# OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 13 JULY 1983

*My Lords,*

In this case, the applicant, a company registered in England ("HGB"), seeks the annulment of Articles 1, 2, 3 and 8 of a Commission decision adopted on 2 December 1981.

The background to the dispute can be set out briefly.

A Swedish company, Victor Hasselblad Aktiebolag, ("VHAB"), manufactures and supplies photographic equipment ("Hasselblad equipment") which, so far as the Community is concerned, is distributed through a number of independent sole distributors appointed by VHAB in each Member State (except Luxembourg). HGB is the sole distributor in the United Kingdom. It is an independent company not owned by VHAB. In 1965 VHAB notified to the Commission a standard sole distributorship agreement. In December 1976 the Commission informed VHAB that it objected to two of the terms in the agreement. By letter dated 10 February 1977 VHAB told the Commission that it would amend the agreement to comply with the points made by the Commission. A new version of the sole distributorship agreement was drawn up and notified to the Commission in 1978. By letter of 20 February 1979 the Commission informed VHAB that this agreement fell within the scope of the block exemption from Article 85 (1) of the EEC Treaty made available pursuant to Commission Regulation No 67/67 of 22 March 1967 (Official Journal 849/67, English Special Edition 1967, p. 10). The sole distributorship agreement made by VHAB with HGB in 1975 was not, however, the standard agreement as notified but departed in several respects from it. This agreement with HGB was amended on 20 November 1977 and notified to the Commission on 25 January 1980.

Of all the distributors in the Community, HGB was the only one to set up a selective distribution system. Authorized dealers were appointed under and bound by the terms of a standard dealer agreement. This was amended in 1978 and introduced progressively as from April. By the end of the year all authorized dealers were bound by it. It was notified to the Commission in December 1979 though the Commission appears to have acknowledged receipt on 25 January 1980.

One of HGB's authorized dealers was a company registered in Northern Ireland called "Camera Care". It appears to have signed the dealer agreement on 7 January 1976. By letter dated 13 February 1978 HGB gave Camera Care three months notice of the termination of the dealer agreement. It is common ground that HGB then took steps to prevent Camera Care from being supplied with Hasselblad equipment. In this it received cooperation from VHAB which contacted the other sole distributors. Camera Care attempted to obtain supplies from the sole distributors in Ireland ("Ilford"), France ("Têlos") and

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Belgium ("Prolux"). In each case there is evidence that HGB or VHAB dissuaded the sole distributors from supplying Camera Care. These events took place between the termination of the dealer agreement with Camera Care and the early part of 1979. The Commission also discovered that, in 1974, attempts had been made to prevent a Belgian dealer from obtaining supplies of Hasselblad equipment from the French sole distributor (the "*Makro* case").

After carrying out its investigations, the Commission came to the view that there had been a concerted practice between VHAB, HGB and five other sole distributors to prevent, limit or discourage exports of Hasselblad equipment between the Member States. Article 1 of the decision declares that this concerted practice was contrary to Article 85 (1) of the Treaty. Article 2 finds that the sole distributorship agreements made with HGB and the other sole distributors concerned also infringe Article 85 (1), "in so far as they grant exclusivity of distribution of Hasselblad equipment", and refuses exemption under Article 85 (3). Article 3 of the decision finds that HGB's selective distribution system infringes Article 85 (1) and refuses exemption under Article 85 (3). In Article 8 the Commission imposed fines on the undertakings concerned. The fine imposed on HGB amounts to ECU 165 000.

HGB (the only one of the undertakings fined by the Commission to have challenged the decision) claims that these provisions of the decision should be annulled so far as it is concerned. It relies on several grounds which it is convenient to deal with under separate headings.

## 1. Procedural defects

HGB's contention that the Commission's Decision is vitiated by procedural defects boils down to two points:

(1) when carrying out its investigations the Commission is obliged to act fairly and objectively; the Commission failed to do so in that it only sought out and took into account evidence tending to incriminate HGB;

(2) the Commission is obliged to set out in its decisions the reasoning which led it to reject evidence tending to exonerate the undertaking under investigation; this it failed to do.

Obviously the Commission must conduct the procedure leading up to the adoption of its decision fairly, addressing itself to the case with a mind open to all the evidence and all the arguments that may be put to it. If there were evidence that the Commission's mind was made up from the outset so that the procedure was followed for the sake of form only, the Commission having ceased to address its mind to the case, there might be grounds for annulling its decision: the right to be heard, which is guaranteed by Article 19 of Regulation No 17 (Official Journal 204/62, English Special Edition,

1959-1962, p. 87) and the general principles of Community law, would not in any real sense be observed if the Commission's mind were closed to all persuasion. HGB in substance contends that that is the position in this case and, in support of its contention, has referred to (1) the similarities between the facts as set out by the Commission in the Statement of Objections and those set out in the Decision itself, and (2) the Commission's alleged failure in the decision to deal with the points made by HGB.

That the facts found in the Decision are the same as those set out in the Statement of Objections does not, however, mean that the Commission did not consider the contentions to the contrary. I am not satisfied by HGB that the Commission ignored as opposed to rejected the evidence and arguments advanced by HGB.

