In Case 73/74

GROUPEMENT DES FABRICANTS DE PAPIERS PEINTS DE BELGIQUE, of Brussels,

SC USINES PETERS-LACROIX S.A., of Brussels,

LES PAPETERIES GENVAL S.A., of Genval,

ETABLISSEMENTS VANDERBORGHT FRÈRES S.A. of Brussels,

PAPIERS PEINTS BREPOLS S.A., of Turnhout,

all assisted by Marcel Grégoire, Advocate at the Cour d'Appel, Brussels, and, in the case of the last applicant, by Guy Schrans, Advocate at the Court of Ghent, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 boulevard Grande-Duchesse Charlotte,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jean-Pierre Dubois and Dieter Oldekop, its Legal Advisers, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Bâtiment CFL, place de la Gare,

defendant,

and

JEAN-MARIE PEX, represented by Louis Van Bunnen, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of Paul Beghin, Avocat-avoué, 9 avenue de la Gare,

intervener,

Application for annulment of the decision of the Commission of 23 July 1974 relating to a proceeding under Article 95 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, H. Kutscher, President of Chamber, A. M. Donner, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and arguments developed by the parties during the written procedure may be summarized as follows:

I — Facts

In 1922 five Belgian companies, producers and importers of wallpaper, joined in founding the Groupement des fabricants de papiers peints de Belgique, which was a *de facto* association, with no documents of constitution, whose head office was in Brussels. Initially, the Groupement was composed of the four applicant companies and of the Rath and Doodeheefver company, which left the Group in 1963.

In the words of its *règlement d'ordre intérieur,* the object of the Group is 'to study and resolve all questions connected with the business of its members'. The members of the Groupement cooperate in setting up a selling price list based on the technical description of wallpapers manufactured by them (weight and colour of the paper). The members of Groupement undertake to apply the Groupement's general conditions of sale. Wallpaper is sold by the Groupement at standard fixed prices. The Group also fixes a re-sale price list in respect of its wallpapers. At present (according to the Commission) these prices are fixed prices for re-sale or (according to the Groupement) target prices on which it is prohibited to *announce* rebates. The Groupement grants a *prime de co-opération* based on the annual turnover of business between their customers and all the manufacturers who are members of the Groupement. According to the Groupement, the *prime de co-opération* system has been or will be changed to include purchases made from other manufacturers in the EEC.

On 30 October 1962, pursuant to Article 5 (1) of Regulation No 17 of the Council of 6 February 1962 (OJ English Special Edition 1959-1962, p. 87) the Groupement notified the Commission on the form provided that an agreement existed between its members relating to the manufacture and distribution of wallpaper. On the form, under the heading 'Details of contents of the Agreement' and against the note 'If the contents of the agreement have been reduced to writing, please attache a copy of the complete text', the Groupement merely placed a dash. But, against the note 'If the contents have not been, or only partly been reduced to writing, state contents here', the Groupement entered:

'— fixing of quality standards;
— fixing of prices, rebates and reductions on sale and re-sale;
— joint publicity.'

Under heading II 3 which read: 'the following additional information should also be supplied: (f) measures which can be taken against participating undertakings (penal clauses, expulsion, stoppage of supplies etc.)', the Groupement entered: 'expulsion'.

Under the heading 'Methods provided for attaining the objectives of the agreement', in the place for entry of 'compliance with specific purchase or selling prices or other market conditions', the Groupement put:

'compliance with list selling prices, the total scale of aggregated rebates and the general conditions of sale'.

With the notification, the Group did not enclose either the general conditions of sale or circulars sent to its customers.

After the Cour de Bruxelles, in proceedings brought by Rath and Doodeheefver against the present members of the Groupement, had, on 16 May 1963, given a judgment in which it held that the Groupement had infringed Belgian competition law, the Commission asked members of the Groupement for information by letter on 26 November 1968. The Commission asked for, *inter alia,* a copy of some documents issued by the Group.

The Commission asked the following questions about the relationship between the Groupement and its customers:

'1. Are exports by Belgian customers prohibited, prevented or impeded by, e.g. being required to be authorized in advance?
2. Are foreign customers prevented from re-exporting to other countries, and from re-importing into Belgium?

The answer to these questions was in the negative.

To the question:

'Are your customers under an obligation to observe your resale prices in Belgium?'

the Groupement replied in the affirmative.

Finally, to the question:

'Are your customers under an obligation to observe your re-sale prices on exports?'

the reply was in the negative.

On 25 September 1972, the Interessengemeinschaft der deutschen Tapetenfabrikanten lodged a complaint with the Commission about the effects of the system of aggregated basic rebates applied by the Groupement on the ground that it impeded German exports to the Belgian market. The Groupement satisfied the complainant by promising to include German exports into Belgium in the calculation of their *primes de co-opération.*

Again, on 22 November, a complaint was registered from Mr J. M. Pex, the owner of a Belgian paint and wallpaper firm who, since July 1971, had placed several wallpaper orders with the Brepols company for delivery to the GB Super Bazaars company. The GB company operates a cut-price policy and publicly announced discounts on the re-sale prices of the Groupement.

When the wallpaper was put on sale in the GB Supermarkets, Brepols sent the following circular to its customers on 4 October 1971:

'In the course of last week you became aware that wallpaper from our 1970/71 collection... has, without our knowledge, been put on sale and sold in a chain of departmental stores at prices from 10 to 15 % below those on the official price list.

We quickly ascertained that this wallpaper was supplied from stock by one of our wholesale customers acting in agreement with this chain of departmental stores.

As such methods are liable to cause serious damage to the interests of our long-standing dealers, amongst them your goodselves, we have replied by suspending all supplies to the wholesaler involved.'

Despite this, Brepols continued to supply Mr Pex up to March 1972.

Furthermore, a circular signed by all the applicants and dated 29 October 1971 was sent by the Groupement to all its customers in the following terms:

'In the present circumstances, it appears to us essential to draw your attention to

the 'general conditions of sale', in particular, to the need for strict compliance with the following three paragraphs:

Simply by placing an order, the customer undertakes to comply with all the obligations which arise from the general conditions of sale and accepts the consequences of any infringements...

Regardless of the method adopted, e.g. by display in the shop window, inclusion in advertising material or when ranges are priced, only the selling prices shown in the price lists may be displayed or published. The price shown must be the price to the public without any reference to a lower price or percentage discount and this applies even during clearance sales.

Re-sale to another dealer:

The buyer may re-sell the Groupement's products to other dealers or intermediaries provided that they expressly agree to these general conditions and fulfil the obligations thereunder towards the Groupement and its members and that the buyer has not rendered himself liable to the cancellation by the Groupement or its members of the *prime de co-opération*. The re-sale price must never fall below that which the buyer would have to pay if he obtained the same goods direct from a manufacturer who is a member of the Groupement.

