divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community.

9. The finding of an infringement of Article 85(1) must be limited only to those parts of a contract which constitute the infringement as long as they are severable from the rest of the agreement.
10. Articles 36, 222 and 234 of the EEC Treaty do not exclude any influence whatever of Community law on the exercise of national industrial property rights.
    The Community rules on competition do not allow the improper use of rights under national trade-mark law in order to frustrate the Community's law on cartels.
11. When a sole distributorship contract is challenged before it, the Commission is not obliged automatically to require other concessionnaires who are not parties to that agreement to take part in the proceedings.
12. The Commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption from the prohibition in Article 85 (3) of the EEC Treaty, but must play its part, using the means available to it, in ascertaining the relevant facts and circumstances.
    Judicial review of complex economic evaluations by the Commission concerning exemption from the prohibition on cartels must take account of their nature by confining itself to an examination of the relevance of the facts and the legal consequences which the Commission deduces there from. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.
13. The improvement in the production and distribution of goods, which is required for the grant of exemption cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities, since the content of the concept of improvement is not required to depend upon the special features of the contractual relationships in question. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.
    In its evaluation of the relative importance of the various factors submitted for its consideration, the Commission must judge their effectiveness by reference to an objectively ascertainable improvement in the production and distribution of the goods and decide whether the resulting benefit suffices to support the conclusion that the consequent restrictions upon competition are indispensable.

In Joined Cases 56 and 58/64

56/64 — ÉTABLISSEMENTS CONSTEN SARL, having its registered office at Courbevoie (Seine), represented by J. Lassier, advocate at the Cour d'Appel, Paris, with an address for service in Luxembourg at the Chambers of J. Welter, avocat-avoué, 6 rue Willy-Goergen,

58/64 — GRUNDIG-VERKAUFS-GMBH, having its registered office at Fürth (Bavaria), represented by its Managing Director, Max Grundig, assisted by H. Hellmann and K. Pfeiffer, of the Cologne Bar, with an address for service in Luxembourg at the Chambers of A. Neyens, avocat-avoué, 9 rue des Glacis,

applicants,

supported by

THE GOVERNMENT OF THE ITALIAN REPUBLIC, represented by A. Maresca, Minister Plenipotentiary and Assistant Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by P. Peronaci, deputy Advocate-General of the State, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaide,

intervener in Cases 56/64 and 58/64,

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by U. Everling, Ministerialrat, and H. Peters, Regierungsrat, with an address for service in Luxembourg at the Chancery of the Embassy of the Federal Republic of Germany, 3 boulevard Royal,

intervener in Case 58/64,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by its Legal Advisers, G. Le Tallec (Case 56/64) and J. Thiesing (Case 58/64), acting as Agents, with an address for service in Luxembourg at the Secretariat of the Legal Department of the European Executives, 2 place de Metz,

defendant,

supported by

FIRMA WILLY LEISSNER, having its registered office in Strasbourg, represented by C. Lapp, of the Strasbourg Bar, with an address for service in Luxembourg at the Chambers of H. Glaesener, Notary, 20 rue Glesener,

UNEF, a limited liability company governed by French law having its registered office in Paris, represented by R. Collin, advocate of the Cour d'Appel, Paris, and by P. A. Franck, advocate of the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of E. Arendt, avocat-avoué, 6 rue Willy-Goergen,

interveners,

Application for annulment of the decision of the Commission of 23 September 1964 under Article 85 of the Treaty (IV/A-00004-03344 'Grundig-Consten');

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux and W. Strauß, Presidents of Chambers, A. M. Donner, A. Trabucchi (Rapporteur), R. Lecourt and R. Monaco, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts may be summarized as follows: By a contract concluded on 1 April 1957, the German company Grundig-Verkaufs-GmbH and the French company Établissements Consten agreed, for an indefinite period, that Consten be appointed 'sole representative' of Grundig for the metropolitan territory of France, the Saar and Corsica. This contract applied to radio receivers, recorders, dictaphones and television sets manufactured by Grundig, as well as the spare parts necessary for their repair, and accessoires.
Consten undertook to buy the articles in question to the extent of a minimum percentage of the total exports from the Federal Republic of Germany to the contract territory, to place regular advance orders, to provide appropriate publicity, to set up a repairs workshop with a sufficient stock of spare parts and to carry out the guarantee and after-sales service.
Consten undertook, in addition, not to sell, either upon its own account or upon that of another, similar articles capable of competing with the goods which were the subject of the contract and not to make deliveries, either directly or indirectly, for or to other countries from the contract territory. A similar prohibition had already been imposed by Grundig on all its sole distributors in the other countries, as well as on the German wholesalers. Grundig undertook, for its part, to grant to Consten the retail sale rights and not to make deliveries, either directly or indirectly, to other persons in the area covered by the contract.
For the purposes of the distribution of Grundig products, Consten was authorized to use the name and emblem of Grundig which are registered in Germany and in other Member States. In addition, on 3 October 1957, Consten registered in France, in its own name, the trademark GINT (Grundig International) which is carried on all appliances manufactured by Grundig, including those sold on the German market. According to the declaration made by Consten on 13 January 1959 concerning the GINT trade-mark, 'this trade-mark is intended to be placed solely on appliances manufactured by the German company Grundig'. Furthermore, according to that declaration, Consten undertook to transfer to Grundig, as soon as it ceased to be the sole distributor, the registration of the abovementioned mark with all the rights attached to it, or to cancel its registration.
Since April 1961, the company UNEF has bought Grundig appliances from German traders who delivered them in spite of the export prohibition imposed by Grundig. UNEF resold these goods to French retailers at more favourable prices than those asked by Consten. Subsequently, Consten brought two actions against

UNEF, one for unfair competition and one for infringement of the GINT trade-mark. In the first of these proceedings, Consten was successful at first instance. However, following an appeal brought by UNEF, the Cour d'Appel, Paris, in a judgment of 26 January 1963 decided to stay the proceedings until the decision of the Commission had been given on the application which UNEF had made to it, on 5 March 1962, for a declaration that the Grundig and Consten companies had infringed the provisions of Article 85 of the EEC Treaty through the provisions of the sole distributorship contract of 1 April 1957 and the ancillary agreement concerning the registration and use of the GINT trade-mark in France.

Another action based on similar grounds was brought by Consten in 1961 in the Tribunal de Grande Instance, Strasbourg against the Leissner company for a declaration that the latter had performed acts of unfair competition by selling Grundig machines in France. That case is still proceeding.

On 29 January 1963, Grundig notified to the Commission the sole agency contracts concluded with Consten and with its concessionnaires in the other Member States. The Commission, provisionally leaving aside the latter contracts, gave its ruling on the contract concluded between Grundig and Consten by a decision of 23 September 1964 (Official Journal, 1964, p. 2545). Article 1 of the operative part of that decision states that the contract in question and the ancillary agreement on the registration and use of the GINT trade-mark constitute an infringement of the provisions of Article 85 of the EEC Treaty. Article 2 contains a refusal to grant the declaration of inapplicability provided for in Article 85(3). Finally, by Article 3, Grundig and Consten 'are required to refrain from any measure likely to obstruct or impede the acquisition by third parties, in the exercise of their free choice, from wholesalers or retailers established in the European economic Community, of the products set out in the contract, with a view to their resale in the contract territory'.

The Consten and Grundig companies, the addressees of the decision, each brought an action for its annulment on 8 December 1964 and 11 December 1964 respectively.

By an order of 6 May 1965 the Court admitted the Italian Government as an intervening party in support of the conclusions of the applicants in the two cases.

By orders of 10 June and 16 June 1965, the Court permitted the Leissner and UNEF companies to intervene in support of the defendant in the two cases.

By an order of 24 September 1965 the Court admitted the German Government as an intervening party in support of the conclusions of the applicant Grundig in Case 58/64.

II — Conclusions of the parties

The *applicant in Case 56/62*, whilst reserving its usual rights, claims that the Court should:

— annul the measure adopted by the Commission of the European Economic Community on 23 September 1964, concerning proceedings under Article 85 of the Treaty (Decision No IV — A/00004–03344 'Grundig–Consten');

— order the Commission of the European Economic Community to bear the costs of the present proceedings.

The *defendant* contends that the Court should:

— dismiss the application;

— order the applicant to bear the costs.

The *applicant in Case 58/62* claims that the Court should:

— annul the decision of the Commission of the European Economic Community of 23 September 1964, concerning proceedings under Article 85 of the Treaty (IV — A/00004–03344, 'Grundig–Consten');

— order the defendant to bear the costs.

The *defendant* contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to bear the costs.

Intervener No 1 (Government of the Italian Republic), in its requests to intervene in the two cases, presented on 27 March 1965, claims that the Court should:

— allow the applications of the applicants and annul the contested decision of teh

Commission of the European Economic Community;
- authorize, even in the main action, the use by the intervener of the Italian language for the drafting of its own statements as well as for its oral observations;
- order the Commission to bear the costs of the proceedings.

Intervener No 2 (the Leissner company), in its statement presented on 14 July 1965, contends that the Court should:
- dismiss the applications;
- order the applicants to pay the costs including those of the intervention.

Intervener No 3 (the UNEF company), in its statement presented on 28 August 1965, contends that the Court should:
- dismiss the applications made by the Consten and Grundig companies;
- order the applicants to pay the costs including those of the intervention.

Intervener No 4 (Government of the Federal Republic of Germany), in its statement presented on 29 October 1965, claims that the Court should:
- allow Application No 58/64 and annul the decision of the Commission of 23 September 1964;
- order the defendant to pay the costs of the application including those of the intervening party.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *The complaints concerning the form of the decision and the procedure followed for its adoption*

1. The complaint concerning the classification of the disputed measure

According to the *applicant Consten*, the disputed measure is vitiated on the ground of an infringement of an essential procedural requirement, the wording published in the Official Journal, including the phrase: 'the EEC Commission has adopted the present *directive*'. In fact, a directive cannot be addressed to individual undertakings. Further, the procedure laid down by the Treaty concerning directives was not followed in the present case and, lastly, the copy of the measure which was communicated to it, and which is drafted differently, does not make it possible to ascertain which of the two versions accords with the measure which the Commission resolved to take.

The *defendant* replies that the wording notified to the applicant includes the expression: 'the Commission has adopted the present *decision*'. The only text applicable to the addressee is that which was notified to it. The drafting of this wording was, furthermore, correct, since the word 'directive' which is found only once in the decision appearing in the Official Journal and only in the French text is due to a mistake made after the adoption of the wording by the Commission; furthermore, this error was repaired by a correction which appeared in the Official Journal of 18 January 1965.

2. The complaint based on the finding of an infringement in the operative part of the decision

The *Government of the Federal Republic of Germany* maintains that the inclusion of the finding of an infringement in the operative part of the decision is contrary to the system of Regulation No 17/62. In fact, according to Article 3 of this Regulation, the Commission may, before taking a decision under paragraph (1), address to the undertakings recommendations for the termination of their practices. Such an action would be useless if, previously, the Commission had expressly stated in a decision that the law concerning cartels had been infringed by these practices. Furthermore, since the nullity of the agreements fulfilling the conditions laid down in Article 85(1) is automatic, it is not possible to see what would be the legal importance to be attributed to the provision of the decision which is called in question. The statement concerning the infringement should have been made in the preamble and not in the operative part.

The *defendant* replies that, if it is true that the finding of an infringement has no legal

effect, it follows that this finding affects nobody adversely. Furthermore, this submission is also unfounded because the said finding must be considered not in isolation but as one of the parts of a general prohibition of the cartel. According to Article 3 of Regulation No 17/62, the duty to terminate an infringement can be ordered only for 'such infringement'. It is therefore quite proper for this finding to have been included in the operative part of the decision.

3. The complaint concerning the failure to communicate the entire content of the file

The *applicant Consten* complains of the infringement of the rights of the defence, arising particularly from the fact that the Commission did not communicate to it the entire content of the file. In particular, unknown persons were heard without the knowledge of the applicant, which was not in a position to make comments on their statements. Even when the applicant was allowed to make comments, as in particular in the case of the intervener UNEF, it was given insufficient time to speak on the matter in question.

The applicant argues in this respect that Article 19 of Regulation No 17/62 of the Council is inapplicable as well as the whole of Regulation No 99/63 of the Commission; to come to a decision upon documents or facts concerning which the undertakings which are the subject of proceedings have not been required expressly to furnish their comments and submissions. The protection of business secrets required by this Regulation does not in the least prevent the communication of necessary information, since such communication is not a disclosure.

The *two applicants* further complain that the Commission took into account two notes from German and French organizations without any prior communication of these documents having been made to them.

The *defendant* replies that under Article 19 (1) of Regulation No 17/62 and Articles 1 and 2 of Regulation No 99/63 it is only obliged to communicate the complaints which it accepts. In fact it communicated all the circumstances and facts which it felt were relevant for forming its opinion. On the other hand, it is not required to communicate all the documents in the file or to give Consten a timelimit to submit their observations equivalent to that granted to UNEF. Furthermore, the wording of the statement by UNEF was afterwards notified to the applicants, who were able to reply to it at leisure. Neither is the Commission obliged to identify and make known the complete text of statements made by other persons. In the present case the persons concerned were Grundig's sole distributors for the Benelux countries, whose explanations could not have been used as a basis for the complaints made against the applicants. As to the alleged inapplicability of certain provisions of Regulations Nos 17/62 and 99/63, the defendant emphasizes that the activities of the Commission in respect of the application of Articles 85 and 86 of the Treaty are of an administrative and not a judicial nature. In consequence, the arguments which the applicant has based upon the principles of court procedure are not applicable in the present case. The system of remedies against decisions adopted by the Commission within the framework of Articles 85 and 86 and the fact that the Commission may of its own motion initiate the procedure for applying these provisions constitute of the administrative character of this procedure. The accusatorial nature of the latter suffices to satisfy the general principle of legal certainty upon which the applicant Consten relies. As to the non-communication of the complete wording of the notes by which French and German authorities (French Ministry for Economic Affairs and the German Bundeskartellamt) provided the information requested by the Commission, the defendant considers that the rights of the defence are not infringed by this fact, since the statement of complaints recapitulates the facts forming the basis of the disputed decision and since it includes only the complaints concerning which the applicant Consten has had the opportunity of giving its explanations during the administrative procedure.

The *applicant Consten* replies that the judicial character of the procedure for applying Article 85 is derived, *inter alia*, from the fact that this procedure may lead to periodic

penalities of a penal and repressive nature; this may be deduced *a contrario* from Article 15(4) of Regulation No 17/62 which provides that the fines shall not be of a criminal law nature.

The said applicant asks that the whole of the Commission's file on the preliminary investigation should be made available in the proceedings.

The *defendant* replies that even if the procedure in question were to be classified as a procedure of a judicial type, respect for the rights of the defence was ensured by the disputed provisions of Regulations Nos 17/62 and 99/63 which the Commission has applied correctly as the applicant itself recognizes, since such a principle does not require the communication of the whole of the file but only of those parts of it which are material to the taking of the decision. But, in reality, the procedure for applying Article 85 has an administrative nature, as appears particularly from Article 16(2) of Regulation No 17/62 authorizing the Commission to fix the total amount of the periodic penalty payment at a lower figure when the undertaking has satisfied its obligation.

4. The other complaints concerning the principle of respect for the rights of the defence

According to the *applicant Consten* the contested measure also infringes the rights of the defence because it does not take account of the principal submissions made by the applicant before the Commission, namely the request for more information as well as the preparation of a general economic analysis of the manner in which the contract operates, prepared by an economic expert independent of the parties involved. Thus, the Commission failed to deal with the requests, objectives and principal submissions of the applicant. That omission also amounts to an infringement of Article 190 of the Treaty.

According to the *defendant* these submissions are still based on the concept of the alleged judicial character of the procedure for applying Article 85. The Commission is free to reject the requests to which the applicant refers without having to give reasons for this rejection. The real problem in knowing whether the decision taken is properly reasoned. The defendant considers that it can deduce from the case-law of the Court on the subject of stating the reasons for decisions that, in order to obtain the annulment of a decision, it is not sufficient that such decision does not meet the requests made by the undertaking to which it is addressed. On the contrary it is incumbent upon the applicant to show in what manner the reasoning is in sufficient to support the measure adopted.

