OPINION OF ADVOCATE GENERAL LENZ
delivered on 16 June 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The present proceedings concern an appeal by the Publishers Association against the judgment of the Court of First Instance of 9 July 1992 in Case T-66/89. [1] In that judgment the Court of First Instance dismissed the application brought by the Publishers Association against the decision of the Commission of 12 December 1988 relating to the Publishers Association — Net Book Agreements proceeding. [2]

2. The appellant is an association of publishers in the United Kingdom. The present proceedings concern two agreements drawn up by the appellant and concluded in 1957. Those agreements are called 'Net Book Agreements' (hereinafter 'NBA'). The parties to the first of those agreements are all publishers who are members of the appellant association, whereas the parties to the second agreement are publishers who are not members of the association. The contents of the two agreements are largely identical.

3. The NBA lay down standard conditions for the sale of books at fixed prices — so-called net books — to be applied by the publishers in question. Under those standard conditions, wholesalers and retailers are in principle prohibited from selling such a book in the United Kingdom or Ireland at a price lower than that prescribed by the publisher. Exceptions to that rule are contained in the NBA themselves and in additional rules which the Publishers Association is authorized to issue by the NBA. Those additional regulations include rules on discounts for libraries, quantity buyers and so-called book agents.

The NBA give the Publishers Association the task of supervising compliance with the agreements and for that purpose collecting information on any infringements by book-

* Original language: German.
1 — *Publishers Association* v *Commission* [1992] ECR II-1995.
2 — OJ 1989 L 22, p. 12.

sellers. The participating publishers are obliged to enforce their contractual rights and their rights under the Resale Prices Act 1976 (a law in force in the United Kingdom) if called upon to do so by the Publishers Association. It should be noted that the Resale Prices Act 1976 enables a publisher to enforce compliance with conditions relating to a minimum resale price in the United Kingdom against all persons who have notice of those conditions.

4. In connection with the NBA and the implementing rules, the appellant also published a 'Code of Allowances' for the sale of new, revised or cheap editions, books with reduced net prices and remainders, and rules for book clubs ('Book Club Regulations') and the annual national book sale. Finally, the appellant published a trade directory ('Directory of Booksellers') listing all booksellers who met certain requirements and had undertaken to apply the abovementioned standard conditions for the sale of 'net books'.

5. Those rules are described in detail in the Commission's decision of 12 December 1988 [3] and in the contested judgment of the Court of First Instance. [4] It is not necessary to go into them in more detail here, since they are of no relevance for the decision in the present proceedings. It must be stated, however, that all those provisions apply only to the sale of 'net books' and that each publisher can decide freely whether or not he wishes to sell a book as a 'net book'. If a publisher decides to distribute a book as a 'net book', the NBA and the related rules apply. It is for the publisher alone, however, to determine the fixed price.

6. According to the findings of the Court of First Instance, about 40 000 new titles are published each year in the United Kingdom, 80% of which are published by members of the appellant association.

Only a small part of United Kingdom book production (approximately 1.2%) is exported to Ireland. However, those exports amount to 80% of imports of books into Ireland and over 50% of total book sales in that Member State. It is also established that about 75% of books sold in the United Kingdom or exported by British publishers to Ireland are marketed as 'net books'. [5]

3 — Cited above (note 2), paragraphs 6 to 30 and 38 to 39.
4 — Cited above (note 1), paragraphs 4 to 16.
5 — Judgment cited above (note 1), paragraphs 17 to 18 and 56.

7. The Restrictive Practices Court (the court with jurisdiction in the United Kingdom in competition matters) has on several occasions examined the compatibility of the NBA with United Kingdom competition law. The court first held that they were compatible in a detailed judgment given in 1962. [6] In that judgment it concluded that the abolition of the NBA would lead to a rise in book prices, a reduction of the number of stockholding book shops and a decline in the number and variety of published titles. The Restrictive Practices Court confirmed that ruling in 1964 and 1968. In late 1993 the competent authority announced its intention to carry out a fresh examination of the NBA and if necessary to refer them once more to the Restrictive Practices Court. [7]

8. After the accession of the United Kingdom to the Community, the appellant association notified the NBA and the other regulations to the Commission in 1973. It was 1988 before the Commission adopted a final decision in this matter. In that decision it decided that the NBA and the implementing rules and other measures adopted by the appellant in that connection [8] constituted an infringement of Article 85(1) 'to the extent that they cover [ed] the book trade between Member States' (Article 1 of the decision). The Commission refused to grant an exemption under Article 85(3) from the prohibition under Article 85(1) of the EC Treaty for the said agreements and other rules (Article 2 of the decision). The appellant association was also ordered forthwith to bring to an end the infringements as mentioned in Article 1 of the decision (Article 3 of the decision) and to inform the undertakings affected of the decision and its consequences (Article 4 of the decision).

9. The question of a possible exemption under Article 85(3) of the EC Treaty is dealt with in points 69 to 86 of the decision. The Commission states that in its opinion 'at least' one of the conditions of Article 85(3) cannot be regarded as satisfied, 'ie the condition that the agreements may not impose restrictions which are not indispensable to the attainment of the objectives of the agreements' (point 70). In examining this question the Commission points out that the appellant stated that without a common application of the standard conditions by publishers, booksellers could not be adequately protected. The Commission took the point of view, however, that the arguments put forward to that effect concerned not so much the necessity of a common application of standard conditions but much more the question whether fixed book prices as such were indispensable in order to attain those objectives. Both aspects could and should however be considered separately (point 71).

6 — [1962] 3 All ER 751.

7 — As at the date of the hearing before the Court of Justice, however, no further steps appear to have been taken.

8 — See paragraphs 3 to 4 above.

The Commission then describes the arguments put forward by the appellant on the

question of indispensability (point 72). According to the Commission, it was argued firstly that it would not be practicable for publishers themselves to have to notify every bookseller of their individual conditions of sale. Secondly, it would not be possible for booksellers to apply and comply with a large number of differing conditions for the resale of books with fixed prices. It was also necessary that each bookseller could be confident that his competitors were subject to the same terms as he was in relation to a particular book; the NBA provided booksellers with that confidence. Finally, compliance with the standard conditions and their enforcement could in practice be monitored only by the appellant association.

The Commission then observes that in order to assess whether restrictions on competition are indispensable, it is relevant 'first to recall the objectives of the present agreements' (point 73). It states in that connection:

'The Association argues that to impede the proper functioning of the agreements would cause stockholding booksellers to order fewer copies of the same title and fewer titles on account of the risk that lower prices elsewhere might leave them with stock which they could not sell. Such conduct would cause the number of stockholding booksellers to decrease. As stocks and display are to be considered essential for sales, sales would therefore fall, publishers would print smaller runs and costs would rise. As a result, and taking into account the higher discounts which would be requested by the trade from the publishers, book prices would therefore rise. At the same time titles with small print runs would possibly not be published at all.'