The object of the requirement in Article 190 of the Treaty, that a decision shall state the reasons on which it is based, is to provide the persons concerned with sufficient details to allow them to ascertain whether the decision is well-founded or whether it is vitiated by error of law and to enable the Court to review its legality. However in several cases the Court has held that the Commission is not obliged to discuss every point of fact or law raised or to give reasons explaining why it has rejected points made by the parties before it (see, for example, Cases 56 and 58/64 *Consten and Grundig* v *Commission* (1966) ECR 299 at p. 338, Case 41/69 *ACF Chemiefarma* v *Commission* (1970) ECR 661 at paragraph 77, Case 14/81 *Alpha Steel* v *Commission* (1982) ECR 749 at paragraph 18 and Case 7/82 *GVL* v *Commission*, 2 March 1983, (1983) ECR 483 at paragraph 12).

What is important is that the Commission should set out the facts and reasons upon which the decision is based so that they can be reviewed. The Commission has to make findings of fact rather than necessarily to set out the conflicting contentions as evidence as to the facts. There may be cases where fairness requires that both versions are set out and analysed: it is in any event somewhat cavalier to make no references to the principal contentions of the company under investigation even when those contentions are rejected. It is in my view better that brief reasons are given why the principal contentions are rejected even though all arguments raised do not have to be dealt with. In the present case it seems clear that where there was a conflict HGB's contentions were implicitly rejected and I do not consider that HGB has succeeded in showing that the reasoning is defective or inadequate so as to justify the Court interfering.

For these reasons, HGB's first submission should be rejected. Elsewhere in the written pleadings HGB asserted that the Commission made use of confidential correspondence in its investigations and disclosed confidential information in breach of its obligation under Article 20 (2) of Regulation No 17. There is no

formal claim that the decision should be annulled by reason of either of these matters. In any event, neither of them would, in my opinion, in this case be sufficient to justify annulment.

2. The relevant market and the effect on trade and competition

(a) HGB takes issue with the Commission on its definition of the relevant market with the object of establishing that the share of the market held by Hasselblad cameras is far too small for any restrictive practice involving HGB to have had an appreciable effect on competition within the United Kingdom or trade between Member States.

In its decision, the Commission defined the relevant market as that in "medium format roll-film reflex cameras", thus excluding all 35 mm cameras. Subsequently it was prepared to admit that the relevant market might include some 35 mm cameras. In its application, HGB's case was that 35 mm cameras were in serious competition with medium format roll-film cameras and it produced some publicity material and several statements made by camera dealers and buyers in order to support this assertion. In the Reply it said that not all 35 mm cameras were in competition, only "sophisticated" or "highly-developed" models, although it also said that 35 mm reflex cameras "mostly belong" to the group of "highly-developed 35 mm cameras". Finally, HGB contended that the relevant market comprised all 6 × 6, 6 × 7 and 6 × 4.5 format cameras, the Nikon F 2 and F 3, Leica R 3 and R 4, Canon F 1 and A 1, Olympus OM 2, Contax RTS and RTS II, and Rollei SL 2000.

It seems that the Commission based its definition of the market in part on certain statements made in the 1978 annual report of the Group of which VHAB forms part, statements made by VHAB in the same year and statements made on behalf of HGB in 1979. The last, in particular, informed the Commission that Hasselblad competed with Bronica, Mamiya, Asahi Pentax and Rollei. The Commission sent a questionnaire to these four competitors, asking, *inter alia*, (1) whether there was an identifiable market for 6 × 6 cameras or whether they formed part of the medium format single lens reflex camera market and (2) whether any of the addressees' products were in direct competition with Hasselblad. The replies to the questionnaire do not suggest that the undertakings consulted by the Commission had a particularly clear idea of what the Commission was looking for. For example, when the Commission asked whether 6 × 6 cameras were regarded by the consumer as "interchangeable" with other medium format cameras, at least two of the undertakings appear to have thought that "interchangeability" referred to a possibility of using lenses and accessories of one make on cameras of another make (which is not an irrelevant factor), whereas the Commission was envisaging product substitutability. The Commission does not seem to have considered broadening the scope of its enquiries.

The function of the Hasselblad camera is to take a still photograph and it is, therefore, possible to argue that the relevant market comprises all apparatus with the same function. There are, however, features of the Hasselblad camera which set it apart from other makes because they determine the type and characteristics of the still photograph which can be taken. These features can be identified as (1) the format (film and picture size) (2) reproduction quality (3) handiness (due to its size, bulk and basic construction, the image being seen from above on a focusing screen placed on top of the camera body, the Hasselblad camera is not suitable for taking photographs under certain conditions, eg with moving subjects) and (4) range of accessories. In addition, the high price of Hasselblad cameras restricts the class of potential buyers to professional photographers, business or specialist users, dedicated amateurs or prestige buyers. These persons, save the last, are likely to be guided in their choice of camera by the use for which it is required. It is to be expected that, in the eyes of the potential buyer, only other makes of camera producing a photograph and therefore possessing features, which are broadly similar or comparable, will be reasonably interchangeable, and therefore compete to a perceptible extent, with the Hasselblad camera. HGB has criticized the Commission for failing to take into account the fact that 35 mm cameras are at least as complex as Hasselblad cameras and have the same or often a better standard of technology. For the purpose of defining the relevant market, in this case, these factors are not, in my opinion, determinative because they relate to the performance by a given camera of its function rather than to the definition of that function.

