OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 22 OCTOBER 1975 [1]

Mr President,
Members of the Court,

1. The four applicant undertakings constitute the Groupement des Fabricants de Papiers Peints de Belgique, which was set up in 1922 and is governed by internal rules *(Règlement d'ordre intérieur)* the most recent version of which, dated July 1971, restricts affiliation to the Groupement to wallpaper manufacturers established in Belgium. The rules provide that, in order to harmonize the conditions for marketing of wallpaper, the Groupement shall, every two years, decide on a *barème-cadre* which lays down, *inter alia,* price ranges and qualities. The *barème-cadre* corresponds to a *barème de prix* laying down ex-factory prices and final retail prices.

Under the Groupement's rules, its members have entered into a mutual engagement to standardize their General Conditions of Sale, which are based on the fixing of sale and resale prices and on the introduction of a rebate known as a *prime de coopération,* the level of which depends on the amount of total annual purchases from all members.

The first article of the contested Decision declares this agreement to be incompatible with Article 85 (1) of the EEC Treaty.

The Decision declares to be incompatible with Article 85 not only the Groupement's *Règlement d'ordre intérieur* but also Circulars Nos 619 and 620, published by the Groupement, which the contested instrument describes as decisions by associations of undertakings within the meaning of the abovementioned article. The Decision futher declares that, as soon as they are included in a contract between a member of the Groupement and a customer, the provisions of these circulars constitute a vertical agreement between undertakings, which is also caught by Article 85.

In Circular No 619 of 2 September 1972, addressed to their customers, the undertakings composing the Groupement imposed:

(a) an obligation on their customers to apply and display the fixed prices;
(b) a prohibition on displaying lower prices or announcing price reductions;
(c) a requirement that clearance sale prices must be adhered to;
(d) an obligation to impose compliance with the obligations under the General Conditions of Sale on all customers.

This circular, as well as circular No 620, also referred to a rebate known as the *prime de coopération,* the percentage of which was based on the total annual purchases from the members of the Groupement. In the contested Decision, the Commission declares that all these provisions have as their object the restriction of competition in respect of the sale of wallpapers in Belgium.

The Decision under consideration also refers to Circulars Nos 617V and 617C, which it considers to be either decisions by associations of undertakings or as in themselves constituting agreements between undertakings as soon as they are included in a contract between a member of the Groupement and a customer. According to the Decision, the object of these circulars is, by fixing resale prices, to abolish price competition between wallpaper dealers. Even if it were true, as

1 — Translated from the Italian.

the applicants claim, that they no longer fix their prices but only forbid the display and announcement of price reductions, the Decision states that the mere fixing of a price, even if only as a guide, affects competition in that it gives all market participants sufficiently certain foreknowledge of their rivals' pricing policies.

Apart from the illegality of these various instruments, another decision declared illegal by the Commission is that taken by the Groupement in October 1971 to cease supplying the Pex undertaking, which likewise constitutes a decision by an association of undertakings within the meaning of Article 85 (1). According to the Commission, that decision was illegal in that it constitutes a restraint on Pex's competition since that time with other wallpaper dealers. The boycott introduced on the basis of that decision was unlawful because it constituted a penalty for infringement of an obligation which was invalid. In fact, the applicants could not claim that Pex should comply with the General Conditions of Sale and charge the fixed prices, or ensure that his customers would comply with them, since they involved clauses and decisions contrary to Article 85 (1) of the EEC Treaty.

2. The Pex undertaking, which was a customer of several members of the Groupement, supplied the undertaking G.B. Entreprises, which resold at retail prices from 10 to 15 % below those fixed by the group. On 28 September 1971 the Brepols undertaking, a member of the Groupement and Pex's supplier, wrote to Pex asking it to ensure that the Super-Bazar stopped placing on sale at reduced prices the products supplied to it by PEX. Brepols threatened to suspend Pex's supplies if it refused. A few days later, on 4 October 1971, Brepols sent a circular to all its customers stating that it had severed business connexions with a wholesaler because the latter was supplying Brepols products to a chain of department stores who were re-selling at prices from 10 % to 15 % below the official list. This was clearly a reference to Pex. On the following 29 October, the Groupement addressed a circular to all its customers stating that it felt it to be necessary 'in the present circumstances' to draw their attention to the obligation placed upon them under the General Conditions of Sale to ensure that those purchasing from them observed the prices laid down. Meanwhile, another member of the Groupement, the Papeteries de Genval, had, on 30 September 1971, informed Pex of the immediate suspension of its supplies because of failure by a large concern, to which Pex supplied products from the Papeteries, to observe the conditions of sale.