After various other observations (which I will discuss below) the Commission addresses the four arguments put forward by the appellant on the question of indispensability and comes to the conclusion that none of those arguments is convincing (points 76 to 85).

10. The Publishers Association brought an action against that decision before the Court of Justice in 1989. In response to its application for interim measures, brought on the same date, the President of the Court of Justice by Order of 13 June 1989 suspended the operation of Articles 2 to 4 of the contested decision. [9] The Court of First Instance, to which the case had been transferred in November 1989 as result of the changes in the rules on jurisdiction which had in the meantime entered into force, dismissed the application in the judgment under appeal. In the first part of its appraisal (paragraphs 43 to 59 of the judgment) the Court of First Instance considered the arguments put forward against Article 1 of the Commission's

9 — [1989] ECR 1693.

decision, and dismissed them. In the second part (paragraphs 60 to 116 of the judgment) the Court of First Instance considered the pleas brought against Article 2 of the decision and dismissed them. Those pleas included *inter alia* an alleged discrepancy between the objections notified to the appellant and those contained in the decision (paragraphs 61 to 70 of the judgment).

11. The appellant seeks

— an order setting aside the judgment,

— part of the same form of order as that sought by it from the Court of First Instance, namely

(i) annulment of Article 2 of the decision in so far as it refused an exemption under Article 85(3) for the NBA and certain related decisions, regulations and other documents referred to in Article 1 of the decision, and

(ii) a declaration that Articles 2, 3 and 4 of the decision are void, and

— an order that the Commission pay the costs of the appeal, the proceedings at first instance and the proceedings for the adoption of interim measures.

The appellant requests the Court of Justice to give final judgment on the application itself, in accordance with Article 54 of the Statute of the Court of Justice, or in the alternative to refer it back to the Court of First Instance for judgment.

12. The Commission asks the Court of Justice

— to dismiss as inadmissible the arguments and conclusions of the appellant in grounds 4(c) to (d) of the appeal,

— to dismiss the appeal as in any event unfounded, and

— to order the appellant to pay the costs of the appeal.

13. The Booksellers Association of Great Britain and Ireland (hereinafter 'the Booksellers Association') and Clé — the Irish Book Publishers Association (hereinafter 'Clé') have intervened in support of the appellant. Pentos Retailing Group Ltd and Pentos plc (hereinafter jointly referred to as 'Pentos'), a bookselling undertaking and its parent company, have been given leave to intervene in support of the Commission.

B — Analysis

Subject-matter and admissibility of the appeal

14. In view of the somewhat peculiar formulation of the appellant association's appeal, the first question to be examined is the scope of the appeal. It is apparent from the appeal that the Publishers Association attacks the judgment of the Court of First Instance only in so far as it upholds Articles 2 to 4 of the Commission's decision. The judgment is not challenged, on the other hand, in so far as it dismisses the pleas directed against Article 1 of the decision. The Publishers Association thus no longer contests the Commission's finding, which was confirmed by the Court of First Instance, that the NBA and the other rules mentioned in Article 1 of the decision constitute an infringement of Article 85(1) of the EC Treaty.

As the Commission rightly stated in its response to the appeal, the appeal is restricted in another respect too, since the judgment of the Court of First Instance is not contested in so far as it dismisses the aforesaid plea regarding a procedural error [10] (based on an alleged discrepancy between the objections notified to the appellant and those relied on in the decision).

In the appeal the appellant is therefore essentially criticizing the Court of First Instance for incorrectly regarding as lawful the refusal in Article 2 of the Commission's decision to grant an exemption under Article 85(3) of the EC Treaty.

15. In its response the Commission has rightly raised the question whether the appellant's appeal relates to all the agreements and other rules mentioned in Article 1 of the Commission's decision. The appellant's statements in the appeal were not entirely clear in this respect. The appellant put an end to this uncertainty only in its

10 — See paragraph 10 above.

reply to a written question by the Court of Justice. In that reply it stated that it had already, during the proceedings before the Court of First Instance, withdrawn the Code of Allowances (Article 1(c) of the Commission's decision) and its decision relating to the conditions for inclusion in the Directory of Booksellers (Article 1(f) of the decision); these were therefore not the subject of the appeal. In my opinion, however, the Court of Justice need not consider this point in detail in its judgment. If the appeal were to be upheld, it goes without saying that the Court of First Instance — or the Commission — when reconsidering the case would only have to examine whether an exemption could be granted for the other agreements and rules. A clarification in the operative part of the judgment is therefore unnecessary. Similar considerations will of course apply if the appeal is dismissed.

16. As I have already stated, the Commission's decision relates to the NBA and the other rules only *to the extent that* they affect trade between Member States. [11] As the Commission again emphasized in its response to the appeal, the decision thus did not extend to the application of the NBA and the related rules in the United Kingdom itself in so far as trade between Member States was not affected thereby. Whether and if so how that distinction, obvious in theory, is applicable in practice, need not be decided here, since the appellant has not put forward any criticisms in this respect in the appeal proceedings. The observations by the intervener Pentos to the effect that the application of the NBA and related rules could not be limited to the United Kingdom are therefore immaterial. As the appellant has rightly submitted, those observations by Pentos constitute an impermissible attempt by an intervener to attack the Commission's decision in another respect. [12]

17. The Commission argues that some of the points raised by the appellant are inadmissible, since they relate to questions of fact, not of law. Under Article 168(a)(1) of the EC Treaty and the first paragraph of Article 51 of the EEC Statute of the Court of Justice, appeals are of course limited to points of law. For simplicity, however, I shall deal with this objection when discussing the individual pleas affected by it.

11 — According to the Commission's observations in its reply to the appeal, that inter-State trade consists essentially of the export of 'net books' from the United Kingdom to Ireland, the import into the United Kingdom from other Member States of books which after import were made 'net books' by the importer or distributor, and the reimport into the United Kingdom of books previously exported to other Member States (particularly Ireland).

12 — It may also be noted, incidentally, that Pentos in fact intervened in the proceedings in support of the Commission.

Substance

Preliminary observation

18. The present case is remarkable from more than one point of view. It is surprising that not until 1988 did the Commission consider itself able to reach a decision on agreements which had been notified as early as 1973. It is also strange that the Commission almost completely ignores the decisions of the Restrictive Practices Court, to which the appellant had attached such great weight during the procedure. The Commission relies instead on a decision it adopted some years previously, only to assert in the subsequent court proceedings that that citation was of no particular importance for the present case.

The arguments put forward by the appellant also raise some doubt as to whether the decision of the Commission is appropriate. The appellant's assertion that one can hardly conceive of a system of resale price maintenance for books which restricts competition less than the NBA has something to be said for it. Also noteworthy — although of course of no relevance for the legal appraisal — is the circumstance that according to the Booksellers Association not only the publishers involved, but also the overwhelming majority of booksellers who belong to that association are in favour of the NBA. Finally, it must be noted that the Commission's decision has the consequence that the book market of the United Kingdom and Ireland, hitherto a single unit, will now be divided along the national frontiers. The appellant and both the Booksellers Association and Clé are not wrong in drawing attention to this consequence, which at least at first sight appears paradoxical.

