OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 1 JUNE 1983 [1]

Mr President,
Members of the Court

The applicant in the proceedings in which I deliver my opinion today together with its subsidiary company Telefunken-Fernseh- und Rundfunk-GmbH (hereinafter referred to as "TFR") which since 1 June 1979 has formed an independent business sector of AEG, is involved in the market in consumer electronic products for the leisure market, manufacturing and selling television, radio, tape-recorder, audio and audio-visual equipment.

In 1973 it was decided for marketing purposes to make selective arrangements in respect of a part of the production, namely the so-called "five-point" programme, the marketing of which was entrusted only to selected dealers. That distribution restriction was notified to the Commission on 6 November 1973 under Article 4 of Regulation No 17. As a result of discussions on the matter certain changes were made to the marketing system at the Commission's request. Finally, the Director General for competition stated in a letter of 17 May 1976 that he had no objections under Article 85 (1) of the EEC Treaty to the wording of the "European Community Agreement" which he had received on 16 March 1976.

The distribution system was operated in such a way that agreements were entered into with specialist wholesalers and retailers satisfying certain conditions under which AEG-Telefunken undertook to deliver contract goods only to dealers within the meaning of the selective distribution agreement and dealers undertook to pass on the contract products within the contractual territory — the European Community — only to resellers who gave prior proof of having signed the distribution agreement. Until the end of 1978 those contracts were entered into by AEG acting at the same time for TFR; thereafter AEG Telefunken Konsumgüter Aktiengesellschaft appeared in the standard contracts as the contractual partner of the dealers, acting in the name and on behalf of AEG and also acting at the same time for TFR. Marketing is carried out in the Federal Republic of Germany through the AEG marketing offices or branches, and in other EEC States through the AEG subsidiary companies responsible for marketing, thus for example through AEG Telefunken France SA (hereinafter referred to as "ATF") and through AEG Telefunken SA Belge (hereinafter referred to as "ATBG").

In the course of the time the Commission received complaints from various dealers who felt themselves aggrieved by the way in which the AEG distribution system was being operated. This prompted the Commission in June 1979 to carry out investigations in respect of TFR, ATBG and ATF as they were moreover also doing at that time with regard to other undertakings operating selective distribution systems in the field of leisure electronics. On the basis of the evidence collected, the Commission, by decision of 29 May 1980, initiated a procedure against the applicant pursuant to Article 9 of Regulation No 17. The Commission formulated its complaints concerning the operating of the selective distribution system in a statement of objections dated 2 June 1980. The applicant responded to that statement in a reply dated 5 August 1980, at a hearing

1 — Translated from the German.

held on 19 August 1980 and in further documents.

On 6 January 1982 the Commission adopted its definitive decision. After a detailed statement of the reasons on which the decision is based, in which the actual operation of the selective distribution system in Germany, France and Belgium is critically examined and assessed in the light of Article 85, the decision states in Article 1 that the selective distribution system introduced by the applicant in respect of Telefunken branded goods contravenes Article 85 (1) of the EEC Treaty in the way in which it is operated inasmuch as (a) dealers, although satisfying the conditions for authorization, were denied access to the contract goods, and (b) the selling prices charged by the contracted dealers were directly or indirectly determined by AEG. By Article 2 AEG is required to terminate without delay the infringements mentioned in Article 1. Article 3 imposes a fine of 1 000 000 European currency units or DM 2 445 780 to be paid within three months of notification of the decision to an account of the Commission.

On 24 March 1982 AEG-Telefunken brought proceedings against that decision before the Court of Justice seeking a declaration that it was void.

By a separate document application was made at the same time to suspend enforcement of the contested decision. After the applicant, as the Commission had requested, had furnished on 17 March 1982 a bank guarantee, a decision was adopted on 6 May 1982 suspending the operation of Article 3 of the decision subject to the maintenance of the security in favour of the Commission.

My opinion on this case is as follows.

I — To begin with, the *content of AEG-Telefunken's European Community Agreement* to which the Commission had no objections, must be briefly examined, and a succinct summary will serve to show to what extent the Commission considers the practical operation of the selective distribution system to be open to criticism.

1. The aforesaid agreement lays down the requirements which specialist retailers and wholesalers must satisfy in order to be authorized to sell Telefunken branded products.

(a) As regards retailers they must in essence run a specialized business or department in the radio, television and phonographic fields and they must be able to display the contract goods appropriately and give specialized counselling to customers in a high-standard sales room and must be able to provide an impeccable guarantee and customer service by means of a specialized workshop and they must also keep a full record of serial numbers and observe the rules of competition law.

(b) As regards specialist wholesalers it is laid down that they must obtain the contract goods on their own account and, in principle, not only to special order and that they have obligations towards both the manufacturer and the retailer by making regular purchases and the provision of proper supplies for specialist retailers. Moreover they too are required to keep full registers of serial numbers and not to commit any infringements of competition law.

2. The Commission takes the view that in practice the applicant did not adhere strictly to those conditions and that it may therefore be alleged that in operating the distribution system it infringed Article 85 (1) of the EEC Treaty.

(a) Thus it is said basically to have pursued a policy of only supplying *traditional* specialist retailers and wholesalers but not the more modern forms of distribution with an aggressive pricing policy such as discount stores. That may be proved by various cases in Germany, Belgium and France whereby it is also clear that to be admitted to the distribution system further conditions, which could not be regarded as qualitative criteria for selection, were also applied.

(b) Furthermore the applicant attempted to grant approved dealers in France *territorial protection* which could only be regarded as an application of *quantitative* selection criteria.

(c) Finally, the applicant pursued a policy in conjunction with the distribution restrictions of keeping retail prices stable and of bringing about a uniformly high level of prices. To that end there were agreements with distributors concerning adherence to a given level or prices, the institution of price agreements between French dealers, the request to dealers to observe certain prices as well as indirect influences brought to bear on prices by the grant of certain advantages.

II — Before I examine whether the allegations made by the Commission or the arguments put forward by the applicant in its defence are justified I think it is appropriate to recall the *previous decisions of the Court of Justice concerning selective distribution systems.*

1. Thus, in the judgment in Case 26/76 [1] it was stated that selective distribution systems may be compatible with Article 85 (1) of the EEC Treaty "provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion" (paragraph 20 of the decision).

There are further findings to that effect in the judgments in Case 99/79,[2] Case 31/80 [3] and Case 126/80.[4] In the first two of those decisions it is also emphasized that cases where admission to a selective distribution network is made dependent on criteria going beyond a mere objective selection of a qualitative nature are in principle caught by the prohibition of Article 85 (1), particularly where they are based on quantitative selection criteria (paragraph 17 of the judgment in Case 99/79 and paragraph 21 of the judgment in Case 31/80). Moreover it should be pointed out, since it appears in the applicant's arguments, that in the judgment in Case 126/80 [4] it is the "capacity" of the

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

2 — Judgment of 10 July 1980 in Case 99/79 *Lancôme* v *Etos BV* [1980] ECR 2511.

3 — Judgment of 11 December 1980 in Case 31/80 *NV l'Oréal* v *PVBA De nieuwe AMCK* [1980] ECR 3775.

4 — Judgment of 16 June 1981 in Case 126/80 *Maria Salonia* v *Giorgio Poidomani and Franca Baglieri* [1981] ECR 1563.

reseller which is mentioned rather than his technical qualifications.

It is also worth mentioning that in Case 26/76 [1] it is stated that in such distribution systems price competition is not generally emphasized either as an exclusive or indeed as a principal factor and the desire to maintain for the wholesale and retail trade a certain level of prices is an objective which may be pursued without necessarily infringing the prohibition contained in Article 85 (1) (paragraph 21 of the decision). On the other hand it is also emphasized in that judgment that the Commission must ensure that rigidity in the price structure is not reinforced, as might happen if there were an increase in the number of selective distribution networks for marketing the same product (paragraph 22 of the decision).

2. Those decisions enable certain important findings to be made in respect of the present case.

(a) As far as admission to a selective distribution system is concerned, different and stricter criteria cannot be applied to a particular group, in this case the discount stores, since the same qualitative criteria must apply to all resellers. If the qualitative criteria for admission are satisfied dealers cannot be rejected on the ground that the number of approved distributors in a given area is sufficient to meet demand since that would represent selection of a quantitative nature. Similarly, if the requirements generally laid down are satisfied no additional conditions may be imposed such as an undertaking to adhere to a given level of prices or the restriction of sales to certain buyers.

Here I should like to add that, in my view, the applicant is wrong when it deduces from the use of the expression "capacity" in the judgment in Case 126/80 [2] that by that is meant the *financial* capacity of dealers as a permissible qualitative criterion. Against that there is not only the expression used in the French version of the judgment, "capacité", but also the fact that "capacity" relates not only to the reseller but also to his staff in whose case it is obviously not appropriate to speak of *financial* capacity. "Capacity" must therefore in truth mean nothing other than the technical ability which is mentioned in the other judgments cited.

(b) Whilst the judgment in Case 26/76 [1] does mention the legitimate desire to maintain a certain level of prices for the specialist wholesale and retail trade, there is nothing to indicate in that connection that the pursuit of that objective by whatever means may never fall within Article 85 (1). If that objective is pursued by means of agreements between the parties to a selection distribution agreement or by encouraging agreements between resellers I should by no means have regarded such conduct as unexceptionable because clearly certain of the elements expressly referred to in Article 85 (1) would then be present. Nor in my

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

2 — Judgment of 16 June 1981 in Case 126/80 *Maria Salonia* v *Giorgio Poidomani and Franca Baglieri* [1981] ECR 1563.

view does the extract cited contemplate a situation in which a manufacturer unilaterally attempts to make his prices prevail, for instance by threatening to terminate the contractual relationship, since that would doubtless be equivalent to the subsequent introduction of an additional and thus unlawful criterion for authorization. On the other hand it appears in principle reasonable to suppose, if the sentence quoted is to have any sensible independent meaning, that it covers only unilateral price recommendations, by way of indications as to possible market prices, intended to give the trade guidance but without any obligation and may therefore be regarded as unobjectionable.

III — Following these introductory remarks I shall now turn first to that part of the case which relates to the problem of discrimination in authorizing dealers including the grant of territorial protection in certain cases. I shall begin by examining the individual cases set out in the decision and shall then examine the critical findings of a general nature relating to this question appearing in the decision under the heading "The introductory phase" and "General distribution policy" as regards Germany and general distribution policy in France.

1. Non-approval of dealers in Germany

Two cases must be considered here: the refusal to supply the Ratio store opened in Kassel in May 1976 belonging to a chain of retail shops (discount stores) belonging to Terfloth & Snoek GmbH and the ban on supplies to the approved wholesaler Harder in Villingen imposed in December 1976 and the events which are of importance in connection with the attempt to have the ban lifted.

(a) Ratio store in Kassel

I need not set out all the details of this case; for that I refer to the Report for the Hearing and the pleadings. The applicant takes the view that a refusal to admit a dealer may be regarded as discriminatory only if it is established that a dealer satisfied the criteria for admission to the distribution system. In Ratio's case the specialist trade criteria were not satisfied and the applicant therefore was unable to admit the Ratio store into its distribution system and it had an obligation to its approved dealers not to do so. On the other hand the Commission considers that it is clear from a memorandum dated 6 April 1976 concerning talks on a first visit to Ratio (Annex 7 to the defence) that the applicant's representatives themselves were of the opinion that the Ratio store did "broadly" satisfy the specialist trade criteria. But in the last resort it does not depend on that factor since there is also discrimination where another factor, namely the apprehended conduct as regards prices, was the decisive reason for non-approval. That is the assumption that must be made in Ratio's case since the decisive factor leading to a refusal to supply Ratio was the fact that it is a discount store and that, as is clear from the memorandum of talks mentioned above, no agreement had been reached on market prices. Furthermore, the applicant must in any case be criticized for not wishing to admit Ratio since it did not specify those admission criteria which were allegedly not satisfied even after Ratio, in a letter of 22 December 1976, repeated its request to be supplied and, at the same time, expressly offered

to satisfy every condition imposed by the applicant.

In my view, the criteria for admission to the distribution system may be said to have been applied in a discriminatory manner only where supplies are refused in spite of the fact that *all* the criteria for admission are satisfied, that is to say, where in respect of a buyer *additional* considerations are conclusive. The question whether the criteria for admission are satisfied can therefore certainly not be left unresolved by reference to the fact that, in any event, other reasons for the refusal to supply were decisive. Otherwise in certain circumstances we should be faced with imposing a sanction for a purely subjective attitude in the absence of any objective proof of a breach of the conditions of competition.

As regards Ratio's store in Kassel it can certainly not be inferred from the memorandum of 6 April 1976 that the applicant itself was of the opinion that Ratio "broadly" satisfied the specialist trade criteria which, moreover, does not amount to satisfaction of *all* such criteria. It is clear from the wording used at the end of the second paragraph of the above-mentioned memorandum, where the word "soll" [is alleged] is used, that it is only statements by Ratio which are being reported. It was therefore not an assessment by representatives of the applicant which in any event was not definitively possible at that time because the store had not been opened and, for a proper assessment, the current management of the business (background noise, available sales staff) must be taken into consideration. That assessment by the applicant was to be carried out at the end of May as is also apparent from the memorandum.

On the other hand there are certain factors which indicate that the assessment then carried out had a negative result for good reasons. Thus it is stated in a letter from Ratio's lawyer dated 22 December 1976 (Annex 40 to the application) that a complaint had been made at the end of May that there was no self-contained specialist department on its premises and that too many products in their original packing were stored in the salesrooms; that is contrary to the requirements laid down in the European Community Agreement under Clause II — 1 (c) that there should be facilities for "appropriate display" and that there must be a "high-standard salesroom". As much is also admitted in a letter from Ratio's lawyer to the Commission of 2 October 1980 (Annex 7 to the defence). Moreover not only is it significant that Ratio did not attempt to obtain supplies by means of a court order and that it did not lodge any appeals against court decisions which the applicant obtained in 1978 because Ratio had obtained contract goods in breach of the distribution restrictions. It is also significant that similar complaints the justification of which was not disputed by Ratio are to be found in a report of a visit of 30 October 1980 (Annex 53 to the application) and that the applicant — as is already mentioned by reference to specific findings in its observations on the statement of objections — was in a position to criticize Ratio for not having sufficient qualified staff because evidence of a specialist training was available only in the case of one of three salesmen responsible for a large sales area.