These conditions automatically impose an obligation on a second buyer also to comply with the Groupement's general conditions of sale.'

In consequence, with the exception of Vanderborght Frères, the members of the Groupement refused to sell wallpaper to Mr Pex on the ground that he had breached their general conditions of sale. Mr Pex never tried to place an order with Vanderborght Frères.

It was for this reason that Mr Jean-Marie Pex lodged a complaint with the Commission alleging that there had been, on the part of the members of the Groupement, a collective refusal to supply wallpaper.

Following various communications between the Groupement and the Commission the latter, on 14 June 1973, initiated a proceeding provided for under Article 3 of Regulation No 17.

It then considered whether the following documents, agreements and decisions complied with Article 85 of the EEC Treaty:

- The Règlement d'ordre intérieur of the Groupement of July 1971,
- Circular 619 on the 1971-1973 marketing year (general conditions of sale),
- Circular 620 O (to wholesalers),
- Circular 617 C *(prix de carte)*,
- Circular 617 V *(prix de voyage)*,
- Decision to apply a joint boycott against Pex, dealer in wallpaper, and the undertaking International Décor in Brussels,
- The concerted practice of Rath and Doodeheefver (société anonyme) pursued on the basis of these agreements and decisions.

On 26 October 1973, the Commission, pursuant to Article 2 (1) of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17 of the Council (OJ English Special Edition, 1963-64, p. 47) informed the Groupement of the objections raised against it.

The Groupement submitted its observations to the Commission by note of 10 December 1973.

At the hearing on 18 December 1973, the Commission, pursuant to Article 19 (1) of Regulation No 17 and to Article 7 *et seq.* of Regulation No 99/63, gave the Groupement an opportunity to present

oral argument concerning the objections raised against it.

After the hearing on 18 December 1973, the applicants, on 24 April 1974, formulated a proposal for a new agreement and submitted it for consideration by the Commission. In particular, the members of the Groupement were proposing to abandon all arrangements affecting prices.

On 25 July 1974, the Commission sent a telex message to the Groupement informing it that the Commission had just taken a decision concerning the Groupement des fabricants de papiers peints de Belgique and its members and that the decision would be notified to it forthwith.

On the same day the Commission issued a press statement containing the substance of the decision.

The disputed decision, dated 23 July 1974, (OJ 1974 L 237, p. 3), was communicated to the Groupement on 29 July 1974. In the decision, the Commission:

1. declared that the *Règlement d'ordre intérieur du Groupement des fabricants de papiers peints de Belgique* of July 1971, Circulars 619, 620, 617 V and 617 C, and the decision not to supply wallpaper to the dealer Pex and to the undertaking International Décor constitute infringements of Article 85 (1) of the EEC Treaty;
2. rejected the application lodged by the Groupement for a declaration of non-applicability of Article 85 (3) in respect of the abovementioned rules and decisions;
3. ordered the Groupement forthwith to terminate the infringement specified;
4. imposed the following fines in respect of the collective boycott;
   (a) BF 6 750 000 on the undertaking of SC Usines Peters-Lacroix S.A.;
   (b) BF 6 000 000 on Les Papeteries de Genval S.A.;
   (c) BF 1 800 000 on Éts. Vanderborght Frères S.A.;
   (d) BF 3 375 000 on Papiers peints Brepols S.A.

II — Procedure

The originating application against the Commission's decision of 23 July 1974 was entered at the Court Registry on 30 September 1974.

By application lodged at the Registry on 3 February 1975, Mr Jean-Marie Pex and GB-INNO-BM asked to be allowed to intervene in support of the defendant's conclusions.

By order of 21 February 1975 the Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate-General, allowed the request.

By statement lodged at the Registry on 1 April 1975, the Société Anonyme GB-INNO-BM announced that it would not proceed with its intervention.

By order of 9 July 1975 the Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate-General, ordered the intervention of the S.A. GB-INNO-BM to be struck out.

On 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.

III — Conclusions of the parties.

— Declare the action to be admissible and well founded;
— Accordingly, annul the decision of the defendant of 23 July 1974 relating to a proceeding under Article 85 of the EEC Treaty (IV/426 — Papiers peints de Belgique);

— In any case annul the decision in so far as it
  (a) treats the prohibition of the announcement of rebates on re-sale prices, the establishment of a system of quality standards and joint sales promotion as coming under Article 85 of the Treaty, and
  (b) impose fines;
— Order the defendant to repay to each of the applicants any sum paid by way of fine pursuant to the abovementioned decision, together with interest to the date of repayment;
— Order the defendant to pay the costs.

In its defence the *defendant* contends that the Court should:
— Dismiss the principal claim in the application as unfounded;
— Dismiss the application as inadmissible in so far as the remaining claims are concerned;
— Order the applicants to pay the costs.

In its reply the *Brepols company* claims, in addition, that the Court should:

In any case annul Article 3 of the decision of 23 July 1974 relating to a proceeding under Article 85 of the EEC Treaty.

Mr Pex contends that the Court should:
— Dismiss the application as unfounded in that it seeks a declaration from the Court that the withholding of supplies by U.P.L. Genval and Brepols was lawful and that the fines imposed on account thereof were unjustified;
— Order the applicants to pay the intervener's costs.

In reply to the intervener, the *Brepols company* claims that the Court should:
— Dismiss the intervention of Mr Pex as unfounded;
— Order the defendant and the intervener to pay the costs.

A — Submissions that the decision should be annulled in its entirety

First submission: inadequacy of statement of reasons

The *applicants* maintain that the decision does not answer the arguments submitted by the Groupement.

Since the Court's review is primarily directed to those reasons for a decision which relate to the Commission's economic assessments, the decision must state the facts and considerations on which it is based.

In its defence the *Commission* replies that it is not required to discuss all the issues of fact and of law on which the decision against the applicants is based: see Case 41/69, *ACF Chemiefarma NV* v *Commission of the European Communities* ([1970] ECR 661). It is only at the stage of proceedings before the Court that the Commission is called upon to justify its decision by refuting the arguments advanced by the applicants in their pleadings (see the Opinion of Mr Advocate-General Mayras in *Cementhandelaren,* Rec. 1972, p. 1003).

Second submission: no adverse effect on trade between Member States

The *applicants* cannot understand why measures which, with the exception of the fidelity bonus, would have been lawful if they had been exclusively applied by its members to products of their own manufacture, ceased to be so because they were applied to the products which they import. The agreement on prices can have no influence on imports because a manufacturer who imports wallpaper does so solely because of the cost of production and certainly not because of the re-sale price.