The contested judgment of the Court of First Instance itself gives rise to a number of criticisms. Since the appellant has put forward certain arguments in this respect, I will postpone discussion of these questions until later.

19. The Commission rightly points out, however, that in determining whether the conditions for an exemption under Article 85(3) of the EC Treaty are satisfied, the Commission has a certain discretion. [13] Judicial review of such assessments must take account thereof and confine itself to 'an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom'. [14] It is for the Court of First Instance to carry out that review.

13 — See the judgment in Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraph 43.

14 — Judgment in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, p. 347. By contrast, the view expressed by Pentos, namely that a decision by the Commission under Article 85(3) is unlawful only if based on a 'manifest' error of fact or a 'manifest' error of law, is of course wrong.

If an appeal is brought against a judgment of the Court of First Instance, the appeal is limited to points of law. As I have already stated on another occasion, [15] in interpreting the term 'point of law' a restrictive approach is appropriate. That is consistent with the case-law to the effect that an appeal is admissible only 'in so far as it is claimed that the decision of the Court of First Instance is incompatible with the rules of law the application of which it had to ensure'. [16] The appeal must relate to the infringement of rules of law '*to the exclusion of any appraisal of the facts*'. [17]

The pleas in law put forward by the appellant must be considered in that light below. I must first mention that in the appeal the appellant has set them out in two sections (the first entitled 'The grounds of the appeal' and the second entitled 'Pleas in law in support of the grounds of appeal') without the relationship between those two sections being made clear. As some of the pleas in law overlap in any case, I will use my own arrangement of them below.

15 — See my opinion of 10 February 1994 in Case C-39/93 P *SFEI and Others* v *Commission*, [1994] ECR I-2681, paragraph 30 et seq.

16 — Judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 13; judgment in Case C-346/90 P *F* v *Commission* [1992] ECR I-2691, paragraph 7.

17 — Judgment in *Vidrányi*, cited above (note 16), paragraph 12; judgment in *F*, cited above (note 16), paragraph 7; most recently confirmed by the judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others*, 1 June 1994, [1994] ECR I-1981, paragraph 48.

The individual pleas in law on the appeal

(1) The nature of the NBA

20. The appellant complains that the Court of First Instance was guilty of a 'fundamental' misinterpretation in paragraph 72, by approving the opinion of the Commission that by means of the NBA a 'collective' system had been created for imposing the same price for any given book on all booksellers. It argues that the NBA in fact enable the individual publisher to practise resale price maintenance for specific books on an *individual* basis, without the publisher being obliged to do so; that is therefore not a *collective* decision. It submits that the system established by the NBA does, however, have certain collective characteristics: thus it enables the appellant, on behalf of the publishers concerned, to give notice of the standard conditions of the sale of 'net books' to all booksellers in the United Kingdom and Ireland. It also enables booksellers to operate on the basis of clear and uniform conditions of sale. The conditions of sale also provide for uniform exceptions. Finally, the system enables the appellant to monitor compliance with the standard conditions. In the appellant's opinion that does not, however, mean that the NBA are a collective system. It submits that the Commission itself called the system established by the NBA an 'individual system of maintained prices which has certain collective characteristics' during the procedure in the *VBVB and VBBB* case, [18] as

18 — Judgment in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19.

can be seen from the summary of facts and issues. [19]

The Booksellers Association and Clé also criticize the Court of First Instance for incorrectly speaking of a 'collective' system.

21. The Commission contends that both it and the Court of First Instance were well aware of the true nature of the NBA. That is shown by paragraphs 45 and 95 of the judgment appealed against. That is not contradicted by the passage in paragraph 72 of the judgment relied on by the appellant for its assertion to the contrary. The appellant gives that passage, which it moreover takes out of context, a meaning which the Court of First Instance did not intend.

22. The Commission's view is in my opinion correct. The observations in paragraphs 45 and 95 of the judgment under appeal show that the Court of First Instance was perfectly well aware that the publishers who were parties to the NBA had the possibility, but not the duty, of making the books published by them 'net books' and applying the standard conditions laid down in the NBA to sales of those books. Those uniform conditions of resale apply in fact only *if* a publisher has made a book a 'net book'. Whether the description of such a system as a *collective* system is a happy description, however, appears to me (contrary to the opinion of Pentos that the NBA are undoubtedly of a collective nature) to be doubtful. The formulation used by the Commission in the *VBVB and VBBB* case would in my opinion have been preferable. Ultimately, however, that question — despite the fact that words are proverbially very good for fighting with — can be left open, since it would have been of importance only if the Court of First Instance had drawn incorrect conclusions from the description it chose to use. That is not the case, however, as will be demonstrated below. [20]

23. The Commission states in this connection that the NBA create a 'conditions cartel' by eliminating, as regards the publishers who are parties thereto, any possibility of competition by applying variant conditions of sale. A publisher who wishes to apply resale price maintenance for his products can do this only on the basis of the NBA and the sale conditions contained therein.

In so far as those observations concern the question of the extent to which the NBA restrict competition, they relate to Article 85(1) and therefore need not be discussed further here, since the findings of the Court of First Instance on that point are not contested in the appeal. The same applies to the

19 — Ibid., page 47.

20 — See paragraphs 24 to 28 below.

opinion, expressed by the appellant during the oral procedure before the Court of Justice, that the publishers who are parties to the NBA are free to maintain the prices of their books without having to use the conditions set out in the NBA.

The appellant submits, however, that those observations of the Commission can also be understood as an attempt to call into question the existence of a further condition necessary for the grant of an exemption. Under Article 85(3) an exemption can of course not be granted if the parties involved would thereby be given the opportunity of eliminating competition in respect of a substantial part of the products in question. If the Commission's observations had related to that condition, they should have been dismissed as inadmissible, since both the Commission's decision and the judgment under appeal deal *exclusively* with another condition for the grant of an exemption, the indispensability of the restrictions on competition. However, the Commission made it clear in the course of the proceedings that its observations were intended merely to describe the content of the NBA.

(2) The *VBBB and VBVB* case

24. In point 75 of its decision, the Commission notes that it has 'already' stated in its decision in the *VBBB and VBVB* case [21] that 'in order to achieve an improvement in the publication and distribution of the books in question, a collective resale price maintenance scheme entailing the imposition of restrictions on competition in trade between Member States, such as contained in the agreements in question, is not indispensable'. The Court of First Instance stated in its judgment that in so doing the Commission did not intend to apply the assessment of indispensability made in the *VBBB and VBVB* case to the NBA system; the Commission in fact intended merely to point out the general principle that the fact that a restriction on competition affords benefits within the market of a specific Member State does not necessarily make it necessary to apply the same restrictions on competition to trade between Member States (paragraph 87 of the judgment appealed against).