In its reply, the *applicant Consten* criticizes the system for the application of Articles 85 and 86 provided for by Regulation No 17/62 and asserts that, in accordance with a rule of law which can be discerned in national laws, it is necessary to confer upon committees independent of the authority which decides and institutes proceedings the duty of preparing general economic analyses and of expressing opinions and recommendations free of all outside influence.

The *defendant* considers that this is a new submission put forward for the first time in the reply and consisting of requesting that Regulations Nos 17/62 and 99/63 be held inapplicable. This submission is inadmissible because it is not based upon any consideration of law or of fact disclosed in the course of the proceedings. It is also unfounded, the applicant having confined itself to asserting the existence of a general principle of law without proving it.

B — *The operative part of the decision*

1. The application of Article 85 (1) of the EEC Treaty

(1) *On questions of a general nature*

(a) The applicability of Article 85(1) to vertical agreements

Both applicants maintain that the prohibition in Article 85(1) does not apply to vertical agreements, but that it applies exclusively to horizontal agreements. The decision is thus vitiated by infringement of the Treaty, or at least, according to the *applicant Consten*, by infringement of an essential procedural requirement, the Com-

mission not having sufficiently explained how and given reasons why Article 85 applies in principle also to vertical agreements.

In support of the first complaint, the applicant Consten emphasizes that none of the five examples set out in Article 85(1) specifically refers to vertical agreements.

The *defendant* raises the objection, first of all, that the field of application of Article 85 is determined by criteria other than the distinction between vertical and horizontal agreements, particularly by the distortion of competition and of trade between Member States. The different types of cartel enumerated by this Article are defined in accordance with their object or their economic effects, and not by the nature of the agreements on which they are based.

In consequence, the reasoning of the decision did not have to show why the prohibition is applicable to vertical agreements, but it must, as it has done, demonstrate that the agreement in question restricts competition and that it may affect trade between the Member States.

The defendant asserts, further, that agreements of the type of those which are here in issue have as their object not only vertical restrictions but also horizontal restrictions on competition. In fact, the agreement concerning an exclusive right of distribution, with absolute territoral protection, has as its object the protection of the person entitled to the exclusive distribution rights from competition on the wholesale level for the goods in respect of which such rights are given.

The *applicant Grundig* opposes this argument and says that it fails to recognize the economic significance of exclusive distribution. In fact, the person entitled to the exclusive rights is not situated on the same commercial plane as the wholesalers and in consequence has no need to enter into competition with them for it is this person who normally supplies the wholesale trade. The relationship as regards delivery is therefore a vertical one.

The *defendant* replies that, since the applicant Consten has itself declared in its reply that it delivers practically only to retailers, there certainly exists a relationship of competition between Consten and the wholesale trade. That is confirmed by the absolute territorial protection given to Consten, which this applicant considers to be indispensable. Moreover, if it were true that there is no competition relationship between Consten and wholesalers, that company would have had no reason to sue the interveners, Leissner and UNEF, which undoubtedly carry on activities as wholesalers, on the ground of unfair competition.

(b) The applicability of the prohibition of cartels to exclusive distribution contracts

The *Government of the Italian Republic* maintains that an examination of Article 85 (1) of the Treaty shows that its provisions do not apply to exclusive distributorship contracts of the type which are in question in the present case. These do not amount in fact to 'agreements between undertakings' within the meaning of this provision: the parties are not on a footing of equality and the producer only transfers to the concessionnaire, which it has freely chosen, certain powers with a view to the marketing of its products. For this purpose it is free to choose the system which it prefers. The prohibition on exporting, which is in question in the present case, arises precisely from the fact that the producer has not transferred all its powers to the concessionnaire and has therefore laid down under the contract the limits within which it intends to rely on the work and resources of the concessionnaire which it has chosen.

The orders given by the producer to its concessionnaire do not differ from those given by another producer to its employees or to its commercial representatives with whom contracts have also been concluded. The contract between the producer and its sole concessionnaire does not therefore concern the economic situation, but only the legal relationships between these two parties; because of this it is irrelevant to the prohibition of Article 85, which deals only with contractual relationships which tend to alter economic phenomena.

The *defendant* remarks that, according to the case-law developed in connexion with the ECSC Treaty, the concept of an undertaking coincides with the legal concept of

natural or legal persons. That concept is equally applicable in the context of the EEC Treaty. The manufacturer and the concessionnaires being persons who are legally independent, carrying on their separate economic activities over a long period, an exclusive concession contract is a contract between undertakings.

As to the concept of agreement, even accepting that this presupposes the reciprocal independence of the parties to the contract, this independence can refer only to the period prior to the conclusion of the agreement, because agreements made for a long period always lead to a certain dependence of one of the parties to the contract on the other, or even to mutual dependence. As the distributing undertakings are independent of the producer before the making of the contract, it would be false to assert that the contract made between the manufacturer and his concessionnaires provides only a formal structural support to a factual situation. In any case, the alleged dependence of the concessionnaire on the manufacturer exists only within the framework and on the basis of that agreement.

According to the *Italian Government*, the applicability of Article 85(1) to contracts granting exclusive rights must also be excluded because of the fact that competition is inconceivable, not only between the sole concessionnaire and the producer, but also between the various concessionnaires of the same producer, for the concessionnaire does not have the legal capacity to carry out any such competitive activity, because he has not received this power from the grantor.

An examination of the effects and of the aim pursued by the contract leads to the same conclusion. The contract has the result of stimulating competition in the Common Market between the makers of comparable products: it therefore has favourable effects for inter-State trade.

If, on the other hand, it appears that the producer, with the assistance of its sales organization, exploits a dominant position in an improper manner, it is not Article 85 but Article 86 which should be applied.

The *defendant* disputes the absence of competition between the manufacturer and the sole concessionaire once the manufacturer himself carries out activities at the wholesalers' level or himself directly supplies certain retailers and ultimate purchasers when large orders are concerned. It is for this reason that sole distributorship contracts generally contain a clause forbidding the manufacturer to deliver directly.

In any case Article 85(1) does not require that competition should be restricted between the parties to the contract; it suffices that it is restricted between the parties, or even solely as regards third parties.

As to the alleged impossibility of competition between the various sole concessionnaires, the defendant remarks that the legal obstacles in the way of this competition are not a consequence of the distribution activities as such of these concessionnaires, but of the duties which are imposed upon them by the agreements made with the manufacturer. Even if one could accept, *quod non*, the exclusive right of the manufacturer in respect of distribution, that would not entitle the manufacturer contrary to Article 85(1) to exercise any influence over the resale of the goods once they have been sold by means of an agreement with his purchasers. The right to a patent and the right to a manufacturer's or dealer's trademark, despite the very extensive protection which they enjoy, would not confer such extensive powers upon their holders.

Furthermore the exclusive right of a manufacturer to distribution does not exist. When the manufacturer does not secure the distribution of his products himself it is the provisions of Article 85 which are applicable to agreements made concerning distribution, and not those of Article 86.

The possibility of an intensification of competition on the level of production does not exclude restrictions at the level of trade in respect of products of the Grundig company. It is only within the framework of Article 85(3) that one may possibly take account of the improvement of competition in the horizontal plane, at the level of production.

(c) The applicability of Article 85 (1) before the adoption of Regulation No 19/65

In case the Court considers that the ex-

clusive distribution contract falls under the prohibition of Article 85 (1), the *applicant Grundig* raises, in its reply, the question whether and to what extent this prohibition was applicable before the adoption of Regulation No 19/65 of the Council of 2 March 1965 (Official Journal of 6 March 1965, p. 533) concerning the application of Article 85 (3) of the Treaty to categories of agreements and concerted practices.

The applicant refers to the judgment in Case 1/58, according to which the prohibitions concerning cartels can have effect only in so far as the legal foundations necessary for the application of those provisions constituting exceptions to the said prohibitions are not established.

The *defendant* raises the objection that this is a fresh issue which is inadmissible because it is not based on Regulation No 19/65 but only on the circumstance that before this regulation the Commission could not have adopted regulations granting exemptions by categories. It is also unfounded. Unlike the case dealt with in the judgment in Case 1/58, where the grant of an authorization was absolutely impossible during the period concerned, the Commission could in fact in the present case have granted the exemption requested under Article 85(3) if the agreement had fulfilled the conditions set out in this provision.

(2) *Failure to define in the decision the extent of the prohibition with regard to the applicants*

The *applicant Grundig and the Government of the Federal Republic of Germany* complain, both from the point of view of infringement of the Treaty and that of infringement of an essential procedural requirement, that the decision declared the contract in question illegal in its entirety without excluding from the prohibition the clauses in respect of which no effect capable of restricting competition was found.

The contractual provisions which are linked only in a purely formal manner to the provisions declared illegal and which are not used to implement or apply those provisions do not fall under Article 85 (1).

The *applicant Grundig* adds that, since the question whether and to what extent a contract is void in civil law for infringement of Article 85 of the EEC Treaty is within the exclusive competence of the civil courts of the Member States, this lack of precision on the part of the Commission is likely to result in contradictory decisions by courts of the various Member States.

The *defendant* raises the objection that the agreements, as such, are prohibited totally, and not partially when they fulfil, either as a whole or by certain of their provisions, the conditions set out in Article 85 (1). The enumeration of all the provisions of an agreement which restrict competition is not required by legal certainty, since the problem of the extent of the nullity provided for in Article 85 (2) is in the last analysis one which falls within the competence of the Court of Justice to which it may be referred by the procedure of Article 177 of the EEC Treaty.

Such an enumeration would furthermore needlessly complicate the duties of the Commission and would be detrimental to the application of prohibitions of cartels. Lastly it even appears doubtful whether it could be done, because often restrictions on competition result only through the combined effect of serveral clauses in a contract and, as a general rule, the economic importance of agreements can be decided only by taking into account the total effect of the agreement being considered. It follows that it is not necessary for the statement of the reasons for the decision to declare the view taken of each clause in the contract.

As to the risk of divergent decisions by national courts, this would follow not from the practice of the Commission, but from the absence in the EEC Treaty of provisions corresponding to those of the second paragraph of Article 65 (4) of the ECSC Treaty. Any possible conflict must be decided in accordance with the procedure provided for in Article 177.

In its reply the *applicant Grundig* asserts that according to the argument of the defendant the legal effects of Article 85 (1) and (2) do not coincide, the prohibition in paragraph (1) necessarily covering the whole of the contract, whilst the nullity provided for in paragraph (2) may be limited to certain parts of it. This interpretation, which assumes logically that the subject-matter of

the concepts of agreement referred to by paragraphs (1) and (2) is different, is in clear contradiction with the wording: in fact paragraph (2) refers expressly to paragraph (1). This makes it clear that the two provisions complement each other perfectly.

On the other hand the opinion of the Commission would lead to insoluble practical difficulties. As the reasons for the Commission's decision do not sufficiently indicate those parts of the agreement which are prohibited and void, national courts would have to make a new examination of the whole of the situation of act and of law, although they do not have sources of information as complete as those of the Commission.

The applicant maintains that the legal structure of contracts granting exclusive rights in general enables the various commitments to be easily distinguished. In a case where the prohibited restrictions follow from the combined effect of several clauses in a contract, the Commission will prohibit the commitments whose combined action produces the effect criticized.

The *defendant* replies that the currently accepted meaning of the term 'agreement' does not justify its limitation to particular clauses; on the contrary it applies generally to the whole of the agreement restricting competition.

The *defendant* denies having interpreted the concept of agreement mentioned in paragraph (1) differently from that for paragraph (2) of Article 85. It restricted itself to stating that the concept of nullity included in the latter provision requires to be interpreted and should perhaps be extended to cover partial nullity.

(3) *The complaints concerning the prohibition of the obligation to refrain from exporting undertaken by Consten*

The *applicant Grundig* maintains that the prohibition of exporting imposed on Consten has no restrictive effect on competition in the French market. It only protects the exclusive rights of third parties operating in other countries. The conditions of the market in these countries were not examined by the Commission. Consequently the application of Article 85 (1) to this prohibition on exporting is not based upon the knowledge of its economic repercussions on the market, but results from the mere existence of the contractual agreement 'in abstracto'. Such a prohibition 'per se' is always incompatible with Article 85 (1) which in each case requires consideration of the circumstances of fact in order to establish whether competition is restricted to an appreciable extent.

The *defendant* raises against this argument a preliminary objection: it is not possible to examine separately, in isolation from its context, the abovementioned clause of the disputed contract. This idea is founded on an incorrect interpretation of the concept of agreement which has already been refuted above.

As a further point the *defendant* asserts that the decision found that the agreement infringes Article 85 (1) not because of its effects but because of its object. The object of the prohibition to export imposed upon Consten is to remove from undertakings situated in other Member States the possibility of buying goods from Consten. The 'perceptible' nature of this restriction on competition arises from the special situation of the market for Grundig products, a situation characterized by a small number of competitors at the production level and by the fact that the products in question were highly specialized.

2. The application of Article 85 (3) of the EEC Treaty

(1) *The complaints concerning the finding of absolute territorial protection*

Both applications maintain that the territorial protection on the basis of which the Commission refused to apply Article 85 (3) to the sole distributorship contract is not established by the contract in question but that it arises, on the one hand, from the prohibition on exporting imposed by Grundig outside the disputed contract on German wholesalers and on its non-French concessionnaires and, on the other hand, from French law on trade-marks.

In taking account of agreements outside the disputed contract, the Commission has exceeded its competence and commited a

misuse of powers. Furthermore it was equally incompetent to take account of the registration of the GINT trade-mark which is a matter governed by national law on trade-marks and, in any case, the decision contained no statement of reasons on this subject.

The *defendant* replies that the guarantee of absolute territorial protection was part of the agreement made between Gundig and Consten. That follows on the one hand from the clause in the contract by which Grundig undertook not to deliver either directly or *indirectly* within the contract territory, and on the other hand from the transfer of the GINT trade-mark to Consten, which completes the system of protection. That interpretation as it appears in the 'statement of complaints' sent by the Commission to the parties during the administrative proceedings, which corresponds literally to the reasoning of the decision, was never disputed by those concerned during the said proceedings. In consequence this submission is also inadmissible because it is in contradiction with the previous attitude of the applicants.

Even if the clause mentioned above were not connected with the deliveries carried out by the applicant's purchasers, the absolute territorial protection of Consten would arise nevertheless from the exclusive distribution contract because Consten, relying upon this contract, was able to take proceedings before the French courts against parallel importers in order to take advantage of legal protection afforded by those courts within the territories mentioned in the contract.

As to the complaints concerning the GINT trade-mark, the defendant replies that if it could take account of the obligations of Consten in respect of this trade-mark it had also the right to take cognizance of its registration, which is a logical prerequisite of these obligations. The statement of reasons in the disputed decision makes clear the existence of absolute territorial protection by linking it to Grundig's undertaking not to deliver directly or indirectly.

Both applicants reply that, even if it were true that Grundig undertook by the contract giving exclusive rights to ensure that Consten had absolute territorial protection, such an obligation would not lead to any limitation on competition and could not fall under the prohibition contained in the Treaty. In fact, this alleged limitation arises only from the existence of the prohibitions upon exporting imposed by Grundig on its purchasers, and not by virtue of the contract with Consten, which had no effect in respect of these persons, being *res inter alios acta*.

Furthermore the *applicant Grundig* maintains that the contract does not contain an obligation in the sense mentioned above: the clause in the contract forbidding it to deliver directly or indirectly to another person means simply that in France the applicant will deliver exclusively to Consten. The exclusion of indirect deliveries has as its object nothing more than to prevent the obligation to grant exclusive selling rights from being circumvented.

The applicant emphasizes that the contract granting exclusive rights in question was made in April 1957, whilst the applicant had imposed prohibitions against exporting on its German purchasers as from 1953.

The *defendant* replies that the fact that the prohibition on exporting intended to bring into effect the territorial protection was already in existence before the contract concluded with Consten allows the inference to be drawn that the applicant Grundig was able to make the territorial protection which accrued to Consten from the said prohibitions the subject-matter of its consideration under the contract for the prohibition on exporting imposed upon Consten. It must therefore be recognized that, having regard to Grundig's well known distribution system, the territorial protection given to Consten became the basis of the contract made between Grundig and Consten so that Grundig could not have derogated from it unilaterally. Furthermore the parties certainly knew from the time of the making of the agreement that absolute territorial protection for Consten followed from the principles accepted by French case-law.

