JUDGMENT OF THE COURT (Fifth Chamber)
17 January 1995 *

In Case C-360/92 P,

Publishers Association, whose head office is in London, represented by J. Lever QC, M. Pelling and R. W. R. Thompson, Barristers, and R. Griffith, Solicitor, of Messrs Clifford Chance, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

appellant,

supported by

Clé — The Irish Book Publishers Association, whose office is in Dublin, represented by J. D. Cooke SC and R. Heron, Solicitor, of Messrs Matheson, Ormsby & Prentice, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

and by

Booksellers Association of Great Britain and Ireland, whose office is in London, represented by C. Quigley, Barrister, and M. Nathanson, Solicitor, of Messrs Penningtons, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

interveners,

* Language of the case: English.

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 9 July 1992 in Case T-66/89 between Publishers Association and the Commission, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, assisted by N. Forwood QC, with an address for service in Luxembourg at the office of G. Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

supported by

(1) **Pentos plc,** whose registered office is in London,

and

(2) **Pentos Retailing Group Ltd,** whose registered office is in Birmingham,

both represented by R. P. Falkner, Solicitor, of Messrs Norton Rose, Kempson House, PO Box 570, Camomile Street, London EC3A 7AN,

interveners,

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias (Rapporteur), President of the Court acting as President of the Chamber, J. C. Moitinho de Almeida and D. A. O. Edward, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the Publishers Association, Clé — The Irish Book Publishers Association, represented by B. Shipsey, Barrister, the Booksellers Association of Great Britain and Ireland and the Commission at the hearing on 10 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1994,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 17 September 1992, the Publishers Association (hereinafter 'the PA') brought an appeal pursuant to Article 49 of the Statute of the Court of Justice of the EEC against the judgment of 9 July 1992 in Case T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995, in which the Court of First Instance dismissed its application for annulment of Commission Decision 89/44/EEC of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association — Net Book Agreements) (OJ 1989 L 22, p. 12, hereinafter 'the decision').

2 The judgment under appeal gives the following account of the facts of the case:

'2. There are two agreements which are the subject of the contested decision. They were concluded under the aegis of the Publishers Association ... representing the vast majority (70 to 80%) of publishers in the United Kingdom. Publishers who are parties to the first of the two agreements are members of the PA, whereas those who are parties to the second agreement are not. According to the PA, its members are not obliged to adhere to the agreement.

3. The agreement concluded between the members of the PA and the agreement concluded between non-members contain essentially the same provisions. The only difference between the two agreements concerns the enforcement mechanism provided.

The content of the Net Book Agreements

4. The agreements, concluded in 1957 under the title "Net Book Agreements" ..., lay down standard conditions for the sale of books at fixed prices, known as "net books". Under those standard conditions of sale, a "net book" may not be sold, offered for sale or permitted to be sold to the public at less than the net published price. The exceptions to that prohibition (books in stock and second-hand books) are expressly governed by the standard conditions of sale, which also allow a "net book" to be sold at a discount to such libraries, book agents and quantity buyers as have been previously authorized by the Association. The amount and conditions of such discount are laid down in the authorization.

5. Those conditions apply to all sales to the public effected in the United Kingdom or Ireland by a wholesaler or retailer when the publisher publishing or distributing the book in question decides to market it at a net retail price. The standard conditions of sale do not, however, apply to sales made by a publisher directly to any non-trading client.

6. The agreements further provide for an enforcement mechanism. The undertakings concerned have appointed the Council of the PA to act as their agent in the collection of information concerning breaches of contract by booksellers and in general information about any infringement of the marketing conditions to which "net books" are subject. ...

7. Pursuant to clause (iv) of the agreements the Council of the Association laid down rules, in the form of standard formulae, authorizing booksellers to grant discounts to libraries, book agents and quantity buyers. Authorization is granted specifically to each library, book agent or quantity buyer concerned.

...

12. The Code of Allowances, published by the PA in the form of a memorandum, reflects the established general trade practice regarding allowances on "net books". Reductions, new editions, cheap editions and remainders are customarily announced beforehand by the publisher in the trade press. Reductions or other benefits, in cash or in kind, are frequently granted in accordance with the period during which the books have been held in stock. The Code is applied only in the home market.

