OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 18 OCTOBER 1983 [1]

Mr President,
Members of the Court,

I — Introduction

1. In Joined Cases 43 and 63/82 the Court is faced for the first time with well-nigh all the problems arising in connection with the application of competition rules in general and with the application of Article 85 of the EEC Treaty in particular to the phenomenon of resale price maintenance. In the second part of my opinion I shall therefore make certain observations about those special aspects of resale price maintenance in general which concern competition law, in so far as relevant to these proceedings.

2. For a summary of the facts and the course of the proceedings in these cases, including the arguments of the parties, I would refer the Court in the first place to the report for the hearing. However, in order that the applicant's arguments may be fully considered I have also had regard, apart from the report for the hearing, to the numerous amendments which the applicants have proposed should be made to that report.

The most important matter which I should like to call to the Court's attention at this early stage is the fact that the contested Commission decision contains no binding provisions regarding the systems of collective resale price maintenance applicable in the Netherlands and Flanders. It concerns exclusively the "transnational" agreement between the two national associations, containing a system of collective exclusive dealing and collective resale price maintenance in trade in Dutch-language books between Belgium and the Netherlands (decision of 25 November 1981, Official Journal 1982, L 54, p. 36, paragraph 1 of the recitals and Article 1). However, I must add straight away that the national systems have presumably played a considerable part as regards the grounds on which the decision is based, whilst moreover in the proceedings a great deal of attention has been paid — *inter alios* by the parties intervening in support of the applicants — to the alleged possible consequences of the decision for national systems of resale price maintenance for books. In this Opinion I shall revert in detail on several occasions to this relationship between the Belgian and Netherlands national systems and the transnational agreement and, in addition, to the legal relevance of that relationship. However, I should like to mention at this stage that the figure of speech which the applicants have preferred in this connection, of national walls or pillars which must be preserved from collapse by a Community roof does not strike me as being entirely felicitous. On the contrary, both national systems, according to the information provided for the hearing, have operated for many decades as national "houses" constantly being consolidated with the same sort of

1 — Translated from the Dutch.

national roof of obligations and sanctions. But if a figure of speech is to be used, the transnational agreement operates rather as a corridor between the two national houses. Outside that corridor no intruders from the other country are allowed into either house and inside it trade between the two countries is subjected to effective supervision to ensure that the corridor rules are observed.

As appears from the case-law of the Court regarding Articles 30 to 36 of the EEC Treaty, however, not all controls or obligations affecting imported goods need necessarily be unacceptable. In particular, in the context of Articles 30 to 36 binding general considerations of a non-economic nature may justify exceptions to the prohibition of import restrictions and in the context of Article 85 (3) — in contrast to the case of measures adopted by the authorities — in particular economic considerations of general importance may provide a basis for dispensation. Another point at issue in these proceedings is how far cultural considerations too may justify dispensation under Article 85 (3). As I shall show subsequently, however, generally speaking a substantive appreciation of the decision at issue depends for the most part more on the evaluation contained therein as to the four requirements of Article 85 (3).

In addition to the parties' written pleadings summarized in the report for the hearing, their written answers to the Court's questions, mentioned in the report, and the oral procedure have substantially elucidated their viewpoints. As of course it has not been possible to include the latter clarifications in the report for the hearing I shall devote a fair amount of attention to them at a later stage in my Opinion.

3. The remainder of my Opinion will be arranged as follows. After the second section about the relevant aspects of the phenomenon of resale price maintenance in general, I shall examine in Section III the substantive claims of the applicants. Then in Section IV I shall consider the extent to which their submissions as to procedure are tenable and finally in Section V I shall examine, as far as is necessary in the present connection, aspects of the problem of alternative solutions from the point of view of content and procedure and shall summarize the conclusions of my analyses.

II — The problems of applying Article 85 to resale price maintenance in general

1. As I have mentioned, in this second part of my Opinion I shall make certain general observations about the problems arising in the application of Article 85 to resale price maintenance systems. First of all I should like to say that in many countries there was lively discussion, in particular in the 1950s and 1960s, between supporters and opponents as to the advantages and disadvantages of resale price maintenance. These discussions led, at least on the part of the authorities, to a broad consensus in the Western countries in which the balance came down against resale price maintenance, at least in its most developed forms. I have always regarded the study

written by the Danish economist Søren Gammelgaard in 1958 in close collaboration with experts from other Member States for the Productivity Agency of the Organization for European Economic Cooperation [1] as a very representative study of these advantages and disadvantages.

The aspects which I shall consider here in particular are: the concepts of individual and collective resale price maintenance (the Court's first question), the relevance of the distinction between national and transnational resale price maintenance arrangements (the Court's second question) and the Commission's practice and problems with regard to the application of Article 85 to the systems of resale price maintenance (the Court's third question). Although in what I have to say I shall naturally have regard to the Commission's answers to the above-mentioned questions of the Court, I shall add certain observations of my own. Only in the third part of my opinion shall I examine the answers of the Commission and the applicants to the Court's remaining written questions, as those questions are of particular importance as regards the aspects of substantive law brought forward in these proceedings.

2. As regards the difference between *individual* and *collective* resale price maintenance I can in principle concur with the Commission's answer to the Court's first question. In the case of *individual resale price maintenance* an individual producer or several individual producers make agreements with every distributor (and any intermediate trade links) as to the consumer price of an article. In the case of *collective resale price maintenance* a distinction may be made between two forms: a collective obligation for all producers in a given sector to impose resale price maintenance on their distributors (with individual maintenance) and a form in which (whether or not in conjunction with a similar collective obligation) maintenance is effected collectively, for example through all the producers and distributors concerned being obliged as against one another as well to uphold resale price maintenance and/or for that purpose have set up collective maintenance machinery (for exemple the secretariat of their common organization or some other organ of the cartel or a joint representative). As the Court will see, my description of collective *maintenance* differs somewhat from the Commission's in order to take better account of reality in all its many facets. For the form in which resale prices are maintained exhibits in practice a great many variations, the actual effect of which on price discipline may be greater or smaller. Moreover even with individual resale price maintenance it is entirely possible to conceive a system of collective maintenance of consumer prices which have been in such cases voluntarily agreed. If then all or almost all producers require of their distributors

1 — *Resale price maintenance*, published by the European Productivity Agency of the Organization for European Economic Cooperation, Paris 1958, including a survey of the relevant legislation of the Western countries at the time of publication. The principal American views on these advantages and disadvantages (mostly originating in the period referred to) are to be found in Part XII, No 2, of the *Journal of Reprints for Anti-trust Law and Economics* (Federal Legal Publications 1981). As regards British publications in the years in question I would refer in particular to: E. B. Stevens and B. S. Yamay, *The Restrictive Practices Court* (London 1965) and A. Turner, *Competition and the Law* (London 1966), both of which express very critical views about the judgment of the Restrictive Practices Court with regard to the Netbook Agreement, on which the applicants and the interveners supporting them have relied. A brief summary of the German discussions during that period may be found in Immenga/Mestmaecker, *Gesetz gegen Wettbewerbsbeschränkungen, Kommentar zum Kartellgesetz, (1981), pp. 462 et seq.*

voluntary resale price maintenance, the economic effect of such an arrangement and that of an entirely collective scheme will be well-nigh the same. At the conclusion of the oral procedure in these cases the Commission's representative too rightly referred to this variable distinction between individual and collective systems.

As regards the agreement under consideration, the Commission, in its answer to the Court's first question, correctly called attention to the fact that Articles 3 and 4 of the agreement relate to the collective obligation to impose resale price maintenance, whilst Article 5 deals with collective observance. For this purpose the two associations have selected the alternative of a joint committee which has the duty to ensure that the agreement is scrupulously observed and which is authorized, in the event of any infringement, to bring the party in question, by a reasoned opinion, before the appropriate national trade committee. Moreover the authority of such national trade committees to adopt measures for the exclusion of the parties concerned from trading is not affected by the agreement (Article 5 (4)). In this case the method of observance of the rules is thus very highly centralized and the only sanction laid down is the "economic death penalty" of "exclusion from trading".

To these remarks about the differences between individual and collective forms of resale price maintenance I would add that in all the cases I have mentioned the resultant exclusion or restriction of price compeititon at the level of retail trade flows from the purely *de facto* or (in the case of a collective obligation) legally imposed conjunction of a large number of individual agreements between the producers concerned and the usually numerous distributors, as mentioned in the Court's judgment in Case 23/67 (*de Haecht* [1967] ECR 407).

The mention made by the Commission, on page 2 of its answer to the first question, of the economic disadvantages of both individual and collective systems of resale price maintenance which, according to a reference, it has for the most part taken from the same Nederlandse Staatsblad as that from which it borrowed its descriptions of concepts (explanatory note to the Netherlands provisions laying down the prohibitions contained in Staatsblad 110 of 1964) seems to me to be largely justified. They are also identical with the objections to be encountered in the writings mentioned above. They are certainly also *inter alia* of importance for an aprecciation of the rules in question here, albeit not in themselves necessarily decisive, since in these proceedings reliance is placed in addition on the cultural importance of a quantitatively and quantitatively good system of distribution. In contrast to the Netherlands (and Belgian) legislation, in the application of Article 85 (3), the accent is not primarily on demonstrating the objections to a set of rules but on an appreciation of their alleged advantages in the light of the two positive and three negative conditions contained in that paragraph. At a later state in my Opinion, in my statement of reasons, I shall refer again to the influence of this difference in the systems.

3. Certainly as regards these proceedings great importance must be attached to the Commission's answer to the Court's *second question,* which relates to the relevance of the connection between the transnational agreement at issue and the national agreements which form its basis. It is true that the decision does not relate expressly to the national agreements, but it makes constant reference to them.

Since one of the formal submissions put forward by the applicants relates to this point I shall refer again in the fourth part of my opinion to this answer as regards this specific case. For the present I shall confine myself to certain incidental remarks as regards the information supplied by the Commission in its answers to the Court's second and third questions about its policy regarding national systems of collective resale price maintenance in general.

