8. National judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty.

9. Where the refusal to grant an exemption under Article 85(3) of the Treaty in respect of a net price system for books is not based on the fact that the condition regarding the promotion of technical or economic progress is not satisfied, it is not necessary for the court called upon to review the legality of that refusal to examine whether the benefits of such a system at the national level, on the assumption that their existence has been proved, also extend to intra-Community trade.

10. Under Article 85(3) of the Treaty, a price maintenance system that restricts competition within the common market cannot qualify for exemption on the ground that it must continue to operate in order to produce beneficial effects inside a national market. Such a situation would in itself contribute to the partitioning of the common market and would consequently tend to thwart the economic interpenetration sought by the Treaty.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
9 July 1992 *

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In Case T-66/89,

Publishers Association, whose head office is in London, represented by Jeremy Lever QC, of Gray's Inn, Stephen Richards, Barrister, of Gray's Inn, and Robin Griffith, Solicitor of Messrs Clifford Chance, London, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented Anthony McClellan, Legal Adviser, and by Berend Jan Drijber, of its Legal Service, assisted by Nicholas Forwood QC, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission Decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association — Net Book Agreements) (OJ 1989 L 22, p. 12).

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, C. Yeraris, C. P. Briët and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 8 October 1991,

gives the following

Judgment

The facts giving rise to the dispute

The subject-matter of the dispute

1 This case concerns a decision of the Commission which, in a proceeding under Article 85 of the EEC Treaty, found that a series of agreements and related rules constituted an infringement of Article 85(1) and rejected an application for an exemption under Article 85(3).

2 There are two agreements which are the subject of the contested decision. They were concluded under the aegis of the Publishers Association (hereinafter 'the PA'), representing the vast majority (70 to 80%) of publishers in the United Kingdom. Publishers who are parties to the first of the two agreements are members of the PA, whereas those who are parties to the second agreement are not. According to the PA, its members are not obliged to adhere to the agreement.

3 The agreement concluded between the members of the PA and the agreement concluded between non-members contain essentially the same provisions. The only difference between the two agreements concerns the enforcement mechanism provided.

The content of the Net Book Agreements

4 The agreements, concluded in 1957 under the title 'Net Book Agreements' (hereinafter 'the NBA'), lay down standard conditions for the sale of books at fixed prices, known as 'net books'. Under those standard conditions of sale, a 'net book' may not be sold, offered for sale or permitted to be sold to the public at less than the net published price. The exceptions to that prohibition (books in stock and second-hand books) are expressly governed by the standard conditions of sale,

which also allow a 'net book' to be sold at a discount to such libraries, book agents and quantity buyers as have been previously authorized by the Association. The amount and conditions of such discount are laid down in the authorization.

5 Those conditions apply to all sales to the public effected in the United Kingdom or Ireland by a wholesaler or retailer when the publisher publishing or distributing the book in question decides to market it at a net retail price. The standard conditions of sale do not, however, apply to sales made by a publisher directly to any non-trading client.

6 The agreements further provide for an enforcement mechanism. The undertakings concerned have appointed the Council of the PA to act as their agent in the collection of information concerning breaches of contract by booksellers and in general information about any infringement of the marketing conditions to which 'net books' are subject. The parties agree that they will enforce their contractual rights and their rights under the Restrictive Trade Practices Act 1956 and the Resale Prices Act 1976 (see below) if called upon to do so by the Council, subject to indemnification by the Association in respect of costs thereby incurred. In the agreement concluded between publishers who are not members of the Association, the mechanism is different in that it makes no provision for indemnification by the Association in the event of action against infringements.

7 Pursuant to clause (iv) of the agreements the Council of the Association laid down rules, in the form of standard formulae, authorizing booksellers to grant discounts to libraries, book agents and quantity buyers. Authorization is granted specifically to each library, book agent or quantity buyer concerned.

8 As far as libraries are concerned, authorization is subject to a two-fold condition: the public must have access to the library free of charge and more than £100 worth of net books must be ordered annually. The discount may not exceed 10% and the library is not permitted to re-sell books on which it has obtained a discount.

9 Book agents are considered to be people, such as heads of schools, who may distribute books but do not carry on the business of selling books as their main activity. Discounts given to a book agent may not exceed 50% of the retail discount granted to the bookseller by the publisher. The book agent himself is obliged to sell the books concerned at the net price.

10 Authorization to grant a quantity discount is valid only for a single order. The discount allowed depends on the value of the order and ranges between 5 and 10%. The books may not be offered for sale by the purchaser nor be made subject to any form of consideration but must be required for gift purposes in connection with the purchaser's business, or for philanthropic purposes.

11 In relation to the application of the agreements, the Association published a so-called Code of Allowances concerning the sale of new, revised or cheap editions, books with reduced net prices and remainders. Furthermore, the Association established regulations for book clubs and rules for the annual national book sale.

12 The Code of Allowances, published by the PA in the form of a memorandum, reflects the established general trade practice regarding allowances on 'net books'. Reductions, new editions, cheap editions and remainders are customarily announced beforehand by the publisher in the trade press. Reductions or other benefits, in cash or in kind, are frequently granted in accordance with the period during which the books have been held in stock. The Code is applied only in the home market.

13 Special rules ('Book Club Regulations') apply to book club editions; they apply to book club operations within the United Kingdom. Under the regulations, publishers may grant special rights only to book clubs registered with the Association as having signed and agreed to the regulations. They include provisions as to the membership of book clubs, lay down conditions to be satisfied by book clubs in offering and selling books and impose certain restrictions on advertising. Surplus

stock of a title may not be remaindered by a book club except with the consent of the licensing publisher. According to the PA, the Book Club Regulations apply solely in the United Kingdom.

14 Since 1955 the PA has permitted an annual national book sale. The sale gives booksellers and publishers an opportunity, subject to the limits and conditions laid down by the PA, to sell slow-moving titles below the net price and thereby to finance restocking.

15 Finally, the Association publishes a 'Directory of Booksellers', updated every two months, listing the booksellers who meet certain requirements and who have undertaken to observe the standard conditions of sale of 'net books'.

16 None of the abovementioned agreements provides for any sanctions to be applied to signatories who do not observe their provisions. Compliance with the standard conditions of sale by booksellers is enforced, where necessary, by means of an injunction. In order to obtain such relief in Ireland and the United Kingdom, it is generally incumbent upon the publisher to prove a contractual relationship with the bookseller. In the United Kingdom, however, the publisher may also rely on Section 26 of the Resale Prices Act 1976, which enables him to enforce conditions concerning a resale price without having to prove a contractual relationship, provided that the bookseller in question has notice of those conditions at the time of buying the book in question.

Uncontested statistical information

17 According to the figures set out in the contested decision, which have not been challenged by the PA, the British publishing industry is amongst the most important in the world and within the Community. The main market statistics are roughly as follows: the number of new titles published each year amounts to

40 000, 80% of which are produced by members of the PA; 65% of the titles published are sold on the British market, the rest being exported; 25% of the exports go to other Member States, 4.5% going to Ireland. As far as imports into Ireland are concerned, it is to be noted that 80% come from the United Kingdom and that those imports represent more than 50% of total book sales there.

18 Another statistic undisputed as between the parties is that about 75% of books sold in the United Kingdom or exported by British publishers to Ireland are marketed as 'net books'.