The Commission took the contested decision as though it were in line with its

previous ones. But the contested decision goes much further than the ASPA decision (OJ L 148 1970, p. 10).

Although, in its judgment of 17 October 1972 in Case 8/72, *Cementhandelaren* v *Commission,* the Court held that a restrictive agreement covering the whole of the territory of a Member State has, owing to its very nature, the effect of reinforcing national divisions, thereby impeding the economic interpenetration sought by the Treaty and providing a protection for national production, before doing so it took care, according to the applicants, to rule that the agreement concerned was in fact consistent with the effect which it was designed to produce. The Court could not have meant to say that, simply because it covers the national territory, every restrictive agreement affects trade between Member States, which would serve as a 'blanket' justification.

The present case has nothing in common with the situation described in Case 8/72. Of the two provisions of the *règlement d'ordre intérieur* which may seem comparable with those in the Cementhandelaren agreement, the first, the prohibition on supplying joint-buying groups and re-selling agents, is no longer in use. The second, which provides that, in order to meet administrative costs, a trader must have a modest turnover before he can become a buyer, has, in practice, no effect.

With regard to the fidelity bonus, the Groupement, as a result of the complaint from the Interessengemeinschaft der deutschen Tapetenfabrikanten, announced that it would be applied to any purchase whatsoever of products coming from any country in the EEC.

The agreements complained of do not preclude the possibility of sales to re-sellers who have not been approved by the Groupement and does not make it more difficult for producers and re-sellers of other Member States to influence or penetrate the Belgian market.

The products imported by the Groupement which are subject to the clause prohibiting rebates represent less than 5 % of the domestic market. In actual fact, the figure is even lower because three of the members of the Groupement own factories abroad and their imports constitute in reality inter-factory trade.

The collection of papers, whether obtained from abroad or elsewhere, in sample books made up for customers is an expensive undertaking, carried out at the request of customers which the Groupement will be only too glad to discontinue.

In the absence of any adverse effect on trade between Member States or of the provision by the Commission at least of some evidence that it has occurred, the contested practice and the measure which merely enforced it must be regarded as lawful.

Finally, according to the applicants, the Commission was wrong in failing to explain how the whole of the *règlement d'ordre intérieur* and all the general conditions of sale are liable to have an adverse effect on trade between Member States; an agreement is not to be appraised on the basis that its various provisions are indivisible.

The *defendant* contends that the Groupement operates a comprehensive system of jointly fixed prices and, as evidence of this, quotes the provisions of the *règlement d'ordre intérieur* and the Groupement's circulars. In any event it maintains that, even if the prices were only a guide, their adoption by the Groupement gives parties to the agreement foreknowledge of the Groupement's pricing policies, (see Case 8/72 — *Cementhandelaren v Commission* (Rec. 1972, p. 977) ground 21).

The interpretation placed by the Court on the criterion of affecting trade

between Member States (Joined Cases 56, 58/64, *Grundig*) is a wide one and applies to the agreement of the Groupement. Imports from other countries into Belgium *via* the applicants amount to nearly 10 % of Belgium's total imports. Since the Groupement comprises four of the five Belgian manufacturers and itself supplies nearly half the Belgian demand, the agreements and decisions of the applicants directly affect imports into Belgium.

On the Belgian wallpaper market there is among wholesalers and retailers, some of whom are not affiliated to the Groupement, a widespread need to import. The Groupement's intention, expressed in its general conditions of sale and in its *règlement d'ordre intérieur*, to cover the whole of the Belgian market on its own, is quite plain. The facts are, therefore, comparable to those in *Cementhandelaren* (quoted above).

Furthermore, the Groupement's customers often apply the Groupement's conditions of sale to wallpaper which it did not supply. The defendant concludes that wholesalers and retailers have only an extremely limited choice in obtaining wallpaper from Belgian manufacturers. For this reason, they must turn to foreign manufacturers but, if they do so, they are often obliged to comply with the Groupement's general conditions of sale.

Although the Commission has studied the disputed clauses in their context, namely, the system of rules applied by the applicants to the market in wallpaper, it emphasizes that, even when taken separately, the provisions of the agreement which was the subject of its decision are liable to affect trade between Member States because:

— the boycott of Mr Pex was a substantial restriction on his freedom to obtain wallpaper not only from other Belgian manufacturers but also from other producers;

— the *prime de co-opération* (supplemented by the rebate on total purchases) discourages the Groupement's customers who wish to do so from obtaining wallpaper from other producers and, especially from foreigners;

— customers are unable to sell products imported by the Groupement at prices below those fixed: in the *ASPA* case the association's customers were also under an obligation to obtain their supplies from members of the association. In that decision the Commission had already established a close connexion between the obligations to charge fixed prices and the criterion of the effect on trade between Member States ('without passing through the official distribution channels').

The Commission concludes that, taken as a whole, the clauses which were held to be in restraint of competition are liable to affect trade between Member States because they are an integral part of a comprehensive system of control applied by the applicants to the wallpaper market and the essential feature of which is the pricing policy which they followed.

The *intervener*, Pex, explains that, under Groupement's general conditions, the list price is not necessarily the selling price. What mattered to the Groupement was that only list price should be displayed and that the rebates, if there were any, should not be announced or publicized. However a dealer who, because of the way he operates, wishes or is able to apply only the announced prices must sell at the catalogue price and is, in this way, bound by what is clearly a fixed price.

Trade between Member States is liable to be affected because, if the intervener had wished to export wallpaper bought from the Group, he would, in order to satisfy its rules, have had to make the foreign importer pay the prices on the Groupement's price liste.

The legality of an agreement between undertakings must be determined by reference not only to the rights and obligations arising from the provisions thereof but also to the legal and economic context in which it exists, especially the context of the exclusive and reciprocal contracts and concessions agreed with subsidiaries or with other foreign manufacturers. The position here is that parallel imports are, to all intents and purposes, excluded.

Brepols replies that Mr Pex has submitted no evidence whatever that the members of the Groupement objected, directly or indirectly, to parallel imports. Moreover, it appears necessary to recall that the present case involves an action against a decision of the Commission. In consequence the only question to be settled is whether that decision, as communicated to the applicants, is sound in law.

Third submission: discrimination

The *applicants* maintain that not only are jointly fixed prices not prohibited in Belgium but that, on the contrary, a maximum price, a minimum price, or a price bracket is sometimes imposed by Belgian laws or regulations.