(2) *The complaint concerning the refusal to grant conditional exemption*

On the assumption that it is admitted that the absolute territorial protection flows

directly from the disputed contract, the *applicant Grundig* maintains that the Commission should have accepted the contract on condition that parallel imports were not prohibited, in accordance with Article 7(1) of Regulation No 17/62.

The failure to grant such an exemption means that the operative part of the disputed decision goes beyond the statement of the reasons given for it and even its very purpose which is to prohibit absolute territorial protection.

The *defendant* replies that it could at its discretion refuse to give the benefit of an exemption or grant it by confining it solely to the parties to the agreement which could benefit from it, by making it subject to requirements or conditions if necessary. Review of the exercise of this discretionary power is not possible except in the case of a misuse of powers, a submission which the applicant did not put forward in respect of partial exemption.

Lastly the defendant emphasizes that absolute territorial protection, according to the contract, constituted an essential element of the Grundig-Consten agreement and that the applicant's representative expressly emphasized at the hearing before the Commission that it would be impossible to eliminate the system of export prohibitions overnight. The defendant itself had thus no reason to grant partial exemption.

The *applicant Grundig* disputes that the Commission has a discretionary power to grant the benefit of the exemption provided for in Article 85(3). When the conditions of this provision are fulfilled it must be accepted that the agreement promotes technical or economic progress, that it is of advantage to the community and that adequate competition exists. The agreement is thus in conformity with the general objectives set out in Article 2 of the Treaty as well as with the special objectives of Article 2 of the Treaty as well as with the special objectives of Articles 85 et seq. In consequence an interpretation of Article 85(3) based on a consideration of its purpose as expressed by its wording leads to the conclusion that in such cases the Commission is required to grant exemption.

Even if such discretionary power were to be recognized, the applicant relies upon the lack of reasons given for the exercise of this power in the present case and, as a further point, on misuse of powers. The contested decision makes not the slightest reference to the fact that the refusal of the exemption sought is the outcome of a discretionary decision and gives no indication of the reasons which were decisive in the exercise of the alleged discretionary power. The misuse of powers arises from the fact that the decision went far beyond the general objectives of the Commission; these consist in the keeping in being, as a general rule, of a contract granting exclusive selling rights. This follows from Regulation No 19/65 which makes provision for the possible exemption by categories of these contracts and a clause allowing undertakings to adapt their contracts to the legal situation established by the exemption of certain categories of agreements. This power to exempt, subject to conditions, already provided for in respect of individual exemptions in Article 8(1) of Regulation No 17/62, should also have been used by the Commission in the present case in order to avoid conflict with its general objectives and placing the applicant without any objective justification in a less favourable situation than all the other undertakings which have made similar contracts.

During the proceedings before the Commission, it was not possible for the applicant to modify its contract in the absence of an opinion from the Commission which alone is responsible for the application of Article 85 of the Treaty and in the absence of any positive information concerning the modification necessary to allow the sole distributorship system to be retained.

The *defendant* replies that it did not rely upon its discretionary power except in respect of the choise between refusal to grant exemption and the grant of a conditional exemption.

The submission of misuse of powers is inadmissible because it is set out in the application in too concise a manner. This submission is also unfounded. In fact, it is not true that during the proceedings before the Commission the parties concerned were left in a state of uncertainty in respect of the conditions in which their agreement could have been exempted from the prohibition. As

long ago as 9 November 1962 the parties to the agreement had been informed by a communication from the Commission of the conditions under which exclusive distribution contracts could be exempted from the prohibitions laid down in Article 85 (1). In addition, during the course of the proceedings before the Commission's departments the attention of Grundig and Consten has been drawn on many occasions to the fact that an exemption under Article 85 (3) could not be granted because of Consten's absolute territorial protection.

There was no need to give reasons for not granting conditional exemption, since the parties had not made even a subsidiary request for such a decision.

Similar arguments to those of the applicant Grundig were presented by the *Government of the Federal Republic of Germany.* This intervener refuses in particular to recognize that the Commission has a discretionary power in respect of the possibility of granting exemption under Article 85 (3) on condition that the undertakings concerned eliminate the causes or the effects of the contract which are incompatible with the Treaty. By refusing the exemption, the Commission failed in one of its duties. Besides, even if one accepts the existence of a discretionary power vested in the Commission, the latter abused it and lastly it did not give reasons for its refusal. The intervener puts forward in this respect the 'principle of proportionality' ('Verhältnismässigkeit'). It asserts in particular that the statements of Grundig and Consten concerning the indispensable nature of absolute territorial protection for the carrying out of the objects of the exclusive distributorship agreement were necessary to safeguard their legal interests and could therefore not be interpreted as amounting to a renunciation of a conditional exemption.

The *defendant* replies by arguments analogous to those which it put forward against the applicant Grundig and which have been set out above. It maintains, in particular, that it cannot be presumed that the parties concerned asked for the grant of a conditional exemption as a subsidiary matter at the same time as they notified the agreement, in particular when they stated, as now, that they are not in a position to modify the agreement. In consequence there was no reason to go into this question in the statement of the reasons for the decision.

Lastly the principle of proportionality to which the intervener refers was developed in German administrative law for the choice of means of enforcement and it cannot in any circumstances apply to a case of refusal of a benefit.

3. The prohibition of the agreement on the GINT trade-mark

(1) *The definition of the subject-matter of the prohibition*

The *applicant Grundig* points out, as a preliminary point, that uncertainties exist as to which agreement on the trade-mark constitutes the infringement found to exist by Article 1 of the contested decision. The agreement of 13 January 1959 to which the statement of the reasons for the decision refers is in reality a unilateral statement by the Consten company which, by its content (undertaking to transfer to Grundig or to have the GINT trade-mark removed from the register at the termination of an exclusive distributorship contract), is not liable to restrict competition.

In these circumstances the applicant considers that the prohibition contained in Article 1 of the decision is not directed against that statement.

The *defendant* replies that the statement by Consten of 13 January 1959 was not taken into account by the contested decision except as a part of the agreement on the GINT trade-mark. The existence of this agreement, which does not appear to be disputed by the applicant, came about on the one hand as a result of the origin of the GINT trade-mark which was introduced by Grundig shortly after it had failed in an action against a parallel importer in the Netherlands in December 1956, and on the other hand as a result of the duty laid upon Consten to transfer the trade-mark to Grundig after the expiration of the exclusive distributorship contract. That obligation is comprehensible only if Consten was enabled by the applicant to register the trade-mark.

In its statement in reply the *applicant*

Consten points to a contradiction in the behaviour of the defendant. By virtue of the registration of the trade-mark in France Consten obtained from the beginning its own right to the trade-mark. The prohibition against assigning its use which was made by Article 1 in the decision thus has no effect on the fact that Consten remains the legitimate owner of the trade-mark.

This consequence is however contrary to the purpose of the decision which appeared to consist of eliminating the 'division of rights in trade-marks'. The question thus arises whether Consten is compelled to give up its right to the trade-mark under the disputed decision and under the threat of incurring the penalty laid down in Article 15 (2) of Regulation No 17/62. The Commission has nevertheless asserted in its statement of defence that Consten continues to enjoy its rights in the GINT trade-mark. The applicant wonders whether in these circumstances Article 1 of the decision concerning the GINT trade-mark is not based upon an error by the Commission.

The *defendant* replies that the prohibition set out in Article 85 (1) applies to the whole of an agreement restricting competition and not to each of its various clauses in isolation. In consequence the finding of an infringement of this prohibition should extend to the whole of the ancillary agreement concerning the trade-mark.

Taking into account the provisions of Article 85 (1) of the EEC Treaty and of Article 3 of Regulation No 17/62 it is unnecessary, according to the defendant, that there should be conformity between the prohibition laid down in Article 1 of the decision and the duty to terminate the infringement provided for in Article 3.

The contested decision does not prevent the exercise by Consten of its legitimate rights in the trade-mark: Consten may in particular continue to prevent any use of the trade-mark for products other than those of Grundig.

(2) *The complaints concerning trade-mark law*

(a) The submission of lack of competence

Both applicants complain that the Commission has exceeded the limit of its competence by asserting in the contested decision that the agreement concerning the registration of the GINT trade-mark in France has the effect of giving absolute territorial protection to Consten and, because of this, of excluding the possibility of claiming rights under national legislation on trade-marks. The Commission is therefore guilty of interfering in a sphere reserved to national authorities.

The *applicant Grundig* maintains, further, that, to the extent to which the Commission considers that the limitation of the effects of national laws concerning manufacturers' trade-marks to the national territory of each State is incompatible with the objectives of the Common Market, it is not possible to overcome this disadvantage execpt by improving and adapting national laws in accordance with the wording of Articles 100 and 102 of the Treaty.

The *defendant* raises the objection that the use of the GINT trade-mark is not intended to fulfil the proper function of a trade-mark, which is to obtain protection for its holders by showing that the goods come from a particular undertaking and in consequence to maintain the quality of the product. This function is in fact carried out perfectly well in the present case by the Grundig trade-mark, affixed to all the products of that undertaking sold by Consten. Neither is the GINT mark used as a dealers' trade-mark which is characterized by the fact that the dealer selects the goods although he does not produce them himself. Consten in fact had the right to sell only Grundig products under the GINT trade-mark. Since the real purpose of the use of the GINT trade-mark by Consten is, with the help of methods derived from trade-mark law, to protect exclusive distribution by the Consten company against parallel imports, the agreement concerning this trade-mark falls under the prohibition of Article 85 independently both of the attitude which might be adopted by French courts concerning the protection of this trade-mark against parallel imports and of the question whether Article 85 (1) applies to agreements having neither the object nor the effect of restricting competition to an extent exceeding the protection of industrial property under national law.

It does not follow at all from the general competence of the Commission concerning the approximation of laws set out in Articles 100 and 102 that Article 85 may be applied in the present case to prevent the prohibition on cartels being circumvented by means of the law on trade-marks. These various provisions of the Treaty are not mutually exclusive. The improper use by Consten of the GINT trade-mark is based, furthermore, on an agreement with Grundig. The EEC Treaty, as well as Article 3 (1) of Regulation No 17/62, justifies the prohibition of this agreement.

The *applicant Consten* replies that the usefulness of the super-imposition of the GINT trade-mark on the Grundig trade-mark follows also from the fact that a part of the goods sold under the GINT trade-mark may not come from the Grundig factories, since Grundig does not itself manufacture all the goods which bear the GINT trade-mark, in particular certain spare parts and accessories. The GINT trade-mark serves primarily to distinguish the distribution networks controlled by Grundig from other distribution systems which are not bound by the same obligations and which have not the same close relationship with the manufacturers and thus the guarantee given to the customer as a result of that relationship is not the same.

The *defendant* argues that, if the aim of the GINT trade-mark were that put forward by Consten, it would appear contradictory to base upon this trade-mark actions directed towards depriving other Grundig distribution systems in France of their supplies. Furthermore, in its statement of 13 January 1959, Consten admitted that the GINT trade-mark was intended to be affixed only to equpment made by Grundig.

According to the *applicant Grundig* the Commission's statement of defence does not make it possible to ascertain whether the defendant disputes having interfered unwarrantably in the sphere of trade-mark law or whether, on the contrary, it considers it has the right to do so. The decisive question, according to the applicant, is whether by using the prohibition on cartels outlined in Article 85 (1) the Commission may eliminate the effects of industrial property rights.

A negative reply is necessary because of the mere fact that Article 85 applies only to restrictions on competition which follow from a contractual or quasi-contractual obligation and not to cases where the restruction of competition is rooted in a national law. Article 3 of the decision applies just as much to the protection derived from the Grundig trade-mark, since the applicant cannot rely upon it for use against parallel imports. That shows that this provision does not apply to a particular agreement but simply to the exercise of rights in the trade-mark.

As to the demarcation between the law concerning cartels and the law concerning trade-marks, the *defendant* replies that the prohibition on cartels should also apply to industrial property rights where agreements concerning these rights are used to create a regional division of the market, an agreement on prices or other restrictions on competition which have nothing to do with the object of obtaining the protection ensured by these rights; otherwise the way would be open to dealings which would circumvent the prohibition on cartels.

Furthermore the prohibition on the improper use of industrial property rights is expressly recognized in the cartel laws of various states. In this respect the *intervener Leissner* quotes a judgment of the French Cour de Cassation according to which the rights of a party in a trade-mark registered by him do not allow him to frustrate economic legislation.

As to the influence of the agreement concerning the GINT trade-mark, the *defendant* observes that the registration of the trade-mark effected by Consten in France could be carried out only on the basis of the agreement made with Grundig. The ancillary agreement thus had decisive importance in respect of Consten's right to the trade-mark.

For Article 85 (1) to apply, it is not necessary that the restriction on competition aimed at by the agreement should follow directly from the latter: it suffices, on the contrary, that the object of the agreement should be directed towards the restriction on competition.

The *applicant Grundig* maintains, on the other hand, that there is no restriction on

competition by reason of the agreement, since Grundig could not have assigned to Consten, with the GINT trade-mark, more rights than Grundig itself possessed.

The *defendant* replies that this argument is contradicted in respect of the facts by the case-law of Dutch and Italian courts according to which parallel imports are lawful where the foreign manufacturer also owns the national trade-mark, but are unlawful where the manufacturer has transferred the trade-mark in respect of the national territory to a sole concessionnaire. It is equally untrue in law, because the prohibition on cartels is directed precisely to preventing concerted action by several participants in the market, independently of whether the same action would be lawful if it were carried out by a single undertaking in the absence of any agreement with other undertakings.

As to the prohibition on the exercise of the right to the trade-mark laid down by Article3 of the decision, the *defendant* asserts that, as the ancillary agreement comes under provisions concerning the same cartels, acts done on the basis of this agreement are also subject to the application of Article 3 of Regulation No 17/62. The defendant considers it doubtful whether the prohibition laid down in Article 3 of the decision is of practical importance also for the Grundig trade-mark.

In any case proceedings against parallel imports based upon this trade-mark should be regarded as an act intended to ensure absolute territorial protection for Consten which the provisions of Article 3 of Regulation No 17/62 are intended to prevent. As this act would have an object outside the proper function of the trade-mark, national law could in no case amount to an obstacle to the application of the provisions of the EEC Treaty concerning cartels.

(b) The submission of infringement of the Treaty

Both applicants complain that the decision infringes Articles 222 and 234 of the EEC Treaty. The guarantee of property rights laid down in Article 222 extends, in fact, to industrial property rights as is confirmed by Article 36 of the Treaty. Article 234 requires that the Convention of 20 March 1883, concerning the protection of industrial property in respect of trade-marks, be observed.

The *defendant* maintains that Article 222 deals particularly with the private or public nature of property rights and guarantees the Member States' freedom to decide the rules in this respect quite independently (but within the framework of the obligations placed upon them under the Treaty). That does not exclude the Commission, within the framework of the duties given to it, from acting also to the extent to which this is necessary within the sphere of property rights of nationals of the Member States. Infringements of individual property rights are necessary furthermore for the application of other provisions of the Treaty; for example Articles 86 and 92, or because of measures directing the market laid down within the framework of the organization of agricultural markets. In these circumstances if the contrary argument of the applicants were accepted the Community might often find it impossible to work towards the results required by the Treaty.

Article 36 deals only with the narrow domain of measures taken by states within the meaning of Article 30 et seq. of the Treaty. It does not apply at all to the relationship between industrial property and other provisions of the Treaty.

The applicants are not entitled to refer to Article 234, which applies only to the sphere of relationships between the Community and the Member States. Furthermore the contested decision affects neither French trade-mark law nor the competence of French courts nor the international obligations of the Member States.

The *applicant Grundig* maintains, on the contrary, that the reference to Article 36 is relevant. This provision recognizes that industrial property rights justify prohibitions on exporting and importing. It is precisely the prohibition on importing consequent upon the legal protection of the trade-mark that the Commission wishes to eliminate by forbidding the parties to exercise their industrial property rights.

The *defendant* replies that the contested decision is not directed against the elimina-

tion of prohibitions imposed by states but is intended to prevent private restrictions on importation consequent upon the actions of Consten which relies upon the GINT trade-mark.

