rules of competition, but that the procedure also presents an opportunity for the undertakings concerned to adapt the practices at issue to the rules of the Treaty. In the event of an exemption's being applied for under Article 85 (3) it is in the first place for the undertakings concerned to present to the Commission the evidence intended to establish the economic justification for an exemption and, if the Commission has objections to raise, to submit alternatives to it. Although it is true that the Commission, for its part, may give the undertakings indications as regards any possible solutions, it is not legally required to do so, still less is it bound to accept proposals which it deems incompatible with the conditions laid down in Article 85 (3).

In Joined Cases 43 and 63/82

VERENIGING TER BEVORDERING VAN HET VLAAMSE BOEKWEZEN, VBVB (Association for the Promotion of Flemish Books), having its place of business in Antwerp, represented by Aimé de Caluwé and Johan Billiet, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

and

VEREENIGING TER BEVORDERING VAN DE BELANGEN DES BOEKHANDELS, VBBB (Association for the Promotion of the Interests of the Book Trade), having its place of business in Amsterdam, represented by Th. R. Bremer, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 2 Rue Goethe,

applicants,

supported by

GROUPEMENT DES ASSOCIATIONS DE LIBRAIRES DE LA CEE (GALC) [Federation of Associations of Booksellers in the EEC, hereinafter referred to as "the Booksellers' Federation"] and GROUPEMENT DES ÉDITEURS DE LIVRES DE LA CEE (GELC) [Federation of Associations of Publishers of Books in the EEC, hereinafter referred to as "the Publishers' Federation"], both having their place of business in Brussels, represented for the written procedure by Jeremy Lever, QC, of Gray's Inn, and Robin Griffith, Solicitor, Brussels, and for the oral procedure by Ormo-Willem Brouwer, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

and

BÖRSENVEREIN DES DEUTSCHEN BUCHHANDELS E.V., having its registered office at Frankfurt-am-Main, represented for the written procedure by Franz-Wilhelm Peter, Rechtsanwalt, Frankfurt, and for the oral procedure by Ormo-Willem Brouwer, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter,

interveners,

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Bastiaan Van der Esch, assisted by Pieter Jan Kuyper, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

NV CLUB,

NV GB-INNO-BM

and

NV SODAL, trading under the name FNAC,

all being undertakings having their registered offices in Brussels, represented for the written procedure by Louis van Bunnen, of the Brussels Bar, and for the oral procedure by Ignace de Greef, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 Avenue Marie-Thérèse,

interveners,

APPLICATION for a declaration that Commission Decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) is void,

THE COURT

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

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the cases, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

The Vereeniging ter Bevordering van de Belangen des Boekhandels (hereinafter referred to as "the Dutch Association") is an association of publishers, book wholesalers, booksellers, importers of books and book-club operators who are established in the Netherlands. Its object is to protect the common interests of booksellers and publishers and to promote cooperation in the book trade in the widest sense, in particular by laying down and administering binding rules governing the book trade in the Netherlands with the object of determining standards and practices for bookselling in the Netherlands and encouraging their observance and application.

The Vereniging ter Bevordering van het Vlaamse Boekwezen (hereinafter referred to as "the Flemish Association"), an association having its place of business in Antwerp, is a federation, possessing legal personality, of publishers, booksellers, sole distributors of domestic and foreign publishing houses and members of allied trades and is established in the Dutch-speaking part of Belgium. Its object is to protect the interests of the book trade in the widest sense; with that aim in view it has drawn up and administers binding rules concerning trade in Dutch-language books in Belgium.

The essential feature of the national rules is a resale price maintenance system, collectively applied, which is binding on the members of the associations. The associations are empowered to conclude with national or foreign organizations binding agreements relating to the book trade.

On 21 January 1949 the Dutch and Flemish Associations made an agreement (amended on 2 June 1958) relating to trade in Dutch-language books between Belgium and the Netherlands.

According to Article 1 thereof publishers and booksellers who are members of the association in one country may on request become members of the association of the other country with the same rights and obligations as publishers and booksellers who, in the other country, are members of that association. Membership is not open to persons who, whilst being members of the association in one country, carry on business as publishers or booksellers or both in the other country without having been recognized by the association of that country.

Under Article 2 of the agreement books to which the agreement relates may not be sold or offered for sale in Belgium or

the Netherlands at retail prices below those fixed by the Netherlands or Belgian publishers, converted at the rate laid down by the Flemish and Dutch associations. Discounts on such prices are to be allowed only to booksellers and wholesalers recognized as such by the associations in the two countries.

Books published in one country by publishers not recognized in that country may not be sold or stocked nor may their sale be promoted in any way in the other country.

No one may be appointed as sole distributor or depository in the other country who in that country holds himself out to the public as a publisher, bookseller or importer, either systematically or occasionally, even for a single title, without being recognized as such by the association of that country.

Articles 3 and 4 of the agreement specify the rules to be observed by publishers and booksellers recognized as such in one country when they carry on business in the other. Thus to carry on business in the Netherlands a publisher must fix a single retail price for each format in which each of his titles appears.

Article 5 lays down a system of penalties for failure to apply the agreement.

The agreement concluded between the two associations was notified to the Commission, in pursuance of Article 5 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87) by the Dutch Association on 30 October 1962 and by the Flemish Association on 3 November 1962, together with the relevant national rules. At that time they made an application for negative clearance for both the transnational agreement and the domestic systems.

On 7 December 1977 the Commission decided to institute a proceeding. The Commission's statement of objections was received by the Dutch Association on 12 January 1978 and by the Flemish Association on 19 December 1977. In pursuance of Article 19 (1) of Regulation No 17 and of the provisions of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47) they were heard on 15 and 16 March 1978 and 18 October 1979; on several occasions they submitted to the Commission written observations and documents.

After obtaining on 20 May 1981 the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions in pursuance of Article 10 of Regulation No 17, the Commission on 25 November 1981 adopted Decision 82/123 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB), notified on 11 and 14 December 1981 respectively and published in the Official Journal on 25 February 1982 (Official Journal, L 54, p. 36).

Article 1 of the decision states that the agreement between the two associations, making provision for collective exclusive

dealing and collective resale price maintenance in trade in Dutch-language books between Belgium and the Netherlands, infringes Article 85 (1) of the EEC Treaty. Article 2 states that the application for exemption under Article 85 (3) of the Treaty is dismissed. Article 3 requires the two associations of undertakings to bring the infringement established to an end forthwith. Article 4 requires the two associations of undertakings to inform their members and affiliates and other parties recognized by or registered with them of the Commission decision and of the fact that the restrictions on competition laid down in the agreement have been brought to an end and stating the practical effects which will result as regards trade in Dutch-language books between Belgium and the Netherlands; they were required to send the Commission a draft notice for that purpose within four months of the receipt of the Commission decision.

II — Written procedure

Applications were submitted to the Court, by the Flemish Association on 5 February 1982 and by the Dutch Association on 15 February 1982, for a declaration that the Commission decision of 25 November 1981 was void. The applications were registered under numbers 43/82 and 63/82 respectively.

By order of 17 February 1982 the Court decided to join the two cases for the purposes of the procedure and the judgment.

By order of 10 March 1982 the Court decided to allow NV Club, NV GB-INNO-BM and NV Sodal, undertakings having their registered offices in Brussels, to intervene in support of the Commission.

By the same order the Court invited the Dutch Association, the applicant in the main action in Case 63/82, which had raised objections in that respect, to inform the Court which documents should in its opinion be kept secret from the interveners, indicating in each case the reasons leading it to claim secrecy.

On that point the Dutch Association, by letter of 19 April 1982, informed the Court, after consultation with the Commission and with its agreement, that there were at that stage no documents on the file which ought to be kept secret from the interveners.

On the same dates as those on which the main applications were lodged the applicants, in pursuance of Articles 185 and 186 of the EEC Treaty and of Article 83 of the Rules of Procedure, each lodged an application for the adoption of interim measures requesting a suspension of the operation of the decision contested in the main actions. The President of the Court by order of 17 February 1982 ordered the joinder of the two applications; by order of 10 March 1982 he allowed NV Club, NV GB-INNO-BM and NV Sodal to intervene in support of the Commission in the applications for the adoption of interim measures and after considering the written observations of the Commission and the interveners and after hearing them at a sitting on 25 March 1982 he made an order on 31 March 1982, the operative part of which is as follows:

"1. The operation of Articles 1, 2 and 3 of the Commission's decision of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) is suspended, in so far as those provisions concern the system of collective resale price maintenance in the trade in Dutch-language books resulting from the agreement between the two associations concerned.

2. The operation of Article 4 of the said decision is suspended.

3. Neither the applicants nor the associations of which they are composed shall apply the penalties or exclusions provided for by the agreement, in particular in Article 5 thereof, against those of their actual members or other parties recognized or registered with them who do not voluntarily comply with the rules contained in that part of the agreement which remains in force.

4. The costs are reserved."

By three orders of 14 July 1982 the Court decided to allow the intervention in support of the applicants in the main actions of the Groupement des Associations de Libraires de la CEE (GALC), having its place of business in Brussels, the Groupement des Éditeurs de Livres de la CEE (GELC), having its place of business in Brussels, and the Börsenverein des Deutschen Buchhandels eV, having its registered office in Frankfurt-am-Main.

By order of 22 September 1982 the Court dismissed the application by the three above-mentioned interveners to be allowed to submit their pleadings and to present oral argument in English.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it asked the Commission and the applicants in the main actions to reply in writing to certain questions and requests; the parties complied within the period prescribed.

III — Conclusions of the parties

The *applicant in Case 43/82* claims that the Court, after requiring the Commission, in pursuance of Article 186 of the EEC Treaty, to produce the internal memoranda drawn up by it in the context of this case, should:

(a) declare the application admissible and well founded and rule that the contested decision must be declared void on the ground that the procedural conditions connected with the adoption of the decision and the preliminary inquiry have not been observed; declare it void also on account of breach of the rights of the defence, of the rules of procedure of Community law and of the duty to answer the submissions made;

(b) alternatively: declare that the Commission is also bound to observe Article 10 of the Convention for the Protection of Human Rights and Article 10 bis of the Paris Convention for the Protection of Industrial Property, which are incompatible with the prohibition of resale price maintenance for books; also declare that Article 85 (1) is not applicable to this matter as this case is not concerned with a decision by an association of undertakings having the effect of distorting

competition or affecting trade between Member States within the meaning of Article 85 (1);

(c) in the further alternative: declare that the Commission has not applied correctly Article 85 (3) or the conditions providing for its application, which do not preclude an exemption's being granted on cultural grounds having economic repercussions;

(d) in any event, order the Commission to pay the costs.

The *applicant in Case 63/82* contends that the Court should:

(a) declare the Commission decision of 25 November 1981 void for infringement of essential procedural requirements, infringement of the Treaty or of rules of law relating to its application;

(b) order the Commission to pay the costs.

The *Booksellers' Federation and the Publishers' Federation, interveners:*

(a) declare that they support the conclusions of the applicants in the main action in so far as they claim a declaration that the Commission decision of 25 November 1981 is void;

(b) ask that the Commission be ordered to pay their costs.

The *Börsenverein des Deutschen Buchhandels, intervener,* declares that it adopts in their entirety the arguments and conclusions of the Booksellers' Federation and the Publishers' Federation, interveners.

