4. The clauses prohibiting exports constitute a form of restriction on competition which by its very nature jeopardizes trade between Member States. Consequently, the Commission was entitled to consider that the infringement entailed a degree of gravity and to take this into account with regard to the provisions of Article 15 of Regulation No 17.

In Case 19/77

MILLER INTERNATIONAL SCHALLPLATTEN GMBH, Quickborn, represented by Wolfgang Schlutius, Günter Espey, Hans-Ulrich Wilhelmi, Ulrich Fichterl, Claus-Detlev Brose and Helmut Baumeister, of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Robert Elter, notary, 11 Boulevard Royal

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Norbert Koch, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, its Legal Adviser, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission Decision of 1 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.018 — Miller International Schallplatten GmbH),

THE COURT,

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Statement of the facts

Miller International Schallplatten GmbH of Quickborn (hereinafter referred to as 'Miller') produces records, tapes and cassettes which it distributes under the 'Europa' and 'Sonic' labels. A third label, 'Somerset', is no longer used, Miller chiefly manufactures bargain-range long-playing records. In order to distribute its products in Alsace-Lorraine Miller concluded an exclusive dealing agreement with the undertaking Sopholest of Strasbourg. That agreement, which was signed on 11 June 1971, contains the following provision in Clause 5:

'No Miller products shall as a rule be exported from Alsace-Lorraine to other countries.'

In its commercial relations with domestic customers Miller applied until 31 July 1974 terms and conditions of sale containing the following Clause 9 (exports):

'No records on 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.'

Since 1 August 1974 the terms and conditions of sale and payment applicable to all domestic and foreign customers have contained the same provision in the following form at Clause IX (exports):

'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.'

After the Commission of the European Communities had intervened upon receiving a complaint concerning the export prohibition, Miller stated by a letter dated 7 May 1975 that it would not impose such an export prohibition in future and would no longer enforce export prohibitions against its customers where such prohibitions were contained in previously-concluded contracts. By a letter dated 3 November 1975 Miller sent the Commission a revised version of its terms and conditions of sale and payments in which the export prohibition no longer appeared.

By a Decision of 23 February 1976 the Commission initiated against Miller the procedure laid down by Regulation No 17/62 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal), English Special Edition 1959-1962, p. 87).

On 1 December 1976, after Miller had been heard pursuant to Article 19 (1) of Regulation No 17 and to Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47), the Commission adopted the decision

relating to a proceeding under Article 85 of the EEC Treaty.

In Article 1 of that decision the Commission found that

'The export prohibitions on recordings by Miller International Schallplatten GmbH contained, until 7 May 1975, in the exclusive dealing agreement concluded by that undertaking on 11 June 1971, in its terms and conditions of sale (domestic market) operating until 31 July 1974 and in its terms and conditions of sale and payment in force from 1 August 1974 constituted infringements of Article 85 (1) of the Treaty establishing the European Economic Community.'

In pursuance of Article 2 of the decision a fine of 70 000 u.a., that is DM 256 200, was imposed upon Miller in respect of the infringements referred to in Article 1. The fine was to be paid within three months of notification of the decision.

The decision of the Commission (IV/29.018 — Miller International Schallplatten GmbH) was notified to Miller on 6 December 1976; it was published in the Official Journal of the European Communities on 29 December 1976 (Official Journal L 357, p. 40).

II — Written procedure

On 4 February 1977 the undertaking Miller lodged an application against the decision of the Commission.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preliminary inquiry. The Court however requested the applicant to produce its accounts for the years 1974 to 1976. The applicant replied that it was unable to comply with this request.

III — Conclusions of the parties

The applicant claims that the Court should:

1. Annul the Decision of the Commission of the European Communities dated 1 December 1976, notified on 6 December 1976, relating to a proceeding under Article 85 of the EEC Treaty;
2. Order the Commission of the European Communities to pay the costs;

Alternatively:

1. Appropriately reduce the fine fixed by the Commission at 70 000 u. a. (DM 256 200);
2. Permit the applicant to pay the said fine by instalments of an acceptable amount, having regard to the strain on its liquid assets occasioned by investments and investment plans;
3. Order the Commission to pay a proportion of the costs.

The Commission contends that the Court should:

— Dismiss the application as unfounded;

— Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

The *applicant* states that it sells its products principally on the German market. Since the repertoire is specifically German the opportunities for marketing its recordings are restricted, apart from a few insignificant exceptions, to German-speaking countries.

Export operations are generally effected through sole importers, not on the basis of any formal agreement but in the context of well-established business relations (for example in Belgium, Denmark and Luxembourg). There are

no commercial relations with the United Kingdom and Ireland.

Within the Community written exclusive dealing agreements exist only for France and the Netherlands.

The applicant has submitted a table dated 29 December 1976 (Annex 4 to the application) according to which export sales constitute 8.19% in terms of volume and 6.77% in terms of value. According to a survey of 29 December (Annex 5) the applicant exports chiefly to the following countries: Denmark, the Netherlands, Belgium, France, Luxembourg, Italy, Sweden, Norway, Finland, Switzerland and Austria. That survey (based on the position at the end of 1975) shows that 26.2% of exports by value go to Austria and 23.4% to Switzerland. The relatively important position occupied by the Netherlands (18.3%) on the export market is due to the production and export to the Netherlands of a special series of stories in Dutch for children. For the other Member States the proportion of exports is only 24.7% (Denmark 7.8%, Belgium 5.9%, France 6.5%, Luxembourg 3.5% and Italy 1.0%).