In its answer to the Court's second question the Commission states that its somewhat wait-and-see policy in respect of the national systems of collective resale price maintenance is justified by the fact that it wished to await the effects of the elimination of the (transnational) protection of the national systems. In addition it states, with reference to its answer to the Court's third question, that the consequences of its stand against transnational protection, of national systems of collective resale price maintenance were in its view even in the past no reason to abstain from taking a stand against such transnational protection and that this has never constituted a ground for one of the Member States to claim that the Commission has thus exceeded its authority under Article 85. Finally it appears from the Commission's answer to the Court's third question that even in 1971 the Commission was doubtful whether it had authority to object to purely national systems of resale price maintenance which did not affect products imported or exported.

I would make the following incidental observations on those answers:

In the first place it seems to me that the Commission's doubts about its authority to take action against purely national systems of resale price maintenance are still justified. It is true that in Case 8/72 (*Vereeniging van Cementhandelaren* [1972] ECR 977) the Court stated that: "An agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production." However, when the Commission, in reliance on that statement, took action against the Belgian national system of collectively fixed sale and resale price of wallpaper, the Court took the view that the possibility of unfavourable influence on international trade *in concreto* was insufficiently demonstrated. As far as concerns in particular a national collective system of resale price maintenance which does not relate *inter alia* to imported or exported products it is indeed not immediately clear that this "by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production". To begin with, such a system, as previously stated, primarily provides

protection for the retail trade and not for production. As is clear, producers remain free under such a system to determine their own sale prices, consumer prices and trade margins. At most it might possibly be shown in a specific case that producers too are protected by the system. Next — and this point is more important — it is by no means clear without further proof that a national collective resale price maintenance system which does not affect *inter alia* imported or exported goods results in a reinforcement of national compartmentalization. In the absence of incidental restrictions on competition such as collective rules on exclusive distributorship, producers from other countries remain entirely free to export to the country in question with or without resale price maintenance and trade, including retail trade, from the country in question remains completely free as respects dealings in such imported products with or without resale price maintenance. In this regard too it is only in specific cases that demonstrable special incidental circumstances, such as a supporting system of collective exclusive dealing or higher profit margins guaranteed by the resale price maintenance in the country of importation (which in particular may deprive foreign producers of an important competitive lever if there is a prohibition of all forms of resale price maintenance in the country of export), may lead to compartmentalization as against imports. High profit margins as a consequence of competition with regard to margins in the case of resale price maintenance occur, however, according to the writings previously mentioned, only where there is keen inter-brand competition. In the case of books there is no question of that, even according to the applicants. In consequence of their very pronounced difference of content most books — in contrast to many branded articles — are not, in the eyes of the consumer, interchangeable.

My second incidental observation is to the effect that in my opinion too the immunity of national systems of resale price maintenance in the absence of proof in the specific case of consequences extending beyond the frontier by no means excludes the possibility, in the system set up by the Treaty, of proceeding against effects of transnational rules which impede imports or exports or of clauses in national resale price maintenance systems which affect products imported or exported. In particular this possibility cannot be regarded as excluded either if the consequence of such proceedings is that the maintenance of the national systems is thereby made more difficult or even made impossible in certain circumstances (in particular a compelling national requirement of "Lückenlosigkeit" [no loop-holes] in the system). In this respect a parallel may very well be drawn as regards the system of Article 85 with Articles 30 to 36 of the Treaty. The prohibition of quantitative restrictions on imports and measures having equivalent effect applies also notwithstanding the serious legal and factual consequences of that prohibition as regards the possibility of introducing or maintaining certain purely national economic measures. Thus the prohibition makes it no longer possible, in accordance with the pre-war Netherlands policy during the depression, to protect the national crisis-cartels, which at that time were frequently encouraged, from foreign competition by the imposition of quotas. Likewise the prohibition means that in all cases in which an importation of any significance takes place declarations that cartel agreements are generally binding, such as are still possible in Belgium and

the Netherlands, are in practice deprived of all purpose. In addition the prohibition means that national rules under public or private law for the reduction of over-capacity (although legally permissible) are deprived of any effect if the over-capacity is an international phenomenon. These examples might be supplemented by countless other ones and nothing in the text or in the practical application of Article 85 indicates that the implementation of the article should not have similar factual consequences for national cartel agreements which are in themselves permissible. According to the annual reports regarding the Netherlands register of restrictive agreements these factual consequences of Article 85 for national price agreements permitted in the Netherlands seem moreover in practice to some extent to exceed expectations.

The last incidental comment which I would make is that the observations which I have already made certainly do not mean that in an appreciation of the negative and positive effects of transnational rules as regards resale price maintenance account cannot also be taken of the legal or factual connections of those transnational rules with purely national rules. The content and consequences of transnational rules may indeed be determined *inter alia* by such national rules. This conclusion, as far as concerns the possibilities of applying Article 85 (3), enures also for the benefit of the undertakings concerned. The justification of a restrictive agreement with transnational effects may thus be found — just as is possible under Article 36 in the case of measure adopted by the authorities — as a contributory or even a primary factor in its objectives of public interest within the national markets concerned.

4. In its answer to the Court's *third question* the Commission observes in the first place that there is very little question of any *development* of its policy as regards the national and transnational aspects of collective and individual price maintenance systems, "because the Commission has made it clear from the beginning that it was an avowed oppenent of any price agreement relating to the price for the ultimate consumer, whether in the form of a direct agreement between producers or of a resale price imposed on distributors".

Then the Commission gives an informative summary of its detailed administrative practice in this matter to which I should like to refer. In my view the incidental observation of the applicant in Case 63/82 at the time of the oral procedure which is in itself correct, to the effect that the resale price maintenance rules in question mostly formed part of agreements which included other restrictions on competition as well does not detract from the relevance, for the purpose of an understanding of its policy in this matter, of these provisions of the Commission, which are contested before the Court in one case only.

Moreover the summary confirms that — with the exception of the decision with regard to Beglian wallpaper which was declared void by the Court — the Commission has hitherto in its decisions carefully abstained from interfering directly with national price maintenance systems the effect of which on imports or exports has not been specifically demonstrated. Indeed the Commission seems always to have taken the view that the public interest in free movement of

goods ought to prevail over sectional requirements for given margins of profit, to be guaranteed by watertight resale price maintenance. In some cases — in particular in the Deutsche Philips and Gero decisions — the Commission seems finally to have prohibited even individual resale price maintenance with effects beyond the national borders. This may help to explain its hesitation in accepting in the book trade an individual system of resale price maintenance as an alternative.

III — Substance — The applicants' complaints

1. Alleged infringement of human rights

The Flemish Association as its first submission with regard to the substance of the case claims that the Commission's decision infringes the right to freedom of expression laid down in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This submission is based on the one hand on the proposition that the liberalization of trade between States ought to carry with it the collapse of national systems. I shall deal with this proposition when considering the decision in the light of the conditions laid down in Article 85 (3). On the other hand the submission is based on the disastrous consequences which the prohibition of the resale price maintenance system will have, it is alleged, as regards the scope and quality of book production. The prohibition therefore amounts to indirect censorship. I shall deal with this submission too when examining the decision in the light of Article 85 (3). As a separate submission the claim may to that extent be left out of account. At the moment I restrict myself to an observation regarding the assumption which underlies this claim, namely that a guarantee of free competition in the book market may in certain circumstances conflict with freedom of expression. With reference to the Court's judgment in the *Nold* case (Case 4/73 [1974] ECR 491, paragraph 18), the Commission correctly observes that basic rights must always operate subject to given social and economic circumstances (p. 20 of the defence). Indeed considerations of profit will never make it possible for publishers with or without resale price maintenance (at least without an external subsidy) to publish all the manuscripts offered to them. It is therefore naturally going too far to speak of indirect censorship and what is more the submission seems to have little connection with the question of whether or not there is resale price maintenance.

2. Alleged infringement of the Paris Convention

A second submission of the Flemish Association is to the effect that the decision conflicts with Article 10 bis of the Paris Convention inasmuch as only the retention of a resale price maintenance system can protect dealers from the policy of "loss-leading" which is not to be encountered in Belgium but which, it is claimed, is prohibited with direct effect by the article in question.

Article 10 bis of the Paris Convention, in so far as relevant here, is worded as follows:

"(1) The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor;

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor;

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose of the quantity of the goods."

In Lisbon in 1958 a third prohibition, that of misleading advertising, was added.

I agree with the Commission (p. 22 of the defence) that from the wording of the above provision it appears clearly that there can be no question of its having direct effect and that there is nothing to indicate either that the Convention countries are required by that article to prohibit "loss-leading policies" (in particular the sale of given products at a loss). By no means all Member States have prohibited such a commercial practice and the Commission therefore concludes, correctly in my opinion, that it is not possible to speak here of a general principle of law to which the Court must have regard. Finally the decision leaves unimpaired the possibility of applying Belgian legislative prohibitions in the matter. This submission must therefore be dismissed.

3. First alleged infringement of Article 85 (1) (necessary restriction of competition)

Referring to the Court's judgments in Cases 26/76 (*Metro* [1977] ECR 1875) and 56/66 (*Société Technique Minière* [1966] ECR 235) the applicants claim that Article 85 prescribes only the maintenance of effective market competition, that competition varies according to the nature of the product in question and the economic structure of the market concerned and that that is the context in which it must be regarded. In this case it is not possible, they claim, to speak of a restriction of competition in the sense of Article 85 (1) in view of the means of effective competition which subsist.