Similarly, the Usines Peters-Lacroix expressly refused Pex's request for supplies; the Vanderborght undertaking has never received orders from the intervener.

At the hearing on 18 December 1973, before the Commission, the Groupement and its members declared that they would continue to withhold all supplies from Pex so long as the latter persisted in its failure to comply with the General Conditions of Sale. At the same time the applicants, as further justification of their attitude, referred to an outstanding debt to Brepols which Pex had failed to pay.

Of the many charges of infringement of Article 85 levied against the aforesaid undertakings in respect of agreements between undertakings and the above-mentioned decisions of the Groupement, I shall first of all deal with those which are more directly connected with the boycott, which is the only charge on which the Commission based the fine imposed on each of the applicants. I am mainly referring to the obligation on the wholesaler to ensure that the obligations arising under the General Conditions of Sale, especially those affecting prices, are observed by retailers.

These obligations, whose actual effect I shall come to in a moment, are in turn linked with the obligation on members to fix their selling prices to wholesalers in accordance with a price-list laid down by the group according to type of product. The resale prices to the public are based on this price-list.

As is clear from the reply sent by the manufacturers in the Groupement to the statement of objections communicated by the Commission in the course of the administrative procedure, the four applicant undertakings and a fifth manufacturer who has not been a member of the group for several years, supply about 60 % of domestic consumption on the Belgian market, 50 % consisting of their own products and 10 % of imports effected by them. The group of four Belgian manufacturers does not specify the volume of sales by the fifth Belgian manufacturer but believes that its members supply about 50 % of domestic Belgian consumption. This percentage includes the proportion of sales effected by them from imports of foreign products.

3. Before going into the substance of the issues raised by the present proceedings, I feel it necessary to clear the ground of certain arguments, advanced by the applicants, which seem to me to be of secondary importance.

(a) In their first submission, the applicants contend that the statement of reasons for the contested Decision is defective in that it did not take account of the arguments advanced by them during the administrative procedure. As has already been established by the case-law of this Court, the Commission, in stating the reasons for its Decisions, even those relating to the fixing of fines for infringement of the rules on competition, is not required to discuss all the issues of fact and of law which may have been touched on by every interested person in the course of the administrative procedure (Judgment in Case 41/69, *ACF Chemiefarma NV* v *Commission of the European Communities* [1970] ECR 690, grounds of judgment Nos 76 and 77). In the words of that judgment, 'the statement of reasons is to be considered sufficient if it indicates clearly and coherently the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission's reasoning'. In this connexion, the applicants in the present case have not advanced any consideration which discloses that the disputed Decision is in any respect defective. On the contrary, they were content to state that the Commission did not reply to arguments which, in their view, were conclusive. However, in assessing the adequacy of the statement of reasons, the Court must confine itself to the question whether the statement succeeds in making clear the line of reasoning followed by the Commission in adopting the contested Decision, in particular by setting out the essential issues of fact and the considerations of law which led to it. If its line of reasoning had omitted considerations and arguments which, in terms of the substantive rules of law applied, shed a wholly different light upon the conduct of the applicants, this might possibly disclose a breach of those rules, and not just a defect of form.

An appraisal of the relevance of the arguments which, according to the applicants, are not covered by the statement of reasons for the Decision falls to be carried out, therefore, when consideration is given to the substance of the action. It is only in that context that the Court can, in the light of the points referred to by the applicants, make an accurate assessment of the Commission's position.

(b) Secondly, the applicants point out that the fixed price system is not, in Belgium, prohibited under national law and they regard as illegal discrimination

the action of the Commission in inflicting fines in respect of conduct directly connected with the fixing of prices whereas, on the other hand, it has never taken action to compel the Belgian State to change its legislation on the subject. The discrimination lies in the fact that the defendant rebukes private parties for something which it tolerates on the part of a State.

