OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 10 JANUARY 1978

My Lords,

This is an action brought under Article 173 of the EEC Treaty by Miller International Schallplatten GmbH (which I shall call 'Miller') to challenge a Decision of the Commission dated 1 December 1976 (76/915/EEC, Official Journal L 357/40 of 29 December 1976) whereby the Commission (by Article 1) declared that certain restrictions on exports imposed by Miller on its customers infringed Article 85 (1) of the Treaty, and (by Article 2) inflicted on Miller, in respect of such infringements, a fine of 70 000 u.a. 'being' DM 256 200.

The facts set out in the Commission's Decision, as supplemented by uncontroverted data placed before this Court, may be summarized as follows.

Miller carries on business at Quickborn, near Hamburg, as a producer of low-priced sound recordings (records, tapes and cassettes). Its repertoire consists as to about 45% of German light music, including music form the German 'hitparade' and German folk songs, as to about 43% of various kinds of recordings for children, the vast majority in German but some in Dutch, as to about 6% of classical music, as to about 5% of popular music in English and as to the balance (less than 1%) of documentary material.

Miller is wholly owned subsidiary of an American company, MCA Records Inc., which is itself a subsidiary of another American company MCA Inc. of Universal City, California.

On 11 June 1971 Miller entered into an exclusive dealing agreement with a Strasbourg firm, Sopholest SA, for the sale of its products in Alsace and Lorraine (that area being defined by reference to a map — see Annex 2 to the Application). Clause 5 of that agreement provided that Miller's products should not as a rule be exported from Alsace-Lorraine to other countries.

On 15 November 1973 Miller entered into a similar agreement with a Dutch firm, Delta BV of Haarlem, for the sale of its products in the Netherlands (Annex 3 to the Application). Clause 9 of this agreement, which was in English, provided:

'In confirming [*sic.*] with the EEC regulations pertaining to title and reshipping rights of goods Delta and Miller agree the following: In that Miller is giving an exclusive right to the territory to Delta, Delta will in the spirit of the agreement refrain from shipping the subject goods outside of the Netherlands without an express understanding from Miller that it will not have a harmful effect on Miller's other importers or licenseses in areas other than the Netherlands.'

Clause 11 provided *inter alia:*

'This agreement shall be construed and binding unto the parties in accordance with the laws of the Federal Republic of Germany and under existing commercial codes as prescribed by the regulations of the European Economic Community.'

Clause 9 was in fact deleted altogether by an addendum to the agreement signed before the agreement came into force. It is not among the infringements of which the Commission held Miller guilty. Its relevance, in the view of the Commission, is as evidence of Miller's awareness, at the time, of the fact that Community law had something to say about such clauses. This goes to the amount of the fine.

So far as regards the rest of the Community, Miller also had sole dis-

tributors in Belgium, Denmark and Luxembourg, though without any formal agreement. For Italy it had granted an exclusive licence to an Italian firm at Brebbia, near Varese, for the manufacture and sale of recordings under its labels. It did not export to Ireland or to the United Kingdom. In fact over half of its exports went to Austria and Switzerland.

In the Federal Republic of Germany itself Miller had over 4 000 customers, including wholesalers, supermarkets, chain stores, department stores, newsagents, 'rack jobbers', ordinary retailers, private persons and exporters.

From about 1970 Miller's terms and conditions of sale in the domestic market contained a clause (Clause 9) which provided:

'No records bearing our labels may be exported. If this provision is not complied with, we may cease supplying the seller and may hold him liable for any claims in damages brought against us in foreign countries in respect of such exports.'

On 1 August 1974 Miller adopted revised terms and conditions of sale containing a clause (Clause IX) in these terms:

'The customer shall as a rule refrain from exporting goods supplied to him by us. In case of breach of this provision we may cease supplying the customer who is in breach and may seek from him an indemnity in respect of any claim for damages brought against us in foreign countries.'