Furthermore in my view it cannot be said that it has been sufficiently shown that, for the applicant, a *decisive reason* for refusing to supply Ratio was the fact that it was a discount store and that no

agreement had been reached on market prices. As regards the point mentioned first there is nothing to indicate that in the documents submitted in the Ratio case. As regards the second point the Commission was indeed able to point to the last paragraph of the memorandum of 6 April 1976 where it is stated: "Market pricing was discussed, although no agreement was reached. Market pricing will depend on the discussions in Kassel". But it cannot be ignored that the first of the sentences quoted relates to the non-contract goods regarding "Ratio-listing for 1976" which is mentioned in the previous sentence. Secondly it was also not shown that significant importance was in fact attached to market pricing. This could easily have been established by questioning Ratio as was in fact done. It is striking however that there is no mention of that in the detailed observations which Ratio sent to the Commission in October 1980.

When the Commission finally criticizes the fact that Ratio was not given the opportunity, in answer to its letter of 22 December 1976 accepting all the conditions, of satisfying all the criteria for admission by means of a statement of the criteria which were not met, it seems to me extremely doubtful whether that could justify the description of its application of the distribution system as improper. Quite irrespective of the fact that, as appears from the letter from Ratio of 22 December 1976, specific complaints were made, one would at least have to concede that this is a completely new type of consideration for the assessment of the operation of a selective distribution system and that therefore an accusation of blame may scarcely be made particularly since under German law — and in that connection the applicant has referred to the judgment in Case 14/68 [1] the *willingness* to satisfy specialist trade criteria is not sufficient but they must be *actually satisfied* where a right to receive supplies is invoked (cf. the judgment of the Bundesgerichtshof [Federal Supreme Court] of 30 June 1981, KZR 11/80).

The Ratio Store case is therefore not capable of proving that the applicant operated a discriminatory practice with regard to authorization. In assessing the applicant's operation of the distribution system it must therefore be left *out of consideration.*

(b) Harder (Villingen)

This case does not involve the critical admission of a dealer as a specialist wholesaler but the manner in which the applicant treated an authorized dealer after banning him at the beginning of December 1976 from the distribution system on account of infringements of the system — repeated supply of considerable quantities of goods to non-contracted retailers (see the letter from the Freiburg sales office dated 15 December 1976 — Annex 55 to the application). In view of the fact that it is also explained in that letter that Mr Harder is prepared, in addition to undertaking to observe the distribution agreement, expressly to enter into the following commitments:

2. Express declaration that it would not supply discount stores or similar undertakings with AEG products; and

1 — Judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm* v *Bundeskartellamt* [1969] ECR 1.

3. Would not export those products to other Community countries.

The Commission reached the conclusion that this was also a case of discriminatory application of the distribution system because the applicant was not content with the fulfilment of the specialist criteria mentioned in the European Community Agreement which Harder evidently satisfied.

In my view the Commission was wrong to use this case as evidence of a discriminatory practice with regard to authorization just as it was wrong in the case of the Ratio Store in Kassel.

It is important to note at the outset that it is presumably beyond doubt that the applicant was justified in imposing a ban on supplies to Harder; since under Clause VI (a) of the European Community Agreement further supplies to a dealer may be cut off if he is in breach of his obligations under the distribution agreement and the Commission never seriously questioned that Harder was in breach of its obligations under Clause V 2 of the European Community Agreement.

It is also significant that in relation to the conversation about a possible continuation of business relations, to which the letter of 15 December refers, it was only recorded that Harder was *prepared* to undertake additional commitments; it is not apparent however that that was *demanded* by the applicant's sales office in Freiburg as a precondition for a resumption of supplies. Even if the assumption were made that the sales office in Freiburg took such an initiative that is in the last resort irrelevant because the final decision as to how the Harder case was to be dealt with, as appears from the final sentence of the letter of 15 December 1976, was to be a matter for TFR. It has however become clear in the course of the proceedings that the definitive termination of business relations by TFR took place for other reasons. It may be seen from the correspondence before the Court that Harder was required to give an explanation of the infringements, a declaration that such infringements would cease and, as provided for by the European Community Agreement, to pay the costs incurred as a result of its infringements. In lawyer's letters of 29 August and 7 September 1977 that alone was named as the condition for the lifting of the ban on supplies. Despite various warnings those conditions were not satisfied. Instead further improper deliveries were made, incorrect information was given about the channels of supply and unjustified subterfuges were established. It is common ground that thereupon relations were finally broken off in September 1977 and Harder never sought to obtain a resumption of supplies.

The Harder case cannot therefore be regarded as evidence of a discriminatory application of the distribution system since it was merely a case of a proper exclusion on account of infringements committed and an unwillingness to give a guarantee that the distribution agreement would be properly applied.

2. Non-approval of a dealer in Belgium

This case concerns the wholesaler Diederichs whose business activities had long since come to notice as a result of his bypassing the respective national agencies and selling Telefunken equipment below ATBG's selling prices. In September 1977 negotiations took place to regularize his activities (see note of 29 September 1977 in Annex 16 to

the defence). It was noted there that Diederichs had practically no administration, that 11 lorry drivers served the whole of Belgium on fixed itineraries and that there was no external sales organization. In a telex message dating from mid-October 1977 (Annex 64 to the application) it was emphasized, in connection with this case, that admission into the distribution system, "in so far as the criteria for admission to the distribution system are satisfied", could take place only if undertakings to desist in future from infringements of the competition rules were given in writing. In a report by ATBG to TFR dated 24 October 1977 (Annex 16 to the defence) there is further reference to the effect that Diederichs had entered into a distribution contract with Grundig and a statement that such an agreement would also be possible for Telefunken. It was added however that: "The talks indicate, however, that Diederichs is unwilling to accept a pricing arrangement that would make his activities compatible with ours". Finally it was stated in a note of 28 October 1977 (Annex 65 to the application) in connection with the Diederichs case that, since it had become clear in further discussions that Mr Diederichs was not prepared to adhere to any of the price levels recommended by ATBG for Belgian retailers and because therefore there was a risk of considerable price instability throughout the Belgian market, in the interests of distribution policy, Diederichs should not be admitted to the distribution system. Since otherwise no legal objections to refusing to enter into a distribution agreement with Diederichs had been raised — the previous infringements constituting sufficient reason — there was no ground for continuing the discussions initiated with Mr Diederichs.

As far as this case is concerned, I have gained the impression from everything that has been stated in the proceedings that the Commission was right to rely on it as proof of the improper operation of the distribution system and that the applicant's argument in its defence, primarily that Diederichs did not in fact satisfy the qualitative criteria for admission, seems unconvincing.

In so far as the applicant relies on Diederichs's earlier conduct contrary to the rules on competition it is important to note on the one hand that according to the last-mentioned note dated 28 October 1977 the alleged infringement of rules on competition by Diederichs manifestly was not the decisive reason for breaking off discussions with Diederichs. Although on the other hand it must be conceded that under the European Community Agreement dealers are required to observe the rules of competition law that quite clearly can only apply to the time *subsequent* to admission into the distribution system. Infringements committed earlier may therefore at the most be relevant only if, owing to their number and importance, they give rise to justifiable fears that they will be continued after admission into the distribution system. However, the Diederichs case does not provide any sufficient ground for such fears. In fact the applicant's references — and no other argument was put forward — to the fact that in 1975 the Belgian Ministry of Economic Affairs dealt with an allegation of unfair competition against Diederichs which clearly was not pursued, and to the fact that Diederichs was found guilty of misleading advertising in a decision of the Commercial

Court at Tongeren of 8 January 1976, which was then affirmed by a judgment of the Court of Appeal Antwerp on 27 June 1977 are hardly sufficient evidence.

The applicant further emphatically maintains that Diederichs did not in fact satisfy the specialist trade criteria of the European Community Agreement and refers to Diederichs's financial position about which enquiries were made as early as September 1977 and about which it was stated in a letter of 19 October 1977 (Annex 66 to the application) that Diederichs's situation was "precarious" but that argument is not convincing. As has already been stated, the applicant is wrong to suppose that, in accordance with the case-law applicable, the financial capacity of a dealer is to be regarded as a relevant qualitative criterion for authorization. The same applies to its reference to the fact that Diederichs was unable to deal with guarantee and after-sale services, to which the Commission correctly stated that under the European Community Agreement that obligation is imposed not on wholesalers but on retailers; the position is the same, again, with regard to the argument that Diederichs was not prepared to give essential information since, in that connection, it is stated in the note dated 29 September 1977 only that Diederichs was not prepared to make its list of customers available for the purpose of agreeing which customers should not be supplied by him, which can hardly be regarded as a refusal to give any information. Although the applicant's statements in the proceedings might give rise to the impression that a strict examination might have aroused justified doubts as to whether Diederichs satisfied the specialist trade criteria, particularly in view of his small staff and the absence of an external servicing organization, all of which rendered impossible regular acquisitions, checks on the customer's premises and customer counselling under the European Community Agreement, the Commission was probably right in fact to regard those arguments only as *ex post facto* reasons. It is material that in none of the documents quoted were those considerations described as decisive whereas, on the other hand, in the letter dated 24 October 1977 it is stated that Diederichs had entered into an apparently similar distribution contract with Grundig. The letter then continues as follows: "Such an agreement would also be possible for Telefunken".

Finally as regards the applicant's arguments relating to the pricing discussions (to the effect that it was not a question of retail prices which Diederichs did not know but his purchase prices and, in the Diederichs case, it was important to avoid a breach of Belgian law pursuant to which ATBG is required to submit to the Ministry the basic net prices to the specialist trade and to grant only certain maximum rebates on those prices and not a particular spread as requested by Diederichs), it should be noted that in one of the documents presented is the last-mentioned reason mentioned as an obstacle to authorization. It is also quite clear from the note of 28 October 1977 in which the breakdown of discussions with Diederichs is mentioned but none of the questions relating to the specialist trade criteria is further enlarged upon, that the important factor was solely the fact that Diederichs was not prepared "to observe any price level recommended by ATBG for Belgian retailers", which gave rise to fears that "there might be

considerable price unrest throughout the Belgian market".

In fact, therefore, it cannot be disputed that in the treatment of the Belgian wholesaler Diederichs the Commission was right to discern a case of discriminatory exclusion from the distribution system, since the decisive factor in that exclusion was not the specialist trade criteria but another factor relating to price structuring which cannot therefore be taken into account.

3. Discrimination in the admission of dealers in France

In this connection there are three cases in which, it is alleged, admission to the applicant's distribution system was agreed only after the receipt of certain assurances relating to price structure.

(a) In the case of the trading chain *Auchan* it may be seen from a document submitted by the Commission (note dated 21 March 1978, Part A of Annex 9 to the defence), that it had been established in Spring 1971 that Auchan was selling products from competing manufacturers "at cost price plus VAT", that a subsidiary in Strasbourg had been causing great difficulties for two years because it was selling Telefunken products at "extremely low prices" and that orders from Auchan had hitherto been ignored. Owing to further pressure exerted by that firm to be admitted to the distribution system it is clear, as the applicant has stated without being contradicted, that information was requested in June 1978 for the purpose of establishing whether the specialist trade criteria were satisfied, but that information was not supplied. Following inspections made by the applicant's representatives, who found that the requisite preconditions were met, Auchan was admitted into the circle of specialist dealers at the beginning of November 1978. On this point there is not only a statement in a document also submitted by the Commission (Note of 20 October 1978, Part C of Annex 9 to the defence) that Auchan is in a position to sign the applicant's European Community Agreement but also the observation, which the Commission regards as particularly telling: Auchan "would be willing . . . in exchange for our deliveries . . . to withdraw all press advertisements featuring our television sets and to adhere to our recommended prices, on condition that in the town where the products were sold no shop of a similar kind charges lower prices, in which case it would need to come into line."

In that connection the applicant, in its observations on the statement of objections, claimed that Auchan had already made itself known by its sensational advertising methods and in particular by advertising with reference to cost prices and lowest prices. That may be proved by a series of letters from Thomson-Brandt in the years 1977 to 1980 mentioning unacceptable "prix d'appel" [special price offers] which finally led to supplies to that undertaking being stopped. In that connection reference may also be made to the ATF document of November 1979 which, by a comparison of purchase and sale prices, shows that Auchan, by granting a free guarantee and a period of six months free of payment was clearly indulging in unfair competition. The assumption had to be made therefore that Auchan, in contravention of French legislation, with a view to attracting customers, was selling below its own costs and thus damaging the reputation of the Telefunken brand. That was why

there had been reservations about the admission of Auchan to the distribution system in view of the obligation laid down in the European Community Agreement to observe the rules of competition law. The discussions of October 1978 related to that alone and their purpose was therefore mereley to ensure adherence to prices which were acceptable under the rules of competition law to which however Auchan did not in fact adhere.

I am inclined to think that here too the applicant's view cannot be accepted. We do not need to decide whether in fact the systematic use of loss-leader offers justifies the exclusion of a dealer from the distribution system or whether the applicant has satisfactorily shown that Auchan in the past indulged in that type of conduct which was contrary to the rules on competition for which the documents adduced by the applicant, which for the most part derive from the time subsequent to Auchan's admission, are hardly sufficient. The Commission was able to claim the wording of the note of 20 October 1978 as being decisive. That note mentions quite clearly an agreement not to advertise Telefunken television sets; moreover no mention is made of prices which are contrary to competition law but adherence to the prices recommended by Telefunken and the possibility to adjust prices to lower ones charged in the relevant town.

It may therefore be said that an additional condition which had nothing to do with the specialist trade criteria was imposed on the admission of Auchan. There was a condition directed at the exclusion of permissible commercial conduct. In fact that is nothing other than a discriminatory operation of the distribution agreement which the Commission was right to criticize in view of the case-law mentioned at the outset.

(b) In the Commission's view the *Mammouth* case (Toulouse) is similar.