25. The appellant is of the opinion that those observations by the Court of First Instance contain an error of law. It argues that the NBA system cannot be compared with the system which the Commission had to decide on in the *VBBB and VBVB* case. In that case, unlike in the present case, there was an agreement as a result of which competition was very considerably restricted, since the publishers were *obliged* to apply resale price maintenance for the books published by

21 — OJ 1982 L 54, p. 36. That decision was the subject of the Court of Justice's 1984 judgment referred to above (note 18).

them. The reference to that case in the Commission's decision was therefore a serious error, and the Court of First Instance failed to recognize this.

The appellant argues that if the Commission intended merely to recall the principle established in the *VBBB and VBVB* case, there is still an error of law, since the appellant at no time claimed that the NBA system had to be applied to trade between Member States because it produced benefits within the market of one Member State. Its central argument had on the contrary always been that the NBA were indispensable 'if the same benefits as those enjoyed by the public in the United Kingdom were to be enjoyed by the public in Ireland'.

26. The Commission and Pentos do not deny that there are significant differences between the NBA system and the agreement which was the subject of the *VBBB and VBVB* case. The Commission confirms, however, that in the passage in question in its decision it indeed intended only to recall a general principle, as the Court of First Instance rightly found. It argues that the reasoning in a Commission decision does not only serve the purpose of discussing the arguments advanced by the parties concerned; on the contrary, it is not merely appropriate but also desirable that the Commission should in its decisions include, in addition to the observations which are absolutely necessary for the particular case, reasoning of a more general nature which could serve as guidance to other economic operators. It adds that the appellant has moreover not disputed that the principle referred to at that point in the decision is correct.

27. I must admit that the Commission's arguments strike me as rather odd. The decision in the *VBBB and VBVB* case is the only decision of the Commission (or the Court of Justice) cited by the Commission in its decision in its observations on Article 85(3) — and precisely that citation, according to the Commission and the Court of First Instance, is to be understood as ultimately being of no relevance for the decision, but simply recalling a general principle. As the appellant rightly says in its reply, that would mean that the citation was irrelevant for the decision made by the Commission in the present case. I also find it difficult to understand why the Commission should use that decision to remind other economic operators of a principle which is not relevant to the decision in the present case. That attempt at an explanation stands on insecure foundations, and it is telling that the observations which the Commission has made on this point in the present proceedings are characterized by extreme caution. The suspicion therefore arises that when adopting its decision the Commission could very well have been of the opinion that the decision in the *VBBB and VBVB* case was relevant for the decision

in the present case. That is supported, for instance, by the circumstance that the earlier decision is mentioned without the differences to the present case being pointed out. The chosen wording ('already') could also be an — admittedly weak — indication that the Commission could have been of the opinion that the principle mentioned by it was applicable in *both* cases. The Commission would then indeed have assumed that the relevant question was whether application of the NBA to trade between Member States was indispensable in order to bring about the benefits which arose from its application in the *United Kingdom*.

28. However, after careful consideration I have nevertheless reached the conclusion that this plea in law on the appeal should not succeed. It is not evident with sufficient certainty from the Commission's decision that it based its refusal to grant an exemption on the considerations in point 75. On the contrary, paragraphs 76 to 85 examine the four arguments put forward by the appellant which in the appellant's opinion show the indispensability of the restrictions on competition. The Commission has some justification for pointing out that that discussion would have been unnecessary if the decision in the case had simply followed from the reasoning in point 75 and the reference therein to the decision in the *VBBB and VBVB* case. The explanation for the reference given by the Court of First Instance in the judgment under appeal is thus admittedly not free of all doubt, but is perfectly tenable. In my opinion, it must therefore be stated that there is no error of law.

(3) Objectives of the NBA and possible alternatives

29. The appellant considers that the Court of First Instance was wrong in upholding the Commission's opinion with respect to the question of indispensability. It argues that it is logically impossible to examine the question of indispensability without first having examined what the objectives of the NBA were, whether (and if so, to what extent) those objectives were in fact achieved, and whether certain other means of achieving those objectives existed which were less restrictive of competition. The Commission admittedly expressed the opinion in point 75 that 'the parties could [22] use less restrictive means to improve the publication and distribution of books'. However, it did not explain more precisely what less restrictive means it had in mind.

30. The Commission considers that the Court of First Instance was perfectly well aware of the objectives of the NBA. It argues that it could have left open the answer to the question whether the NBA in fact achieved the desired objectives and contented itself with examining the question whether an alternative existed which was less restrictive of competition. In its opinion, that approach is logically justified and also serves adminis-

22 — The German text uses the word '*sollten*' ('should') here. However, it is clear from the English text — the only authentic one — that no obligation was meant to be imposed here, but merely a reference made to the existence of other possibilities.

trative economy, and the Court of First Instance was right in not objecting to the Commission's approach. It submits that this criticism is moreover a question of fact which cannot be made the subject of a ground of appeal.

The Commission is further of the opinion that it is not obliged to describe in detail to a party seeking an exemption under Article 85(3) what alternative means which are less restrictive of competition exist to attain the desired objectives in each case. It adds that it nevertheless (contrary to the appellant's assertion) did put forward an alternative, namely individual agreements for the purpose of maintaining prices of books. It would have been up to the appellant to demonstrate that that alternative was not practicable. That was not done, however.

31. The plea in law to be considered here can in my opinion be divided into two parts. The appellant firstly challenges the approach, approved by the Court of First Instance, used by the Commission in considering Article 85(3). It also complains that the Commission did not explain to it what alternatives to the NBA system existed.

32. As regards the question of the lawfulness of the Commission's approach in general, this must in my opinion be regarded as a question which is amenable to review by the appellate court, since if the Commission in considering the question of Article 85(3) had proceeded from a wrong *starting point*, it would have committed an error of law. The same would apply to the judgment of the Court of First Instance if it approved an approach which was thus vitiated by an error of law.

In my opinion, however, the Commission's approach as such cannot be objected to. Under Article 85(3) it is necessary in order for an agreement to be exempted that that agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, allows consumers a fair share of the resulting benefit, does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. An exemption is possible only if the agreement meets all four of those conditions. A refusal to grant an exemption is therefore already justified if only *one* of those conditions is not satisfied. The Commission could therefore restrict itself to an examination of the question whether the restrictions on competition resulting from the NBA system were indispensable for attaining the desired objectives. If that was not the case, it was indeed unnecessary, for the reasons stated by the Commission, to examine the other requirements of Article 85(3).

33. It is self-evident, however, that the Commission and the Court of First Instance had to examine first what benefits were to be attained by means of the NBA system. To that extent I agree with the appellant's argument. Consideration of the question whether a restriction on competition is indispensable to the attainment of the *desired objectives* presupposes that it has first been established what those objectives are. On the other hand, the Commission could leave open the question *whether* those objectives actually were attained, once it was certain that the restrictions on competition in question were not indispensable for attaining them.