The *Italian Government*, intervening, considers that the Commission cannot judge whether a trade-mark which has been registered legally by an undertaking is necessary or not; neither from the negative point of view can it decide that the undertaking has not the right to make use of it. Because of Article 222 of the Treaty the Commission has no such power even in a case where the utilization of the trade-mark amounts to a means of affecting competition. It is not possible to rely upon Article 85 (1) in order to declare the contract in question void; only Article 86 could apply if the conditions stipulated in it were fulfilled.

The *defendant* replies that the reference to the absence of any independent function of the GINT trade-mark had no other object than to corroborate the findings of fact concerning the object of the agreement, which is to restrict competition.

As to the argument based on Article 222 of the Treaty, the defendant refers to the arguments which it has already put forward in answer to the applicants. Since this Article 222 contains no restriction favouring particular provisions laid down in the Treaty, the defendant wonders how the intervener can draw a distinction between Articles 85 and 86 concerning the possibility of applying them to the field of the law on trade-marks.

4. The prohibition against impeding parallel imports

(1) *The form and scope of the prohibition*

The *applicant Grundig* maintains that Article 3 of the decision is drafted in terms so wide, far exceeding the objectives of the decision, that its provisions are in fact inapplicable. The applicant however does not attach decisive importance to this error, which could be corrected by re-drafting the Article in narrower terms.

The *German Government*, intervening, complains, both from the viewpoint of formal defects and of an infringement of a rule of law relating to the application of the Treaty, that the decision has failed to specify and to confine to the infringement which it found to exist the duty imposed upon those to whom the prohibition was addressed in the terms in which that duty is imposed by Article 3 of Regulation No 17/62. Because of its abstract nature and its scope which goes beyond the prohibited agreement without any limitation in time, the decision arrogates to itself the same effects as a substantive law confined to the applicants and thus violates the principle of equality of treatment.

The *defendant* raises the objection that it appears clearly from the reasons given for the decision that only those acts fall under the prohibition which serve the same objectives as those of the agreement restricting competition. The question whether in a given case an act of the applicant infringes the prohibition of Article 3 must be considered on its own.

(2) *The complaints concerning the infringement of principles of procedure*

The *applicants* and the *German Government* complain that the contested decision is vitiated by an infringement of an essential procedural requirement in that Article 3 of the operative part refers to the whole European distribution of Grundig products whilst the procedure under Regulation No 17/62 was not employed except in respect of the agreements made between Grundig and Consten. The Commission therefore pronounced *ultra petita* and, further, infringed an elementary principle of procedure which the applicant Grundig regards as enshrined in Article 19 (1) of Regulation No 17/62 concerning the right of all the parties concerned to be heard.

The *applicant Grundig* maintains in particular that Article 3 of the decision is vitiated because of the fact that it is intended to prohibit it from exercising rights which it has under valid contracts.

In fact the contracts which it made with the German dealers and the sole concessionnaires of the countries of the Common Market other than France were properly notified to the Commission and are there-

fore provisionally valid. The Commission has therefore no right to forbid the applicant to prevent its dealers and sole concessionnaires from exporting to France. It appears clearly from the wording of Regulation No 17/62 that Article 3 (1) requires complete conformity between the finding that there is an infringement and the duty to bring it to an end. The Commission cannot therefore legally require the termination of an infringement in respect of agreements concerning which it could not, for procedural reasons, find any infringement.

The *defendant* raises the objection that the failure to hear third parties does not affect the interests of the applicants at all. This complaint is therefore inadmissible. It is furthermore unfounded, as is the complaint that it made a decision *ultra petita*, because the contested decision imposes duties only upon Consten and Grundig.

The *defendant* asserts that it had the right to take into consideration agreements which were not the subject of the decision, to the extent to which that was necessary to evaluate the real significance of the agreements complained of. To this end it had to place these agreements in the context of time and space where they were intended to function and thus within the sales system established by Grundig throughout the Common Market.

What is important is that these considerations contained in the statement of the reasons for the decision were not taken up again in the operative part which refers exclusively to the agreements concluded between the Consten and Grundig companies. Therefore the decision has no effect on the legal existence of the prohibitions on exporting imposed by Grundig upon parties other than Consten.

The *applicant Consten* replies that the functioning of contracts made between Grundig and its various concessionnaires in the Common Market is distorted by Article 3 of the contested decision because Consten cannot require from Grundig respect for its territory by the other distributors, whilst it can be compelled to respect the territory of those distributors. The applicant has therefore a legal interest in putting forward the abovementioned submission of infringement of an essential procedural requirement.

The *defendant* objects that Consten can rely upon the nullity of the clause by which it undertook not to export applicances outside its territory. The contested decision results in practice in making possible not only importations into France of Grundig equipment by dealers other than Consten but also the export of this equipment by Consten into Common Market countries other than France.

(3) *The complaint of infringement of Article 85 (1) of the Treaty and Article 3 (1) of Regulation No 17/62*

The *applicant Grundig* states that Article 3 of the operative part of the contested decision is based on the idea that the Commission has the right to impose certain duties upon undertakings in respect of their actual behaviour in order thus to exercise a decisive influence upon the individual commercial policy of each undertaking.

Because of this fact it does not come within Article 3 of Regulation No 17/62 which, in accordance with Article 85 (1) of the ECC Treaty, has the sole aim of re-establishing free competition between the undertakings concerned and of eliminating the ties which restrict it.

The *defendant* objects that the prohibition of agreements provided for in Article 85 (1) must necessarily also include acts by the parties based upon their agreement, because the agreements or decisions are not prohibited for their own sakes but because they put competition and the freedom of other undertakings in danger. The fact that Article 85 speaks of 'practices' rather than simply of 'agreements on concerted practices' confirms that interpretation.

Lastly the contested decision did not lay down a particular course of market conduct for those concerned but simply forbade them to undertake a course of conduct based upon a prohibited agreement.

The *applicant* replies that, unlike Article 86, Article 85 (1) does not forbid 'practices' but only 'concerted practices', a concept which presupposes that a consensus of intentions on the part of the undertakings concerned is essential. In consequence the prohibition of

cartels can only be intended to eliminate infringements and to restore to undertakings the freedom to act independently in the market. The question how undertakings behave in fact, once that liberty is restored, is not the subject of Article 85 but, should the occasion arise, only of Article 86 of the Treaty. Nor can Article 3 (1) of Regulation No 17/62 justify the attitude of the defendant because that provision contains in substance only a reference to the general rule laid down in Article 85 (1).

The applicant disputes that the interpretation which it upholds would result in making the prohibition of cartels ineffective. This prohibition being directed towards maintaining freedom of competition, its aim would be fulfilled by the re-establishment of freedom of independent action of the undertakings concerned, following from the elimination of agreements which restrict competition.

The *defendant* states that, if it had confined itself to stating that the agreements infringed the prohibition laid down in Article 85 (1) and refused to grant them the benefit of the exemption, the applicants Grundig and Consten would probably try in the future also to achieve territorial protection by means both of prohibitions against exporting imposed upon German wholesalers and by the use of the GINT trade-mark. In order to avert this danger and to avoid the necessity for instituting new procedures it was necessary therefore to include the duty to terminate the infringement in the operative part of the decision.

C — *The findings of fact*

1. The complaints concerning the limitation of the examination only to products bearing the Grundig trade-mark

The complaints concerning the limitation of the examination of the 'relevant market' to products bearing only the Grundig trade-mark are set out below in relation to the criterion of 'restriction on competition' (see D, 1, a, below).

2. The complaints concerning the limitation of the examination to a single type of equipment of the Grundig range

Both applicants state that, whilst the sole distributorship contract which had been the subject of the prohibition covers the whole range of Grundig products and applies particularly to wireless sets, television sets and dictaphones, the inquiry had confined itself to the tape-recorder market and that even within this restricted sphere the inquiry was directed only to one particular type of equipment, the TK 14 tape-recorder. The proportion of the aggregate turnover of the transactions between Grundig and Consten represented by this tape-recorder was only 1.9% in 1963 and the percentage for the whole of the tape-recorder sector amounted only to 20.8%. The applicants deduce from this that the Commission prohibited the contract without holding an inquiry on the possible effects of the contract on the market.

The *defendant* replies that the TK 14 tape-recorder could properly be the principal subject of the inquiry because it is representative of Grundig tape-recorders, as appears from the statements made at the end of 1962 by the 'Deutscher Radio- und Fernseh-Fachverband' contained in the statement made to the Commission by the Bundeskartellamt as well as an inquiry carried out by the French Ministry for Economic Affairs.

The *applicant Grundig* replies that neither of the two abovementioned organizations had facilities for obtaining information in other countries, and thus for formulating an opinion concerning the relations between market prices and German and French discounts. If it is admitted furthermore that the TK 14 tape-recorder is one of the most popular, that means to say, according to the applicant, that the facts considered are not representative but are based upon an exceptional situation.

The *defendant* objects that neither Grundig nor Consten showed during the course of the proceedings that the situation in respect of other appliances differs noticeably from that concerning the TK 14 tape-recorder. On the contrary, the explanations provided by Consten in Schedule 1 to the written reply of 21 February 1964 to the statement of complaints concerning the price charged for other equipment show that the findings arrived at concerning the TK 14 tape-

recorder had general validity. It follows in fact from this that at the beginning of 1964 the actual prices in France were still from 20% higher, also as regards the other appliances, than the 'theoretical' prices calculated on the basis of the German prices.
The *applicant Grundig* objects that the price differences as they appear from the abovementioned letter from Consten were not reproduced correctly by the Commission: they vary between 12% and 16% in comparison with the actual retail price or between 14% and 19% in comparison with the theoretical price.
The *intervener* UNEF produces a comparative table aimed at showing that for the year 1962 the price differences established in the case of the TK 14 tape-recorder are also found in other models, which confirms the representative nature of this tape-recorder.

3. The complaints concerning the period taken into account

The *applicant Grundig* states that the date relied upon by the Commission as proof of its allegations relate to price differences existing two years before the decision was taken and which, because of the development of the markets, no longer have any probative value.
The *defendant* objects that since the period which was the subject of the contested decision there has been no change in the general economic situation and the structure of the sector of the economy in question. Furthermore if in every case the Commission had to rely upon very recent data those concerned would easily be able to obtain a favourable decision by temporarily changing their behaviour.
The *applicant Grundig* replies that its exports to France in 1963 and 1964 increased by about 150% which shows that there was a considerable increase in the pressure of competition and, in consequence, of repercussions on prices.
The *defendant* replies that whilst the general economic situation remains unchanged it is not possible to require the Commission in the course of its procedure constantly to carry out new research in favour of the parties concerned. The onus is upon them to show proof of changes which have taken place concerning the facts established by the Commission and which have been communicated to them. However, the statements which they made at the beginning of 1964 have shown that at this date the previous prices differences still substantially continued to apply. Furthermore, as UNEF was able to obtain more and more parallel imports since 1963 because of the stay of proceedings decreed in the Consten-UNEF case, it is justifiable to assume that the effects of territorial protection are better reflected by the situation existing in 1962.

4. The complaints concerning the examination of prices, gross margins and overheads

(a) *As to prices and gross margins*

As to the alleged price differences found by the Commission as between Germany and France rising at the end of 1962 on the basis of the catalogue price for a certain type of recorder to 44% after deduction of customs duties and taxes, and on the basis of the 'actual prices' (catalogue prices less discount) at least to 23%, the *applicant Grundig* asserts that the decision confined itself almost exclusively to comparing retail prices paid at later stages. Furthermore in France such influence is legally prevented by the prohibition on vertical agreements on prices. In addition the comparison of absolute prices made by the decision based upon the idea that theoretical prices (actual prices less customs duties and taxes) are already identical throughout the Community neglects the fact that taxes and duties differ considerably from one State to another.
The only acceptable comparison would be that of the respective gross margins. Gross margins in Germany and France are identical, or show at the most a difference of 2%.
The *defendant* objects in the first place that the statement of prices included in the decision need not have led to the application, to the sole distributorship agreement, of the prohibition on cartels laid down in Article 85 (1). This information is of use only to illustrate the fact that the agreement may affect trade. In accordance with the case-law

of the Court the evaluation of the concrete effects of an agreement is not necessary when it appears already from the contents of the agreement that the conditions for application and for prohibition are fulfilled, as is the case in the present instance.

As a subsidiary point the defendant emphasizes that both applicants asked continually for a comparison of these prices during the inquiry, and that on the other hand they expressly opposed a comparison of margins as suggested by the company UNEF. Consequently this complaint is inadmissible. Furthermore, it is without foundation because the relationship between retail prices appearing in the decision and wholesale margins emerges from the finding, which is repeated in the decision, that the absolute retail margin of profit is practically the same in Germany and France. It follows from this that Consten's margins are appreciably higher than those of German wholesalers. The information gathered by the national authorities confirms this conclusion. The comparison of retail prices amounts in fact therefore to an advantage for the applicant. Lastly, Consten has a clear influence upon retail prices because on the one hand it recommends prices, which to a great extent influences the fixing of the actual prices, and on the other hand the prices to the ultimate consumer are necessarily all the higher the greater Consten's margin becomes.

The defendant disputes the figures provided by the applicant Grundig concerning national taxation imposed on trade between Germany and France. It calculates the incidence of it at 42.6% and not at 49.42% as Grundig does. The correctness of the Commission's calculations was accepted by the applicant Grundig during the administrative proceedings. Furthermore the action of parallel importers who paid a purchase price higher than Consten shows that the importation into France of Grundig's products is economically in their interests precisely because of the abnormal price differences existing between the two countries.

The *applicant Grundig* replies that during the proceedings before the Commission it had requested a comparison, not of the prices on the German and French markets, because the applicances subject to parallel importation were sold to the French consumer at the same price as those delivered by Consten, but of the services given by Consten and UNEF. The finding that the services given by Consten is superior from every point of view would have refuted the incorrect assertion that parallel imports led to a better supply to the market than the sole distributorship system.

The applicant maintains in addition, as to the alleged substantial similarity of the absolute margin earned by the retail trade in Germany and in France, that the Commission has not established how the aggregate gross margin is divided in Germany between the wholesale trade and the retail trade; in consequence the facts considered by the Commission do not provide a sufficient basis for accepting that Conston's margins are appreciably higher than those of the German wholesalers.

The *defendant* replies that the findings on prices are not decisive either for the application of Article 85 (1) or for the refusal to exempt the agreements.

Furthermore the basis of comparison of retail prices was introduced into the proceedings by Grundig and Consten with a view to proving the equality of prices as between Germany and France. The Commission, in Schedule 1 to the statement of complaints, has employed the same bases of calculation chosen by the parties concerned, although correcting mistakes of calculation. The applicant Grundig thus contradicts itself in no longer wishing to accept, since the calculations have become unfavourable to it, the method of comparison of prices which it has chosen. Furthermore, in order to assess whether the agreement allows consumers a fair share of the resulting benefit, it is necessary to take account of the retail price.

As to the complaint, which the applicant puts forward in its reply, that the finding that the margin which remains to the retail trade is essentially the same in absolute values in France and in Germany, the defendant maintains that this is a fresh issue which is inadmissible.

This complaint is not relevant either, in view of the fact that the disputed finding did

not play a decisive rôle in the adoption of the decision.

(b) *As to overheads*

The *applicant Grundig* maintains that there was no inquiry either concerning overheads which were unequal in France and in Germany. In particular, distribution in France involved noticeably higher transport costs than in Germany, the density of the population in Germany being 232 inhabitants per square kilometre and in France 87 inhabitants.

Consten had also large advertising expenses amounting in 1962 to approximately 6.6% of the amount of the sales of the applicant Grundig in France. On the other hand the advertising expenses of Grundig in Germany amounted to only 1.8% of its turnover in Germany and that was because this turnover was in 1962 twenty times larger than that which it had on the French market. In these circumstances if Grundig had become responsible for the expenses of commercial publicity and for fairs and exhibitions on the French market it could not have delivered to Consten at the same price as to its German wholesalers. The Commission neglected this fact when it objected that the advertising expenses borne by Consten ought to have been borne by the Grundig company, since the latter did this in Germany, and without any alteration being made in the 'ex factory' price for Consten. Because of this difference in marketing in the German market and in the French market, Consten also bore proportionately higher overheads than those of Grundig in respect of other cost factors and particularly the expenses of services under guarantee and other after-sales services.

The applicant Grundig also states that the production cost for Grundig products sold in France is in general higher than that of Grundig products sold in Germany because most of the appliances intended for France required technical modifications or even, in the case of television sets, completely separate production with higher production costs.