However, the Commission has correctly observed that the passage referred to in the *Metro* judgment cited relates to the application of Article 85 as a whole (including paragraph (3)), whilst later in the same judgment it is stated that price competition can never be entirely eliminated (that is, even when Article 85 (3) is applied). In its defence (pages 26 to 28) the Commission has put forward many additional arguments showing that the applicants wrongly place reliance on the *Metro* judgment. In my view, however, the arguments already cited may suffice. As I have already shown in paragraph 2 of Section II of my Opinion, resale price maintenance results at the level of retail trade in an exclusion or at least (if certain exceptions may be allowed) in a restriction of price competition for the products concerned. On the basis of the essential significance of price competition in the system laid

down by Article 85, as stated by the Commission and the Court and regard being had to the unambiguous wording of Article 85 (1), there can in my opinion be no doubt that resale price maintenance which is applied by all or almost all of the producers of the goods concerned has the effect of a (perceptible) restriction of competition within the meaning of that paragraph. More particularly the provision in question here concerns the first example of a restriction of competition, namely agreements which: "(a) directly or indirectly fix purchase or selling prices" specifically at the level of selling prices for the retail trade and thus of purchase prices for the consumer.

This submission should therefore be dismissed.

4. Second alleged infringement of Article 85 (1) (requirement of (perceptible) unfavourable influence on trade between Member States)

Next the applicants deny that their agreement is capable of having an unfavourable influence on trade between Member States. The more detailed submission is contained in the Netherlands Association's application (pages 28 to 31). In this connection the association initially cites the relevant paragraphs from the Court's judgments in the *Consten and Grundig* cases (Joined Cases 56 and 58/64 [1966] ECR 299) and *Hugin Kassaregister AB* (Case 22/78 [1979] ECR 1869). In view of the importance attributed to these quotations I reproduce them here.

In the first-mentioned case the Court stated with regard to the criterion under discussion here:

"In this connection, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States." [1]

and in the *Hugin* case:

"Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market."

The applicant now claims that the agreement in question aims at the integration of the Flemish and Dutch linguistic and cultural community, that it is precisely the abolition of this transnational resale price maintenance system which will lead to the partitioning of the Flemish and Dutch market and that the Commission wrongly attributes to the Belgian-Netherlands frontier a role which is disadvantageous for the realization of a single market between the Member States. Moreover competition between a bookseller in one country and a bookseller in the other is only possible, in the main, in relation to the same titles (intra-brand competition) and such

1 — In its quotation of this paragraph the applicant incorrectly refers to "objective" (singular), which naturally may give rise to misunderstanding as to the scope of the paragraph, but this is corrected by the accurate quotation from the other judgment.

competition is hardly relevant in view of the slight price elasticity of books. The applicant then claims also that the price level of books does not differ from one country to another, that the collective exclusive dealing agreed upon is no longer observed and that the Commission wrongly assumes the existence of two markets divided by a fortuitous frontier.

As the applicant's claim that the Commission wrongly took into account collective exclusive dealing which, it alleges, is no longer observed, is primarily regarded by the applicant in its pleadings as a formal complaint, I shall return to this matter in greater detail in the fourth section of my Opinion. At the moment it suffices to observe that, whatever may be the position as regards actual implementation, is is clear that the provisions in this regard in the transnational agreement have never been rescinded in spite of proposals to that effect. At least potentially therefore, these provisions may certainly exclude trade between Member States with unrecognized publishers or dealers and in this connection I would refer also to Article 5 (4) of the agreement prescribing penalties, which I have already mentioned.

As regards the applicants' remaining argument, I would point out in the first place that the Commission has rightly remarked that according to the same *Consten and Grundig* judgment cited by the Netherlands applicant the criterion relating to international trade is primarily of importance for the division of responsibility between the Commission and the national cartel authorities.

As the applicants themselves have acknowledged that their agreement is primarily intended to prevent parallel imports which might affect the national systems of resale price maintenance it is hardly possible for them to maintain that this form of international competition and its restriction are scarcely relevant.

Finally the applicants' claim that the transnational resale price maintenance is intended precisely to promote market integration at a uniform level in Belgium and the Netherlands is naturally entirely untenable in the light of the objectives of the Treaty. As appears from Article 3 (f) and is expressly confirmed in the Court's case-law the provisions with regard to the establishment of a common market, including the rules on competition, have as their object "the institution of a system ensuring that competition in the common market is not distorted". A price cartel affecting consumer prices (which is what resale price maintenance amounts to, as previously shown), which affects in particular international trade is incompatible with this object — irrespective of the price level, as the applicants moreover might have been able to deduce from the last part of their own quotation from the *Hugin* judgment.

This submission must therefore be dismissed. So must the separate claim by the Flemish Association that this influence is not perceptible. Apart from what I have already stated about the relevance of the exclusion of price competition I think it is important for the rejection of this argument that, as the

Commission has observed, this applicant does not deny that Belgium is especially a country of import for Dutch-language books. The opportunity for parallel imports of books not subject to price maintenance from Belgium to the Netherlands (an important target of the transnational agreement) is moreover particularly great as a result of this concentration of production in the Netherlands.

5. The applicability of Article 85 (3)

The applicants' most important substantive submissions undoubtedly relate to the Commission's refusal to grant an exemption under Article 85 (3) for the disputed transnational agreement. Only in the following two sections of my Opinion shall I examine the procedural complaints which the applicants also make against the Commission in this connection. The major procedural complaints against the Commission concern on the one hand the fact that by its decision it anticipated the later appreciation of the national systems and on the other hand that it made no mention of any merits of a transnational system of individual resale price maintenance.

5.1. First condition

The applicants contend in the first place that the disputed agreement, contrary to the Commission's view, does in fact contribute to improving the production and distribution of books. This improvement is, it is claimed, to be attributed in each case to the resale price maintenance system. This system, they allege, is the only thing which allows both publishers and booksellers the opportunity to arrange for cross-subsidization between best-sellers and less profitable books, that is, between titles with a high and those with a low velocity of circulation. At the wholesale level it is claimed moreover that that agreement has led in Belgium to a very far-reaching automation and in the Netherlands to the establishment of the Centraal Boekhuis [Book Centre], which plays a great part in the rapid distribution of books. Both forms of rationalization of the wholesale stage are possible only in a system of resale price maintenance.

As regards the production level, to begin with I share the Commission's opinion that the applicants failed to give a convincing answer both at the hearing by the Commission and in the various stages of the proceedings before the Court to the express question, which was repeatedly put, as to why publishers cannot, like the many other producers with differentiated production, finance losses on one product with profits on another, even without resale price maintenance. Publishers are of course free, even without resale price maintenance, to fix their own selling price direct from the publishing house. The most important attempt at such an answer was made by the Dutch Association's representative during the oral procedure. Briefly summarized, his argument amounted to a statement that publishers do not know in advance which titles appear to be best-sellers and which do not, and a claim that at most a quarter of new titles run to a reprint and that as a rule profit comes from reprints and not from the remaining titles. For that reason the

publisher is obliged to cover a broad general range in which the marketability of a new publication is in practice not predictable.

I regard this argument too as being far from convincing. To begin with, the existence of a large number of specialist publishers demonstrates that the suggestion that the market situation and the cost-price structure to which reference is made *forces* the publishers to keep a broad general range is not in accordance with the true state of affairs. Moreover the Commission is in my view correct in stating that publishers, in contrast to many other producers with a differentiated spread of products, can sell successful titles for many years in great numbers and with costs which decrease after the first impression. In so far as it may be correct that the success of the first impression is not predictable and that profit is never made on it, it seems also from the arguments at the oral procedure that roughly a quarter of titles, the identity of which is well known, may well undergo one or more reimpressions. The risk of loss with regard to such titles is thus practically eliminated and the incidental argument that a broad general spread is necessitated no longer applies to the same extent. On balance I think too that the market situation and the cost-price structure for books certainly gives the publishers not less but probably more opportunity for cross-subsidization of losses than those available to other producers with a differentiated spread of products. The profit figures produced by the Commission for the biggest Netherlands publishing houses seem to confirm this.

Nor is it in my opinion surprising that the applicants have laid the main stress in their argument on the claim that cross-subsidization of losses within the publishing houses is not sufficient if the continued existence of an adequate number of booksellers with a broad range is not ensured. That is the reason for which I regard it as appropriate to deal with the alleged improvements in production and distribution together. For the continued existence of a sufficient number of dealers with a broad range what is clearly needed in the first place is a rational and rapidly operating wholesale trade with a broad if not complete range. However, the applicants claim, but have not made it seem credible in any way at any stage of the procedure, that the improvements in efficiency in the wholesale trade can no longer be maintained after the termination of the transnational agreement. The actual stress is laid on the claim that the continued existence of a book trade holding a broad range in stock at the retail level will be threatened by the termination of the transnational agreement. To that is added the further claim that its termination will inevitably make impossible also the continued existence of the national systems. I shall therefore examine these two claims in greater detail.

As regards the first claim I would point out to begin with that the Commission has already observed in its decision (last sentence of paragraph 51) that: "In spite of the resale price maintenance scheme there has clearly already been a sharp drop in the number of general

booksellers in the Netherlands, partly due to the rise of self-service shops selling almost exclusively popular books and magazines and the fairly substantial growth in the turnover of book clubs, which generally offer a fairly limited range of books." This, it is true, is specifically denied by the Flemish Association, but it appears, even from the statistics produced by the applicants themselves, that the market share of booksellers offering a general range in Belgium amounted in any case to less than 50% in the last year for which figures are available and that in the Netherlands (including stationers, recognized department stores, mail-order booksellers and kiosks) it in fact declined from 1977 to 1980 (expressed in numbers of sales outlets) from 65% to 54%. In turnover figures expressed in guilders the market share of the booksellers offering a general range in the wide sense referred to declined in the Netherlands to approximately the same extent over the same period. For these figures I refer in particular to the answers of both associations to the Court's seventh written question. Secondly the applicants have not demonstrated convincingly that the risk for booksellers holding stocks of books is as great as for the large-scale publishing houses. In contrast to the latter, booksellers offering a general range can very easily ensure that the number of reprints in their stock forms a greater proportion of the total number of titles than is the case with the publishing houses. In addition the claim that next to nothing is earned on first impressions clearly does not apply to the booksellers to the same extent as to the publishers. With freedom to determine their margin of profit (which does not exist in the case of resale price maintenance) this will probably apply to an even lesser extent. The possibilities of internal compensation for booksellers holding stocks thus seem to me on balance in the case of free determination of prices to be greater than for the publishers rather than less.