The Commission argues that it well appreciated the benefits which the NBA system was intended to bring about and which the appellant relies on, as can be seen from point 73 of the decision, cited above, [23] and that in its further examination of the question, it assumed that the NBA did in fact bring about those benefits. The passage referred to in fact deals with precisely those circumstances which the appellant used as arguments to justify an exemption, namely that without the NBA system book prices would rise, the number of publications might decrease and the number of stockholding booksellers fall. Looking at it from a positive angle, this means that according to the appellant's submissions the benefits of the NBA are that they guarantee lower book prices, ensure that a large number of books is published (including those for which there is little demand) and maintain a sufficient number of stockholding booksellers in the market. The Commission has not disputed that those are benefits within the meaning of Article 85(3), so that I need not discuss questions on that point. However, I wish to observe that I was impressed by the observations of the Booksellers Association, during the oral hearing before the Court of Justice, on the last of those benefits. The intervener stated on that occasion that the presence of a large number of stockholding booksellers in the market guaranteed the widest possible distribution of books — and I would add that that is certainly in everyone's interest. [24]

The Court of First Instance recognized those objectives of the NBA too, as the Commission submits. In paragraph 72 of the judgment under appeal the Court of First Instance summarizes the contents of the Commission's observations on that point. As the Court of First Instance put it, the aims pursued by the NBA were to avoid a decline in stock levels which would result in shorter print runs [25] and to prevent an increase in book prices and the disappearance of titles printed in short runs. It may well be asked

23 — See paragraph 9 above.

24 — The present case differs in that respect from the situation which the Court of Justice had to rule on in Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125. In that judgment the Court of Justice stated (paragraph 184) that the number of intermediaries was 'not necessarily an essential criterion for improving distribution within the meaning of Article 85(3)'. It must be borne in mind, however, that that case related to the distribution of tobacco products.

25 — The English text reverses the relationship of cause and effect ('to avoid the decline in stock levels which would result from shorter print runs') compared with the German text ('a decline in stock levels which would lead to smaller print runs'). However, this is probably an oversight rather than an error of content.

whether the Court of First Instance in those words in fact gave a reasonable summary of the aims of the NBA as put forward by the appellant. It is noticeable above all that the risk of a decline in the number of stockholding booksellers is not expressly mentioned. However, I need not go into this question further, since the appellant has made no specific complaint in that respect. It must also be presumed in favour of the Court of First Instance that it was familiar with point 73 of the decision (which it refers to in paragraph 72 of its judgment) in its entirety.

34. Even if the Commission and the Court of First Instance were thus aware of the *objectives* of the NBA, it is not yet certain whether they also correctly appreciated their *extent*. As mentioned above, the appellant complains that both the Court of First Instance and the Commission misunderstood what it regards as the central feature of the present case — namely, that the NBA system is indispensable for ensuring that the benefits sought occur *in Ireland as well*. That question — which goes to the heart of the present case — is in my opinion best examined in connection with the appellant's criticism of the opinion expressed by the Court of First Instance in paragraph 84 of the judgment under appeal. [26]

35. I will now turn to the appellant's complaint that the Commission did not specify what other means, less restrictive of competition, there were for attaining the objectives of the NBA. The Commission rightly refers in this connection to the judgment of the Court of Justice in the *VBVB and VBBB* case. The Court of Justice held that it was in the first place for the parties seeking an exemption 'to present to the Commission the evidence intended to establish the economic justification for an exemption and, if the Commission has objections to raise, to submit alternatives to it. Although it is true that the Commission, for its part, may give the undertakings indications as regards any possible solutions, it is not legally required to do so ...' [27] If the Commission denies that particular restrictions on competition are indispensable, it will at least have to indicate what alternatives it has in mind. Otherwise — as the appellant expressively puts it — the Commission would in fact be given *'carte blanche'* and would be enabled simply to deny the indispensability of restrictions on competition *in abstracto* without any explanation.

However, contrary to the appellant's assertion, the Commission has indeed indicated what alternative it had in mind. As can be seen for example from points 74 and 82 of the decision, the possible alternative consisted in the Commission's opinion of 'indi-

26 — See paragraph 37 et seq. below.

27 — *VBVB and VBBB*, cited above (note 18), paragraph 52. See also the judgment in Case 42/85 *Remia* v *Commission* [1985] ECR 2545, paragraph 45.

vidual resale price maintenance agreements'. [28] As the Commission has rightly stated, it did not have to decide at that stage whether such individual agreements would be compatible with Article 85. It should be observed that the Commission at that time had no knowledge, nor could it have, of the specific content of such individual agreements. That question would have had to be answered only if corresponding agreements had been notified to the Commission. It was sufficient that the Commission stated that the NBA system was not the only conceivable means of attaining the desired benefits. The Commission did that. It was thus for the appellant to show that such individual agreements between publisher and bookseller were not likely to bring about the benefits aimed at by means of the NBA system. The Commission's approach can therefore not be objected to, and the Court of First of Instance was able to reject the appellant's objections on this point. [29] That plea in law in support of the appeal must therefore fail.

36. The Booksellers Association considers in this context that the Commission ought not to have restricted itself to refusing the appellant's request for an exemption for the NBA. It should instead have entered into negotiations with the appellant in order to find an acceptable alternative. The Commission was not entitled to refuse an exemption until the parties concerned had refused to accept the Commission's suggestions. Even if the Commission might in other cases be able to restrict itself to refusing a request for exemption without putting alternatives to the parties concerned, an exception must be made in the present case, since it concerns agreements which have been applied over many years and are in the public interest.

28 — See also point 74 of the decision.
29 — Paragraph 90 of the judgment.

It does not appear to me to be necessary to consider the details of that argument developed by the intervener. This is probably a new legal ground which should be regarded as inadmissible, as the Commission rightly observes. It should be emphasized in any event that a rule with the content argued for by the intervener does not exist in Community law.

(4) Paragraph 84 of the judgment under appeal

37. The appellant makes two criticisms of the findings of the Court of First Instance in paragraph 84, only one of which requires detailed examination. It must first be stated that in that paragraph the Court of First Instance dismisses an argument allegedly put

forward by the appellant that the NBA system would collapse if its application were confined to the national market (in other words, the United Kingdom market).

38. The appellant first asserts that it at no time put forward the argument discussed by the Court of First Instance. That is contradicted by the Commission. However, in its opinion the objection could not succeed even if the appellant had in fact not put forward that argument, since it is not clear what influence the fact that the Court of First Instance dismissed an argument that had not been advanced could have on that Court's conclusions on those arguments which the appellant *did in fact advance*.