The national court's appraisal of the validity of the NBA

19 The Restrictive Practices Court (the competent body in the United Kingdom in competition matters) has on several occasions considered the validity of the NBA in the light of British legislation, giving a first favourable ruling in 1962. The court held with regard to the agreement concluded between the members of the PA that (i) the abolition of the NBA would deprive the public of special benefits or advantages because it would entail the raising of prices, the reduction of stock-holding book shops and a decline in the number and variety of published titles, (ii) the public would not suffer any appreciable harm from the maintenance of the NBA as compared with the disadvantages which would arise from its abolition, and (iii) the NBA was, accordingly, not contrary to the public interest.

20 In 1964 the Restrictive Practices Court held in a summary proceeding that the 'non-members" agreement was not contrary to the public interest on the same grounds as those set out in its 1962 ruling.

21 In 1968 the validity of the NBA was reconsidered by the Restrictive Practices Court in the light of the new provisions of the Resale Prices Act 1964. The court, following the same reasoning as that set out in its 1962 ruling, granted an exemption from the general prohibition on price maintenance contained in the Resale Prices Act 1964.

Administrative procedure before the Commission

22 Following the accession to the Community of the United Kingdom, the NBA and the Book Club Regulations were notified, separately, by the PA to the Commission on 12 June 1973, pursuant to Articles 5 and 25(2) of Regulation No 17 of the Council of 6 February 1962 ('First Regulation implementing Articles 85 and 86 of the Treaty', OJ, English Special Edition 1959-1962, p. 87), as subsequently amended and supplemented, with a view to obtaining an exemption under Article 85(3) of the Treaty. The notifications were registered under reference numbers IV/27.393 and IV/27.394 respectively.

23 In 1978 the PA supplied the Commission with a copy of the book entitled 'Books are Different' (938 pages), containing not only the ruling given by the Restrictive Practices Court in 1962 but also the written pleadings together with relevant documents and a large part of the record made of the hearing.

24 In the same year the PA also provided the Commission with more recent evidence, consisting of two volumes of statistical and explanatory material, evidence given orally at a meeting organized by the Commission on 21 April 1978, and subsequent written statements by the President of the Booksellers Association of Great Britain and Ireland and the President of the PA.

25 In 1985 the PA supplied further evidence to the Commission at its request.

26 On 23 September 1986 the PA also notified to the Commission the amendments made in 1985 to some of the rules contained in the Book Club Regulations.

27 On 8 October 1986 the Commission decided to initiate, pursuant to Article 85(1) of the EEC Treaty, preliminary administrative proceedings under Regulation No 17 regarding the cases referred to above, and on 16 October 1986 it communicated to the PA the objections raised against the NBA.

28 The statement of objections also indicated that the Commission intended to refuse the exemption sought for the NBA under Article 85(3) of the Treaty.

29 In February 1987 the PA sent the Commission a memorandum, together with a series of supporting appendices, in reply to the statement of objections. In that memorandum the PA pointed to the contrast it had observed between the approach taken in the statement of objections and the content of the Commission's communications to the Council regarding the book trade. It further stated that, if the NBA gave rise to any of the problems to which the Commission was referring, the most pragmatic solution would be the application of Article 85(3), the conditions of which were clearly satisfied.

30 On 14 and 15 October 1987 the representatives of the PA had the opportunity of expressing to the Commission orally the views of the Association on the objections raised against it, pursuant to Article 19(1) of Regulation No 17 of the Council and to the provisions of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47, hereinafter 'Regulation No 99').

31 Having received the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission adopted on 12 December 1988 Decision 89/44/EEC (hereinafter 'the Decision'), published in OJ 1989 L 22, at page 12. The operative part of the Decision is as follows:

'*Article 1*

The following constitute an infringement of Article 85(1) of the EEC Treaty to the extent that they cover the book trade between Member States:

(a) the Net Book Agreements, 1957, concluded within the framework of the Publishers Association between the undertakings listed in Annexes I and II to this Decision, together with:

(b) the decisions of the Publishers Association concerning discounts to libraries and book agents and quantity discounts;

(c) the so-called code of allowances established and published by the Publishers Association;

(d) the book club regulations of the Publishers Association;

(e) the decisions of the Publishers Association concerning the conditions governing the annual national book sale;

(f) the decision of the Publishers Association concerning the conditions for mentioning booksellers in the directory of booksellers.

Article 2

An exemption under Article 85(3) of the EEC Treaty for the agreements and implementing and related rules as mentioned in Article 1 is hereby refused.

Article 3

The Publishers Association shall take all steps necessary for bringing the infringement as mentioned in Article 1 to an end forthwith.

Article 4

1. The Publishers Association shall inform the undertakings listed in Annexes I and II to this Decision, the book clubs established in the United Kingdom and the booksellers mentioned in the directory of booksellers, in writing of this decision and of the fact that the infringement has been brought to an end, stating the practical effects which this will have on the terms under which trade in books is carried on between the United Kingdom and the other Member States.

2. The Publishers Association shall submit for approval by the Commission a proposal for a notice to that effect within two months of receipt of this Decision.

Article 5

...'.

Procedure and forms of order sought by the parties

32 In those circumstances, the PA, by application lodged at the Registry of the Court of Justice on 27 February 1989, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Decision.

33 By a separate document lodged at the Registry of the Court of Justice, also on 27 February 1989, the applicant, acting pursuant to Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure of the Court of Justice in force at that time, applied for an interim measure suspending the operation of the Decision in its entirety until the Court of Justice had given judgment on the application in the main proceedings.

34 By order of 13 June 1989 (Case 56/89 R [1989] ECR 1693), the President of the Court of Justice granted a suspension of the operation of Articles 2 to 4 of the Decision and dismissed the remainder of the application.

35 By order of 15 November 1989 the Court of Justice referred the case to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

36 The written procedure then followed the normal course before the Court of First Instance.

37 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, at the same time, to request the Commission to produce certain documents.

38 The parties presented oral argument and replied to questions from the Court at the hearing on 8 October 1991.

39 The applicant claims that the Court of First Instance should:

— declare void Article 1 of the Decision, as a consequence of declaring void Article 2 thereof;

— in the alternative, declare void Article 1 in so far as it holds that the application of the NBA and related documents, regulations and decisions to books imported into the United Kingdom and Ireland from other Member States, where those books were published (this being one of the respects in which the NBA is said to 'cover the book trade between Member States'), constitutes an infringement of Article 85(1) of the Treaty;

— declare void Articles 2, 3 and 4 of the Decision;

— order the Commission to pay the costs.

40 The defendant contends that the Court of First Instance should:

— dismiss the application as unfounded;

— order the PA to pay the costs.

Substance

41 In its application the applicant first sets out its pleas and arguments directed against Article 2 of the Decision, concerning the Commission's refusal to grant an exemption for the NBA under Article 85(3) of the EEC Treaty. The PA also concentrates most of its arguments on this issue. In the second place, the applicant presents pleas and arguments in support of its claim for the total, or alternatively partial, annulment of Article 1 of the Decision, which deals with the alleged infringement of Article 85(1).

42 Faced with those claims the Court would point out that, according to the established case-law of the Court of Justice, the individual exemption provided for in

Article 85(3) of the Treaty for certain agreements, unlike the exemption provided for in the case of agreements which belong to certain categories, may be granted only for agreements which, although caught by the prohibition laid down in Article 85(1), fulfil the conditions set out in Article 85(3). Therefore, for the sake of logical order, the plea put forward in the alternative, to the effect that there is no infringement of Article 85(1) of the Treaty, should be examined first and then the pleas concerning the application of Article 85(3). Finally, depending on how the Court deals with those pleas, it may be necessary to consider the applicant's plea to the effect that the annulment by the Court of Article 2 of the Decision must necessarily entail the annulment of Article 1 of the Decision.