On the whole the applicants have put forward no arguments for the opposing view but have rather equated booksellers and publishers in this respect without further ado. My statements with regard to the publishers will then also apply to booksellers holding stocks. Finally the conclusion that a collective resale price maintenance system supplies no reason at all in itself to encourage booksellers to hold greater stocks seems to me to be decisive. Moreover with such a system they may very well opt for a more restricted range with exclusively popular books. If they do not so opt that will principally be because they see greater advantage, or at least sufficient advantage, in holding a broad range, that is to say because with such a broad range a sufficient demand exists on the part of a section of the public. It is difficult to see why that demand from a section of the public should disappear if resale price maintenance were to be abolished. If the publishers attach such great importance to the continued existence of a large number of booksellers with a broad range, it is difficult to see why the publishers, even in the case of the complete elimination of any form of resale price maintenance, should not be able to allow this type of bookseller a lower purchase price than booksellers with a smaller range. This too has been correctly noted by the Commission. Fewer objections would arise from a mutual agreement to

that effect than from the system of resale price maintenance which has been practised.

As I mentioned previously, the applicants' argument is based *inter alia* on the claim that the continued existence of the two national resale price maintenance systems stands or falls with the existence of the transnational agreement, since the latter serves only to make the national rules watertight. In that case the alleged improvements in production and distribution must be attributed primarily to the national rules. Only if the termination of the transnational agreement were to lead inevitably to the collapse of the national rules, as claimed, would a causal link likewise be demonstrated between the alleged advantages and the transnational agreement.

I concede that the forces of a free price mechanism cannot be so easily suppressed. If certain dealers see economic advantage and economic opportunities in purchasing books at lower prices than those laid down they will not shrink from finding structures which make it possible for them to do so. It may be seen from the fact to which I have already referred, to the effect that it was deemed necessary to provide in Article 5 of the transnational agreement for the sanction of the economic death penalty of total exclusion from trading, how strong the market prices are which are involved in a combination of national rules and a transnational agreement in resisting the passing on of lower costs in prices. However, the important point to note here is the fact that Netherlands case-law as far as the last instance has made it clear that on the basis of the national resale price maintenance system it is possible to take action also against artificial export which has as its only purpose the opportunity to import again free from price maintenance (the so-called U-turn mechanism applied by certain supermarkets or discount houses). As the re-importation of books bought from ordinary traders in Belgium always entails more or less high costs, it is difficult to see — apart from the difficulties involved in preventing it — that if such a course again becomes possible the continued existence of the Netherlands system will be endangered if the prices and margins of profit under the Netherlands resale price maintenance system are fixed at a reasonable level.

In Belgium this whole problem of undercutting of prices by re-importation hardly occurs, as the vast majority of Dutch-language books, as stated, are published in the Netherlands. It may be conceded that this very fact perhaps makes more difficult the preservation of a resale price maintenance system in Belgium by a national system, but the practice made clear during the proceedings shows that even the conclusion of the mutual transnational agreement did not make possible such a rigorous observance of the Belgian national system as in the case of the Netherlands system. Nor does the second claim in the applicants' argument regarding the first positive condition of Article 85 (3), to the effect that the termination of the transnational agreement will lead also to the collapse

of the national systems, carry conviction. The applicants' complaints regarding the appreciation of the transnational agreement in the light of the first condition of Article 85 (3) must therefore be dismissed. In this connection I have left out of account the argument contained in paragraph 53 of the decision, to the effect that in any event any alleged advantages derived from the rules are outweighed by the disadvantage that the elimination of any price competition in the distribution of a given title removes the most important stimulus to rationalizing and improving the distribution system. However, I shall revert to this argument in another connection.

5.2. Second condition

Since, as I have shown, the applicants have not demonstrated convincingly that the transnational agreement contributes to improving the production and distribution of books, it is strictly speaking superfluous to consider in greater detail the appreciation of the decision against the second positive condition of Article 85 (3). That condition includes the requirement that the agreement must allow consumers a fair share of the resulting benefit. Nevertheless, I should like to make the following observations, for the sake of completeness, as regards this most important condition. The applicants claim in the first place that the alleged advantage for consumers lies in the benefit they too have as a result of the broad availability which they see as the result of collective resale price maintenance. As it is clear that neither all publishers nor all booksellers offer a broad range of titles, this argument must be rejected. To judge by the interest in other channels of distribution, obviously only a proportion of consumers are interested in this broad range of titles. The considerable proportion of consumers [1] who do not belong to what the Dutch Association, on page 3 of its answer to the Court's seventh written question, refers to as "active purchasers" and who according to the answer seldom or never visit bookshops with a broad range of books, are on the contrary prejudiced by the rules, since they prevent the savings made by booksellers with a restricted range from being passed on to the consumer in the form of price reductions. It is thus impossible to state that *the* (that is to say, *all)* consumers share this alleged advantage of the agreement.

Next the applicants have argued that only a system of collective resale price maintenance can enable the public to be provided with good service in the form of information and individual orders and that that too is beneficial to the public. On this point too it is sufficient for me to observe that only the category of active purchasers to which I have already referred makes use of these services and that the consumers who place no value on these services must nevertheless pay a share of the costs of the system, since they cannot share in the cost advantages available to booksellers who do not provide such services.

To sum up, I regard the more detailed argument put forward by the Commission with regard to this essential condition for exemption in paragraphs 54 to 56 of its decision and supplemented during the proceedings before the Court as not having been refuted by the applicants as regards this second condition either. Moreover I was struck by the fact that, in the later stages of the proceedings before the Court and

1 — For the size of this proportion I would remind the Court of the figures mentioned by the Dutch Association's representative during the oral procedure.

in particular during the oral procedure, the applicants scarcely made any additional efforts to refute the Commission's argument on this matter. The gravamen of their claim on this point was transferred instead to the cultural argument which, in accordance with the structure of the disputed decision, I shall deal with in discussing the first negative condition of Article 85 (3).

5.3. Third condition

Strictly speaking an appreciation of the transnational agreement in the light of the "indispensability requirement" of Article 85 (3) (a) is superfluous where an agreement does not satisfy both positive requirements. Yet there are three reasons which persuade me that it is desirable to consider this requirement too in greater detail. (a) First of all, as I have said, the cultural factor, which played such a large part in the later stages of these proceedings and also in the political discussions regarding the Commission decision, can only be considered in this context in conjunction with the structure of the Commission decision. (b) The same applies, albeit to a lesser extent, to the discussion about alternative solutions. However, I shall come back to this point too later on in my Opinion in connection with the related procedural aspects. (c) Finally the discussion of this requirement offers a good opportunity to revert once more to the *objections* in connection with competition policy against collective resale price maintenance. In the structure of Article 85 these objections are assumed in the case of price agreements covering a whole sector. It was therefore necessary for the Commission in its appreciation of the agreement in question in its decision only to make a summary examination of this agreement, which it did in particular (see paragraph 53) in the context of the appreciation of the agreement in the light of the first positive condition of Article 85 (3). In the system laid down by Article 85 in fact the undertakings concerned must, in so far as necessary with the cooperation of the Commission, show first of all that an agreement contributes to making objective improvements in production or distribution, which may justify an exemption from the prohibition in principle of price agreements laid down in Article 85 (1) and which moreover counterbalance the disadvantages connected with such agreements. The balancing of the advantages and disadvantages of a set of rules, in other words the drawing up of what in France is termed the "bilan économique", must therefore take place exclusively in the context of the first condition of Article 85 (3). The system of this paragraph is somewhat strained if this balancing up is carried out again in the context of the first negative condition of Article 85 (3). The applicants have dealt with this point however *inter alia* in respect of the requirement of indispensability. Moreover it should not be forgotten that the national cartel policy of the two Member States concerned is based on the concept of misuse, in which it is not the advantages but on the contrary the disadvantages which must be demonstrated from the point of view of public importance. In order to convince public opinion in the Member States in question — which is sensitive to the price of books — the Commission might then in my view have done better to devote a little more attention in its decision to these disad-

vantages of the system, although, as I have mentioned, that was not necessary in the system laid down by Article 85. Only in its answer to the Court's second written question and during the oral procedure did the Commission make good this omission in good measure by further amplifying the disadvantages briefly referred to in its decision.

At this point I shall deal in succession with the three points mentioned, on which the applicants' submissions are concentrated.

(a) The cultural argument

In my view the Commission has given itself much unnecessary difficulty by claiming in the last subparagraph of paragraph 60 of its decision that: "It is not for undertakings or associations of undertakings to conclude agreements on cultural questions, which are principally a matter for government." In answer to the Court's sixth question the Commission, it is true, made a considerably more differentiated approach to this proposition, as even the applicants admitted during the oral procedure, but as regards public discussion of this matter (including that in the European Parliament) the damage was already done. Moreover the Commission also claims in that answer (p. 18) that: "It cannot readily be conceived that the Commission should decide that the condition of an improvement in distribution is satisfied purely and simply because certain cultural values are promoted by a system of collective resale price maintenance"; and moreover that: "In appreciating an agreement in the light of Article 85 (3) it neither can nor may attribute decisive significance to certain culturally desirable consequences of a given form of distribution without more ado." In making this appreciation the Commission, it states, can take the cultural consequences of an agreement into account only in "a negative sense". "That is to say that the Commission must take care that no cultural values are destroyed." This, it claims, it did in paragraph 57 *et seq.* of its decision in dealing with the requirement of indispensability and I would agree with that view.

