution system. In these circumstances, it claims, it is impossible to speak of an improper application of the system unless it can be shown that applicants satisfying the conditions for admission were rejected for reasons of territorial protection.

100 The question whether any territorial protection existed must be considered both from the point of view of a guarantee against the initiatives of approved re-sellers from other areas and from that of a guarantee against the admission of fresh dealers in a given area.

1. The case of Le Roi de la Télé

101 It may be seen from a letter of 9 November 1972 from ATF that ATF felt it could not comply with a request for supplies from Mr Iffli because of its commitments with regard to distribution in the Metz area with Le Roi de la Télévision. An ATF internal memorandum of 30 June 1978 states: "We are aware of the problem which this application raises as regards Metz in view of the exclusive rights which Le Roi de la Télé has had up to now. But a decision will have to be taken." That indicates that territorial protection had been granted to Le Roi de la Télé even before the introduction of the selective distribution system until 1978 and was abandoned only when ATF, confronted with a fresh application from Iffli, took the view that both financial and legal considerations militated strongly against the rejection of the application.

2. Lama

102 Point (34) of the decision mentions in a letter of 23 October 1978 in which ATF wrote to the wholesaler Lama in Paris that: "In the case of wholesalers it is normal that we should grant them *de facto* exclusive rights over a given territory, although that is becoming illegal in the light of the Scrivener circular".

103 AEG claims that that letter does not prove specific conduct on the part of ATF designed to refuse admission of a trader to its distribution network so as to grant territorial protection to an approved re-seller and that the sentence quoted by the Commission was used simply to stress, with some exaggerations normal in trade reports, ATF's readiness to oblige a trade associate.

104 It must however be observed that a grant of *de facto* exclusive rights cannot be put into effect except by excluding other distributors active in the same area as the approved re-seller. By acknowledging that the grant of *de facto* exclusive rights was in keeping with its normal practice and by confirming its undertaking to maintain that practice with regard to Lama, ATF therefore itself provided evidence of improper conduct.

3. Radio du Centre

105 In a letter of 2 March 1978 ATF wrote to Radio du Centre that its commercial objectives in the colour television and radio-electro-acoustics sector for 1978 "oblige us to reconsider our 1977 agreements as far as the allocation of your area of activity for our brand is concerned". If ATF was obliged, in order to arrange a joint operation by Radio du Centre and SNER in the Department of Puy-de-Dôme, to amend the agreements entered into with Radio du Centre, it is impossible to avoid the conclusion that those agreements guaranteed Radio du Centre territorial protection which prevented ATF from accepting in the same area applications for admission from other traders.

4. Schadroff

106 The wholesaler Schadroff, Bourg St Andéol, complained that a wholesaler from Marseille had made offers in its sales area and ATF wrote to Schadroff on 13 April 1979 to the effect that one of its employees had "asked the Marseille wholesaler to stop making such offers in your sales area" and reminded Schadroff that he enjoyed "*de facto* exclusive rights . . . which we have always defended, as we have proved on numerous occasions". That letter shows that ATF took active steps to prevent other approved traders from invading the exclusive sales area granted to Schadroff.

C — The cases of influence brought to bear on prices

1. Direct influence

(a) In the Federal Republic of Germany

(i) Suma

107 The memorandum from the AEG sales office in Munich dated 20 April 1977 in which it is stated that Suma had promised "not to act as a price leader but, at most, to take the lowest price on the market and, if possible, to adopt a position somewhere between average shop prices and the lowest prices" leaves no doubt that Suma was induced to restrict its freedom of competition in the matter of selling prices.

(ii) Holder

108 A TFR memorandum of 30 November 1976, mentioned in point (41) of the decision, states that TFR had "explained in detail to Holder the distribution and price-fixing policy".

109 AEG has claimed in that connection that that case concerned a conversation relating to the introduction of a quite new item of TFR equipment, the TRX 2000, which however was very dear. The need for it to be very carefully launched made it necessary to explain in detail to re-sellers the method of distribution of the equipment and the prices which could best ensure its commercial success.

110 Even on the supposition that, as is probable, TFR did not restrict itself to giving Holder information as to the price which, regard being had to the market situation, was best adapted to the launch of the new equipment, but actually intended to fix a selling price for it, nevertheless, in contrast to the Suma case in which the price undertaking covered the whole range of Telefunken contract goods, the infringement of the competition rules would concern here only a single model within a single category of contract goods and in respect of one small retailer, which would mean that this shortcoming was deprived of most of its significance.