The plea that there is no infringement of Article 85(1) of the Treaty

The Decision

43 Points 44 to 68 of the Decision contain a legal assessment, the conclusion of which is that the agreements and the implementing and related rules in dispute come under the prohibition of Article 85(1) of the Treaty.

44 Before reaching that conclusion the Decision first characterizes the parties to the agreements as undertakings, the PA as an association of undertakings, the NBA as an agreement between associations of undertakings and the related rules as a decision of an association of undertakings. The latter characterization is also applied to the Code of Allowances and the Directory of Booksellers.

45 Secondly, the Decision holds that the conditions governing the application of fixed resale prices, such as those laid down in the agreements and implementing rules, have as their object or effect the restriction of competition within the common market between the various economic operators successively engaged in the various stages of marketing a book. That is stated to be the case with regard to publishers, who are almost totally prevented from adapting those conditions (and in particular the exceptions thereto) to the 'commercial potential' of the books concerned. The freedom for publishers to decide whether to make a book a 'net book'

or not does not prevent the agreements and implementing rules from being restrictive, because if a publisher decides to impose a fixed price for a book he is then bound to impose upon resellers almost wholly uniform conditions as to discounts — that is to say, the same conditions as other parties to the agreements are bound to impose. The same is also the case with booksellers, since the conditions in question curtail their freedom to depart from the fixed resale price by applying an individual discount policy in order to increase their sales. Thus resellers have less freedom than they might otherwise have obtained from the individual publishers.

46 The legal assessment in the Decision regarding the other rules related to the agreements is essentially as follows: the Decision regards the Code of Allowances as an instrument to limit the negative effects of the maintenance of the net price system. The object of the publication and application of the Code is to reduce the full exploitation by booksellers (or publishers) of the competitive possibilities otherwise available in certain circumstances, when new editions or cheap editions are offered. The Decision describes the Book Club Regulations as restricting the possibilities for price competition between book clubs and booksellers, by imposing time-limits to be observed by book clubs before announcing offers and by making the remaindering of book club editions dependant upon the consent of the publisher. The fact that book clubs must be registered with the Association as having signed and agreed to the regulations confirms that those regulations are an instrument of the agreements and reinforce their objectives. As to the conditions governing the annual national book sale, the Decision finds that, since they must be observed by the participating publishers, wholesalers and retailers, they have as their object and effect the canalization of the ways in which publishers and especially booksellers might want to eliminate the negative effects of the agreements. The conditions required for inclusion in the Directory of Booksellers are found by the Decision to have equally restrictive effects, because the Directory is intended and considered to constitute a guide of bona fide booksellers, and the fact of not being mentioned in the Directory constitutes a competitive disadvantage for a bookseller. That disadvantage applies in particular to booksellers who do not sell 'net books'. Lastly, the Decision states that the enforcement mechanism provided for in the agreements also has restrictive effects, owing to the assignment of a

central role to the Association, which ensures a more efficient surveillance of compliance with the agreements and related rules.

47 As regards the impact on competition of the agreements and their implementing and related rules, the Decision states that they have an appreciable effect, due to the adherence to them of many representatives of the United Kingdom publishing industry, whether members of the PA or not, with the result that a very large proportion of books sold in the United Kingdom and in Ireland are 'net books'. Indeed, the agreements and rules in question have enhanced (and still do) the transparency and certainty for a publisher of the market behaviour of other publishers and of booksellers as to the discounts which may be offered as an exception to the rule of the fixed price and as to the moment from which other editions of 'net books' may be offered on the market or from which the net price will be reduced or removed.

48 In the third place the Decision assesses the effect of restrictions on trade between Member States. It finds that the agreements and related rules actually and potentially affect trade between Member States to an appreciable extent. More specifically, the Decision states that the agreements and rules govern (a) practically all exports of 'net books' from the United Kingdom to Ireland, representing the great majority of Irish book imports, (b) all re-imports of 'net books' from Ireland into the United Kingdom, (c) all exports of 'net books' by booksellers in the United Kingdom and Ireland whenever sales are made to purchasers in other countries who are not booksellers, (d) sales by booksellers established in the United Kingdom and Ireland of books re-imported from other Member States, for which the net price must be charged when certain conditions are met, and (e) sales of the great majority of books imported into the United Kingdom and Ireland from other Member States.

Arguments of the parties

49 The applicant contends that Article 1 of the Decision represents a misapplication of Article 85(1) of the Treaty and is vitiated by inadequate and defective reasoning. The PA seeks the annulment of Article 1 in so far as it relates to the importation into the United Kingdom and Ireland of books from other Member States, on the following grounds: (a) should the PA's claim seeking the annulment of Article 2 be allowed, it would be important for the Commission, in reconsidering the question of exemption for the NBA, to know how far the NBA falls under Article 85(1); (b)

should its claim regarding Article 2 of the Decision be dismissed, it would be of great practical importance to know what further measures would need to be adopted to ensure that the NBA ceased to 'cover the book trade between Member States'.

50 The applicant argues that the assertion made in point 66 of the Decision, that 'the great majority of books imported into the United Kingdom and Ireland from other Member States, where those books were published, are also made net books within the meaning of the agreements' relates to a situation where a book has been published in another Member State and copies of that book are imported into the United Kingdom by a United Kingdom publisher or exclusive distributer for marketing in the United Kingdom. In that situation, the United Kingdom publisher or exclusive distributor is free to publish the book in the United Kingdom as a 'net book', in accordance with the conditions of the NBA, and in practice that option is frequently exercised. In the Association's view, the fact that publishers or exclusive importers may choose to apply the standard conditions of sale laid down by the NBA to books which have been imported from other Member States where they have been published does not support the conclusion that the NBA actually or potentially affects trade between Member States. It is only after the trade between Member States has taken place that a book may be made the subject of the NBA. There is no condition in the NBA that requires, either at the time when the book is imported or at all, that its sale should be governed by it. That feature, according to the applicant, distinguishes the present case from the *Leclerc* case (Case 229/83 *Leclerc* v *Au blé Vert* [1985] ECR 1), in which the rules in question required the compulsory setting of minimum prices for imported books on importation.

51 The Commission points out first of all that the PA's argument is extremely limited in scope. The PA's challenge relates solely to one aspect of the trade in books between Member States (point 66 of the Decision), namely books imported into the United Kingdom or Ireland 'from other Member States' where they have been published. The PA does not, therefore, challenge the correctness of the Commission's finding that Article 85(1) is applicable in so far as it covers other aspects of the trade in books between Member States. Those aspects, which are set out points 62 to 65 of the Decision, constitute a substantial proportion of the trade between Member States.

52 With reference to the PA's specific criticism regarding point 66 of the Decision, the Commission states that once the 'publisher or exclusive distributor' has declared that a book published in another Member State is to be put on the market in the United Kingdom and Ireland as a 'net book', the NBA affects the conditions of any subsequent trade between Member States (particularly with Ireland) in regard to such a book. Secondly, the Commission further states that the application of the NBA to imported books constitutes, on the PA's own admission, 'an optional method of increasing sales that is open to a publisher'; if that claim is right, then the PA cannot at the same time deny the possibility that the application of that system may have an appreciable effect on the volume of trade between Member States. Thirdly, and more generally, the Commission contends that, whatever may be the effects of the NBA on book sales in the United Kingdom, the NBA must produce those effects for imported books as well as for books produced domestically.

Appraisal of the Court

53 The Court notes, as a preliminary point, that both in its reply and at the hearing the applicant stated that it was withdrawing the Code of Allowances and the Directory of Booksellers. That statement cannot alter the scope of the dispute, since, as the Commission rightly pointed out, the PA has neither notified the Commission of its decision to withdraw those two publications nor produced evidence of implementation of that decision (see Case 35/83 *BAT* v *Commission* [1985] ECR 363, at paragraph 22).