The fact that, within its field of application, national legislation permits conduct which may, in another field, be prohibited under Community law does not necessarily mean that it is unlawful under the Treaty. As is made clear by the Judgment in Case 14/68 *(Walt Wilhelm and Others* v Bundeskartellamt, [1969] ECR 14), national law on competition applies in parallel with Community law subject only to the principle of the supremacy of Community law and, as emphasized by the Court in the judgment quoted, the reservation that, when independently applying their law relating to competition, the Member States may not introduce or retain measures capable of seriously prejudicing the practical effectiveness of the Treaty. In particular, it follows from the foregoing that, where measures adopted by a national authority prove to be incompatible with the view taken by the Commission as a result of the procedure initiated by it with regard to an agreement, the national authority is required to avoid adopting measures which may prevent the decisions of the Commission from having full effect.

The possiblility of conflict when there is parallel application of national law and Community law governing competition, to which the Court was referring in laying down these principles, really arises in cases where national law is stricter than Community law. In such circumstances, in fact, a prohibition imposed by a national anti-monopoly authority might militate against the full effectiveness of a Community decision authorizing, under Article 85 (3) of the Treaty, an agreement which, though in restraint of competition, was considered to accord with other overriding Community interests. In the reverse situation, however, which would appear to be that with which we are dealing in the present case, namely, that in which national anti-monopoly law tolerates restrictions on competition which are prohibited under Community anti-monopoly law, there does not appear to be any real likelihood of any conflict arising because the fact that they are permitted by national law cannot conceivably obstruct the full effectiveness of a Community prohibition which is in itself directly applicable in all the Member States. Moreover, the national authorities are free to adopt towards agreements subject to their own exclusive jurisdiction, namely, those which have no effect on the working of the common market, a position which may, in one way or another, be at variance with that under Community law.

There is, therefore, no evidence that, in the present case, the Commission failed in its duty because it did not make representations to the Belgian authorities concerning the national legislation referred to by the applicants. The latters' submission based on discrimination must, accordingly, be rejected.

(c) The applicants further criticize the Commission for having failed to take account of the proposals included with their letter of 24 April 1973. In the applicants' view, the letter, which was despatched during the administrative procedure, gave full satisfaction to the Commission on all material points.

For its part, the Commission maintains that the letter did not make it clear whether the agreements listed in the statement of objections had been terminated.

However that may be, the question is of little importance in the present dispute since, even on the assumption that, in

the letter, the applicants had offered an explanation capable of fully satisfying the Commission on the subject of the removal of the illegal clauses from their basic agreements, this could not, in any case, have altered the sole fact on which the fines were based, namely, the boycott of the Pex undertaking, which had already taken place, in execution of an illegal agreement. As an argument in support of annulment it is, therefore, without foundation.

(d) The applicants also state that the Decision, in doing no more than declare that the cessation of supplies to the G.B. undertaking was due to the fact that G.B. applied different prices from those laid down by the group, ignored other practices carried on by the Grand Bazar, namely, the announcement of reductions which in reality were no such thing, because the undertaking had based the alleged reductions on prices appropriate to different types of wallpaper form those under which the products sold by G.B. ought to have been classified. The Commission draws attention to the fact that, since the system of classification by quality (the non-observance of which by G.B. is complained of by the applicants) is closely connected with the fixing of prices, it forms an integral part of the system of market control established by the group and, as such, would, on the assumption that it came within the prohibition in Article 85, be equally illegal. Apart from this, it must be borne in mind that, as is clear from the file, the essential reason for the boycott was certainly not an occasional and, as claimed by G.B., wholly accidental mistake in classifying an article but solely the non-fulfilment of an obligation not to apply or at least not to announce, reductions.

4. At the commencement of the oral procedure, the representative of the Groupement lodged a declaration by the applicants in which they withdraw their case against that part of the contested Decision which concerns the prohibition both of the agreements imposing an obligation to apply the prices fixed and of the agreements prohibiting the display of lower prices than those fixed or recommended, or at least the announcement of price reductions.

At the same time, the applicants asked the Court to take note of the extent to which this reduced the scope of their applications.

As a result of this withdrawal of part of the applicants' conclusions, the application must henceforth be regarded as limited to contesting only that part of the Decision which refers to the fines imposed on each of the four undertakings which belong to the Groupement.

The penalties were imposed in respect of the collective boycott carried out to the detriment of Pex. The applicants' conduct must be looked at in the context of the conditions of sale, in applying which they behaved as they did.