The Commission refers to an internal memorandum by ATF dated 20 October 1978 (Annex 10 to the defence), according to which that store would receive supplies only after the head of the radio and television department of Mammouth in Toulouse had undertaken to adhere to the price levels generally applied in Toulouse although at that time the head office of Mammouth was clearly not interested in entering into business relations with ATF.

In that connection the applicant has primarily objected that the Mammouth case was not contained in the statement of objections but was mentioned for the first time in the contested decision which presumably must be construed as meaning that that case must be left out of account owing to the infringement of the right to be heard in the administrative procedure. Moreover it explained that the situation could only be correctly understood with the knowledge that the buyer of Mammouth Toulouse, as is also apparent from the memorandum of 20 October 1978, sought to force approved wholesalers to make deliveries by threatening to launch a "cut-price" publicity campaign at the end of October. It was above all important to avoid that. Moreover the discussions with Mammouth Toulouse, as is borne out by a statement by ATF dated 15 February 1982 (Annex 57 to the application) were only concerned with restraining Mammouth from selling at prices which, in relation to average prices, were unacceptable, that is to say from selling at cost price, thus basically requiring observance of the obligation contained in clause II 1 f of the European Community Agreement.

As far as the first part of those arguments is concerned it must be

admitted that in a decision under Article 85 only the infringements mentioned in the statement of objections may be set out and that if new facts are being alleged against an undertaking the statement of objections must be supplemented so that the undertaking concerned has the opportunity of making its views known (judgments in Cases 41/69 [1] and 51/69 [2]). It is however also the case that a decision may set out further evidence in support of facts already alleged (judgment in Case 54/69 [3]) and that a supplementary statement of objections is called for, *inter alia*, only if the proof of disputed infringements is to be based on considerably altered facts (judgment in Case 51/69 [2]). In the present case the allegation was made in the statement of objections that so-called discount stores had been admitted to the distribution system in France only when they had adapted themselves to the price structuring envisaged by ATF and undertakings capable of influencing the market had been given no scope to determine prices in France. Therefore it is possible in fact to take the view that Mammouth too falls into that category and that its inclusion was therefore intended only as additional evidence of allegations already made and in that connection no further statement of objections was necessary because the proof of the infringement was not being based on considerably altered facts.

Furthermore, it should not be overlooked that the Commission is relying on a document which was copied at ATF's premises with the latter's knowledge; for the applicant it is therefore not an unknown document but a document which it ought to have expected might be used. There has therefore been no infringement of the applicant's right to be heard in spite of the absence of any specific notification concerning the Mammouth case and this case therefore need not be left out of consideration.

In addition, it is necessary to agree in principle with the Commission's assessment as regards competition law. It is true that in the document of 20 October 1978 mention is made of the threat of a "cut-price" publicity campaign which it was possible to have cancelled. That however does not necessarily mean "purchase price" which is mentioned in the memorandum of 15 February 1982. It is also important that in the decisive passage of the first-mentioned note mention is made only of the "price levels generally applied in Toulouse" whereas there is nothing to support an interpretation to the effect that the objective pursued was to avoid "purchase prices" in distortion of competition.

It is therefore unnecessary to hear witnesses as to the meaning of the agreement reached, but it may be stated that in the Mammouth case as well an additional condition for obtaining deliveries was imposed namely an agreement to some extent not to compete as regards prices and therefore the case was properly adduced as evidence of the discriminatory operation of the distribution system.

(c) In the third case to be examined in this connection we are concerned with

1 — Judgment of 15 June 1970 in Case 41/69 *Chemiefarma NV* v *Commission* [1970] ECR 661.

2 — Judgment of 14 July 1972 in Case 51/69 *Bayer AG* v *Commission* [1972] ECR 745.

3 — Judgment of 14 July 1972 in Case 54/69 *Francolor* v *Commission* [1972] ECR 851.

the admission of the dealer *Iffli* in Metz who will subsequently be mentioned also in another connection.

Here the admission of Iffli was said to have been made conditional on the agreement of dealers already approved in Metz; further Iffli had to undertake to ATF that it would adhere to the retail sale prices laid down by that company.

(aa) My impression on the first point is that the Commission has been unable sufficiently to show that any such consideration — certainly an irrelevancy — which would justify an allegation of discriminatory operation of the distribution system was in fact decisive. It is true that it is stated in a memorandum of 30 June 1978 (Annex 58 to the application) that Iffli's application for admission to the distribution system gave rise to problems because of the "exclusive rights enjoyed until now by 'Le Roi de la Télé' " (another dealer already approved in Metz). It is however also emphasized in that note that: "The arrival of Darty" (an important retail chain) "in Metz means that more or less exclusive protection is no longer necessary" and it is pointed out at the end merely that a meeting must be held with a representative of Le Roi de la Télé "to let it know our position and to ensure that it is not faced with a *fait accompli*". That alone seems to have been done subsequently — no contacts with other approved distributors are mentioned — by means of a letter dated 11 October 1978 (Annex 61 to the application) in which it is stated: "To the extent ... to which certain resellers might be in a position to sign our 5-point contract and to satisfy ... the criteria which we have always looked for we might envisage collaborating with them". Shortly afterwards on 23 October 1978 the European Community Agreement was also signed by Iffli.

There is therefore no evidence in the Iffli case of an unlawful additional condition for admission in the form of a *right of consultation* of dealers already authorized, with the result that that allegation must be left out of consideration in the assessment of the case in its entirety.

(bb) As regards the second aspect the Commission relies on the following sentence of the memorandum of 30 June 1978: "Mr Iffli undertakes to adhere to our prices and gives an assurance that his purpose in choosing Telefunken is not to smash the brand."

In that respect the applicant observed that, from the wording used "casser la marque" [smash the brand] and "nos prix" [*our* prices], which can only mean ATF's sale prices, the only concern must have been to prevent sales below cost price, in other words, conduct in distortion of competition. In that respect Iffli gave rise to justifiable fears. In fact he had already used makes other than Philips for belligerent campaigns and in particular at the end of 1977 had made loss-leading offers below his own cost price. Since, in early 1978, the Darty undertaking, which was known to have an aggressive pricing policy, had established a branch in Metz it was to be expected that Iffli would launch a price war against it. These fears, which found expression in the words quoted, proved, in early 1979, to have been fully justified when, in fact, as is shown in detail by a letter from the applicant's representative to the Commission dated 7 November 1980, loss-leader offers were advertised by Iffli in which Telefunken products were offered at prices 15% below the normal prices.

It seems to me however that on this point we must follow the Commission's

interpretation rather than the applicant's. In that connection, it is important to note that it has not been proved that Iffli, before being admitted to the distribution system, conducted himself, by means of loss-leader offers, in such a way as to distort competition; it is also significant that "casser la marque" need not necessarily mean sales at below cost price. In particular however it is not unjustified to read "nos prix" in conjunction with the explanation of retail prices given a few paragraphs earlier and the statement that Telefunken's trade policy had suceeded "in maintaining retail sale prices and thus in preserving a reasonable margin for resellers." The Commission was also right to point to the fact that in order to prevent sales below cost price presumably another form of wording would have been used. Finally, it must not be overlooked that the interpretation given by the Commission was confirmed in a letter from Iffli dated 12 August 1980 (Annex 8 to the application) in which mention was made of the fact that it had been explained to Iffli that it was prefereble for "price competition to operate in respect of other brands" and in which it is also emphasized that discussions related to adherence to "the margin imposed by Telefunken" as well as its promise" not to cause any price competition on Telefunken television sets".

Without any further evidence, since Iffli's credibility, which has been called in question by the applicant, is of no particular significance in this context, the Iffli case may be counted amongst those in which the existence of a discriminatory practice with regard to admission must be acknowledged because admission was tied to a promise to refrain from competition as regards retail prices.

4. I now come to the cases which, in the Commission's decision, are gathered under the heading: *"Territorial protection"*. In that connection it is stated in general terms in the decision that certain dealers in France had been allocated a specified sales area territory, that they would face no competition as regards Telefunken products within the area allocated and that therefore the admission of other dealers who had applied had been rejected. If that were to be proven that would also be a case of an unlawful operation of the distribution system because that would entail a *quantitative* selection restricting competition in a given area which, under the case-law of the court, cannot be permitted. On the other hand such cases do not, in my opinion, include those in which a manufacturer because, in the context of his sales strategy he comes to the conclusion that an area is adequately supplied, refuses *on his own initiative* and without any obligation to do so to consider application from other dealers, which may be termed a factual or moral exclusivity of approved dealers.

(a) The first case of interest in this connection is that of the trading house *Le Roi de la Télé* in Metz.

Here my impression is that the existence of the factual elements of an infringement mentioned in the decision, namely guaranteed territorial protection and the refusal of further applicants, has not been satisfactorily shown.

As regards the first point the Commission was able to rely only on two letters addressed to the abovementioned dealer dated 3 January 1978 (Annex 62 to the application) and 11 October 1978 (Annex 61 to the application). Although three sentences from the last-mentioned letter are set out by the Commission it cannot, with the best will in the world, be inferred from

them that le Roi de la Télé was granted territorial protection. That is true of the statement: "Our head office in Frankfurt has ordered us not to limit our customer network too much ..." which may certainly be understood as a purely unilateral restriction; it is however also true of the general assurance: "We shall do our utmost to avoid anarchy in our distribution network" and of the final statement: "It is in our common interest to cushion the attacks made on us by coordinating and adapting our approach to any given set of circumstances". Although, on the other hand, the letter of 3 January 1978 mentions "Our wish to protect your position in Metz as our actions have shown until now", it was however shown, by reference *inter alia* to the other contents of that letter, that it was merely a reaction to a complaint by Le Roi de la Télé concerning the fact that the dealer Iffli had sold Telefunken products in Metz by taking advantage, in distortion of competition, of a breach of contract by a third party at a time when he had not yet been admitted to the distribution system.

As far as the second point is concerned — refusal to admit further applicants — we must certainly leave out of consideration the statement in the first paragraph of the letter from Iffli to the Commission dated 12 August 1980 according to which ATF had refused to enter into business relations with Iffli on account of the exclusive rights granted to Le Roi de la Télé since that exclusivity relates to the years 1969 to 1972, namely to a time at which the distribution system with which we are dealing did not exist. In this connection it is also important to mention the letter of 11 October 1978, which I have already considered, in which in general terms willingness is expressed to accept into the distribution system any person satisfying the specialist criteria. In so far however as reference is made to the subsequent treatment of Iffli, not only is it essential to remember that he was in fact admitted as a dealer; but it cannot be said from the description of the course of negotiations (see the letter from the applicant to the Commission dated 18 September 1980) that his admission was unduly delayed. Finally it must not be forgotten — and this militates quite clearly against the Commission's argument — that long before Iffli applied to be admitted not only had FNAC and Atlas stores but also a subsidiary of Darty been admitted in Metz after an individual inspection. In respect of those dealers too it has not been possible to demonstrate that their admission was refused for as long as possible; in their case, moreover, no mention is made of any attempt to influence competition by securing certain pricing arrangements.

(b) The *Lama* case should be mentioned as well.

In this connection the Commission is merely relying on a letter of 23 October 1978 (Annex 14 to the defence) in which, in response to a complaint by Lama that retail chains (Direct and Cart/Expert) were appearing in Lama's sales territory with ATF's agreement, it was explained that marketing by wholesalers could not be compared with marketing by retailers and in which it was stated that: "In the case of wholesalers, however, it is quite normal that we should grant actual exclusive rights in a given territory although this is becoming illegal in the light of the Scrivener circular".

To my mind that proves nothing more than a *de facto* exclusivity in the sense described above which means that ATF itself made no efforts to obtain further wholesalers in Lama's sales territory. In any event it was not shown that with respect to Lama other interested parties were excluded from marketing and therefore this case in my view is not a proper one to show that the applicant made a quantitative selection.

(c) The other two cases mentioned in this connection *(Radio du Centre* and *Schadroff)* concern — at any rate according to the preamble to the decision — another aspect of territorial protection; because their subject-matter is clearly related, however, I shall examine them here.

(aa) In the first case some relevance must be ascribed to a letter written by ATF on 2 March 1978 to Radio du Centre (Annex 13 to the defence). The letter mentions: "1977 agreements as far as the allocation of your area of activity for our brand is concerned". Further on, it is explained that, on account of business trends, "a joint operation by your company and SNER, your fellow distributor in Roanne, is justified" and, in respect of 1978, a corresponding alteration to the areas of activity was carried out in such a way that, apart from areas which were to be regarded as the "area of activity" of Radio du Centre, one territory (Corrèze) was to be jointly served with Cleis France and another (Puy de Dôme) jointly served with SNER.

At issue here is therefore not the rejection of applicants and a quantitative selection but the *determination of a wholesaler's area of activity* and any alteration thereto. That is of course to be understood in such a way that, when admission into the distribution system takes place, a demarcation of areas of activity is carried out, with the result that every wholesaler must adhere to the area allocated to him and consequently refrain from competing in other areas. It is understandable that that should be subject to criticism because it is conduct connected with the distribution system. When the applicant states that it was merely a case of determining regional distribution centres without granting them exclusive rights because it was open to it at any time to allocate parts of such areas to other dealers, it may be held against it not only that in the letter mentioned express mention is made of *agreements ("accords").* The conduct described is also, I suppose, relevant in the context of *bringing about a concerted practice* and is therefore rightly criticized by the Commission particularly as it could not be demonstrated that the demarcations were in practice without significance and that dealers did not adhere to them.

It may therefore be said from the outset that the Commission had no grounds for including the *Radio du Centre* case in its decision.

(bb) The same applies to the *Schadroff* case (paragraph 35 of the decision) if regard is had merely to the facts mentioned in the preamble to the decision.

In that connection the Commission relies on a letter dated 13 April 1979 (Annex 15 to the defence). That letter is clearly based on a complaint by Schadroff that a wholesaler in Marseille had offered products within Schadroff's sales area. In

that connection it is stated that the Marseille wholesaler has been "asked to stop making such offers in your sales area (moreover a promise to that effect has been made to you)". At the end of the letter it is then further stated that Schadroff may be assured that he enjoys "the advantage of having *de facto* exclusive rights over a given territory — rights which we have always defended, as we have proved on numerous occasions".