13. Special rules ("Book Club Regulations") apply to book club editions; they apply to book club operations within the United Kingdom. Under the regulations, publishers may grant special rights only to book clubs registered with the Association as having signed and agreed to the regulations. They include provisions as to the membership of book clubs, lay down conditions to be satisfied by book clubs in offering and selling books and impose certain restrictions on advertising. Surplus stock of a title may not be remaindered by a book club except with the consent of the licensing publisher. According to the PA, the Book Club Regulations apply solely in the United Kingdom.

14. Since 1955 the PA has permitted an annual national book sale. The sale gives booksellers and publishers an opportunity, subject to the limits and conditions laid down by the PA, to sell slow-moving titles below the net price and thereby to finance restocking.

15. Finally, the Association publishes a "Directory of Booksellers", updated every two months, listing the booksellers who meet certain requirements and who have undertaken to observe the standard conditions of sale of "net books".

...

Uncontested statistical information

17. According to the figures set out in the contested decision, which have not been challenged by the PA, the British publishing industry is amongst the most impor-

tant in the world and within the Community. The main market statistics are roughly as follows: the number of new titles published each year amounts to 40 000, 80% of which are produced by members of the PA; 65% of the titles published are sold on the British market, the rest being exported; 25% of the exports go to other Member States, 4.5% going to Ireland. As far as imports into Ireland are concerned, it is to be noted that 80% come from the United Kingdom and that those imports represent more than 50% of total book sales there.

18. Another statistic undisputed as between the parties is that about 75% of books sold in the United Kingdom or exported by British publishers to Ireland are marketed as "net books".

The national court's appraisal of the validity of the NBA

19. The Restrictive Practices Court (the competent body in the United Kingdom in competition matters) has on several occasions considered the validity of the NBA in the light of British legislation, giving a first favourable ruling in 1962. The court held with regard to the agreement concluded between the members of the PA that (i) the abolition of the NBA would deprive the public of special benefits or advantages because it would entail the raising of prices, the reduction of stockholding book shops and a decline in the number and variety of published titles, (ii) the public would not suffer any appreciable harm from the maintenance of the NBA as compared with the disadvantages which would arise from its abolition, and (iii) the NBA was, accordingly, not contrary to the public interest.

20. In 1964 the Restrictive Practices Court held in a summary proceeding that the "non-members'" agreement was not contrary to the public interest on the same grounds as those set out in its 1962 ruling.

21. In 1968 the validity of the NBA was reconsidered by the Restrictive Practices Court in the light of the new provisions of the Resale Prices Act 1964. The court, following the same reasoning as that set out in its 1962 ruling, granted an exemption from the general prohibition on price maintenance contained in the Resale Prices Act 1964.'

3 In Article 1 of its decision the Commission held that the two 'net book agreements' (hereinafter 'the NBA') concluded within the framework of the PA, together with the implementing and related rules, constituted an infringement of Article 85(1) of the EEC Treaty to the extent that they covered the book trade between Member States.

4 In Article 2 of the decision the Commission rejected the PA's application for an exemption under Article 85(3) of the EEC Treaty, on the ground that the restrictions imposed by the NBA were not indispensable to the attainment of the stated objectives, namely avoiding a decrease in the number of stockholding booksellers, a fall in sales, smaller print runs, and hence a rise in book prices.

5 Finally, in Articles 3 and 4, it ordered the PA to bring the infringement to an end and, as a preliminary step, to submit for approval by the Commission a proposal for a notice to inform publishers, booksellers and book clubs of the consequences of the decision for the trade in books between the United Kingdom and the other Member States.

6 In 1989 the PA brought an action against the decision before the Court of Justice. On an application for interim measures, the President of the Court, by order of 13 June 1989, suspended the operation of Articles 2 to 4 of the decision. The Court of First Instance, to which the case had been remitted in November 1989 pursuant to the new jurisdictional rules, dismissed the action in the judgment under appeal.