During the administrative proceedings it was stated to the Commission on behalf of Miller that those revised terms and conditions applied both to domestic and to foreign customers (see Annex 1 b to the Application). The Commission so found (see paragraph 6 of its Decision). In answer to a question asked by the Court at the close of pleadings it was, however, said on behalf of Miller that that was a mistake, that foreign customers with whom there was no formal agreement received only price lists, not the terms and conditions of sale.

On 7 May 1975, following representations made by the Commission as a result of a complaint it had received from one of Miller's German customers, Miller stated that is would no longer enforce export restrictions on its customers. Later in the same year it issued new terms and conditions of sale, omitting Clause IX.

In this action Miller claims a declaration that the Decision of the Commission is void. Alternatively it asks the Court to reduce the fine and to allow it to be paid by instalments. (A claim that Miller should be allowed to pay the fine in a currency other than DM was withdrawn following the decision of the Court interpreting its Judgement in the *'Sugar* cases' [1977] ECR 445.)

In essence Miller's claim that the Commission's decision should be declared void is, according to my understanding, based on the contention that the Commission did not show and could not show that the restrictions on export in question came within Article 85 (1) of the Treaty, in that the Commission did not show and could not show either that those restrictions might affect trade between Member States or that they had as their object or effect the prevention, restriction or distortion of competition within the common market. In particular Miller contends that the Commission erred in overestimating its (Miller's) standing in the market.

In view of the nature of the arguments presented to us in support of those contentions, I must, I think, recall the relevant law as laid down by this Court.

Firstly, the phrase 'which may affect trade between Member States' in Article 85 (1) connotes that the agreement in question is capable of having an impact,

whether direct or indirect, and whether immediate or potential, on freedom of trade between Member States, so as to impede, in particular by partitioning the market in certain products as between Member States, the attainment of the objective of a single market comprising all of them. Whether an agreement may thus affect trade between Member States is to be ascertained on the basis of objective data, either of law or of fact — see for instance Case 56/65 *Sociéteté Technique Minière* v. *Maschinenbau Ulm GmbH* [1966] ECR 235, at p. 249 (Rec. 1966 p. 337, at p. 359) and Cases 56 & 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 341 (Rec. 1966 p. 429, at p. 495). Secondly, as the same authorities show, the reference in Article 85 (1) to an agreement having as its 'object or effect' the prevention, restriction or distortion of competition within the common market, connotes an alternative test. If, on the face of it, an agreement has that as its object, it is unnecessary to inquire as to its effect. It is only if the object is unclear, that it is necessary to go on to consider the effect of the agreement, in the sense of its consequences in fact.

That alone renders irrelevant those of the contentions put forward in this Court on behalf of Miller that were avowedly based on the submission that a restriction on exports to other Member States cannot be held to offend against Article 85 (1) unless it is shown that that restriction has in fact had the consequence of affecting trade between Member States and of impeding competition in the common market on a substantial scale. Thus contentions were developed at great length on behalf of Miller to the effect that its German customers did not want and were not equipped to indulge in export trade (even though it was one of them, seemingly, whose complaint to the Commission triggered off the whole of these proceedings, and even though, as the Commission pointed out, it seems improbable that, for instance, a wholesaler in Aachen would prefer, rather than to supply a retailer in Eupen himself, to refer him to a distributor in Brussels). Similarly, contentions were developed on behalf of Miller to the effect that there was no attraction for its foreign customers in exporting to other countries, or back to Germany (even though, on Miller's own admission, Sopholest SA had found it profitable to despatch goods from Strasbourg to Switzerland and to Austria, and Delta BV had found it profitable to supply the Belgian market from Haarlem). These contentions led to a lengthy debate between Miller and the Commission as to the reasons why Miller charged higher prices in its home market than in export markets, and indeed as to the precise amount of the difference. All that was, in my opinion, with great respect to the parties, irrelevant. Subject to the exceptions that I shall mention in a moment, Article 85 (1) forbids the inclusion in commercial agreements of clauses expressly restricting trade between Member States and competition within the common market, and it does so regardless of whether in fact such trade or such competition is trade or competition that those affected do or do not want, or are able or unable, to enter into.