In order to support its contentions, HGB has produced some publicity material and several statements made by camera dealers and buyers. The value of such material has been weakened by the changes in the position adopted by HGB. For example, HGB rely on a letter from the British Photographic Importers Association which says that Hasselblad cameras face competition from other 6 × 6 medium format cameras, 35 mm cameras and "also from some other types". It is difficult to regard this as sure support for HGB's final contention that all 35 mm cameras do not compete with Hasselblad, only some. At all events, the letter appears to be based on a comparison of sales of 35 mm and 120 roll-film cameras in 1979. The more detailed information produced by the parties concerning the volume of sales of the cameras alleged to be in competition and the prices charged is incomplete and provides no useful guidance so far as competition between them is concerned.

Although there is substance in some of the criticism made that the Commission did not investigate in depth the nature of the various cameras under review, the information available to the Court points, in my opinion, to a definition of the relevant market along the lines of that adopted by the Commission. I am not satisfied on the evidence that there is a sufficient degree of interchangeability between medium format cameras of the

same or a broadly comparable standard as Hasselblad cameras and the 35 mm models referred to by HGB. Accordingly I do not consider that any error of law has been shown in the Commission's approach; on the available material it was entitled to conclude as it did as to the extent of the relevant market.

Even if the market were to be defined as suggested by HGB, I am not persuaded that the *de minimis* rule applies in this case. In order to decide that issue it is necessary to look at a number of factors such as the size in absolute terms of the undertakings involved in the restrictive practice, the structure of the market, the scope of the restrictive practice concerned and the existence of similar practices. HGB has concentrated only on the market share held by Hasselblad equipment.

Most of the information on the market shares held by Hasselblad which has been produced to the Court relates to the United Kingdom market. There are figures agreed between the Commission and Camera Care which show that, in terms of the volume of sales on the United Kingdom market in the three years 1977 to 1979, HGB held 41%, 36% and 29.5% of the relevant market as the Commission has defined it. This underestimates the market share held by Hasselblad because it appears to exclude sales of Hasselblad equipment made other than through HGB. Other figures have been produced which show that, if the market is defined as comprising all 120 roll-film cameras, Hasselblad's market share in 1978 to 1979 would be 26.05% by volume and 48.52% by value. On the other hand, if the market is defined as comprising all reflex cameras, both 35 mm and 120 roll-film, Hasselblad's share drops to 0.597% by volume and 2.92% by value. Even HGB does not go this far, since it contends that only some 35 mm cameras compete with Hasselblad.

At the hearing, Counsel for HGB said that, in 1982, HGB's share of the market, as defined by it, came to 4.5% by volume. This figure, however, is said to include sales of both complete cameras and camera bodies. If the latter are excluded, the market share drops to 2.6% by volume. Counsel for HGB emphasized that his figures fell below the 5% level mentioned by the Commission in its Notice of 19 December 1977 (Official Journal C 313 of 29. 12. 1977, p. 3). No figures have been made available which show the market share by value. Since Hasselblad equipment has low volume but highly priced sales, the difference between the market share in terms of volume and that in terms of price is significant, as can be seen from the other figures which I have mentioned. For this reason, even if HGB's figures can be accepted, I do not think that it can be concluded that, on the basis of market share, the de *minimis* rule applies.

(b) So far as HGB's selective distribution system is concerned, it cannot, in

my view, be seriously contended that its alleged anti-competitive effects were confined to the United Kingdom. Assuming the Commission's findings to be justified, it is quite easy to see that, in this case, price-fixing combined with restrictions on exports and on parallel imports may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

3. The dealer agreement

The Commission takes exception to clauses 6, 23 and 28 of the standard dealer agreement notified to the Commission, the quantitative selection of dealers and the influence on resale prices. The Commission did not, however, impose a fine in respect of the restrictions contained in the dealer agreement for the period after notification (see paragraph 74 of the Decision) i.e. after 25 January 1980.

Exemption under Article 85 (3) was refused on the ground that the dealer agreement was detrimental to the interests of consumers because it tended "towards ossification of the price structure and hence towards higher consumer prices" (paragraph 71).

Clause 23 of the dealer agreement imposes certain obligations on authorized dealers regarding the advertising of Hasselblad products. The Commission took exception to clause 23 (c) which provides that the authorized dealer must withdraw and not repeat "any advertisements or announcements made by the Dealer to which the Company (HGB) has notified its objection in writing to the Dealer". The same obligation figured in the dealer agreement before its amendment. The Commission's objection is that it enables HGB "to prevent actively competing and price-cutting dealers, particularly those who import but not through the Hasselblad distributor, from advertising their activities" (paragraph 60 of the Decision). In its Defence the Commission made clear that the power to object to an advertisement is held to be a restriction on competition if it is exercised so as to prevent advertisements or offers at low prices. The Commission does not appear to object to the use of clause 23 (c) in order to maintain advertising standards. As evidence that HGB did use clause 23 (c) to prevent authorized dealers from advertising offers at low prices, the Commission relies on the dispute which arose between HGB and Camera Care and led to the termination of the dealer agreement made with the latter.

Clause 28 enables HGB to terminate the dealer agreement by notice in writing. Paragraph (b) gives, as one of the grounds of termination, a change in the geographical location of the authorized dealer's premises without HGB's prior written approval. The Commission says that this is intended to protect the sales territories of authorized dealers from competition (paragraph 61 of the Decision).