It may in fact be assumed that that is based on an agreement concerning the *demarcation of territories* as described above. That too was therefore rightly criticized by the Commission in connection with the operation of the distribution system particularly since the impression gained must be that the demarcation of areas of activity was effectively ensured by the applicant at least by obtaining agreement amongst the wholesalers concerned. For that reason it may in the last resort remain open whether pressure which would certainly have been improper was exerted on the wholesaler in Marseille for example by a threat to break off business relations.

On the other hand the Commission has in my view been unable to show — and this was moreover mentioned only in the proceedings before the Court but not in the statement of objections or in the decision itself — that in Schadroff's territory a quantitative selection in the form of a *refusal to supply* another dealer was made. That Schadroff in any event enjoyed no absolute exclusivity was made clear by the applicant in its observations on the statement of objections by reference to the activity of chains of subsidiaries in the territory concerned as well as to a letter from Schadroff dated 7 November 1977. For its further arguments, as the Court is aware, the Commission refers to a communication which ATF sent to *Chapel* following a request of 23 May 1977 by that undertaking (Part A of Annex 12 to the defence). In that communication it is pointed out that ATF had been working for 15 years with the wholesaler Schadroff in the department concerned, that he marketed exclusively Telefunken colour-television sets and the suggestion was made that Chapel should apply to that company.

In that connection, however, the applicant's observations on the statement of objections, which have not been seriously called in question or contradicted, must be remembered. Thus Chapel, it seems, in May 1977, at a time when it ran only a retail business, expressed interest only in conditions of sale and ATF was probably justified in reacting negatively to that since no interest was expressed in making a purchase. Not until April 1978 was a wholesale company under the name Semavem set up. That company in September placed a single order of an unusual kind for one product of each type and immediately thereafter published advertisements in respect of all the products ordered. That and the continuation of the advertising campaign, although the court officer had established that Semavem did not have in its possession the products advertised, were regarded by the applicant as an infringement of the rules on competition (insertion of loss-leader advertisements) and therefore the applicant did not sign the Community agreement or therefore admit Semavem to the distribution system.

In such a situation, which the Commission failed to investigate further, it cannot in fact be assumed that the

refusal to supply Chapel and the wholesale company set up by it later is sufficient evidence that Schadroff was guaranteed exclusivity and that a quantitative selection was practised in his area.

5. Since an examination of the individual cases mentioned in the decision has shown that only as regards a part of them is it correct to speak of an improper operation of the distribution system, I shall now turn my attention to those sections of the preamble to the decision in which the applicant's *general policy* is discussed and the attempt is made on the basis of documents of general scope to point to factors indicating an improper implementation of the distribution contract. As in the decision, a distinction will be made between the introductory phase, general distribution policy in Germany and general distribution policy in France.

(a) The introductory phase

In this connection four documents were mentioned by the Commission, intended to lead to the basic conclusion that distributors were not to be supplied if they might represent a risk as regards the price level sought by the applicant and which therefore, it may be assumed, point to the use of selection criteria other than purely qualitative ones.

(aa) Of those documents the memorandum of 7 September 1973 has in my view *no compelling force.* It was submitted at the request of the Court as Annex 3 to the Commission's letter of 16 December 1982 and bears the heading "European Communities distribution system — Reflections arising from a discussion on 31 August 1973 in Berlin" in which it is stated: "The trade needs a minimum profit margin. There are two possible ways of ensuring that:

(a) either the industry supplies these products at prices which guarantee the trade its margin; or

(b) the industry makes sure that the goods do not flow into channels which do not need this high margin. These channels are cash-and-carry stores which disrupt price levels and jeopardize the existence of the specialist trade."

In that connection I do not consider it to be of such importance that the use of the word "Reflections" points to expressions of opinion with no binding force, that it is not a document emanating from the directors of TFR, that it dates back to a time at which the distribution system had not yet been notified or a definitive decision about it been adopted by the applicant or that it is not mentioned that such distribution centres would not be admitted even if they satisfied the specialist trade criteria. Of most importance is that, in a statement preceding the one quoted, it is stated: "The Telefunken products being manufactured today and, to an even greater extent, those which are about to produce, need an explanatory demonstration and demand a large capital investment on the part of the trade: representation, demonstration, service, trained staff." Following on from that there is then a statement which, following the judgment in *Metro,* [1] is a pertinent one, to the effect that the trade needs a minimum profit margin. When it is said, with regard to cash-and-carry stores, that is to say stores which generally provide no after-sales service,

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

that such stores should be refused supplies, that should be seen in the context of the statement that they "do not need this high margin". That is saying no more than that they perform no particular services and therefore do not satisfy the criteria which in that connection are properly regarded as decisive (representation and the like). When the position is seen in that light, no objection can surely be made against the general exclusion of such dealers from a purpose-designed selective distribution system.

(bb) The same clearly also applies to the statements of 22 September 1975 of the Münster sales office concerning marketing policy (submitted as Annex 3 to the rejoinder) in which it is stated, in connection with discount stores, that there seems to be a trend towards specialized departments but in which it is also stated that attempts are being made to exclude the customers in question.

I certainly do not consider the applicant's statements (quoting entries from dictionaries) to be of decisive importance, namely that cash-and-carry stores, discount stores, self-service stores and cut-price shops fail to satisfy, merely on the basis of normal linguistic usage, the criteria required of a specialist retailer because it is not of course precluded that, in individual cases, the specialist trade criteria may nevertheless be satisfied. What is more significant, however, is that the memorandum was written by a *sales office* which was naturally not in a position to lay down policy binding on TFR, and that a large concern such as the applicant's certainly cannot be held to account for all expressions of opinion by its associates even if they are not contradicted. Moreover, it is not reasonable to regard such a basically internal assessment, which at the most may give rise to a certain presumption, as sufficient for it to be accepted that there has been an improper manipulation of the distribution system. If penal consequences are to be attached to it, it would have to be proved — an it has not been — that the internal assessment was also translated into practice. On the contrary an examination of the individual cases has shown that no discount store was improperly excluded. The applicant produced two letters to German discount stores dating back to 1976 as evidence of its willingness in principle also to admit dealers of that kind into the distribution system; the applicant also explained (observations on the statement of objections p. 38 et seq.) that a considerable number of such dealers had been admitted, seven in Germany, six in France, seven in the Netherlands and two in Belgium, and there was no evidence anywhere that there had been attempts to influence prices.

(cc) That is also all that need be said arising out of a memorandum of 5 July 1976 concerning a discussion on 21 June 1976 relating to marketing policy (Annex 24 to the defence). Although it was stated there in relation to a discussion about various marketing concepts under (1):

"Continuation of our marketing concept in force at the present time, that is to say, separation of our delivery programme on the one hand into a free programme accessible to all distributors in our sector, and on the other hand a tied programme which, on account of the intensity of counselling and service (for example colour television and Hi-Fi equipment), is sold only by the traditional specialist retail and wholesale trade",

and if one ignores the fact that at the beginning of that document mention is made in quite general terms of the "consistent alignment of our marketing policy in the direction of the criteria laid down in our selective distribution system", the conclusion which may be reached is no more than that a marketing concept, as described in the extract quoted, was laid down in principle. That cannot however be regarded — and here I refer to my arguments relating to the document dated 22 September 1975 — as evidence that sales are made *exclusively* to the traditional specialist retail and wholesale trade and that new channels of distribution were in no event to be admitted.

(dd) Finally the applicant's arguments relating to the "Guidelines on the Distribution Agreement" dated 8 October 1973 are in my view also convincing. That is a document which was also drafted before notification or implementation of the distribution system and consequently can in principle have no bearing on the way in which it was put into practice.

In those arguments (cf. Annex A to the applicant's pleading of 24 February 1983), in connection with the requirement in principle to check conscientiously whether all the criteria of the distribution system are satisfied, it is stated:

"Furthermore, it is possible that, for instance, some branches of chain-stores may carry out all the required specialist trade functions, but not the whole undertaking. Supplies should theoretically be refused even here. Should you however encounter special difficulties and consider it appropriate to supply the specialist departments of these firms with goods covered by the distribution agreement we would request you to carry out negotiations only by prior agreement with Hanover."

I am in agreement with the applicant that in such cases the refusal in principle to provide supplies cannot be called in question since the danger exists that contract goods may be passed on to branches which do not satisfy the criteria and in that way the reputation of the brand may be damaged by inexpert treatment. In cases however in which supplies are nevertheless considered appropriate the fact that the prior agreement of the head office of TFR is required ought not to be open to criticism — and in that connection the applicant was able to refer to a judgment of the Bundesgerichtshof [Federal Supreme Court] of 30 June 1981 — since the head office is in a better position to see whether branches other than those which it is proposed to supply satisfy the specialist trade criteria and since there is a guarantee that the goods will not be passed on to unsuitable branches.

(ee) As an interim conclusion it may therefore be stated that the *documents set out in the section headed "The introductory phase" are not of themselves sufficient to assist materially in substantiating the allegation that the distribution system was improperly applied.*

(b) Under the heading *"General distribution policy"* the Commission goes on to refer to the minute relating to a sales managers' conference which took place on 24 May 1976 (submitted by the Commission at the request of the Court as Annex 4 to its pleading of 16 December 1982).

It is stated therein: "The distribution system is being subjected to pressure by the discount stores. Until now it has been possible to postpone any decision." It is also mentioned that managers were concerned about the negative effects of any relaxation of the distribution agreement (specialist trade); they took the

view however that, in the long run, that development was inevitable. Finally it is stated on page 5:

"To avoid confrontation by too inflexible an attitude towards discount stores, the following arrangement was agreed:

To lay down qualitative criteria for discount stores;

To the extent to which only individual branches of the discount stores satisfied the conditions, the discount store must be prepared to accept selection;

The selection of discount stores must be made in close agreement between the office and TFR;

The principal specialist dealer groups were to be informed by TFR of the action taken. If the talks to be held showed a lack of agreement on the part of the groups, legal action would have to be brought to protect the distribution agreement."

From the wording of the document it must probably be conceded that the Commission was basically right in its assessment of it in the sense recorded in its objection since it shows that until then there had clearly been a refusal to examine whether the specialist trade criteria were satisfied by discount stores and that only "in the long run" was a relaxation of the distribution system as regards the discount stores regarded as inevitable. This no doubt indicates an improper application of the distribution system and thus the aforementioned documents of 22 September 1975 and 5 July 1976 assume a certain importance at least in this connection.

It must of course also be added that it seems hardly possible to derive from the aforementioned minute all the preconditions necessary for the application of Article 85 and in particular for imposing a fine. In fact it contains nothing of any relevance for that purpose and in that connection the Commission carried out no further investigations as to the proportions which the discrimination against the discount stores assumed although it can scarcely be assumed that all the discount stores concerned satisfied the specialist trade criteria or were even interested in the marketing of Telefunken products.

The aforementioned minute also seems to give grounds for concern on account of the agreement mentioned on page 5, first in so far as regards the determination of qualitative criteria for discount stores — which indicates the fixing of additional criteria — and secondly as regards consultation with the principal specialist dealer groups and the need, in the event of any lack of agreement on their part, to take legal action to protect the distribution agreement. Even if that is not to mean, as was emphasized by the applicant, that the specialist trade was to be informed of every application for admission by a discount store, it must however be assumed from the context as a whole that the sales managers, following general consultation of the specialist trade regarding the content of the agreement and in the event of objections' being raised by those groups, felt obliged to take that into account and to allow legal proceedings to be brought regarding the admission of discount stores. Whether or not that is to be termed a right on the part of the specialist trade groups to be consulted — which is probably going a little too far — it seems to express the fact that the admission of discount stores, in the event of a certain reaction by those groups, was hindered and delayed, which also seems to point to a discriminatory application of the distribution agreement.

However, on this point the applicant raised the objection that what was involved were merely *proposals* by the sales managers to the board and those proposals were never in fact implemented. That fact cannot simply be ignored particularly since there is no evidence to be found in any other document to indicate such conduct. Nor can a simple reference suffice, such as that made by the Commission, to the effect that those were *agreements* by the sales managers because naturally even such an agreement as to intent cannot obscure the fact that they had no authority in the matter. Before consequences were drawn with regard to a procedure leading to the imposition of a fine, additional enquiries as to the subsequent fate of the ideas put forward and their actual transposition into practice would have been appropriate. Since that was not done, that part of the minute, in which an agreement by the sales managers is mentioned, must I think be left out of account in these proceedings and it may therefore be stated in regard to the allegation relating to the *general distribution policy in Germany* that it is proved only to an extent which has a *very limited value.*

(c) As to the *general distribution policy* applicable in *France* the Commission further relied on a series of documents which at this juncture must first be assessed from the point of view of *discriminatory authorization;* I shall come back later to pricing policy.

(aa) In the first place I must mention the memorandum dated 7 July 1977 (Annex 25 to the defence), in which it is stated that the distribution policy was not to be changed and in which, consequently, Sedif (obviously an approved wholesaler) was requested "not to supply our products to the discount stores (Hyper, Carrefour, Conforama, etc)". On that point the applicant stated that that document was irrelevant for two reasons. First, it was not mentioned in the statement of objections and furthermore it was clear that the discount stores referred to had not been admitted to the distribution system at that time, since they had no interest in TFR products, and could not therefore be supplied.

As far as the first argument is concerned, I feel that my comments in connection with the Mammouth case are also valid here. It is important to note that in the statement of objections ATF's policy on the admission of discount stores was criticized in general terms. In that connection the material document, a copy of which the applicant knew the Commission to have made in the context of the proceedings instituted against it, merely provides further evidence within the meaning of the aforementioned case-law. Therefore no doubt it was possible for the Commission to use it in the proceedings against the applicant without being charged with an infringement of the right to be heard.