7 With respect to the decision contested by the applicant, the judgment under appeal states *inter alia* that:

'72. In points 71 to 86, the Decision examines the question whether a collective system of fixed prices for the book trade is indispensable to the attainment of the purported aims of the applicant association. Although referring to the aims pursued by the NBA scheme, namely to avoid the decline in stock levels which would result from shorter print runs and to prevent an increase in book prices and the disappearance of titles printed in short runs, the Commission takes no position on the question whether such aims are attained in practice and whether the distribution system is the one best suited to their attainment in the national context. The Decision emphasizes, however, that this case concerns the appraisal of a price-fixing system which, in covering exports to other Member States, in particular to Ireland, as well as imports and re-imports from other Member States, including Ireland, precludes price competition resulting from intra-Community trade (point 75). The Decision also finds that, in the interests of achieving the aims mentioned above, the PA has established a collective system imposing the same price for any given book on all booksellers, so as to ensure that there is no price competition as to the same title (point 73, third paragraph). At that stage, it is apparent from the Decision that it has regard to the extent of the restrictions under the NBA system, as they are set out in points 50 to 59. In view of the nature of the restrictions under the NBA system and their impact on intra-Community trade, the Decision considers that the PA is required to demonstrate that the achievement of the aims of the agreements calls for a collective scheme rather than an individual vertical resale price maintenance system (point 74).'

8 In this appeal the PA seeks to have set aside that part of the Court of First Instance's judgment which rejected the plea in law that Article 2 of the decision, concerning the refusal to grant an exemption under Article 85(3) of the Treaty (paragraphs 71 to 116 of the judgment), was not properly reasoned. On the other hand, that part of the judgment which rejected the plea that there was no infringement of Article 85(1) of the Treaty is not contested.

9 As can be seen from the PA's reply to a written question put by the Court, the appeal is directed more specifically against the upholding by the Court of First Instance of the Commission's assessment that the restrictions of competition resulting from the NBA, the PA's decisions concerning discounts to libraries and book agents and quantity discounts, the regulations on book clubs and the decisions on the conditions governing the annual national book sale were not indispensable (Article 1(a), (b), (d) and (e) of the decision).

10 On the other hand, the appeal is not concerned with the so-called Code of Allowances or with the PA's decision concerning the conditions for mentioning booksellers in the Directory of Booksellers (Article 1(c) and (f) of the decision). The PA had already expressly stated during the written procedure before the Court of First Instance that it would abandon those arrangements.

11 By application lodged at the Court Registry on 30 November 1992, Pentos plc, a bookselling company, and Pentos Retailing Group Ltd, one of its subsidiaries, applied to intervene in support of the form of order sought by the Commission. By applications lodged at the Court Registry on 16 and 18 December 1992 respectively, Clé — The Irish Book Publishers Association (hereinafter 'Clé') and the

Booksellers Association of Great Britain and Ireland (hereinafter 'the Booksellers Association') applied to intervene in support of the form of order sought by the PA. By orders of 8 March 1993 the Court granted leave to intervene.

The pleas in law in support of the appeal

12 In its first plea in law, the PA, supported by Clé and the Booksellers Association, argues that the Court of First Instance erred in law by adopting, in paragraph 72, the Commission's conclusion that the PA had established a 'collective system' imposing the same price for any given book on all booksellers, whereas the NBA enables each publisher to impose resale prices individually. The PA submits that the only collective characteristics of the system are that the NBA enables the PA to give notice of the standard conditions to all booksellers in the United Kingdom and Ireland, that it enables booksellers to operate on the basis of a manageable set of conditions, that it provides for common exceptions to the resale price maintenance condition, and that it enables the PA to monitor compliance with the standard conditions.

13 In a second plea, the PA submits that the Court of First Instance, in paragraphs 85 to 87 of its judgment, erred in not holding that the Commission's reference to Commission Decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428—VBBB/VBVB) (OJ 1982 L 54, p. 36; judgment in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, hereinafter 'the Dutch Books case') was irrelevant because of the differences between that case and the agreements at issue here.

14 The PA also considers that the Commission's argument, summarized in paragraph 87 of the judgment, that the purpose of that reference was merely as a reminder of

a general principle to the effect that the benefits of a scheme within the national market do not make it indispensable to apply it to trade in books between Member States, was also irrelevant. The PA's principal argument at all times was not that because collective retail price maintenance produced benefits in the national market, it was therefore indispensable to trade between Member States, but that the NBA was indispensable for allowing Irish readers to enjoy the same benefits as the British public. The PA submits that that error of law should have been condemned by the Court of First Instance.