54 On the main issue, the Court finds that in contesting the legal assessment of the Decision analysed above, concluding that all the conditions for Article 85(1) of the Treaty to be applied to the agreements and rules in question are satisfied, the plea made by the applicant is limited to challenging one isolated aspect of the condition that intra-Community trade in books should be affected, namely imports into the United Kingdom and Ireland.

55 As regards the condition that intra-Community trade must be affected, it should be recalled that the Court of Justice has consistently held that an agreement, a decision by associations of undertakings or a concerted practice must make it

possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that the attainment of the objectives of a single market between States might be hindered (see Case 5/69 *Völk* v Vervaecke [1969] ECR 295, Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545).

56 In the present case, the objection raised by the applicant relates only to imports into the United Kingdom and Ireland from other Member States (point 66 of the Decision) whereas the Commission's assessment is based on a whole set of objective factors of law or fact, set out above at paragraph 48 (points (a) to (d)). Those factors, the correctness and validity of which have not been challenged, concern exports and re-imports between the United Kingdom and the other Member States. As regards Ireland in particular, its imports of books from the United Kingdom amount, as already mentioned, to about 80% of total book imports. Around 75% of the books exported to Ireland by British publishers are marketed as 'net books'. The fact that exports to Ireland represent a very small share of total book production in the United Kingdom, namely 1.2%, is irrelevant inasmuch as only the effects on the Irish market must be taken into account. On that market, imports of books from the United Kingdom account for more than 50% of total sales. It should be noted that at the hearing the PA claimed that if the application of the NBA were to be confined to the British market alone, the system would not collapse but all the attendant disadvantages would be felt in Ireland. That statement by the applicant association corroborates the finding contained in the Decision as to the scale of the effects of the NBA scheme on the book market in Ireland.

57 It should be recalled in this regard that anti-competitive conduct confined to the territory of a single Member State is capable of having repercussions on patterns of trade and competition in the common market (see Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, at page 3522, and Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, at page 2191). That being so, and in view of the other undisputed findings reproduced above, in particular at paragraph 48, the

Court finds that the Commission made a correct assessment of the facts of the case when concluding that the agreements and the implementing and related rules actually and potentially affect trade between Member States to an appreciable extent.

58 As regards the applicant's argument that the provisions of the NBA operate only after trade transactions between Member States have taken place, the Court considers it to be unfounded. If the publisher or exclusive importer decides to apply the standard conditions of sale laid down by the NBA to an imported title, that choice is decisive for all subsequent trade transactions, namely (a) importation of new consignments of the same title, (b) exportation from the United Kingdom to Ireland of a title originally imported into the United Kingdom and sold as a 'net book', and (c) direct importation into Ireland of a title from other Member States, when that title was previously imported into the United Kingdom and sold there as a 'net book'.

59 It follows from the foregoing that the plea that the contested agreements do not significantly affect trade between Member States must be dismissed.

Pleas concerning the application of Article 85(3) of the Treaty

60 The applicant relies on two pleas in challenging Article 2 of the Decision: first, it claims that an essential procedural requirement was infringed; second, that the reasoning of the Decision was inadequate and defective, and, more generally, that the Commission misapplied Article 85(3) of the Treaty with regard to the indispensability of the restrictions imposed by the NBA and its related rules.

(a) *Plea alleging a discrepancy between the objections notified and those contained in the Decision*

Arguments of the parties

61 The applicant claims that the Commission infringed an essential procedural requirement inasmuch as the arguments cited in the Decision for refusing an exemption were not those raised in the statement of objections. In the statement of objections the Commission had relied mainly on the assertion that the NBA eliminated competition between booksellers in respect of a large share of total book sales (point 66), whereas in the Decision it argued that the NBA was not indispensable to the achievement of the benefits it sought.

62 The applicant further submits that it was on the issue of the elimination of competition that it concentrated its main arguments during the administrative procedure, since that was the only point in respect of which the statement of objections contained specific arguments against the granting of an exemption. It also observes that the Commission adopted a decision fundamentally different from the statement of objections, without even giving the parties any indication in writing as to how the revised case was formulated or giving them an opportunity to comment on that revised case. If the Commission had given it such an opportunity, the PA could have identified the Commission's errors of fact and reasoning, pointed to the relevant evidence already in the Commission's possession, and adduced further evidence.

63 The Commission does not dispute that in the statement of objections the issue of the elimination of competition was discussed at greater length than the other conditions laid down by Article 85(3). Nevertheless, it contends that in points 71 and 72 of the statement of objections it clearly — albeit briefly — indicated that the PA was required to prove the indispensability of the restrictions laid down by the NBA in so far as they related to (re-)imports and (re-)exports. According to the Commission, it is inherent in the concept of 'objections' under Article 4 of Regulation No 99 that whenever the definition of the issues and the burden of proof are on the notifying party, as in the present case, the statement of objections required by that article may be more broadly expressed. The Commission also contends that the PA was aware of the importance attaching to the issue of the indispensability

of the provisions for the purpose of the administrative proceedings, and claims that the point is confirmed in particular by the fact that, at the hearing, its counsel set out in detail the four arguments considered by the PA to establish the indispensability of the restrictions imposed by the NBA.

Appraisal of the Court

64 It is clear from Articles 6 and 19(1) of Regulation No 17 read together with Articles 2 and 4 of Regulation No 99 that the Commission's obligation to inform the undertakings and associations of undertakings concerned of the objections which it raises against them and to uphold in its decisions only the objections in respect of which those undertakings or associations of undertakings have had the opportunity of expressing their views also exists where a decision is adopted following a request for the application of Article 85(3). Nevertheless, the Commission's obligation to inform an undertaking of the objections it is raising against it and to maintain in its decision only those objections essentially concerns the stating of the reasons which lead it to apply Article 85(1), either by ordering that an infringement be terminated or imposing a fine upon the undertakings, or by refusing to give them negative clearance or the benefit of paragraph 3 of the same provision (see Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, at paragraphs 11 to 13).

65 Furthermore, the Court of Justice has consistently held that the statement of objections, the aim of which is to ensure that the rights of the defence are observed, must set forth clearly, even if succinctly, the essential facts upon which the Commission relies at that stage of the proceedings. However, the subsequent decision is not necessarily required to be a replica of that statement of objections (see *van Landewyck* v *Commission*, cited above, *Musique Diffusion Française* v *Commission*, cited above, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, and also the order in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899).

66 In the present case, the Court finds that the statement of objections contains not only a detailed account (points 42 to 63) of the grounds on which the Commission

decided to apply Article 85(1) of the Treaty but also a special section (points 64 to 72) devoted to the question whether Article 85(3) of the Treaty is applicable. Accordingly, although the Commission gave prominence to the aspects regarding the fourth condition for the grant of an exemption, namely that the restrictions must not have the effect of eliminating competition in respect of a substantial part of the products in question, it none the less observed, in points 71 and 72, that the Association had not set out the grounds on which it considered the application of the NBA to be indispensable to the attainment of the supposed benefits in connection with (re-)imports and (re-)exports.

67 Those points of the statement of objections read as follows:

'Finally, as to the condition that the agreements must be indispensable for realizing the improvements, [the] parties set out that without a common application of the Standard Conditions by publishers who choose to issue any particular book at a net price (...) there could be no guarantee that the booksellers would be protected, as they are in the case of net books, and the public would consequently suffer. [The] parties, however, did not specify and it is not clear to the Commission either, why the improvements claimed result from the application of the agreements and the related rules and regulations on (re-) imports and exports, nor why such application is indispensable to that end.'