Clause 6 requires dealers to "utilize" the Hasselblad equipment supplied to them for retail sale or sale for professional use and binds them not to supply equipment to another dealer in "the United

Kingdom or elsewhere", without HGB's consent. This is said to infringe Article 85 (1) because it impedes exports and, in addition, "the prohibition on cross supplies restricts competition because the economic freedom of authorized dealers is impeded seriously, and makes authorized dealers dependent" (paragraph 59 of the Decision). HGB's case is that the object of Clause 6 was to prevent sales to dealers outside franchised premises but not to prevent exports; it was introduced as a result of complaints from authorized dealers that they had undertaken expensive promotional and demonstration work for Hasselblad equipment, only to find that other, unauthorized dealers in the same geographical location were obtaining supplies from authorized dealers in other areas. It is denied that HGB's then solicitors were ever given instructions to include the words "or elsewhere" in clause 6 when drafting the agreement.

As a matter of interpretation "or elsewhere" in my opinion clearly covers sales abroad.

The Commission was in my view entitled to infer from the wording of Clause 6 that HGB intended to prevent its authorized dealers from exporting Hasselblad equipment without its consent. No evidence has been produced by HGB which tends to show that this inference was unfounded. Quite the contrary. HGB rely on a letter dated 18 January 1982 which is from the solicitors acting for HGB's then solicitors. This letter quotes a contemporary note of the instructions received from HGB, which were that the dealer agreement should contain "an absolute prohibition against the dealer supplying any other dealer or any other shop or person with cameras for sale". HGB was aware of the addition of the words "or elsewhere" long before the amended dealer agreement came into effect but appears to have raised no objection to them. It is contended that, in point of fact, neither HGB nor its authorized dealers understood clause 6 as imposing a ban on exports. The proof of this is said to lie in the fact that exports did go on and were encouraged by HGB. Although HGB has produced a considerable amount of material in order to support its assertions, there is no evidence of a sale made by a United Kingdom authorized dealer to another Member State during the period in question (i.e. after April 1978). In consequence there is nothing to justify the Court overturning the Commission's conclusion that clause 6 was intended to impede and did prohibit exports.

The Commission's next complaint about clause 6 was that it prevented authorized dealers from selling either to each other or to unauthorized dealers, such as Camera Care. The Commission takes the view that a prohibition on sale to authorized dealers always restricts competition and that a prohibition on sales to unauthorized dealers restricts competition unless it is "essential" that the

product in question should be sold only to qualified dealers. HGB claims that it never intended to restrict sales between authorized dealers. No contemporary evidence to support this has been produced. The only existing proof of HGB's intention is the wording of clause 6 and the extract from the letter of 18 January 1982, quoted above. Both, whether taken individually or together, tend to suggest an intention to prohibit sales between authorized dealers.

Selective distribution systems may be compatible with Article 85 (1), as the Court accepted in Case 26/76 *Metro* v *Commission* (1977) ECR 1875, so long as the restrictions adopted do not exceed what is required for the appropriate distribution of the product. HGB has not shown that the Commission was wrong in this case to have concluded that a prohibition on sales between authorized dealers did infringe Article 85 (1).

So far as the alleged restriction on sales to unauthorized dealers is concerned, the Commission did not suggest in its Decision that HGB's selective distribution system infringed Article 85 (1) *per se* because no form of selection was necessary to ensure the proper distribution of Hasselblad equipment. The Commission's complaint relates to the criteria of selection, not the necessity for a selection and paragraph 27 of the judgment in the *Metro* case necessarily implies that, in the context of a selective distribution system which is compatible with the common market, a restriction on resale to a dealer outside the system is not a restriction on competition. The crucial question is, therefore, whether the selective distribution system did infringe Article 85 (1) because it did not fulfil the conditions laid down by the Court, that dealers are selected on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the dealer and his staff and the suitability of his trading premises, such criteria being laid down uniformly for all potential dealers and being applied without discrimination (see, for example, Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775 at paragraph 15). If the selection criteria do not fulfil these conditions, the whole selective distribution system, including the restriction on resale, infringes Article 85 (1). On the other hand, if the selection criteria are compatible with Article 85 (1), so is the corresponding restriction on resale.

The Commission says that HGB's policy was not to include in its dealer network every dealer able to comply with the terms and conditions required by HGB but to ensure an even geographic spread so that no area was saturated with authorized dealers; it therefore selected its dealers on both objective criteria of a qualitative nature and quantitative criteria (see paragraphs 35 and 64 of the Decision). Moreover HGB authorized only one-sixth of the dealers who were

otherwise qualified. In substance HGB admits this but seeks to justify the use of quantitative criteria by saying that, unless such a limitation were applied, authorized dealers would not be competititive or profitable and would not be able to finance the minimum stock requirements amounting to UKL 3 000 of stock. It is also said that to authorize every potentially qualified dealer (said to numer some 2 000) would be impracticable given that the number of Hasselblad cameras sold per annum is far less than the number of potential dealers.

The Commission accepts that the employment of trained staff and requirements concerning the suitability of premises are qualitative criteria which do not restrict competition as long as they are applied objectively and do not exceed the requirements of an appropriate distribution of the product. I do not consider that it has been shown that there was a breach of Article 85 (1) in these respects in this case.

The dealer agreement does not in terms assign to an authorized dealer a specified sales territory although clause 28 (b) entitled HGB to terminate the agreement if the dealer changed the geographical location of the premises without HGB's consent. There is no evidence that, when considering whether to accept a new dealer, HGB so arranged matters that there was a *de facto* division of the United Kingdom into separate sales territories. On the other hand, on one occasion, HGB refused to accept new dealers in London due to a "saturation situation" (see Annex 17 of the Application). The explanation for this appears to be found in a statement made by or on behalf of HGB when the dealer agreement was notified to the Commission — viz. HGB "is prepared to grant dealerships to any dealers which satisfy the qualitative criteria set out in the agreement, subject, however, to the provision that if in a small area there should already be a large number of dealers, it reserved the right not to appoint a new dealer, for fear that the qualitative criteria can then not be met by the existing dealers" (see page 50 of the Application).