It was asserted on behalf of Miller that it had been liberal in granting dispensations from the clauses here in question. That may be so, but the vice struck at by Article 85 (1) is the imposition of such clauses in the first instance, not any particular degree of illiberality in their enforcement. That must be so if only because such clauses have an inhibitory effect that cannot readily be calculated. One cannot tell, for instance, how many of Miller's customers, on how many occasions, were inhibited from exporting, without thought of seeking a dispensation. Indeed, if the inhibiting effect of such clauses could be disregarded, Article 85

(2), which renders them void, would be sufficient by itself to secure the objectives of Article 85 (1). Yet, it would be unrealistic to suppose that it is. In such a case as this, liberality in granting dispensations is no doubt a matter to be taken into account in assessing the fine, but it is not material to the question whether or not there has been an infringement.

I have mentioned exceptions.

The most important exceptions are of course those in Article 85 (3), but that provision is not invoked here.

Then there is an exception which is implicit in Article 85 (1) itself. If it is shown that in the absence of a particular restriction on competition, particular trade could not take place at all, that restriction is not struck at by Article 85 (1). Thus, in the *Technique Minière* case, this Court held that a restriction on competition contained in an exclusive dealing agreement may fall outside the scope of Article 85 (1) if, without it, the manufacturer concerned could not penetrate the geographical area covered by the agreement at all. So also in Cases 19 & 20/74 the *'Kali* cases' [1975] ECR 499 the Court held that Article 85 (1) did not strike at an agreement enabling an undertaking to sell its surplus production to its competitor, where, without that facility, it could not market that production at all. Miller has not sought to avail itself of that exception.

Lastly there is an exception, of which Miller does seek to avail itself, to the effect that an agreement is not within Article 85 (1) if the position of the parties to it in the market is so weak that the agreement can affect the free play of competition and trade between Member States only to an insignificant extent. This exception was established by the judgments of the Court in Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, Case 1/71 *Cadillon* v *Höss* [1971] ECR 351 and Case 22/71 *Béguelin Import* v *G. L. Import Export*, ibid. p. 949. As a matter of history this exception seems to have developed out of the last, in that *Völk* v *Vervaecke* was similar to the *Technique Minière* case. Indeed Mr Advocate General Gand clearly thought that the decision in *Völk* v *Vervaecke* must follow that in the *Technique Minière* case (see [1969] ECR at pp. 305-306). But the exception has acquired a life of its own and it seems to me that, as an independent exception, it can only be based on the principle *de minimis non curat lex*, or, as some prefer to state it, *de minimis non curat praetor*. Moreover, although *Völk* v *Vervaecke*, *Cadillon* v *Höss* and the *Béguelin* case were all three about exclusive dealer agreements, I can see no reason why the exception they thus establish should not be of general application. But, whereas the plea, where the *Technique Minière* and *Kali* exception is invoked, is 'my sin is no sin because without it I could not trade', the plea here is 'my sin should be disregarded because it is so tiny'. In order for that plea to be accepted, the breach of Article 85 (1) must indeed be negligible.

On behalf of Miller we were referred to the Commission's Notice dated 27 May 1970 'concerning Agreements, Decisions and Concerted Practices of Minor Importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community' (Official Journal C 64/1 of 2 June 1970). I do not think, however, that reference to that document can assist Miller's case. As Mr Advocate General Dutheillet de Lamothe pointed out in *Cadillon* v *Höss* [1971] ECR at p. 361) and again in the *Béguelin* case (ibid. at p. 968), the terms of that Notice themselves made it clear that it was issued for guidance only and that it had no legal effect. The Notice was worded as an expression of opinion by the Commission, it mentioned that the 'quantitative definition of "appreciable"'