An appraisal of their conduct depends in the first place on an appraisal of the clauses of the agreement between the four members of the group, which comprises the group's Règlement d'ordre intérieur, referred to above, and the decisions on pricing policy. A boycott in defence of interests threatened by the unlawful conduct of the party concerned would not in itself be actionable.

The first comment to be made is that a promise to follow a different course in the future seems a poor foundation on which to demonstrate that past conduct does not come within the rule in Article 85 (1) of the Treaty. It may be an act of mere expediency, rather than recognition or confession of guilt.

The parties hold divergent views concerning the actual effect, at the material time, of the obligations imposed on the subject of prices. Whereas the Commission maintains that the system

of fixed prices was still continuing, the applicants contend that the group had, for some time, no longer been insisting on strict adherence to their prescribed retail prices, which appear on the list adopted. They say that the obligation on retailers was thenceforth restricted to ensuring that shops did not display lower prices than those shown on the list or that no reductions were announced.

Even though the applicants have withdrawn part of their conclusions, this point still has a bearing on the decision in the present case because, although the undertakings are willing to comply with the prohibitions laid down in the Decision, with effect from the date on which it was adopted, they continue to maintain that, in the circumstances in which they acted, their conduct was not contrary to Article 85 of the Treaty.

During the hearing the applicants' lawyer expressly recognized that the refusal of the undertakings constituting the Groupement to supply Pex was due entirely to the fact that Mr Pex had first broken his undertaking to forbid those purchasing from him, in particular the Grand Bazar of Antwerp, to announce price reductions, and had then, without further ado, repudiated it.

Nevertheless, the applicants continue to deny that the action they took in respect of the agreements on prices, which includes, *inter alia*, a prohibition against announcing price reductions, is illegal.

On the question of fact, the Commission contends that the statement that the group had, for some years, no longer insisted on observance of the prices laid down for sales to the public is contradicted by the price-list and by a letter of 22 October 1973 from the group to G.B. Entreprises, in which the undertaking is reprimanded for not observing the prices fixed for resale of the products of undertakings in the group.

In a number of cases, however, which obviously did not attract so much attention as that of Grand Bazar and did not, therefore, alarm the majority of other dealers who were customers of undertakings in the group, no objection was raised when retailers in fact applied prices which departed from those laid down. Nevertheless, the provision in paragraph 7 of Circular No 619 of 2 September 1972, which lays down the General Conditions of Sale for customers, is still a serious interference with freedom to fix resale prices. Retailers were, in fact, forbidden to announce any reductions whatever on wallpaper, and it was, furthermore, obligatory for shops to display notices supplied by the group informing customers that no reduction could be given on the products concerned. These notices were required to be exhibited in a prominent position either in the shop window or in the shop itself.

Thus, by means of an agreement between the manufacturers and of a series of vertical agreements between them and retailers, independent fixing of retail prices was discouraged. In the case particularly of the big stores, where bargaining is impossible, the mere fact of being obliged to display the prices fixed by the group means that, in making sales, they have to adhere strictly to those prices, the effect of which, at least in the present case, is undoubtedly to make them compulsory. To contend, as was done in defence of the applicants at the hearing, that such a situation was entirely due to the present structure of the big stores seems a fallacious argument. If it is, in fact, true that, until the big stores radically change their system of sale, based on fixed prices, to match that of the small shops (that is, unless they change their principal characteristic), they will be unable to offer discounts on the Belgian or foreign products placed on the market by the members of the group, it follows that the very undertakings which could play a valuable competitive role have to charge fixed

prices not subject to discount, and this represents a serious restriction on competition and the operation of its attendant advantages.

5. I now come to one of the main problems in this case.

The applicants contend that the restrictions on competition with which we are concerned could not, in any event, have any serious effect on trade between the Member States. In this connexion, there is a statement in the contested Decision that the agreement and the decisions in question also refer to wallpaper manufactured abroad and sold in Belgium by members of the group.

For the condition regarding the importance to the Community of the restriction of competition to come into play, even when taken in its original meaning, it is not necessary that the conduct in question should have the effect of reducing the flow of goods in trade between the Member States, but it is sufficient that this is carried on in conditions which are inconsistent with the principle of freedom of trade and free evolution of the prices of goods. In establishing whether this is true in this case, regard must be paid to the aforesaid clauses restricting competition in the context of the legal relationships in which they were intended to operate.