(b) In France

(i) Darty

111 An ATF letter of 26 May 1978, mentioned in point (42) of the decision, refers to an "undertaking given by the Darty company to increase its retail prices".

112 The fact that the undertaking given by Darty consisted in bringing to an end a promotional campaign in the Paris region and in reverting to its original prices in no way means that the steps taken by ATF to achieve that result did not amount to unlawful influence brought to bear on prices. AEG's statement that the word "undertaking" was used in error, whereas what was

involved was a unilateral decision on Darty's part, lacks plausibility, the more so as a visit to Darty of one of ATF's managers concerned, as a memorandum of 5 June 1978 expressly shows, "prices charged for colour television sets in Paris".

(ii) The Paris distributors

113 The aforementioned memorandum also refers, as regards the Paris region, to the fact that on 2 June 1978 "everybody" seemed willing to increase prices and that only FNAC had not already done so, for which reason ATF's Mr Hondré was to make contact with FNAC.

114 AEG denies that the expression "everybody" can relate to "the retailers in Paris supplied by ATF" as is stated in point (43) of the decision, but the third heading in the memorandum ("Prices charged in Paris"), together with the word "everybody", is in conflict with the view that that memorandum concerned only Darty and FNAC.

115 In those circumstances the existence of an agreement on prices between AEG and the retailers in the Paris region may be regarded as proved.

(iii) Camif

116 Point (44) of the decision bases the Camif case on the following passage from an ATF memorandum of 5 June 1978: "In view of the fact that certain retailers, including Darty, regard Camif as a normal customer and thus as a competitor and are therefore inclined to align themselves on Camif price catalogues, we took steps on 2 inst. to ask Mr Dechambre to increase the retail prices of goods in his 1978 winter catalogue". In view of this *verbatim* quotation AEG's mere assertion that ATF invited Camif to increase its prices so as to take account of an increase in AEG's selling prices which was to take place in September 1978 seems very unconvincing.

(iv) Cart

117 In a letter of 4 November 1977, mentioned in point (46) of the decision, ATF reminds Cart of the price agreement between the two undertakings and emphasizes that Cart's failure to comply with those commitments can only "cast a shadow over our commercial relations". It adds that: "The reaction of certain of our representatives has inevitably come to our notice, since they feel that Cart, instead of encouraging the keeping up of prices, is selling off dirt cheap". ATF finally asks Cart if it would be possible to stop the distribution of the Cart catalogue containing the disputed prices or if necessary to withdraw it.

118 The request to keep prices up, which was the purpose of the letter of 4 November 1977 can in no way be justified by reference to the need to take account of an increase in selling prices to the wholesale trade which took place only in September 1978. Furthermore the letter of 21 July 1978, informing Cart of that increase, is not restricted simply to indicating the retail selling prices which might be charged to take account thereof, but adds: "As agreed between us, we ask you to take account in the publication of your catalogue of the retail selling prices set out above and to regard them as minimum prices".

(v) FNAC, Darty and Grands Magasins

119 An ATF memorandum of 13 October 1978 (point (45) of the decision), entitled "retail prices as from 18. 9. 1978", contains the following passage: "We are arranging with our customers Siège," that is to say Darty, "FNAC and Grands Magasins for all these prices to be applied on 2 November 1978". Even if, as AEG asserts, that passage relates only to the passing on in the retail prices of the increase in the wholesale prices, the fact remains that ATF exerted pressure on certain of its distributors to pass the increase on as soon as possible and even concluded an agreement with them to that effect.

(vi) Capoferm

120 It may be seen from an ATF internal memorandum of 3 April 1979 that the retail groups Capoferm/Darty had given an undertaking to ATF that a special premium which had been granted to them to pay for old television sets handed in as a means of promoting the sale of new sets would not be used to reduce retail prices.

121 In view of the fact that that premium was already deducted from the price invoiced by ATF, the distributor was in practice undertaking to preserve the same profit margin both in the event of the handing in of an old set and thus of the payment of the premium to the customer and in the event of the set's being sold without the production of an old one. That undertaking to retain a minimum price even where, in the absence of the handing in of an old set, the premium may be regarded as a mere advantage granted to the distributor, amounts to a price agreement which is incompatible with Community competition law.