thereby given was 'no absolute yardstick' and it pointed out that in a doubtful case the undertakings concerned were 'free to apply for negative clearance or to notify the agreement'. More important still it stated that 'This Notice is without prejudice to any interpretation which may be given by the Court of Justice of the European Communities'. It could not be otherwise, for the Commission has no power to alter the law as laid down by Article 85 (1) of the Treaty. In a case where an undertaking had, in bona fide reliance on the terms of the Notice, proceeded on the assumption that an agreement to which it was a party was outside the prohibition in Article 85 (1), it may be that a sort of estoppel would arise precluding the Commission from subsequently fining that undertaking on the ground that the agreement was in fact within the prohibition. But there can be no such estoppel here, for there is no suggestion that Miller relied in any way on the Notice. Indeed it is difficult to see how it could bona fide have done so. The Notice appears to have been worded with 'horizontal' agreements between either producers or distributors in mind. Its wording does not readily fit a case, such as the present, of a producer imposing the same restriction on the generality of his distributor customers. Who, in such a case, would be the 'parties to the agreement' whose 'turnover in all goods and services' (together with that of their subsidiaries and parent companies) must be aggregated to determine whether it exceeded the prescribed limit? Perhaps the answer is that, in this case, one would have had to aggregate the turnover of Miller, of all its customers, and of all their respective subsidiaries and parents (including MCA Records Inc.). Certainly, no-one has attempted that calculation.

I should perhaps mention, for the sake of completeness, that the Notice was recently replaced by a similar one dated 19 December 1977 (Official Journal C 313/3 of 29 December 1977). The foregoing remarks would apply equally in relation to the latter Notice if it were relevant. In my opinion, however, it is not here relevant, if only because the legality of a Decision adopted by the Commission in December 1976 cannot be affected by something published by the Commission in December 1977; and, of course, having regard to the terms of Article 173 of the Treaty, it is, on this part of the case, only with the legality of the Commission's Decision at the time when it was adopted that Your Lordships are concerned.

What I may perhaps call the *de minimis* point was dealt with by the Commission in paragraphs 12 to 15 of its Decision as follows:

'12. The finding that there has been an infringement of competition in this case cannot be affected by the size of Miller's share of the market for all sound recordings. Miller primarily records light music. The peculiar characteristics of light and serious music are such that they are only rarely interchangeable. Accordingly, recordings of light music may be said to constitute a separate market. Since in the Federal Republic of Germany light music recordings account for around 90% of the turnover in sound recordings of all types, the share of 6.07% enjoyed by Miller in the market for all sound recordings represents a share of 6.7% in the market for recordings of light music.

13. It should furthermore be noted that around half of Miller's repertoire consists of recordings for children, in which market this undertaking has a leading position.

14. Although half of Miller's repertoire consists of recordings in German for children and the rest mainly

of music from the German hit parade and German folk music, the customers of this company might have been in a position to compete by exporting the goods in question to other countries of the Community. For the sale of Miller's recordings is not restricted by reason of language to the German market, as can be seen from the fact that Miller accounted for 3.25% of German record exports in 1975. Many other Community countries may be regarded as export markets, since, even if only in regions bordering on Germany, people in those countries tend to have at least some knowledge of the German language.

Knowledge of the German language by purchasers in other Community countries may be said to be of minor importance as regards the sale of sound recordings of the German hit parade and folk music (songs in dialect and carnival songs, for example). Furthermore, purchasers in other Member States may have an interest in reimporting Miller's products into the Federal Republic of Germany from other countries.

15. The restriction of competition was consequently appreciable.'

The figures of 6.07% for Miller's share of the German market for all sound recordings and of 3.25% for its share of German exports had in fact been supplied by Miller itself to the Commission during the administrative proceedings, though, it is fair to say, with a warning, in the case at least of the former figure, that it might overestimate Miller's true share of the market because it was based on statistics published by the Bundesverband der Phonographischen Wirtschaft e.V. (the Federal Association of the Recording Industry) which did not include the output of a number of 'rogue' manufacturers (see Annex 1 c to the Application). Before this Court the Commission showed that, allowing for that unrecorded production, Miller's share of the German market could still properly be estimated to exceed 5% (see the Defence p. 9).