The costs of finance borne by Consten to keep very large stocks (amounting to 7 000 000 French francs at the end of 1963) necessary for the whole of the production programme and for spare parts is not comparable with the corresponding overheads of German wholesalers. The question whether specific sales expenses in one country should have repercussions on the prices in that country or should be incoporated in a uniform price for all countries does not lend itself to an abstract solution but is determined by the conditions of competition on the market and, in the first place, by the sharp competition between the various manufacturers.

This competition and the increase in sales figures makes the price differences, which are already noticeably reduced, disappear completely in the Common Market when the penetration of the market has reached a uniform level.

The *defendant* replies that it is necessary to distinguish between the specific costs of distribution in France and the expenses which are imposed unilaterally on Consten, unlike the situation affecting German wholesalers. As to the first category, the expenses which are imposed unilaterally on Consten, unlike the situation affecting German wholesalers. As to the first category, the expenses of financing in connexion with stocks represent approximately 12% of the annual turnover of Consten. The applicant Grundig has not argued that the average stock of German wholesalers is appreciably below this rate. Although Consten's transport costs may be higher than those of the German wholesalers, one of the principal causes of this is the fact that the applicant Grundig made provision for only one exclusive distributor for France. Thus in the case of the distribution of Grundig products in those parts of France bordering on Germany it is necessary to make allowance for the price of transport from the Franco-German frontier to Paris and back. However, it is not possible to rely on exclusive distribution, the cause of these disadvantages, to justify the prices stated.

As to the overheads unilaterally imposed on Consten and particularly the advertising expenses and the guarantee service, they are of no importance with respect to the findings concerning the fair share of consumers in the profits, because Consten was certainly

not inclined to bear these costs without a corresponding reduction in the 'ex factory' price, except in the context of the guarantee of absolute territorial protection. The placing of these expenses on distribution, which is allowed under this protection, leads to an increase of retail prices in France. In consequence, the special overheads undertaken by Consten cannot be used to justify the existing price differences.

The alleged modifications of Grundig products sold in France are generally of an insignificant nature, and in any case there is no modification in respect of recorders, as the applicant itself says. In consequence, it is possible to draw the conclusion that at least in this section, which represents almost a quarter of all the transactions between Grundig an Consten, the applicant Grundig does not make a corresponding reduction in the 'ex factory' price to make up for the fact that Consten bears the advertising expenses and the risk entailed by the guarantee. That shows that consumers do not have a fair share of the benefit resulting from the agreement in the field of recorders.

The argument of the applicant Grundig that the taking over by Consten of the advertising expenses is actually necessary because of the fact that such expenditure is proportionately higher in France and that therefore it is in any case necessary to fix higher prices in France constitutes a negation of the Common Market: the transfer of certain expenses falling within a sector constituted by a Member State, including the special expenses of entering the market, to the consumer in that State, is actually made possible only by the fact that the prices of products are, in the territory in question, kept artificially separate through the exclusion of parallel imports. Such a process leads to the continuation of impediments to trade.

Similar arguments were advanced by both parties also in respect of the costs of entry upon the French market.

5. The complaint concerning the geographical aspect

The *applicant Consten* maintains that the concept of the Common Market provided for in Article 85 (1) includes by definition the concept of multi-nationality which is not the case in the present instance, the decision of the Commission relating only to the French market.

The *defendant* replies that for the purpose of applying the prohibition on cartels it suffices to show the existence of restrictions on competition within the Common Market which are likely to affect trade between Member States.

6. The complaint concerning the concept of 'sellers' 'buyers'

The *applicant Consten* asserts that since the Commission accepts that there can be only a single buyer in France directly supplied by Grundig it becomes necessary to consider the situation of competition at the retail level because the wholesale level is by definition non-existent. Competition is particularly keen in France in the field of the products in question and between the very retailers of Grundig products. This fact proves once more that the decision amounted to a misapplication of Article 85.

The *defendant* replies that to understand the restriction on competition resulting from the contract in question it is necessary to consider the matter at the level of importatien, as was done in the decision.

7. The complaints concerning the statement of reasons for the decision

The *applicant Grundig* states that in its decision the Commission does not publish concrete figures but confines itself to giving partial results of its calculations in respect of which it is not possible to say with certainty upon what basis they were obtained. Neither the prices used for the comparative calculation nor the method of calculation are known, so that it is not possible to ascertain whether any arithmetical errors may have occurred. In consequence the decision does not conform to the requirements of Article 190 with regard to stating reasons for decisions and it should therefore be annulled on the ground of an infringement of an essential procedural requirement.

The applicant recalls that during the

proceedings before the Commission it had already asked in vain for proof of the points raised and because of this it complains of the shortcomings of the enquiry.

Lastly, as the Commission's enquiry dealt only with a single type of appliance representing a very small percentage of the turnover between Grundig and Consten the applicant Grundig raises this complaint also from the point of view of inadequate reasoning for the decision, because the Commission in its decision did not give the necessary information concerning the repercussions of the prohibited contract on the Common Market.

The *defendant* replies that the statement of reasons cannot have the purpose of setting out in detail the proof of findings made during the enquiry; further, the risk of revealing business secrets would be increased. The parties concerned suffered no damage because the bases of the findings of fact by the Commission had been communicated to them with the statement of complaints. There is therefore no reason to put these calculations in the statement of reasons for the decision.

D — *The criteria for the application of the prohibition laid down in Article 85 (1)*

1. The criterion of restriction of competition

(a) *The importance of competition between products of different makes*

Both applicants and the German Government, taking the view that the decision restricts the examination only to Grundig products, maintain that the Commission interpreted the concept of competition falsely because this concept, far from being limited to products of a single brand, covers competition between similar products of the various competing brands.

Because of this, the decision infringes Article 85 (1) as well as Article 190 of the Treaty because it has not sufficiently explained why it is not necessary to take account of this competition between the different brands.

The *German Government* asserts in particular that the 'prevention', 'restriction' or 'distortion' of competition in the Common Market cannot be held to exist solely upon the basis of the monopoly situation of one undertaking for the products of a single manufacturer. Because of the possibility of interchangeability with similar products it is possible that the exclusive situation of an undertaking in respect of the products of a single manufacturer may not affect the market situation of the products in question. The prohibition can apply only to cartels leading to a noticeable and important change in the market conditions for the products concerned.

As regards more particularly the type of agreements in question the intervener maintains that, since sole distributorship contracts are permitted in principle in all the Member States, one should because of this exclude the possibility that the authors of the Treaty had intended that these contracts should fall *per se* under the prohibition of Article 85 (1).

According to the intervener it is shown by experience that vertical agreements for exclusive representation as opposed to horizontal agreements have not the purpose of restricting or distorting competition on the market to a noticeable extent. If one accepts that this presumption favours the applicants, there is no particular factor in the present case which is capable of rebutting it. In consequence the Commission interpreted Article 85 (1) in an incorrect manner.

The *defendant* accepts that the concept of competition applies equally to competition between similar products of different brands but emphasizes that even if competition is restricted in respect of the products of a single brand Article 85 remains applicable. Competition must take place not only between producers and distributors of products of different brands but also between traders supplied by the same producer. These different types of competition are complementary. Substitution competition alone, that is to say, that which exists between products of different brands, often lacks strength and applies only in a general way. Thus for example the TK 14 tape recorder regarded as Grundig's 'best seller', is sold in France for 600 FF while the Philips tape recorder of the corresponding type is sold for 530 FF; on the other

hand, in Germany it is the Philips which is the dearer (335.80 DM), whilst the Grundig equipment costs only 306.80 DM.

Replying to the Federal Government the defendant considers furthermore that it is very doubtful whether the products in question manufactured and sold by different brand names may be regarded as 'similar'. The prevailing opinion in legal doctrine rules this out even in the case of products coming from the same maker but sold under different brand names. The examples quoted by UNEF during the course of the oral procedure show that competition between brands is not very effective because of the absence of opportunity for the consumers to make comparisons.

Furthermore, competition limited to the different makes means that prices and the quality of service which are the results of the dealer's own efforts tend to be of little consequence when set against the price and quality of the goods produced by the manufacturer; on the other hand competition between distributors of the same make stimulates and rewards the dealer's own efforts because it takes place between identical products. In this case competition takes place particularly in relation to prices and to the provision of services connected with the sale and use of products.

In this situation the Commission had no need to extend its examination to the competition in France between all the distributors and manufacturers of products similar to those distributed by Consten, because such an examination would have revealed nothing useful on the question of the absence of competition between distributors of Grundig products, this fact alone being capable of justifying criticism on the basis of Article 85 (1).

The decisive criterion for the coming into force of the prohibition mentioned in Article 85 (1) is independent of the ascertainment of the proportion held by the products in question on the 'materially relevant market'; it consists of the finding that the agreement interferes with the freedom of action of the parties or with the position of third parties on the market not only in a theoretical but also in a perceptible manner.

In the present case the application made by the undertaking UNEF, the intervention of the undertaking Leissner and the previous course of conduct of Grundig and Consten in respect of these undertakings is proof that the restriction on competition brought about by the prohibited agreements is not imperceptible. The reference to the legal situation of exclusive agreements in the Member States, even assuming the assertions of the intervener to be correct in that respect, are not relevant in the present case for the interpretation of the Community rules on competition, for the rules of the EEC Treaty must comply with requirements which do not exist within a purely national context. In particular, as opposed to conditions existing in a Member State, where absolute territorial protection for various dealers is not attainable, a system of exclusive concessions with absolute territorial protection for various dealers is not attainable, a system of exclusive concessions with absolute territorial protection for territories coinciding with those of Member States may lead within the Common Market to the artificial maintenance of the various national markets and obstacles to trade which impede the establishment of the Common Market.

Both applicants state that the system of granting exclusive rights, whilst limiting the freedom of action of the parties to the contract, has allowed an increase in competition in the Common Market between the various makes. In consequence the application of the prohibition in Article 85 (1) to exclusive distribution agreements would result in restrictions on competition from this point of view. In these circumstances the Commission, before holding Article 85 (1) to be applicable, should have considered the economic effects of the contract concerned upon competition between the various makes in order to arrive at at general economic assessment.

The *applicant Consten and the German Government* refer particularly to the necessity to avoid a prohibiton *per se* and to apply the prohibition by relying upon a 'rule of reason', and accuse the Commission of having regarded the prohibiton as lawful in the absence of such an examination whilst restricting itself to a reference to the provisions in Article 85 (3) regarding exemptions.

The applicant Consten criticizes this artificial division of Article 85 into two parts: prohibition and exemption from prohibition. Article 85 should be applied simultaneously as a whole. It would be quite impossible for the decision taken under paragraph (3) to have any retroactive effects were there any substantial failure to comply with the formalities of notification. According to the applicant this system, based upon an artificial partitioning of Article 85, amounts a blatant infringement of the Treaty. Lastly the narrownesss of the exceptions laid down in paragraph (3) and particularly the difficulty of proving negatives necessitate a more 'reasonable' interpretation of paragraph (1).

The *defendant* replies that not only does the agreement in question restrict the freedom of action of the contracting parties on the market but it also has repercussions which alter the position of other undertakings and of consumers on the market. All the undertakings established in France see their range of choice limited since they cannot by the applicant's products from other dealers, particularly from German dealers. The prohibition on exporting imposed on Consten also affects its business partners as well as the undertakings and consumers of other countries in the Community. Since the existence of these two restrictions is enough to justify its decision, the defendant did not consider it necessary to make a more detailed enquiry.

The defendant takes issue in particular with the argument of the applicant that, for the purposes of applying Article 85 (1), it is required to draw up a sort of economic balance sheet setting out the alleged advantages and disadvantages of restrictions on competition. It mentions in this respect that the system established by Article 85 is different from the American system where the criterion of the 'rule of reason' was developed. Since the American anti-trust rules consist of provisions unqualified by any exceptions, the authorities whose duty it was to apply them found themselves obliged to seek to mitigate those provisions by taking into account the degree of distortion of competition. In consequence during the preliminary enquiries they regularly consider in what area and between what persons there is rivalry for the purchase and the sale of products which answer a particular need. Since Article 85 by contrast contains a general prohibition (paragraph (1)) together with an exception (paragraph (3)), the exemption of agreements which come within the sphere of application of the general prohibition cannot be finally decided except within the framework of paragraph (3) which allows these various factors to be taken into account. It is thus only in relationship to the last condition imposed by this provision (the undertakings in question must not be able to eliminate competition in respect of a substantial part of the products in question) that it may be necessary to investigate the degree of competition remaining.

The *applicant Grundig* replies that the purpose of a sole distribution agreement in international trade is that of creating new competitive relationships by enabling producers of another country to take part in competition beyond their national frontiers. International commerce requires producers selling abroad to entrust the distribution of its products and the defence of its interests to a responsible representative who knows his market and has the resources necessary for the task. That is where the meaning and economic justification of exclusive distribution is to be found and this remains the same, independently of the legal form taken by the sales organization chosen by each of these producers, whether such form be that of a branch or an agency or of a dealer using his own name. It is therefore unjustifiable to treat these types of sales organizations in different ways.

The *Italian Government* too considers that the choice of legal form for a sales organization is made in accordance with prevailing circumstances and cannot change the character of the economic phenomenon and the necessity for the producer to avoid any disorganization in the distribution of his products on the market.

The *defendant* criticizes the distinction made by the applicant Grundig between the object of and the means employed in the agreement for the purposes of the application of Article 85 (1). The object cannot be confined just to the purely subjective intention of the parties, that is to say, to the

purpose envisaged by the agreement, but it must include also those objectives which are no more than instruments for use in the achievement of a distant goal. In consequence, the intensification of competition on a horizontal plane by means of absolute territorial protection incompatible with the requirements of the Treaty does not permit an agreement to be accepted as lawful by virtue of its object alone.

The defendant is opposed furthermore to the idea, which is also supported by the Italian Government, that independently of the method of distribution which he has chosen the manufacturer should be able to exercise an influence on the disposal of the goods at each stage of distribution. Article 85 is intended in fact to guarantee competition on the market including competition at the stage of distribution. However, the system of competition protected by this provision is founded upon the conviction that in principle the effects of competition lead from a general economic point of view to organizing the market in their own interests. To the extent to which the manufacturers sell goods themselves or through commercial representatives in the legal sense, they do not come within the field of the prohibition of agreements; but as soon as they entrust distribution to independent traders acting in their own name and at their own risk the situation is different even from the economic point of view.

The *applicant Grundig* states in addition that the Commission is wrong to criticize the fact that French purchasers are compelled to buy from a single importer. In fact, even if the sole distributorship contract were abolished, that situation would not be changed from the point of view of competition because the applicant itself would then be the only one offering Grundig products to those engaged in subsequent stages of the marketing process, as is the case in Germany. The applicant's obligation to sell only to Consten does not therefore limit competition to the detriment of French purchasers.

The *defendant* objects that the prohibition of the disputed contract alters the situation of French purchasers who can buy Grundig products from other wholesalers, particularly in Germany, even if the applicant Grundig keeps to its principle of delivering directly only to Consten. It is in fact above all the applicant's undertaking not to deliver in France, even indirectly, which constitutes the basis of the absolute territorial protection of Consten and of its monopoly.

(b) *The complaints concerning the difference of treatment between independent concessionnaires and commercial representatives*

The *applicant Grundig* emphasizes that in its announcement of 24 December 1962 concerning commercial representatives (Official Journal, 1962, p. 2921) the Commission stated that sole distributorship contracts made with agents, sole representatives and commission agents are not covered by the prohibition laid down in Article 85 (1) of the Treaty. According to the applicant the reasons which the Commission gave in this respect are equally valid in respect of sole distributorship contracts made with dealers acting in their own name and on their own account. As the recent German case-law of the Bundesgerichtshof has emphasized, there has been an evolution which has resulted in these dealers themselves being incorporated into the commercial organization of the manufacturer and from the economic point of view fulfilling numerous functions which are normally carried out by commercial representatives. Futhermore under civil law important provisions of the law concerning commercial representatives are now being applied by analogy in most of the Member States to traders acting on their own account.

The applicant maintains lastly that both in the case of the independent concessionnaire and that of the commercial representative there is only one offeror in the market. The result is that neither on the horizontal plane nor on the vertical plane are the conditions of competition different in the two cases.