I mentioned that the criticism which the Commission incurred by the attitude referred to was unnecessary; that was because in view of the arguments it had already put forward in the decision there was no need for it to make any such claim. The applicants' cultural argument as they present it in practice takes the form of the need for a broad range of book titles with publishers and a sufficiently large number of booksellers. But the Commission had already shown that this need, which it acknowledged as such, is not met by a system of collective resale price maintenance, still less that such a system — transnationally reinforced — is indispensable for the purpose. I therefore regard it as unnecessary also, and undesirable as well, to examine in detail the passage referred to regarding cultural policy. I confine myself to expressing my regret at the undifferentiated form — which gives rise to misunderstanding — in which this superfluous passage in the decision was worded and repeating my earlier observation that with or without resale price maintenance publishers and booksellers must always operate subject to the incidental condition of a sufficient return. There can therefore never be any question of an absolute priority of cultural over economic considerations.

In the same subparagraph of its decision — and equally unnecessarily — the Commission has created still further difficulties for itself by its reference to the Belgo-Netherlands Treaty on the Dutch-language Union. On the same grounds of the irrelevance of this argument I shall refrain also from going in detail into the applicants' broad claims regarding the argument. I shall content myself with three observations on this point. In the first place I doubt whether Article 233 of the EEC Treaty in fact applies, in addition to the customs and economic union between Belgium, Luxembourg and the Netherlands (and the monetary and economic union between Belgium and Luxembourg), to the Belgo-Netherlands Language Treaty. As the EEC Treaty itself does not apply to such cultural matters, it does not seem at first sight to be consistent with the *ratio* of Article 233 to give it such a broad construction. In the second place, like the Commission, I cannot see that a uniform language ought also to require the laying down of uniform prices for books in Belgium and the Netherlands. If the Belgian and Netherlands Governments take the view that it should, it will ultimately be necessary to await a Belgo-Netherlands arrangement on the part of the authorities before the question of the applicability of Article 233 can actually be put to the test.

(b) Alternative solutions

As regards the applicants' argument that no less far-reaching restrictions on competition are available in order to attain the alleged positive results of the transnational agreement, I should like to point out first of all that the decision leaves unaffected even as regards Belgium and the Netherlands purely national systems of individual resale price maintenance such as exist in Germany and the United Kingdom. The same is true of the collective national systems of resale price maintenance such as now exist in Belgium and the Netherlands. Unless on closer examination of the national rules it should appear that they also impede normal commercial parallel imports into both countries or otherwise relate to normal import and export it seems to me moreover improbable if the line of policy hitherto pursued by the Commission, which I have already described, is continued, that it will still turn its attention to the national systems as such. I have already indicated the legal and economic reasons which would in fact hinder any alteration in that policy. The parties intervening in support of the applicants, too, who have clearly been motivated above all in their intervention by concern as to the possible indirect consequences of the decision for national systems in other Member States, cannot actually find in the contested decision, for the reasons mentioned, any grounds for their concern.

As the Commission has correctly contended, the applicants cannot rely as regards matters of legal form on the French rules to which reference has been made because they are rules made by the national authorities, and they cannot do so as regards their content because the French rules, in contrast to the agreement at issue, expressly make possible certain competition at the distribution level.

It may be acknowledged that the Commission has taken a perceptibly more reserved attitude as regards transnational alternatives to the arrangement in question. As regards a transnational collective support system of national

individual resale price maintenance systems, these reservations are clearly illustrated in particular by paragraphs 27 to 30 inclusive of the decision. At the conclusion of the oral procedure the Commission's representative in answer to a question from the Court threw further light on the Commission's reservations with regard to such an alternative. As I mentioned earlier, I regard this argument as convincing in so far as the boundary between individual and collective systems is fluid to such an extent that a system which from the formal point of view is individual may involve more or less the same economic and legal drawbacks — certainly in the case of collective maintenance — as a completely collective system. In particular this applies if all or well-nigh all publishers apply a similar individual system. From the legal point of view, nevertheless, the decision does not arrive at any conclusion with regard to such an alternative.

During the proceedings, moreover, the Commission mentioned various other alternatives to a system of resale price maintenance intended to attain the objective pursued, at the level of both publishers and distributors. In its answer to the Court's sixth written question (p. 23) it has summarized these alternatives once again. As previously mentioned, I shall return in the following parts of my Opinion to the procedural grounds for the Commission's hesitation in going too far in formulating alternatives in the context of Article 85 (3).

To sum up, my view is that the question of indispensability does not need to arise at all in this case since the Commission, in the context of its freedom to formulate policy in the matter, has come to the conclusion on compelling grounds that the two positive conditions of Article 86 (3) were not satisfied. However, the Commission has made it clear into the bargain that its decision makes possible various alternative solutions, in particular national ones, which restrict competition less than the present conjunction of two sets of national rules with a transnational agreement intended to make the national rules watertight. I have already shown why, in my opinion too, this finishing transnational touch is not indispensable for the continued existence of the national rules. The existence of the German and English national systems, which in spite of the fact that the book market in these languages extends beyond frontiers has no transnational umbrella, confirms the Commission's judgment in this matter.

(c) The economic drawbacks to the rules

It is not without good reason that Article 85 (3) (a) makes it impossible to impose on the undertakings concerned "restrictions which are not indispensable to the attainment of these objectives" — that is to say objectives which in principle are regarded as positive. The applicants have claimed that experience shows that the resale price maintenance system is the only means of ensuring optimal production and distribution in the book trade. Apart from the fact that experience does not in any case show that transnational agreements are also necessary for this purpose, this thesis entirely fails to recognize the economic objections to resale price maintenance, which were acknowledged in the course of the 1950s and 1960s throughout the vast majority of the Western world (though in Germany somewhat later). In

this connection I refer in the first place to what I said in Section II (1) and (2) of this Opinion about these objections and to the literature which I then cited. The argument which the Commission put forward in its answer to the Court's first question regarding these economic disadvantages may be summarized to the effect that even individual resale price maintenance makes it impossible for distributors to reflect differences in costs in their sale prices. In the case of collective resale price maintenance this objection is considerably reinforced for the reasons given by the Commission. In the first place purchasers can then no longer choose between goods with and goods without resale price maintenance in a given line. In addition producers can no longer adapt their sales policy in this respect to changed circumstances. Finally control and maintenance of fixed resale prices in the case of collective maintenance of the system are very much stricter. The normal power relationships between individual producers and their distributors are superseded by the power relationships between the price-maintaining collective and the (potential) individual price-breakers. I should like to add to the argument as thus summarized that a centralized control system will usually be much better organized than a control system of individual producers and that collective sanctions, such as complete exclusion from trading, tend to be much more severe in nature than sanctions (frequently legal proceedings) of individual producers. Above all, however, I should like to add to the argument that every generally or almost generally applied resale price maintenance system eliminates the permanent pressure for price reduction arising from effective price competition. It is just for that reason that a resale price maintenance system does not in fact guarantee an optimal distribution of books, as the applicants allege in their submissions about the application of the requirement of indispensability. The incentive of price competition for the devising of more efficient methods of distribution is in this way eliminated for the book trade. What is more, the decision itself correctly places the main stress on this point in paragraph 53 and the Commission further elaborated the matter convincingly during the oral procedure.

It is against the background of the seriousness of these general objections to resale price maintenance that the requirement of indispensability laid down in Article 85 (3) for the present transnational agreement must be interpreted and assessed. The more serious the restrictions on competition, the more strictly this requirement of indispensability must be interpreted. On the basis of my examination of the decision in the light of the first two conditions of Article 85 (3) it will already be clear that for me too there is no doubt that the reinforcement of the national systems brought about by the transnational agreement cannot survive the test of the requirement of indispensability. On the contrary, after studying all the documents I am personally of the opinion that with the continued existence of adequate public interest bookshops selling a general range even with the complete elimination of any resale price maintenance will not be worse served but better than if it is retained because of a greater freedom of manoeuvre as regards price formation. In this connection I would point out in

passing that in addition the countless more culturally orientated shops, despite the fact that they charge higher prices than department stores and supermarkets for the same category of products, have sprung up like mushrooms out of the ground. A quantitatively and qualitatively better range will therefore probably be able to go hand in hand with higher prices in the book trade too and need not in any case be more severely threatened by supermarkets and other channels of distribution than is the case today.

All the submissions with regard to the requirement of indispensability should therefore in my view be dismissed.

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

I have already referred to the fact that even the *Metro* judgment on which the applicants have relied rejects the complete exclusion of competition. Here too my presupposition is that examination in the light of the last condition of Article 85 (3) is likewise superfluous if one or more other conditions of that paragraph are not satisfied. For the sake of completeness I would add, however, that the applicants themselves have acknowledged that "interbrand" competition plays practically no part in the booktrade. In these circumstances it can only be concluded that any competition in consumer prices which may still be allowed by the national systems is suppressed by the national agreement. Regard being had to the essential function which the Commission and the Court have always attributed to effective price competition it follows that the agreement in question does not satisfy the last condition of Article 85 (3) either.

IV — The submissions as to procedure

1. Taking into account in the decision of the collective exclusive dealing arrangement

The applicants complain that the Commission based its contested decision on the system of both collective exclusive dealing referred to and collective resale price maintenance, whereas for a considerable time, in particular from the first hearing on 15 and 16 March 1978, it has known that the first-mentioned aspect of the agreement was no longer being applied. As a result, they claim, the decision gives an inaccurate picture of the state of affairs. Consequently the statement of the grounds on which the decision is based is defective since one of the two pillars on which the Commission's attitude is founded has collapsed.

The Commission does not deny that the applicants had informed it that the agreement continued to exist only in theory. On the contrary the fact is expressly stated (paragraphs 22 and 38). It points however to the fact that the provisions in question have never been formally deleted from the contested agreement. Still less has it ever been formally notified of this non-application in the sense that there has been a fresh notification.