15 In a third plea, the PA argues that the Court of First Instance erred in law in upholding the Commission's view that the NBA was not indispensable to the attainment of the objectives pursued, without taking a position as to whether or not those objectives were actually attained. To ascertain whether the agreement was indispensable, the Court should first have determined what the objectives of the NBA were and then considered whether, and if so to what extent, the NBA in fact achieved them, and finally whether they could be achieved by a means which was less restrictive of competition.

16 In a fourth plea, the PA criticizes the Court of First Instance for misinterpreting Article 85(3) of the Treaty by holding, in the last sentence of paragraph 84 of its judgment, that the PA, being an association consisting of publishers established in the United Kingdom, was not entitled to rely on any negative effects which abolition of the NBA might have on the Irish market, in order to show that the NBA was indispensable.

17 In a fifth plea, the PA submits that the Court of First Instance erred in law in dismissing, also in paragraph 84, the argument that the NBA system would collapse if its application were confined to the national market. The PA denies ever having put forward such an argument.

18 In a sixth plea, the PA submits that the Court of First Instance made a number of errors of law concerning the decisions of the Restrictive Practices Court (RPC).

19 Firstly, the PA claims never to have maintained, as is asserted in paragraph 79 of the judgment, that the Commission and the Court of First Instance were bound by the findings of the RPC on the positive effects of the NBA on the internal market in the United Kingdom, but merely intended to rely on the findings of fact and the evidence on which they were based in support of its application for exemption.

20 Secondly, the Court of First Instance was wrong to state, in the same paragraph, that the Commission had taken sufficient account of the findings of the RPC. Point 43 of the Commission's decision did not show that it had considered the findings in the RPC decisions.

21 Finally, the Court of First Instance erred in law in referring, in paragraph 77 of its judgment, to a submission by the PA that the RPC's findings as to the benefits of the NBA applied both to intra-Community trade and to sales in the United Kingdom of books produced nationally. The PA never made any such submission, but merely argued that those benefits accrued just as much to the Irish public as to the British public.

22 In a seventh plea, the PA argues that the Court of First Instance was wrong in considering separately each of the four submissions put forward by the PA to show the indispensability of the NBA (paragraphs 96 to 115 of the judgment) when, in the PA's opinion, it is the cumulative effect of the problems referred to in

those submissions which renders individual resale price maintenance unworkable and thus makes a system such as the NBA indispensable to the attainment of the objectives pursued.

23 In an eighth plea, the PA considers that the Court of First Instance erred in law in failing to note the contradiction between the decision at issue and the Commission's communication to the Council of 27 November 1985 (COM(85)681 final), in which it stated that resale price maintenance for books was a positive contribution to preserving stockholding bookshops.

24 The third plea in law, which takes a central place in the arguments in support of the appeal, should be examined first. That plea must also be seen in relation to the fourth and sixth pleas, which challenge the reasoning in the judgment with regard to the distinction between the national and intra-Community effects of the NBA.

25 The essence of those pleas is that the Court of First Instance did not take into consideration the consequences of the existence of a single language area forming a single market for books in Ireland and the United Kingdom. That omission is said to have prevented the Court from carrying out a sufficiently detailed review of the Commission's assessment that the restrictions of competition resulting from the application of the NBA were not indispensable.

6 In paragraph 83 of the judgment under appeal, the Court first held that 'evidence showing that the inherent benefits of the NBA system at the national level also extend to intra-Community trade might have been relevant had the Commission's refusal to grant the applicant the exemption sought been based on non-fulfilment of the condition regarding the promotion of technical or economic progress. However, that condition is not at issue here, since the ground for the rejection of the

PA's application relates solely to the indispensability of the restrictions on competition arising from the application of the NBA. Accordingly, it is not necessary for this Court to consider the benefits of the NBA on the national market, on the assumption that their existence has been proved, in order to assess the legality of the Commission's refusal'.

27 That reasoning ignores the need to determine the extent to which, having regard to the single language area referred to above, the objectives pursued by the NBA, the restrictions of competition arising therefrom, and the relationship between the objectives and the restrictions were to be assessed in the same way or differently, depending on whether the assessment related to the national territory alone or to the Community market.

28 In paragraph 84 of the judgment under appeal, the Court then held that 'the PA, which is an association consisting of publishers established in the United Kingdom, is not entitled to rely on any negative effects which might be felt on the Irish market, even though that market belongs to the same language area'.