The *defendant* replies that it is not possible *a priori* to exclude the possibility that sole distributorship agreements made with representatives in the proper meaning of the term are covered by the prohibition laid down in Article 85. According to the announcement quoted by the applicant the

only contracts not affected by the prohibition are those made with representatives whose functions are genuinely no more than auxiliary and who in particular do not personally assume risks as do independent concessionnaires. Moreover what is involved here constitutes an exception to the application of the principle of prohibition, an exception which cannot be applied by analogy other than to those persons mentioned by the said announcement.

The case-law quoted by the applicant refers only to social objectives and therefore cannot have any bearing upon the application of rules of competition.

The *applicant Grundig* states that the prohibition of sole distributorship contracts concluded with traders working on their own account would necessarily lead to a policy which without any important economic reason would alter relationships under private law, with the sole purpose of escaping the prohibition: as far as possible, sales would be entrusted to exclusive representatives or even to non-independent branches integrated into the producer undertaking which would be possible only for large undertakings so that only small or medium undertakings would in the final outcome be affected by the prohibition. consequences would be incompatible with the objects of Article 85 of the Treaty.

As to the alleged encouragement of the tendency towards concentration resulting from the prohibition of the disputed agreements the *defendant* states that this is not a matter of an interpretation of the law but of an interpretation of economic policy and, as such, without any importance in the context of the present proceedings. Furthermore it is the sole distributorship agreement with absolute territorial protection which lead to concentration at the level of the wholesale trade.

2. The concept of 'agreements...which may affect trade between Member States'

Both applicants and the German Government state that the Commission interpreted wrongly the second condition of Article 85 (1) which among the agreements restricting competition prohibits only those which may affect trade between Member States. The applicants emphasize that from 1957 to 1963 the increase of turnover in the trade between Grundig and Consten was more than 4 000%, increasing from 500 000 DM to 22 700 000 DM. If the Commission intended to maintain that in spite of this there has been an impediment to Franco-German trade it should have shown that trade between the Member States would have been more favourable, that is to say, more intense, without the agreement under criticism.

The *applicant Consten* starts from the proposition that, since freedom of trade and of contract constitutes a fundamental rule of law in France and other Member States and since Article 85 (1) lays down a restrictive rule which derogates from the general law, it is necessary to interpret that Article restrictively because it should have the least possible effect on these fundamental freedoms. For this purpose it is necessary to take into account in the first instance the results of economic agreements and not of abstract formulations describing the means employed.

Seen from this point of view, in order that the prohibition of Article 85 (1) should be applicable it is not sufficient, according to the *two applicants*, that an obstacle to competition should lead to trade between the Member States developing in conditions differing from those in which it would develop without this limitation, but it is necessary that the limitation should produce unfavourable effects on that trade. The different interpretation accepted by the contested decision would virtually mean that the two conditions for the application of Article 85 (1) were identical: the restriction on trade between States would in fact be the logical consequence of any effective restriction on competition.

The *defendant* replies that the increase in exports of Grundig equipment from Germany does not by itself mean that this agreement was not capable of 'affecting' trade within the meaning of Article 85 (1). It is not the purpose of the rules of competition to encourage an increase in the exchange of goods between Member States which must be achieved by the progressive elimination of customs duties and quantitative restrictions, but they are intended to

protect the trade in liberalized goods against everything which might distort competition. If decisive importance is attached to the quantitative increase in trade the consequence would be that export and specialization cartels between undertakings established in various Member States, cartels which lead naturally to an increase in trade, would be excluded from the Community's policy on cartels. Moreover, the prohibition of the practices of duming and aids granted by states shows the inconsistency of the opposing argument.

The defendant states further that the figure mentioned by the applicant concerning the increase in exports, assuming it to be correct, can be explained above all by the quantitative restrictions on the import of electro-technical appliances existing in France before the entry into force of the Treaty, and by the consequent small volume of exports to France in 1957. The elimination of quantitative restrictions during the years 1960–1962 was the main cause of the favourable development of Grundig exports to France. If other undertakings had been able to obtain Grundig appliances from Germany, trade would probably have developed even more favourably, because their competition would have encouraged the sole representative to provide improved services.

The defendant disputes, lastly, that according to its 'qualitative' concept any restrictions on competition may affect trade between Member States within the meaning of Article 85 (1). That is not the case in respect of the restrictions on competition which only have repercussions within a Member State.

The *German Government* maintains that in order to show the existence of a restriction on trade between Member States it is necessary to take account of all the commercial relationships concerning the supply of and demand for goods of the same type; it is not sufficient to take into consideration the effects of an agreement on external commerce of products of a single brand.

The *defendant* replies that it took account of the influence of the restriction on competition on inter-State trade on the basis of qualitative criteria. The purely quantitative approach of the intervener fails to recognize that the criterion which makes it possible to determine which agreements may affect trade between Member States is of impotance as a criterion of competence: it serves to mark out, in respect of competition, the area covered by Community rules and the competence of national authorities. Reliance on quantitative criteria would unduly restrict the field of action of Community law and create legal uncertainty because of the indeterminate and debatable nature of the said criteria.

E — *The conditions for the application of Article 85 (3)*

1. Questions of principle

The *defendant* maintains that the provisions of Article 85 (3) are exceptional in nature within the system of rules on competition in the EEC Treaty. It thus follows that:

— in case of doubt, the exemption must be refused;
— the requirements as regards giving reasons are fewer in case of refusal than when exemption is granted.

The *applicant Grundig* considers that this objection has no concrete nature, because the defendant has not stated how the argument of the applicant was based upon a misunderstanding of the exceptional nature of this provision. Furthermore, according to the principles laid down with regard to the ECSC in the judgment in Case 1/58, the prohibition and the exemption, considered as connected facts in a single system, are situated on the same level, the possibility of derogations being closely linked to the application of the prohibition. These considerations should be all the more valid under the EEC Treaty, since the importance of the derogating provision in relation to the prohibition is even greater there than in the ECSC Treaty.

In case of doubt on the question whether the conditions for application of the exemption are fulfilled, it is for the Commission to elicit the factual situation as far as possible and necessary and to justify the findings of fact upon which the negative decision rests. Lastly the argument of the Commission that the obligation to give reasons for its decision is diminished in the case of a refusal

to apply Article 85 (3) finds no support in the case-law of the Court.

The *defendant* replies that it has made no statement upon the relative importance of paragraph (1) and paragraph (3) of Article 85. It does not dispute that the prohibition on cartels and the provision which derogates from it are connected elements of one and the same system. As to its duty to give information, the Commission maintains that it did not confine itself in the present case to the information provided by the parties concerned but that it carried out inquiries itself by referring to national authorities to the extent necessary for the solution of the question of exemption.

As regards stating the reasons for decisions concerning cartels it appears from the case-law of the Court concerning the ECSC Treaty that there are special requirements concerning the statement of reasons when the decision departs from the prohibition on cartels.

2. The complaints regarding the criterion of the improvement of production and of distribution of goods

Both applicants criticize the reservations contained in the contested decision in respect of the fact that the sole representatives are responsible for publicity: according to the decision that practice does not contribute to improving the distribution of goods and is concerned only with the division of overheads between Grundig and Consten.

According to the two applicants it is not in the present case a simple question of apportioning overheads; the practice which was criticized is justifiable by the necessity, for the producer who wishes to have effective publicity, of procuring the assistance of persons who know the market and have a commercial network in the country into which the product is to be introduced.

The *applicant Grundig* observes in particular that since it has to build a sales organization in more than 120 countries it could not have undertaken on its own account the publicity in connexion with launching its products on the market to the same degree as the sole representatives. Furthermore, if it had been able to do it, it would have had higher costs to bear in France than in Germany and this would necessarily have had repercussions on the prices charged on the French market.

The *defendant* replies that during the period under consideration Grundig products had already been introduced into France and that there could no longer be any question of the cost of initial publicity.

Although accepting that advertising effected directly by the concessionnaire may be more suitable than that carried out by the manufacturer, the defendant criticizes the manner in which in the present case advertising expenses are divided. Since the prices fixed by Grundig for Consten were the same as those charged in Germany and since the latter prices have already taken into account Grundig's advertising in Germany, the products distributed in France with the help of absolute territorial protection are doubly burdened by advertising expenses. This amounts to a partitioning of the markets contrary to the principles of the Common Market, which does not contribute to an improvement in the efficiency of undertakings.

3. A fair share in the benefits for consumers

(a) According to the *applicant Consten* the Commission should have considered the application of the Treaty in respect of the situation which will exist on the expiration of the transitional period, since all the extrinsic factors which still distort competition between Member States, such as differences in legislation, customs duties, etc., will have disappeared. At that time, should it be that different prices are charged for the same product in the various Member States, consumers will make their purchases from retailers in the countries offering the lowest prices.

The *defendant* replies that Article 85 is already applicable during the transitional period, in the specific conditions existing during that period. Furthermore even in the ideal situation at the expiration of the transitional period purchases by private individuals in states other than those in which they reside can be only of an occasional nature or will not be possible on a systematic basis except in frontier areas.

According to the *Leissnèr company* the applicant's argument amounts to main-

taining that before 1970 it is impossible to know exactly the effect upon the market of the contract in question and that it is therefore necessary to wait until that date to decide upon the question of the applicability to the present case of Article 85.

(b) The *German Government* maintains that to the extent to which Consten is in competition with other undertakings selling similar products of different makes it is necessary to consider as an accepted fact that the French consumers have a fair share in the advantages deriving from the contract in that they benefit from that competition (reduction in prices, improvement in the quality of goods and in distribution). Since the decision does not exclude the existence of that competition, the refusal to apply Article 85 (3) is unfounded.

The *defendant* replies that this complaint fails if it is admitted that the restriction on competition between Grundig products must be taken into account, the competition between manufacturers not being sufficient by itself to be capable of providing the creation in France of 'market prices' for Grundig appliances (see above D 1 (a)).

(c) The *applicant Grundig* maintains that the Commission cannot base its refusal on the argument that the sole representatives, because of absolute territorial protection, could in theory demand higher prices than they could have done in the absence of that protection. The Commission failed therefore to consider an essential question, namely whether in the present case there was an advantage for the consumers. Contrary to Article 85 (3) it also disregards the fact that the fixing of the prices charged by Consten is determined among other things by the competition which plays a considerable rôle on the French market: it has been in fact following the intensification of horizontal competition that French consumers have benefited since the institution of the Common Market from reductions of the order of 40%. In these circumstances, taking into account reliable indices which allow the inference to be drawn that the activities of sole representatives have contributed considerably to this reduction, the *two applicants* assert that if the Commission had had doubts concerning the relationship of cause and effect between the activities of the sole representatives and that improvement in prices, it should have clarified the situation by making the inquiry which they had asked for.

The *defendant* replies that it is not for the defendant but for the applicants to give proof of the causes of the reductions in prices which they put forward in order to claim the benefit of exemption from the prohibition on cartels. No such proof having been furnished, the decision rightly declared to be irrelevant the assertion that these reductions were a consequence of the sales organization in question. Furthermore, in its letter of 15 January 1963, Consten recognized the influence of the liberalization of imports on price reductions.

The defendant furthermore rules out the possibility that an expert's report might have been favourable to the applicants, since the difference in price of Grundig appliances in Germany and in France was such that it prevented consumers from having a fair share of the benefits, even assuming that the other conditions imposed by Consten had been very favourable.

The *intervening company UNEF* maintains that it was the cause of the modification made by Consten to its distribution system. It was in fact following the entry into the market by UNEF that Consten had to modify, in respect of its customers, the system practised until that time, which was identical to that which Grundig practised in respect of UNEF. The intervener provides the text of an agreement binding Consten to each authorized distributor of Grundig products to show that all the charges and all the risks including those concerning advance orders were transferred by Consten to the authorized distributors who in their turn benefited from absolute territiorial protection, with the consequence that the prices had been frozen at the highest level.

Both applicants dispute this assertion of the intervener.

The *applicant Consten* states that the contract of an authorized Grundig distributor to which the intervener refers amounted only to a trial, which was abandoned in 1961 for reasons quite different from the activities of UNEF. The entry into the market of UNEF had no noticeable consequence upon Consten's system of distribution. In this

respect it points out that in 1963 UNEF sold only a little more than 1% on the French market for tape-recorders and dictating machines.
The *applicant Grundig* contests the assertion of the intervener that by a system of exclusive distribution at the regional level Consten fixed prices as high as possible. Furthermore the intervener sold the equipment at the same price as Consten. The applicant goes on to state that the development of Consten's prices was determined by other factors than the influence exerted by the intervener, such as that arising from the fact that retail prices had declined by 26.2% during the three half-years preceding the entry of UNEF into the market, and by 2.2% only during the three half-years which followed, whereas the resale prices declined by 26.1% before the arrival of UNEF and only by 9.4% afterwards; and that finally the same price reductions occurred for television sets, which are not sold by UNEF.
(d) *Both applicants* complain that the Commission based its examination on price differences and neglected the fact that the fair share of consumers in the resulting benefit may show itself in other spheres than that of price, such as for example the size of the distribution network, the efficiency of guarantee and of after-sales services and even improvement in their range of choice. The applicants argue that at equivalent prices Consten offered benefits far better than those of the parallel importers.
The *defendant* replies that it does not overlook the fact that the advantages which the consumers enjoy from the guarantee and after-sales services and from the maintenance of stocks play an important rôle in respect of the fair share of consumers in the benefits, but it emphasizes the necessity for a certain relationship between these factors and the price asked of the consumers. In the present case the excessively high prices of Grundig equipment sold in France excludes any reasonable relationship in this respect.
The *defendant and the intervener UNEF* observe furthermore that UNEF set up its own guarantee service which contributed through competition to an improvement in the guarantee conditions offered by Consten. UNEF also distributed all Grundig appliances with the exception of television sets; it extended its commercial activity to the provinces and it had stocks which included the whole range of spare parts and accessories.
Because of the competition to be expected at the wholesale stage, by reason of the increase in the numbers of parallel importers the *defendant* mentions that the latter will not be able to sell Grundig products in France unless they offer the retail trade conditions at least equivalent to the services provided by Consten.

4. The necessity for absolute territorial protection

(a) *General*

The *German Government* complains that the Commission on the one hand did not consider whether the contribution to the improvement in production and distribution which it admits to have been consequent upon the agreements in question could have been obtained without the restrictions imposed upon the undertakings concerned, and that on the other hand it misinterpreted the arguments of the applicants in this respect. The Commission confined itself to stating that Consten, even without absolute territorial protection would be in a position to act as sole representative. But it did not argue that the factors whose favourable effects upon the market (advance orders, guarantee and after-sales service) it has recognized could be maintained intact without absolute territorial protection.
The *defendant* replies that the indispensable nature of the restriction cannot be evaluated from a subjective point of view by taking account of the particular situation of the parties to the agreement because the authorization of restrictions could thus become the reward for inadequate economic performance. According to Article 85 (3) only restrictions on competition, the positive effects of which are greater from the economic point of view than the disadvantages, and which are objectively necessary to obtain certain improvements, are to be authorized. That is not the case in the present instance. The intervener is wrong in starting from the proposition that it is for the Commission to show that the

restrictions are not indispensable. It is on the contrary for the undertakings which ask for the benefit of the exemption to prove that the restrictions are indispensable.

(b) *Advance orders*

The *applicant Grundig* points out that in accordance with the contract in dispute Consten is required to give a firm order for quantities sold annually six to eight months in advance. This advance order allows production to be planned and prices to be calculated, thus enabling the best use to be made of the undertaking's capacity and also making price reductions possible. This requirement carries with it, however, a serious risk for the sole representative which bears the consequences of errors in its forecasts. The representative must thus forecast market trends very carefully, which is possible only by excluding as far as possible uncertain factors. If parallel imports are permitted it becomes impossible to make this quantitative forecast, since the parallel importer will always buy where, for whatever reason (for example compulsory sale, bankruptcy liquidation), the most favourable conditions are found; furthermore he sells products of any make and according to the circumstances goes from one to another, and this involves another uncertain factor. Without enjoying absolute territorial protection Consten would thus not be able to place a firm order six to eight months in advance for its annual requirements.

The *applicant Consten* also complains that the decision disregards the system and importance of advance orders.