In making a general appraisal, regard must be paid to the way in which the system of discount referred to as 'prime de coopération' influences the behaviour on the market of the large number of customers who obtain their supplies from the undertakings composing the group. The type of discount which increases with the volume of purchases from the undertakings in the course of a year discourages purchasers from turning to other sources of supply. And it must be borne in mind that the ability of the applicants to offer a large number of different patterns is such as to provide sufficient variety for the majority of their clients who, therefore, will not normally need to turn to other sources of supply in order to satisfy the consumer, especially as the group also makes it possible for its customers to obtain foreign products through its own channels. This latter arrangement, which might be regarded as being no more than an incentive offered to retain the loyalty of customers, may assume particular importance when linked with what I may describe as the vertical fixing of a minimum price laid down by common consent by the manufacturers for the resale of the goods concerned. Clearly, therefore, another consequence is that the prospect of the said premium may tend to discourage independent attempts to find other sources of supply for customers.

6. After these brief indications of the factual background to the agreements restricting competition in the field of retail prices, let us now examine in greater depth the meaning of the principle relating to the effect of the agreement on trade at the Community level.

I must begin by saying that there is an insufficient consensus of opinion concerning the interpretation of the assumption regarding the effect on the inter-State market of clauses restricting competition.

When the authors of the Treaty laid down the criterion of the effect of a restriction of competition on trade between the Member States they were emphasizing the importance of freedom of trade between States; this is explained, historically, by the original purpose of the competition rules in the Treaty, which was to assist in dismantling the traditional obstacles to trade between the various States which had been formed into the Community.

Moreover, as has been brought out in juristic writings (Ulmer, Der sachliche Anwendungsbereich des EWG-Kartellverbots, in Juristische Analysen, Wirt-

schaftsrecht 1970, n. 1, p. 30), in a unified multi-national market, within which there are no longer any national frontiers impeding the movement of goods, the abovementioned criterion must assume a significance to match the new situation which has come into being; it must be interpreted in such a way as to bring within the prohibitions of Article 85 agreements in restraint of competition which affect the attainment of the objectives for which the common market was established. In this sense, the criterion relating to the effect of the restriction of competition on trade between States serves to define that restriction itself by requiring that, in order to come within the purview of Community law, it must be of importance within the ambit of the Community system in respect of the objectives pursued. Even from this wider standpoint, this requirement would still perform the function of tracing the dividing line between the area exclusively within national jurisdiction and that subject to Community law on competition.

The concept of the effect on the pattern of trade outside the country would, accordingly, be replaced by one based not merely on the local importance of the restriction on competition but on its importance for the Community, a concept which is not limited by reference to the location of the undertakings which are parties to an agreement, or to the place where the products covered by the agreement had their origin or are sold within the Community.

In support of this interpretation as one which meets the specific operational requirements of the Community system, it should be noted that, interpreted literally, the criterion relating to the effect of an agreement on trade between Member States would be liable to produce results which are hardly compatible with the degree of unity which the common market should represent. For example, even if an agreement in force in the Grand Duchy of Luxembourg were, as far as the products covered by it were concerned, of minimal importance in terms of the Community market in those products, it would, despite this, almost always be capable of having an effect on trade between the Grand Duchy and other Member States. On this basis, and on the assumption that it fulfilled the other conditions, the agreement would satisfy the abovementioned criterion, taken in its strict sense as referring to the national territorial basis as such. On the other hand, however, a much more important agreement, operative within an area such as Germany, might escape the prohibition in Article 85 solely owing to the fact that, although it distorted competition in a section of the common market very much larger than the Grand Duchy, and thus had repercussions on the general state of the market, it did not have a direct effect on the pattern of trade with other Member States.

These possible consequences of the literal interpretation of the criterion referred to above should impel us to seek a wider interpretation, better suited to the purpose which must be ascribed to Article 85 within the framework of a common market characterized henceforward by a high degree of economic integration between the States which constitute it.

The situation should, therefore, be clarified by a criterion to the effect that the Community interest which the prohibition of restrictive agreements is designed to further is not simply one of preventing the partitioning of the territory of the Community into separate national markets but now, principally, of keeping competition in a healthy state in terms of the common market.