29 That finding is vitiated by an error of law. Nothing in the wording or the spirit of Article 85(3) of the Treaty allows that provision to be interpreted as meaning that the possibility for which it provides, of declaring the provisions of paragraph 1 inapplicable in the case of certain agreements which contribute to improving the production or distribution of goods or to promoting technical or economical progress, is subject to the condition that those benefits should occur only on the territory of the Member State or States in which the undertakings who are parties to the agreement are established and not in the territory of other Member States. Such an interpretation is incompatible with the fundamental objectives of the Community and with the very concepts of common market and single market.

30 Finally, with respect to the decision of the RPC, the Court of First Instance stated in paragraph 79 of its judgment that 'as is clear from point 43 of the decision, the Commission did not ignore the ruling of the British court. However, as the Commission rightly observed, the national court, which was of course giving judgment prior to the accession of the United Kingdom and Ireland to the European Communities, did not directly express any view as to the indispensability of the restrictions on competition within the common market arising from the NBA. In so far as that court did indirectly touch on the question of external trade, it found that the PA had not proved that the abolition of the NBA would lead to a substantial decline in exports. It must therefore be concluded that the Decision is not vitiated by inadequate reasoning on the ground that it did not specifically rebut the findings of the Restrictive Practices Court in 1962 or the evidence produced by the applicant to show that the situation on the book market has not changed substantially since 1962. In any event, as the Court of Justice held in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* (cited above, at paragraph 40), national judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty'.

31 That reasoning is marred by the fact that it does not indicate that the Court considered whether the appellant's contention, summarized as follows in paragraph 77 of the judgment, was correct:

'The applicant argues that the Commission was bound by the principle of sound administration to have due regard to the findings of fact contained in the 1962 judgment of the Restrictive Practices Court of the United Kingdom, even though the Commission was not bound by that ruling when exercising its powers. The PA submits that the finding by the British court that the NBA was indispensable applies both to the international book trade and to sales in national territory of books produced nationally. Those findings of fact by the national court were still perfectly valid at the date of the contested decision, in respect of both the

British and Irish markets. Similarly, the applicant maintains that it supplied the Commission with an important set of evidence showing that the situation had not undergone any significant change since the time of the Restrictive Practices Court's ruling. ...'

32 It follows from the above considerations that the judgment under appeal is vitiated by a number of errors of law. Consequently, it must be set aside, without there being any need to consider the other pleas in law in support of the appeal.

33 In accordance with the second sentence of the first paragraph of Article 54 of the Statute of the Court of Justice of the EEC, the Court of Justice may, if the decision of the Court of First Instance is quashed, itself give final judgment in the matter, where the state of the proceeding so permits. That condition is fulfilled in the present case.

The action brought before the Court of First Instance for annulment of the Commission's decision

34 In its application for annulment the PA puts forward a number of pleas in law. However, as stated in paragraph 8 above, the part of the judgment of the Court of First Instance rejecting the plea that there was no infringement of Article 85(1) of the Treaty is not challenged by the appeal and has thus become final.

35 This Court must therefore rule on the plea alleging that Article 2 of the decision, concerning the refusal to grant an exemption, was wrongly reasoned.

36 The PA submits, firstly, that the reasoning of the decision with respect to the indispensability of the restrictions of competition (points 71 to 86 of the decision) is based on factors contradicted by the evidence produced in support of its application for exemption. The PA refers *inter alia* to the decisions of the RPC as showing that the fixing by publishers of resale prices for 'net books' could not long survive the end of the NBA (LR 3RP 246, 312) and that the abolition of the NBA would bring about a decrease in the number and facilities of stockholding booksellers, a rise in book prices and a fall in the number of titles published (LR 3RP 246, 322).

37 Secondly, the PA submits that the decision is based on a number of mistakes of fact and reasoning, more particularly with respect to the reference in point 75 of the decision to the Dutch Books case.

38 Since the PA's two submissions aim essentially to show that the decision fails to take proper account of its argument concerning the negative effects of the decision on intra-Community trade and in particular on the book market in Ireland, they should be considered together.