As to the second part of the argument, it is true that it was not possible to refute the statement that the three discount stores mentioned had justifiably been refused supplies, since they have not yet been admitted to the distribution system. It should not be overlooked, however, that the memorandum goes further than that and imposes a general prohibition on supplies to discount stores. In that connection the Commission was thus certainly right to criticize the position, particularly as there are no apparent indications that by the expression used ("grandes surfaces") all that was meant was supermarkets supplying foodstuffs and having no specialist departments, particularly since, on the basis of other documents submitted in the proceedings, it cannot in general terms be said of such forms of trading that they do not in any

event satisfy the preconditions for admission (cf. for example the note of 5 January 1978 to which I shall now turn — Annex 6 to the Commission's pleading of 16 December 1982).

(bb) The note of 5 January 1978, which I have just mentioned and which relates to ATF's planning for 1978 is also of importance.

It mentions one the one hand something about ATF's dealer network as compared with the French market — in 1977 discount stores with a market share of 7% dealt only with 0.5% of ATF's trade — which justified the finding that the proportion of discount stores (grandes surfaces) with ATF was extremely low. It is further stated that: "Recently ATF has been subjected to increasingly determined inquiries from discount stores. Those requests have so far been turned down. Cooperation must under all circumstances again be avoided in 1978."

On that point the applicant was unable to present any weighty argument. The Commission was therefore right to adduce that document as evidence of such a restrictive admission policy on the part of the applicant towards such discount stores; for nowhere in that document is there any indication that the negative reaction to the inquiries mentioned was due to the fact that the specialist trade criteria were not satisfied, nor is it stated that the policy planned for 1978 related only to cases in which discount stores did not satisfy the admission criteria.

(cc) The same is true of the document dated 1 September 1978 listed third (Annex 7 to the Commission's pleading of 16 September 1982), in which it was stated in connection with the French market that "out-and-out discounters have so far deliberately not been supplied for reasons of pricing policy", which proves that the policy envisaged in the memorandum of 5 January 1978 was indeed carried out in 1978.

Although the applicant stated in that connection that the sentence in question was to be understood as meaning only that that type of distributor had not been actively recruited, reference may be made not only to the memorandum of 5 January 1978 but also to the fact that there is nothing in the letter dated 1 September 1978 to support the interpretation which the applicant gives it.

(dd) Finally, I must mention the letter dated 12 January 1979 (Annex 8 to the reply), in which it is stated in connection with modern sales outlets that, since they had increased considerably in importance, it was planned in the medium term *gradually* to *relax* the policy on such outlets.

In fact all that can be found therein is confirmation that until that time a restrictive admission policy had been followed (gradual relaxation) and that that policy was accelerated only thereafter. That is moreover also borne out by the letter submitted by the applicant addressed by ATF to TFR dated 26 October 1978 (Annex 75 to the application) with its statement that: "The legal position compels us to enter into contracts with all parties who satisfy the objective criteria", from which it follows that the discriminatory policy on admissions was clearly discontinued only in Autumn 1978.

(ee) In conclusion it may therefore be said that *the general distribution policy in France* was in fact *until the end of 1978 characterized by an improper application of the distribution agreement.* It should of

course be added that nothing is known about the extent to which pure discount stores, where they satisfied the specialist trade criteria, were at all interested in marketing Telefunken products and that therefore no idea of the extent of the disputed discrimination may be gained on the basis of the general documents — although that can scarcely be dispensed with for the purpose of assessing the applicant's conduct.

IV — Influence brought to bear on prices in the case of approved dealers

I now come in this further section of my investigation to the criticisms relating to the application of the distribution system with a view to exerting an influence on market prices.

The Commission's point of departure is quite clear: in its opinion selective distribution systems are at the limit of what is lawful from the point of view of competition law since trade competition with a brand (intra-brand competition) is restricted by the fact that not every distributor is admitted to the distribution system. From that it deduces — should there be no objections to the application of such distribution systems under Article 85 — an absolute rule that approved dealers must in no way be influenced in their pricing arrangements. In the operation of the Telefunken distribution agreement it considers that freedom to have been prejudiced in many ways: by agreements, both vertical and horizontal, by concerted conduct, by gentlemen's agreements, but also by unilateral campaigns by the applicant ranging from price recommendations and intensive price discussions to instructions, accompanied by hidden pressure, with regard to pricing. In the light of the precept laid down in the judgment in Case 26/76 [1] to ensure that the rigidity of the price structure is not reinforced, it believed that it must express its emphatic disapproval of the effects of price structuring in the case of Telefunken products because, in that way, price competition, which in any event had been restricted by the exclusion of certain particularly aggressive distributors, had been reduced.

Since the decision on the one hand sets out a series of individual cases in this connection too and on the other hand attempts, by means of documents of general scope, to prove the existence of a general policy of ensuring a high level of prices and high dealer margins, it seems appropriate again to divide the investigation, as in the first section, in such a way as to inquire first into the individual cases mentioned from the various countries and then the general distribution policy in the countries concerned.

1. Influence brought to bear on prices in France

(a) The individual cases mentioned

(aa) The Auchan case

It has already become clear in another context that the admission of Auchan into the distribution system was made conditional on the assurance that it would adhere to the prices recommended by ATF and would apply prices no lower than those charged in the town in question (cf. memorandum of 20 October 1978). We are therefore here concerned with a clear *agreement* which is closely connected with the distribution

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

system which, as a result, was rightly criticized also from the point of view of its influence on price competition, particularly since it could not be shown that it was concerned only with the exclusion of prices contrary to the rules on competition.

On the other hand the applicant's argument that Auchan never subsequently adhered to its assurance is, in the first place, irrelevant since it is sufficient for the purposes of Article 85 if a restriction on competition is *intended*, which is surely true in the case of an agreement. Its references to the fact that Auchan always advertised lowest prices and cut prices (p. 86 of the observations on the statement of objections), and that the prices advertised were so slightly above the net purchase prices that with the remaining margin the additional services advertised (time allowed for payment and guarantee) could not have been covered and that other manufacturers as well, as is demonstrated by a letter from Thomson-Brandt dated April 1980, had criticized loss-leader offers by Auchan, may at the most be of relevance in assessing the *extent of the infringement of the rules on competition* whereby it is also important to note that business relations, as stated on page 85 of the observations on the statement of objections, developed normally only as from the end of 1979.

(bb) The Mammouth case

This case is similar. Here as well the decisive factor is the promise mentioned in the memorandum of 20 October 1978 to adhere to prices charged in Toulouse, which points to an agreement to desist from price competition. That was also rightly criticized as influence brought to bear on prices in connection with the distribution system. Although the applicant stated (on page 33 of the application) that the pricing policy of Mammouth, following its admission to the distribution system — although it had not been criticized by ATF — had been very aggressive, that can be of importance merely in assessing the effects of the agreement entered into.

(cc) The Iffli case (Metz)

In the Commission's view three factors are of importance in this case: first, on admission into the distribution system Iffli undertook to adhere to the retail sale prices laid down by ATF (see memorandum of 30 June 1978); furthermore, the applicant was instrumental in bringing about an agreement on a policy of fixed prices between Iffli and two other dealers in Metz (Le Roi de la Télé and Darty); finally Iffli explained on 12 August 1978 that representatives of ATF had stated that re-sellers in the Paris region and in other regions of France had agreed to refrain from price competition in Telefunken products.

On the first point it must be recognized that the Commission is right to criticize that application of the distribution agreement amounting to a restriction of price competition.

With regard to the two other points on the other hand, it became apparent in the course of the proceedings that there are good reasons for not following the Commission's argument.

Admittedly, as regards the first point, it must be conceded that it is stated in the memorandum of 30 June 1978: "We thought it would be better to arrange a fixed-price policy agreement for Metz between Le Roi de la Télé, Iffli and Darty" and that Iffli stated in his letter of 12 August 1980 that, according to

the statements of ATF's representatives, Darty and Le Roi de la Télé had agreed not to indulge in price competition with Telefunken products. In that connection however not only did the applicant state emphatically that the proposal mentioned in the letter of 30 June 1978 had not been taken up and that it therefore had not been instrumental in bringing about any agreement on prices between the three aforementioned dealers. It also pointed to the fact that Darty, a company with a very high turnover and aggressive pricing policy, could clearly not have been interested in any such agreement, which would in any case have been pointless since there were two other retail dealers in Metz to ensure price competition. It would accordingly have been appropriate to examine these facts more closely, for instance by questioning the dealers involved. In any event, on the basis of the available evidence and in view of the application made by the applicant in the administrative procedure, on the ground that Iffli lacked credibility, to address a formal request for information to Iffli, which was not done, it cannot be assumed that the allegation that the applicant encouraged a horizontal agreement on prices has been satisfactorily proven.

With regard to the third point the applicant stated emphatically that Iffli's statement was pure invention and that evidence of Iffli's lack of credibility had been shown (see the letter dated 7 November 1980 addressed to the Commission). Therefore, Iffli's explanations, which were given without any formal request for information, and on account of which the confrontation requested by the applicant (cf. its letter of 18 September 1980) did not take place, can hardly be regarded as a sufficient basis for the allegation made by the Commission.

With regard to Iffli therefor, only the criticism of the first fact referred to is justified. When moreover the applicant points to the very modest turnover achieved by Iffli in Telefunken products in 1978 and 1979 and to the absence of orders as from 1980 (page 89 of the observations on the statement of objections, and page 98 of the application) and also claims that Iffli did not in fact adhere to the agreement mentioned in the letter of 30 June 1978, which is borne out by official findings of loss-leader offers made with very low Telefunken prices (cf. memorandum of 26 March 1979, Annex 60 to the application), that is at best only of significance in assessing the *effects* of the infringement which has been established against the provisions of competition law.

(dd) Other French cases

Whilst the cases of the three re-sellers, which I have just dealt with, concerned agreements reached essentially at the same time as admission into the distribution system the six other cases still to be discussed in this context relate to campaigns influencing prices *subsequent to admission* into the distribution system.

(i) Of prime importance in this connection is a letter from ATF dated 26 May 1978 (Annex 9 to the Commission's pleading of 16 December 1982) in which mention is made of "a commitment made by the *Darty* group to increase its sales prices as from 31 May 1978", which came about as a result of a visit by ATF representatives.

In the administrative procedure and in the proceedings before the Court the applicant stated that what had led to the

letter was the fact that Darty had launched a sales promotion campaign, in respect of the three product types mentioned, limited to Paris and the month of May. After that had ended Darty returned on its own initiative to the earlier normal price arrangement and it was merely a question of informing ATF's field salesmen and other dealers of that fact. Having regard to the strong market position of Darty — in France the company has a market share of between 8 and 10 % in the field of consumer electronics — and in view of the applicant's small market share in France it was inconceivable that the applicant should have influenced Darty's pricing arrangements. The word "engagement" [commitment] had been incorrectly applied; in fact it should have read "décision prise par la société Darty" [decision taken by the Darty group].

That argument appears unconvincing to me however. The applicant also explained (cf. page 145 of its application) that, during that campaign, competing dealers did not push their products and placed no further orders; that prompted ATF's representatives to visit Darty. Since it was subsequently expressly stated that a *"commitment"* was made to raise prices then that must presumably be regarded as an agreement. Therefore that conduct was rightly regarded as improper in the assessment of the application of the distribution agreement even if it may be assumed that the applicant would not have been in any position to compel Darty unilaterally to adopt a specific course of action on prices.

(ii) Next in importance is a memorandum dated 5 June 1978 relating to "prices for colour television sets prevailing in Paris" (Annex 19 to the defence). There it is stated that: "Tout le monde semble d'accord pour remonter les prix (date du 2/6/78 — soir)" "[Everyone seems in agreement about raising prices (2 June 1978 — evening)] and the instruction is given to get in touch with FNAC and Darty. The Commission infers from that that *agreements on prices existed between Paris dealers.*

From everything we have heard the Commission has here drawn over-hasty conclusions without adequate investigations. The applicant has explained that the memorandum related to Darty's sales promotion campaign mentioned above, in which FNAC had joined. As is apparent from its introduction, it states, the memorandum was drawn up following a visit to Darty and it may therefore be assumed — in particular also because of the use of the word "remonter" that "tout le monde" relates not to all Paris retail dealers but solely to Darty. It is in fact unlikely, if only Darty and FNAC carried out a sales promotion campaign, that all Paris dealers should have reached an agreement on an increase in prices. Nor is it clear from the memorandum that any agreement prompted by ATF was reached between Darty and FNAC since, in respect of FNAC, it is stated that prices had not yet been raised and FNAC should therefore be contacted. As to the nature of the contacts with FNAC, in particular whether there was an agreement or improper influence, accompanied by pressure, brought to bear on pricing arrangements, the memorandum is however silent.

On this point the Commission's argument to the effect that, at ATF's prompting, price agreements were reached between Paris dealers or that the contacts with FNAC with a view to bringing an influence to bear on prices went beyond what is permissible in the context of a distribution agreement

cannot, in the absence of further clarification, be regarded as proven.

(iii) Furthermore, the Commission attaches importance to a memorandum dated 5 June 1978 (Annex 20 to the application) in which it is stated with regard to the catalogue prices of the mail order agents group *Camif* that, since other dealers regarded Camif as a competitor and adjusted their prices in line with it, ATF had requested it "to increase the resale prices in its 1978 winter catalogue".

Here again, having heard the arguments of the applicant and in the absence of any further clarification by the Commission, I should not like to say that any unlawful influencing of prices has been proved. In fact the applicant explained that the request to Camif was to be seen against the background of the increase in manufacturers' prices envisaged for 1 September 1978 which is in fact mentioned in a letter to Cart — Annex 10 to the Commission's pleading of 16 December 1982. That kind of timely indication of a planned increase in prices should not however be viewed as anything other than normal information given in the context of a continuing business relationship and, presumably, a request or recommendation to take account of it is not to be regarded as improper interference with the freedom of pricing arrangements, at least where it is not accompanied by any pressure, of which there is no sign in this case, such as a threat to break off business relations.

(iv) The Commission also attaches significance to the ATF memorandum dated 13 October 1978 (Annex 22 to the defence) concerning the retail prices arranged as from 18 September 1978. The memorandum begins with the statement that the prices arranged for that date "have not all been applied on account of the stocks held by your customers" and continues: "We agree with our large-scale customers, namely Darty, FNAC and Grands Magasins, that all those prices should be applied with effect from 2 November 1978.