In appreciating this submission it is necessary to start with the purpose of the notification, which puts the Commission in a position to acquaint itself with and investigate the agreement as such to establish whether it is of such a nature as not to come under the prohibition in Article 85 (1) or qualifies for an exemption under Article 85 (3). The question now is whether the Commission is required to restrict its investigation and assessment of the agreement, as it

was notified, if those concerned curtail the restrictive operation of the agreement by no longer applying certain provisions, but without formally amending them. In my view the answer should be in the negative. The subject of investigation by the Commission is ultimately the agreement notified by the applicants themselves. Any other concept might frustrate the function of notification and investigation in important respects. Moreover those concerned might restrict the application of the agreement notified for a given period in order to resurrect it in its more restrictive form after the decision, based on the less restrictive actual implementation. In this connection I refer to Case 106/79, *VBBB* v *Eldi Records* [1980] ECR at p. 1149, paragraph 16, in which the Court stated: "The effects of the notification extend to the scope of the agreement at the time of its notification . . .".

From the answers to the Court's ninth written question it appears that exclusive dealing in the Netherlands has indeed not been completely eliminated. Moreover the statement in the decision, paragraph (43), to the effect that (inter-State) trade in books is effected to a large extent between undertakings recognized by, or affiliated to, the associations, has not substantially been challenged in the proceedings.

Finally the Commission has pertinently observed that for an accurate statement of grounds on this point it is sufficient, according to Article 85 (1), for agreements to "have as their object" the restriction of competition within the common market (Joined Cases 56 and 58/64, *Consten and Grundig* [1966] ECR 299). It is common ground between the parties that the provisions in question have that meaning. The submission should therefore be dismissed.

2. Allegation of internal discrepancies and incomplete representation of the facts

Next the complaint is made that the Commission has on the one hand expressly stated in paragraph 1 of the decision that the proceeding does not concern the national system of collective resale price maintenance but on the other hand has declared that the system of collective resale price maintenance under the transnational agreement infringes Article 85, whereas the same collective resale price maintenance system occurs also in the national systems. It is alleged that as a result there is a defect in the statement of the grounds on which the decision is based since the national rules as such never played any part in the proceeding. In view of the importance of this submission I have already made a number of general observations in the second part of my Opinion regarding the relevance of this connection between the transnational and the national systems for an appreciation of this case. I should also like to refer to what I said regarding the substantive aspects of this connection in the third part of my Opinion. As the submission is put forward as a matter of procedure I restrict myself here to the procedural aspects.

It is true that the decision expressly states that the national systems are not the subject of the proceeding (paragraph 1), whilst subsequently, in paragraphs 4 and 5, the distribution and price-fixing

systems for Dutch-language books in the Netherlands and Belgium are described. Finally in paragraph 48 *et seq.* in the context of the applicability of Article 85 (3) certain aspects of collective resale price maintenance in general are examined. In my view this reveals no defect in the statement of the grounds on which the decision is based and is not in conflict with any other formal procedural requirement. In the first place the subject under review is stated in the decision, namely the transnational agreement between the two associations. The national systems are expressly left out of consideration. It was only for a proper presentation of the state of affairs that it was necessary to describe the national systems in order, as the Commission has correctly argued, to make clear the context in which the transnational agreement operates. That description is purely factual in nature. Finally in the third part of the decision in the context of the "Applicability of Article 85 (3)" in relation to the system of collective resale price maintenance laid down in the transnational agreement an examination is made of "certain aspects of collective resale price maintenance in general, since the assessment of the agreement for the fixing of prices of books in inter-State trade cannot be separated from that subject" (last subparagraph of paragraph 48).

The verdict at which the Commission has arrived on this point in respect of the general aspects will be equally applicable to the national system of collective resale price maintenance. That does not mean however that with this the Commission has actually already arrived at a verdict in law affecting the national system as such. For that purpose, as I noted in the third part of my Opinion, what will be of particular importance is the question whether the national agreements in question can influence unfavourable trade between Member States so that the Commission has power to take action or to put it another way whether Article 85 applies to these national resale price maintenance systems in the book sector, which are restricted to one Member State.

The legal appreciation in the decision on this matter relates to the collective system of fixed prices beyond the frontiers. My view then is that in the decision no verdict has been reached as regards the national systems as such. The allegation that the statement of the grounds on which the decision is based is defective should therefore be dismissed.

3. Breach of general principles of law, in particular principles of the proper use of legal procedure

Under this heading I shall discuss seven submissions brought forward during the proceedings against the decision.

(a) A *first* submission is linked factually with the one previously referred to under 2 since it is claimed that the decision in fact demolishes the national systems without bringing a formal proceeding against them for the purpose or making a statement of objections.

From the third part of my Opinion it may be seen that I cannot share the view that the decision must lead to the *de facto* demolition of the national systems. I therefore think that this submission may be dismissed on those grounds alone. What is more, I note that the transnational reinforcement of the system of collective resale price maintenance in the

book sector in relation to the national agreements was indeed referred to in the statement of objections. Moreover in conjunction therewith the national agreements came under discussion in detail in the administrative procedure, both at the two hearings and in the observations in writing.

(b) A *second* submission is to the effect that the Commission adopted the disputed decision in breach of promises made in the European Parliament and at the time of the hearing of 15 and 16 March (p. 100) to conduct an investigation into fixed prices in the book sector at European level before adopting a decision with regard to the transnational agreement at issue. Consequently it is alleged to have acted contrary to expectations aroused in the minds of the parties.

With regard to what was said at the hearing on 15 and 16 March 1978 I observe in the first place that the director referred to, Mr Ferry, could not have aroused any legitimate expectations in this matter in the minds of the applicants and in this respect I would refer *inter alia* to Case 71/74, *Frubo* [1975] ECR at p. 582, paragraph 20. It may be remembered that in other cases too, *inter alia* in steel-quota cases, the Court has already repeatedly regarded any promises made by officials of the Commission as irrelevant for reliance on the principle of the protection of legitimate expectation. Consequently in my view it is impossible to maintain that a statement made at a hearing on 15 and 16 March, irrespective of its content, should be capable of arousing such expectations that the adoption of the decision some three years later, on 25 November 1981, came as a surprise, since in those three years there had been contacts between the Commission and the parties concerned over matters of detail, including a second hearing on 18 October 1979, at which it was precisely the question of fixed prices for books on which the discussion centred.

In the communication regarding the hearing on 15 and 16 March 1978 it is stated in the first place that the intention is not to take any decision with regard to the agreement in question until in April 1978 a conference regarding the book trade has taken place at European level, so that additional evidence may be obtained. In connection therewith it is stated that after that conference and after the Commission has taken a policy decision on books, the parties are requested to amend the agreement in respect of the provisions which, they allege, are no longer in operation. I am not aware whether the Commission in fact adopted a policy decision on books in general rather than just in relation to the agreement at issue, and if so when. The communication in question is indeed in my view no model of clarity. First it appears as if the adoption of the decision is deferred until the meeting in April at European level, whilst this is later specified in greater detail in the sense that subsequently another general policy decision of the Commission is to precede the adoption of the decision. In any case, from the wording and in particular the repeated use of "We do not intend . . . to proceed with a decision . . ." it seems sufficiently clear that what is involved is simply an intention and not a line of policy binding the Commission.

I therefore think that this part of the submission should be dismissed.

As regards the communication from Commissioner O'Kennedy in the European Parliament on 13 February 1981 my view is that it merely emphasized that the agreement in question did not concern the subject of discussion with the Parliament. He stated expressly that in that connection the Commission, regard being had to its task in pursuance of Article 85, could not enter into any prior consultation with the Parliament.

It is not possible, either, to infer from the documentation produced by the applicants with regard to the discussions in the European Parliament any promise by the Commission *vis-à-vis* the Parliament, as claimed by the applicants. On this point therefore I am in agreement with what the Commission stated on the matter in its pleadings. Furthermore, even if the applicants' claim had been justified it would still not have been established that it could rely on it in law before the Court.

This part of the submission too should therefore be dismissed.

(c) It is claimed in the *third* place that the decision is discriminatory to the prejudice of the agreement in dispute since other systems which are alleged to be comparable have been left unchallenged. Their compatibility has been substantiated by a reference to the fact that in other systems too schemes for a fixed price for books have been included. In particular reference is made to the British Netbook Agreement, the German Sammelrevers and the present French system ("Loi Lang").

In my view it is not necessary in the context of this submission to refer the Court in detail to the schemes mentioned. It is sufficient to state that the agreement at issue is expressly transnational in character, having been entered into by the two associations in the Netherlands and Belgium in relation to cross-frontier trade and that systems of both collective exclusive dealing and collective resale price maintenance are included in the agreement notified. The Netbook Agreement and the German Sammelrevers are at first sight less restrictive than the contested agreement since both are based on a system of individual resale price maintenance with no exclusive dealing. Moreover both are primarily national in character — it is true with a certain transnational effect. The Commission has stated that the extent of this and the corresponding assessment in the light of Article 85 are meanwhile under consideration. The application of the Netbook Agreement in Ireland seems indeed to be hampered by the fluctuations in the rate of exchange between the pound sterling and the Irish pound as a result of which ultimately no unitary price can be established for every publication in Ireland, as the Commission stated in answer to a question from the Court.

The French system is laid down in a statute of 10 August 1981 and its character is thus in all respects a matter of public law. As previously noted, booksellers can *inter alia* give a discount of a maximum of 5% of the price fixed for the public. It is true that it is provided that in the case of importation of a book originally published in France the importer must fix the price to the public at at least the same level as the

publisher. The Commission stated that it had put questions to the French Government on this matter.

I feel sure that from this summary it is already sufficiently clear that there are differences between the disputed agreement on the one hand and the other systems on the other. Even supposing that such differences were less important, that could not justify infringements of Community competition law on the part of the applicants or a failure by the Commission to take action in respect of them (see Joined Cases 209 to 215 and 218/78 *van Landewyck* [1980] ECR at p. 3249, paragraph 84). Of course the Commission cannot proceed simultaneously against all comparable infringements of Article 85. The Commission did not therefore, by adopting the decision, act in breach of the principle of non-discrimination. The submission should therefore be dismissed.