The *defendant* denies that parallel imports have the effect of preventing the sole representatives from making their advance orders. The business relationships of parallel importers are not purely occasional in character; as from the time when parallel imports are no longer impeded, orders made by parallel importers will lead the German wholesalers to take account of them in their advance orders.

In any case any increase, because of parallel imports, of risks borne by Consten in respect of advance orders could be compensated for by a sufficient modification on the part of Grundig of 'ex works' prices for its deliveries to Consten. Furthermore, if the sole importer lowers its prices, parallel imports will decline and the risks related to advance orders will be reduced accordingly.

The *applicant Grundig* denies that the German wholesalers for their part give advance orders. Grundig's letter of 23 April 1964, from which the defendant claims to draw this conclusion, confines itself to stating that the German wholesalers give their orders not according to the needs of the French market but to their own sales forecasts. In Germany it is not the wholesalers but the sales branches situated throughout the distribution territory and belonging to Grundig which undertake the duty of placing advance orders.

The *defendant* replies that during the proceedings before the Commission UNEF stated that German wholesalers must place advance orders. This was not disputed by the applicant. Thus it was quite proper for the contested decision to declare that the German wholesalers gave advance orders.

The *intervener UNEF* asserts that it also is subject to the system of advance because no German wholesaler would be able to provide it with the quantities which it needs if they had not been incorporated into its advance orders, since Grundig only manufactures on firm orders and only delivers to traders who have placed their orders in advance. The intervener maintains that the German wholesalers enjoy no absolute territorial protection since no area is reserved to them and that they may sell their goods anywhere on German territory. These wholesalers are required to place advance orders covering three to six months. That shows that it is not necessary to benefit from absolute territorial protection to conform to the system of advance orders.

The *applicant Grundig* objects that the intervener UNEF has not demonstrated by adequate documentary evidence that it actually places binding advance orders. It maintains that in Germany Grundig products are on the whole distributed by branches belonging to the Grundig company itself, each one of which is responsible for a particular territory and is entrusted with forward planning. Furthermore Germany also enjoys absolute territorial protection as

a result of the fact that all the sole representatives outside Germany are bound by prohibitions against exporting.
The *applicant Consten* points out that UNEF, lacking knowledge of the planning of Grundig production, could not assume responsibilities connected with the preparation of that programme.
The *German Government* maintains that the fact that the German wholesalers enjoy no territorial protection cannot be relied upon, as is done in the statement of reasons for the disputed decision, in order to deny the indispensable nature of Consten's territorial protection. Consten fulfils in France the same functions as Grundig's branches in Germany and it cannot therefore be compared to German wholesalers. It has not been proved that the sales areas of branches overlap one another and that for this reason they do not enjoy absolute territorial protection.

(c) *Costs of entering the market*

The *applicant Grundig* states that because of the pressure on prices exerted by horizontal competition the sole concessionnaire, by bearing considerable launching expenses, assumed a great risk because it is not possible to know in advance if the conditions of the market will enable these expenses to be amortized. It is therefore the exclusive distributor who should reap the benefit of the efforts which he has made, and not his competitors such as parallel importers of the same appliances. If that guarantee cannot be given it would be impossible to set up a system of exclusive sales because no exclusive distributor would be preapared to bear the costs of entry upon the market; that is even more the case since parallel importers, who do not bear these costs, are in consequence able to offer even lower prices. In view of the fact that the Commission accepts that costs of entering the market should be amortized later, it should have considered whether absolute territorial protection is not indispensable, at least during a proper transitional period.
The *applicant Consten* makes similar criticisms and in particular complains that the contested decision contradicts the principles of profit and of risk which are the basis of a liberal economy.

The *defendant* raises the objection that before the adoption of the disputed decision it was not aware of costs of entering the market which had not been amortized. It had no reason to initiate an inquiry of its own motion on this subject. As review by the Court concerns the proper basis of the decision in fact and in law at the date on which it was adopted, such examination must be based only on the facts which were known to the Commission at that date or which the latter was required to discover of its own motion. In consequence this submission is inadmissible.
The submission is also unfounded both in law and in fact. The principles of an internal market forbid the use of private agreements restraining competition so as to make special costs borne within a certain area chargeable only to the consumers in that area. The argument of the applicant Grundig comes down to saying that the risks of an undertaking must be borne by the public by means of protection against competition until the complete amortization of the expenses which they entail.
In any case it has not been proved that, in the absence of absolute territorial protection, certain sole concessionnaires are not inclined to undertake the placing of branded goods on the market. The very considerable number of notifications of such contracts to the Commission appears to prove the contrary. In the present case Consten's turnover shows furthermore that the stage of opening the French market to Grundig's products has already passed.
Lastly the concept of a liberal economy defended by Consten according to which it would not undertake the risks of the market unless it were certain to be able to meet its obligations would inevitably lead to a monopoly.
The *applicant Grundig* argues that the opening of the French market to its products is far from being completed. But the supplying of the most distant regions, which the exclusive representative is bound to ensure, is made extremely difficult by the actions of parallel importers who limit their activities to the Paris area. The sole distributor would not be able to bear the costs of setting up new after-sales service departments.
The defendant objects that this argument

was not relied upon either during the inquiry or during the hearing and that it is consequently inadmissible in the present proceedings. It is also unfounded because the existence of a few rare gaps in Consten's distribution network does not justify granting to that company protection for the whole of the territory covered by the contract. Lastly, if Grundig, because of the duties which it entrusted to it, gave Consten an adequate discount on the 'ex works' prices, Consten would be able to undertake all its contractual obligations even without absolute territorial protection.

(d) *Observation of the market*

The *applicant Grundig* maintains that the specialized knowledge which the products in question require and the necessity for rapid adaptation to alterations in various types of equipment in that field preclude specialized organizations to which the contested decision refers from being able to replace the study of the market carried out by the sole representatives in an adequate manner.
The *defendant* admits that the economic and technical observation of the Franch market by Consten may contribute to an improvement in the production and distribution of goods; that cannot, however, lead to the assertion that the protection in dispute is indispensable in order to enable the sole representative to carry out its duties.
The *applicant Grundig* replies that if the sole distributor had not the benefit of absolute territorial protection it would not be inclined to undertake the expense necessitated by observation of the market, because the results of its efforts would benefit parallel importers who have not to bear such charges. In consequence absolute territorial protection is also indispensable for the purposes of market observation.
The *defendant* points out that this argument by the applicant Grundig appears for the first time in the reply. It is thus a fresh issue and is inadmissible. The statement that territorial protection is indispensable for the observation of the market is equally unfounded. Observation of the market must in fact enable the technical improvements desired by French consumers to be made to products intended for export to France. This advantage will benefit only Consten since Grundig delivers only to it equipment provided with a special accessory for France.

(e) *The guarantee and after-sales service*

Both applicants state that most retailers are not in a position to ensure the execution of work under guarantee and that it is the sole representative who must carry it out. The latter cannot refuse to carry out this work even on equipment which has been imported by others, because such refusal would have troublesome consequences for the good reputation of Grundig products which would in the long run lead to a reduction in the turnover of the sole representative.
According to the applicants, the Commission totally omitted to consider the question whether it is possible to ensure guarantee and after-sales service without complete territorial protection. The opening of the French market to parallel importers compels sole distributors to refuse to carry out after-sales work on equipment imported by parallel importers; thus the elimination of complete territorial protection would bring to an end the guarantee of after-sales repairs and therefore produce results contrary to the interests of the consumer. Furthermore the mere fact that some parallel importers do not provide these services or provide them in an inadequate manner may have unforeseeable damaging consequences upon the reputation of Grundig products and extremely unfavourable effects upon the development of the turnover. The Grundig company has thus the greatest interest in ensuring that the importer does not decide individually whether or not he will provide the guarantee and after-sales service, and in compelling him contractually to provide these services.
The *defendant* replies that it may reasonably be assumed that retailers are not disposed constantly to purchase appreciable quantities of equipment for which guarantee and after-sales services are not assured.
On the other hand the contested decision has clearly distinguished the guarantee service from the after-sales service for which payment is made. In the case of the latter

service it is a question of a remunerated activity which Consten carries on for profit, even as regards equipment coming from parallel imports. As to the free guarantee service, the expenditure which it involves is included in the calculation of sale prices 'ex works'. In fact in Germany it is the manufacturer who pays the cost of the guarantee service. Since the Grundig company fixes the same prices for exports to France, it could apply the same guarantee system in France. Furthermore according to the figures provided by Consten the cost of repairs which the latter has carried out free of charge for equipment sold by parallel importers is negligeable, seeing that the aggregate costs borne by Consten for the after-sales service and guarantee service amounts for the year 1963 to 1.18% of its turnover.

The *intervener UNEF* states that it sells all over France and that it provides a guarantee and after-sales service. It is thus able to ensure regular and satisfactory distribution for the consumer and for the manufacturer provided that supplies are not refused to it. It gives a guarantee card bearing its printed letter-heading with every piece of equipment sold by it in order to prevent confusion with Consten.

The *applicant Consten* objects that although UNEF sells throughout France it does not ensure a marketing network and satisfactory services. It sells stocks of equipment which are outdated and unsuitable for the purposes of the French consumer. Furthermore the UNEF company has never quoted precise statistical facts concerning the size of its stocks of spare parts and of the Staff of its after-sales service.

IV — Procedure

By order of 29 June 1965 the Court, considering that Cases 56/64 and 58/64 were connected in their subject-matter, joined them for the purposes of procedure and of judgment, none of the parties having raised objections in this respect.

By Order of the Court of 6 May 1965, the Italian Government was authorized, at its request, to use the Italian language for the drafting of its statements and for its oral submissions.

The applicant Consten in its observations on the further statement of the Italian Government presented on 29 October 1965 asked the Court to refrain from deciding Case 56/64 until it had given judgment on Application 32/65 made by the Italian Government, because the present proceedings are only a particular case, the solution of which depends directly upon the solution of questions of general scope raised by the abovementioned application of the Italian Government. By letter of 29 November 1965, the applicant stated that it withdrew this request.

At its hearing on 10 February 1966, the Court, upon hearing the preliminary report of the Judge-Rapporteur and the views of the Advocate-General, decided to ask the defendant to produce certain documents before the opening of the oral procedure. These documents were duly produced.

The oral submissions of the parties to the main action and the interveners were heard at the hearings on 7, 8 and 9 March 1966.

The Advocate-General delivered his opinion at the hearing on 27 April 1966.

Grounds of judgment

The complaint relating to the designation of the contested measure

The applicant Consten pleads infringement of an essential procedural requirement since the text of the contested measure is described in the Official Journal as a directive, whereas a measure of this type cannot be addressed to individuals.

Where a measure is directed to specific named undertakings, only the text which is notified to the addressees is authentic. The text in question includes the words 'The Commission has adopted the present decision'.

This submission is therefore unfounded.

The complaints regarding violation of the rights of the defence

The applicant Consten complains that the Commission violated the rights of the defence in that it failed to communicate to it the content of the complete file.

The applicant Grundig makes the same complaint, in particular with regard to two notes from French and German authorities which the Commission took into account in reaching its decision.

The proceedings before the Commission concerning the application of Article 85 of the Treaty are administrative proceedings, which implies that the parties concerned should be put in a position before the decision is issued to present their observations on the complaints which the Commission considers must be upheld against them. For that purpose, they must be informed of the facts upon which these complaints are based. It is not necessary however that the entire content of the file should be communicated to them. In the present case it appears that the statement of the Commission of 20 December 1963 includes all the facts the knowledge of which is necessary to ascertain which complaints were taken into consideration. The applicants duly received a copy of that statement and were able to present their written and oral observations. The contested decision is not based on complaints other than those which were the subject of those proceedings.

The applicant Consten maintains that the decision is also vitiated by violation of the rights of the defence in that it did not take account of the principal submissions made by it to the Commission, in particular of requests for further inquiries.

In non-judicial proceedings of this kind the administration is not required to give reasons for its rejection of the parties' submissions.

It does not appear therefore that the rights of the defence of the parties were violated during the proceedings before the Commission.

This submission is unfounded.

The complaint concerning the inclusion in the operative part of the decision of the finding of infringement

The German Government supports the submission that there was an infringement of an essential procedural requirement on the ground that the finding that an infringement of Article 85 of the EEC Treaty had been committed should have been included solely in the preamble to and not in the operative part of the decision.

That finding constitutes the basis of the obligation of the parties to terminate the infringement. Its effects on the legal situation of the undertakings concerned do not depend on its position in the decision.

This complaint therefore does not disclose any legal interest requiring protection and must consequently be rejected.

The complaints concerning the applicability of Article 85 (1) to sole distributorship contracts

The applicants submit that the prohibition in Article 85 (1) applies only to so-called horizontal agreements. The Italian Government submits furthermore that sole distributorship contracts do not constitute 'agreements between undertakings' within the meaning of that provision, since the parties are not on a footing of equality. With regard to these contracts, freedom of competition may only be protected by virtue of Article 86 of the Treaty.

Neither the wording of Article 85 nor that of Article 86 gives any ground for holding that distinct areas of application are to be assigned to each of the two Articles according to the level in the economy at which the contracting parties operate. Article 85 refers in a general way to all agreements which distort competition within the Common Market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the Treaty does not make any distinction.

Furthermore, the possible application of Article 85 to a sole distributorship contract cannot be excluded merely because the grantor and the concessionnaire are not competitors *inter se* and not on a footing of equality. Competition may be distorted within the meaning of Article 85 (1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy. This applies all the more, since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of Article 85.

It is thus possible that, without involving an abuse of a dominant position, an agreement between economic operators at different levels may affect trade between Member States and at the same time have as its object or effect the prevention, restriction or distortion of competition, thus falling under the prohibition of Article 85 (1).

In addition, it is pointless to compare on the one hand the situation, to which Article 85 applies, of a producer bound by a sole distributorship agreement to the distributor of his products with on the other hand that of a producer who includes within his undertaking the distribution of his own products by some means, for example, by commercial representatives, to which Article 85 does not apply. These situations are distinct in law and, moreover, need to be assessed differently, since two marketing organizations, one of which is untegrated into the manufacturer's undertaking whilst the other is not, may not necessarily have the same efficiency. The wording of Article 85 causes the prohibition to apply, provided that the other conditions are met, to an agreement between several undertakings. Thus it does not apply where a sole undertaking integrates its own distribution network into its business organization. It does not thereby follow, however, that the contractual situation based on an agreement between a manufacturing and a distributing undertaking is rendered legally acceptable by a simple process of economic analogy—which is in any case incomplete and in contradiction with the said Article. Furthermore, although in the first case the Treaty intended in Article 85 to leave untouched the internal organization of an undertaking and to render it liable to be called in question, by means of Article 86, only in cases where it reaches such a degree of seriousness as to amount to an abuse of a dominant position, the same reservation could not apply when the impediments to competition result from agreement between two different undertakings which then as a general rule simply require to be prohibited.

Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85 (1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process.

The submissions set out above are consequently unfounded.

The complaint based on Regulation No 19/65 of the Council

The applicant Grundig raises the question whether the prohibition in Article 85 (1) was applicable to the agreement in question before the adoption of Regulation No 19/65 of the Council concerning the application of Article 85 (3) to certain categories of agreements.

This submission was relied upon by the applicant for the first time in the reply. The fact that this regulation was adopted after the application was brought does not justify such delay. In fact, this submission really amounts to a claim that

before the adoption of the regulation the Commission should not have applied Article 85 (1) since it lacked the powers to grant exemptions by categories of agreements.

In view of the fact that the situation in question existed before Regulation No 19/65 was adopted, the regulation cannot constitute a fresh issue, within the meaning of Article 42 of the Rules of Procedure, capable of justifying the delay in indicating it.

The complaint is therefore inadmissible.

The complaints relating to the concept of 'agreements... which may affect trade between Member States'

The applicants and the German Government maintain that the Commission has relied on a mistaken interpretation of the concept of an agreement which may affect trade between Member States and has not shown that such trade would have been greater without the agreement in dispute.

The defendant replies that this requirement in Article 85 (1) is fulfilled once trade between Member States develops, as a result of the agreement, differently from the way in which it would have done without the restriction resulting from the agreement, and once the influence of the agreement on market conditions reaches a certain degree. Such is the case here, according to the defendant, particularly in view of the impediments resulting within the Common Market from the disputed agreement as regards the exporting and importing of Grundig products to and from France.