The *Commission* contends that the Court should:

(a) dismiss the applications made by the Dutch Association and the Flemish Association;

(b) order the applicants to pay the Commission's costs and the parties intervening in their support to pay their own costs;

(c) in the alternative: order the Flemish Association to pay half the Commission's costs.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, contend that the Court should dismiss all the conclusions of the applicants in the main action.

IV — Submissions and arguments of the parties in the written procedure

The *applicants and the parties intervening in their support* put forward against the contested decision a series of complaints, some based on procedure and others on substance, by which they claim it is vitiated and which ought to lead to a declaration that it is void.

The *Commission and the parties intervening in its support* consider all the above-mentioned submissions to be unfounded.

A. The complaints of a procedural nature

The taking into account of the system of collective exclusive dealing

The *applicants* complain that the Commission based its decision on the alleged existence in the disputed agreement of a system of collective exclusive dealing although it knew beyond doubt that that system was at least no longer actually applied. According to the *Flemish Association* the Commission was officially informed of that fact in 1979 and 1981 at the time of the notification of the abolition of the

machinery for according recognition in the Belgian national system. Since the conditions for recognition in the national system, having a transnational scope, have been abolished, the exclusive dealing system cannot continue to operate at inter-State level.

Moreover, at the hearing the Commission's representative acknowledged that the features relating to the collective exclusive dealing system no longer played any role and that the complaints put forward in that respect had become nugatory.

The *Commission* claims that its decision had to relate to the agreement as it was notified to it. No official amendment to the agreement was ever made. In order that its decision may be properly based all that is necessary is for the Commission to establish that the purpose of the contested agreement is to restrict competition. Moreover the notification of a fresh version of the Belgian national system combined with the implementation of a different policy by the two associations concerned might involve the effective reapplication of the rules of exclusive dealing at transnational level.

The taking into account of the national systems

The *applicants* put forward a double complaint against the Commission: on the one hand its decision bears the stamp of an internal contradiction inasmuch as it considers the national systems whilst refusing to include them in the proceeding; on the other, it has undertaken an incomplete and erroneous appreciation of the national systems and of their connection with the disputed agreement.

The *Commission* states that it dealt with the national systems only to the extent necessary and indeed indispensable for an appreciation of the context of the disputed agreement, but it gave no legal appreciation of the systems which are not the subject of the proceeding.

The taking into account of the resale price maintenance system in general

The *Booksellers' Federation and the Publishers' Federation, interveners,* make a complaint against the Commission which links up with that of the applicants.

In spite of the assertion that the subject-matter of the decision is not the legality of a system of resale price maintenance as such, the Commission has omitted to prove the special nature of the transnational agreement or of the national rules of the Flemish and Dutch Associations. In actual fact it took as its point of departure the idea that a general system of resale price maintenance for books could not be permitted in view of the Community competition rules. The arguments put forward in the contested decision on the advantages of the disputed system at the publishing and distribution level are based on a more general consideration of a system of resale price maintenance. Similarly, in its defence the Commission in refusing the application for exemption takes as its basis certain general aspects of collective price maintenance.

The *Commission* denies that it made a general appreciation of the practice of a system of resale price maintenance. It simply dealt with certain general aspects of the situation with regard to collective prices since an appreciation of the agreement could not be undertaken in complete isolation from such aspects.

Observance of the applicants' rights

The *applicants* complain that from several points of view the Commission disregarded their rights both in drawing up the contested decision and in its content.

(a) In dealing with the national systems in the context of an appreciation of the disputed agreement the Commission prejudged its decision on those systems without having initiated an official proceeding. Such conduct jeopardizes the rights of the national associations.

(b) In adopting its decision the Commission disregarded its promises, made at the hearings and before the European Parliament, to hold an inquiry into the book trade first. Moreover it refused to participate in any meaningful way in a search for solutions or to take into account the Parliament's declarations of intent.

(c) The systems laid down in the disputed agreement correspond to the system in force in the other Community countries. In arriving at a decision on the Belgo-Netherlands agreement alone and in refusing negative clearance by reason of the resale price maintenance system at transnational level the Commission is discriminating between persons and organizations in the various Member States, to the prejudice of the integration of the small Dutch-language cultural and linguistic community.

(d) On the basis of its statement that all the Member States have a resale price maintenance system in books, the *Flemish Association* complains that the Commission has disregarded the case-law of the Court which, in a judgment of 14 May 1974 (Case 4/73 *Nold* [1974] ECR 491), requires that regard shall be had to the fundamental rights common to the Member States and, in a judgment of 18 May 1982 (Case 155/79 *AM & S* [1982] ECR 1575), to the principles and concepts common to the Member States. Moreover, by prohibiting the resale price maintenance system, the Commission has called in question the constitutional principle of freedom of expression.

The *Commission* states that none of those criticisms is relevant.

(a) It in no way arrived at any judgment with regard to the national systems and the question of their compatibility with Community rules on competition remains an open one.

(b) It did not give the promises alleged by the applicants but insisted before the European Parliament on its responsibilities in the sphere of competition. At the hearings its representative clearly formulated its objections to the agreement.

(c) The contested agreement has specific characteristics, which are particularly restrictive, and which stem from its transnational and collective character.

(d) The national rules with regard to prices for books belong to a special field of law regulating economic and social policy and have nothing to do with general rules of law or, *a fortiori*, with fundamental rights.

The *Booksellers' and Publishers' Federations, interveners,* put forward criticisms which link up on several points with those of the applicants.

By its decision the Commission adopted a general point of view on the system of resale price maintenance for books, both at national and transnational level, whilst refusing to allow the associations concerned to play a part in the proceedings to protect their rights. Such conduct is moreover contrary to its representative's statement that the associations concerned would have an opportunity to present their arguments and to the promises made to the European Parliament to undertake a detailed study of the book trade.

The *Commission* confirms that the disputed decision does not prejudge its appreciation of resale price maintenance systems in general.

The interveners are relying on supposed promises which in fact were never given.

The legality of the procedure

The *Flemish Association, one of the applicants,* states that the procedure which led to the contested decision was illegal in several respects.

(a) The Director-General for Competition had no authority to sign the statement of objections *per procurationem* and the Commission has altogether failed to show that such authority existed.

Moreover the Director-General cannot show any delegation of powers to make such a statement of objections; in any event such a delegation would have been illegal and according to the case-law of the Court cannot be presumed.

(b) The *Flemish Association* submits that the Commission infringed Article 3 (3) of Regulation No 99/63 by excluding from the hearing on 15 and 16 March 1978 a Flemish author who the association had suggested should be heard. By that decision the Commission wished to exclude authors from the category of consumers to whom reference is made in Article 85 (3) of the Treaty.

(c) The hearing of 18 October 1979 was irregular as the official authorized by the Commission improperly arranged for a substitute to attend.

The *Commission* for its part contends that the procedure was in no way irregular.

(a) The expression *"per procurationem"* does refer to a delegation of power to sign which the competent Commissioner, after approving the statement of objections, was legally entitled to confer on the Director-General.

(b) The Commission by no means intended to exclude certain consumers from the hearing, although the question does arise whether writers must be regarded as consumers in relation to the system of collective exclusive dealing and the collective resale price maintenance scheme under consideration.

In this case the absence of the author in question was due to his inability to attend; moreover the category of authors was represented at the hearings by another author.

(c) The official who attended the hearing on 18 October 1979 had a special authorization from the Commissioner responsible for competition.

The formal legality of the decision

The *Flemish Association, one of the applicants,* supported on certain points by the Dutch Association, calls in question from various points of view the formal legality of the contested decision.

(a) There was an infringement of Articles 2 and 4 of Regulation No 99/63 inasmuch as the decision contains objections which did not appear in the statement of objections. That statement essentially contested the machinery for according recognized status, whereas the decision lays the emphasis on the system of resale price maintenance.

(b) The decision in question is illegal as a result of the imprecision of the statement of objections, which was not corrected by the Commission. The statement contains inaccurate figures and deals with the national and inter-State exclusive dealing systems which have in fact been abolished.

(c) According to the case-law of the Court (judgment of 13 July 1966, Joined Cases 56 and 58/64 *Consten and Grundig* [1966] ECR 299) the Commission is required to reject the submissions put forward by the parties. However, in this case it failed to reply to the legal submissions relating to an infringement of Article 10 bis of the Paris Convention, on unfair competition, and of Article 10 of the European Convention for the Protection of Human Rights, on freedom of expression. That unjustified failure to reply means that the submissions must be deemed to be accepted.

(d) The Flemish Association was never allowed, in spite of a request put forward in a memorandum of 1 October 1979, to have cognizance of the administrative file or of the Commission's documents, or even a summary of the contents of the file.

The *Commission* refutes the criticisms of the legality of its decision.

(a) The statement of objections and the decision relate both to the collective exclusive dealing system and to the collective resale price maintenance system.

(b) The statement of objections complies with the requirements as to clarity laid down by the case-law of the Court. The figures which are alleged to be inaccurate were the subject of an exchange of views in depth. If, following the statement of objections, there was need for a correction the Commission was under no obligation to make it except in its decision.

(c) It may be seen from the established case-law of the Court that the Commission is not required to refute all the matters of law and of fact raised by the parties. The *Grundig* judgment, on which the applicants rely, lays down principles which are the contrary of those alleged.

(d) The Commission never received a specific request from the Flemish Association to supply it with information. The memorandum referred to had no validity except as a general declaration of principle.

B. Submissions of a substantive nature

The European Convention for the Protection of Human Rights

The *Flemish Association* sets out the unacceptable effects which the abandonment of the system of resale price maintenance would have both quantitatively and qualitatively on the production of books. In support of its argument it refers in particular to the system observed in Sweden and in France after the abolition of the resale price maintenance system. In adopting its decision the Commission committed a breach of the principle of freedom of expression embodied in Article 10 of the European Convention for the Protection of Human Rights: the abolition of resale price maintenance would lead, regard being had to the characteristics of the market in question, to a situation of indirect censorship.

The *Commission* contends that the position in France and Sweden cannot constitute a valid example for Belgium and the Netherlands. It is very improbable that the freeing of inter-State trade will lead to a collapse of the national systems. The rules on competition cannot be incompatible with the principle of freedom of expression since their aim is not to affect that fundamental right. Furthermore there are no grounds for establishing any relationship between that principle and the qualitative level of book production.

The Paris Convention

According to the *Flemish Association* only the maintenance of a resale price maintenance system can protect booksellers against the practice of loss-leading, which may already be seen in Belgium. The Paris Convention which, in Article 10 bis, lays down a system of protection against that practice, is self-executing and creates rights for individuals. As the Convention has been ratified by Belgium and the Netherlands, as indeed by all the other Member States, before the signature of the EEC Treaty, it must take precedence over the latter.

The *Commission* denies that the Convention is self-executing since the States which have signed it retain considerable liberty in interpreting the concept of "unfair competition". There can be no question in this respect of a generally recognized principle of law which the Court is called upon to uphold. Similarly the question of the respective rank of the Convention and the EEC Treaty cannot be solved in the way proposed by the applicant.

On the substantive level it must be stated that charging a price lower than the maintained price is not *ipso facto* a sale at a loss. Traders who are the victims of actual loss-leading practices may find sufficient protection under the national legislation applicable.

The application of Article 85 (1)

A. The nature of the disputed agreement

The *Flemish Association* complains that the Commission has not accurately described the contested agreement. It is in fact a decision by associations of undertakings. Such a decision comes under Article 85 (1) only if it is actually applied by the members. However, the exclusive dealing system, even though included in the agreement, was never implemented.