68 In those circumstances it must be accepted that the Commission made it clear, in its statement of objections, that the PA was required to show that the restrictions laid down by the NBA and related rules were indispensable in so far as they concerned (re-)imports and (re-)exports. Thus the PA, which had the burden in the first place of submitting to the Commission all the evidence to substantiate the economic justification for the exemption sought (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19 and in *Remia* v *Commission*, cited above), thereby enabling the Commission to conclude that the agreements in question met each of the four conditions laid down by Article 85(3) of the Treaty, had

a proper opportunity for making known its views on the indispensability of the restrictions on competition arising from those agreements. That finding is borne out by the fact that the PA had the chance to give its views specifically on that point in its written observations in reply to the statement of objections and, at the subsequent hearing, to set out in detail the four arguments showing, in its view, that the restrictions imposed by the NBA were indispensable.

69 In any event, it should not be overlooked that whenever an exemption under Article 85(3) of the Treaty is sought, it is incumbent on the applicant undertaking to prove that it satisfies each of the four conditions laid down therein, and to set out in the A/B application form its position on each of those conditions, in accordance with the note annexed to Regulation No 27 of the Commission of 3 May 1962 ('First Regulation implementing Council Regulation No 17', OJ, English Special Edition 1959-1962, p. 132). It should also be recalled that, owing to the cumulative nature of the conditions required, the Commission is entitled at any time before the definitive adoption of the decision to find that any one of the conditions is not satisfied.

70 It follows from the foregoing that this plea in law must be dismissed as unfounded.

(b) *Plea alleging that the reasoning of the Decision concerning the assessment of the indispensability of the restrictions on competition arising from the NBA is incorrect*

71 In presenting this plea the applicant adduces a number of arguments designed to demonstrate that the Decision bases its negative assessment of the indispensability of the restrictions on competition arising from the NBA on inadequate and defective reasoning which ignores the evidence produced, and, more generally, that the Decision misapplies Article 85(3) of the Treaty.

72 In points 71 to 86, the Decision examines the question whether a collective system of fixed prices for the book trade is indispensable to the attainment of the

purported aims of the applicant association. Although referring to the aims pursued by the NBA scheme, namely to avoid the decline in stock levels which would result from shorter print runs and to prevent an increase in book prices and the disappearance of titles printed in short runs, the Commission takes no position on the question whether such aims are attained in practice and whether the distribution system is the one best suited to their attainment in the national context. The Decision emphasizes, however, that this case concerns the appraisal of a price-fixing system which, in covering exports to other Member States, in particular to Ireland, as well as to imports and re-imports from other Member States, including Ireland, precludes price competition resulting from intra-Community trade (point 75). The Decision also finds that, in the interests of achieving the aims mentioned above, the PA has established a collective system imposing the same price for any given book on all booksellers, so as to ensure that there is no price competition as to the same title (point 73, third paragraph). At that stage, it is apparent from the Decision that it has regard to the extent of the restrictions under the NBA system, as they are set out in points 50 to 59. In view of the nature of the restrictions under the NBA system and their impact on intra-Community trade, the Decision considers that the PA is required to demonstrate that the achievement of the aims of the agreements calls for a collective scheme rather than an individual vertical resale price maintenance system (point 71).

73 Under Article 85(3) of the Treaty, an exemption cannot be granted unless, *inter alia*, the agreement does not have the effect of imposing on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives, referred to in paragraph 3, of promoting technical or economic progress and allowing the resultant benefit to be shared fairly.

74 The Court of Justice has held that, where an exemption is sought under Article 85(3), it is in the first place for the undertakings concerned to present to the Commission the evidence for establishing the economic justification for an exemption and, if the Commission has objections to raise, to submit alternatives to the Commission. Although it is true that the Commission may give the undertakings indications as regards any possible solutions, it is not legally required to do so, still less is it bound to accept proposals which it considers to be incompatible with the conditions laid down in Article 85(3) (*VBVB and VBBB* v *Commission* and *Remia* v *Commission*, both cited above).

75 Moreover, it has been established in previous cases that, although under Article 190 of the Treaty the Commission is required to state the reasons for its decisions by setting out the elements of fact and law and the considerations which have prompted it to adopt a decision pursuant to the rules on competition, that article does not require the Commission to discuss all the matters of fact and of law which have been raised by the parties during the administrative proceedings. The statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (see *IAZ and Others* v *Commission*, at paragraph 37, *Michelin* v *Commission*, at paragraph 14, *VBVB and VBBB* v *Commission*, at paragraph 22, and *Remia* v *Commission*, at paragraph 26, all of which are cited above).

76 It is in the light of those principles, laid down in the case-law, that it must be determined whether or not the Decision is based on an incorrect material fact or vitiated by an error of law or a manifest error of assessment. In order to determine those questions, this Court considers it appropriate to examine first of all the broad objections formulated by the applicant, then to deal with the objection concerning the misstatement of the PA's arguments, and, thirdly and lastly, to appraise the legality of the reasons given for the Commission's replies to the four specific arguments put forward by the PA at the hearing.

— *The broad objections*

(i) Disregard or misconstruction of the evidence produced

77 The applicant argues that the Commission was bound by the principle of sound administration to have due regard to the findings of fact contained in the 1962 judgment of the Restrictive Practices Court of the United Kingdom, even though the Commission was not bound by that ruling when exercising its powers. The PA submits that the finding by the British court that the NBA was indispensable applies both to the international book trade and to sales in national territory of books produced nationally. Those findings of fact by the national court were still perfectly valid at the date of the contested decision, in respect of both the British and Irish markets. Similarly, the applicant maintains that it supplied the Commission with an important set of evidence showing that the situation had not undergone any significant change since the time of the Restrictive Practices Court's ruling. With regard to exports, the applicant argues that the Commission attached

undue importance to a point of detail in the judgment of the Restrictive Practices Court, in which it is stated: 'We have not been satisfied that the condemnation of the agreement would be likely to cause a reduction in the volume of earnings of the export trade which would be substantial in relation to the whole business of the book trade'. Taking all those elements as a whole, the applicant argues that, in its decision, the Commission reaches a conclusion directly contrary to that reached by the Restrictive Practices Court as regards the indispensability of the restrictions on competition.

78 The Commission does not deny that the PA had supplied a considerable body of evidence even before the statement of objections was issued. As regards the question whether the judgment of the national court was to be taken into account, the Commission contends that its independence in the exercise of its powers and the discharge of its duties under the Treaty would be undermined if the mere existence of a ruling of a national court or tribunal were to have the effect of binding it to the findings of fact contained therein, or, as the PA contends, of requiring it to explain and prove a 'relevant change of circumstances' subsequent to the date of that ruling. It points out that similar arguments were rejected by the Court of Justice in its judgment in *VBVB and VBBB* v *Commission* (cited above, at paragraph 40). The Commission further contends that the judgment delivered by the Restrictive Practices Court in 1962 does not even address the particular point at issue here, namely the justifiability of the NBA's restrictions as far as imports and exports between Member States are concerned. In so far as it did briefly consider the question of exports, the judgment had rejected the argument regarding the public interest, pleaded by the PA as justification for the restrictions laid down. Lastly, as to the other evidence provided, the Commission argues that it deals mainly with the application of the NBA merely to the domestic sales of books published in the United Kingdom.