(c) In Belgium

(i) Verbinnen

122 Point (39) of the contested decision refers to the fact that, according to information provided by the Belgian retailer Verbinnen, ATBG had requested him in January or February to increase the price of a Telefunken television set so as to bring it up to the retail price level in that part of Belgium.

123 The information supplied by Verbinnen to the Commission in two letters of 3 and 27 November 1980 does not show that ATBG exerted pressure to require him to keep to certain retail selling prices. Nor does it emerge from the letter of 27 November that ATBG attempted to force Verbinnen to charge the prices fixed by Telefunken. Verbinnen himself uses in his letter the Dutch word "voorstellen", which means "suggestions" and it would no doubt be going too far to take the view that a reference in an informal conversation to a price which ATBG regarded as chargeable for a given type of equipment is in itself tantamount to bringing an unlawful influence to bear on prices.

2. Indirect influence

(a) Suma

124 Point (49) of the decision states, with reference to a TFR memorandum of 20 April 1977 that a good conduct bonus of 2% on turnover had been promised to Suma as a reward for the restraint it had shown in the field of price competition.

125 AEG has provided various explanations regarding the nature of that bonus: at the hearing on 19 August 1980 it stated that it was a recompense for making available advertising space in shop windows and shops; subsequently it claimed that it was in fact only an extra rebate in view of Suma's importance as a customer.

126 Mr Waltenberger, Suma's manager, for his part stated on 2 September 1980 to an officer of the Commission that: "The good conduct bonus of 2% offered by AEG in talks with Suma on 20 April 1977" (cf. AEG memorandum of that date) "was to be granted on the ground that AEG was in principle to be informed of the article to which the publicity campaign related before press advertisements appeared. In addition AEG-Telefunken secured agreement that particularly aggressive prices offered by competitors would be communicated to Telefunken and would not be immediately adopted by Suma unless it was clear that they were campaigns by competitors of unlimited duration".

127 A letter of 15 October sent to the Commission by AEG's lawyers, which Mr Waltenberger by a telex message of 29 October 1980 declared to be fully in accordance with the facts, denies that any influence was brought to bear on prices but expressly concedes that the "bonus" was officially presented as a reward for information with which Suma supplied Telefunken on market trends.

128 Even if, interpreting all the statements mentioned above in the way most favourable to AEG, the Court were to take the view that the 2% bonus

related simply to an undertaking on the part of Suma to inform TFR of the prices charged by Suma itself and the other distributors, there is no doubt that such an undertaking was such as to allow TFR to keep a check on the prices charged by Suma, which had expressly agreed, as is clear from the memorandum of 20 April 1977 from the AEG sales office in Munich, to adopt a moderate attitude with regard to competition and to facilitate TFR's intervention if other approved distributors operated too aggressive a price policy. Since the obligation linked with the bonus thus had the effect of facilitating TFR's control over prices, it must be concluded that the bonus amounted in fact to a means of exerting an indirect influence on prices.

3. Other individual cases of influence brought to bear on prices

(a) Wilhelm

129 In a letter of 22 July 1976 to the Saarbrücken sales office, TFR asked for information about Wilhelm's "very disturbing prices" and asked the reasons for "this fresh price-offensive". However, contrary to the Commission's view, an implied request to take steps against an undertaking charging reduced prices cannot be deduced from that letter, which may very well be interpreted as requesting the addressee to check whether Wilhelm's conduct was correct. In fact that was the sense in which the letter was understood by the Saarbrücken sales office, which replied on 22 July 1976 that Wilhelm's offers formed part of normal price competition.

(b) Schlembach

130 In a memorandum of 9 September 1977, mentioned in point (51) of the decision, the employee in charge of TFR's Cologne office reported that on 8 September 1977 he had held a "frank and at times heated discussion" with the retailer Schlembach concerning his newspaper advertising of Telefunken products and that he had made it clear that "a repetition of the advertisements would lead to a considerable worsening of relations". Since AEG has not succeeded in adducing any evidence in support of its allegation that the advertisements in question constituted an infringement of German

competition law, it must be stated that the threats of an interruption of trade relations were completely unjustified and were simply designed to exert an improper influence on the prices of the trader in question.

(c) Gruoner, Südschall and Massa

131 The cases of Gruoner, Südschall and Massa were wrongly mentioned in the decision since, as may be seen from a report of 31 October 1978 from the Mannheim sales office, those undertakings had marketed, at very low prices stigmatized by TFR as disruptive, Imperial model television sets which were not subject to the Telefunken selective distribution system. In such cases there can therefore be no question of an improper application of that system.