A minimum stock requirement of UKL 3 000 seems to me in this case (unlike the *Metro* case) to have been reasonably necessary for the proper distribution of the products even though it may, as HGB accepts, limit the number of potential dealers. On the other hand, HGB adopted the position that a dealer must, to be competitive, sell twice the minimum value of stock in a year and the number of dealers was limited in order to assist the authorized dealer to achieve that. Such a practice seems to me to have been, as the Commission contends, a restriction on competition and contrary to Article 85 (1).

The Commission has granted exemption under Article 85 (3) in similar cases: one close example is to be found in Decision No 70/488 *Omega* (Official Journal, L 242 5. 11. 1970, p. 22, 27). The reason why it did not grant exemption in this case is not shown. Although HGB has in formal terms claimed the annulment of the refusal to grant exemption, it has not

addressed to the Court any arguments tending to show that the Commission wrongly exercised its discretion in the matter. Its case is based entirely on the contention that there was no breach of Article 85 (1). In the circumstances, it seems unnecessary to consider whether an exemption should have been granted.

In paragraph 73 of the Decision it is stated that measures to influence prices were applied intermittently, as required, in 1973, 1975, 1978, 1979 and 1980. The only evidence for 1978 to 1979 relates to the Camera Care case.

Lastly, there is the allegation that HGB tried to prevent price competition between its authorized dealers and used the dealer agreement to influence retail prices. The Commission appears to have based itself on the following:

(1) a statement made in August 1973 by a representative of HGB to the effect that "where retailers cut prices by around 10%, (HGB) even held back on supplying certain dealers";

HGB submits that the August 1973 statement is irrelevant because it was made long before the present owner of HGB took over in 1975 and he was never aware of it, so it could not have reflected his policy. The Commission, on the other hand, has said that it is up to HGB to produce evidence tending to show that HGB changed its policy after August 1973. This argument should not, in my view, be accepted. The August 1973 statement is only direct evidence of what an HGB representative said in August 1973.

(2) a letter dated 1 December 1975 in which HGB is said to have "threatened any of its dealers who did not treat the prices given in the retail price list published by it as minimum selling prices with the withdrawal of credit facilities";

(3) a memorandum of 24 March 1980, in which HGB is said to have told dealers that "it made no sense to embark on a pricing policy which was damaging profitability in a way that might be difficult, if not impossible, to recover";

According to HGB, the 1 December 1975 letter was written because HGB was worried that, if prices were cut any more, some of its dealers might not be able to meet their financial commitments or even go bankrupt. It therefore decided to write to the dealers warning them of the consequences, in particular, that HGB would not give further credit facilities to a customer who might not be able to meet his financial obligations. The Office of Fair Trading in England appears to have objected to the terms of the letter and so HGB drafted another, which seems to be the memorandum of 24 March 1980 mentioned by the Commission in its decision. It appears to be common ground, however, that this letter contained the following sentence; "Obviously, you as a dealer are completely free to sell our products at

(4) the termination of the dealer agreement with Camera Care.

whatever price you wish". This weakens considerably the force of the Commission's charge.

So far as selective distribution systems are concerned, attempts to maintain price levels do not necessarily fall under the prohibition in Article 85 (1) (paragraph 21 of the judgment in the *Metro* case). In the present case, it is certain that HGB did not want to end up financing price competition between its authorized dealers. The fact that it made this clear to the dealers would undoubtedly cause them to limit the extent of any price cutting. It does not seem to me that this is contrary to Article 85 (1). In order to establish a breach of Article 85 (1), the Commission would have to show that HGB took steps to limit price competition and influence prices which were unjustifiable having regard to the structure of the market and the functioning of its dealer network. The evidence relied on relating to the years 1973, 1975 and 1980 does not establish this. The Commission's case therefore turns on HGB's treatment of Camera Care.

## 4. The Camera Care case

In brief, the allegations on which the Commission founded its decision are that, in 1978, HGB terminated the dealer agreement with Camera Care because it was undercutting other dealers. HGB then took steps to prevent Camera Care from being supplied with Hasselblad equipment, whether from United Kingdom or foreign dealers, and to this end made attempts to trace the sources of the equipment sold by Camera Care.

The Commission's case is that HGB terminated the agreement with the object of restricting competition. The event following which HGB gave notice of termination was the publication in the professional press of what it described as the "Swedish massage" advertisement. On its first appearance HGB had protested about its bad taste and asked that it should not reappear. Camera Care is alleged to have given an assurance that it would not. Subsequently the advertisement was published again and Camera Care explained that it had not been able to withdraw the advertisement in time before publication. HGB did not accept this. From the correspondence that ensued between HGB and its then solicitors, it is apparent that HGB wished to use the Swedish massage advertisement as an excuse to justify terminating the dealer agreement. HGB's only objection was that the advertisement was vulgar. It did not voice any objections to the fact that the advertisement also declared that Camera Care would "match any other dealer's price". HGB was also concerned with another advertisement. It objected to this because of the references to prices.