79 As regards this objection, it should first be noted that, as is clear from point 43 of the Decision, the Commission did not ignore the ruling of the British court. However, as the Commission rightly observed, the national court, which was of course giving judgment prior to the accession of the United Kingdom and Ireland to the European Communities, did not directly express any view as to the indispensability of the restrictions on competition within the common market arising from the NBA. In so far as that court did indirectly touch on the question of external trade, it found that the PA had not proved that the abolition of the NBA would lead to

a substantial decline in exports. It must therefore be concluded that the Decision is not vitiated by inadequate reasoning on the ground that it did not specifically rebut the findings of the Restrictive Practices Court in 1962 or the evidence produced by the applicant to show that the situation on the book market has not changed substantially since 1962. In any event as the Court of Justice held in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* (cited above, at paragraph 40), national judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty.

(ii) Distinction between the national and the intra-Community effects of the NBA

80 Following a remark made by the Commission in its defence, to the effect that the Decision does not cast doubt on the validity of the NBA scheme in the national context, the parties exchanged argument on the point whether it is possible to distinguish between the beneficial effects of the application of the system in the domestic markets of the United Kingdom and Ireland, on the one hand, and its effects on trade within the Community, on the other. The PA maintains that the Commission's attempt to draw a distinction between the effects due to the application of the NBA to national sales and the effects on exports and imports constitutes an error of law. It submits that it has always maintained that the NBA, with its standard conditions of sale, secures benefits for all books which publishers choose to publish as 'net books' (whether produced nationally or imported and sold in the United Kingdom or Ireland) and that the application of that agreement is indispensable for the attainment of those benefits. The PA further argues that the evidence produced in the course of the administrative proceedings related to imports and exports as well as to national sales of books produced nationally.

81 The Commission replies that the points raised by the PA in its reply relate to a question on which it did not take a position in the Decision and which does not arise in this case. The Commission explains that in its statement of defence it was seeking to draw attention to the fact that the PA drew no distinction between the

purely domestic effects of the NBA and its effects on intra-Community trade. The whole thrust of the PA's arguments failed to acknowledge even the possibility that different considerations might apply to these two situations. Although that fact formed no part of the basis for the Decision, the Commission considered it appropriate to point out the erroneous assumption in the PA's reasoning.

82 That dispute, which continued into the hearing, also concerned the extent to which the application of the NBA could be confined within the United Kingdom without causing major problems. The Commission maintains that the disappearance of the NBA, in so far as it affects trade with the other Member States, would not have any effect on the application of the system at the national level. The PA definitively stated its position at the hearing when it accepted as already mentioned, that the confinement of the application of the NBA to the United Kingdom market would not precipitate the collapse of the scheme but all the disadvantages would be experienced on the Irish book market.

83 The Court holds that evidence showing that the inherent benefits of the NBA system at the national level also extend to intra-Community trade might have been relevant had the Commission's refusal to grant the applicant the exemption sought been based on non-fulfilment of the condition regarding the promotion of technical or economic progress. However, that condition is not at issue here, since the ground for the rejection of the PA's application relates solely to the indispensability of the restrictions on competition arising from the application of the NBA. Accordingly, it is not necessary for this Court to consider the benefits of the NBA on the national market, on the assumption that their existence has been proved, in order to assess the legality of the Commission's refusal.

84 As regards the applicant's argument that the NBA system would collapse if its application were confined to a national market, the Court finds this argument irrelevant too. Under Article 85(3) of the Treaty, a price maintenance system that restricts competition within the common market cannot qualify for exemption on the ground that it must continue to operate in order to produce beneficial effects inside a national market. As the Court indicated above (at paragraph 57 of this

judgment), such a situation would in itself contribute to the partitioning of the common market and would consequently tend to thwart the economic interpenetration sought by the Treaty. It should further be noted that the PA, which is an association consisting of publishers established in the United Kingdom, is not entitled to rely on any negative effects which might be felt on the Irish market, even though that market belongs to the same language area.

(iii) Parallels between the NBA and the 'Dutch books' case

85 The applicant complains that the Commission failed to consider the NBA on its own merits and that it limited its statement of the reasons for its decision to references to the decision which it had adopted in case IV/428 — VBBB/VBVB (Decision 82/123/EEC of 25 November 1981, OJ 1982 L 54, p. 36), in which the collective system of resale price maintenance for the sale of books was different. The drawing of parallels between the NBA and the 'Dutch books' case is regarded by the PA as a serious defect of reasoning, on account of the difference between the two agreements involved.

86 The Commission rejects that criticism. It states that in referring to its decision in the VBBB/VBVB case it was not expressing a definitive view as to whether the NBA was indispensable. It was indeed for that reason that the Commission considered the four specific arguments advanced by the PA on this issue. According to the Commission, point 75 of the Decision merely draws attention to a more general principle, namely that the objectives sought by national resale price maintenance arrangements do not necessarily make it indispensable to apply the same or similar restrictions to trade in books between Member States. The case to which it referred provided a clear illustration of why that should be so.

87 The Court finds that the PA's objection is based on a misinterpretation of the Decision (point 75, end of the first paragraph). The Commission's reference to its aforesaid decision in the VBBB/VBVB case does not represent an application to the NBA system of the assessment made of the indispensability of the system for sales of Dutch language books but merely a reminder of a principle stated in that case.

According to that principle, a collective resale price maintenance scheme which affords benefits within the national market does not necessarily make it indispensable to apply the same restrictions to trade in books between Member States. It was therefore with justification that the Commission, as it explained in its written pleadings, merely sought in that passage of the Decision to point out the above-mentioned principle before going on to consider the four specific arguments which the PA invoked in order to demonstrate the indispensability of the restrictions on competition arising from the agreements in question.

(iv) Absence of any proposed alternative

88 The applicant states that, although the Commission refers to the possibility of individual resale price maintenance as a less restrictive alternative to the NBA, it does not commit itself on the question whether it would permit such an alternative. The Commission is likewise totally silent, according to the applicant, on the question whether individual resale price maintenance could provide the same benefits as those arising from the NBA.

89 The Commission rejects this objection. It maintains that it was not the object of the Decision to give any ruling on distribution systems that had not been notified by the PA, such as individual resale price maintenance arrangements: its decision addressed only the issue whether, on the assumption that systems like the NBA did produce the beneficial effects attributed to them by those participating, such systems needed to be collective in nature rather than individual.

90 The Court of First Instance considers the objection to be ill founded on two grounds. First, the Decision expresses no view as to whether individual resale price maintenance systems are compatible with the Community rules on competition but deals with the question whether, on the assumption that the NBA system affords the advantages which the PA says it does, such a system should be collective in nature rather than individual. Secondly, as the Court has already pointed out (at paragraph 74 above), the Commission was under no obligation to suggest to the applicant an alternative system affording the same advantages as the NBA.

— The alleged misstatement of the PA's arguments

91 The applicant contends that the need for a common application of standard conditions, that is to say the fact that the same benefits afforded by the NBA could not be achieved, in the absence of that agreement, by the application of resale price maintenance conditions by individual publishers, has been a central feature of its arguments. However, in the PA's view, the Commission, in stating in point 71 of the Decision that 'The arguments put forward ... however concerned not so much the necessity of a common application of standard conditions ...' is guilty of a misstatement. Contrary to that statement, it is clear, according to the PA, from various passages in 'Books are Different' that the need for a common application of standard conditions has been presented as a vital element. Furthermore, as regards point 72 of the Decision, the applicant points out that the Commission omitted to mention the reference made by its counsel at the hearing to the finding of the Restrictive Practices Court that individual resale price maintenance could not long survive the end of the NBA. Finally, the applicant claims that point 73 of the Decision is misleading in referring to the objectives of the NBA in so far as it fails to take account of the fact that the NBA applies only to those books which publishers at their individual discretion choose to publish as 'net books'. It states that the NBA does not in any way require them to do so.