Legal opinion and case-law are broadly in favour of a system of fixed prices. Occasionally, the Belgian legislature even lays down a system of fixed prices (of which the applicants supply examples). A Belgian national cannot believe that what his State decrees can conflict with Community provisions. The Commission's failure, in these circumstances, to take action makes it guilty of unlawful discrimination against the applicants.

The *defendant* contends that once the restrictive practice operated by the Groupement is found to restrict competition by cutting out price competition between their manufacture members as well as between dealers and, accordingly, to fall under the prohibition in Article 85 (a), the Groupement cannot, in view of the supremacy of Community law, rely on Belgian law. If the control of the market exercised by the Groupement comes within a prohibition contained in the Treaty, the applicants cannot object that the decision finding that this is so constitutes discrimination. Finally, some decisions of the Belgian courts have condemned fixing arrangements.

The *intervener* maintains that the legality of a system of jointly fixed prices backed up by refusal to sell to any refractory intermediary, is, even under Belgian law, open to challenge if the way in which the system operates discriminates against department stores alone. The intervener alleges that some other retailers openly apply price reductions of 20 %, and that, in fact, Belgian legal opinion concedes that manufacturers who fix prices are bound in good faith to do so in respect of all re-sellers who are in competition with each other.

Brepol's reply to the intervener is that, without denying that some retailers allow rebates of this magnitude, this is not however prohibited under the general conditions of sale in force since the 1969/71 marketing season. What the department stores usually do is to announce discounts publicly, which, of course, is prohibited under the general conditions of sale.

Fourth submission: refusal to negotiate

According to the *applicants,* the defendant could have obtained complete satisfaction by negotiation. In this way the decision should have taken account of the proposals submitted by the Groupement. In its letter of 24 April 1973 the Groupement listed the only provisions which were still applied April 1973 the Groupement listed the only provisions which were still applied and this meant that all the others had been revoked. The decision is, accordingly,

wrong in stating that 'to the end of the hearing' the undertakings 'insisted... that their entire arrangement must be maintained intact'.

The *defendant* replies that the applicants never clearly stated that they had ended the agreements complained of in the notice of objections. Instead, as a delaying tactic, they submitted proposals for negotiation but, so long as the agreements and decisions complained of remained in force, the Commission was under no obligation to negotiate an arrangement of any kind and a prohibition was the only possible outcome.

Thirteenth submission: erroneous interpretation of Article 85

The *applicants* refer to competition law in the United States, the tenor of which is reflected in the Treaty, and claim that no prohibition of fixed prices by the Federal anti-trust law applies if the following conditions are satisfied:
- the law of the state concerned recognizes the legality of the fixed price system and enforces it;
- the products concerned are in 'free and open' competition with similar products;
- no system of jointly fixed prices is involved.

The Groupement has not operated any price system of jointly fixed prices. The Commission ought to have paid regard to the economic realities of the 'common market' in the United States of America and the lessons of tried and tested anti-trust law, as the Court itself did (see Case 6/72, *Europemballage* and *Continental Can* v *Commission, [1973] ECR 215).*

The *defendant* replies that, in contrast with the legislation in force in the United States of America, there are no provisions by way of exception in the Treaty, or in Community law derived therefrom, which specifically legalize fixed price agreements. Moreover the agreements in the present case involve *jointly* fixed prices; even in the United States this type of agreement would not be permitted.

B — Submissions for the annulment of the part of the decision imposing fines for refusal to supply Mr Pex

Fifth submission: no boycott

The applicants emphasize that the decision uses the word 'boycott', which implies a determination finally to eliminate a troublesome competitor. Mr Pex has never been a competitor but a customer and there was never any question of eliminating him. Those members of the Groupement who were involved suspended supplies for the time being until Mr Pex observed certain legitimate obligations imposed by the sellers.

Brepols, which had been his main supplier, agreed to supply him again if Mr Pex promised at least to observe the conditions of sale and his contractual obligations; it must be made clear that Pex and his nominee, International Décor, supplying wallpaper purchased from Brepols to retailers who advertise reductions, suffered no more than a temporary and provisional suspension of supplies, the normal penalty for conduct of this kind. Furthermore, supplies already received have not been paid for and the Brepols company is still owed more than Bf 200 000.

Moreover, Brepols even suggested a selection of wallpaper, not included in its brand ranges, for direct or indirect re-sale to supermarkets. In view of this it is impossible to refer to an intention to eliminate an alleged competitor.

Furthermore, Brepols contends that suspension of supplies is not unlawful in itself. It quotes the principle of the defence 'non adimpleti contractus' under which the obligations of the parties are

mutual and one party can suspend fulfilment of his commitments if the other party does not observe his own.

The *defendant* replies that Pex's alleged actions do not justify a boycott; the suspension of supplies with the object of forcing a dealer to follow a course of conduct laid down by the suppliers is a classic example of such a boycott. The object of Article 85 is not only to ensure that there is competition between the parties to a restrictive agreement but also that the freedom of action and of choice of a third party such as Mr Pex is safeguarded. The object of the collective boycott was to eliminate Mr Pex from the market, so long as he continued to act without regard to the conditions of sale imposed by the Groupement; tht fact that the action was a collective one takes it out of the category of methods available under civil law as a penalty for infringement of contractual obligations.

The defendant notes that Mr Pex was at no time reproached for not having paid for the supplies of wallpaper delivered to him by Brepols in order to make clear to him why supplies had ceased. It was only at the time of the hearing that the debts which Mr Pex owed to the Brepols company were mentioned as an additional ground for the boycott.

The *intervener* explains that, after the boycott, he was forced to go abroad to find suppliers who, as he was unknown to them, demanded payment in cash or a payment on account which would have exhausted his funds. This is the explanation why he was not in a position to pay Brepols's bills.

Brepols denies that Mr Pex's debts are the result of the refusal to supply him; in fact they were incurred on a date before supplies were refused.

Sixth submission: no concerted action in the alleged boycott

According to the applicants each of the manufacturers took his own decision on the question of the commitments undertaken but not fulfilled by Mr Pex.

In fact, Brepols supplied Mr Pex until March 1972, six months after the alleged collective boycott decision. Rath & Doodeheefver also withheld supplies from Mr Pex although the decision makes no reference to any collaboration between the members of the Groupement and that company. Finally, foreign manufacturers did the same because of their doubts about Mr Pex's solvency.

The *Brepols company* points out that it ceased supplies to Mr Pex not at the request of the members of the Groupement but at the request of other re-sellers. Moreover it gave Mr Pex a reasonable time in which to comply with his obligations.