It would in my opinion be pointless to examine whether the appellant made use of the argument in question in the course of the procedure before the Commission and the Court of First Instance. That Court itself states in paragraph 82 of its judgment that the appellant accepted at the hearing that the confinement of the application of the NBA to the British market would not lead to the collapse of the system. Why the Court of First Instance nevertheless then discussed the argument in question in paragraph 84 of its judgment and rejected it is a mystery. I am inclined to believe that it was due to a mistake by the Court of First Instance. Be that as it may, the fact that that Court deals with an argument which was not (or no longer) raised may admittedly give rise to doubt as to whether the Court applied the necessary care in drawing up its judgment. For evaluating it in law, on the other hand, it is irrelevant, since — as the Commission has rightly observed — it is not apparent what influence those superfluous observations by the Court of First Instance could have had on its position with respect to the arguments actually advanced. Criticism directed against such superfluous observations is to be regarded as of no effect. [30]

39. It is less easy to find an answer to the questions thrown up by the appellant's second criticism of paragraph 84 of the judgment. In that passage the Court of First Instance rejects the aforesaid alleged argument of the appellant with the comment that a price maintenance system which restricts competition within the common market cannot qualify for exemption on the ground that it must continue to operate in order to produce its beneficial effects within the market of a Member State. The judgment then states:

'It should further be noted that the [appellant], which is an association consisting of publishers established in the United Kingdom, is not entitled to rely on any negative effects which might be felt on the Irish market, even though that market belongs to the same language area.'

30 — See the judgment in Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 31.

40. The appellant claims that the Court of First Instance committed a manifest error of law in that passage. It maintains that an applicant from a particular Member State who requests exemption for an agreement which has an effect on trade between Member States cannot be prevented from relying on the beneficial effects of that agreement in other Member States. The appellant submits that it always relied on the fact that the NBA system was indispensable in order to bring about the same benefits in Ireland as in the United Kingdom. The Booksellers Association and Clé support that submission by the appellant.

41. It cannot be denied that the passage in the judgment cited above contains a manifest error of law. An exemption under Article 85(3) presupposes that the agreement in question brings about certain positive effects. Article 85(3) contains no provisions as to *where* those benefits are to occur. It is self-evident, however, that all beneficial effects which come into being in the Community are of relevance in that context. The competition rules of the EC Treaty are intended to ensure the functioning of the internal market. It would be incompatible with that objective if an economic operator from a specific Member State were prevented from relying in the context of Article 85(3) on benefits occurring in another Member State. That conclusion seems to me so trite that it requires no further explanation.

42. The Commission agrees that the passage in question in the judgment is difficult to understand and makes it clear that it does not share the view expressed by the Court of First Instance. It considers, however, that that observation by the Court of First Instance is irrelevant for these proceedings, since it was made in the context of the rejection of an argument which was not advanced, or no longer advanced, by the appellant. Of course the appellant could have relied on benefits which occurred in Ireland. It had been unable to establish, however, that restriction of the application of the NBA to the United Kingdom would have the negative consequences it alleged in the Irish market. For that reason too, it considers that the appellant's criticism is irrelevant.

43. Those observations are not convincing. Paragraph 84 of the contested judgment can indeed — as I have already stated — be regarded as superfluous and therefore ignored. The passage in question can moreover in view of its wording be regarded as an *obiter dictum* in the context of paragraph 84, which reduces its significance even further. Attacks against that passage *as such* therefore miss the mark. It cannot be denied, however, that the Court of First Instance states here that the appellant can in its opinion not rely on benefits in Ireland in order to be granted an exemption. As I have already stated, [31] however, the question of the indispensability of a restriction on competition can be properly assessed only if there is clarity as to the objectives of the agreement in question. In the present case those objectives included the

31 — See paragraph 33 above.

bringing about of those beneficial effects *in Ireland too*. Since the Court of First Instance clearly seems not to have realized this, it proceeded from an incomplete, and hence wrong basis when examining the indispensability of the restrictions on competition. That is in my opinion an error of law which — as it is a fundamental error — would justify quashing the judgment.

44. The Court of Justice has already held, however, that an appeal must be dismissed 'if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative provisions appear well founded on other legal grounds'. [32] So if the Commission's decision on this point were correct, that would be justification for upholding the judgment regardless of the error of law on which it is based. That would presuppose that the Commission itself was well aware of the extent of the benefits alleged by the appellant when it considered the question of the indispensability of the restrictions on competition.

45. The Commission's observations in the appeal proceedings give rise to doubt as to whether that was the case. In the response the Commission refers to the fact that exports to Ireland represent only a very small share — about 1.2% — of United Kingdom book production. It is therefore not likely that if the application of the NBA were confined to the United Kingdom, there would be an appreciable effect on the activities of publishers in that territory. Print runs, costs and the number and variety of books published by British publishers would not alter appreciably. Irish book buyers would therefore be able to benefit in that respect in the same way as book buyers in the United Kingdom. The Commission also considers that the adverse effects feared by the appellant with respect to the number of stockholding booksellers in the *United Kingdom* would also not be likely to materialize. The possible effects on the number of booksellers in *Ireland*, on the other hand, are merely mentioned in a footnote to the response. It is also noticeable that in the rejoinder the Commission complains that the appellant has shifted its ground and now relies on an argument which is very different from the argument it advanced in the proceedings before the Court of First Instance. Those observations give the impression that the Commission originally took no account of the question of the possible effects on Irish booksellers.

46. The Commission's comments on an observation made by the appellant in the reply also feed that suspicion. The appellant states there that its case was always based on the adverse effects the removal of the NBA would have on Irish booksellers and indi-

32 — Judgment in Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28.

rectly on book buyers in Ireland and Irish publishers. The Commission interprets that statement to mean that the appellant bases its application for exemption for the NBA on the ground that they lead to benefits for the competitors of the appellant association's members. It says that such an argument must be regarded as unusual at the least. It suggests that it is possible that the observations at the end of paragraph 84 of the contested judgment can be explained by the fact that the Court of First Instance had considerations of that type in mind.

Those observations testify to the imagination and ingenuity of the Commission's representatives, but fail to convince. Clé explained at the hearing before the Court of Justice how the said argument of the appellant is to be understood. The argument is that the present case concerns the continued existence and viability of stockholding booksellers in Ireland, and the existence of those booksellers of course also — indirectly — benefits the Irish publishers. The appellant's argument is therefore perfectly logical and coherent in this respect. The observations of the Commission, on the other hand, are if anything likely to divert attention away from the actual problems in the present case. The Commission's observations would have been unnecessary if it had had specific evidence to refute the appellant's assertion that it had not taken account, or not adequately taken account of the effects on booksellers in Ireland.

47. The appellant's submission that the Court of Justice should quash the judgment of the Court of First Instance and the decision of the Commission in this respect and thereby cause the Commission to make a fresh decision on its application for exemption therefore has much to be said for it. I have nevertheless reached the conclusion that the ground of appeal in question ought not to succeed, since the appellant has in my opinion nevertheless in the end failed to prove that the Commission when adopting its decision failed to take into account the possible beneficial effects of the NBA on the structure of the book trade in Ireland. As stated above, in points 76 to 85 of the decision the Commission discussed the specific arguments which the appellant considered proved the indispensability of the NBA. It is not apparent that the Commission examined those arguments only in respect to the United Kingdom. On the contrary, the relevant observations of the Commission expressly refer to Ireland at two points. [33] It would have been for the appellant to advance further arguments to demonstrate that the application of the NBA to trade between Member States was indispensable in order to bring about certain benefits in Ireland. That was clearly not done. The appellant appears to have restricted itself to putting forward its four arguments generally and with no particular emphasis on the Irish market.