This purpose implies that the prohibition is concerned with agreements which may result in a restriction of competition such as to be significant at Community level,

this being understood as referring not to state frontiers or geographical areas but to the effect of the agreement on the products to which it relates, viewed not from the purely national standpoint but from a wider standpoint which takes the unity of the Community economy into account.

7. Having specified how, in my view, an interpretative ruling might now be given, I now return to the circumstances of this case.

In view of the interest which the majority of small retailers in Belgium have in the generalized maintenance of minimum prices for sales to the public instead of prices laid down or recommended by the Groupement, it might be better to use the term 'minimum guaranteed prices'. This guarantee, enforced on pain of ostracism by the manufacturers of anyone who did not comply with the rules of sale based on the maintenance of minimum prices, constituted, together with the 'prime de coopération', an inducement to Belgian retailers to retain their links with the manufacturers belonging to the Groupement.

As the Groupement's representative stated at the hearing, the guarantee on prices, imposed or 'recommended', was introduced primarily in the interest of small retailers anxious to avoid competition with better organized retailers.

Because of the combined effect of the various clauses and arrangements referred to above and, above all, because of the retail price guarantee given by the manufacturers, the agreements in question had the effect of artificially maintaining an out-of-date and uneconomic pattern of distribution in an important section of the common market.

By operating to impose the distribution network on the Belgian market, the price agreements were likeley to discourage the retailers concerned from selling foreign products which had not been imported through the Groupement and were, therefore, liable to hinder the sale of foreign products in Belgium and this very fact might result in a distortion of competition at Community level in the products concerned.

It would certainly have been a good thing if the Commission had carried out a more comprehensive and thorough investigation into the comparative importance of the applicants' position in the market in the products concerned within the Community. In the circumstances, however, the fact, which is not in dispute, that, at the material time, these four undertakings controlled about half the amount of wallpaper sold in Belgium may, when it is recognized that this represents a not inconsiderable part of the market for these products within the Community, be sufficient justification for recognizing the importance to the Community of the restriction of competition arising from these agreements.

8. It has thus been established that, in view of the group's position on the market and, in particular, the mechanism of the *prime de coopération* and its effect on the conduct of customers, the sales and price fixing system operated by the group constitutes a restriction of competition contrary to Article 85. It now remains to be seen whether there is any substance in the submissions made by the applicants regarding that part of the Decision which refers to their action in carrying out a boycott to the detriment of the Pex undertaking.

It emerges clearly from the circular letter sent by the Brepols undertaking to its customers on 4 October 1971 that Brepols's suspension of supplies to PEX was, as in the case of similar action by the other members of the Groupement, caused by Pex's non-compliance with the conditions of sale dealing with the

obligations of wholesalers and retailers in respect of prices. The fact that, for some months, the Brepols company continued, it seems almost in secret, to make deliveries to Pex, contrary to its decision, communicated in the said circular of 4 October, to suspend all supplies, in no way alters the fact that the circular sent by the group of Belgian wallpaper manufacturers to their customers on 29 October 1971 constituted a clear threat to suspend supplies to any one who acted in the same way as Pex. The latter circular clearly indicates the determination of the group, of which Brepols was also a member, to apply the penalty which Brepols had already announced as against Pex.

It is important to bear in mind that the abovementioned circular from the group had been preceded, apart from the Brepols circular of 4 October, by a letter dated 28 September from Brepols to Pex in which the latter was asked to get in touch with G.B. Entreprises and persuade it to comply with the conditions of sale laid down by the group. It had also been preceded by a letter of 30 September from the Genval undertaking to Pex in which the latter was informed that Genval would suspend all supplies to Pex so long as the latter continued to supply the G.B. undertaking with Genval products.

The argument with regard to certain invoices which Pex had failed to pay Brepols by the date on which they fell due was advanced in connexion with this case at a later date, so it is impossible to regard the failure to pay as the deciding factor which led to discontinuance of supplies.

The sudden cessation of supplies to the Pex undertaking on the part of the undertakings in the group was also noted by the Tribunal de Nivelles in its judgment of 1 March 1973. During the administrative procedure before the Commission, the group's legal adviser stated that the reason for this action was Pex's refusal to observe the group's General Conditions of Sale. The argument with regard to the fact that financial relationships between Pex and Brepols were in abeyance was set out as an additional argument and not as the main reason for the attitude adopted by Brepols in common with the other undertakings in the group, in conformity with the joint intention which they expressed in the circular of 29 October 1971, referred to above.