With regard to the composition of its repertoire the applicant submits the following figures (data relating to 1975):

— Programme for children and young persons: 42.95%
— Light music (in German): 44.75%
— Light music (in English): 5.08%
— Serious music: 6.23%
— Documentary series: 0.98%

The first two categories are intended exclusively for German-speaking consumers. The only items which might be dealt in outside German-speaking regions are the categories covering 'serious music' and 'light music' (in English).

With regard to the position it occupies on the general market in sound recordings in the Federal Republic of Germany the applicant states first that there are no exact figures for that market. It is obliged to use the statistics published by the Bundesverband der Phonographischen Wirtschaft e. V. (Federal Association of the Recording Industry, hereinafter referred to as the 'BPW') which provide only limited information since the members of that association do not declare all their sales and sales effected by non-members as well as figures for clandestinely produced records are unknown.

It must therefore be conceded that the market as a whole is considerably more extensive than that indicated by the figures of the BPW and the applicant's share of the market must accordingly be reduced.

In the terminology of the BPW, the applicant's sound recordings must be placed in the category of bargain-range recordings since the selling price to customers does not exceed DM 10. The applicant, however, maintains that it is impossible to consider that there exists a market 'in bargain-range sound recordings' within the general market in sound recordings. The relevant market is the general market in sound recordings and, furthermore, the market at the level of the common market.

The applicant claims that the factual conditions required by Article 85 (1) of the EEC Treaty are not satisfied in the present case. In this connexion it refers to the case-law of the Court of Justice, in particular to the judgment of 30 June 1966 in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* ([1966] ECR 235) and maintains that trade between Member States has not been appreciably affected. According to the judgment of the Court of 9 July 1969 in Case 5/69 *Völk* v *Vervaecke* ([1969] ECR 295) an agreement falls outside the prohibition contained in Article 85 when it has only an insignificant effect on the market, taking into account the

weak position which those concerned have on the market in the product in question.

A — The applicant's position on the market

The *applicant* maintains that it occupies only a weak position on the European market as a whole. In particular the weakness of its position is clear from the following factors:

— on the European market in sound recordings as a whole its share of the market can scarcely be expressed as a percentage, either in terms of volume or of value;

— it does not enjoy an appreciable share of the domestic market in sound recordings within the Federal Republic of Germany. Its share, in terms of value, is some 2.5%; its share in terms of volume is probably well below 5%;

— since the applicant's repertoire is almost entirely confined to the German language it is dependent on categories of German-speaking consumers, which restricts its flexibility;

— it has only limited capital; it is however in competition with undertakings with extensive capital;

— it does not have its own subsidiaries which could support its sales policy;

— it operates on an extremely small advertising budget.

From the mere fact of the weakness of the applicant's position on the market it is clear that the market has not been appreciably affected and that the conditions required by Article 85 (1) of the EEC Treaty are not satisfied.

The *defendant* submits figures concerning the applicant's sales for 1975. On the basis of information supplied by the BPW for that year the defendant estimates the applicant's share of the entire domestic market in sound recordings at 3.75% in terms of value and 5.15% in terms of volume. The applicant's share of exports by members of the BPW amounts to 2.66% (in terms of volume). However, such percentages are of no evidential value whatever in relation to competition.

In order to appraise the applicant's competitive position in the market in sound recordings the relevant market must be delineated from the point of view of competition.

The competitive relationships between different sound recordings depends upon the greater or lesser degree of their 'substitutability'. This latter is determined by the requirements expressed by demand and may be indicated by the cross-elasticity of demand in relation to the price.

In 1975 recordings intended for children and young persons accounted for 42.27% of the applicant's total production. It may be conceded from the outset that such recordings do not compete directly with recordings of classical music and light music. A reduction in the price of such records will not, because of the specific market for such records, involve an increase in the total demand at the expense of records of classical or light music. It is equally unlikely that a reduction in the price of records of classical or light music will cause a slump in demand for recordings for children. Cross-elasticity of demand in relation to prices is minimal. The interchangeability of products in those two categories is not merely slight — they belong to different markets.

The applicant's portion of the total sales of records for children (in 1975) on the domestic market may be estimated at 25.54% in terms of volume and at 15.33% in terms of value. The table submitted by the applicant (Annex 9 to the application) shows that the market in question is divided amongst 19

competitors and that the applicant occupies the second position.

Furthermore, the applicant's production is characterized by the fact that it consists almost entirely of 'cover' versions, that is to say copies by unknown performers who remain anonymous and copy, for a single fee, international stars or well-known artists, adopting their vocal characteristics and words. The applicant's production is classified in the category of bargain-range articles.

The defendant disputes the applicant's argument that full-price and bargain-range products form the same market and that the two categories are infinitely interchangeable. If there were no differences it would be impossible to explain the existence of different prices. Furthermore, according to the figures of the BPW concerning domestic sales for 1975 the total sales of full-price products exceeded those of bargain-price products. If all the basic qualities of recordings of original works and imitations were as similar, except for price, as the applicant maintains it would be impossible to explain those sale figures.

It must be conceded that the demand for original recordings and the demand for recordings of imitations stems from different consumers. The two markets are distinct; the demand for full-price products is decidedly not elastic.

The applicant's share of sales by members of the BPW on the domestic market of bargain-range recordings may be estimated at 22.06%; the actual proportion is somewhat less since the BPW's figures do not take into account supplies to clubs, sales by means of catalogues, recordings made to order and sales effected by non-members of the BPW. The applicant's share, in terms of units, of exports by members of the BPW amounted to 2.66% in 1975. That percentage was calculated on the basis of members' total sales including 45 rpm records; if the latter are excluded this percentage is 3.22. The applicant's domestic sales and exports in 1975 constituted respectively 91.81% and 8.19%, in terms of units, and 93.21% and 6.79%, in terms of value, of the total sales for that year.