33 — See points 77 and 81.

Since it thus cannot be established that the Commission proceeded from a wrong understanding of the benefits aimed at when it examined the indispensability of the restrictions on competition, the plea in law in question should be rejected on the basis of the considerations already stated above.

(5) Decisions of the Restrictive Practices Court

48. Additional observations made by the Booksellers Association in this connection need be discussed only briefly. The intervener submits that the Commission and the Court of First Instance failed to take proper account of the importance of the NBA within the common language territory of the United Kingdom and Ireland. It argues that to give certain benefits to the residents of one territory and refuse them to the residents of another territory is an infringement of the principle of equality. That argument cannot be followed. There can be no question of inequality of treatment, since the Commission merely decided that the appellant had not succeeded in demonstrating that the restrictions on competition in the NBA were indispensable in order to bring about the benefits sought.

49. The appellant criticizes the Court of First Instance for attributing to it, in paragraph 77 of the judgment, an argument which it never used. The Court of First Instance states at that point that the appellant asserted that the finding by the Restrictive Practices Court that the NBA was indispensable applied both to sales in the United Kingdom of books produced there and to trade between Member States. The appellant contends that it merely submitted that the evidence before the British court and the conclusions of that court were just as relevant for Ireland as for the United Kingdom. It states that the Commission gave no reasons for its conclusion that the consequences which in the opinion of the Restrictive Practices Court would occur in the United Kingdom if the NBA came to an end would not occur in Ireland. The Commission thereby infringed Article 190 of the EC Treaty.

The Booksellers Association also submits that the decision of the Commission, confirmed by the Court of First Instance, has the effect of dividing the hitherto unitary market along national frontiers. The answer to that argument is that the fact that the decision was limited to the aspects relating to trade between Member States and did not deal with the purely national application of the NBA follows from the restricted scope of Article 85 of the EC Treaty.

The appellant submits that the Court of First Instance was also wrong to conclude that it

was apparent from point 43 of the decision that the Commission was aware of the decisions of the Restrictive Practices Court. In fact neither that passage nor any other passages in the decision show that the Commission took those decisions into account. The appellant accepts that there is no obligation on the Commission to deal with all the evidence put before it. It argues that in the present case, however, the Commission omitted to evaluate some of the most important items of evidence, namely the evidence produced to the Restrictive Practices Court and the conclusions of that court. The Commission ought not to have rejected the request for exemption without examining that evidence carefully and completely. Had it carried out such an examination, it could not logically have reached the conclusion which it actually did reach. The argument used by the Court of First Instance in paragraph 79 of its judgment, namely that national judicial practices cannot obstruct the application of the competition rules in the EC Treaty, is admittedly correct. That consideration is in the appellant's opinion irrelevant, however, since the present case is merely concerned with whether the appellant could rely on the said evidence in the context of its application for the grant of an exemption.

Court's rejection of the arguments actually advanced by the appellant.

The Commission further submits that point 43 of its decision shows that it did not overlook the decisions of the British court. However, it had not been necessary to deal expressly with the findings of the Restrictive Practices Court and the evidence before that court, since they were not directly relevant to the questions to be discussed by the Commission in the present proceedings. Firstly, the British court did not directly express any view on the indispensability of the restrictions on competition within the common market arising from the NBA. Secondly, the Restrictive Practices Court had not regarded it as proved that the abolition of the NBA would lead to a significant reduction in earnings from export trade (which includes exports to Ireland). Finally, the British court considered exclusively whether the maintenance of the NBA was compatible with the public interest in the *United Kingdom*.

50. The Commission counters that the misrepresentation by the Court of First Instance of its submissions, complained of by the appellant, would be of significance only if such a mistake (which the Commission moreover does not regard as proved) was directly relevant to the reasons for the

51. On the criticism that the Court of First Instance dealt with an argument which the appellant had not submitted, I can content myself with a reference to my observations on an analogous criticism of paragraph 84 of

the judgment. [34] Even if the appellant's criticism were correct, it would not be apparent what influence the superfluous (on that hypothesis) observations of the Court could have had on its conclusions with respect to the arguments actually advanced.

52. As to the question whether the Commission took into account the decisions of the Restrictive Practices Court, it must be observed that they are merely mentioned in point 43 of the decision. Neither the specific content of those decisions nor the evidence before that court is discussed in more detail by the Commission at that or any other point in the decision. There is merely another reference to the proceedings before the national court in point 71 of the decision. There the Commission asserts that the arguments on the question of the indispensability of the NBA put forward in those national proceedings had concerned not so much the necessity of a common application of standard conditions in the case of fixed book prices but much more the question whether resale price maintenance for books as such was indispensable in order to attain the desired objectives. The Court of Justice has already pointed out, in the order it made in the proceedings for interim measures, that the said national decisions did indeed also examine the question of the indispensability of laying down standard conditions of sale. [35] That order also held that the Commission had in points 72 to 86 of its decision considered the indispensability of the NBA 'without taking account of the appraisal made by the abovementioned national court'. [36] In those circumstances it can scarcely be asserted that it is apparent from the Commission's decision that it 'did not ignore' the decisions of the British court, as the Court of First Instance felt it could assume. [37]

I am puzzled as to why the Commission did not deal with the proceedings before the Restrictive Practices Court in more detail. If the appellant regarded those proceedings as of such great importance for the present case, the obvious thing to do would have been to deal with those proceedings, even if only briefly. The omission cannot be attributed to lack of time, in view of the length of the procedure. In the proceedings before the Court of First Instance and in the appeal proceedings the Commission stated the reasons which had led it to the view that the said national proceedings were of no particular importance for the present case. Why it did not previously do this in the decision itself is inexplicable.

53. I am nevertheless of the opinion that the Commission is in the right on the substan-

34 — See paragraph 38 above.
35 — Cited above (note 9), paragraph 30.
36 — Ibid., paragraph 29.
37 — In paragraph 79 of its judgment.

tive point. The Commission correctly points out that the Restrictive Practices Court examined the NBA with respect to their compatibility with the competition law of the *United Kingdom*. The decisions of that court were handed down before the accession of the United Kingdom to the Communities. They therefore did not relate to the interpretation of Article 85 of the EC Treaty, and can therefore not be directly adduced to answer the question in issue here, the indispensability of the restrictions on competition in the NBA with respect to *trade between Member States*. The Court of First Instance saw this quite rightly in paragraph 79 of its judgment. [38]

The appellant and Clé appear to assume that in the national proceedings the British court reached the conclusion for the United Kingdom that the restrictions on competition contained in the NBA were indispensable in order to attain the desired benefits, and that the Commission therefore had to prove that the same reasoning did not apply to Ireland. That cannot be followed. Such a reversal of the burden of proof is not compatible with Article 85(3). It was for the appellant to prove that the restrictions on competition were indispensable with respect to trade between Member States. For that purpose the appellant put forward four specific arguments, which will be discussed below.