The circular was signed by all the members of the group and is, accordingly, clear evidence of their intention to fall in with the refusal to supply which had been expressly announced by Brepols, Genval and Peters-Lacroix. As we have seen, the fourth member of the group, Vanderborght, not having been expressly requested by Pex for supplies, was not called upon to give a direct refusal, but its signature of the circular of 29 October constitutes a positive step in execution of the boycott and makes it reasonable to suppose that, in the event, its attitude would have been no different from that of the other three members.

What is involved, therefore, is a genuine collective decision by the association composed of the four applicant undertakings to boycott the Pex undertaking and threatening similar action by the undertakings in the group against any other customers who might follow Pex's example.

The participation, which may be presumed from evidence which is clear and consistent, of Brepols in the agreement to boycott Pex was, like the participation of every other member of the Groupement, a necessary condition for the adoption of the relevant decision on the part of the group and for its implementation, though on different dates, by the applicant undertakings. This is further indication of Vanderborght's involvement in the boycott despite the

fact that it had no occasion for directly refusing any request from Pex for supplies.

As the group's General Conditions of Sale are incompatible with Article 85 (1) of the Treaty and do not come within the authority conferred under Article 85 (3) they are, accordingly, unlawful, and the infringement by a customer of clauses which form part of them cannot constitute the basis of reprisals against him.

9. Now that it has been established that there was an actual boycott of Pex by the group because Pex failed to observe rules of sale which, as I have mentioned, are unlawful, the next question which arises is whether this further illegal conduct on the part of the applicants justifies the fines imposed on them by the contested Decision.

I must first of all dispose of the objection raised by the applicants that the group's specific decision on the boycott is of no significance with regard to trade within the Community. The effect which the agreements which led to the boycott have been found to have on trade between the Member States suffices to justify the same assumption in the case of the said collective decision which, as has been seen, constitutes a specific act implementing the said agreements.

A more interesting question is that concerning notification.

Under the provisions of Article 15 (5) (b) of Regulation No 17, no fine could have been imposed on account of the collective decision to boycott Pex so long as the Commission had been duly notified of the text of the General Conditions of Sale laid down by the group, which expressly included the suspension of supplies among the penalties which the members of the group had pledged themselves to apply to anyone who did not observe the said conditions. In the absence of a preliminary decision within the meaning of Article 15 (6) of Regulation No 17, opposing the continuance of that measure, no penalty could have been imposed on the undertakings in respect of conduct prior to the contested Decision, at least in so far as the boycott did not exceed the limits or conditions prescribed in the agreement.

However, when giving notification of the agreements which existed between them, the applicants, instead of replying correctly to the question appearing under paragraph 1 of Section II of the relevant form from the Commission and providing it, as expressly requested, with the text of the conditions of sale laid down in common between them, preferred to confine themselves to replying to Question No 2, which was provided solely for cases in which, and to the extent to which, the substance of the agreement was not part of a written document and the applicants answered the question by indicating the object of the agreement fixing quality standards, prices and reductions without making reference to any possible penalties.

It is true that, under the Belgian legal system, the existence of rules of sale relating to price fixing might well have implied that there also existed an agreement between the members of the group providing for penalties for non-observance of the prices laid down. But this does not excuse the impropriety of the applicants' behaviour in failing to produce a document which had been expressly requested and which would have removed any possibility of doubt about the contents of their agreements, including those dealing with penalties on customers. It would scarcely accord with principles of clarity in legal relationships, or with the requirements of speed and efficiency in the Community administration's dealings with undertakings, if the latter were permitted with impunity to excuse themselves from supplying the documents and information requested of them merely on the ground that, by an effort of the

imagination, the officers of the Commission might have been able to assume the existence of an agreement on that particular point as well. Since there was a relevant written agreement, it should have been reported in the way best suited to the requirements of the scrutiny of agreements, for which purpose the notification of agreements restricting competition is required and as expressly requested by the Commission. Even if due to mere negligence and not to design, the applicants' failure to fulfil the obligation to notify the text of the joint conditions of sale justifies the imposition of penalties on them because of the action which, to the detriment of Pex, they took in execution of their agreement. This accords with the provision made in Article 15 (2) of Regulation No 17, under which undertakings are liable to be fined if 'intentionally or negligently' they have committed an infringement.