The *Commission,* for its part, takes the view that both the wording of Article 85 (1) and the interpretation given to it by

the Court in its judgment of 15 May 1975 (Case 71/74 *Frubo* [1975] ECR 563) make it possible to assess the scope of a decision taken by an association of undertakings.

B. The restriction on competition

(a) The concept of effective competition

According to the *applicants* Article 85 implies the existence of effective competition on the market. The Court has recognized in its judgments of 25 October 1977 (Case 26/76 *Metro* [1977] ECR 1875) and 30 June 1966 (Case 56/66 *Société Technique Minière* [1966] ECR 235) that competition varies according to the nature of the product and the economic structure of the market concerned and that it must be placed in its actual context. However, the Commission, by restricting itself to asserting that a system of resale price maintenance is automatically covered by the prohibition, tends to fail to have regard to the specific nature of the market in question and the context in which the disputed decision is placed. Inter-brand competition can, in the circumstances, play only a secondary role since one book differs from another and forms a market apart. At the level of retail competition between products of the same brand an analysis of the compatibility of the agreement with the requirements of Article 85 (1) must take account of the legal and economic context. From that point of view it should be recalled that all the Member States apply a system of resale price maintenance so as to guarantee an effective distribution structure and freedom of expression. The agreement in question contributes to the integration of the Flemish and Dutch linguistic and cultural communities — an object which is in conformity with both the principles of the Member States concerned and the principle of integration in Community law and which is embodied in the treaty on the linguistic union between Belgium and the Netherlands.

The *Commission* shares the applicants' views with regard to the role of the concept of effective competition. However, the Court has never taken the view that the Commission must undertake the same weighing up in the context of Article 85 (1) of the different aspects of competition as that which it is required to effect under Article 85 (3) or even an analogous comparative appreciation. The *Metro* judgment makes an appraisal of effective competition in relation to Article 85 as a whole. It also specifies, moreover, that price competition must never be completely eliminated. The applicants cannot claim that there are objective requirements peculiar to the book trade of which it may be said that they do not constitute a restriction on competition. Similarly they cannot claim, in application of the judgment of 8 June 1982 (Case 258/78 *Nungesser* [1982] ECR 2015) that restrictions on competition are necessary to stimulate competition in the book trade.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, also contend that, even though the intensity of competition may vary according to the products and the structure of the market concerned, it cannot be conceded that the privileged form of competition represented by price competition may be entirely eliminated. It is of the greatest importance that there should exist a network of distributors of books alongside the official network charging rigid uniform prices.

(b) The appreciation of the various aspects of competition

— Price competition

The *applicants* stress the fundamental difference between the market for books and that for any other product. Amongst consumers of books there must be numbered the important category of borrowers, who are not greatly inclined to buy books, even at reduced prices. It cannot be conceded that consumers reserve a given part of their income for the purchase of books, that a price reduction makes it possible to increase sales or that price is the decisive factor in consumer choice. Such an argument would be refuted in addition by the very slight elasticity of demand in relation to price, as experience shows. Research shows that a reduction of less than 20% of the price leads to hardly any increase in sales; the same research leads to the conclusion that an abandonment of the system of fixed prices would be more likely to lead to a tendency for prices to rise.

The agreement in question, moreover, by no means involves a total price freeze but at the most a certain rigidity in their structure. At the level of publishers the price is fixed with complete freedom; prices charged by publishers to whole salers and by wholesalers to retailers are also free. At retail level booksellers have various opportunities to agree to price reductions. Furthermore, at that level there is competition, which is by no means negligible, between various types of publication of the same title.

The *Booksellers' and Publishers' Federations, interveners,* also stress the specific nature of the market in books as compared with that in other goods; the Commission is at fault in not having taken account of that point.

The *Commission,* for its part, thinks that the category of borrowers constitutes an important potential source of buyers. Liberalization of competition on the book market might increase the proportion of his income which the consumer devotes to the purchase of books as compared with that devoted to products of the leisure market in general. As regads price elasticity it must be stated that the book market is characterized by relative elasticity. The figures put forward by the applicants are matters of mere allegation. Furthermore it is not difficult to find on the market undertakings which are prepared to grant discounts of the order of magnitude in question. The importance to be attributed to price competition between products of the same brand may be seen from the declarations of the applicants themselves, which show that little weight must be attached to competition between different titles, even of analogous content. It is clear that price competition at the retail level has been almost eliminated. The features of price competition on which the applicants rely have only an entirely secondary importance.

— Other aspects of competition

The *applicants,* having regard to the specific nature of books and the special structure of the market concerned, emphasize various aspects of competition which they claim are affected by competition at price level alone. The application of the system of resale price maintenance has allowed booksellers to improve supply, to hold considerable stocks and to supply services in connection with orders and information.

According to the *Commission* those factors have only a relative importance as

large groups of consumers do not make use of the type of bookshop described. What is particularly important is that the exclusion of price competition prevents the consumer from determining freely beyond the frontiers the relationship between the level of prices and the services offered.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, support the Commission's argument to the effect that the cultural nature of books cannot justify their being exempted from the provisions of the Treaty on competition. Price competition is by no means incompatible with the existence of other aspects of competition relied on by the applicants.

(c) Whether the contested decision is well founded

The *applicants* allege that the Commission has not given a sufficient statement of the reasons on which the decision is based as regards restriction of competition. They state once more that, in a system of effective competition affecting a specific market such as that for books, a system of resale price maintenance, whether individual or collective, does not have the effect of resulting *ipso facto* in a restriction of competition. Furthermore the Commission has failed to take account of the fact that trade in Dutch-language books between Belgium and the Netherlands is not subject to a system of exclusive dealing.

The *Flemish Association* also claims that the Commission has made competition an object in itself and has failed to interpret Article 85 by reference to the aims of integration set out in Article 2 of the EEC Treaty and confirmed by the European Parliament.

The resale price maintenance system is the only means of resisting effectively the practice of loss-leading; such a system is applied in all the Member States of the Community.

There is a contradiction in forbidding to undertakings under Article 85 (1) what is permitted for Member States under Articles 30 to 36 of the Treaty.

The *Commission* emphasizes that the disputed agreement still provides, apart from the system of collective resale price maintenance, for a system of collective exclusive dealing. The contested decision moreover provides a specific statement of the reasons on which it is based as regards each of the two systems.

With regard more particularly to the resale price maintenance system, the Commission stated clearly in the contested decision that the machinery in question excludes price competition between booksellers and restricts the freedom of action of publishers and importers.

There is a difference in subject-matter between Articles 30 to 36 of the Treaty and Article 85; the former relate to practices capable of affecting trade between Member States and the latter to practices affecting competition. Article 30 is relevant to the application of Article 85 only in so far as it represents a threshold of competence from the point of view of the effect on trade between Member States.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, acknowledge that competition appears not as an ideological proposition but as one means amongst others of achieving the common market. However, the Court, in its settled case-law, has stressed the importance attributed to the existence of effective

competition, that is to say of the amount of competition necessary for fulfilment of the fundamental requirements and attainment of the aims of the Treaty and, in particular, the creation of a single market with conditions analogous to those of a domestic market.

C. The effect on trade between Member States

The *applicants* state that, contrary to the Commission's conclusions, any trader in either country remains free to obtain supplies from any other trader in the other country.

The Commission is making competition into an end in itself and is attempting to find in the modification of the competition structure the criteria for the exerting of an effect on trade between Member States instead of considering in accordance with the case-law of the Court in the *Grundig* judgment and the judgment of 31 May 1979 (Case 22/78 *Hugin* [1979] ECR 1869) the effect of that change is competition on the achievement of the aims of a single market. It is disregarding the independent nature of the criterion of the effect on trade between Member States as compared with that of the restriction of competition. Similarly it is disregarding the objects of the Treaty and the characteristics of the product and of the market in question. According to the Treaty competition is not an object in itself but one of the means by which the integration of the market may be effected. However, the agreement in question is directed towards the integration of the Flemish and Dutch linguistic and cultural communities. The abandonment of this transnational system of resale price maintenance would effect a partitioning of the Flemish and Dutch markets. The Commission would be committing the error of conferring on the Belgo-Netherlands frontier a role detrimental to the achievement of a single market between the Member States.

The *Commission* emphasizes the formal role which the criterion of effects on trade between Member States plays in the context of Article 85 at the level of the division of powers between itself and the national authorities competent in the matter of agreements, decisions and concerted practices. Thus it is not possible for it to arrive at a decision on a national system unless such a system exerts by itself an external influence on trade between Member States.

In the substantive sphere, it should be noted that the applicants have themselves acknowledged that the purpose of their agreement is to hinder parallel imports. The integration of the market in books within the Community must be achieved on the basis of free competition. The Commission has not deduced the unfavourable effects on intra-Community trade from the restrictions placed upon competition but from the fact that traders in one country are deprived of their freedom to choose their own channels of supply and to determine their prices. It by no means confers on the Belgo-Netherlands frontier a role to the detriment of the achievement of the common market, but confines itself to a finding, in conformity with the criteria laid down by the Court in the *Grundig* judgment, that the agreement is capable of jeopardizing, actually or potentially, freedom of trade between Member States. The same judgment moreover lays down the principle that an increase in volume of trade cannot exclude the

possibility that the agreement may affect trade between Member States. The applicants have failed to show that the application of the transnational system of collective resale price maintenance is necessary for the achievement of the cultural and linguistic integration of the Netherlands and Flanders.

The *parties intervening in support of the Commission* claim that it cannot be denied that from the economic point of view the Belgian and Netherlands markets in books remain distinct, if only by reason of the different national currencies, not to speak of any differences relating to taxation and to the customs and tastes of consumers. If the purpose of the Treaty is to effect a single market it cannot to that extent permit the practice of resale price maintenance operating beyond the frontiers.

D. The perceptible effect of restrictions on competition

The *Flemish Association* disputes the data which the Commission has supplied regarding the Flemish market and the importance of patterns of trade between the Netherlands and Flanders. In particular the Commission has disregarded the importance and the independence of the Flemish market.

In its analysis of the criterion of the perceptible effect the Commission is at fault in referring to the system of exclusive dealing, which has been abolished both at Belgian national level and between States.

It is necessary to take account of the very feeble impact of the market in Dutch-language books on the European market as a whole, as compared with the English, French and German language markets, which, moreover, are governed by an inter-State system of resale price maintenance.

The *Commission* stresses that the exclusive dealing system continues to form part of the agreement and that it has never been notified of any amendment. As to the factual data which are disputed, it should be noted that in any event the figures, which could only with great difficulty be proved accurate, are not an essential foundation for the disputed decision, which is based on the finding, which has not been challenged by the applicant, that the Dutch-speaking part of Belgium is primarily an importing country.

The applicability of Article 85 (3)

A. The application under Article 186 of the EEC Treaty

The *Flemish Association* alleges that the Commission refuses to produce the internal memoranda establishing that an exemption under Article 85 (3) has been considered; the applicants request the Court to adopt an interim measure under Article 186 of the EEC Treaty for the discovery of such documents.

Article 83 (3) of the Rules of Procedure, on which the Commission relies in opposing that request, is not applicable in this case and in any case it is sufficient for the application to be made separately.

The *Commission* replies that Article 186 is not an appropriate means for the type of measure sought by the applicant. Furthermore the application is vitiated by a formal defect: in pursuance of Article

83 (3) of the Rules of Procedure, it ought to have been made by a separate document.