By letter dated 13 February 1978, HGB indicated to Camera Care its disapproval of what appears to be the Swedish massage advertisement, saying that the format was in bad taste and complaining of the use of the word "Hasselblad" in conjunction with Camera Care's own trade name, both being printed using the

Hasselblad type-face. By letter of the same date, HGB gave notice of the termination of the dealer agreement. Camera Care replied by letter of 15 February saying that the content and wording of advertisements had frequently been discussed with HGB and indicating that certain aspects of the Swedish massage advertisement had been approved by HGB. On 24 February 1978 HGB again wrote to Camera Care saying that the dealer agreement had been breached because Camera Care had used the name "Hasselblad" in conjunction with its own trade name (both printed using the Hasselblad typeface); with regard to the words "We will match any other Dealer's price", the letter says "We cannot be held responsible for prices charged by Dealers at retail and although we accept that certain sales will be lost by you to other Dealers due to price competition, I pointed out to you on numerous occasions that it is not our policy to refund any profits that may have been lost by you on these potential transactions". HGB repeated that the Swedish massage advertisement was damaging to its reputation and that of VHAB. The letter ends by saying that the decision to terminate the dealer agreement was not taken lightly and that "many factors" were taken into consideration.

These factors are not specified. HGB has indicated that it found the person who ran Camera Care difficult to get on with and that it was dissatisfied with the fact that Camera Care did its own repairs and servicing. HGB did not cut off supplies to Camera Care immediately but offered to maintain supplies for the following three months at a level higher than Camera Care's normal monthly requirements.

There is some evidence in the correspondence between HGB and its then solicitors and between HGB and Camera Care that HGB did not simply seek to maintain advertising standards. It was prepared to, and did, object to slogans which tended to indicate price competition between authorized dealers. As a result, the Commission's allegations concerning the use by HGB of clause 23 (c) of the amended dealer agreement (which is the same as clause 22 (c) of the original version) are substantiated. On the other hand, there is no reason to doubt HGB's assertions that it found the Swedish massage advertisement to be objectionable on grounds of taste. HGB admits that this was the last straw which broke the camel's back and Camera Care does not deny the difficulties between it and HGB which arose during the running of the dealer agreement.

The Commission's case can be summarized, in the light of the evidence available, as follows:

(1) HGB was opposed to advertisements showing price competition between dealers; it was therefore opposed to price-cutting;

(2) Camera Care appears to have cut prices more than other dealers;

(3) Camera Care's dealer agreement was terminated;

(4) therefore the "main reason" why the dealer agreement was terminated was that Camera Care cut prices.

The evidence before the Court, in my view, establishes that Camera Care cut prices more than most other authorized dealers, although not to the extent alleged by the Commission. Even taking into account HGB's contentions, there was, it seems to me, sufficient evidence to justify the conclusion that the agreement was terminated substantially because of price-cutting.

As far as events after the termination of the dealer agreement are concerned, the Commission made the following allegations in its decision:

(1) other dealers in the United Kingdom refused to do business with Camera Care, sometimes citing clause 6 of the dealer agreement and sometimes "for fear of reprisals" from HGB;

(2) HGB "intervened personally" with a firm called Life Photographics and threatened to terminate the latter's dealer agreement if it supplied Camera Care;

(3) Camera Care was still unable to obtain Hasselblad equipment from dealers in the United Kingdom at the time the decision was adopted (2 December 1981);

(4) HGB continuously monitored Camera Care's trade, using a detective agency from 13 October 1978 to 10 December 1979 and carrying out serial number checks in 1979 and 1980;

(5) there was a concerted practice involving VHAB and several sole distributors, designed to prevent Camera Care from receiving supplies, which went on until at least August 1980.

HGB denies any knowledge of (1) and (2). The Commission produced no evidence to show that these allegations were based on fact. The decision cannot, therefore, be upheld to this extent.

As to the other points there is no evidence that Camera Care sought supplies from one of HGB's authorized dealers or from HGB itself and was refused, or that Camera Care asked to become an authorized dealer and was rejected, so that it is unnecessary to consider whether these matters would have constituted a restriction on competition. HGB admits that it made test purchases in order to trace Camera Care's sources. HGB however denies that it ever employed a detective agency and the Commission eventually abandoned this point. The concerted practice is also admitted although HGB says that it lasted only until October 1979.

In my opinion the concerted practice to prevent supplies reaching Camera Care was an infringement of Article 85 (1). Since *Consten and Grundig* v *Commission, supra,* it has been clear that

positive steps taken by distributors to prevent parallel imports are contrary to the competition rules. HGB has argued that its part in the concerted practice was not unlawful and could not be punished by a fine because HGB believed that parallel imports could lawfully be prevented under the terms of VHAB's original sole distributorship agreement which had been notified to the Commission. This agreement contained a provision prohibiting the sole distributor from selling or offering for sale outside the territory covered by the agreement. The Commission had objected to this provision in a letter dated 23 December 1976 and VHAB had drawn up a new version of the standard agreement and notified it to the Commission on 6 March 1978. Article 1 of this agreement prohibits the sole distributor from actively promoting or carrying on sales and also soliciting customers outside the contract area. Otherwise there is no prohibition on exporting outside the contract area. On 30 August 1978 VHAB wrote to the Commission saying that it had sent a copy of the new agreement to its sole distributors, including HGB. At the hearing Counsel for HGB restricted the claim to the period leading up to that date.