Those percentages relate to quantity. Since Miller is essentially a low-price producer, its percentage of the market expressed in terms of value is necessarily lower. The Commission credibly estimated it at 3.75% (see the Defence pp. 8-9).

Such figures are on any view a far cry from, for instance, the figures of 0.2% and 0.5% of the market that were in point in *Völk* v *Vervaecke* (see [1969] ECR at pp. 303-304). I do not think, however, that, in applying the *de minimis* principle, one should look only at percentages of the market. One should look also at the production and turnover of the undertaking or undertakings concerned in absolute terms. Here we know that for 1975 Miller's production amounted to nearly 10 million recordings and its turnover to over DM 34 m. I cannot regard such figures as negligible: Article 85 (1) does not apply only to giants. One must look also at the scope of the offending restriction. Here it was imposed on every one of Miller's customers, at least in the home market.

Before this Court there took place between the parties an elaborate controversy as to what was in this case 'the relevant market', on the one hand geographically and on the other hand qualitatively. At one point Counsel for Miller went so far as to contend that the relevant market, geographically, was the whole Community — and that despite the contention he had advanced in another context that there was in the Community no substantial market for Miller's products outside Germany and the parts of other Member States bordering on Germany where German was commonly spoken. It was also contended on Miller's behalf that the

market for recordings was indivisible. It was said that the Commission had been wrong in approaching this case on the footing that there were separate markets for recordings of light music and recordings of serious music, or separate markets for recordings for children and recordings for adults, or separate markets for low-priced recordings and expensive recordings. In the circumstances it does not seem to me necessary to express an opinion on those points. I would however observe that the Commission did not rest its Decision on the existence of a distinct market for low-priced recordings, although it had raised the point during the administrative proceedings and evinced a renewed fondness for it in the argument before us.

In Miller's Reply it was contended on its behalf that the unreliability of the available statistics and the other difficulties in the way of establishing the facts about the market were such that it was impossible to determine exactly what its share of the relevant market truly was, and therefore impossible for the Commission to discharge the onus of showing that that share was significant. That contention seems to me to stand the law on its head. In a case where, on the face of the relevant agreement, it infringes Article 85 (1), it is not the law that the application of that Article is nonetheless excluded unless the ascertainable facts are such as to enable the Commission to demonstrate that the *de minimis* principle is not in point.

I turn to Miller's alternative claims for a reduction in the amount of the fine and for provision to be made for payment of it by instalments. In support of those claims, there are put forward, on behalf of Miller, four considerations:

(1) an alleged error on the Commission's part in holding that Miller infringed Article 85 (1) intentionally;

(2) the triviality of Miller's infringement of that Article;

(3) Miller's financial position and, in particular, its low rate of profit and its lack of cash (due, so Miller asserts, to heavy commitments to investment); and

(4) the fact that the revised terms and conditions of sale that Miller adopted in 1974 had been settled by a Rechtsanwalt, Herr Kirchner, of Hamburg.

As to the first of those points, the Commission's findings were in fact expressed as follows (in paragraph 21 of its Decision):

'Miller has intentionally infringed Article 85 (1). It knew and intended that its prohibitions on export would prevent its customers from competing in the goods in question in other Community countries. Miller was also aware that export prohibitions were contrary to Community law, or at least chose to ignore any doubt on this question.'

The finding that Miller had at least chosen to shut its eyes to any doubt as to the effect of Article 85 (1) was based on the content of clause 9 of the agreement between Miller and Delta BV and, more particularly, on an administrative proceedings that they were aware that Community law forbade, at least, complete prohibitions on exports (see Annex 1 d to the Application). In the circumstances it seems to me that that finding was justified. It is interesting to observe that, although Miller, in its pleadings, indicated profuse evidence on many other points, it indicated none on this.