The *defendant* quotes the letter of 28 September 1971 from Brepols to Mr Pex, the letter of 30 September 1971 from Genval to Mr Pex, the Brepols circular of 4 October 1971 and the Groupement's circular of 29 October 1971 as evidence that there was in fact an agreement to withhold deliveries to Mr Pex. The fact that Brepols continued its deliveries matters little if it is established that all the members of the Groupement jointly decided no longer to supply Mr Pex. The fact that Brepols did not adhere to the decision is irrelevant, since Article 85 may be applicable even if a restrictive agreement is not fully effective. The defendant offers proof that Brepols continued to supply Mr Pex in secret after the collective decision to boycott him.

Seventh submission: adequacy of the 1962 notification

The *applicants* consider that, inasmuch as the applicants may have been parties to an agreement prohibited under Article 85 (1) of the EEC Treaty, this agreement was notified on 30 October 1962 and remained fully operative until the

Commission took the contested decision. As the agreement was fully operative, the applicants were justified in implementing it and in applying the civil-law penalties embodied in the agreement. The applicants concerned were entitled temporarily to suspend deliveries.

A correct reply was given to all the questions on the notification form and there could consequently be no justification for imposing fines.

To ensure that the agreement on fixing prices, rebates and reductions on sale and re-sale is observed, it necessarily follows that the client who does not observe it must be denied supplies. If the departments of the Commission failed to appreciate this from this one notification, they can scarcely be familiar with business practice. If there were need to inform them of it even more explicitly, Section III of the form should have been confined to its heading 'Means provided for attaining the objectives of the agreement'. Again, the notification said that the agreement was concerned with 'observance of the general conditions of sale'. However, these can only be in writing. A copy of them was not enclosed but the form did not require that general conditions of sale should be enclosed.

Whatever view may be taken regarding notification of the other provisions of the general conditions, it is clear that the agreement relating to the imposition of jointly fixed prices on sale and re-sale was specifically notified.

As conditional and temporary suspension of deliveries was in fact a normal contractual penalty for disregard by the buyer of his obligations, there was no need for it to be the subject of separate or express notification.

When the Commission, on 28 October 1971, requested to be informed of the general conditions of sale, it explained that this referred to the 1971/72 marketing years, thus demonstrating that it was aware of the practices being applied by the applicants.

The applicants conclude that the defendant was not entitled to impose the fines provided for under Article 15 (2) (a) of Regulation No 17/62 in respect of acts which took place after notification and before its decision inasmuch as these acts kept within the limits of the activity described in the notification (Article 15 (5) (a) of Regulation No 17/62).

The *defendant* replies that the notification was defective. Of the measures capable of being taken against the 'participating undertakings' the notification referred only to expulsion, no mention being made of the other penalties provided for against customers.

The purpose of notification is to enable the Commission to assess the validity of agreements notified to it: full answers must therefore be given. It follows from Article 4 (3) of Regulation No 27 that the clauses of an agreement which are not expressly mentioned are not regarded as notified.

Even if a system of jointly fixed prices necessarily implies penalties, this does not mean that those penalties *ipso facto* include a collective boycott as distinct from another measure, such as an individual refusal of supplies. The Commission contends that it had every right to treat the collective boycott sanction as not having been notified by the applicants and as being accordingly liable to be punished by a fine.

The *intervener* points out that under Belgian case-law a boycott, whatever its purpose, is illegal if it is disproportionate to the action of the person against whom it is directed.

Brepols's reply to the intervener is that the case to which the latter refers was concerned with a boycott decision by a group representing 99 % of the Belgian market in cigarettes.

Eighth submission: inaccurate statement of reasons

The applicants maintain that, in so far as it refers to the alleged boycott, the decision is based on factual inaccuracies.

The applicants justified their refusal of supplies to the supermarkets of the GB company not on the ground that, as alleged in the decision, GB merely sold below the recommended prices but because GB had wrongfully changed the categories of wallpaper sold.

The *defendant* replies that the decision would have been the same if the applicants' statements had been correct. The boycott which was the subject of the decision was the boycott of Pex and not of the GB company. Moreover, so long as the quality classification system remained an integral part of the system set up by the Groupement for controlling the market, it would be caught by the prohibition in Article 85. The GB company was not, therefore, under an obligation to apply the Groupement's quality classification system.

Ninth submission: ultra vires

In the *applicants'* view, the fact that GB was or was not under an obligation to observe, in a Belgian retail shop, the selling price fixed by a supplier, who is also established in Belgium (more specifically, the prohibition on sales subject to advertised reductions) cannot affect trade between Member States. In consequence, the Commission ought to have declared itself as having no powers in this matter.

The *defendant* considers that it has demonstrated that the system of jointly fixed prices is such as to have an adverse effect on trade between States. The provisions of the agreements complained of must not be considered in isolation from each other. The boycott of Pex threatened all dealers who did not wish to comply with the Groupement's pricing policy.

Tenth submission: disregard of legitimate expectations

The *applicants* contend that the Commission did not follow its own precedents and that, even supposing that the applicants were wrong in assuming that the prohibition they imposed, and the penalty which was its logical consequence, were lawful, they acted in good faith so that although the Commission felt obliged to declare the contested clauses illegal, it had no right to condemn the applicants for holding a contrary view.

In its first report on competition policy (paragraph 55) the Commission, without differentiating between individual and collective agreements, in effect declared that purely national fixed price arrangements do not in general come, as such, within Article 85 (1), and that vertical price fixing is essentially a competition question at national level.

The Commission has on more than one occasion allowed it to be understood that it was in favour of exemption being granted in cases where an agreement did not have the effect of preventing or restricting parallel imports of the products concerned. In two decisions in 1968 (*'Cobelaz'* and *Comptoir français de l'azote*), the Commission declared that, although there was in fact an understanding on prices between the parties to such agreements, the agreements could not adversely affect trade between Member States because clauses providing for fixed or standard prices do not, in themselves, interfere with the parties' freedom to export or import, or that of third parties, within the common market.

In this connexion, the applicants refer the Court to the wording of the questions asked by the Commission in its request for information in 1968 and in subsequent years.

In its decision in *ASPA* (JO 1970, L 148, p. 9) the Commission considered that

Article 85 did not apply to restrictive agreements which
- only involve undertakings in the same State, and
- only cover the home market of that State,
- provided that they do not affect the freedom of the parties or of third parties to export or import.

The contested decision condemns practices which satisfy all three of the conditions described by the Commission.

As a result of the decisions of the Commission in the *Vereniging van Vernis- en Verffabrikanten in Nederland* (JO 1969, L 168, p. 22) and *ASPA* cases, in which negative clearance was given after the parties had abolished the obligation to observe the fixed prices, the applicants were able to draw the conclusion that when they abandoned the policy of fixed prices they, too, were in order from the standpoint of Community law.