(d) In the *fourth* place the complaint is made that the Commission did not seek alternative solutions with the applicants but restricted themselves to the statement that an exemption under Article 85 (3) was not possible. I have already examined the substantive aspects of this complaint in the third part of my Opinion. I stated then that the complaint was not altogether correct from the factual point of view but that the Commission had in fact adopted a reserved attitude as regards the formulation of alternatives.

In its reaction to the formal submission the Commission in the first instance inquires which principle of law has in the applicants' view been breached by its conduct. In the reply the claim is made that it is a matter of dereliction of duty and the frustration of legitimate expectation.

It is necessary to state that nowhere in Article 85 (3) or in the implementing Regulation, No 17, is any such duty on the part of the Commission prescribed. Moreover any such conduct on the part of the Commission would be accompanied by risks in the sense that ultimately it would be unable to fufil its task under Article 85 with an open mind.

At the conclusion of the oral procedure the Commission's representative pertinently referred to this matter, in answer to a number of questions put by the Court, in particular with reference to the application of Article 85 (3). The formultion of proposals which may lead to the issue of negative clearance meets with fewer objections from the Commission. This seems to me too to be justified simply because negative clearance can always be revoked if serious new facts come to light. An exemption on the other hand is binding even on national courts. In its consultations with trade and industry the Commission must therefore be on its guard against tying itself down so firmly to given solutions that the guarantees of impartiality laid down in the procedure, in particular as regards third parties concerned, such as competitors or customers, are undermined. Moreover the Commission has correctly indicated that in sectors with many undertakings it is not in a position to survey completely the internal interplay of interests which may militate for or against certain solutions. This is an additional reason for it to exercise considerable reserve in taking the stage as an "alternative designer of cartels".

In this case, moreover, there seems to have been regular contact between the parties concerned and the Commission since the communication of the

statement of objections at the end of 1977 and it must therefore be possible to speak of a certain dialogue. In the letter of 9 August 1979 from the Director, Mr Ferry, the statement is made that it is possible to conceive of less restrictive systems than collective resale price maintenance, for example "Joint purchases by booksellers and forms of cooperation such as are described in the notice relating to agreements, decisions and concerted practices affecting cooperation between undertakings" (Official Journal 1968, C 75, p. 3 and C 84, p. 4).

In that connection the applicants themselves in letters to the Commission's Mr Dubois mention the elaboration of proposals in the sense suggested by the Commission (VBBB document No 11, VBVB document No 30).

Finally it appears from what is stated in VBBB's reply (Case 63/82, p. 13), that the Commission did in fact make suggestions. This leads the applicant to claim in this connection that the disputed decision conflicts with the suggestions and therefore frustrates the expectations aroused. As regards these expectations I refer for their repudiation once again to Case 71/74, *Frubo* [1975] ECR at pp. 581 and 582.

The submission should therefore be dismissed.

(e) In the *fifth* place the applicant (VBVB) claims that a system of fixed book prices applies in all Member States. For that reason it believes that the decision conflicts with the fundamental rights common to all Member States, which must be observed in the Community. In this connection the applicant cites the *Nold* judgment (Case 4/73, [1974] ECR 491).

The applicant correctly claims that according to the Court in safeguarding the principle on which it relies what is at stake must be *fundamental* rights, common to all the Member States. In the *Nold* case the Court stated that these must be rights flowing from the constitutional traditions common to the Member States or which are connected with international declarations of intent relating to the protection of human rights on which the Member States have collaborated or of which they are signatories (paragraph 13).

The applicant has not shown that a fixed price for books, in so far as it does actually apply in all Member States, belongs to that category of rights. What is in question here is a measure in the sphere of the law relating to economic planning. Further, I refer on this point to what I have already said regarding a similar substantive submission by the applicants in the third part of my Opinion.

The submission should therefore be dismissed.

(f) In the sixth place the complaint is made that the Commission, in spite of an express request from the applicant VBVB dated 1 October 1979, did not supply all the evidence to the applicant beforehand and so infringed the rights of the defence.

In the document in question the applicant wrote to the Commission *inter alia* (document No 15):

"The applicant ought to be allowed the right to examine the information on which the Commission relies. The rights of the defence require that the applicant should be notified in advance of the evidence which it is intended to bring against it."

This request however was not specified in greater detail. Moreover no further reference was made to it although the Commission did not react to the request in any way. It is therefore not incomprehensible, regard being had *inter alia* to the wording of the request, that the Commission assumed that it was more a declaration of principle than a specific request for the production of particular documents. I would observe incidentally that this request is contained in an introductory section, "Preliminary observation", which contains a number of general remarks, before in the following section the objections as set out in the letter of 9 August 1979 are examined. Furthermore the nature of the document emanating from the applicant is not altogether clear to me as it is referred to as a "note".

Only in the reply does the applicant make it clear that it is concerned with three documents, namely:

The minutes of the meeting with the Group of Book Publishers in the EEC;

The in-depth inquiry notified in the letter from Mr Ferry, the Director, dated 9 August 1979;

The inquiry referred to in the draft resolution, if it should be accepted, as mentioned in the letter of 13 November 1980 from Mr Ferry to the applicant.

The Commission points out in the rejoinder that the minutes of the meeting are already in the applicant's possession as its representatives were also present at the meeting.

As regards the second request the relevant passage in the letter reads as follows:

"After examining in depth the collective system of resale price maintenance for books in the Dutch-language areas, *inter alia* with the help of the documents which you sent to us with regard to the book trade in the Netherlands and Flanders, I have come to the provisional conclusion that your application for an exemption under Article 85 (3) of the EEC Treaty for the draft of the new agreement between the VBBB and the VBVB cannot be accepted."

It is not clear to me what the applicant now actually has in view, since later in the letter the reasons on which the decision to reject the application, that is to say the conclusions of the previous inquiry, are stated in detail.

Finally I need only say with regard to the third request dated 1 October 1979 that it could have no relevance to the possibility of certain inquiries notified by the Commission in the letter of 13 November 1980 as they are separated by more than a year.

Moreover that letter concerned a negative attitude with regard to a new draft agreement put forward (decision, paragraphs 27 to 30). Consequently the original points of objection, of 19 December 1977, were maintained. In them the facts complained of against the applicant are entirely clearly set out. The Court has already stated that it is unnecessary to produce the whole file — *Consten and Grundig* [1966] ECR at p. 338. It is sufficient that undertakings should be informed of the essential elements of fact on which the objections are based (Case 48/69 *ICI* [1972] ECR at p. 650, paragraphs 21 to 26).

In my view the applicant has not shown that it has been deprived, as a result of the Commission's unforthcoming attitude, of the data necessary for the conduct of its defence. I refer in this connection to Joined Cases 209 to 215 and 218/78 *van Landewyck* [1980] ECR at p. 3237, paragraph 39.

This submission too should therefore be dismissed.

(g) Finally the complaint is made that the Commission has not answered all the applicants' points. This refers to the claim that it did not examine the submissions that the Commission by its attitude infringed Article 10 of the European Convention for the Protection of Human Rights on freedom of expression or Article 10 bis of the Paris Convention regarding protection against the policy of 'loss-leading'. I have already dealt with the substantive aspects of this submission.

It is true that the Commission did not in its decision examine these points, which were raised during the proceeding albeit at different times. It is however the established case-law of the Court that it is not necessary for the Commission to examine all the matters of fact and of law put forward by the parties concerned during the administrative procedure, or that it does not need to state reasons in its decision in so far as submissions raised by the parties are rejected (see *inter alia* Joined Cases 56 and 58/64 *Consten and Grundig* [1966] ECR at p. 338 and most recently Joined Cases 209 to 215 and 218/78 *van Landewyck* [1980] ECR at p. 3244, paragraph 66).

This submission relating to procedure should therefore be dismissed.

4. Irregularities in the procedure

Next the complaint is made that the Commission is responsible for a number of formal defects amounting to three irregularities in the procedure leading up to the disputed decision.

(a) The communication of the statement of objections of 12 January 1978 was in the *first* place wrongly signed *per procurationem* by Mr Schlieder since no such delegation of power existed and that if it did it was unlawful.

In my view this submission may be disposed of immediately by reference to the Court's case-law on this point in Case 48/69, *ICI* [1972] ECR at pp. 649 and 650, paragraphs 11 to 14 and in Case 8/72, *Vereeniging van Cementhandelaren* [1972] ECR at pp. 988 and 989, paragraphs 10 to 14. There the Court decided that the official referred to was acting in the context not of "a delegation of power, but merely under an authorization to sign which he had received from the Member of the Commission" responsible.

In this connection the Commission has also observed that this was the authorization to sign conferred on Mr Schlieder by the Commissioner concerned after he had himself approved the statement of objections (in the context of the authority delegated by the Commission to that Member). According to the Commission this is a matter of settled practice which has been approved by the Court in the judgments mentioned, in consequence of which, for every notification of a statement of objections approved, such a delegation of authority to sign is conferred anew.

As concerns the applicants' observation that it was shown in the cases referred to that the Commissioner responsible had personally approved the statement of objections, in contrast to the present case, the Commission has offered to submit the necessary documents. Although the Court did not avail itself of this offer, it may be assumed that in this case the Commission's standard practice was certainly followed.

This submission too should therefore be dismissed.

(b) In the *second* place it is alleged that the Commission infringed Article 3 (3) of Regulation No 99/63 inasmuch as, it is claimed, it excluded from the hearing a Flemish author who was put forward as a witness for VBVB.

This submission is unfounded in view of what is stated on p. 50 of the report of the hearing on 15 and 16 March 1978 by VBVB's representative, from which it appears that the Commission had reconsidered its previous view that the application should be refused. The absence of the author in question at the time of the hearing was to be ascribed to the fact that he was apparently not informed in sufficient time of the change in the Commission's attitude, now positive.