If any criticism can be levelled at paragraph 21 of the Commission's Decision, it is that the Commission went on, in that paragraph, to express itself in terms suggesting that traders in the Community ought to be aware of its own Decisions in individual competition

cases. I think that traders in the Community ought to be presumed to know the law as laid down by the Treaties, by Regulations made thereunder and perhaps by decisions of this Court. But it is too much to expect of them that they should keep abreast of all the Commission's Decisions in individual cases. These are not law-creating. That flaw in the Commission's reasoning does not however, it seems to me, affect the validity of the Commission's finding as to Miller's attitude. Moreover, as I shall show, the Commission in fact fixed the amount of the fine that it imposed on Miller on the basis that its infringement was a negligent rather than an intentional one.

I turn to the triviality point. As to this it is in my opinion necessary to bear in mind the terms of Article 15 (2) of Regulation No 17 (Official Journal L 204 of 21 February 1962) These, so far as here relevant are as follows:

'The Commission may by decision impose on undertakings ... fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently ... they infringe Article 85 (1) ... of the Treaty ...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

Thus the Commission's discretion as to the amount of a fine may be taken to lie in the range between 0% and 10% of the turnover of the undertaking concerned. In saying this I do not overlook the reference in Article 15 (2) to 'from 1 000 to 1 000 000 u.a.', but the Council cannot thereby have meant that an undertaking with a turnover of less than 10 million u.a. could be proportinately more heavily fined than one with a turnover of over 10 million u.a. The lower limit of 1 000 u.a. must, I think, be taken to indicate that, if the appropriate fine is less than that amount, no fine should be imposed.

Accordingly, a fine of 10% of turnover may be taken to be appropriate to an intentional infringement of the gravest kind and of considerable duration. At the other end of the scale, a fine of less than 1% is appropriate for a merely negligent infringement, of the most trivial kind and continuing only for a short time, in a case where, nonetheless, the circumstances warrant the imposition of some fine.

Here the amount of the fine represented, on Miller's own calculation, 0.73% of its turnover. The Court of course has, under Article 17 of Regulation No 17, unlimited jurisdiction to review decisions whereby the Commission has fixed a fine. But it seems to me that, in a case where the Commission has fixed the fine at the lowest end of the scale, it would show scant respect for the exercise by the Commission of its discretion if the Court were to reduce the fine still further on the mere ground that the infringement was trivial.

In view of a subsidiary point made on behalf of Miller, I should, I think, observe that the Commission (in paragraph 22 (b) of its Decision) expressly recorded that, among the factors it took into account in fixing the amount of the fine was that 'Miller was, however, aware of instances of exports being made to other Member States and did not apply sanctions'.

As regards Miller's financial position, the Court (as it was empowered to do by Article 45 (2) (b) of the Rules of Procedure) requested production of Miller's balance sheets for the years 1974 to 1976, in order in particular to see what its rate of profit and its cash resources were. Miller asked to be allowed to refrain from producing them, on the ground that it did not want the figures diclosed. The Court

did not insist, but, as was made clear in the answer given by Counsel for Miller to a question put to him by one of Your Lordships at the hearing, Miller knew that, in so doing, it was depriving itself of the possibility of the Court mitigating the fine in the light of such factors. Apart from assertions in general terms made on behalf of Miller, the Court has no information as to those factors at all.

The fact that Miller's revised terms and conditions of sale had been settled by Rechtsanwalt was not mentioned to the Commission during the administrative proceedings, nor was it mentioned in Miller's Application to this Court. It was first referred to in Miller's Reply, the explanation given being that the relevant papers had, until then, been forgotten in an old file. I confess to Your Lordships that this is the aspect of this case that has given me the most concern. I do not doubt that, whilst the fact that a layman has acted on the advice of a qualified lawyer is in general no defence either to a civil claim or to a criminal charge, it must, in the absence of bad faith, be a strong mitigating circumstance when it comes to the assessment of any penalty, even though expressed not to be 'of a criminal law nature' (Article 15 (4) of Regulation No 17).

The Commission relies in the first place on Article 42 (2) of the Rules of Procedure of the Court, which provides:

'No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure.'