The applicants' legitimate expectations were strengthened by the absence of any reaction on the part of the Commission to measures, taken under Belgian public law, which have the same effect as the conduct of which the applicants are accused. Similarly, there was no reaction to the judgment of the Belgian Cour de Cassation in the 1960 case of *Griepekoven* v *Union Spépha.*

Furthermore, in stating, in item IV (2) of the decision, that it is leaving open the question whether or not the members of the Groupement acted in good faith, the defendant is in breach of the provision in Article 15 (2) of Regulation No 17/62 under which infringements may not be punished unless they are committed 'intentionally or negligently'.

As the applicants acted at all times on the basis of the legitimate expectations aroused by the positive action or by the inaction of the Commission, they believe that, if there has been an infringement of Article 85 (1) of the EEC Treaty, it was not committed 'intentionally or negligently'.

Every authority must act in accordance with the state of the law which it has itself created (Judgment of 5 June 1973 in Case 81/72).

The Commission cannot, in this connexion, rely on its own objections in order to question the applicants' good faith because the notice of objections has no legal value.

The *defendant's* reply to the argument that it failed to produce evidence of the applicants' bad faith, is that this passage in the decision concerned (item IV, 2) refers to the question whether or not the applicants acted in good faith solely in respect of the notification. As regards the boycott, on the other hand, the decision declares that it was an infringement 'intentionally' committed.

The applicants cannot ignore the evolution of Community law as regards the relationship between national law and Community law on the subject of competition, as exemplified by the judgment in *Walt Wilhelm* ([1969] ECR 1). In the *ASPA* decision, it was because all the restrictive clauses had been eliminated that the Commission was able to give negative clearance. The Commission adds that it is in the process of re-examining the files, which, in 1969, induced it to authorize a series of restrictive agreements which were not, at the time, liable to affect trade between Member States. As for the Commission's inaction in relation to measures of national public law, its outcome must be judged in the light of the case-law of the Court (Judgment in Joined Cases 90 and 91/63, *Commission* v *Luxembourg and Belgium* [1964] ECR 625). It is not possible to disregard the development of Community law, particularly on the subject of competition, where progress has been appreciable.

Moreover, the effect of the statement of objections was to destroy the applicants' good faith in so far as it existed.

The *intervener* takes the view that the applicants took an enormous risk in failing to take account of the very clear indications given to them by such precedents in Community law as the principles underlying the *ASPA* decision and the *Cementhandelaren* case (quoted above).

The intervener points out that the fact an infringement was not 'intentional' does not dispose of the principle of a fine. The penalty applies even though the mistake was made in good faith, which, at most could be taken into account in determining the amount of the fine.

Even on the assumption that Peters Lacroix, Brepols and Genval had, in the beginning, offended solely by negligence, they ceased to act in good faith at the latest when they became aware of the decision of the President of the Tribune de Commerce of Nivelles on 1 March 1973.

After the Commission's decision, Brepols and Genval persisted in their refusal when they made the restoration of relations subject to discriminatory and unacceptable conditions (joint security with GB, refusal of all normal credits). On the other hand, the conduct of Peters Lacroix after the decision was correct.

Eleventh submission: excessive fines

The *applicants* contend that, for the reasons set out in the foregoing submission, the fines applied are out of all proportion to the actual gravity of the situation.

Although the notification took place in 1962, it was only in 1968 that, after the judgment in the case between the applicants and Rath and Doodeheefver, the Commission asked for basic information. That judgment established that at that time the Groupement supplied nearly 85 % of the Belgian market and it also referred to the applicants' circulars. It was only five years later that the Commission stated its objections. In Joined Cases 6 and 7/73 (*Commercial Solvents* v *Commission* [1974] ECR 223) there had been no notification or request for information before a third party lodged a complaint, but, in its judgment, the Court reduced a fine imposed by the Commission on the ground that the latter had reacted too slowly.

The *defendant* points out first that the fine was imposed solely on account of the collective boycott of Mr Pex and that Mr Pex's complaint is dated October 1972. The Commission's reaction on this point is dated 23 January 1973.

Twelfth submission: illegality of the fine imposed on the Éts. Vanderborght Frères S.A.

The Éts. *Vanderborght* Frères S.A. never refused to sell either to Mr Pex or to GB because it never received any request for supplies.

The answer of the *defendant* is that, once it is established that all the members of the Groupement had jointly decided no longer to supply wallpaper to Mr Pex, it is not absolutely necessary, for the purpose of imposing a penalty for this decision, to demonstrate that the boycott was applied by all the members.

C — Alternative Claims

In the alternative, the *applicants* ask the Court to recognize the legality under Article 85 of the Treaty of:

— the prohibition on announcing rebates on the resale price;
— the establishment of a quality system;
— the joint action on sales promotion.

The applicants explain the ground on which they consider these provisions to be in the general interest.

The *defendant* takes the view that these alternative claims are inadmissible in the present proceedings. The applicants have notified new agreements on a quality system and joint action on sales promotion. The defendant cannot give a ruling on these new agreements until the Court has ruled on the application brought before it for annulment *in toto* of the decision.

Oral procedure

At the hearing on 30 September 1975, Maître Grégoire made the following statement on behalf of the Groupement des papiers peints de Belgique and of its members.

'The applicant companies:

hereby declare that they no longer contest, with effect from the date on which it was taken and as regards the future, the decision of the Commission of the EEC of 23 July 1974 in so far as it prohibited the agreements

- imposing an obligation to charge the prices fixed and display them
- prohibiting the display of lower prices or of reductions made by reference to the fixed or recommended prices.

They request the Court to note the reduction in the scope of the application which follows from the foregoing.'

In the course of his oral argument, Maître Grégoire made it clear that the Groupement accepts the contested decision as regards the future but not as regards the past.

The Groupement still maintains that the Commission was unable to impose fines for refusal of deliveries to Mr Pex on the ground that:

1. The prohibition against announcing reductions on the prices and the obligation to require a second buyer to comply with this prohibition cannot affect trade between Member States.
   Every Belgian wallpaper distributor was and always has been free to obtain his supplies from wherever he wishes, whether from another Belgian manufacturer or another manufacturer abroad. The fact that members of the Groupement buy paper abroad is irrelevant.
2. Even if an agreement of this kind could affect trade, the Groupement acted in good faith in believing that it did not.
3. The refusal to supply Mr Pex was a normal consequence of his breach of the commitments which he had entered into with the members of the Groupement. The legality, in terms of Community law, of the penalty imposed for infringement of the prohibition necessarily follows from the legality of the prohibition against announcing reductions. If this were not so, the Commission would have to demonstrate that the refusal to supply Mr Pex was in itself capable of affecting trade between Member States.
4. In any case, as the agreement had been notified, a measure which was no more than a means of enforcing the agreement cannot be the subject of a fine.
5. If the refusal to supply Mr Pex can be the subject of a fine, the fine imposed was excessive.
6. Finally, the decision imposing a fine ought to be annulled because the statement of reasons for it is inadequate.