Regard being had to these circumstances it is unnecessary in my view to go further into the Commission's formerly negative attitude or the alleged infringement of Article 3 (3) of Regulation No 99/63.

The submission should therefore be dismissed.

(c) *Lastly* the complaint is made that the course of the hearing on 18 October 1979 was irregular inasmuch as not all officials who were concerned with the matter, particularly the Director, Mr Ferry, were present or alternatively that the latter had arranged to be represented by another official.

It is not clear which principle of law the applicant claims has been breached in this respect. It may be assumed that what is involved is Article 9 (1) of Regulation No 99/63, which reads: "Hearings shall be conducted by the persons appointed by the Commission for that purpose."

It appears from the rejoinder that the Commissioner responsible for competition had delegated authority to conduct hearings to the director dealing with restrictive practices and abuse of dominant positions or in his absence to his deputy.

The hearing on 18 October 1979 was not conducted by the Director, Mr Ferry, but by Mr Mussard, adviser, presumably as his deputy.

This seems therefore to have been completely in accordance with the delegation for the conduct of hearings referred to above.

Then too at the beginning of the hearing it was announced that Mr Mussard would replace Mr Ferry in charge of the hearing in accordance with Article 26 of the Commission's Rules of Procedure and in particular with the special delegation as laid down by the Commissioner responsible.

Article 26 of the Rules of Procedure designates the official who is to take the place of his superior if the latter is unable to attend.

The applicant has therefore by no means shown that the hearing was tainted with irregularities of any kind as a result of the replacement of Mr Ferry by Mr Mussard.

In so far as the applicant takes the view that all officials concerned with the case should always be present during the hearing, it is sufficient for me to refer to the judgment in Joined Cases 209 to 215 and 218/78 *van Landewyck* [1980] ECR at p. 3234, paragraph 27, where the same argument was rejected. In this case it has not been denied that Mr Mussard was present during the whole hearing.

The submission should therefore be dismissed.

5. A further submission is to the effect that the Commission infringed Articles 2 and 4 of Regulation No 99/63 since the decision is alleged to contain complaints which did not occur in the statement of objections, or alternatively that the statement of objections contained a number of ambiguities which ought to have been cleared up.

The first of these points amounts in particular to a claim that the statement of objections was based principally on the element of collective exclusive dealing in the disputed agreement, whereas in the decision the agreement was appraised as to both the collective exclusive dealing and the collective resale price maintenance.

From a perusal of the statement of objections however it appears incontestable that it concerns both elements, both as regards the applicability of Article 85 (1), under Section II, and the non-applicability of Article 85 (3), under Section III (*inter alia* points 2 and 4).

Naturally the decision contains a more detailed statement of the grounds on which it is based than does the statement of objections, with regard also to a number of aspects concerning the collective resale price maintenance, and this corresponds entirely to the function of the statement of objections in the administrative procedure. In this connection I refer to the Court's judgments in Case 41/69 *ACF Chemiefarma* [1970] ECR at p. 691, paragraphs 90 to 95, and Joined Cases 209 to 215 and 218/78 *van Landewyck* [1980] ECR at p. 3245, paragraph 68.

Next the applicant claims that the statement of objections contains "manifestly inaccurate statistics" and that the admission system was wrongly included in it.

In so far as the applicant takes the view that the Commission is accordingly required to issue a fresh statement of objections it fails to appreciate the function of the administrative procedure (statement of objections, written reaction, hearing of the undertakings concerned) which precedes the adoption of the decision and the purpose of which is to allow those concerned to exercise their right of defence. Where in the decision no account is taken of the observations or criticismus made, these may be brought before the Court as an item of dispute in contesting the decision.

Furthermore the "manifestly inaccurate statistics" alluded to by the applicant are not specified in greater detail. It is thus impossible to consider them further here. I have stated previously that the criticism regarding the inclusion of the requirement of admission in the statement of objections (and in the decision) is unfounded.

The submission should therefore be dismissed.

V — Final observations and conclusions

1. Summary

In what I have said up to now I have come to the conclusion that all the submissions put forward by the applicants as matters of either substance or procedure against the contested decision should be dismissed. In this connection the most important submissions in my view concerned the refusal of an exemption under Article 85 (3). My conclusion on this point was that the transnational agreement at issue in fact did not satisfy any of the four cumulative requirements of that article or at least that the Commission was entitled in the context of its freedom to decide policy to come to that conclusion. So as to do full justice to the applicants I have gone further in refuting their arguments than is necessary for the Court. The Commission has correctly observed that it is expressly confirmed in the Court's case-law that in particular, albeit not exclusively, in the examination in the light of the two positive requirements laid down by Article 85 (3) for the possibility of an exemption the Commission enjoys a freedom to decide policy which the Court can review only as regards legality. The appraisal of the alleged contributions to the improvement of production or distribution and the weighing up of any improvements established against the economic objections to an agreement (the "economic balance" of the agreement) is of course primarily a matter of economic policy in connection with which the Court needs in particular to have regard to the appreciation of the arguments put forward by the applicants. Regard being had *inter alia* to the very serious objections against collective resale price maintenance in general throughout much the greater part of the Western world, which I have once again surveyed briefly in my Opinion, I restrict myself in this summary of the positive requirements in question to the conclusion that the Commission, after careful examination of all the arguments, has cited genuine grounds of policy to which the Court must have regard for its view that the two positive conditions of Article 85 (3) are not satisfied. In doing so the Commission has also *inter alia* made an appropriate appraisal of the cultural factor translated by the applicants themselves into a requirement of a broad range. Furthermore in what I have said I have stated in addition from the legal point of view why I myself believe the arguments put forward by the Commission in support of its conclusion to be correct. Having regard to the fact that this is politically such a delicate matter I think moreover that it is possible to understand and appreciate that the Commission — albeit unnecessarily from the legal point of view — after the negative result of the examination of the agreement in the light of the two positive requirements has examined it also in the light of the two negative conditions of Article 85 (3). If the Commission, acting in the scope of its freedom to formulate policy, had given the disputed agreement the benefit of the doubt with regard to the positive conditions (which it did not), it demonstrates with good reasons in support that in any case the two negative requirements of Article 85 (3) are not satisfied.

2. *The problem of the alternatives*

The question whether and if so what alternatives exist to the prohibited provisions in the transnational agreement has been raised by the applicants both in the examination in the light of the requirement of indispensability in Article 85 (3) and in their submissions on matters of procedure. For that reason I stated previously that I would return to this point in this final section of my Opinion. What is more, the Netherlands applicant at the afternoon hearing during the oral procedure argued that a confirmation by the Court of the Commission decision, including the point of collective exclusive dealing, "would leave a void, an interregnum in which no new system could yet come into being for a certain period capable of dispelling the tension which nevertheless exists in the market, so that a suitable transition would be impossible". In that connection the Netherlands applicant requested the Court to indicate in its judgment its ideas with regard to the various alternatives.

In relation to this request I would state first of all that it is possible for the Court to comply with this request only to a limited extent. It is not only the Commission's freedom to formulate policy in this matter but also the fact that no single alternative forms as such the subject of these proceedings which impose great restrictions on the Court. Nevertheless it may well be possible to make some observations regarding the alternatives mentioned during the proceedings.

The most important statement which is possible in this connection is the fact that the contested decision and therefore the Court's judgment too have nothing to do with the national rules which form the basis of the transnational agreement. This applies also to the national systems of collective exclusive dealing in so far as they are still in force, which according to the information supplied during the proceedings is no longer the case in Belgium in particular. There need therefore be no fear of an interregnum (especially in the Netherlands) during continued consultation with the Commission, even in this latter respect. I have already observed that the national collective price maintenance rules with the limitations imposed thereon by the national administrative and judicial authorities in themselves form a solid bulwark. Both the rules existing and permitted in Germany and the United Kingdom and the fact that since it became impossible to enforce the transnational agreement by penalties no serious transnational disturbances of the national systems have come to light indicate that these national rules in themselves already form an important alternative. In this respect I refer also to what I said earlier about this alternative and in particular also about the objective difficulties which the Commission must overcome in order to come to grips with the national systems as well.

As regards the other alternatives expressly regarded by the Commission during the whole discussion of this matter as acceptable (at the level of both the production and distribution of books), it is certainly striking that such alternatives seem to proceed from the complete elimination of any form of resale price maintenance even at national level. From my previous arguments it will have become clear to the Court that I am fully aware of this. However, that does not in any way detract from my other

statement to the effect that the Commission's decision and therefore a dismissal of the applications directed against it does not affect the national systems.

As is already apparent from the alternatives which have been expressly referred to by the Commission as acceptable, but as it has expressly confirmed in the decision and above all during the oral procedure, the Commission in fact adopts an extremely reserved attitude towards alternatives in the form of a transnational system of individual resale price maintenance. I have already explained why I regard these reservations as being in all respects comprehensible in view of the fluid transition between individual and collective systems of resale price maintenance. This is certainly the situation in so far as a more or less generally applied individual system of resale price maintenance is collectively maintained transnationally. However, this does not alter the fact that the decision does not give a definitive view, either, with regard to alternatives in the form of transantional individual resale price maintenance and that a continued discussion with the Commission on this point thus remains possible. From the very fact that these proceedings do not relate to such a form of resale price maintenance, but regard being had also to the Commission's discretion as regards decision making in this matter, it does not seem to me to be possible for the Court to go further than such a finding in its judgment. Any kind of a suggestion in the judgment that a solution of that kind might actually be possible would amount to an encroachment on that discretion and furthermore would fail to take into account the complicated framework of reference which the Commission, according to its exposition during the last part of the oral procedure, applies to such problems.

3. Conclusion

Summing up my conclusions with regard to the many individual submissions put forward by the applicants, my Opinion is that:

(a) the applications should be dismissed;

(b) the applicants should be ordered to pay the whole of the costs with the exception of those incurred by the parties intervening in their support, which should be borne by the interveners themselves.