(d) Kaufhof (Kassel) and Hertie (Frankfurt)

132 In the report of 31 October 1978 previously referred to, it is stated that offers at very low prices made *inter alios* by Kaufhof (Kassel) and Hertie (Frankfurt) had disrupted the market and that "considerable efforts were needed before order could be restored".

133 AEG states that that expression refers to the efforts which it had to make to convince the other distributors, who were alarmed by those two retailers' very low prices, that the special offers made by Kaufhof and Hertie were not based on specially advantageous conditions of supply offered to them by TFR.

134 As the Commission has not attempted to clarify that point, the rather vague sentence in the document referred to above cannot be regarded as sufficient evidence to establish th existence of an infringement.

D — Conclusions regarding the individual cases

135 An examination of the individual cases referred to by the Commission makes it possible to reach the following conclusions:

(a) An improper application of the selective distribution system must be regarded as sufficiently proved in law in the following cases: Ratio, Auchan, Iffli, Diederichs (admission subject to improper conditions); Le Roi de la Télé, Lama, Radio du Centre, Schadroff (territorial protection); Suma, Darty, Camif, Cart, FNAC (direct influence brought to bear on prices); Darty, FNAC, dealers in Paris and Grands Magasins (price agreement); Suma (indirect influence brought to bear on prices); and Schlembach (attempt to influence prices).

(b) On the other hand the evidence adduced by the Commission is not sufficient to prove an infringement of the competition rules in the cases of Harder, Holder, Wilhelm, Gruoner, Südschall, Massa, Kaufhof (Kassel), Hertie (Frankfurt) and Verbinnen, whilst the Mammouth case cannot be considered because it was not mentioned in the statement of objections and was not communicated to AEG before the decision was adopted.

136 It is clear from the foregoing considerations that AEG's systematic conduct in the improper application of the selective distribution system must be regarded as having been sufficiently proved in law. The fact that the Commission has not succeeded in proving a number of individual cases does not call in question the systematic nature of AEG's improper conduct and does not affect the scope of the infringement as determined by the Commission in its decision of 6 January 1982.

137 The Court feels that it must emphasize the gravity of such an infringement, which consists in applying a selective distribution system, after its approval by the Commission, in a manner contrary to the undertakings entered into by the applicant, upon which the compatibility of the selective distribution system with Article 85 of the Treaty depended.

138 In these circumstances there are no grounds for fixing the fine at an amount other than that determined by the Commission. AEG's application for a declaration that the Commission's decision of 6 January 1982 is void must therefore be dismissed in its entirety.

IV — Interest

139 The question whether AEG is required to pay interest on the amount of the fine until the date of the actual payment remains to be considered.

140 During the proceedings AEG claimed that there was no legal basis in Community law for any requirement to pay default interest.

141 There can be no doubt that, particularly in a situation typified by very high interest rates, there may be a considerable advantage for an undertaking in delaying the payment of a fine as long as possible. If the view were to be taken that measures designed to offset that advantage were not permissible in Community law that would amount to encouraging manifestly unfounded actions with the sole object of delaying payment of the fine. It is impossible to imagine that such an effect was intended when the provisions of the Treaty concerning legal remedies against measures adopted by the institutions were drafted.

142 Moreover the same principle is expressed in Article 86 (2) of the Rules of Procedure of the Court according to which, if the Court adopts an order suspending the operation of a measure or any other interim order, "the enforcement of the order may be made conditional on the lodging by the applicant of security of an amount and nature to be fixed in the light of the circumstances".

143 On the basis of the foregoing considerations it is clear that AEG must pay the Commission default interest on the amount of the fine. As regards the amount to be paid in that connection, as AEG has not disputed either the rate of interest due to the Commission or the date from which the interest is payable, there is no need for the Court to arrive at a decision in that respect.

Costs

144 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. As the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders AEG-Telefunken AG to pay to the Commission of the European Communities default interest on the fine imposed;**

3. **Orders the applicant to pay the costs incurred by the Commission of the European Communities.**

Mertens de Wilmars Koopmans Bahlmann Galmot

Pescatore Mackenzie Stuart O'Keeffe Bosco Due

Delivered in open court in Luxembourg on 25 October 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

CONTENTS

Facts and Issues

Decision