In its reply the *applicant* continues to maintain that there is no specific market for bargain-range recordings. In fact bargain-range products may to an infinite degree be substituted for full-price products. The two categories are not distinguished by the repertoire, the use to which they are put by the consumer, the method of manufacture, the persons who purchase them or the technical or musical quality. The difference in price is accounted for simply by the fact that, as a matter of trade practice, recordings do not usually bear the high royalities payable to the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (Society for Musical Performance and Mechanical Reproduction Rights). The applicant further explains that cover versions amount to only some 10% of its repertoire. In any event cover versions are not important, with regard to the delineation of the relevant market.

With regard to recordings for children the applicant states that the defendant is mistaken both in its delineation of the market and in its calculation of the share of the market. In fact, there is no market in sound recordings intended for children. The applicant emphasizes that it has abandoned the distinction formerly made between recordings for 'children' and recordings for 'young people' and that it refers only to recordings for young people. Recordings for young people are to a very large extent interchangeable with light music in general. The purchasers of such records are chiefly adults who give the records to children. Since adults know that children of some eight years old and over have a liking both

for records of popular songs and for records of tales and adventure stories they often buy them records of songs instead of records of tales and the like. In any case, even if the relevant market is considered as distinct, the applicant disputes the figures put forward by the defendant. Finally, the number of competitors in this field is not restricted to 19. In this connexion the applicant refers to the undertakings listed in Annex 7 to the application which also market sound recordings intended for children.

In conclusion the applicant claims that:

— The relevant market cannot be delineated with any degree of certainty;

— The limits should be wide rather than narrow having regard to the overlapping of areas of the repertoire;

— In delineating regional markets it is necessary to include at least German-speaking regions other than Germany;

— Even if the relevant market is successfully delineated it is impossible to establish exactly the applicant's share of the market because no reliable data exist.

In its rejoinder the *defendant* repeats that if the whole market in sound recordings exists at all it is as a mere statistical entity. Such a delineation of the market is of no assistance with regard to the competitive relationships between the various groups of sound recordings.

With regard to the market in bargain-range sound recordings the defendant emphasizes that although a difference in price does not constitute in itself a sufficient criterion for distinguishing a separate market, considerable differences in price nevertheless indicate that products sold at different prices are not interchangeable. The decisive difference between bargain-range recordings and full-price recordings is that the former consist of recordings by unknown artists, musicians or performers whilst full-price recordings are made by widely-known and famous stars and artists.

In the course of the administrative procedure the applicant's representative made a general statement expressly describing as cover versions recordings made by unknown artists. In its reply the applicant clarified this concept and calculated that the proportion of cover versions to its total production is around 10% whilst, according to its previous statement, its production consisted almost entirely of cover versions.

Nevertheless it is unnecessary to consider this question of definition in greater detail. In order to distinguish between bargain-range recordings and full-price recordings the important factor is the extent to which the performers are well known, and the common factor in the applicant's repertoire is undoubtedly the fact that its performers are not well known.

The applicant's declarations concerning the calculation of production costs are incomplete. It is able to maintain a low cost price for its recordings because it pays its artists a single fee. Furthermore, full-price sales, unlike bargain-range sales, are promoted to a not inconsiderable degree by the artists involved. The applicant naturally incurs no expense for such promotion, which could only be financed by charging higher prices. The outcome of this commercial policy is a recording which is deliberately distinguished from the market in full-price recordings. By supplying recordings of unknown artists who are not 'big names' the applicant from the outset and as a matter of principle abandons the considerable category of purchasers who particularly prize the individuality of the interpreter and the originality of his work. For this

category of consumer there is no substitute for the full-price recording; manufacturers of such recordings do not in principle encounter competition from manufacturers of bargain-range recordings. The market shows that the cross-elasticity of demand in relation to prices for full-price records is infinitely weak in relation to bargain-price records. Even if the applicant further reduced its prices it could not win over any purchaser seeking performances by famous artists.

In conclusion, the defendant states that full-price records and bargain-range records are not offered for sale on the same market. Each of those two categories of product has its own specific market. Competition between sellers of the two categories of product is in principle precluded; competition between sellers of one and the other category of product takes place only in unusual situations (sales at a loss or if there is no bargain-range product on the market). The applicant's share of the market in its capacity as a manufacturer of bargain-range sound recordings must thus be calculated on the basis of all sales of bargain-range sound recordings and not of sound recordings in general.

With regard to the question whether there is competition between recordings for children and young persons, on the one hand, and light music, on the other, the defendant considers that the only important factor is whether the two categories of product answer the same need.

The repertoire produced by the applicant (Annex II to the reply) shows that the programme, containing titles of material which is spoken and sung, is chiefly directed at the very young, whilst the spoken word recordings are also intended for older children. The sound recordings are not directed solely at the need to entertain children; they require concentrated listening and also have educational, moral and sociological aims. Their function gives them a greater affinity to story books and adventure books than to light music. The criterion of the satisfaction of the need for entertainment — which is common to all — is too general to delineate the relevant market.

B — The importance of the prohibitions on exports

The *applicant* considers that the conditions appearing in the Notice of the Commission of 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 (Journal Officiel C 64 of 2 June 1970, p. 1) are satisfied in the present case: the contested prohibitions on exports have not had any effect on market conditions within the common market.