The concept of an agreement 'which may affect trade between Member States' is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under the prohibition of Community law contained in Article 85; otherwise it escapes the prohibition.

In this connexion, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may 'affect' such trade in the abovementioned manner. In the present case, the contract between Grundig and Consten, on the one hand by preventing undertakings other than Consten from importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting those products to other countries

of the Common Market, indisputably affects trade between Member States. These limitations on the freedom of trade, as well as those which might ensue for third parties from the registration in France by Consten of the GINT trade mark, which Grundig places on all its products, are enough to satisfy the requirement in question.

Consequently, the complaints raised in this respect must be dismissed.

The complaints concerning the criterion of restriction on competition

The applicants and the German Government maintain that since the Commission restricted its examination solely to Grundig products the decision was based upon a false concept of competition and of the rules on prohibition contained in Articlr 85 (1), since this concept applies particularly to competition between similae products of different makes; the Commission, before declaring Article 85 (1) to be applicable, should, by basing itself upon the 'rule of reason', have considered the economic effects of the disputed contrast upon competition between the different makes. There is a presumption that vertical sole distributorship agreements are not harmful to competition and in the present case there is nothing to invalidate that presumption. On the contrary, the contract in question has increased the competition between similar products of different makes.

The principle of freedom of competition concerns the various stages and manifestations of competition. Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85 (1) merely because it might increase the former.

Besides, for the purpose of applying Article 85 (1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.

Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision.

It thus remains to consider whether the contested decision was right in founding the prohibition of the the disputed agreement under Article 85 (1) on the restriction on competition created by the agreement in the sphere of the distribution of Grundig products alone. The infringement which was found to exist by the contested decision results from the absolute territorial protection created the said contract in favour of Consten on the basis of French law. The applicants thus

wished to eliminate any possibility of competition at the wholesale level in Grundig products in the territory specified in the contrast essentially by two methods.

First, Grundig undertook not to deliver even indirectly to third parties products intended for the area covered by the contract. The restrictive nature of that undertaking is obvious if it is considered in the light of the prohibition on exporting which was imposed not only on Consten but also on all the other sole concessionnaires of Grundig, as well as the German wholesalers. Secondly, the registration in France by Consten of the GINT trade mark, which Grundig affixes to all its products, is intended to increase the protection inherent in the disputed agreement, against the risk of parallel imports into France of Grundig products, by adding the protection deriving from the law on industrial property rights. Thus no third party could import Grundig products from other Member States of the Community for resale in France without running serious risks.

The defendant properly took into account the whole distribution system thus set up by Grundig. In order to arrive at a true representation of the contractual position the contract must be placed in the economic and legal context in the light of which it was concluded by the parties. Such a procedure is not to be regarded as an unwarrantable interference in legal transactions or circumstances which were not the subject of the proceedings before the Commission.

The situation as ascertained above results in the isolation of the French market and makes it possible to charge for the products in question prices which are sheltered from all effective competition. In addition, the more producers succeed in their efforts to render their own makes of product individually distinct in the eyes of the consumer, the more the effectiveness of competition between producers tends to diminish. Because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated. The efforts of the dealer are stimulated by competition between distributors of products of the same make. Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market.

It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of Article 85 (1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten) or of the corrections of the criteria upon which the Commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects, can in any way lead, in the face of abovementioned restrictions, to a different solution under Article 85 (1).

The complaints relating to the extent of the prohibition

The applicant Grundig and the German Government complain that the Commission did not exclude from the prohibition, in the operative part of the contested decision, those clauses of the contract in respect of which there was found no effect capable of restricting competition, and that it thereby failed to define the infringement.

It is apparant from the statement of the reasons for the contested decision, as well as from Article 3 thereof, that the infringement declared to exist by Article 1 of the operative part is not to be found in the undertaking by Grundig not to make direct deliveries in France except to Consten. That infringement arises from the clauses which, added to this grant of exclusive rights, are intended to impede, relying upon national law, parallel imports of Grundig products into France by establishing absolute territorial protection in favour of the sole concessionnaire.

The provision in Article 85 (2) that agreements prohibited pursuant to Article 85 shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself. The Commission should, therefore, either have confined itself in the operative part of the contested decision to declaring that an infringement lay in those parts only of the agreement which came within the prohibition, or else it should have set out in the preamble to the decision the reasons why those parts did not appear to it to be severable from the whole agreement.

It follows, however, from Article 1 of the decision that the infringement was found to lie in the agreement as a whole, although the Commission did not adequately state the reasons why it was necessary to render the whole of the agreement void when it is not established that all the clauses infringed the provisions of Article 85 (1). The state of affairs found to be incompatible with Article 85 (1) stems from certain specific clauses of the contract of 1 April 1957 concerning absolute territorial protection and from the additional agreement on the GINT trade mark rather than from the combined operation of all the clauses of the agreement, that is to say, from the aggregate of its effects.

Article 1 of the contested decision must therefore be annulled in so far as it renders void, without any valid reason, all the clauses of the agreement by virtue of Article 85 (2).

The submissions concerning the finding of an infringement in respect of the agreement on the GINT trade mark

The applicants complain that the Commission infringed Articles 36, 222 and 234

of the EEC Treaty and furthermore exceeded the limits of its powers by declaring that the agreement on the registration in France of the GINT trade-mark served to ensure absolute territorial protection in favour of Consten and by excluding thereby, in Article 3 of the operative part of the contested decision, any possibility of Consten's asserting its rights under national trade-mark law, in order to oppose parallel imports.

The applicants maintain more particularly that the criticized effect on competition is due not to the agreement but to the registration of the trade-mark in accordance with French law, which gives rise to an original inherent right of the holder of the trade-mark from which the absolute territorial protection derives under national law.

Consten's right under the contract to the exclusive user in France of the GINT trade mark, which may be used in a similar manner in other countries, is intended to make it possible to keep under surveillance and to place an obstacle in the way of parallel imports. Thus, the agreement by which Grundig, as the holder of the trade-mark by virtue of an international registration, authorized Consten to register it in France in its own name tends to restrict competition.

Although Consten is, by virtue of the registration of the GINT trade-mark, regarded under French law as the original holder of the rights relating to that trade-mark, the fact nevertheless remains that it was by virtue of an agreement with Grundig that it was able to effect the registration.

That agreement therefore is one which may be caught by the prohibition in Article 85 (1). The prohibition would be ineffective if Consten could continue to use the trade-mark to achieve the same object as that pursued by the agreement which has been held to be unlawful.

Articles 36, 222 and 234 of the Treaty relied upon by the applicants do not exclude any influence whatever of Community law on the exercise of national industrial property rights.

Article 36, which limits the scope of the rules on the liberalization of trade contained in Title I, Chapter 2, of the Treaty, cannot limit the field of application of Article 85. Article 222 confines itself to stating that the 'Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85 (1). The power of the Commission to issue such an injunction for which provision is made in Article 3 of Regulation No 17/62 of the Council is in

harmony with the nature of the Community rules on competition which have immediate effect and are directly binding on individuals.

Such a body of rules, by reason of its nature described above and its function, does not allow the improper use of rights under any national trade-mark law in order to frustrate the Community's law on cartels.

Article 234 which has the aim of protecting the rights of third countries is not applicable in the present instance.

The abovementioned submissions are therefore unfounded.

The complaints concerning the failure to hear third parties concerned

The applicants and the German Government state that Article 3 of the operative part of the contested decision applies in fact to the whole distribution of Grundig products in the Common Market. In so doing it is said that the Commission exceeded its powers and disregarded the right of all those concerned to be heard.

The prohibition imposed upon Grundig by the abovementioned Article 3, preventing its distributors and sole concessionnaires from exporting to France, constitutes the corollary to the prohibition on the absolute territorial protection which was established for the benefit of Consten. This prohibition thus does not exceed the limits of the proceedings which culminated in the application of Article 85 (1) to the agreement between Grundig and Consten. Furthermore the contested decision does not directly affect the legal validity of the agreements concluded between Grundig and the wholesalers and concessionnaires other than Consten, but it confines itself to restricting Grundig's freedom of action as regards the parallel imports of its products into France.

Although it is desirable that the Commission should extend its inquiries as far as possible to those who might be affected by its decisions, the mere interest in preventing an agreement to which they are not parties from being declared illegal so that they may retain the benefits which they derive *de facto* from the situation which results from that agreement cannot constitute a sufficient basis for establishing a right for the other concessionnaires of Grundig to be called automatically by the Commission to take part in the proceedings concerning the relationship between Consten and Grundig.

Consequently this submission is unfounded.

The complaints concerning the application of Article 85 (3)

The conditions of application

The applicants, supported on several points by the German Government, allege *inter alia* that all the conditions for application of the exemption, the existence of which is denied in the contested decision, are met in the present case. The defendant starts from the premise that it is for the undertakings concerned to prove that the conditions required for exemption are satisfied.

The undertakings are entitled to an appropriate examination by the Commission of their requests for Article 85 (3) to be applied. For this purpose the Commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances.

Furthermore, the exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.

The contested decision states that the principal reason for the refusal of exemption lies in the fact that the requirement contained in Article 85 (3) (a) is not satisfied.

The German Government complains that the said decision does not answer th question whether certain factors, especially the advance orders and the guarantee and after-sales services, the favourable effects of which were recognized by the Commission, could be maintained intact in the absence of absolute territorial protection.

The contested decision admits only by way of assumption that the sole distributorship contract in question contributes to an improvement in production and distribution. Then the contested decision examines the question 'whether an improvement in the distribution of goods by virtue of the sole distribution agreement could no longer be achieved if parallel imports were admitted'. After examining the arguments concerning advance orders, the observation of the market and the guarantee and after-sales services, the decision concluded that 'no other reason which militates in favour of the necessity for absolute territorial protection has been put forward or hinted at'.

The question whether there is an improvement in the production of distribution of the goods in question, which is required for the grant of exemption, is to be answered in accordance with the spirit of Article 85. First, this improvement cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities. These advantages are generally indisputable and show the agreement as in all respects indispensable to an improvement as understood in this sense. This subjective method, which makes the content of the concept of 'improvement' depend upon the special features of the contractual relationships in question, is not consistent with the aims of Article 85. Furthermore, the very fact that the Treaty provides that the restriction of competition must be 'indispensable' to the improvement in question clearly indicates the importance which the latter must have. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.

The argument of the German Government, based on the premise that all those features of the agreement which favour the improvement as conceived by the parties to the agreement must be maintained intact, presupposes that the question whether all these features are not only favourable but also indispensable to the improvement of the production or distribution of the goods in question has already been settled affirmatively. Because of this the argument not only tends to weaken the requirement of indispensability but also among other consequences to confuse solicitude for the specific interests of the parties with the objective improvements contemplated by the Treaty.

In its evaluation of the relative importance of the various factors submitted for its consideration, the Commission on the other hand had to judge their effectiveness by reference to an objectively ascertainable improvement in the production and distribution of the goods, and to decide whether the resulting benefit would suffice to support the conclusion that the consequent restrictions upon competition were indispensable. The argument based on the necessity to maintain intact all arrangements of the parties in so far as they are capable of contributing to the improvement sought cannot be reconciled with the view propounded in the last sentence. Therefore, the complaint of the Federal Government, based on faulty premises, is not such as can invalidate the Commission's assessment.

The applicants maintain that the admission of parallel imports would mean that the sole representative would no longer be in a position to engage in advance planning.

A certain degree of uncertainty is inherent in all forecasts of future sales possibilities. Such forecasting must in fact be based on a series of variable and uncertain factors. The admission of parallel imports may indeed involve increased risks for the concessionnaire who gives firm orders in advance for the quantities of goods

which he considers he will be able to sell. However, such a risk is inherent in all commercial activity and thus cannot justify special protection on this point.

The applicants complain that the Commission did not consider on the basis of concrete facts whether it is possible to provide guarantee and after-sales services without absolute territorial protection. They emphasize in particular the importance for the reputation of the Grundig name of the proper provision of these services for all the Grundig machines put on the market. The freeing of parallel imports would compel Consten to refuse these services for machines imported by its competitors who did not themselves carry out these services satisfactorily. Such a refusal would also be contrary to the interests of consumers.

As regards the free guarantee service, the decision states that a purchaser can normally enforce his right to such a guarantee only against his supplier and subject to conditions agreed with him. The applicant parties do not seriously dispute that statement.

The fears concerning the damage which might result for the reputation of Grundig products from an inadequate service do not, in the circumstances, appear justified.

In fact, UNEF, the main competitor of Consten, although it began selling Grundig products in France later than Consten and while having had to bear not inconsiderable risks, nevertheless supplies a free guarantee and after-sales services against remuneration upon conditions which, taken as a whole, do not seem to have harmed the reputation of the Grundig name. Moreover, nothing prevents the applicants from informing consumers, through adequate publicity, of the nature of the services and any other advantages which may be offered by the official distribution network for Grundig products. It is thus not correct that the publicity carried out by Consten must benefit parallel importers to the same extent.

Consequently, the complaints raised by the applicants are unfounded.

The applicants complain that the Commission did not consider whether absolute territorial protection was still indispensable to enable the high costs borne by Consten in launching the Grundig products on the French market to be amortized.

The defendant objects that before the adoption of the contested decision it had at no time become aware of any market introduction costs which had not been amortized.

This statement by the defendant has not been disputed. The Commission cannot be expected of its own motion to make inquiries on this point. Further, the argument of the applicants amounts in substance to saying that the concessionnaire would not have accepted the agreed conditions without absolute territorial protec-

tion. However, that fact has no connexion with the improvements in distribution referred to in Article 85 (3).

Consequently this complaint cannot be upheld.

The applicant Grundig maintains, further, that without absolute territorial protection the sole distributor would not be inclined to bear the costs necessary for market observation since the result of his efforts might benefit parallel importers.

The defendant objects that such market observation, which in particular allows the application to the products intended for export to France of technical improvements desired by the French consumer, can be of benefit only to Consten.

In fact, Consten, in its capacity as sole concessionnaire which is not threatened by the contested decision, would be the only one to recieve the machines equipped with the features adapted especially to the French market.

Consequently this complaint is unfounded.

The complaints made against that part of the decision which relates to the existence in the present case of the requirements of Article 85 (3) (a), considered separately and as a whole, do not appear to be well founded. Since all the requirements necessary for granting the exemption provided for in Article 85 (3) must be fulfilled, there is therefore no need to examine the submissions relating to the other requirements for exemption.

The complaint concerning the failure to grant a conditional exemption

The applicant Grundig, since it considers that the refusal of exemption was based on the existence of the absolute territorial protection in favour of Consten, maintains that the Commission should, under Article 7 (1) of Regulation No 17/62 of the Council, at least have allowed the sole distributorship contract on condition that parallel imports were not impeded and that in, the absence of such conditional exemption, the operative part of the decision goes beyond the statement of reasons given as well as the object of the decision—the prohibition of absolute territorial protection.

The partial annulment of the contested decision renders any further discussion of the present complaint unnecessary.

Costs

Under Article 69 (3) of its Rules of Procedure, where each party succeeds on some

and fails on other heads the Court may order that the parties bear their own costs in whole or in part. Such is the case in the present instance.

The costs must therefore be borne on the one hand by the applicants and the intervening Governments of the Italian Republic and the Federal Republic of Germany, and on the other hand by the defendant and the intervening companies Leissner and UNEF.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 3, 36, 85, 86, 222 and 234;
Having regard to Regulations Nos 17/62 and 19/65 of the Council;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice;

THE COURT

hereby:

1. **Annuls the decision of the Commission of the European Economic Community of 23 September 1964 relating to proceedings under Article 85 of the Treaty (IV-A/00004-03344, 'Grundig-Consten'), published in the Official Journal of the European Communities of 20 October 1964 (p. 2545/64), in so far as in Article 1 it declares that the whole of the contract of 1 April 1957 constitutes an infringement of the provisions of Article 85, including parts of that contract which do not constitute the said infringement;**
2. **Dismisses the rest of Applications 56/64 and 58/64 as unfounded;**
3. **Orders the applicants, the defendants and the intervening parties each to bear their own costs.**

Hammes Delvaux Strauß

Donner Trabucchi Lecourt Monaco

Delivered in open court in Luxembourg on 13 July 1966.

A. Van Houtte — Registrar

Ch. L. Hammes — President