So far as can be seen, the only evidence of the operation of the concerted practice before 30 August relates to contacts between HGB and Têlos, the French sole distributor. The sole distributorship agreement made with Têlos does not appear to have been an "old" agreement benefiting from provisional validity. In any event, it is doubtful if provisional validity subsisted after 1976. In consequence, there was no ground for HGB's belief that any action by Têlos to prevent Camera Care importing Hasselblad equipment into the United Kingdom from France was lawful.

Article 15 (5) of Regulation No 17 provides that fines may not be imposed in respect of acts taking place after notification and before the Commission has decided whether or not to apply Article 85 (3). However, Article 15 (6) of Regulation No 17 provides that Article 15 (5) does not apply where the Commission has informed the undertakings concerned that, after a preliminary examination, it is of the opinion that Article 85 (1) applies and no exemption should be granted under Article 85 (3). The Commission acts under Article 15 (6) by way of a decision (see Cases 8-11/66 *Cimenteries* v *Commission* [1967] ECR 75). The letter of 23 December 1976 does not appear to have been such a decision. Nonetheless, HGB cannot, in my opinion, rely on immunity from fines under Article 15 (5). This immunity is granted in respect of acts which "fall within the limits of the activity described in the notification". HGB engaged in a concerted practice. This does not, in my view, fall within the limits of the sole distributorship agreement notified to the Commission, even though it did include a prohibition on exports outside the contract territory.

Turning to the question of the date on which the concerted practice ended, there is very little evidence of its continued existence after October 1979. The Commission appears to rely, in particular, on (1) a sales strategy paper drawn up in 1980 by HGB (2) evidence that HGB was covertly buying Hasselblad equipment from Camera Care in December 1979 and (3) a statement made by Ilford, the Irish distributor, to the effect that it felt obliged not to export until early 1980. There is nothing in the sales strategy paper which, in my opinion, shows the continuance of any anti-competitive practice. HGB counters the inferences to be drawn from the other evidence relied on by the Commission by saying that it ceased participating in any concerted practice to prevent parallel imports after taking legal advice. This appears to have been at the time Camera Care began proceedings for interim relief pending completion of the Commission's investigations. The Court gave judgment in the proceedings brought by Camera Care on 17 January 1980 (see Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119).

Although the Commission is entitled, once a concerted practice has been established, to rely on a presumption of continuance until the concerted practice is shown to have been terminated, I would accept HGB's evidence that, once it had taken legal advice and whilst the Commission was undertaking its investigation and Camera Care seeking interim relief, any concerted practice stopped at the end of 1979.

## 5. The concerted practice and the sole distributorship agreement

The Commission alleges in its decision that the object of the concerted practice was to give effect to VHAB's general sales policy of protecting its sole distributors from parallel imports. The concerted practice was implemented in various ways:

(1) the boycott of Camera Care is relied on as evidence of a general policy to prevent exports between Member States which, it seems, is alleged to have gone on since June 1974 (HGB is said to have been involved as from Summer 1978);

(2) the provisions in the sole distributorship agreements to the effect that the serial numbers of equipment sold and the name and address of the purchaser should be recorded and notified to VHAB were used to trace the source of exports;

(3) price lists and business secrets were exchanged between VHAB and the sole distributors in order to eliminate competition in the form of parallel imports. The exchange of information is said to have gone on for years (paragraph 26 of the Decision) but, in paragraph 73 of the Decision, it is said that HGB was involved as from April 1977.

HGB's principal argument is that, while it was engaged in a restrictive practice

designed to prevent Camera Care from getting supplies of Hasselblad equipment in 1978 and 1979, there was no overall policy to prevent parallel imports in general. I do not accept this. Although the only instance of the ban on exports between Member States, apart from the *Makro* case in 1974, is the boycott of Camera Care, the overall picture is that HGB, VHAB and the other sole distributors were combining in order to prevent parallel imports in general. This appears very clearly from the documents, which contain constant references to "grey imports" and "grey trading", meaning parallel imports. For example, in a letter dated 4 December 1978, HGB wrote to Ilford to say that it was pleased that Ilford was "cooperating in helping to stamp out the grey trading in Hasselblad equipment". In a subsequent letter to Ilford, dated 5 March 1979, HGB said: "Obviously if a dealer obtains 'grey' imports his sales in no way contribute towards our costs, whereas the customer was undoubtedly influenced by our advertising and promotion when making his decision to buy a Hasselblad!". Similar general remarks were made by VHAB in its correspondence.

Article 2 of the Commission's decision declares that the sole distributorship agreements, including that made with HGB, infringe Article 85 (1) "in so far as they grant exclusivity of distribution of Hasselblad equipment", and refused exemption under Article 85 (3). So far as can be seen, however, the Commission's objection to the agreements was founded not on their terms but on the manner in which they were put into effect. The key part of the decision seems to be paragraph 55 which says: "As implemented, the sole distributorship agreements ... do not, therefore, fall within the block exemption provided for in Article 1 (1) of Regulation No 67/67/EEC, with the result that Article 85 (1) of the Treaty applies to them because of their exclusivity". The words "as implemented" seem to refer to the concerted practice. Since the sole distributorship agreement made with HGB does not appear to have contained a general clause prohibiting all export sales, the implementation of the agreement appears to be the only ground for taking it outside the scope of Article 1 (1) of Regulation No 67/67.