With regard to the clause contained in the general conditions of sale the applicant states that the kind of businesses run by its customers on the domestic market (for example large stores, supermarkets, rack jobbers and other retail undertakings) precludes any export operations. Even the wholesalers supplied by the applicant cannot be considered as exporters to other Member States.

Any economic interest which German customers might have in exporting is precluded because the prices charged to German customers are some 20% higher than the free-at-frontier selling price for Germany.

The prohibition on exports included in the exclusive dealing agreement with Sopholest have likewise had no effect on market conditions. That undertaking has displayed no interest in exporting to other countries. Nor have its operations ever been impeded by the existence of the clause in dispute. Sopholest has indeed resold products in Switzerland

and Austria without being penalized by the applicant. This last fact shows that the prohibition on exports had no effect on the market.

The prohibitions on exports did not have as their object or effect the restriction of competition. According to the applicant the facts of the case show that it did not seek to restrict competition, and in particular that it did not conclude agreements containing a general prohibition on exports with its exclusive dealers in foreign countries. Such a prohibition was stipulated solely with, and at the express request of, the undertaking Sopholest. The applicant was not furthering its own interests; that it did not endeavour to restrict trade between Member States is clear from the very fact that it did not take measures to prevent the delivery of indirect supplies to foreign countries, for example those effected from Alsace-Lorraine to Switzerland and Austria.

In order to appraise the existence in the present case of the 'effect' it is necessary to take into consideration the actual effects which the agreement had on the market.

The applicant recalls that its German customers were not, or were not in a position to be, interested in exporting. The clause appearing in the general terms and conditions of sale accordingly did not produce any effect on the market. The prohibition on exports laid down with regard to Alsace-Lorraine likewise did not in fact restrict competition for the reasons set out above.

The *defendant* observes that the incidence of prohibitions on exports is determined by the competitive position and power of the applicant on the geographical market which the prohibitions are intended to protect.

Although certain categories of the applicant's customers, by reason of the kind of business which they conduct, are not particularly interested in exports, the wholesalers (12), exporters (6) and foreign customers (30) are still in a position to effect exports. The prohibitions on exports stipulated with regard to such customers have a dual function. On the one hand, they protect the outlets of distributors bound by contract to the applicant against other contractual distributors, other foreign importers, domestic exporters and wholesalers. On the other hand, they protect the applicant's domestic market against direct re-exports by distributors under contract and foreign importers and against the indirect re-export of products which might be distributed by exporters and wholesalers on certain foreign markets.

The incidence of the protection of the domestic market must be appraised not in terms of the position of the applicant within the common market as a whole or in certain export markets but in terms of its position in the domestic market itself.

In appraising the incidence of the protection of the markets of distributors bound by contract it is necessary also to take account of the competitive power of the applicant on the domestic market. That power may be expressed as a share of the market of more than 20% in respect of sound recordings intended for children or sold in the bargain-range and enables the applicant to maintain its export sales prices by way of its domestic sales.

In both cases the geographically relevant market is that of the Federal Republic of Germany.

With regard to prices the domestic wholesale trade suffered discrimination in relation to domestic exporters, foreign distributors bound by contract and importers. In fact the export prices charged by the applicant were between 10 and 32.56% below its prices to wholesalers, that is, wholesale prices are now 48% higher than export prices. The defendant has not relied on this

discrimination to deduce any infringement by the applicant of cartel law. The defendant does however object to the applicant's reliance upon this distinction to infer a lack of incidence in relation to the prohibitions on exports imposed on wholesalers. Wholesalers may certainly have encountered genuine difficulties in exporting but the applicant itself caused them since it denied the wholesale trade preferential treatment with regard to export prices.

If the level of prices on foreign markets is such that the wholesale trade cannot reasonably export, the prohibition on exports and the refusal to grant wholesalers the export sale price produces the same economic result, namely the separation of the two channels of distribution. The higher selling price charged on the domestic market and the prohibition on exports constituted two facets of the same sales policy; whilst in cartel law price distinctions in themselves are not suspect this is no longer the case when they are combined with a prohibition on exports.

With regard to foreign purchasers' interest in exports the defendant considers that they perhaps displayed no interest themselves in export opportunities on neighbouring markets. On the other hand, it is clearly very much in their interest that other persons should refrain from exporting onto their own market. Whilst such customers did not perhaps have a positive interest they certainly had a negative interest, which explains their wish to conclude agreements prohibiting exports.

Finally, the defendant disputes the line of argument which the applicant bases on the German language repertoire. The percentages exported to the Member States Denmark, France, Belgium and Luxembourg, for example, are not negligible. Those exports do not consist exclusively of recordings of classical music and of English light music and the proportion of German titles in those exports cannot be explained solely by the fact that German is better understood in the border areas. With regard to light music and in particular records from the hit parade and folk music understanding of German is merely a subordinate factor.

Furthermore, foreign purchasers may be regarded as potential distributors of the applicant's products on the applicants' domestic market. Taking into account the differences in the prices charged by the applicant this factor is of decisive importance.

The defendant considers that the applicant is confusing the intention to restrict competition and the interests served by a 'voluntary' restriction of competition. Even if it is supposed that the applicant stipulated the prohibitions on exports in response to the wishes of its customers it nevertheless remains the case that such provisions were in fact intended to protect certain markets and that the applicant agreed to those prohibitions in the interests of purchasers who were bound to it by contract. Furthermore, the facts as a whole indicate that the prohibitions on exports served the applicant's interests. The applicant had a dual objective:

— It wished to protect the markets of distributors bound to it by contract in order to encourage them to undertake essential investments. Because of the relative weakness of the applicant's position on foreign markets and of the difficulty which it experienced in finding agents it is to a certain degree dependent on those distributors. That is why it adopted as its own the interest of those purchasers in obtaining territorial protection and laid down conditions in its contracts prohibiting exports. In addition, the prohibitions on exports imposed upon wholesalers were likewise intended to protect the

markets of foreign distributors under contract.