92 The Commission argues that the arguments regarding the indispensability of the NBA, put forward by the PA on its notification and during the administrative proceedings, were all designed to establish a broad justification for the NBA by reference to its objectives. They did not address the specific issue whether the application of the NBA, in so far as it relates to exports and (re-) imports between Member States, was indispensable to the attainment of those objectives. That was the issue to which the Commission wished to draw the PA's attention at point 72 of the statement of objections.

93 The Court notes first of all, with regard to the applicant's arguments which are reproduced in point 71 of the Decision that, contrary to the PA's contention, the Decision does not state that the PA did not put forward arguments concerning the need for the application of a collective system. In this regard, the Decision contains

the following passage: 'The arguments ... however concerned not so much the necessity of a common application of standard conditions in case of fixed book prices but much more the question whether fixed book prices as such are indispensable in order to attain their alleged objectives.' The Court considers, however, that it is clear from point 71 of the Decision that although the Commission considered that the arguments put forward by the applicant concerned above all the question whether fixed prices for books were indispensable as such in order to achieve the objectives pursued by the PA, it did not in the least exclude the possibility that some of the PA's arguments related to the need for a common application of standard conditions in a system of fixed prices for books. The complaint that the Decision, in point 71, altered the meaning of the PA's argument therefore lacks foundation in fact.

94 Secondly, as regards the statements reproduced in point 72 of the Decision and the applicant's argument based on the Commission's omission to mention in the Decision the introductory statement relating to the national court's ruling made by counsel for the PA at the hearing, the Court considers that such an omission cannot be regarded as significant. In any event, according to the case-law of the Court of Justice cited above (see paragraph 75), the Commission, which, moreover, took into consideration the judgment of the Restrictive Practices Court, was not obliged to discuss in its Decision all the points of fact and of law which had been raised by the PA during the administrative procedure.

95 Thirdly, as regards the statements contained in point 73 of the Decision, it must be stated that the applicant's contention that the Decision misstates the facts is itself based on a misinterpretation of the Decision. In concluding in point 73 that in order to achieve the averred objectives the PA imposes a uniform price in retail sales of books the Decision does not base that conclusion on the assumption that every publisher is required to market a title as a 'net book'. This question is examined thoroughly in points 52 and 53 of the Decision. It is apparent from those points that the Commission took into consideration the freedom of publishers to publish a book as a 'net book' but that it considered, rightly, that when a book is marketed as a 'net book' the traders concerned have no latitude to apply individual conditions of sale.

— The four arguments put forward by the PA to demonstrate the indispensability of the NBA

(i) Practical difficulties facing publishers

96 At the hearing, the PA put forward four specific arguments to prove the indispensability of the agreements. The first argument, as initially put forward by counsel for the PA, was that in practice it is not possible for publishers individually to give notice of their standard conditions to each bookseller. It would be necessary to give such notice to each contracting party and, moreover, in the United Kingdom the giving of such notice would allow legal proceedings to be brought against a sub-buyer, that is to say a buyer who has no direct contractual relationship with the publisher, since the Resale Prices Act 1976 affords this right to publishers who have notified their conditions of sale to their sub-buyers. During the written and oral procedure before the Court, the applicant raised another aspect of this argument, namely the administrative burden which would fall on publishers if they had to draw up their own standard conditions of sale and then give notice of them to each bookseller. In performing those functions the organization set up by the NBA assumes a task which would otherwise be unmanageable for individual publishers.

97 The Commission states in reply that the mere formulation of conditions of sale does not constitute a massive administrative burden. It is a task which has to be undertaken by any trading entity wishing to define its contractual terms of trading. Furthermore, it is possible that many publishers would not seek to draft their own conditions from scratch but would simply take as a starting point the PA's present standard conditions and then, depending on their own individual assessment of their commercial interests, modify those conditions. With regard to the notification of the chosen conditions, the Commission perceives two distinct situations. First, there is notification to parties with whom the publisher has a direct contractual relationship. In that instance, there is no reason to envisage any appreciable extra burden for publishers. The second situation concerns notification to those with whom the publisher does not have any direct contractual relationship. This situation arises only in the United Kingdom, where, under the Resale Prices Act 1976, notification is a precondition which alone enables the observance of conditions laid down by the original vendor as regards the resale price to be imposed on

sub-buyers. The Commission concludes that the mere fact that the giving of such notices may be administratively easier for publishers if, instead of being given individually, they are communicated through some collective system cannot be sufficient justification, either on its own or in combination with other factors, for imposing a comprehensive and uniform collective resale price maintenance system.

98 The Court finds that the rejection in the Decision of that argument, as it was originally cast, on the ground that it was irrelevant, is well founded. Although a common system of giving notice may alleviate the administrative burden on publishers, that fact does not justify the establishment of a system which, as is pointed out in the Decision (point 78), in imposing uniform conditions of sale that restrict competition on the common market, goes beyond what is strictly necessary for implementing such a system. The practical convenience afforded by a common system of giving notice may not be allowed to justify the establishment of a common system of net prices. Moreover, in so far as the argument refers to the legal effects of the Resale Prices Act 1976, it must be observed that the view is rightly taken in the Decision that the applicant may not rely on the national legislation of a Member State in order to prove the indispensability of an agreement at the intra-Community level (see, most recently, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439).

99 As regards the other aspect of the argument, emphasizing the burden which would be placed on every publisher if he were individually obliged to draw up his own standard conditions, that point cannot be regarded as relevant either. As the Commission pointed out in its written observations, publishers could refer to standard conditions of sale proposed by their association in so far as, far from applying such conditions uniformly, they would adapt them to their commercial interests and to their own individual situation so that each trader preserves his decision-making autonomy.

100 Consequently, the applicant's contention that the drawing up by publishers of individual conditions of sale and their notification to booksellers would constitute a massive administrative burden is not well founded since it is not established that such a burden would exceed that arising from normal commercial practice.

(ii) Practical difficulties facing booksellers

101 The second specific argument of the PA also concerns an added administrative burden, this time on booksellers. In its view, it is not possible for booksellers, especially those who maintain stocks containing a large number of titles, to comply with different conditions of sale, providing for exceptions, varying from one book to another, depending on the publisher. According to the applicant, many booksellers are constantly selling 'net books' at a discount, by virtue of the exceptions built into the standard conditions of sale. If individual publishers had their own separate conditions, they would have to insert their own separate exceptions as well, and this would create an unmanageable situation for each bookseller, having to handle orders for a number of books from a variety of publishers.

102 Furthermore, the applicant contends that the Commission was only able to speculate about the administrative infrastructure of stock-holding booksellers, since it failed to investigate this matter during the administrative procedure. Likewise, the PA does not accept the figures quoted by the Commission from the Fishwick Report, which estimates that some 20 publishers account for about 50% of national sales, and requests the Court to verify the figures, should it believe this issue to be material. Moreover, sales to libraries constitute an important part of the business of many stock-holding booksellers, which means that, in the absence of the NBA, they would also have to satisfy themselves that those applying for discounts did indeed qualify for them.

103 The Commission, which first makes the point that it is normally for the party seeking the benefit of an exemption under Article 85(3) to submit arguments and evidence proving that its application satisfies the conditions laid down, states, with regard to stock-holding booksellers, that the evidence which it has does not suggest that the additional work involved would be excessive, having regard to the administrative infrastructure which those booksellers have. As the Fishwick Report confirms, twelve publishers account for two thirds of all national sales and for two thirds of all exports.