In that connection the criticisms levelled by the Commission, particularly after the applicant's explanations, appear to be well founded. The aforementioned large-scale customers clearly still had extensive stocks of products bought cheaply; smaller customers on the other hand ceased to sell products bought more dearly following the increase in prices of September 1978 and were therefore pressing ATF to do something. If in that connection there was concertation between ATF and several customers regarding prices that active participation of ATF in an agreement on pricing arrangements certainly goes beyond what may be described in the context of a selective distribution agreement as normal endeavours by means of price discussions to guarantee a certain level of prices to the specialist trade.

(v) What is more, we must consider two letters addressed to the purchasing group *Cart.* In the first, dated 4 November 1977 (Annex 21 to the defence), surprise is expressed that two catalogues intended for its members were issued, one with generally applied prices and the other with reduced prices. Furthermore an agreement about the issue of two catalogues is mentioned "on condition that one is at high prices and the other at floor prices" and the question is raised whether it is possible to withdraw the catalogue. In the second letter of 21 July 1978 (Annex 10 to the Commission's pleading of 16 December 1982) there is mention of a price increase

with effect from 1 September 1978; recommended minimum retail prices are set out and the letter ends: "As agreed, we ask you in drawing up your catalogue to take account of the retail sale prices set out above and to regard them as minimum prices".

In that connection the applicant explained that the prices contained in Cart's 1977 winter catalogue manifestly departed from the mutually envisaged prices and Cart discovered, when ATF expressed its surprise about it, that in fact a *mistake* had been made because an earlier price list had been used. Furthermore what was involved was merely contacts with a view to the preparation of the catalogues so that purchasers might learn in good time whether an increase in manufacturers' prices was to be expected; the letter of 21 July 1978 contains nothing more than a communication of that kind.

This anodyne interpretation however appears unconvincing. The question whether in fact a pricing error occurred in Cart's winter catalogue for 1977 may remain open. What is fundamental is that express mention is made in the first-mentioned letter about an *agreement* concerning the issue of two catalogues under certain conditions, that is to say an agreement on prices, and reference is also made to a possible worsening of business relations which must be construed as a threat and exercise of pressure. The wording of the letter of 21 July 1978 also points to the existence of an agreement to take account of the prices notified, about which it is expressly stated that they are to be regarded as minimum prices. Therefore the Commission was entitled to draw the conclusion that, in respect of business relations with Cart also, ATF gave evidence of conduct to which exception may be taken under competition law because it clearly went further than mere price recommendations of no binding force.

(vi) There is one last significant point in this connection — an ATF letter dated 3 April 1979 (Annex 6 to the reply), relating to the special conditions for a particular product, in which it is stated: "This product will be invoiced with effect from 1 April 1979 at a net price, with premium deducted, of 2 854 FF exclusive of tax". It continues: "The Darty group has undertaken not to take advantage of this special premium of 225 FF to reduce the retail price".

In that connection the applicant, in its observations on the statement of objections, has stated that this related to a sales promotion campaign for a colour television set whereby buyers would be paid 500 FF for an old set of which 225 FF would be borne by ATF; therefore ATF had been concerned to prevent that bonus from being used to reduce the price to the consumer.

Here too, however, we shall have to uphold the Commission's view that the letter discloses conduct which is questionable from the point of view of competition law. In fact this amounts to an agreement not to use the premium granted by ATF to undercut the retail prices mentioned in the letter. That constitutes an unlawful agreement to adhere to a given level of prices.

(b) Documents of general scope relating to the distribution policy pursued in France

Following the finding that in a series of cases unlawful influence was brought to bear on prices on the French market in the context of the distribution system,

thus jeopardizing price competition, it remains to examine what may be gleaned in this connection from additional general documents which were adduced by the Commission as evidence to show that ATF had pursued a policy of high prices.

In this connection four documents are of importance:

(aa) An ATF circular to field salesmen dated 13 September 1977 (Annex 5 to the Commission's pleading of 16 December 1982) in which it is stated that their role is "to impress on customers that Telefunken intends to protect them (correct profit margin)";

(bb) The ATF note dated 30 June 1978 which has already been mentioned in connection with the Iffli case and in which it is stated that Iffli for various reasons intended to be admitted into the distribution system *inter alia* because he was "aware of Telefunken's trading policy which succeeds in keeping retail prices stable and thus in maintaining an appropriate profit margin for retailers", and in which in general terms "our pricing policy" is also mentioned;

(cc) The file note of 5 January 1978 which has also already been mentioned in which, following a description of the dealer structure for 1977 for ATF and for the French market, it is explained that since the proportion of discount stores (grandes surfaces) with ATF was extremely small it had been possible to maintain a uniformly high price level for Telefunken products (higher profit margin than on competing products);

(dd) A letter of 12 January 1979 (Annex 8 to the reply) relating to business plans for 1978 in which the "high price policy" is explained by means of a price comparison with comparable products manufactured by Philips, Thomson or Grundig and from which it emerges that that policy goes hand in hand with the reluctance to open up the distribution system to modern sales outlets.

In my view these documents reveal no *further* independent arguments on the question of improper influence brought to bear on prices.

The first-mentioned circular was presumably intended to give field salesmen a sales argument; apart from the fact that a certain minimum margin is perfectly legitimate on account of the specialist trade services associated with costs, where a "marge correcte" [correct profit margin] is mentioned, that serves merely to demonstrate the fundamentally restrictive admission policy towards discount stores, which has already been taken into account in another context.

The same applies to the second document, where it speaks of a "marge convenable" [appropriate profit margin]. Where the latter document however goes on to speak about the maintenance of retail prices and generally about the pricing policy of ATF that is probably worded in too general a way for conclusions to be drawn in respect of given methods of bringing influence to bear on prices.

As regards the third and fourth-mentioned documents it must admittedly be conceded that they appear to support a high-price policy on the part of ATF. They do not however produce any new

evidence of any *particular measures* in the sphere of pricing arrangements.

2. *Influence brought to bear on prices in Belgium*

In this connection the decision sets out only a single relevant case and for the rest reference is made to a document of general scope.

(a) Turning first to the individual case, we must note that the retailer *Verbinnen* stated that he had been requested at the beginning of 1980 to increase the price of a television set by BFR 3 000, which, however, he refused to do (see the letters from Verbinnen dated 3 November 1980 and 27 November 1980, Annexes 9 and 11 to the application).

(aa) In this connection, as a result of an objection by the applicant, the question first arises whether this case ought to have been included in the decision at all since it was not set out in the statement of objections.

I do not have any reservations on this point. The question may remain open whether this is merely fresh evidence in support of an allegation already contained in the statement of objections. In any event it is determinant that the two letters mentioned were submitted to the applicant for its observations and that it did in fact express its views on them (see letter from its lawyer dated 24 April 1981) which precludes any suggestion that there was an infringement of the right to be heard in the administrative procedure.

(bb) As regards the facts on which the Commission bases its criticism, the applicant stated that the price charged by Verbinnen was not unusual since the same product had been offered for sale at an even lesser price by 13 dealers and that ATBG had taken no steps in the matter and the applicant therefore demanded that this point of contention should be clarified by issuing a request for information subject to a fine or by confronting Verbinnen.

In view of this state of affairs in which the Commission did not grant the applicant's request, it may be doubted from the outset whether the statements made by Verbinnen ought to be regarded at all as admissible evidence. In no event however would it be possible by that means to show that there had been conduct contrary to the rules on competition in connection with the application of the distribution agreement. At the most an assumption might be made as to the existence of *unilateral* measures which were not supported by any pressure or threat of sanctions and which therefore remained ineffective. What the Commission however regards as the exercise of a kind of pressure — mention is made in Verbinnen's letter dated 3 November 1980 only of "machinatie" [machination] whereby a sales representative of ATBG passed himself off as an apparent purchaser and anonymously asked for information and criticized the products, cannot be regarded as an attempt to bring influence to bear. Further, it is important to note that such machination is mentioned only in connection with an attempt to influence Verbinnen's *import* activities but not his pricing arrangements.

In my opinion the case of the dealer Verbinnen who, from the information given by the applicant is still being supplied, cannot be regarded as evidence of improper influence having been brought to bear on pricing arrangements in Belgium.

(b) The document relating to *general pricing policy* in Belgium is a minute by ATBG dated 19 December 1978 (Annex 8 to the Commission's pleading of 16 December 1982) with a statement

relating to sales promotion. It is stated therein: "Allowing prices to fluctuate freely inevitably leads to a situation in which small customers do not achieve the minimum margin' and further: "It is not our intention to fix a single market price ... but to ensure, by establishing average market prices, that prices do not fluctuate by more than BFR 1 000".

On that point the applicant emphasized that those were only thoughts pursued by the author of the report, and not a binding determination of ATBG's policy. In fact the recipient of the communication, the managing director of ATBG, did not have an intellectual grasp of the proposed system for calculating prices and in any event it was never applied in Belgium. In view of those statements the Commission attempted to ascertain whether the pricing policy was implemented and what steps were taken against uncompliant dealers but manifestly without success. However, the applicant was able without contradiction to point to the fact that, after it had been heard, seven requests for information were addressed to Belgian dealers but the Commission had received only the reply from Verbinnen which has already been dealt with. Thus it seems to me difficult to maintain the allegation that a pricing policy as described in the above-mentioned document was pursued in Belgium.

If, over and above that, it is assumed that certain *price recommendations* were given to retailers such conduct, which amounts to stating the market price which may on average be achieved resulting from the cost calculations of the manufacturer and from a comparison with prices of competing products, cannot be regarded as amounting to an improper application of the distribution agreement. There is no need to decide here to what extent the Belgian legal situation is of relevance. What is important is what was said in the judgment in Case 26/76 [1] concerning the desire to maintain a certain level of prices for the specialist wholesale and resale trades, and on the other hand the fact that unilateral measures are in principle not covered by Article 85. Whilst however a selective distribution system as such does not fall within Article 85 and the same is the case with unilateral pricing measures, it cannot be assumed that a combination of those factors is to be assessed differently. Therefore unilateral pricing measures are open to question only when it is attempted to enfore them by means of pressure because then free pricing arrangements are in fact being jeopardized. Any attempt to apply such pressure, which incidentally in view of the market position of Telefunken, considerable inter-brand competition and the power to control demand exercised by large purchasers or purchasing groups does not immediately seem conceivable, as also the existence of concerted conduct between dealers which may be brought about as a result of a price recommendation, must rather be proved on the basis of specific evidence.

(c) In the Belgian marketing area it cannot therefore be said that the steps taken by the applicant as regards prices in the context of the distribution system were improper, if one disregards the Diederichs case, which has been examined in another connection.

3. Influence brought to bear on prices in Germany

I come finally to some cases of allegedly improper influence on pricing arrange-

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

ments which the Commission believed it had found in Germany. Here a distinction is made in the decision between direct influence (paragraphs 40 and 41) and indirect influence on prices (paragraphs 48 to 52).

(a) As regards the first aspect the *Suma* and *Holder* cases are of interest.

(aa) In respect of the Suma undertaking (Munich) a memorandum dated 20 April 1977 of a conversation is of importance (Annex 68 to the application). According to that memo it had been made clear to the management of Suma how important the market prices in the Suma shops were for TFR. At the same time it was agreed that the market price level would be discussed and sale prices fixed. Finally the manager of Suma agreed "not to act as a price leader but, at most, to take the lowest price on the market and, if possible, to adopt a position somewhere between average shop prices and the lowest prices . . .". On the other hand the Commission refers to a note of the hearing of that manager according to which AEG-Telefunken is said to have received an assurance "that particularly aggressive prices by competitors would be notified to Telefunken and not be adopted immediately by Suma".

It is apparent that these documents concern more than merely discussions with no binding force about possible pricing arrangements. Rather what is involved is a price agreement in the context of the distribution contract which, even if perhaps no promise was made to adhere to the sale prices fixed by Telefunken, was intended to restrict Suma's freedom to fix its prices in a downward direction. The Commission was certainly right to criticize that as too far-reaching.

Although the applicant claimed that the agreement in fact had no effect that is of no importance to the fundamental assessment, but at the most plays a part in weighing the extent of the distortion of competition.

(bb) As far as concerns the *Holder* undertaking, a small retailer in Southern Germany, the Commission refers to a memorandum of the Munich sales office dated 13 November 1976 (Annex 2 to the reply) in which it is mentioned that a certain appliance had been supplied "after the marketing concept and the pricing policy had been explained in detail to Holder".

From the arguments put forward in the course of the proceedings, however, it is difficult by that means to prove an improper influence on pricing arrangements. As the applicant explained without contradiction what was involved clearly was the introduction of a new and expensive product requiring much counselling and with regard to which dealers therefore had to be convinced, by pricing discussions, of its marketing possibilities. Moreover not only is there no evidence of any pressure being brought to bear, which might have been ascertained by questioning Holder; but it is also clear that Holder evidently did not adhere to the prices indicated but published cheap offers for which reason the appliance was bought off the market by Telefunken.

Where the Commission additionally took the view that from the introductory sentence of the memorandum it was to be assumed that this example was to be

used in discussions with the purchasing cooperative Interfunk with the objective of bringing about greater price discipline that seems to me to be without consequence because nothing was ascertained about the content of such conversations and mere speculation about possible influence on prices can certainly provide no sufficient basis for allegations of breaches of competition law.

(b) The cases of indirect influence on prices

(aa) In this connection *Suma* again plays a leading role inasmuch as it may be gleaned from the memorandum dated 20 April 1977 mentioned above that there was an agreement as to the payment of a bonus whereby there would be granted, in addition to a quantity bonus of 1% and a sales promotion bonus of 0.5%, both to be paid half-yearly, a "good conduct bonus" of 2% to be paid at the year-end. The Commission seeks to make a connection between the latter and the proposal of the Munich sales office of 22 December 1976 (Annex 18 to the defence) in which it is stated in connection with an annual bonus of 2% that payment might be made dependent on price behaviour conforming to market trends and that it would be possible to control market conduct by means of the annual bonus.