— Secondly, because of the differences between selling prices on the domestic and foreign markets the applicant was of necessity interested in preventing the re-introduction of its products onto its domestic market.

Finally, there is likewise no doubt that the prohibitions on exports had the effect of restricting competition: the fact that the applicant was able for years to maintain its system of price-differentials on the various markets is sufficient proof of this.

In its reply the *applicant* disputes the contention that it practised a system of price-differentials and price maintenance.

It is true that its domestic prices are higher than selling prices abroad. Thus the domestic wholesale price for Europa recordings (which by themselves constitute 94% of sales by volume) amounts to DM 3 whilst the selling price to foreign importers is only DM 2.70. However, this difference in price is simply due to the fact that selling prices abroad contain a lower element of costs, for the following reasons:

— Foreign customers, unlike domestic customers, have no right to exchange the product;

— The applicant does not undertake publicity or sales promotion abroad and only the domestic cost price is burdened with such costs;

— Representation costs are not incurred in relation to foreign business, apart from occasional visits to foreign customers.

According to a table submitted as Annex 13 to the reply, distribution costs on the domestic market amount to DM 0.4302 per unit as opposed to DM 0.0943 per unit abroad. The cost price on the domestic market is thus burdened with average distribution costs which are some 33 pfennig higher, which is approximately the amount by which the selling price abroad for Europa records is exceeded by the price charged on the domestic market (DM 0.30). There can thus be no question of 'maintenance', as the defendant alleges. Likewise the applicant is not trying through the disputed clause to protect markets in which the level of prices differs. It has never endeavoured in previous years to prevent re-exportations from or re-importations into the Federal Republic. In fact it has never used the device of vertical price fixing which might be prompted by that interest. The prices have never been other than recommended prices, with the result that there are no uniform prices in sales to final consumers on the German market.

In short, the clauses prohibiting exports contained in the general terms and conditions of sale as printed did not arise from a sales system based on prohibitions on exports but really constituted an insignificant formality. Likewise the parties did not intend that the clause contained in the contract with the undertaking Sopholest should be of any practical importance.

The applicant continues to maintain that for various reasons its customers as a whole were not at all interested in exports. With regard in particular to wholesalers, the applicant states that their lack of interest in exports is to be explained principally by problems of technical implementation, of organization, language and staff which also affect the wholesale trade since it is not specifically organized with a view to exports.

Furthermore, wholesalers are not interested in exports in view of the profit margin (see above).

Exporters established in the Federal Republic are likewise not affected by the contested clause since they receive

the goods from the applicant for the very purpose of exporting them.

Whilst foreign customers (amounting in all to 30 importers) have in certain circumstances a 'negative interest' in the prohibition on exports. this constitutes an entirely passive wish which is not in the nature of a restriction of competition.

Foreign importers are not themselves basically interested in an active export trade to other countries and are interested chiefly in supplying their own national market. Whilst this is the position in principle, they are not prevented from effecting occasional exports when the opportunity arises, which shows that their freedom to decide whether to export has not been impeded.

Likewise, foreign customers are not interested in re-exporting. In this connexion the applicant recalls that it has never had a specific interest in preventing such re-imports or re-exports (see above).

Finally, German customers also have no interest in re-imports since there are many disadvantages in obtaining supplies by way of re-imports, namely:

— Foreign customers do not purchase the complete range of products;

— Customers do not enjoy the right to exchange articles in foreign transactions;

— Domestic customers do not thereby obtain any publicity material;

— The profit-margin remaining after re-importation is not significant because the foreign supplier adds his own expenses and his profit to his purchase price.

The *defendant* observes in its rejoinder that the statements made by the applicant in the course of the administrative procedure showed that it clearly believed that only strict prohibitions on exports applicable without exception constituted restrictions on competition within the meaning of Article 85 of the EEC Treaty. The defendant considers that any influence under a contract brought to bear on the freedom of action and decision of undertakings must be considered as a restriction on competition and there is a whole range of such influences extending from absolute prohibition to a mere obligation to notify. In the present case, according to the express statements of the applicant, those concerned wished to avoid as far as possible an uncontrolled proliferation of exports. It may well be that the exclusive distributors were to remain free to export, but they were liable to be subjected to a check which might be instituted, if necessary, to prevent 'proliferation'.

With regard to differences in price according to the markets involved, the defendant remarks, first, that the statement concerning the right of exchange is contrary to the terms and conditions of sale and payment, since Clause VII (complaints, exchange and compensation) does not draw any distinction between domestic and foreign customers.

The reference to differences in distribution costs is furthermore irrelevant. In fact it is of little importance with regard to the market to establish the basis of regional variations in the prices charged by a seller. When such differences exist purchasers go to the cheapest source of supply. This tendency to exploit differences in price ultimately leads to an alignment of prices. Bearing in mind the natural forces of the market an appreciable difference in prices cannot be maintained unless the seller retains control of the distribution network and is thus capable of separating the various price-areas. A difference of 10% is sufficiently large to bring those forces into operation.

Finally, the defendant disputes the applicant's line of argument which relies on the absence of vertical price fixing to deny that it has an interest in protecting its domestic market. The point at issue here is not the protection of the applicant's customers but the sole interest of the applicant itself in maintaining its selling prices on the German market. A fall in the selling price to the final consumer would not trouble the applicant as long as it can itself sell the product at DM 3. However, if its foreign customers were to re-export onto the domestic market and sell at prices below those charged by the German wholesale trade the selling prices charged by the applicant to the wholesalers would be affected. Wholesale traders naturally insist on obtaining the same benefits with regard to price as their foreign competitors.