In reply to a question put by the Court, the Groupement maintains that the circular of 29 October 1971, which was signed by all members of the Groupement, had no connexion with the decision of certain members of the Groupement to withhold supplies to Mr Pex. Their circular was simply a reminder to customers, when a new range was launched every two years, of the Groupement's general conditions of sale.

For *Brepols,* Maître Schrans submitted the following arguments:

1. Refusal to supply Mr Pex cannot be compared with the unconditional and final refusal to sell which was condemned by the Court in *Commercial Solvents* v *Commission* ([1974] ECR 223). That case was concerned with refusal to sell to a buyer who intended to use the product in deliberate breach of certain legitimate obligations: *non serventi fidem non est fides servanda.* Brepols, has, since October 1971, made clear its intention to apply a normal contractual penalty to Mr Pex in order to exercise perfectly legitimate pressure on him as a defaulting party to the contract but applied it only in March 1972.

2. There was never any agreement between the members of the Groupement to suspend supplies.

3. Even if the Groupement did in fact pursue a policy of fixed prices, the policy was expressly notified to the Commission on 30 October 1962. Anyone who has notified the fixing of re-sale prices can continue to act within the limits of what he has notified.

4. The notified agreement was fully operative and valid up to the date of the Commission's decision. It was binding on the parties and, subject to the conditions provided for under national law, could be set up against third parties.

5. Even if the suspension of supplies were not the normal contractual penalty adopted in the case of a defaulting party to a contract but a form of restriction of competition, this restriction could not affect trade between the Member States.

6. The Commission adduced no ground for the purpose of establishing that the trade between Member States was liable to be affected by this restriction of competition in the case of Mr Pex.

7. The decision of the Commission ought, accordingly, to be annulled for an infringement of an essential procedural requirement.

For *Mr Pex,* Mr Van Bunnen claimed that, after the Groupement's boycott, Mr Pex did not find a single channel for parallel imports of wallpaper, even for that sold by the Groupement, because the members of the Groupement concluded exclusive dealing agreements abroad which destroyed any chance of parallel imports.

All that is needed for a boycott to be correctly described as such is that the object of ceasing supplies should be a positive or negative attitude or line of conduct. A boycott intended to enforce an illegal agreement is in itself illegal.

As the boycott is a separate penalty capable of being applied independently of other, less severe, penalties, it constitutes a prohibited practice even though the boycott is imposed for infringement of agreements which have been notified. A boycott is an extra-legal penalty, added to the normal contractual penalties.

Community law on competition cannot ignore a restrictive agreement on the pretext that its effects are felt only within national frontiers when, in fact, one of the objects of that law is to deprive those frontiers of their economic significance.

Mr Dubois, *acting as Agent for the Commission,* notes that the general conditions of sale represent a decision by all members of the Groupement. The Groupement's circular of 29 October 1971 was signed by all the members of the Groupement and all stated that the reason for the suspension of supplies to Mr Pex was non-observance of the general conditions of sale.

For Article 85 to apply it is not essential for the Groupement's boycott decision to have been fully applied by all the members. Otherwise the liability, in terms of Article 85, of someone who is a party to a boycott decision will depend upon the action of the person who is the subject of the boycott. Though a collective boycott decision is arrived at by other means, the actual application of the boycott merely represents an additional reason for applying Article 85.

Breach of contract cannot constitute justification for a collective boycott. There is a fundamental difference between the refusal of an individual undertaking to enter into commercial relations with another undertaking and the collective boycott of a trading partner which may mean his elimination. Even if a collective boycott is not prohibited under Belgian law, it cannot be regarded as a normal civil-law penalty for disregard by a buyer-re-seller of his contractual obligations.

The Commission maintains that it is impossible to make a legal appraisal, in terms of Article 85 (1), of the collective boycott without regard to the system which it is designed to preserve. The Commission is not under a duty to imagine clauses to which no reference is made in the notification. The communication, at the formal request of the Commission, of the instruments of agreement in a case where only a part of their contents was mentioned on the notification form cannot, in any case, serve as notification of the clauses not referred to in the notification.

The boycott of Mr Pex is directly capable of affecting trade between Member States because it is an implied threat to all wallpaper dealers who are customers of the applicants. Though customers of the Groupement are free to obtain wallpaper from abroad, such purchases are not taken into account in awarding the *prime de fidélité* and dealers in this way suffer at least a partial loss of the benefit represented by this bonus. Although the decision to boycott Mr Pex was not notified to the Commission, this does not make it any less the result or consequence of the impugned agreements concluded by the Groupement. The words, 'The agreement constituted by the *règlement d'ordre intérieur,* and the decisions based on it' used in the decision also covered the collective decision to boycott Mr Pex.

As regards the amount of the fines, this could be regarded as very low considering that it represents no more than 1·5 % of the turnover achieved by each applicant in the wallpaper trade.

The main consideration which impelled the Commission to impose fines on all the applicants was its concern to prevent large undertakings from using their strength on the market to eliminate a small dealer in competition with them.

In reply to a question put by the Court the members of the Groupement declared that they have no exclusive dealing arrangements either *de jure* or *de facto,* with their foreign suppliers.

The Advocate-General delivered his opinion at the hearing on 22 October 1975.

Law

1 By application lodged at the Court Registry on 30 September 1974, the Groupement des Papiers Peints de Belgique and its members sought the annulment of the decision of 23 July 1974 (OJ 1974, L 237, p. 3), in which the Commission declared a series of agreements and decisions of the Groupement to be incompatible with Article 85 (1) of the EEC Treaty, refused the application for a declaration of non-applicability, ordered the members of the Groupement to bring the infringements to an end immediately and imposed fines on the members of the Groupement for their collective decision to suspend supplies to Mr Pex.

Subject-matter of the action

2 During the oral proceedings the members of the Groupement announced that they no longer contested 'the decision of the Commission as from the date on which it was delivered and as regards the future in so far as it prohibited the agreements imposing the obligation to charge the prices fixed and to display them' and the agreements 'prohibiting the display of lower prices or of reductions made by reference to the fixed or recommended prices'.

3 The Groupement stated that it continued to contest the legality of the decision as regards the past, not for the purpose of seeking its annulment *in toto* but in order to demonstrate that the suspension of deliveries to Mr Pex did not come within the prohibition in Article 85 (1) and that, in consequence, the decision of the Commission imposing the fines for such suspension should be annulled.