104 As regards the various exceptional categories of sale, which are governed by special conditions, the Commission observes that while it is true that these conditions might vary between publishers, it is not apparent that the administrative burden, for those booksellers who effect significant volumes of such sales, would be unmanageable.

105 The Court observes first of all that that argument, as put forward in the administrative procedure and subsequently developed during the written procedure, essentially concerns the British market and not the applicability of the system in the context of intra-Community trade and is not therefore a telling factor. The Commission was therefore right to reply, in the Decision, only to the argument as it had been formulated by the PA, upon whom lay the burden of proving that the requirements laid down by Article 85(3) of the Treaty were fulfilled (see paragraph 74 above). In any event, as regards the reasons given for the rejection of the argument by the Commission, it must be considered that the Decision, in emphasizing in the first three paragraphs of point 80 the fact that a large part of the books sold are published by a limited number of publishers, provides a sufficient explanation of the reasons for which it cannot accept that abolition of the NBA would involve an excessive administrative burden for booksellers. Moreover, in the written procedure, the defendant institution amplified its reasoning by rightly pointing out the modern administrative infrastructure (computerization and so forth) which stockholding booksellers have today, which alleviates considerably their burden of work.

106 It must also be observed that the applicant's argument would be particularly valid, as the applicant indeed accepts, in so far as it refers to the uniform conditions governing discounts, having regard to the fact that the retail price, whether under a common system or individual system of fixing prices, is almost always different for each title. Without its being necessary to rule on the legality, under the Community rules on competition, of a system of uniform conditions of discount, the Court should point out that the applicant has not in any event explained why publishers could not apply uniform conditions of discount, irrespective of the existence of any system, collective or individual, of imposed prices. Finally, it should be observed that the specific categories of buyers (book clubs, libraries, book agents, quantity buyers) which, under the system in question, are the only ones able to receive a discount, are too limited in number for the determination of the discounts granted to them to be such as to impose an unmanageable burden of work on booksellers.

It follows from the reasons mentioned above that the Commission was entitled to consider the second specific argument put forward by the applicant to be unfounded.

(iii) Booksellers' confidence regarding their competitors' conduct

107 The PA's third argument concerns the confidence which the NBA gives booksellers as regards the conduct of their competitors. The applicant has stressed the importance for booksellers to be confident that their competitors will not buy or sell the same title at a price lower than the net price. Such confidence could not exist in an individual system of fixed prices because it would be impracticable for an individual publisher to monitor, let alone to enforce, strict adherence to his conditions by all the booksellers in the country.

108 Furthermore, according to the applicant, the fact that breaches of the standard conditions by booksellers are relatively few in number and that the work of monitoring and enforcement can be carried out by a relatively small organization is a tribute to the simplicity and effectiveness of the NBA. It is therefore, in its view, a complete fallacy to rely on that fact to show that individual conditions could be monitored equally well in the absence of the NBA; in fact, they could not.

109 The Commission takes the view that this argument has two aspects: the first concerns the confidence which the system in question gives to the bookseller that his competitors will be subject to identical terms; the second concerns the confidence that the bookseller can have that those terms will be enforced. It considers that the PA has not shown that it would be impracticable for an individual publisher to monitor, let alone to enforce, 'strict' adherence to his conditions by all the booksellers in the country.

110 The Commission further points out that in point 36 of the Decision it is noted that, on the PA's own admission, few breaches of the standard conditions have been notified to it and have actually been established. However, the most relevant point, in the Commission's view, is that the monitoring of compliance with the NBA depends mainly on complaints from booksellers or on discoveries made by the sales representatives of the publisher concerned when visiting booksellers. The Commission therefore concludes that there is no immediately apparent reason to think that the detection of infringements would become materially more difficult.

111 The Court observes that this argument is rejected in point 84 of the Decision as unconvincing on the ground that it 'comes down to the statement that the Association considers that booksellers cannot have the same confidence vis-à-vis its individual members when they operate through individual resale price maintenance agreements as when they operate through a collective agreement. The Commission does not in any way understand on what basis the Association so distrusts the individual publishers' behaviour vis-à-vis booksellers ... even more so now that most publishers are members of the Association ...'.

112 The Court considers that that reply is reasoned to the requisite legal standard since, under a collective agreement as well as under an individual agreement on net prices, it is the same person, the publisher, who will have the responsibility of granting the same conditions of sale to booksellers and enforcing those conditions upon retail sale. On the assumption that a collective system of fixed prices may subjectively reinforce booksellers' confidence, this circumstance is not capable on its own of justifying an agreement which, by imposing uniform selling prices for books, excessively restricts the free play of competition on the common market. It must therefore be considered that the Commission's reply to the applicant's third argument is not vitiated by any error of reasoning.

(iv) The need for the standard conditions to be monitored and enforced by the PA

113 The applicant association considers that in practice only it is capable of monitoring and ensuring compliance with standard pricing conditions and observes that the Commission does not deny the correctness of its proposition but seeks merely to

dismiss it as irrelevant. In the PA's view, this point is just as relevant as those which have already been considered, because it represents a further reason why the benefits of resale price maintenance for books could not be obtained without the NBA. In its view, the dismissal of the argument as irrelevant is therefore a serious defect of reasoning.

114 In addition to what has already been set forth above in paragraph 110, the Commission replies that this fourth argument was dismissed by the Decision as irrelevant because the Association did not explain why a collective agreement on standard conditions of sale was indispensable in allowing the Association to act on behalf of all publishers.

115 The Court considers that, as far as this specific argument of the PA is concerned, to the effect that an association acting for all publishers needs to be made responsible for monitoring and enforcing standard conditions, the Commission was right to consider it not relevant on the ground that it did not explain the need for a collective agreement on standard conditions of sale (point 85 of the Decision). Without there being any need to rule on the legality, under the Community rules on competition, of a system which makes an association responsible for monitoring the uniform application of standard conditions of sale, it must be pointed out that the applicant has not put forward any reason to show that such a monitoring system could not be set up irrespective of the existence of an agreement, whether collective or individual, fixing net prices. Moreover, the Commission was right to maintain that even under a collective agreement on fixed prices the monitoring of compliance with the terms of the agreement depends, above all, on complaints from booksellers or findings made by the sales representatives of the publishers concerned (see paragraph 110 above).

116 It follows from all the foregoing considerations that the applicant has not established that the restrictions of competition arising from the NBA did not go beyond what is strictly necessary and consequently that it is not justified in maintaining

that the Commission was wrong to dismiss its application for an exemption in the contested decision (see, in particular, Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015, paragraph 77, and Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 58). Accordingly, it must be concluded that in the application of Article 85(3) of the Treaty the Commission did not rely on incorrect facts or commit any error of law; nor did it make any manifest error of assessment. This submission must therefore be dismissed.

117 Since the claims for the annulment of Article 2 of the Decision must be dismissed, it is not necessary to examine the applicant's plea that the annulment of Article 2 of the Decision by the Court must entail the annulment of Article 1. Since the applicant's claims directed against Articles 1 and 2 of the Decision have been dismissed by the Court, the claims directed against Articles 3 and 4 of the Decision must also be dismissed.

118 It follows from all the foregoing that the application must be dismissed.

Costs

119 According to Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party must be ordered to pay the costs if they have been applied for by the successful party. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those incurred during the proceedings before the Court of Justice for the adoption of interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those incurred in the proceedings before the Court of Justice for the adoption of interim measures.

Cruz Vilaça Barrington

Yeraris Briët Biancarelli

Delivered in open court in Luxembourg on 9 July 1992.

H. Jung J. L. Cruz Vilaça

Registrar President