The question of the interest of certain categories of customers in exporting is ultimately irrelevant. If the applicant's views on this point were to prevail the applicability of the prohibitions of agreements would depend upon the motives of the parties concerned. A potential interest in taking action on the part of the party whose conduct is restricted and the mere existence of the obligation to refrain from that course of action is evidence of such an interest. Furthermore, the defendant disputes the contention that the wholesale trade is confronted with insurmountable difficulties.

With regard to the handicap constituted by the higher domestic price the defendant recalls that the applicant itself is responsible for this. The wholesale trade does not receive export refunds for products which it may export. It is indeed clear that the applicant cannot on the one hand impose restrictions on exports and on the other offer export refunds.

With regard to the interest of foreign purchasers in exports the defendant refers to its previous statement. With regard to the alleged disadvantages of the re-export trade it submits the following observations:

- Foreign customers are in no way prevented from purchasing the complete range in order to sell or supply it to German purchasers;
- Since there is no distinction in terms of trading conditions between German customers and foreign customers both accordingly enjoy the same rights;
- In the majority of cases German customers do not require selling aids because they have them already, but foreign customers can nevertheless request that delivery should include selling aids;
- The profit margin of 10% is very attractive, especially as the German wholesale trade must, like foreign suppliers, include costs and profits in its calculations.

C — *Article 15 (2) (a) of Regulation No 17*

The *applicant* claims in the alternative that, in the absence of misconduct, Article 2 of the contested decision must be annulled, even if there was an infringement of Article 85 (1) of the EEC Treaty. In particular it did not act intentionally. The prohibition on exports contained in the terms and conditions of sale were nothing more than a formality and the prohibition contained in the 'Alsace-Lorraine' contract was merely a concession of a formal nature granted at the request of the undertaking Sopholest. The clauses in dispute have no practical significance so far as the applicant is aware.

If the applicant were accused of misconduct by way of negligence the fine would have to be considerably reduced, if only because of the applicant's lesser degree of liability.

In the present case, however, no negligence has occurred. In 1971 the applicant, which at that time was a very small undertaking, was almost wholly ignorant of Community law. When it amended its terms and conditions of sale in 1974 it could perhaps have learned something regarding prohibitions on exports if it had been a member of the relevant trade associations, if it had had a legal department or perhaps even an economic policy department. However, it had never had an organization of that nature.

In the present case there has not been a serious infringement of Article 85 of the EEC Treaty, as is shown by:

— The absence of wrongful intent;

— The lack of incidence on the market, or at any rate the minimal nature of the effects on the market;

— The fact that no penalty was applied;

— The very small number of prohibitions on exports.

Finally, if it were possible to maintain in the present case that there has been an infringement due to misconduct through negligence, that infringement cannot have been committed earlier than the new version of the terms and conditions of sale printed in 1974. Consequently the scale of magnitude for the assessment of the fine should be reduced by at least three-fifths.

Since the applicant's policy of low prices leaves only a narrow profit margin a fine amounting to some 0.73% of its turnover would constitute an extremely heavy burden. It accordingly requests the Court to reduce the fine considerably or even to annul it.

The *defendant* considers that as a whole the circumstances of the present case show that the undertaking corresponded to the applicant's wishes and that it was a factor in its sales policy from the point when the prohibition on exports provided for in the terms and conditions of sale were applied for the first time.

It considers it unnecessary to disprove every argument relied upon by the applicant to deny the seriousness of the infringement. Nevertheless, with regard to the number of prohibitions on exports, it must be emphasized that the terms and conditions of sale and payment which were brought into operation from 1 August 1974, and consequently Clause IX thereof, were applied without distinction to all customers, domestic and foreign. With regard to the absence of penalties the defendant refers to paragraph 22 of the contested decision in which account is taken of this factor.

Concerning the amount of the fine the defendant observes that a fine amounting to 0.73% of the applicant's turnover is of a low order in terms of the discretionary power which it enjoys and it cannot be accused of misuse of that power.

In its reply the *applicant* sets out the following new facts to show that it is not at fault: the investigation of papers previously filed away has revealed that the applicant, by a letter of 25 September 1973, instructed a lawyer to check the legal aspects of the terms and conditions of sale and payment which it had previously applied. On 14 November 1973 the applicant's legal adviser sent it the general conditions containing the disputed clause prohibiting exports. The lawyer did not indicate that that clause might be unlawful and that it would be necessary in certain circumstances to obtain negative clearance from the Commission. Such being the case it cannot be maintained that the applicant is at fault since it was entitled to rely on its legal adviser; it is more a case of excusable ignorance.

If the Court of Justice does not in fact annul the decision of the Commission on the ground that there are no factors

constituting a restriction of competition or on the ground that there is no misconduct, nevertheless the amount of the fine should be reviewed in favour of the applicant and appreciably reduced. In this connexion regard should be had to the new factors which have been put forward in the course of the written procedure.

The *defendant* contests this new argument both from the point of view of substance and from that of procedure.

With regard to procedure this argument constitutes a fresh issue within the meaning of Article 42 (2) of the Rules of Procedure of the Court of Justice. If the applicant had put forward those factors in the course of the hearing the defendant would have opposed them with detailed arguments. In the interests of establishing the truth the defendant would not in principle have objected, even though the issue has been raised out of time, to an explanation during the course of the proceedings. It nevertheless considers that the fresh issue is indefensible.