39 Under Article 190 of the EEC Treaty, decisions must state the reasons on which they are based. It has consistently been held that while the Commission is not required to discuss all the issues of fact and law raised by undertakings seeking an exemption, the statement of reasons in any adverse decision must enable the Court to review its lawfulness and make clear to the Member State and the persons concerned the circumstances in which the Commission has applied the Treaty.

40 In the present case, the decisions of the RPC have been put forward by the PA as essential evidence of the alleged benefits. Its arguments that the findings of the

RPC concerning the benefits of the NBA in the United Kingdom were also of relevance in assessing the consequences of those agreements in Ireland appear to have some force, in view of the single language area.

41 In those circumstances the Commission should have considered the arguments put forward by the PA on the basis of the RPC decisions.

42 However, although the Commission did mention the decisions of the national court in point 43 of its decision, it merely referred to their existence without discussing their content.

43 Furthermore, in point 72 of its decision, where it summarizes the PA's arguments, the Commission made no mention of the conclusions of the RPC or the benefits of the NBA on the Irish book market.

44 The Commission's decision thus does not contain any explanation of why the conclusions of the RPC and the documents produced by the PA in support of its arguments are of no relevance. It follows that, in view of the existence of a single language area formed by the British and Irish markets, the Commission did not give adequate reasons for its decision on this point.

45 In point 75 of the decision the Commission refers to the application of the NBA to exports to other Member States, in particular Ireland. Point 75 of the decision states:

'... The Commission has to deal here with a price-fixing system extending to exports to other Member States, in particular to Ireland, as well as to imports and re-imports from other Member States, including Ireland. The system as currently applied precludes price competition resulting from trade between Member States at the level of distribution. The Commission has already stated in Decision 82/123/EEC in Case No IV/428 — VBBB/VBVB that in order to achieve an improvement in the publication and distribution of the books in question, a collective resale price maintenance scheme entailing the imposition of restrictions on competition in trade between Member States, such as contained in the agreements in question, is not indispensable.'

46 It must be noted, however, that in the Dutch Books case the agreement at issue included an obligation for all publishers to fix for each of their publications a retail selling price which had to be observed up to the stage of retail sale and established a system for the recognition of publishers and booksellers, which thus prevented any competition with non-recognized publishers and booksellers.

47 The system designed by the Flemish and Dutch associations of publishers and booksellers thus differed from that set up by the NBA, as described by the Court of First Instance in paragraphs 4 and 5 of the judgment under appeal, quoted in paragraph 2 above. The NBA agreements provide for uniform standard conditions for the sale of books at a fixed price, which apply only if the publisher chooses to market a book as a 'net book'.

48 It must therefore be held that the reference to the Dutch Books case is manifestly inappropriate and thereby constitutes a defect in the statement of reasons.

49 Article 2 of the decision must therefore be annulled, and, as a consequence, Articles 3 and 4, on the ground of infringement of essential procedural requirements within the meaning of Article 173 of the EEC Treaty, without it being necessary to consider the other pleas in law raised by the PA.

Costs

50 Article 122 of the Rules of Procedure provides that where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2), applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful in all essential aspects, it must be ordered to bear its own costs and to pay all the costs incurred by the appellant, both in the proceedings before the Court of First Instance and in the proceedings before this Court, and the costs incurred before this Court relating to the intervention by Clé — The Irish Book Publishers Association and the Booksellers Association of Great Britain and Ireland.

51 Under Article 69(4) of the Rules of Procedure, the Court may order an intervener other than the Member States and institutions to bear his own costs. In the circumstances, the interveners Pentos plc and Pentos Retailing Group Ltd shall bear their own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Sets aside the judgment of the Court of First Instance of 9 July 1992 in Case T-66/89;**

2. **Annuls Articles 2, 3 and 4 of Commission Decision 89/44/EEC of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association — Net Book Agreements);**

3. **Orders the Commission to bear its own costs and all the costs incurred by the appellant, both in the proceedings before the Court of First Instance and in the proceedings before this Court, and the costs incurred before this Court relating to the intervention by Clé — The Irish Book Publishers Association and the Booksellers Association of Great Britain and Ireland;**

4. **Orders Pentos Plc and Pentos Retailing Group Ltd to bear their own costs.**

Rodríguez Iglesias Moitinho de Almeida Edward

Delivered in open court in Luxembourg on 17 January 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President of the Court acting as
President of the Fifth Chamber