B. The Commission's role in the application of Article 85 (3)

The *applicants and the Booksellers' and Publishers' Federations, interveners,* are critical of the way in which the Commission has considered the possibilities of exemption under Article 85 (3). They claim that it took the decision in question before coming to a decision on the general problem of fixed prices for books and before holding the promised inquiry on the book market. By its decision it prejudged the appreciation of the national systems, to be made later.

In that connection the applicants repeat the criticisms relating to the taking into account of the exclusive dealing system, actually abolished, and of the analysis of the national systems, which are not the subject-matter of the proceeding.

The Commission has failed to say anything about any merits of an individual transnational system of resale price maintenance. In its analysis it has disregarded cultural factors and the need to protect freedom of expression.

The *Commission* repeats that it never gave the supposed promises and that the decision in dispute in no way prejudges its appreciation of the national systems. No revocation of the system of exclusive dealing or of the collective nature of the resale price maintenance system was ever notified to it. The national systems were analysed only to the extent necessary and indeed indispensable for an appreciation of the transnational agreement. There are no grounds for attributing to the cultural factor any absolute priority over the rules of competition. Morevoer the applicants cannot validly maintain that the decision jeopardizes freedom of expression. The Commission's appreciation of the conditions for the application of Article 85 (3) is in conformity with the criteria set out by the Court in the *Grundig* judgment.

C. Contribution to improving production or distribution

(a) Improving production

The *applicants* emphasize the high quantitative and qualitative standard of Dutch-language publishing in the Netherlands and Flanders — geographically a very restricted market — which is to be ascribed to the collective resale price maintenance system — the only system capable of permitting publishers to arrange to the necessary extent to cross-subsidize best-sellers and less profitable books. Experience in France and Sweden after the abandonment of the system of resale price maintenance proves the existence of a causal link between this very extensive supply and the disputed price system, which benefits all consumers.

The *Booksellers' and Publishers' Federations, interveners,* concur with the applicants' analysis of the unfavourable effects which the abolition of the resale price maintenance system would have on the quantitative and qualitative standards of book production.

The *Commission* takes the view that the imposition of a fixed price to the

consumer is not indispensable to the application of cross-subsidization at the publisher's level. There is nothing to prevent a publisher who wishes to apply a certain amount af cross-subsidization from fixing an appropriate price at the outset. The Swedish and French examples are irrelevant. What is relevant here is the abandonment of the disputed transnational system, not the radical suppression of a national system.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, explain that at the level of the publisher the abolition of resale price maintenance is not capable of affecting the supply of books in any way at all. The publisher is free to continue to apply a set-off of trading margins between the various types of books.

(b) Improving distribution

— Wholesale level

According to the *Flemish Association* effective distribution, which may be established at that level, may be ascribed to far-reaching computerization, which can only be financed in the framework of a collective resale price maintenance system. Flanders has a very well developed distribution network of wholesale booksellers, a large number of whom will inevitably go out of business if the system at issue is abandoned. The Commission has itself admitted that the resale price maintenance system may have contributed to improving the distribution of books in the Netherlands and Flanders.

The *Dutch Association,* for its part, stresses the part played by the Centraal Boekhuis (Book Centre) in the distribution of books. Collaboration between publishers and booksellers within that organization has been made possible only owing to a system of reseale price maintenance.

The *Commission* disputes the existence of the causal link which the Dutch Association wishes to establish between computerization and a fixed retail price. Wholesalers could cover the expenses occasioned by computerization by means of their trading margin — irrespective of the existence of a fixed price.

Distribution is not effected entirely by wholesalers or the Centraal Boekhuis. Moreover it is difficult to see why the setting up of the latter body should only have been possible as a result of the setting up of a collective system of resale price maintenance between Belgium and the Netherlands.

Once again the Commission stresses that the transnational system is at issue, not the national systems.

— Retail level

The *applicants* state that only a resale price maintenance system makes it possible for booksellers to arrange for cross-subsidization between titles which sell slowly, giving low profits, and titles which sell rapidly, giving high profits. The maintenance of high levels of stock is possible only as a result of the practice of the system at issue. Its abolition would entail unfavourable consequences for retailers.

The actions of the discount stores bring about a perceptible reduction in the price of quick-selling books, thus making inroads into an important source of income for booksellers.

All booksellers, including those in rural areas, become the victims of those who cut prices and have to choose between a reduction in the quantity of books sold and a reduction in turnover.

Regard being had to the widespread dissemination and sale of books it is difficult to envisage that a reduction in price might attract new consumers.

The solution of specialization, advanced by the Commission, is valid only for a restricted number of booksellers in the large towns.

The increase in stock held in bookshops is the result of a large number of factors and cannot simply be explained by the increase in the total number of books on offer and the efficiency of wholesalers.

The idea of granting bookshops bigger trade margins at the expense of publishers would only displace the problem to that level: in any event only large-scale publishers are in a position to undertake that type of assistance.

There is only a single market in Dutch-language books and the transnational agreement is the keystone of the two national systems.

The *Booksellers' and Publishers' Federations, interveners,* also claim that the abolition of the system of resale price maintenance in trade in books between the Netherlands and Belgium would mean that booksellers would lose a portion of their profits from the sale of "popular" books. The consequence would be that bookshops would have to reduce stocks of "specialized" books in proportion. The abolition of the system of resale price maintenance would reinforce the general deterioration in the book trade, which is due to the poor economic climate.

The *Commission* draws attention to the development of new forms of distribution, which attract to them a significant part of the profit resulting from the sale of best-sellers. Moreover it disputes the argument that the profits from the sale of successful books contribute to the maintenance of stocks.

As to the alleged prejudicial effects which the abolition of the resale price maintenance scheme would involve for retailers, it must be noted that discounts are applied only selectively and hardly affect booksellers established in country districts.

It would be possible to reach fresh categories of purchasers by liberalizing price competition.

As the holding of stock is the essential characteristic of a bookshop it would be illogical to consider reducing it; bookshops might usefully improve their efficiency by specializing.

The range of books at present held by bookshops is merely the reflection of the number of titles on the market and the efficiency of the distribution system.

It may be reasonably expected that publishers will accept sacrifices to assist the bookseller whose profit margins may be reduced as a result of a liberalization of competition.

The applicants' arguments relate to the retention of a national system of resale price maintenance. They have failed to show that the transnational system is the cause of the alleged improvements in production and distribution. However, it is established that the national system is perfectly viable even without the transnational "keystone". Nor must it be forgotten that the agreement provides, apart from the collective resale price maintenance system, for a transnational collective system of exclusive dealing.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, claim that the effect of cross-subsidization relied on by the applicants is not peculiar to the market in books and is to be met with in the case of a whole series of other products. In large-scale distribution this phenomenon is known as "off-setting margins", the undertaking's final profit resulting from the compensated mean of the goods with a large margin and those with a small or non-existent margin.

D. The fair share for consumers

The *applicants* take the view that those who benefit from the contested rules, as consumers within the meaning of Article 85 (3), are the readers, whether as purchasers or borrowers, the libraries, the market in second-hand books and old editions, authors and trade associations.

Purchasers, in particular, benefit from a wide range of high quality offered by bookshops, the supply of services as regards information and facilities for placing orders at retail level and relatively low average prices. Readers who use libraries benefit fully from a wide spread of works. For authors and trade associations the advantage lies in a guarantee of opportunities for publishing and distribution and consequently of the maintenance of their income and employment.

The *Commission* wishes to limit the concept of consumer, as regards the bookshops concerned, to purchasers of books only. The question arises whether a large supply constitutes a fair share for consumers; in any event the applicants have not succeeded in proving the existence of a causal link between the system of resale price maintenance and high production.

Moreover the applicants' statements on the average level of prices are open to challenge.

The application of the system of resale price maintenance has the effect of requiring the great majority of consumers to subsidize the minority of direct users of services and purchasers of slow-selling books.

NV Club, NV GB-INNO-BM and NV Sodal, interveners, state that they have chosen to follow a policy of reduced prices and to work for the benefit of all consumers; the applicants are defending special and restricted trade interests only. The public interest requires preference to be given to the Commission's argument.

E. The indispensable nature of the restriction of competition

The *applicants* submit that the transnational system of resale price maintenance constitutes the keystone of the national systems which, in the long term, cannot outlive the abolition of the agreement at issue; but these national systems are not in question in these cases.

The Commission has rejected various proposals made by the applicants, in particular the idea of an individual system of resale price maintenance, whilst refusing to suggest any alternatives.

Experience shows that the system of resale price maintenance is the only means of guaranteeing optimal production and distribution in the book

trade, in particular in the context of a restricted linguistic community.

The Commission is disregarding the cultural factor in its appreciation of the possibility of granting an exemption in pursuance of Article 85 (3).

The *Commission* takes the view that the applicants have not succeeded in showing why the transnational restriction is indispensable to the maintenance of the national systems. Practice shows that those systems are perfectly viable without the application of supranational restrictions.

Furthermore the content of the idea of optimal production or distribution must give rise to speculation in the absence of any effective competition.

As to the cultural factor, the Commission would be ready to take it into consideration, but it is unacceptable for organizations representing commercial interests to make a show of cultural arguments so as to infringe the Community competition rules.

The *Booksellers' and Publishers' Federations, interveners,* in support of the applicants' arguments, make a detailed analysis of the function of the transnational agreement in maintaining the national systems. Under this head they distinguish three different situations: the importation and re-importation of Dutch-language books, and the importation of foreign-language books.

As regards the importation of Dutch-language books the economic considerations underlying the application of a system of resale price maintenance are identical for a region whose linguistic and political frontiers coincide and for a linguistic region bestriding a frontier.

As to the exportation of Dutch-language books note must be taken of the risk of speculative transactions consisting in export followed by a re-import for purely artificial reasons. Such a practice would irremediably jeopardize the national resale price maintenance systems.

The Commission is disregarding the fact that the abolition of the resale price maintenance system would lead to a reduction in the spread of foreign-language books held by bookshops.

As regards the statement of the reasons on which the decision is based the Commission is open to the criticism that it has not indicated clearly whether the agreement is condemned because it is based on the collective nature of the system or because of opposition in principle to all resale price maintenance practices, even on the basis of an individual decision.

Moreover the Commission has not specified the less restrictive means said to be available to the parties to guarantee an appropriate level of publishing and distribution.

Nor is it clear from the decision whether the cultural advantages of an agreement constitute a relevant factor in the appreciation made on the basis of Article 85 (3).

In any event the Commission cannot justify its refusal to grant an exemption by the notion that the competent public authorities would not hesitate to adopt, if necessary, the measures required for the protection of the cultural interests endangered by the abolition of the system of resale price maintenance. The examples of France, Germany and the United Kingdom moreover demonstrate that the States recognize that the

application of a resale price maintenance system is the most appropriate method of protecting cultural interests. Since the economic situation in the book market has repercussions in the cultural sphere, the Commission cannot, in its appreciation of the ecnomic factors, completely disregard the cultural factor.

The *Commission* repeats that it does not understand why the application of a collective resale price maintenance system is essential in order that there may be a certain cross-subsidization at production or distribution level.

It is not required to indicate in its decision any possibly less restrictive means which might be applied.

As regards the declarations made before the European Parliament by its representative, it should be noted that he emphasized the diversity of fixed-price systems existing at State level — a fact which in itself makes it possible to doubt whether the most restrictive system is indispensable. The doubts expressed as to the indispensable nature of that type of system by no means imply any duty on the Commission's part to cause an in-depth study of the book market to be undertaken. It is essentially for the public authorities to arrange for the protection of cultural interests. As regards Article 85, its preference would be for effective competition accompanied by certian steps on the part of the authorities rather than a system of distorted competition without the invervention of the authorities. It is indisputable that certain Member States attach greater importance to the cultural factor than to considerations of competition; however, that cannot be the Commission's standpoint.