The course of events shows that it cannot be maintained that the applicant was in error regarding the prohibition. According to its own statement it was aware in general, if not in detail, of the prohibition in November 1973. The regular consultations which it held with its legal adviser during the same period provided it with the opportunity to clarify the position. The fact that the legal adviser said nothing regarding the compatibility of the prohibition on exports with the law in force does not suffice to change the positive, general knowledge of a prohibition into an error not entailing misconduct with regard to that prohibition. For that to be the case it would at least have been necessary expressly to extend the consultation to cover the prohibition on exports.

When the opinion of the legal adviser was obtained the applicant must have been surprised that the adviser did not comment on this matter. A person who in such circumstances relies upon silence is not only guilty of serious negligence but also acts, in some degree at least, intentionally.

V — Oral procedure

The parties presented oral argument at the hearing on 27 October 1977.

The Advocate General delivered his opinion at the hearing on 10 January 1978.

Decision

1 By an application which was received at the Court on 4 February 1977 the undertaking Miller International Schallplatten GmbH (hereinafter referred to as 'Miller'), having its head office in Quickborn near Hamburg, instituted proceedings against the Commission Decision of 1 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal, L 357/40) in which it was found that the prohibitions on the export of records, tapes and cassettes inserted by Miller in an exclusive dealing agreement and in its terms and conditions of sale constituted infringements of Article 85 (1) of the Treaty and a fine of 70 000 u.a. (being DM 256 200) was imposed upon the undertaking.

The applicant claims that this decision should be annulled or alternatively that the fine should be annulled or reduced.

2 The file indicates that the applicant produces sound recordings (records, cassettes and tapes) which it sells chiefly on the German market, exporting only a limited proportion of its production, partly to Community countries and partly to third countries.

Its production consists chiefly of bargain-range sound recordings and a considerable proportion, more than 40%, is made up of records for children and young persons.

It sells its products to wholesalers, newsagents and rack-jobbers, department stores, retailers and supermarkets and, in the case of exports, either to exclusive importers established abroad or to German exporters.

3 The applicant's behaviour, which resulted in the contested decision, is not disputed as to the facts but the parties differ as to the appraisal of the effects of that behaviour and, consequently, of its gravity.

4 It is common ground that on 11 June 1971 the applicant concluded an exclusive dealing agreement with the undertaking Sopholest of Strasbourg for the distribution of all of its products under the 'Europa' and 'Somerset' labels within Alsace-Lorraine, which agreement included at Clause 5 the following provision: 'No Miller products shall as a rule be exported from Alsace-Lorraine to other countries'.

It is also common ground that the applicant, in its commercial relations with customers established in the Federal Republic of Germany, applied until 31 July 1974 terms and conditions of sale containing in Clause 9 (exports) the following provision: 'No records on 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'.

After 1 August 1974 the applicant applied new terms and conditions of sale and payment to its foreign and German customers, Clause IX (exports) of which was worded as follows: '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'.

5 Further, it has been established that Miller charged its German customers prices differing sharply from the export prices, the latter being lower than the prices charged to wholesalers and much lower than the prices of products supplied to department stores, retail trade organizations, retailers and private consumers.

6 Although the applicant does not dispute that these facts are substantially correct it nevertheless maintains that they cannot have appreciably affected trade between Member States in view of the insignificance of the undertaking on the market in sound recordings, the nature of its products, which are chiefly intended for the German-speaking public, and the nature of its customers.

It concludes from these factors that, whilst it is true that the prohibitions on exports are not compatible with the nature of a common market, it cannot be charged with infringement of the provisions of Article 85 (1) of the Treaty.

Furthermore, it maintains that in its particular case those prohibitions on exports did not correspond to a blameworthy objective but were merely adopted at the wish of its co-contractors, their purpose being 'purely visual and psychological'.

7 In this connexion it must be held that, by its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer since the agreed purpose of the contracting parties is the endeavour to isolate a part of the market.

Thus the fact that the supplier is not strict in enforcing such prohibitions cannot establish that they had no effect since their very existence may create a 'visual and psychological' background which satisfies customers and contributes to a more or less rigorous division of the markets.

The market strategy adopted by a producer is frequently adapted to the more or less general preferences of his customers.

Consequently Miller's statement that the disputed prohibitions originated in the wishes of its co-contractors rather than its own unilateral and premeditated strategy, even if it is correct, cannot allow its behaviour to escape the prohibitions contained in Article 85 (1) of the Treaty.

The adoption by Miller of a prohibition on exports both in its contract with the undertaking Sopholest and in its terms and conditions of sale must be assessed in this light.

The incidence of the prohibition of exports on intra-Community trade

8 First, Miller relies upon its weak position on the market in question and the 'derisory' proportion of the total market formed by its production in order to maintain that its behaviour cannot have affected intra-Community trade.

9 However, according to the data produced by it in the course of the administrative procedure its share of the total market in sound recordings in the Federal Republic of Germany was assessed for 1970 at 5.19%, for 1971 at 5.05%, for 1972 at 4.91%, for 1973 at 5.87%, for 1974 at 5.05% and for 1975 at 6.07% in terms of volume of sales.

It is not disputed that it specializes in the production of bargain-range long-playing records and music cassettes and, within that category, in particular in the production of sound recordings for children and young persons, so that its share of the market in bargain-range recordings and those for children may be expressed as appreciably higher percentages.

Finally, it is not disputed that for 1975 Miller's sales amounted to a total of DM 34 376 167 for the domestic market and exports.