In relation to this agreement, the Commission also relies on HGB's repair service which, it alleges, discriminates against parallel imports and thus constitutes an anti-competitive measure which falls within Article 3 (b) of Regulation No 67/67. This provides that block exemption does not apply where "the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, in particular where the contracting parties: ... (2) exercise other rights or take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract".

HGB founds its claim for annulment on a denial that it was involved in any concerted practice and that its repair service discriminated against parallel imports. The question of the concerted practice has already been dealt with and it is only necessary to consider the point about the repair service.

The Commission's decision asserts that HGB "practises a more rapid repair service for 'normally' imported cameras, thereby placing purchasers of parallel-import Hasselblad equipment at a disadvantage" (paragraph 57). Hasselblad equipment is covered by a twelve-month manufacturer's guarantee and, under the terms of the sole distributorship agreement, HGB was obliged to do all repairs and servicing required for customers under the guarantee free of charge. With effect from 1 January 1979 HGB introduced its "Silver Service Card" guarantee scheme. This extended the manufacturer's guarantee for a further period of 12 months. The Commission does not appear to object to this. In its advertising, however, HGB said that the Silver Service Card also gave the card holder priority in servicing. In the Reply, HGB admitted that, whenever possible, card holders benefited from a 24-hour service. The Commission's case is that this is an anti-competitive practice because the giving of priority over parallel imports detracts from the benefits to which they are entitled under the manufacturer's guarantee and acts as a deterrent to parallel importing.

Although a sole distributor may lawfully combat parallel imports by offering a better or wider range of after-sales services, it may not take steps to deprive parallel imports of benefits to which they are entitled under a manufacturer's guarantee. This is a measure to prevent dealers or consumers from obtaining parallel imports within the meaning of Article 3 (b) (2) of Regulation No 67/67. It does not, in my view, matter that it is adopted unilaterally by one of the contracting parties to the agreement in question, at least if the other contracting party acquiesces in it. Whether priority in servicing is to be characterized as better servicing or a reduction in the advantages accruing under the manufacturer's guarantee, is a more difficult question.

The position, as I see it, can be put in this way. A sole distributor which, like HGB, is bound to provide after-sale and guarantee services, must honour its obligations without discriminating against parallel imports. Where, as appears to be the case here, the sole distributorship agreement does not provide that guarantee repairs must be completed within a specified time or must be given priority over non-guarantee repair work, the sole distributor could only be accused of discriminating against parallel imports if there were evidence either that guarantee work was not carried out on parallel imports at all or that it took longer or was done less efficiently than comparable repair work, whether guarantee or non-guarantee, done to equipment sold through the sole distributor. In this situation, the sole distributor is not, in my view, guilty of anti-competitive conduct if it offers a more efficient service to some customers as long as the general level of efficiency does not reveal

discrimination against parallel imports. The position is different where, for example, the sole distributorship agreement requires the sole distributor to give priority to guarantee work. In that event, a difference in the performance of guarantee work as between parallel imports and equipment sold through the sole distributor can be justified only if there is a legitimate business reason such as payment of an extra charge.

In the present case, the Commission was asked to provide the Court with a detailed list enumerating every instance known to it when it adopted its decision of a refusal by HGB to repair Hasselblad equipment or delays in repairs. The Commission replied, saying that it knew of only one refusal to repair. The evidence for this is to be found in a letter dated 16 February 1981 which appears to relate to events in 1978. The probative value of this letter is controversial for various reasons and is the subject of a libel action brought by HGB in England against the alleged writer. The Commission did not apparently investigate individual cases of delays in repairs. Camera Care has produced to the Court a letter apparently written to it by a third party which alleges that, in 1982, HGB said that it could repair a camera bought from Camera Care in approximately one week; a "24-hour or replacement service" was not possible because Camera Care was not an authorized dealer. Various other material of doubtful probative value has also been produced to the Court. After assessing all the evidence, it is my opinion that it has not been established that parallel imported cameras were discriminated against unlawfully.

Counsel for Camera Care put some weight on advertisements placed in the professional press by HGB which are alleged to indicate that, if a customer buys from an unauthorized dealer, he would not get "genuine Hasselblad service". I do not construe these advertisements as a threat made by HGB to the effect that it would not give "genuine Hasselblad service" to a parallel import.

In the result, it is my opinion that the Commission's allegations concerning the Silver Service Card guarantee are unfounded but that in other respects the decision should be upheld.

## Conclusions

Many other points of detail have been argued and reargued in the written pleadings. They do not in my view affect the conclusions to which I have come and I do not think it assists to deal with them *seriatim.*

Although there are a number of respects in which the findings made by the Commission in its Decision cannot be upheld, none of them is such as to justify annulling Articles 1, 2, 3 and 8 of the Decision because they do not alter the substance of the Commission's conclusions that HGB was involved in a concerted practice to prevent, limit or discourage exports of Hasselblad equipment between the Member States and that HGB's selective distribution system does infringe Article 85 (1). Nonetheless, it is, in my view, right to reduce the fine imposed on HGB by Article 8 of the Decision. Having regard to the size of HGB's turnover, its profits, the duration and gravity of the breaches of the competition rules which are supported by the evidence and the role played in them by HGB, the facts that the fine imposed on VHAB represented about 1,6% of its turnover, that imposed on HGB about 4% of its turnover, it seems to me that it would be appropriate to reduce the fine to ECU 80 000.

Since each party has, in my opinion, been successful in regard to some issues and unsuccessful in regard to others, it seems to me to be fair and convenient that each party, including Camera Care, should bear its own costs.