F. Elimination of competition in respect of a substantial part of the products

The *applicants* stress that price competition has an altogether secondary role in the book market. In any event, the restriction of competition makes itself felt only at the level of retail prices for books of the same title; competition continues to play its part at other levels of distribution between interchangeable titles and between various editions of the same book. Account should be taken of the essentially local nature of retail trade, at which level the restriction operates.

The *Commission* repeats that in its view retail price competition between the same books is essential for the consumer, since competition between interchangeable publications has only a restricted role to play. The applicants' arguments with regard to the local nature of price competition are irrelevant. The agreement results in the consumer's being deprived of all incentive to turn to another local market over the frontier; similarly the retailer has no incentive to obtain supplies from the other State.

V — Replies to the Court's questions and requests

In reply to the questions and requests put by the Court at the end of the written procedure to the Commission and the applicants in the main actions answers were given or action was taken as follows:

A. Questions and requests to the Commission

"1. The Commission is requested to define what it understands by 'collective system of resale price maintenance' and to explain the difference between such a system and *'individual* system of resale price maintenance', particularly from the point of view of effective competition. It is requested also to explain if appropriate whether there are intermediate forms between the two systems."

An individual system of resale price maintenance implies an agreement between producer and reseller on the price to the consumer. A collective system may exhibit two forms: the first consists in a collective obligation of all producers in a given sector to impose a price to their resellers; the second extends the system of imposed prices from the producers to the resellers. The agreement at issue is a combination of the two forms.

The individual system is a disadvantage to efficient distributors because it prevents them from converting savings in costs into a reduction in the selling price to the public. Prices are fixed permanently at a high level to take account of the margin of profit necessary for a reseller on the border-line.

The disadvantageous features of the collective system are even more marked: resellers in a given sector are deprived of any choice between goods subject to a resale price maintenance system and those which are not; producers can no longer adapt their policy to the requirements of the market. Normal relations between resellers and producers are replaced by a relationship of compulsion between a group of resellers oberving the scheme and a (potential) individual price-cutter.

An individual system of resale price maintenance, applied systematically in a given sector, has perceptibly the same effects on effective competition as a collective system. In the nature of things, however, an individual system is more flexible: the producer remains free to abandon the system at any time and the reseller retains his liberty to negotiate with the producer.

"2. It appears from the file that the applicants, when notifying the Commission of the agreement which is the subject of the contested decision, also notified the agreements existing within each of them, drawing attention to the close links between the transnational agreement and the two national agreements. In fact, the Commission's decision contains numerous references to the national agreements although they are not the subject of the decision, as is stated in paragraph 1 of the preamble to the desision. Can the Commission state its intentions with regard to the files concerning the national agreements? Why did its decision relate exclusively to the transnational agreement in view of the links between that agreement and the national agreements?"

The object and effect of the agreement at issue was incontestably to affect trade between Member States; it is therefore without any doubt a matter with which the Commission has authority to deal.

It is not clear that the position is the same as regards the national agreements.

The Netherlands agreement affects trade between Member States only to a slight extent; moreover it is established that it does not hinder parallel imports.

The Belgian agreement is capable of affecting inter-State trade to a greater extent; but it is characterized by a more flexible application and the Flemish collective system of resale price maintenance has been abolished by a decision of the national courts.

The Commission's "wait and see" attitude in respect of the national collective resale price maintenance agreements is justified by its willingness to await the effects of the abolition of measures designed to protect the national systems. The contested decision has, it is true, certain effects on the national systems; however, its scope must not be overestimated. In rejecting the transnational agreement only, the Commission has not exceeded its powers of appraisal or acted *ultra vires.* It is entitled to reserve its power of appraisal with regard to the national systems.

"3. The Commission is requested to provide a summary of the development of its policy as regards the national and transnational aspects of collective and individual resale price maintenance systems in general (see the third subparagraph of paragraph 48 of the preamble to the disputed decision), together with the most important references as regards its practice in adopting decisions, its answers to Parliamentary questions on the subject, its annual reports and all other public communications."

There is no question of any development in the Commission's policy as regards resale price maintenance systems: the Commission has always opposed a system of fixed prices applied to the final consumer. Resale price maintenance is essentially a competition problem at national level; the Commission seeks to ensure however that intermediate sellers and consumers retain the opportunity to buy on the most favourable conditions within the common market. Where such a system restricts competition and affects trade between Member States the Commission has the right to intervene. The fact that a resale price maintenance system is authorized at national level does not prohibit the Commission from intervening with regard to measures intended to ensure its enforceability at supranational level, since the public interest in free movement of goods must take precedence over the advantages which certain sectors may enjoy as a result of the application of such a scheme. The numerous cases cited by the Commission illustrate the principles of that policy.

"4. The Commission is requested to draft a memorandum making clear to what extent there exist for books in English, French or German agreements of a private nature or rules of public law regarding trade in books, in conjunction with a collective or individual resale price maintenance system and to what extent the agreement referred to in the decision at issue exhibits aspects

which differ from the agreements or rules first mentioned."

(a) The British Netbook Agreement consists in an individual system of maintained prices which has certain collective characteristics.

The decision to apply a maintained price depends on each individual purchaser, who also decides on the measures to be taken to deal with individual infringements.

The system of conditions of sale linked to the system of maintained prices and the collection of information on the application of the system are of a collective nature.

A court decision has provided for an exemption from the legal prohibition of maintained prices in favour of the Netbook Agreement.

The British system has repercussions outside the United Kingdom, particularly in Ireland. In contrast to the agreement at issue, however, it does not aim at ensuring complete supranational enforceability.

(b) The German legislation on restrictions of competition includes, in so far as concerns resale price maintenance, a derogation in favour of published works. The German resale price maintenance system too exhibits features which are both collective and individual.

The application of the system depends on a decision of the individual publisher but extends automatically and mandatorily to all potential buyers. The German system is implemented in the form of a standard contract ("Sammelrevers") which lays down in particular a duty for booksellers to observe, and for intermediate purchasers to require the observance of, the imposed price, even in the event of re-importation.

The Sammelrevers may be assimilated to the Netbook Agreement; however, it has more perceptible supranational repercussions inasmuch as it contains a provision capable of hindering parallel imports.

(c) France has a system under public law ("Loi Lang"), involving a duty to impose a retail selling price even in the event of re-importation, a restriction on the grant of discounts and rules on prices for sales by book clubs.

The Commission is at present studying this system with a view to possible proceedings under Article 169 of the EEC Treaty.

The French system cannot be compared to the agreement at issue: it does not exclude all competition between booksellers as regards price.

"5. The Commission is requested to provide:

(a) a copy af the 'explanatory memorandum' on the subject of the fresh inquiries requested in 1981 and 1982 and the 'summary of ... earlier studies' referred to in Mr Andriessen's reply to a question from a Member of the Parliament on 10 August 1981 (Official Journal, C 240, p. 20);

(b) a memorandum relating to the question to what extent the fresh inquiries have already produced results which may be of some relevance for these proceedings."

The Commission submits a copy of the explanatory memorandum requested, with a list of studies already undertaken and refers to the Twelfth Report on Competition Policy as regards the results of the most recent studies.

"6. The Commission is requested to submit a memorandum containing:

(a) a more precise explanation of its views of the scope of its powers to take account of the specific cultural nature of the product and of the market in question, regard being had to Article 85 (3);

(b) a more detailed statement of reasons than that presented in the decision (paragraph (51)) and in its pleadings as regards the applicant's line of argument regarding 'cross-subsidization' in respect of bookshops;

(c) information as to the extent to which it takes the view that there is a possibility of finding an alternative to cross-subsidization as regards not only publishers but also booksellers or, if appropriate, why it feels that such alternatives are ineffective or undesirable as far as bookshops are concerned."

As far as the specific cultural nature of the product is concerned the Commission feels, as far as concerns the choice of the objectives which may play a part in connection with the application of Article 85 (3), that it cannot depart from the criteria which it lays down; at the most it might have regard to purposes closely bound up with the criteria set out in that article.

The specific cultural nature of the product cannot be related to the concept of improving production or distribution. Article 85 (3) does not permit the Commission to conduct a cultural policy.

Of course the Commission must ensure that it does not negate cultural values by refusing a possible exemption, but only to the extent to which restrictions on competition are indispensable. The Commission cannot, because of adventitious cultural considerations, relinquish its power to take action against agreements which affect trade between Member States.

As regards the questions of "cross-subsidization" and any alternative solutions, it must be acknowledged that it is in principle for the Commission to obtain and appraise the evidence with regard to a possible exemption under Article 85 (3); but it is in any case entitled to refuse exemption when the evidence produced is not convincing. It has no duty to expound the "positive" effects of its decision or to suggest alternative solutions.

Moreover the abolition of supranational protection does not imply the abandonment of all cross-subsidization. It is established that the national systems can operate without the protection of the transnational agreement. There is no direct and essential link between cross-subsidization and the supranational collective resale price maintenance system.

The applicants themselves acknowledge that cross-subsidization is possible without any transnational collective resale price maintenance scheme, although to an inadequate degreee, but they do not provide any explanations as to the degree they have in mind.

The system at issue is excessively restrictive, as is particularly noticeable at the levels of publication and sale, and it

is not offset by its advantages in the field of distribution.

Although the Commission has in principle no part to play as regards alternative solutions, it has nevertheless refered to the possibilities of specialization, of purchasing groups, of differentiation of margins, of financial assistance and of selective distribution.

B. Questions addressed to the applicants

"1. The applicants are requested to explain in greater detail how they can relate the considerable increase in the market share of book clubs, self-service shops and other sales channels offering a limited range and often at lower prices (mentioned *inter alia* in paragraphs 12, 16 and 51 of the preamble to the decision and on page 43 of the rejoinder and apparently admitted by the applicants) to the protection, brought about by the introduction of a collective system of resale price maintenance, of cross-subsidization at the level of specialist bookshops offering a large range (whose share of the market, according to the Commission, has considerably diminished as a result of the development of other channels of sale)."

The *Flemish Association* claims that in analysing the distribution system in question account must be taken of all levels of the distribution network and of the aggregate of a very diversified supply the trend of which is characterized by a spectacular increase and by the appearance of additional stages in the distribution network.

Retail distribution has two sides: the traditional bookshops, the book departments of newsagents and the specialist shops with a limited but specialized range on the one hand; and self-service stores, department stores, supermarkets and book clubs on the other. The first group applies the resale price maintenance system and the distributors of the second group select their own prices.

The increase in the market share of distributors of the second group should not be exaggerated: the genuine booksellers' share of the market has in practice been preserved, although there is at present a tendency to decline owing to the competitition of the supermarkets, which apply a policy of discounts for certain types of book for a limited period, combined with a limited range, which brings about an enormous cultural impoverishment.

The application of lower prices by book clubs does not result, in view of their rules, which impose reasonable requirements on the consumer, in eliminating the competition of bookshops properly so called.

Cross-subsidization arrangements as far as publishers and retailers are concerned are not affected by book clubs; on the other hand they simply do not exist as regards shops which practise loss-leading.