In this connection the applicant stressed that the proposal of the Munich sales office was in fact not taken up by TFR in that form. The good-conduct bonus was instead explained at the hearing before the Commission by the applicant's home sales director as remuneration for making show-rooms available; likewise it was also stated in the observations on the statement of objections (page 73) that the bonus in question was granted for participation in sales promotion campaigns and in making shop windows available. Likewise in the memorandum dated 20 April 1977 no connection is made between the price discussions reported on page 1 and the bonus mentioned on page 3. Furthermore the managing director of Suma explained to the Commission (note dated 2 September 1980) that the bonus was remuneration for "informing AEG in principle before any newspaper advertisments relating to the products in question appeared". Finally not only is it undisputed that Suma received the bonus in spite of repeated special campaigns but it is also significant that SUMA's managing director assured the applicant's lawyer (Annex 12 to the application) that the bonus was granted in return for informing the manufacturer about market trends and in the light of the large turnover achieved by SUMA, but that the bonus had to be justified to Head Office under the chosen designation because it was not provided for in the context of the conditions.

In view of that situation I do not think it can be regarded as proven that by means of the bonus any influence was exerted on price behaviour in SUMA's case.

(bb) The Commission also attaches importance in this connection to the applicant's conduct towards the retailer *Wilhelm* in Saarbrücken.

When Wilhelm in July 1976 advertised low prices TFR wrote to the Saarbrücken Sales Office stating that an advertisement had been seen from Wilhelm with "very disturbing prices" and asking why that was happening again (Annex 7 to the reply). The Commission interprets that as a tacit

request to intervene to correct the situation.

On closer examination however it is apparent that this case too cannot be used as evidence of an attempt improperly to influence prices. In that respect it is determinant that, in reply to the inquiry dated 23 July 1976 (Annex 71 to the application), the answer was given that the cause had been Kaufhof advertisements the prices of which had immediately been adopted by certain large-scale dealers, and of particular importance is the statement made in that letter that Wilhelm's offer had had no adverse effects for the Saarbrücken office.

Even if therefore the question of 22 July 1976 is assessed as an indirect request to attempt to impose price discipline the decisive point in the last resort is that no steps of any kind were taken because the Saarbrücken sale office obviously regarded Wilhelm's conduct as normal price competition.

(cc) In the *Schlembach* case the Commission on the one hand quoted a memorandum dated 9 September 1977 (Annex 23 to the defence) of a sometimes "heated discussion" which is said to have taken place in regard to advertisements under the slogan "Color-Preisaktion" [Colour-Price Bargain Offer]. It was made clear that a repetition of such advertisements would lead to a "considerable worsening of relations" and it was stated that by means of that discussion "the likelihood of a renewed aggressive advertising campaign" had been reduced. Secondly the Commission refers to a memorandum of the Dortmund sales office dated 30 September 1977 to TFR (Annex 72 to the application) mentioning the disturbing pricing appearing in Schlembach's advertisments for Telefunken colour-television sets and steps to be undertaken in connection with the Schlembach case. Another recipient of the memorandum was asked whether there was "no neat, unusual way of keeping the customer in check" which the Commission interprets as a tacit request to take steps against Schlembach.

As far as these documents are concerned the view may in fact be taken in respect of the one first-mentioned that it proves the existence of influence having been exerted on an undertaking in its pricing arrangements and thus an improper action in the context of the distribution agreement even if it did not necessarily involve the maintenance of the price level desired by the applicant. Admittedly, the applicant submitted in the proceedings before the Court that advertisements with that slogan were to be regarded as publicity for an improper special presentation within the meaning of Paragraph 9 (a) of the German Law against unfair competition in conjunction with Paragraphs 1 and 2 of the Order of the Minister for the Economy of the Reich dated 4 July 1935 and thus as contrary to competition law in accordance with the provisions of the European Community agreement, on the ground that the impression is given of particular advantages accruing to the purchaser. But against that it may be said that the applicant has not clearly shown the existence of an improper special presentation and that, in particular, it included in its observations on the statement of objections nothing that might have prompted the Commission to pursue that question further. With regard to the first-mentioned document it must therefore be admitted that the Commission was right to include it in its allegations particularly since the presumption that the applicant was merely concerned that a certain level of prices was adhered to is supported by the fact that, in the memorandum, the

negative consequences for the level of market prices in the Rhine-Ruhr region is expressly mentioned.

As regards the second document the applicant stated in its observations on the statement of objections that it was aimed primarily at obtaining information about special campaigns bordering on the improper, that is to say, a possible case of unfair competition. Certainly no objection may be raised against such an inquiry and the supervision for that purpose of the dealers admitted to the distribution system since constant cheap offers give rise to the presumption that the cost-intensive specialist-trade criteria (counselling and customer service) can no longer be met (see judgment of the Bundesgerichtshof of 24 September 1979). Although the latter also mentions steps to be taken and at the end poses the question mentioned above that is however not sufficient to support a complaint. It was in fact shown that the addendum constituted merely a question to the manager of the marketing branch in Cologne, that is, not an instruction from the person responsible for marketing. Nor does it appear that steps were in fact taken in response to the tacit invitation — something which might easily have been clarified by questioning Schlembach — so that in the end the question may also remain open whether such measures would in fact have been justified on account of factors constituting a case of unfair competition.

(dd) Finally a situation report from the Mannheim Sales Office dated 31 October 1978 and relating to October 1978 included by the Commission must be examined (Annex 5 to the defence).

To the Commission it seems worthy of note that the report states that offers from the undertakings Gruoner and Südschall with regard to a certain Imperial parallel model had had a "disruptive" effect; and that advertisements and activities of the Massa-Märkte concerning Imperial products from Telefunken had been described as "disrupting the market" and also that further market disruptions by Kaufhof (Kassel) and Hertie (Frankfurt) are mentioned and finally the statement that "considerable efforts were needed before order could be restored". From that the Commission concludes that following the revelation of disruptive prices, certainly in the case of the three last-mentioned dealers, successful efforts were made to rectify the position, that is to say, in this case too, to exert an influence on prices with a view to maintaining the level of prices sought by the applicant.

On this point too it is impossible to accept the Commission's views.

During the procedure before the Court it became clear that the Gruoner and Südschall cases were certainly cited erroneously — even the Commission in that connection spoke in the oral procedure of an error because in their case contract goods were not involved so that there is no need to decide whether these cases ought to be left out of consideration in any event because they were not mentioned in the statement of objections. In my view the same applies to the Massa-Märkte case where moreover the Telefunken brand name was improperly used in advertisements for *Imperial* products and for that reason a warning was perfectly proper.

As far as the "disruptions" of the market by Kaufhof and Hertie are concerned, it is clear on the one hand that it is difficult to take exception to internal reports

about the market behaviour of customers as in any case they do not establish whether specialist trade quality is put at risk by pricing arrangements. On the other hand the applicant explained in that connection that complaints had been received from retailers because Kaufhof and Hertie had launched special offers for a limited period and for special products and subsequently it had been possible to convince the retailers that the special offers were not based on special conditions of TFR. It is that to which the expression "restoring order" relates and not to a successful increase in prices. That sounds to me plausible and if in that connection the Commission had any doubts it ought to have sought to clarify the matter further before drawing conclusions from that document to support its argument.

V — The application of Article 85 (1) of the EEC Treaty to the improper application of the distribution agreement

1. The examination of the case so far has shown that the allegations made by the Commission against the applicant are certainly justified *only in part.*

(a) Therefore it is no doubt necessary to strike out some of the very far-reaching provisions of the decision which, apart from the finding that the distortion of competition was appreciable, are also of relevance in assessing the fine.

I am thinking particularly of the observation that the refusal to admit dealers and the influence brought to bear on prices were not isolated measures but that there were a *large number* of cases in which restrictions had occurred, which is certainly not true, regard being had on the one hand to the period of time to which the decision relates and on the other hand to the enormous number of business transactions to which no exception has been taken involving approximately 12 000 authorized specialist dealers in the Community. In particular I have in mind the very serious finding that the discrimination against dealers and the fixing of sale prices were carried out *systematically* — in the oral procedure the word "planmäßig" [methodically] was used, which certainly cannot be regarded as correct.

(b) To examine this point further, when the Commission with regard to the *admission of dealers* made the general observation in relation to the distribution agreement that access to the system had been *generally* prevented for new sales outlets and price-cutting dealers and where in another place it stated that no admission had been granted or admission had been made difficult for certain forms of distribution and dealers despite the fact that they satisfied the specialist trade criteria and where it also in that connection mentioned that dealers who were not prepared to accept the minimum sale price fixed by the applicant had not been admitted to the distribution system, the truth of those statements amounts in fact to no more than the following:

(aa) It is proven only that *one* dealer (Diederichs) was not admitted for the last-mentioned reason.

(bb) In relation to discount stores and cut-price shops it became clear that only in Germany and France and then only for a certain limited period were such distributors excluded or admitted after delay. In that connection it is not only unclear, because the Commission did not

make any inquiries in that connection, how many dealers in fact were affected by it; but the plaintiff was also able without contradiction to point to the fact that it *did in fact admit a large number of discount stores* and in other countries as well.

(cc) As far as territorial protection in France is concerned, *no case* of exclusion on that ground of other dealers was established; it may be said rather that there was territorial protection only inasmuch as in respect of two wholesalers a demarcation of their territorial areas was effected.

(dd) Finally, we have seen also that only *three cases* could be proven in which admission was tied to *assurances about pricing arrangements* and furthermore nothing is known about the actual effects.

(c) As far as *influence brought to bear on prices* is concerned where the Commission on the other hand stated that considerable influence was exercised on the fixing of resale prices and that thereby to a large extent low-price offers had been prevented it is however now clear on the contrary that influence brought to bear on prices in the form of *agreements* was found only in the case of certain French dealers for short periods and in the Suma case in which moreover the manager of Suma stated that Suma felt it was free to determine its own prices. Beyond that, *unilateral* influencing of prices could be established only in one individual case, namely Schlembach. Accordingly, regard being had in particular to the detailed explanations by the applicant of the price situation in Germany (see Annexes 30 and 32 to the application) it can hardly be regarded as correct to say that the applicant by means of the distribution agreement persistently pursued a policy of high prices to the disadvantage of consumers.

2. It is thus important to state that those infringements against competition law in the application of the distribution agreement which may be regarded as proven are relevant under Article 85 (1) — assuming that the restriction on competition was appreciable — only if it is shown that they were capable of *affecting trade between Member States* and what more, as has been repeatedly affirmed by decisions of the Court, to an appreciable extent (see judgments in Cases 19/77, [1] 209 to 215 and 218/78 [2] and 126/80 [3]).

The Commission considers that that must be assumed because the distribution system governs *trade between Member States* and thus, since it is *applied on a Community-wide basis,* it must in principle be assumed on the basis of the purpose to which it is adapted to be capable of affecting trade between Member States. It considers that in such a case only a small number of infringements is necessary for Article 85 to be applicable because even they change the nature of the distribution system, which then becomes unacceptable in its entirety. The Commission further points out that a substantial trade in Telefunken products takes place at the wholesale and retail level. Not least it emphasizes that, since dealers with a large turnover capable of making imports

1 — Judgment of 1 February 1978 in Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131.

2 — Judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *van Landewyck* v *Commission* [1980] ECR 3125.

3 — Judgment of 16 June 1981 in Case 126/80 *Maria Salonia* v *Giorgio Poidomani and Franca Baglieri* [1981] ECR 1563.

were either not admitted into the distribution system or were admitted only after fulfilling additional conditions, it may be presumed that trade has been perceptibly different from what it would have been without such discrimination.

I take the view, together with the applicant, that there are a number of objections to this attitude.

(a) I feel it is not true that the applicant's distribution system *controls trade* between Member States, and certainly a reference to the *Community-wide* applicability of the distribution system is not sufficient to support the assumption that, if certain infringements exist, the system is in principle capable of affecting trade between Member States.

In principle the distribution system merely determines who — whether as a wholesaler or as a retailer — may trade in Telefunken products, that is, may market goods of which it may generally be assumed that they are supplied by *national* marketing companies or wholesalers in their own country. Although under the distribution agreement it is also possible without difficulty to purchase goods from approved dealers in other Member States that is however merely tacitly assumed and that does not make it possible to say that trade between Member States is being controlled.

If on the other hand it must be assumed that a selective distribution system under the conditions laid down by case-law is not covered by Article 85 (1) such a system may only fall under Article 85 in so far as it is *improperly operated.* It is therefore appropriate to make an individual examination into whether alleged infringements, in other words application of the system otherwise than in conformity with the rules, have detrimental effects on trade between States since it seems that it cannot be sensible to suppose that a system which in itself is not open to criticism takes on a different character as a whole merely because some infringement is found to have been committed which is certainly only of local importance given its limited extent, and must therefore be considered in its entirety as harmful to the regulation of competition in the Community.

(b) If I interpret the decision correctly, of the infringements already mentioned and examined the most important in the Commission's eyes for the purposes of Articles 85 (1) are those in which large-scale dealers capable of entering the export trade were excluded from marketing or were only admitted into the distribution system belatedly and after satisfying additional conditions. In the light of the relevant case-law, namely the judgments in Cases 6 and 7/73 [1] and 22/78 [2], that must be fully accepted.

Accordingly, in the present case, only the Diederichs case in Belgium, the temporary non-admission of discount stores in Germany and cut-price shops in France together with the Auchan, Mammouth (Toulouse) and Iffli (Metz) cases fall to be considered, in which admission to the distribution system was tied to an assurance that a certain level of prices would be adhered to. If in addition the question is examined whether those cases give rise to a presumption that trade was appreciably affected, in my view the Commission has

1 — Judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Commercial Solvents Corporation* v *Commission* [1974] ECR 223.

2 — Judgment of 31 May 1979 in Case 22/78 *Hugin Cash Registers Ltd* v *Commission* [1979] ECR 1869.

not succeeded in adducing sufficient evidence.

(aa) With regard to the Diederichs case it may indeed by assumed that Diederichs would have been in a position and also prepared to import Telefunken products from Germany. It may also be assumed that imports of television sets are not made impossible or considerably more difficult by the fact that in Belgium such sets must be equipped for cable television since, from the persuasive statements made by the Commission, such an adjustment ought not to involve any particular problems.