In the course of the procedure, during lengthy debates concerning the percentages, the applicant maintained that it was impossible to obtain accurate statistical data concerning the market in question, that the figures must accordingly be treated with caution and that they give an excessively favourable impression of its position on the market, but this argument cannot affect the substance of the said data.

10 In assessing Miller's position on the market it is necessary to pay particular attention to the market of the Federal Republic of Germany, if only because, as Miller itself has stated, its production programme is directed principally at a German-speaking public.

The parties disagree as to whether, in determining the relevant market, reference must be made, as the applicant maintains, to the whole market in sound recordings, or whether, as the Commission suggests, it is necessary to distinguish first a market for full-price recordings on the one hand and a

market for bargain-range recordings on the other and, further, to distinguish a separate market for children and young persons.

Within the context of the present dispute this point need not be settled because it is evident that Miller's sales constitute a not inconsiderable proportion of the market and that it specializes in the production of certain distinct categories for which it occupies a position on the market which, if not strong, is at any rate important.

In this connexion it must accordingly be concluded that Miller, far from being comparable to the undertakings concerned in the judgments of 30 June 1966 *(Technique Minière* v *Maschinenbau Ulm,* Case 56/65 [1966] ECR 235), of 9 July 1969 *(Völk* v *Vervaecke,* Case 5/69 [1969] ECR 295) and of 6 May 1971 *(Cadillon* v *Höss,* Case 1/71 [1971] ECR 351), is an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade.

11 Miller adds that, nevertheless, its behaviour cannot affect intra-Community trade because its programme is largely intended for a German-speaking public and can be of only marginal interest to the public in other Member States.

12 It is unnecessary to establish the extent to which this statement is accurate since it is sufficient to find that Miller has concluded contracts for exports to other Member States and has in fact exported a part, albeit a relatively minor part, of its production to those States.

Nevertheless, such exports appeared to Miller and to certain of its customers as being of sufficient importance to justify adopting the clauses in dispute.

Furthermore, the importance of Miller's German market led it to protect that market against the re-importation of products exported at low prices.

13 Finally, Miller continues to maintain that neither its German customers nor its exporters or foreign customers were interested in intra-Community trade, so that the prohibitions on exports did not interfere with their freedom of competition.

Furthermore, the higher prices charged to resellers resident in the Federal Republic of Germany in themselves rendered exports to the other Member States unprofitable.

14 Arguments based on the current situation cannot sufficiently establish that clauses prohibiting exports are not such as to affect trade between Member States, even if it were possible to establish beyond reasonable doubt the accuracy of such general statements, since that situation may vary from one year to the next in terms of changes in the conditions or composition of the market, both in the common market as a whole and on the various national markets.

Furthermore, as has already been observed above, the fact that resellers, as customers of the applicant, prefer to limit their commercial operations to more restricted markets, whether regional or national, cannot justify the formal adoption of clauses prohibiting exports, either in particular contracts or in conditions of sale, any more than the desire of the producer to wall off sections of the Common Market.

Finally, the existence of the clauses in dispute has at least assisted Miller in maintaining its policy of lowering export prices.

15 It is clear from the foregoing as a whole that the clauses in dispute were such as to affect trade between Member States.

Miller indeed alleges that the Commission should have established that those clauses had an appreciable effect on intra-Community trade but that argument cannot be accepted.

In prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition Article 85 (1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect.

The Commission, basing its assessment on Miller's position on the market, its scale of production, ascertainable exports and price policy, has provided appropriate proof that in fact there was a danger that trade between Member States would be appreciably affected.

16 The contested decision was thus justified in its finding that in the contested clauses prohibiting exports Miller infringed the provisions of the said article.

Consequently, the application must be dismissed in so far as it is directed against Article 1 of that decision.

The fine

17 The applicant has requested in the alternative that the fine of 70 000 u.a. should be annulled or reduced.

It has maintained that it did not intentionally commit the infringements of which it is accused and furthermore that those infringements were not serious.

It claims that in adopting the clauses prohibiting exports it did not intentionally infringe the prohibitions contained in Article 85 (1) of the Treaty.

This lack of awareness is said to be demonstrated by the opinion of a legal adviser consulted by the applicant concerning the drafting of its terms and conditions of sale, which opinion, produced as an annex to its reply, does not mention the fact that a clause prohibiting exports might be incompatible with Community law.

18 As is clear from the foregoing as a whole, the clauses in question were adopted or accepted by the applicant and the latter could not have been unaware that they had as their object the restriction of competition between its customers.

Consequently, it is of little relevance to establish whether the applicant knew that it was infringing the prohibition contained in Article 85.

In this connexion the opinion of a legal adviser, on which it relies, is not a mitigating factor.

It must thus be held that the acts prohibited by the Treaty were undertaken intentionally and in disregard of the provisions of the Treaty.

19 With regard to the gravity of the infringement, the clauses prohibiting exports constitute a form of restriction on competition which by its very nature jeopardizes trade between Member States.

Consequently, the Commission was entitled to consider that the infringements which it found were of a certain gravity and to take this into account with regard to the provisions of Article 15 of Regulation No 17.

20 The applicant has further maintained that the amount of the fine is extremely burdensome for an undertaking of its nature.

21 Nevertheless, by its refusal to produce its accounts, which the Court requested, it has prevented verification of this statement.

22 It follows that the application in respect of Article 2 of the contested decision is not well founded and accordingly must also be dismissed.

Costs

23 Under Article 69 (2) of the rules of procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

The applicant has failed in its submissions.

It must accordingly be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders the applicant to pay the costs.**

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 1 February 1978.

A. Van Houtte
Registrar

H. Kutscher
President