54. I must first consider the wider argument of the Booksellers Association that the Commission, although not bound by the decisions of national courts, is under a duty of cooperation with the national competition authorities in accordance with Article 5 of the EC Treaty. According to that argument, the Commission is obliged to take the findings of those authorities into account, in so far as this is necessary to ensure a fair application of the competition rules in the EC Treaty and prevent any unwarranted interference with the application of national competition law rules. The appellant apparently attempted to adopt that argument as its own at the hearing before the Court of Justice.

In my opinion it can be left open whether the Commission's objection that this is an inadmissible new submission is correct. The (in any case very vague) argument of the intervener can in any event not be followed. The intervener's argument ultimately amounts to imposing a duty on the Commission to bring the application of the Community competition rules into line with national competition rules and their application in the particular case. As the Commission has

38 — For this reason the observations of the British court on the possible effects on export trade of the abolition of the NBA, referred to by the Commission, also seem to me to be of no importance.

rightly stated, the basic principle of Community law that it takes precedence over national law would thereby be turned upside down.

55. This ground of appeal too should therefore be rejected. I stress once again, however, that I would have thought it considerably more appropriate for the Commission to explain in the decision itself why it did not attribute to the proceedings before the Restrictive Practices Court any particular importance for the present case, instead of explaining its reasoning for the first time in the court proceedings.

(6) Examination of the appellant's specific arguments

56. The appellant complains that the Court of First Instance and the Commission examined each of its four principal arguments on the question of indispensability separately and distinctly from the others. In its opinion it follows from those arguments taken as a whole that the restrictions on competition contained in the NBA are indeed indispensable for attaining the desired benefits.

The appellant submits that it always emphasized that a system of resale price maintenance for books must be simple to operate in order to bring about positive effects. The cumulation of difficulties arising from individual agreements without the benefit of the means provided by the NBA would render such individual agreements impracticable in view of the number of publishers, the number of publications and of individual copies of a book stocked by booksellers and the nature of the book trade.

57. The Commission rightly responds that four weak arguments do not turn into a convincing argument by being taken together. The appellant has in my opinion been unable to explain how taking the submissions together can lead to a demonstration of the indispensability of the restrictions on competition, if none of the individual arguments is convincing on its own.

58. The Commission also points out that the appellant does not challenge the observations of the Court of First Instance on the individual arguments as such. As I have already stated, in the course of the procedure before the Court of Justice the appellant emphasized above all the possible consequences of the Commission's decision on booksellers in Ireland. The parties intervening in support of the appellant have also emphasized this. The

Booksellers Association spoke of a danger to smaller booksellers. Clé even spoke of the 'collapse' of the book market in Ireland and expressed its fear that the Commission's decision would lead to practical difficulties which would have to be regarded as a 'nightmare'.

In those circumstances one might have expected the appellant to attack at least the findings of the Court of First Instance with respect to the second of the appellant's arguments (that booksellers were not in a position to apply and comply with a large number of differing conditions of sale of various publishers). The Commission's observations on this point in points 79 to 83 of its decision do not in fact appear to me to be particularly convincing. The findings of the Court of First Instance in this respect also leave something to be desired. [39] It would not be appropriate, however, to subject those observations of the Court of First Instance on the individual arguments need not be considered. This ground of appeal must therefore also fail.

(7) Considerations of legal policy

59. The appellant points out that the Commission stated in its Communication to the Council of 27 November 1985 [41] that resale price maintenance for books had positive effects and did not infringe the competition rules in the EC Treaty. It submits that the Commission's approach in the present case is not consistent with that and infringes the principle of proper administration, and that the Court of First Instance failed to take account of that contradiction.

The Commission disputes that and argues that in that communication it unmistakeably made clear that it would not tolerate any practices which were not compatible with Community competition law. In the present case it adopted a 'pragmatic' approach and restricted itself to those aspects of the application of the NBA which affect trade between Member States.

39 — Paragraph 105 of the contested judgment states, for instance, that that argument 'essentially' concerns the British market and is therefore 'not ... a telling factor'. How the Court of First Instance reached that conclusion is not apparent to me.

40 — Judgment in Case C-136/92 P, cited above (note 17), paragraphs 29 and 52.

41 — COM (85) 681 final.

It cannot be seen how the argument advanced by the appellant could help the appeal succeed. As the Commission rightly stresses, the appellant has not claimed that the communication in 1985 gave rise to an expectation — which might deserve legal protection — on its part to the effect that the Commission would not object to the NBA system. I consider, moreover, that these are questions of policy which are of relevance *de lege ferenda*, but whose consideration — as Pentos rightly argued — is not within the jurisdiction of the Community courts.

60. The same also applies to the references by the appellant and the Booksellers Association to the fact that the Commission had to take the cultural aspects of the present case into account when adopting its decision. As the Booksellers Association has correctly stated, a duty to take those aspects into account already followed from the case-law of the Court of Justice. As a result of the Treaty on European Union, that duty is now expressly mentioned in the EC Treaty (Article 128(4) of the EC Treaty). However, as can be seen from point 75 of the Commission's decision, it did not overlook those cultural aspects. [42]

61. Finally, the appellant also relies in this connection on a resolution of the European Parliament of 21 January 1993 in which the Parliament favours the maintenance of resale price maintenance for books in common language areas. The Commission rightly points out that that submission is irrelevant simply because the resolution was passed long after the adoption of the contested decision by the Commission.

62. This ground of appeal must therefore also be rejected.

Costs

63. Since the appeal must therefore be dismissed, the appellant must be ordered to pay the costs in accordance with Article 122 and Article 69(2) of the Rules of Procedure of the Court of Justice. Since Clé and the Booksellers Association, who intervened in the proceedings in support of the appellant, have failed in their submissions, it appears to me to be reasonable to order those interveners to bear their own costs in accordance with the second paragraph of Article 69(4) of the Rules of Procedure. The intervener Pentos has improperly attempted to use the present proceedings to call into question the lawfulness of the application of the NBA in the United Kingdom. Since that intervener has otherwise largely restricted itself to repeating the Commission's arguments, it seems to me right that it too should bear its own costs.

42 — See on this point now also paragraphs 175 and 177 of the *23rd Report of the Commission on Competition Policy* (COM(94)161 final).

C — Conclusion

64. I therefore propose that the Court dismiss the appeal and order the appellant to pay the costs of the appeal proceedings, with the exception of the costs of the interveners, who are to bear their own costs.