10. Again, the applicants contend that the Decision is contrary to what they had been reasonably led to expect because it departed from the Commission's own established practice as it was, in particular, defined in the *Aspa* case (OJ L 148, 1970, p. 9).

In the Aspa case, the Commission was concerned with an association of undertakings (manufacturers of toilet articles and general agents, exclusive dealers in toilet articles, established in Belgium) who originally required their members in particular to observe, and ensure that those who purchased from them observed the provisions dealing with the general conditions of sale to the public. In order to ensure strict compliance with these obligations, all the members were under an obligation collectively to suspend all supplies to wholesalers or retailers who did not comply with the obligations imposed on them. The obligation to adopt the prices laid down for sale to the public applied to imported products as well as to those manufactured by members of the group. The Commission thereupon declared that this joint decision, which had as its object or effect the prevention, restriction or distortion of competition within the common market, might also affect trade between Member States.

In view of the Commission's attitude, Aspa amended its rules on several occasions removing, *inter alia,* the provisions relating to the observance of prices laid down for sale to the public and also removing the obligation upon middlemen and retailers to re-sell the products on the basis of the general conditions of sale fixed by the association. The penalty consisting of the collective suspension of supplies was thus also formally abolished.

As a result of these amendments, the Commission found that it had no longer any grounds for action under Article 85 (1) of the EEC Treaty in respect of Aspa.

Because, in that case, the Commission considered a system of compulsory prices, fixed separately in each case, to be incompatible with Article 85 (1) of the Treaty on the ground that the enforcement machinery was a collective one, I do not see why it should, on the other hand, be regarded as permissible to operate a collective system which not only covers the enforcement machinery but is also directly involved in the process of fixing the selling prices to wholesalers and those laid down for sales to the public. But the applicants contend that the conclusion may be drawn from the Aspa decision that the Commission would have held Article 85 (1) to be inapplicable to agreements in restraint of competition which, apart from the fact that only undertakings of a single Member State are involved and that they apply only within the market of that State, do not restrict the freedom to export or import enjoyed by the parties to the agreement or by third parties.

This conclusion by the applicants is probably derived from the application of

the converse of an argument based on the ground given in the Aspa decision for holding that the original system, referred to above, of compulsory joint enforcement of the prices laid down fulfils the requirement that trade between States might be affected, in other words, that the restrictions imposed on the freedom of traders to obtain supplies of Aspa products for sale in Belgium without going through the official distribution channels was liable to impede trade in those products.

Apart, however, from the fact that, in principle, this type of argument can scarcely be described as conclusive, it must be borne in mind that, in contrast to what it had done in previous Decisions on compulsory prices, the Commission did not, in the Aspa case, differentiate between the clauses dealing with fixed prices and those directly affecting intra-Community trade. This ought at least to have drawn attention to the importance attached by the Commission to restrictions on competition arising from agreements providing for collective action to ensure observance of the prices laid down, especially as the Aspa case was not so much concerned with prices jointly agreed between the members of the group, as in the present case, but only with prices laid down for sales to the public which were freely and independently fixed by each member for the products which he sold in Belgium.

I cannot, therefore, see how the Decision of the Commission in the Aspa case can constitute a precedent which justifies the view of the applicant undertakings that the rules applied by the group and the action which it took thereunder against the Pex undertaking are compatible with Article 85.

All the submissions put forward by the applicants are, therefore, without foundation.

11. With regard to the amount of the fine, regard must be paid however to the fact that the applicants were working within the framework of national legislation which, to an extent greater than others, in principle permitted the concerted fixing of resale prices and, consequently, the adoption of penalties against recalcitrant customers, and that the applicants might perhaps have assumed that, since the right to impose penalties is the normal concomitant of an agreement fixing prices, this could be regarded as having been implied in the notification of their agreement. This might avail to reduce the extent to which they are blameworthy. There is no evidence that the contested Decision took this aspect of the matter into account in fixing the amount of the fines.

I am, therefore, of the opinion that the Court, while dismissing the applications for annulment of the contested Decision, should substantially reduce the fines imposed on the applicants.

Each party should, accordingly, bear its own costs.