There is no contradiction between the existence of cross-subsidization and a decline in the number of specialist bookshops: the purpose of subsidization is not to benefit a particular form of distribution but to ensure the existence of ranges which are as extensive as possible.

The *Netherlands Association* emphasizes that cross-subsidization (or internal subsidization) takes place both with pub-

lishers and bookshops and involves an interaction between them both. Furthermore a distinction must be drawn between the general bookshop, typified by a very wide range of stock, and the specialist bookshop offering a very wide selection in a restricted field. The quality and size of such ranges distinguish that type of distribution from that engaged in by book clubs, self-service shops and other sales channels with a limited range.

The transnational agreement and the national agreements which form its foundation aim at creating optimal conditions for as wide a dissemination as possible of a large range of books in conditions which are economically justifiable. There can be no objection to the development of other sales channels provided that their use does not affect the operation of the bookshops' distribution network.

The agreements in question do not involve excessive restrictions of competition; their purpose is to allow booksellers holding a considerable stock to enjoy a reasonable existence economically, to integrate books into the socio-economic context by taking into account the difference between active purchasers, who look for a considerable spread, and non-active purchasers, to maintain the net quantities of books held in stock and to develop other methods of distribution to reach non-active purchasers.

A distinction should be drawn between book clubs and self-service shops and other sales channels. If they apply prices fixed by the publisher self-service shops and other sales channels do not threaten the operation of the traditional bookshop.

Book clubs sell from a limited stock to members only; sales are made by a special system on the basis of a catalogue; the limited stock consists of older books entered in the catalogue long after their appearance; the clubs provide a guarantee of ability to buy up and market that type of book.

That special structure, combined with a rapid turnover of stock, enables book clubs to charge prices below those in bookshops.

The book clubs' relative market share has considerably increased of recent years whilst that of bookshops holding stock has declined, though not to the same extent. The book clubs' market share has increased independently; however, their expansion is no longer continuing and their relative market share has at least stabilized.

In absolute terms the position of bookshops holding stock has not been adversely affected; the development of book clubs has hardly been unfavourable to them and is not contrary to the collective resale price maintenance system or to the continuance of cross-subsidization for traditional bookshops, which is bound up with them.

"2. The applicants are asked to explain their point of view with regard to the replacement solution proposed by the Commission in paragraph 51 of its decision so as to ensure the saleability of less-commercial titles."

The *Flemish Association* refutes the Commission's statement that cross-subsidization can exist only at production level and is not necessary at distribution level. The cross-subsidization machinery also operates, and must continue to operate, at the level of the specialist bookshop; in the absence of maintained prices such shops would have no defence against the unremitting cut-throat competition of the supermarkets and would be forced to go out of business — which would mean the disappearance of sales of cultural books.

In that respect the activities of book clubs present no problem.

The number of specialist bookshops in the Dutch-speaking part of Belgium has not diminished; however, no further expansion is now taking place and the stocks held by existing bookshops are not being extended.

The *Dutch Association* takes the view that the solution proposed by the Commission, namely the application of cross-subsidization between less commercial titles and popular publications would be impracticable.

As regards titles which sell well there would be, in the absence of a system of resale price maintenance, strong price competition which in the long run would reduce publishers' profit margin. For the bookshops, where the maintenance of a wide spread is due to the fact that the rapid turnover in successful books offsets the slow turnover of titles which sell less readily, the abolition of resale price maintenance would mean a reduction in the profit margin and would annihilate any advantage resulting from the rapid turnover of successful titles; the result would be a reduction in stocks of books which sell less readily.

At the publisher's level the acceptance of works by new authors or the publication of books which do not sell readily is possible only as a result of the continued sale of older titles and to the ability of bookshops to stock new editions or books which do not find a ready sale. That interaction between publication and distribution is possible only as a result of a system of resale price maintenance.

By reason of their special features books scarcely lend themselves in the restricted Dutch-speaking area to publicity campaigns. The absence of a network of bookshops holding stocks means a reduction in the publication of new titles.

The distinction made by the Commission between publishers of general-interest books and others does not correspond to reality: there are no publishers of general-interest books who include in their stock-in-trade only works which sell well.

The existence of an appropriate network of booksellers holding stock is a necessary condition for the publication of a wide spread of titles.

"3. The applicants are asked to explain why the Netherlands system of collective exclusive dealing, referred to in paragraphs 39 and 40 of the decision, has never been formally abolished whereas the rules applicable to Flemish bookshops have apparently been amended since they were notified."

The *Flemish Association* feels that the Belgian system for granting recognition

was poorly adapted to the reality and trend of the market. The Flemish Association based its policy on the idea that the encouragement of reading and dissemination of books should be as wide as possible; a satisfactory degree of expansion took place particularly with newsagents selling books incidentally. Some self-service shops joined the association and observed the resale price maintenance system. However, certain types of supermarket, which regarded books as loss-leading articles and applied discounts, did not join the association.

The *Dutch Association* remarks that paragraphs 39 and 40 of the disputed decision deal with the transnational system of exclusive dealing.

In trade in books between the Netherlands and Belgium recognition of the trader is irrelevant. The parties did not formally cancel the provisions in question as the agreement was due to be reviewed in the context of the negotiations with the Commission.

The collective exclusive dealing system applied in the Netherlands has been to a great extent formally revoked and in particular the scope of the exclusive dealing has been considerably restricted.

VI — Oral procedure

At the sitting on 13 July 1983 oral explanations and answers to questions put by the Court were given by A. de Caluwé and J. J. Billiet for the Flemish Association, by Th. R. Bremer of the Dutch Association, by B. Van der Esch and P. J. Kuyper for the Commission, by O.-W. Brouwer for the Booksellers' Federation, the Publishers' Federation and the Börsenverein des deutschen Buchhandels, interveners, and by I. de Greef for Club, GB-INNO-BM and Sodal, interveners. For the most part they put forward their lines of argument as to the points included by the Court in its written questions and requests and as to the significant aspects of the question of the application to the agreement of Article 85 (3) of the EEC Treaty.

The Advocate General delivered his opinion at the sitting on 18 October 1983.

Decision

1 By applications lodged at the Court Registry on 5 and 15 February 1982 respectively the Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) [hereinafter referred to as "the Flemish Association"] having its place of business in Antwerp, and the Vereeniging ter Bevordering van de Belangen des Boekhandels (VBBB) [hereinafter refered to as "the Dutch Association"], having its place of business in Amsterdam, brought actions under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal, L 54, p. 36) was void.

2 The contested decision relates to the agreement concluded on 21 January 1949 between the two associations, each of which represents the great majority of publishers and booksellers in Flanders and the Netherlands respectively. The agreement, which was amended on 2 July 1958, was notified to the Commission in accordance with the provisions of Regulation No 17 of 30 October 1962 by the Dutch Association and on 3 November 1962 by the Flemish Association. The notifications were accompanied by an application for exemption under Article 85 (3) in case the agreement should be considered contrary to Article 85 (1). It may be seen from the file that at the same time as their agreement was notified the applicants also notified the Commission of the agreements and rules in force within each of the two national associations (hereinafter referred to as "the national agreements").

3 The proceeding was initiated by the Commission on 7 December 1977. The statement of objections was contained in two identical letters sent to the applicants on 19 December 1977 and 12 January 1978.

4 The first heraring of the parties took place on 15 and 16 March 1978, the second on 18 October 1979 and a supplementary meeting with the parties on 19 March 1981. Between those dates the applicants submitted to the Commission a number of alternative suggestions, none of which the Commission was however able to accept. The Commission confirmed its attitude by letter of 27 March 1981 and on 25 November 1981 it adopted the decision which is the subject of the proceedings. In that decision the Commission stated that the agreement constituted an infringement of Article 85 (1) and refused to grant an exemption under Article 85 (3).

5 The applications were lodged on 5 and 15 February 1982. On the same dates the applicants lodged applications for the adoption of interim measures with a view to a suspension of the operation of the decision in question whilst the proceedings in the main actions were pending. By order of 31 March 1982 the President of the Court granted such a suspension within certain limits and subject to certain conditions.

6 The agreement, which is described in greater detail in paragraph 9 of the decision at issue, is characterized by three closely linked groups of provisions:

(a) The publisher must fix for each of his publications a retail selling price and has a corresponding duty as against all the other members of the two national associations to ensure that that price is observed up to the stage of retail sale, the only exceptions being those exhaustively prescribed by the national agreements. Those arrangements are hereinafter described as "the resale price maintenance system".

(b) There is a system for the recognition of publishers and booksellers with mutual recognition of affiliation to the national associations. Members are forbidden to engage in any trade with publishers and booksellers who are not recognized. Those arrangements are hereinafter referred to as "the exclusive dealing system".

(c) A committee is set up to supervise the scrupulous observance of the agreement and to work in cooperation with similar committees operating within the national associations; it is to decide when the agreement has been infringed, to make the appropriate representations to those concerned and may where appropriate exclude them from trade. Those arrangements are hereinafter referred to as "the penalty system".

7 According to the applicants the Commission wrongly took the view that the agreement still involved the exclusive dealing system. They do not deny that the agreement still includes express provisions to that effect, but they maintain that for a long time past they have no longer been applied and should therefore be regarded as having lapsed. The fact that those provisions still form part of the agreement cannot therefore, they claim, be considered an infringement of Article 85.

8 If the applicants had intended definitively to abolish the exclusive dealing system, the only means of doing so effectively, regard being had to the rules on competition, would have been, as the Commission has pertinently observed in paragraph 38 of its decision, to make a formal amendment to the agreement and to notify it in the manner required by Regulation No 17. As there has been no such amendment the only course open to the Commission

was to appraise the agreement in accordance with the terms notified to it in 1962. The Court also must therefore consider the agreement in the form in which it was notified in 1962, including the exclusive dealing system.

The application of Article 85 (1)

9 In Article 1 of its decision the Commission states that the agreement is incompatible with Article 85 (1). The objections to the agreement, mentioned in paragraphs 34 to 46 of the decision, may be summarized as follows:

The agreement in dispute must be classified as an "agreement between associations of undertakings" within the meaning of Article 85 inasmuch as its effect is to bring together the members and affiliates of both associations including publishers, book clubs, importers, exclusive representatives, wholesalers and booksellers. It involved a restriction on competition within the common market by reason of both the collective exclusive dealing system and the collective resale price maintenance system for which it makes provision.

The exclusive dealing system involves a prohibition of purchasing, stocking or encouraging the sale of books published in the other State by a publisher who is not recognized. Those provisions have the effect of restricting the greater part of trade in books between Belgium and the Netherlands to recognized undertakings and therefore prevent recognized publishers and traders from dealing with non-recognized publishers and traders from the other State.

Under the resale price maintenance system publishers in both States are required to fix a single retail price for each of their publications and sellers are required not to sell a book in the other State at a retail price other than that fixed by the publisher. According to the Commission that system excludes all price competition for one and the same title between booksellers in the two States. Traders are forbidden any personal effort which might permit them to increase their market share by reselling books below the price fixed by the publisher or to provide consumers with a fair share of the benefit resulting from rationalization measures.

The majority of undertakings in the book trade in Flanders and the Netherlands are affiliated to the two associations or recognized by them so that the agreement involves a perceptible restriction on competition inasmuch as its aim is to subject trade in books to rules which prevent publishers of Dutch-language books and booksellers in either State from freely selecting their channels of supply and distribution in the other State and from determining their conditions of purchase and sale. The agreement, according to the Commission, is therefore such as to hinder freedom of trade between Member States. Its harmful effects are all the more significant inasmuch as the trade in books between the Netherlands and Belgium is very considerable.