4 Alternatively, the members of the Groupement contend that the fines were so excessive that the Court, which has unlimited jurisdiction in the matter, should reduce them.

5 The applicants relied on submissions referring to infringement of the provisions of the Treaty and the inadequacy of the statement of reasons for the decision.

The substance of the case

Adverse effect on competition within the common market

6 The applicants maintain that the decision was wrong in declaring, under item II c. 3, that they fixed re-sale prices for wallpaper dealers.

7 They do not deny, however, that retailers who have obtained their supplies direct from the Groupement or through dealers, are bound to display the lists of prices fixed jointly by the members of the Groupement and must not make any public announcement of rebates on these prices.

8 The applicants maintain that all that is involved is prohibition on announcing rebates, retailers being free to grant rebates in particular cases, even on a regular basis, provided that they do not announce them publicly.

9 Article 85 (1) of the Treaty expressly identifies agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions' as incompatible with the common market.

10 If a system of fixed selling prices is clearly in conflict with that provision, a price-list system under which the announcement of rebates on these prices is prohibited is equally so.

11 Consequently, it matters little whether the decision was wrong in holding that the members of the Groupement had operated a system of fixed re-sale prices.

12 Furthermore, there is no dispute that the agreement between the members of the Groupement, which embraces four out of the five Belgian wallpaper manufacturers, prevents any competition on the selling prices in Belgium for wallpapers which they sell under the joint trade-mark 'Decorgroup'.

13 Apart from the direct or indirect fixing of prices, the agreement which was the subject of the contested decision also comprises a series of restrictive clauses relating to other trading conditions listed under item II A. 2 (a) to (u) of the contested decision.

14 Although some clauses of the *règlement d'ordre intérieur* had ceased to be applied before the contested decision was taken, it is not disputed that the essence of the agreement covering all aspects of the sale and marketing of the Groupement's wallpapers remained in force until the decision prohibited them.

15 The applicants maintain that the decision not to supply Mr Pex was taken individually by each manufacturer approached by him because Mr Pex had broken his contracts.

16 The right reserved to the Groupement to decide to suspend supplies to a buyer who does not comply with the general conditions of sale was expressly included in the circulars addressed to customers by the members of the Groupement.

17 In the circular of 29 October 1971, sent by the Groupement to all its customers, it is stated that:

'In the present circumstances it appears to us essential to draw your attention to the "general conditions of sale", in particular, to strict compliance with the following three paragraphs:

Simply by placing an order, the customer undertakes to comply with all the obligations which arise from the general conditions of sale and accepts the consequences of any infringements . . ..'.

18 It is clear from these words and from the timing of its publication that this circular was intended to reassure retailers that the Groupement was seeing that the general conditions of sale were applied and that appropriate steps would be taken against any competitor practising undercutting especially as the conditions of which the customers were reminded were the very ones which Mr Pex had infringed.

19 It must, accordingly, be recognized that the Commission was in possession of sufficient evidence that the decision to suspend deliveries to Mr Pex was taken jointly by the members of the Groupement.

20 Consequently, the fact that Mr Pex did not try to place an order with one of the members of the Groupement and that another member of the Groupement continued deliveries for a certain time does not suffice to invalidate the Commission's finding that there was a collective decision to refuse to supply Mr Pex.

21 In consequence, the control of the market exercised by the Groupement characterized by its pricing and rebates policy, and supported by penalties in order to ensure strict compliance with the general conditions of sale, was intended to and did restrict or distort competition in Belgium and, consequently, within the common market.

Effect on trade between Member States

22 The applicants maintain, first, that the agreements and decisions of the Groupement were not liable to affect trade between Member States.

23 They maintain, secondly, that even if, in fact, the agreements and the decisions were liable to affect trade between Member States, the contested decision did not specify how this trade could be affected.

24 Thirdly, the members of the Groupement state that they believed in all good faith that the agreements and decisions did not affect trade between Member States, and that there is, accordingly, no justification for fines for a decision which merely enforced the agreements.

25 The fact that a price-fixing agreement of the type in question only covers the marketing of products in a single Member State does not rule out the possibility that trade between Member States may be affected.

26 In fact, a restrictive agreement extending over the whole of the territory of a Member State is by its very nature liable to have the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production.

27 In this connexion it is important to identify the means available to the parties to a restrictive agreement to ensure that customers remain loyal, the relative importance of the agreement on the market concerned and the economic context in which it exists.

28 The decision of the Groupement concerning the *barème de la prime de co-opération,* the level of which depends on the amount of all purchases from all members during a given year could have the effect of concentrating orders with members of the Groupement with the result that the customer who has already covered part of his requirements from members of the Groupement is encouraged to buy his entire requirements from those members, in order to obtain the highest possible rebate.

29 The decision does not explain how the fact that 10 % of Belgian imports, representing 5 % of the total Belgian market, sold by the Groupement subject to its prices and conditions is, in the absence of exclusive arrangements between the members of the Groupement and foreign manufacturers, liable to affect trade between Member States.

30 Under Article 190 of the Treaty, the Commission is required to state the reasons on which its decisions are based, enumerating the facts forming the legal basis of the measure and the considerations which led it to adopt the decision.

31 Although a decision which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions, if it goes appreciably further than the previous decisions, the Commission must give an account of its reasoning.

32 With regard to the finding in the decision of the territorial protection arising from the restrictive practice and the closing off of the national market, the decision does not clearly set forth the grounds on which the Commission found them to exist, the mere reference to an earlier case constituting insufficient explanation.

33 Without excluding the possibility that a restrictive pricing practice such as that in dispute may in fact affect trade between Member States, the fact remains that, when the defendant adopted a decision which went appreciably further than its earlier decisions, it ought to have supplied a more detailed statement of the grounds on which it was based.

34 In this respect, the obligation on the Commission, under Article 190 of the EEC Treaty, to give reasons for its decisions is not satisfied by the straightforward assertions appearing under heading E of the contested decision entitled 'The effect on trade between Member States'.

35 In consequence, Article 4 of Decision No 74/431/EEC of the Commission must, in accordance with the applicants' claim, be annulled.

Costs

36 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

37 In this case the defendant has failed in its submissions.

38 The defendant must, therefore, in accordance with the applicants' claim, be ordered to pay the costs.

THE COURT

hereby:

1. **Annuls Article 4 of Decision No 74/431/EEC of the Commission;**

2. **Orders the Commission of the European Communities to pay the costs.**

Lecourt Kutscher Donner

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 26 November 1975.

A. Van Houtte
Registrar

R. Lecourt
President