The case by itself is however hardly sufficient to suggest that trade was appreciably affected. For such an allegation the Commission has ascertained too little as to the nature and extent of the business activities of Diederichs — the turnover figures mentioned are rather modest — and of significance in that connection is the small market share, in respect of television sets as well, held by Telefunken in Belgium (in that connection I would recall the judgments in Cases 73/74 [1], 19/77 [2] and 209 to 215 and 218/78 [3] and it is probably also of relevance that Diederichs had to cease trading merely a year after the negotiations in question.

(bb) With regard to the temporary non-admission of discount stores in France and Germany it may probably be assumed that some of them from their size could be considered able to engage in inter-State trade. On that point however in the absence of the necessary inquiries by the Commission, we know so little about the dealers actually concerned and their activity, that for that reason alone it cannot be said that their temporary exclusion from the distribution system had or materially contributed to an appreciable effect on trade.

(cc) Finally, as far as the Auchan, Mammouth and Iffli cases are concerned, because detailed inquiries were not made, it is necessary to fall back on speculation, so that merely Auchan and Iffli might possibly be considered since it can scarcely be assumed that the Mammouth *branch* in Toulouse was contemplating parallel imports.

Nor should it be overlooked furthermore that the dealers mentioned were not excluded from distribution; instead what is objectionable is that their admission was tied to assurances. Quite irrespective of the fact that the assurances were clearly not adhered to, the fact can however scarcely have had any effect on possible import transactions by making sales more difficult because Auchan was only obliged not to charge prices lower than those charged in the relevant town and in the case of Iffli the obligation was mainly "not to cut the prices of branded products".

Even in view of the fact that for the purpose of Article 85 (1) it is not an actual restriction on trade which is important but the fact that the conduct concerned may restrict trade (see Case 19/77 [2]) the preconditions for the application of Article 85 (1) can hardly be said to be satisfied in these two cases. On the one hand because of the small

1 — Judgment of 26 November 1975 in Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491.

2 — Judgment of 1 February 1978 in Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131.

3 — Judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *van Landewyck* v *Commission* [1980] ECR 3125.

market share held by Telefunken in respect of television sets in France too a certain restriction of Auchan's and Iffli's marketing activity can scarcely have led to an appreciable effect on trade. On the other hand, owing to the different broadcasting standards for television in France and Germany and the impossibility of conversion in the case of black and white sets and on account of the high costs incurred in converting colour television sets, parallel imports are inconceivable and the applicant stated that they had never occurred. As far, however, as concerns multistandard sets, which may be used without difficulty on both sides of the border, in respect of which it is possible to conceive that there might be trade in the border areas it may presumably be ruled out straight away that the prevention of their sale, by reason of the infringements of the rules on competition established by the Commission, could have assumed an extent which would signify an appreciable restriction on trade.

(c) If, over and above those cases and contrary to what is suggested by the preamble to the decision, the other proven instances of an improper application of the distribution agreement were held to be relevant the following should be stated in their regard:

(aa) There seems to me to have been no appreciable effect on trade as a result of the *territorial protection* found to have been granted in France in the form of a demarcation of the areas of activity of several wholesalers. Here it seems to have been a question of a purely internal matter which recalls the judgment in Case 22/78.[1] Even if however it were to be supposed that the opening of competition in the areas concerned might have led to an increase in sales of Telefunken products and thus to an increase in imports, on account of the absence of specific inquiries as to the nature and extent of the business activities of the wholesalers concerned, it is not possible to determine whether the amounts involved are such as to make it conceivable that trade was appreciably affected.

(bb) With regard to the agreement reached with *Suma* and the influence brought to bear on prices in the *Schlembach* case it must likewise be stated that it was merely a national matter because, as the Commission itself accepts, trade in Telefunken products from France to Germany is not conceivable and because in addition there was no mention of the two aforementioned dealers having any interest in exporting.

(cc) In the few cases of influence being brought to bear on the pricing arrangements of French distributors subsequent to their admission to the distribution system (paragraphs 42, 45, 46 and 47 of the contested decision) those concerned mainly campaigns which were very limited in space and time. In this connection too, too little is known about the nature and extent of the business activity of the dealers involved.

3. Thus it is necessary to state not merely that the Commission's findings as to the extent of the unlawful application of the distribution agreement must to a considerable extent be regarded as unsound. In so far as the operation of the distribution agreement was rightly criticized, in my view it has not been satisfactorily shown that it was capable of appreciably affecting trade between the Member States.

That means that the basic statement in Article 1 of the contested decision that the distribution agreement introduced by AEG-Telefunken for Telefunken

1 — Judgment of 31 May 1979 in Case 22/78 *Hugin Cash Registers Ltd* v *Commission* [1979] ECR 1869.

products constitutes, in the way it was applied, an infringement of Article 85 (1) of the EEC Treaty, cannot be maintained. Thus at the same time the requirement contained in Article 2 to terminate the infringements found and in particular the fixing of a fine in Article 3 are deprived of their foundation.

The application is therefore well founded on the basis of the considerations set out thus far.

VI — The other submissions

Therefore none of the other questions raised in the proceedings need now in fact be examined. I shall however deal with them at least in the alternative.

1. Article 85 (3)

In that connection it is stated in the decision that the *implementation* of the distribution agreement which was criticized by the Commission was *not notified* so that that alone is sufficient reason for not exempting it. Moreover it was emphasized that no exemption could be granted for a distribution system which discriminates as to admission and brings influence to bear on prices because those restrictions are not indispensable to the orderly marketing of the products in question and there are no apparent advantages for consumers. Against that the applicant points to the fact that it expressly applied for an exemption on notification and the Commission cannot therefore impose a fine without making a determination on it. With reference to the judgment in Case 26/76 [1] it takes the view also that the concern to ensure a certain level of prices is inherent in a selective distribution agreement and actions designed to bring about that end therefore fall within the general application of the distribution system and therefore no special notification is necessary.

If, contrary to my opinion, Article 85 should be held to apply, I would agree with the Commission on this point.

As a general rule an exemption presupposes notification to the Commission. It is also certain that, when the application to the Commission was made, it was explained that every dealer satisfying the specialist trade criteria was admitted to the distribution system. On the other hand it was never clearly stated and thus did not form part of the subject-matter of the notification that certain borderline cases were to be treated with reserve, that under certain circumstances additional conditions were to be satisfied, that on admission areas of activity might be demarcated in which other dealers were not to operate and that during the existence of business relations with approved dealers there would be price agreements or influence would be brought to bear on pricing arrangements going beyond mere guidance. Therefore, in regard to the distortions of competition alleged by the Commission, in so far as the criticism may be regarded as justified, in fact for formal reasons alone a decision granting exemption is inconceivable.

Moreover, no other assessment is possible in reliance on the fact that the judgment in Case 26/76 [1] mentions the basically legitimate desire to maintain a certain level of prices for the specialist wholesale and retail trade. Apart from the fact that the wording is naturally not capable of covering discriminatory measures on *admission* to the distribution

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

system its meaning must in principle be understood to mean that it appears unobjectionable to maintain a level of prices which in itself results from the restriction of marketing to dealers who have to support certain special charges which are reflected in pricing arrangements. There is nothing however to support the supposition that that is intended to refer to special price campaigns going beyond guidelines with no binding effect, which, by regular interference with the freedom to fix prices, impair price competition.

2. The fact that the decision was addressed to AEG-Telefunken

In that connection the applicant emphasized in its observations on the statement of objections that TFR — whose marketing policies alone are at issue — is a legally independent branch of the AEG undertaking and its management has wide powers of decision-making. It also claimed that the decision to apply the distribution agreement was taken without any instruction from the management of AEG-Telefunken and that the determination of marketing policy and the practical operation of the distribution agreement was a matter for TFR alone. Thus certain methods of applying the distribution agreement could not be attributed to the parent company AEG and therefore the decision ought not to have been addressed to it in the absence of any involvement by AEG itself.

In the Commission's view, on the other hand, the decisive factor is that the distribution system was notified by AEG, that AEG also appears as a party in the agreements entered into with dealers and that marketing is carried on by AEG's marketing organization. It considers moreover that even if the application of the distribution agreement was a matter for TFR alone it is significant that TFR is under the control of AEG and has to follow the latter's instructions which were in fact given in individual cases. It is therefore possible to speak of a single economic unit with the result that the parent company must be regarded as responsible for the practical operation of the distribution system.

Similar problems have come before the Court on a number of occasions. For instance in the judgment in Case 48/69 [1] a parent company and legally independent subsidiary company were treated as one economic unit on the supposition that the subsidiary company the majority of whose shares were held by the parent company did not independently determine its market behaviour but essentially followed the instructions of the parent company. In such a case, where there was a possibility of decisively influencing the policy of the undertaking and where use was in fact made of the power to give instructions it was considered appropriate to attribute the anti-competitive behaviour of a subsidiary to the parent company (see also judgments in Cases 6/72 [2] and 6 and 7/73 [3]).

These proceedings involve the application of a distribution agreement which is open to criticism in view of the dis-

1 — Judgment of 14 July 1972 in Case 48/69 *Imperial Chemical Industries Ltd* v *Commission* [1972] ECR 619.

2 — Judgment of 21 February 1973 in Case 6/72 *Continental Can Co. Inc.* v *Commission* [1973] ECR 215.

3 — Judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Commercial Solvents Corporation* v *Commission* [1974] ECR 223.

criminatory exclusion of a dealer, of the laying down of supplementary criteria for admission and the determination of the areas of activity of approved dealers as well as of measures to influence the pricing arrangements of approved dealers during the existence of business relations. To attribute all that without further consideration to the parent company because it signed the distribution agreements and made available its sales organization appears in fact to be questionable on the basis of the case-law mentioned. Even if it were considered reasonable to attribute to the parent company as a signatory the events which occurred *on conclusion* of the contracts, that would be difficult without specific evidence of influence being brought to bear, which the Commission has not adduced, in so far as the exclusion of dealers or the mechanism based on the pricing arangements after admission to the distribution system are concerned.

The decision is therefore surely rightly challenged by the applicant to the extent to which *all allegations* as to the improper application of the distribution system are directed at the parent company.

3. The imposition and determination of the fines

If the Court should find that the improper application of the distribution agreement, in so far as it may be regarded as being proven, constitutes an infringement of Article 85, no objection can be raised in principle against the imposition of a fine. I say that because at any rate following the judgment in Case 26/76 [1] (in October 1977) — and the great majority of the infringements which I regard as proven falls within that period — an allegation of liability seems justified and, contrary to the applicant's view, there cannot be any question of "unavoidable errors" in the context of a distribution agreement which in principle is directed centrally.

But a *considerable reduction of the fine* would certainly be appropriate. In that connection it is material that a substantial part of the Commission's allegations cannot be upheld and that the Commission did not obtain a reliable picture of the actual effects of certain infringements on the market and consumers. I leave the exact fixing of the fine to the discretion of the Court.

4. Finally I must say a few words about the question whether the applicant, if a fine remains payable, must *pay interest* on this amount until actual payment.

In this connection I must remind the Court that the Commission on serving the contested decision stated that on expiry of the period for payment (21 April 1982) it would enforce the claim in spite of the fact that an action had been brought; but so long as the matter was pending before the Court it would adopt no measures of enforcement if the applicant agreed that the claim should bear interest amounting to 1 % above the discount rate of the Bundesbank with effect from the expiry of the period for payment and provided the Commission was given a bank guarantee covering the debt together with interest. The applicant agreed to this proposal in so far as on 17 March 1982 its bank gave the guarantee required by the Commission. Furthermore the applicant in a letter of 28 April 1982 agreed that the claim for the fine should bear interest as from expiry of the period for payment and this

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875.

it confirmed at the hearing of its application for a suspension of the decision.

Subsequently, on 6 May 1982 the President made the order mentioned at the outset suspending the operation of Article 3 of the decision subject to a maintenance of the guarantee given to the Commission. Since the applicant's agreement was subject to the reservation that the Court should examine the question whether interest might be demanded, the order contained a corresponding reservation. Therefore in dealing with the main issue I must say something about the duty to pay interest although the contested decision itself contains nothing about it.

The applicant claims that there is no legal basis in Community law for such an obligation. The Commission points to Article 185 of the EEC Treaty and relies on the fact that the applicant's agreement was a precondition of the Commission's agreement to a suspension of its decision and therefore forms the legal basis for the claim to interest. Furthermore it claims that only in that way is the purpose of the decision imposing a fine achieved or unnecessary court proceedings with the objective of economizing the interest obviated. If the Court should find that there is no duty to pay interest the Commission in the alternative proposes that the fine should be increased by a corresponding amount so as to prevent any economic advantage accruing from the suspension of operation of the decision.

On this point I would again agree with the Commission. Where it finds that there has been an infringement of Article 85 (1) and considers a fine appropriate then that fine is immediately enforceable in the period provided; under the system of the Treaty, financial sanctions must in principle have immediate effect because the bringing of an action has in principle no suspensory effect. If certain conditions are satisfied other arrangements may be made by means of an order under Article 85 of the Rules of Procedure. Some time ago an intermediate solution was found which was also applied in the present case and that seems to me not only to be entirely sensible because it tempers the harshness of immediate enforcement, gives security to the Commission and makes it no longer attractive to defer fulfilling an obligation to pay by bringing an action. Nor is a legal basis lacking, since the fundamental concept on which such a step is based is contained in Article 86 (2) of the Rules of Procedure.

Should the Court therefore, contrary to my opinion, take the view that the applicant's conduct justifies the imposition of a fine the order made by the President should be confirmed in such a way that the relevant amount should bear interest with effect from the due date laid down in the decision in the manner mentioned unless it is preferred — as would be possible in the event of reduction of the fine — to fix the amount of the fine in such a way that at the same time account is taken of the duty to pay interest.

VII — In conclusion:

In my view the proceedings have shown that the Commission's finding that the distribution agreement introduced by AEG-Telefunken with effect from 1 November 1973 constituted an infringement of Article 85 (1) in the way in which it was applied is not satisfactorily proven. The Commission's decision should therefore be set aside in its entirety and it should be ordered to bear the costs of the proceedings including the costs incurred in proceedings for the adoption of interim measures.