10 The applicants put forward two groups of objections to that part of the decision, some formal and procedural and others involving the Commission's appraisals of the content of the agreement.

Formal and procedural objections

11 The Flemish Association in particular has raised numerous objections as to form and procedure; two of its objections have been taken up and further developed by the Dutch Association, as will appear below.

12 *First* the Flemish Association complains that the official who signed the statement of objections was not empowered to do so by an authorization duly granted by the Commission.

13 In reply to that complaint, which does not appear in greater detail in the application, the Commission has given circumstantial information from which it appears that the signatory of the document containing the statement of objections had been duly provided with instructions and duly authorized by the Commission in accordance with a practice expressly approved by the Court.

14 In raising this objection the applicant is failing to have regard to the fact that delegation of power to sign, as the Court has recognized in its judgments of

14 July 1972 (Case 48/69 *ICI* [1972] ECR 619, paragraphs 10 to 14) and 17 October 1972 (Case 8/72 *Cementhandelaren* [1972] ECR 977, paragraphs 10 to 14), is the normal method by which the Commission exercises its powers. The applicant has not supplied any evidence leading to the supposition that in this case the Community administration has failed to observe the rules applicable in the matter. This submission must therefore be dismissed.

15 *Secondly* the Flemish Association claims that the hearing on 18 October 1979 was conducted illegally as not all the officials appointed by the Commission to conduct the hearing in pursuance of Article 9 of Regulation No 99/63 were present.

16 Article 9 (1) of Regulation No 99/63 provides that: "Hearings shall be conducted by the persons appointed by the Commission for that purpose." Under that provision only persons duly appointed by the Commission may conduct hearings in the matter. On the other hand, in the event of several persons' having been appointed to follow a given case, that provision imposes no obligation as regards the simultaneous presence at hearings of all the persons appointed or certain of them. This submission also must therefore be rejected.

17 *Thirdly* the Flemish Association complains that the Commission did not accept its proposal that at the hearing F. van Vlierden, President of the Vereeniging van Letterkundigen [Literary Association] should be heard in his capacity as a writer.

18 Article 7 (1) of Regulation No 99/63 provides that: "The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest . . .". Paragraph 2 provides that: "The Commission may likewise afford to any other person the opportunity of orally expressing his views." It appears from that article that the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry. In fact it appears from the minutes of both hearings that the applicants were given the opportunity to express their views in the freest possible way and to put forward to speak on

their behalf persons representing all aspects of the book trade. The applicant has not adduced any evidence to show that in the circumstances the Commission, in not hearing Mr van Vlierden, unduly restricted the inquiry into the matter and thus limited the applicants' opportunity to provide explanations of the various aspects of the problems raised by the Commission's objections. This submission also must therefore be dismissed.

19 *Fourthly* the applicant complains that the statement of objections was incomplete and that certain of the objections raised were inadequately or inaccurately explained. It takes the view that in those circumstances the Commission has infringed Article 4 of Regulation No 99/63 under which the Commission may in its decisions deal only with those objections raised against the parties concerned in respect of which they have been afforded the opportunity of making known their views. The applicant does not give any more detailed indications as to the parts of the decision to which this criticism relates.

20 It may be seen from a comparison of the statement of objections and the contested decision that in the statement of objections the Commission expressly referred to the three matters finally established in making its declaration that the agreement was incompatible with Article 85 (1) and in its refusal to grant an exemption under Article 85 (3), namely: the system of resale price maintenance, the exclusive dealing system and the penalty system. The parties were therefore fully informed of the scope of the inquiry initiated against them and were in a position to defend themselves. This submission also must therefore be dismissed.

21 *Fifthly* the Flemish Association complains that the Commission did not reply to certain of its arguments and claims that accordingly the decision at issue should be declared void on the ground of an inadequate statement of the reasons on which it is based. In this respect it mentions the fact that the Commission attached no importance to its arguments of a cultural nature or to those relating to Article 10 of the European Convention for the Protection of Human Rights and to Article 10 bis of the Paris Convention.

22 In this connection it must be recalled that although, under Article 190 of the Treaty, the Commission is required to state the factual matters justifying the

adoption of a decision, together with the legal considerations which have led to its adopting it, the article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings (see, most recently on that subject, the judgment of 9 November 1983, Case 322/81 *Michelin* [1983] ECR 3461. The statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded. From that point of view it must be conceded that the Commission, in its statement of reasons, has sufficiently set out all the considerations of law and of fact on which it has relied in arriving at the operative part of its decision. This submission also must therefore be dismissed.

23 *Sixthly* the Flemish Association claims that the Commission did not give it access to the administrative file and that it was therefore unable to take cognizance of certain documents or studies used by the Commission for the purposes of its decision.

24 It may be noted that the Flemish Association was not in a position to identify any document which might have been used by the Commission as a basis for its decision but which is not accessible to the applicant. Its complaint therefore seems rather to relate to the fact that it has not had the opportunity to inspect the Commission's file with a view to determining whether it might possibly contain documents in which it might be interested.

25 In that connection it must be observed that although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, there are no provisions which require the Commission to divulge the contents of its files to the parties concerned. It does not appear in fact that the Commission has made use of any document which was not available to the parties and on which they have not had the opportunity to make their views known. This submission also must therefore be dismissed.

26 The *seventh* complaint is advanced by both the Flemish and the Dutch Associations. Both applicants complain that the Commission has declared on several occasions its intention to hold an inquiry into the book trade in the Community as a whole before adopting any decision with regard thereto. They point on the one hand to a declaration made at the conclusion of the hearing on 15 and 16 March 1978 by the Commission's representative, Mr Ferry, and on the other hand to declarations made by Commissioner O'Kennedy at the sitting of the European Parliament on 13 February 1981 on the occasion of the discussion of the Beumer report on fixed prices for books (European Parliament Debates, Official Journal 1981, Annex, No 1-266, p. 335, and Doc. 1-544/80 of 10 November 1980), and the Commission's answers to two Parliamentary Questions, the first on 10 August 1981 to Written Question No 514/81 by Mr Beyer de Ryke (Official Journal, C 240, p. 20), and the second to Question No 28 by Mr Van Miert (Official Journal 1981, Annex, No 1-273, p. 185).

27 A study of the declaration in question shows that the Commission did not at any time give an undertaking of the kind which the applicants attribute to it. It did no more that state that it was carrying out investigations into the various markets in books within the Community and that it hoped to resolve the problems arising with regard to competition as a whole. Those declarations could not have the effect of preventing it from pursuing as a matter of priority any particular agreement as soon as it had completed its inquiries thereon. This submission also must therefore be dismissed.

28 Finally in an *eighth* complaint the applicants submit that the Commission's attitude has been inconsistent and that the rights of the defence have been infringed inasmuch as the Commission, after receiving simultaneously the notification of the national agreements and of the agreement linking the two associations, and after allowing it to be understood at a preliminary stage that it was including all the agreements in its investigation, severed the so-called "transnational" agreement from the remainder so as to make it the subject of a separate decision. The applicants point out that, notwithstanding, the decision at issue contains numerous references to the national agreements and they attribute to the Commission an intention to bring those agreements to an end by indirect means without calling them openly in question, by assailing the transnational agreement alone in view of the fact that

the operation of that agreement is a necessary condition for the continued existence of the national agreements.

29 The Commission concedes that the agreement at issue cannot actually be isolated from its context and that it has therefore necessarily had to refer to the national agreements to the extent to which the transnational agreement refers to them. It denies, however, that it therefore wished to arrive at an appreciation as to whether the national agreements come within the field of application of Community law and, if they do, whether they are compatible with the provisions of the Treaty.

30 Although the relationship between the transnational agreement on the one hand and the national agreements on the other is indisputable, the Commission cannot be criticized for concentrating its attention on the agreement between the two associations. Although the provisions of the transnational agreement refer to the national agreements in respect of each of the three essential features referred to above, the position nevertheless remains that that agreement may be made the subject of an appraisal in terms of its own objectives and it is not necessary at the same time to effect an appreciation of the national agreements.

31 Moreover, in paragraph 1 of the recitals in the preamble to its decision the Commission has expressly excluded the national agreements from its ambit. It follows from the procedure selected by the Commission that the judgment which the Court is called upon to make cannot be interpreted as prejudging matters which have not been the subject of the proceedings. In the absence of any injury in this respect it is therefore impossible to take the view that the procedure adopted by the Commission has adversely affected the rights of the defence. This submission also must therefore be dismissed.

The application of Article 85 (1)

Complaints of a substantive nature

32 From the substantive point of view the applicants advance five different submissions regarding interference with freedom of expression as guaranteed in particular by Article 10 of the European Convention for the Protection of

Human Rights, infringement of Article 10 bis of the Paris Convention, a divergence between the Commission's interpretation of Article 85 of the Treaty in this matter and the consistent practice of the Member States, the Commission's failure to have regard to the special structure of the market in books and finally the complete absence of any injurious effect on competition within the common market, regard being had to the special features of the linguistic region in question.

1. Submission as to interference with freedom of expression

33 The applicants claim essentially that the effect of the resale price maintenance system, owing to the optimal organization of the distribution network, is to encourage a multiplicity of titles issued by publishers and thus to ensure the publication of less readily saleable works such as, for example, works of science and poetry. In those circumstances the abolition of the system of resale price maintenance, as is shown by the example of certain States (and in that regard the applicants mention Swedish and French experience), would result, they claim, in restricting freedom of expression and in making publishing dependent on State subsidies. The Commission's action therefore jeopardizes freedom of expression as defined in particular in Article 10 of the European Convention for the Protection of Human Rights.

34 Although it is true that certain economic provisions may not be without effect from the point of view of freedom of expression, the position nevertheless is that the applicants have not established in this case the existence of any real link between the Commission's decision and freedom of expression as guaranteed by the European Convention, even on the supposition that it might be possible to interpret it in such a way as to include guarantees regarding the possibility of publishing books in economically profitable conditions. To submit the production of and trade in books to rules whose sole purpose is to ensure freedom of trade between Member States in normal conditions of competition cannot be regarded as restricting freedom of publication which, it is not contested, remains entire at the level of both publishers and distributors. This submission must therefore be dismissed.

2. Submission as to infringement of Article 10 bis of the Paris Convention

35 The applicants claim that the system of resale price maintenance constitutes a guarantee against the so-called practice of "loss-leading", that is to say against the sale at abnormally low prices of certain books with the sole object of attracting customers. Their view is that such practices are contrary to Article 10 bis of the Paris Convention as amended by the Lisbon Act, 31 October 1958, (Convention Manual published by the United International Bureaux for the Protection of Intellectual Property, Geneva). The effect of the Convention, it is alleged, is to bind the Community also and consequently to take precedence over the rules on competition.

36 It would appear that in alluding to Article 10 bis of the Paris Convention the applicants are referring to paragraph 1 which states: "The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition." They take the view that the so-called practice of "loss-leading" constitutes an act of unfair competition within the meaning of the provision cited. Since, according to them, the system of resale price maintenance constitutes a defence against such practices, the Commission is not entitled to require its abolition by the application of the competition rules of the Treaty.

37 The fact that a system of resale price maintenance may have the incidental effect of preventing unfair competition of the kind described by the applicants is not, however, a sufficient reason for failing to apply Article 85 (1) to a whole sector of the market such as the book trade. It is open to undertakings which may have suffered injury as a result of unfair competition to have recourse to legislation on trade practices such as exists in one form or another in all the Member States, which provides remedies against abuses such as those mentioned by the applicants. On the other hand, the fact that such abuses exist cannot in any circumstances justify an infringement of the Community rules on competition. This submission must therefore be dismissed.