It seems to me that the Commission is seeking too strict an interpretation of that provision. If Miller's explanation is correct, the 'fresh issue' here in question is based on a matter of fact which came to light during the written procedure, even though perhaps not because of something in it. Moreover Article 42 (2) must be interpreted in conjunction with Article 42 (1) which provides:

'In reply or rejoinder a party may indicate further evidence. The party must, however, give reasons for the delay in indicating it.'

The view is tenable that the only issue here is as to the heinousness of Miller's infringement and that what it seeks to do is to proffer further evidence in support of its case on that issue.

At all events I should be loath to exclude matter going to mitigation of a fine on such tenuous procedural grounds.

No more convincing to my mind is the objection put forward on behalf of the Commission that this new point contradicts points made earlier on Miller's behalf to the effect that, if it infringed Community law, it did so in ignorance of that law and because it had no legal department of its own to warn it of the possibility of infringement. If the Commission was right in finding that, in fact, Miller chose to shut its eyes to the full effect of Community law, that sort of point is manifestly irrelevant.

I am on the other hand impressed by the Commission's analysis of the circumstances in which Miller obtained from Herr Kirchner the draft of its revised terms and conditions of sale.

The evidence annexed to Miller's Reply begins with a letter from Miller to Herr Kirchner dated 25 September 1973, which is signed on behalf of Miller by one H. Müller. The letter recalls that on a number of occasions, in the context of litigation that Herr Kirchner had been conducting on behalf of Miller, he had criticized Miller's terms and conditions of sale, and it asks him to redraft them (Annex 14 to the Reply). There is next a letter from Herr Kirchner to Miller, dated 14 November 1973, enclosing his draft, which included Clause IX in a more stringent form than that finally

adopted (see Annexes 15 and 16 to the Reply). From the terms of that letter one gathers that Herr Kirchner's chief concern was to protect Miller against defaulting customers. There is lastly a follow-up letter, dated 22 November 1973, from Herr Kirchner to Miller, with which he encloses his bill, but also discusses a German statute of 17 July 1973 which gave effect in Germany to the Uniform Law on International Sale of Goods. Herr Kirchner points out that the provisions of that statute must be expressly excluded in writing if Miller's own terms and conditions of sale are to prevail (Annex 17 to the Reply).

Nowhere in that correspondence is there any mention of Community law. Yet, at the same time, Miller was negotiating its agreement with Delta BV, which was signed on 15 November 1973, and in connexion with which it was admitted on behalf of Miller that it knew that Community law had something to say about clauses like Clause IX.

Miller, in its Reply, proffered the evidence of Herr Müller and of Herr Kirchner himself. The Court thought it right to hear legal argument before deciding whether to hear that evidence. The Commission submits that the Court could not properly, on the basis of its scant knowledge of the circumstances surrounding the production by Herr Kirchner of Miller's new terms and conditions of sale, reduce the fine. I agree. We do not know how it came about that Herr Kirchner overlooked Community law, or how it came about that Miller failed to instruct him to advise about it, or how Herr Kirchner's draft of Clause IX came to be modified.

So I think that there are two courses open to Your Lordships. One is to order an enquiry under Article 45 of the Court's Rules of Procedure into those questions. The other is to remit the case to the Commission to reconsider the amount of the fine in the light of the evidence now proffered by Miller. There is a precedent for such a remission in Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, though here the Court's jurisdiction to order it must rest not on Article 176 of the Treaty, but on Article 172 coupled with Article 17 of Regulation No 17. I think, for my part, that the latter would be the correct course, because its adoption would respect the principle that the ascertainment of the facts bearing upon the amount of a fine to be imposed under Regulation No 17 and the fixing of the amount of that fine are, in the first instance, matters for the Commission.

I do not think, however, that any part of the costs of this action should fall upon the Commission, for it has, in my opinion, been, in no respect, blameworthy.

In the result, I am of the opinion that Your Lordships should —

(1) Cancel the fine imposed by Article 2 of the Commission's Decision and remit the case to the Commission to determine, in the light of the new evidence profferred by Miller, what the amount of the fine should be; and

(2) order Miller to pay the costs of this action.