3. Submission as to a divergence between the Community's action and the policy pursued in that connection by various Member States

38 The applicants claim that as a result of legislation and concordant judicial practice the system of resale price maintenance for books is permitted in all the Member States and in any case in the Federal Republic of Germany, France and the United Kingdom. The Commission must therefore accept this convergent practice as a mandatory guideline in settling its own policy on the subject.

39 In this connection the Commission claims that the practices prevailing on the three markets referred to are not comparable to the system established by the agreement which forms the subject of the decision at issue. Furthermore it has made it clear that in any case it reserves the right to appraise the practices referred to by the applicants in the light of the requirements of the Treaty.

40 In that connection it must be observed that national legislative or judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty. The same reasoning must apply with even greater force in relation to practices of private undertakings, even where they are tolerated or approved by the authorities of a Member State. This submission also must therefore be dismissed.

4. Submission to the effect that the Commission has failed to have regard to the special structure of the market in books

41 The applicants, supported especially on this point by the Booksellers' and Publishers' Federations, interveners, claim that the competition on which the Treaty insists must be understood as "effective competition", adapted to the special conditions of the market in question. The Commission's error is not to have taken account of the specific nature of the book as a product or of the special nature or structure of the book market, having taken the view that price competition was the essential element in competition. However, each book constitutes a market in itself and price elasticity of books, as goods, is minimal, so that other facets of competition have a predominant interest in comparison with price. In this connection the applicants mention:

the variety of supply, the diversity of stock held by bookshops, the speed with which orders are executed, and the services offered to consumers by way of information and advice.

42 The applicants also claim that the practice of resale price maintenance leaves freedom of competition unimpaired both at the level of publishers — who are free to determine the selection of titles which they publish and to determine prices with due regard to the state of the market — and in relationships between the various stages of the distribution network — wholesalers and retailers. The consumer derives only advantages from this system as he may buy the same book in all places at the same price and in return enjoys a wide spread of titles available and the best possible service.

43 In reply to that argument the Commission emphasizes that it is not overlooking the freedom of competition between publishers or the fact that the resale price maintenance machinery allows the continuance of a certain competition within the distribution system, between publishers, wholesalers and retailers, relating to the sharing of the margin existing between the publisher's sale price and the price compulsorily applied in sales to the consumer. But once these factors are accepted, the decision actually relates, according to the Commission, to the applicant associations' policy with regard to profit margins and the structure of distribution channels which are its consequence. The Commission considers that the resale price maintenance system totally eliminates price competition at retail level and thus removes all incentive for attempts to rationalize distribution in such conditions that the benefit comes to the consumer. The Commission casts doubt on the applicants' analysis according to which, in the consumer's eyes, the price of a book is a negligible factor in comparison with other ancillary matters such as diversity of stocks and service. It takes the view that the introduction of price competition at the level of final distribution might be advantageous for a better dissemination of books in more economical conditions.

44 In coming to its decision on the arguments of the parties based on the special structure of the book market, which forms the central issue of the proceedings, the Court reminds the parties that, as mentioned above, the sole question before it is the conformity of the transnational agreement with Article 85 (1) and that its judgment can therefore relate only to the restrictive effects

of that agreement on trade between the markets in Dutch-language books in the Netherlands and Belgium.

45 Its view is however that the special features of that market do not permit the two associations to set up, in their mutual relations, a restrictive system whose effect is to deprive distributors of all freedom of action as regards the fixing of the selling price up to the level of the final price to the consumer. Such an arrangement would indeed infringe Article 85 (1) (a), which expressly prohibits all agreements which "directly or indirectly fix purchase or selling prices". Furthermore the system of resale price maintenance laid down in the agreement allows each of the two associations to control outlets as far as the last stage in the other Member State from the point of view of price-fixing and thus to make impossible the introduction of sales methods capable of allowing consumers to be supplied in economically more favourable conditions, which brings the applicant associations also into conflict with the contents of Article 85 (1) (b).

46 Thus, even on the supposition that the specific nature of books as an object of trade may justify certain special conditions in the matter of distribution and price, the conclusion must be drawn that in any case the very fact that the two large national associations of publishers and booksellers have extended to intra-Community trade the closely supervised rules which are in force within them constitutes a sufficiently marked restriction of competition to justify the appreciation effected by the Commission under Article 85 (1). The submission put forward by the applicants must therefore be dismissed.

5. Submission relating to the absence of any prejudicial effect on trade between Member States

47 The last submission made by the applicants as regards the application of Article 85 (1) is that the Commission was wrong to consider that the agreement had any prejudicial effect on competition in trade between Member States. On this subject they explain that, regard being had to the linguistic community between the Netherlands and the Flemish part of Belgium, the geographical region to be taken into account is not the political territory of the two States in question but the Dutch-language territory inasmuch as it forms a single entity. When matters are considered from that

point of view it may be seen that what is at issue is an effect purely internal to the region in question and that there is therefore no prejudicial effect on the common market. That state of affairs, they allege, was recently acknowledged by the Belgo-Netherlands Treaty on the Dutch-language Union concluded on 9 September 1980 (Moniteur Belge 1982, p. 1786, and Staatsblad van het Koninkrijk der Nederlanden 1981, p. 453).

48 That line of argument on the part of the applicants disregards the express wording of Article 85, which refers to "trade between Member States". In this case the agreement indisputably affects trade between two Member States, notwithstanding the linguistic links between them. This submission also must therefore be dismissed.

49 It follows from all the foregoing that the Commission was right to regard the agreement as falling within the prohibition contained in Article 85 (1).

The applicability of Article 85 (3)

50 At the time of notifying the agreement the applicants, in case it was considered incompatible with Article 85 (1), requested the Commission to make use of the power reserved to it by Article 85 (3) in order to declare the prohibition contained in paragraph 1 inapplicable to their agreement. By Article 2 of its decision the Commission dismissed that application for exemption. In paragraphs 47 to 63 of the preamble it set out its reasons for stating, in the light of the criteria laid down in Article 85 (3), that in its view the agreement did not constitute a contribution to improving the production or distribution of goods and did not allow consumers a fair share of the resulting benefit, that the restrictions imposed by the agreement did not appear to be indispensable and finally that the agreement eliminated competition in respect of a substantial part of the products in question.

1. The Commission's refusal to follow up the applicants' alternative proposals

51 As indicated above, the applicants submitted to the Commission certain alternative proposals set out in paragraphs 24 to 31 of the preamble to the decision. They complain that those proposals, which might have mitigated the effect of the resale price maintenance system, were not accepted by the Commission which, for its part, did not put forward any specific proposals which might have made an exemption possible.

52 In this connection it must be stated first of all that the purpose of the preliminary administrative procedure is to prepare the way for the Commission's decision on the infringement of the rules of competition, but that the procedure also presents an opportunity for the undertakings concerned to adapt the practices at issue to the rules of the Treaty. In the event of an exemption's being applied for under Article 85 (3) it is in the first place for the undertakings concerned to present to the Commission the evidence intended to establish the economic justification for an exemption and, if the Commission has objections to raise, to submit alternatives to it. Although it is true that the Commission, for its part, may give the undertakings indications as regards any possible solutions, it is not legally required to do so, still less is it bound to accept proposals which it deems incompatible with the conditions laid down in Article 85 (3).

53 This submission must therefore be dismissed.

2. The question of improving the production or distribution of books

54 The applicants, together with the Booksellers' and Publishers' Federations, interveners, claim that the agreement is intended to improve the production and distribution of books as a result of the system of "cross-subsidization" made possible by the resale price maintenance system. They explain in this connection that the existence of the fixed price allows the publisher, as a result of the profit realized on his successful titles, which meet with a ready sale and a rapid turnover, to accept the responsibility and the risk of publishing more difficult and less profitable works. Distributors in their turn are in a position to maintain more extensive stocks and to serve their customers better by helping in this way to disseminate a greater number of varied works.

55 On the other hand, they allege, the abolition of resale price maintenance would have the effect of concentrating trade on works which sell readily with the result that more difficult titles will be abandoned. Although it is true that successful books would sell more readily, there would be multiple negative consequences: publishers would no longer be able to assume the risk of publishing less promising works and the existence of small-scale specialist publishers would be threatened as a result. The variety of titles published would be reduced in consequence, the number of bookshops holding an extensive stock of books and offering service to customers would diminish to the advantage of distributors interested solely in works with a rapid turnover which would make it possible for them to reduce their profit margin. As a consequence of that transformation of distribution structure it would be necessary to expect, as the counterpart of the reduction in price of the easy titles, a corresponding increase in the price of all other works.

56 The Commission disputes the applicants' deductions. Its view is that the applicants have not established any causal relationship between the abolition of resale price maintenance and the phenomena which they describe, such as a reduction in the number of titles published and in the number of bookshops holding a sufficiently varied stock. According to the Commission the "cross-subsidization" machinery depends essentially on the policy followed by publishers in fixing their selling prices and it could operate without any necessity to have recourse to a system of resale price maintenance, which concerns essentially the distribution and not the publishing of books. The reduction in the number of bookshops is already well advanced, in spite of the existence of the resale price maintenance system, which proves that it has other causes. The introduction of fresh methods of sale in the book sector, such as the setting up of book departments in department stores and newsagents, is having the effect of encouraging the dissemination of books amongst new classes of consumer. All things considered, it is perfectly possible, the Commission states, to conceive of the organization of an effective system of distribution without recourse to the strait-jacket of resale price maintenance.

57 The interveners supporting the Commission, NV Club, NV GB-INNO-BM and NV Sodal, state that diversity of supplies, maintenance of stocks, speed of execution of orders and other services performed for customers are perfectly compatible with a policy of price reduction, as experience in various Member States of the Community shows.

58 In dealing with these arguments it should be recalled once again that the Court's decision can relate only to the transnational agreement. It does not appear that the Commission has exceeded the limits of its discretion in refusing, in view of the characteristics of the agreement, to recognize that it is such as to improve production and distribution of books as far as concerns trade between the markets in Dutch-language books in the Netherlands and Belgium.

59 The applicants, for their part, have not succeeded in showing that the continued existence of the transnational agreement is a condition for improving the production and distribution of books by the extension to trade between the two markets concerned of the effects of the "cross-subsidization" system, whatever view may be taken in the last resort of the intrinsic merits of the system — which can be conclusively appraised only in terms of the national agreements.

60 In the present of the proceedings the submission put forward by the applicants against the Commission's refusal to recognize that the agreement at issue is such as to contribute to improving the production or distribution of the goods in question must be dismissed.

61 As the conditions necessary for the grant of exemption under Articles 85 (3) are cumulative, it is unnecessary to consider the submissions relating to the other conditions for exemption.

62 It follows from all the foregoing that the applications must be dismissed.

Costs

63 In pursuance of Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

64 Since the applicants and the parties intervening in their support have failed in their submissions, they must be ordered to pay the costs; however, as regards the costs of the application for the adoption of interim measures, account must be taken of the fact that the interveners were not parties thereto.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants and the parties who have intervened in their support to pay the costs of the main action and orders the applicants to pay in addition the costs of the application for the adoption of interim measures.**

	Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 17 January 1984.

P. Heim
Registrar

J. Mertens de Wilmars
President