in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and the value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market.

It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure.

17. If an undertaking has participated in two concerted practices which were both designed to prevent parallel imports to a particular country of goods produced by the same firm, the Commission is entitled to treat the infringements as a single offence and therefore to impose a single fine.

In Joined Cases 100-103/80

100/80

MUSIQUE DIFFUSION FRANÇAISE SA, Vélizy, represented by R. Collin, of the Paris Bar, and L. De Gryse, Advocate with right of audience before the Court of Cassation, Belgium, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 Rue Philippe-II,

101/80

C. MELCHERS & Co, Bremen, represented by J. F. Bellis and I. van Bael, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

102/80

PIONEER ELECTRONIC (EUROPE) NV, Antwerp, represented by M. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 Rue Philippe-II,

103/80

PIONEER HIGH FIDELITY (GB) LIMITED, London, represented by J. E. Rayner-James, Barrister of Lincoln's Inn, instructed by D. F. Hall of Linklaters & Paines, Solicitors, London, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. Temple Lang, and by M.-J. Jonczy and Götz zur Hausen, Members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, O. Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission's Decision of 14 December 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV.29.595 — Pioneer Hi-fi equipment), published in Official Journal L 60 of 5 March 1980 at p. 21, is void,

THE COURT,

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe, U. Everling (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, K. Bahlmann and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

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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 — The Pioneer Group and its distribution system in the EEC

1. The Pioneer Electronic Corporation, Tokyo, is one of the world's leading manufacturers of hi-fi equipment. Its turnover was 530 million dollars in 1976 and 843 million dollars in 1977.

2. Most of the Pioneer products sold in Europe are imported by the subsidiary company Pioneer Electronic (Europe) NV, Antwerp, hereinafter referred to as "Pioneer" or "Pioneer (Europe)". At the time when the events involved in the present cases occurred, Pioneer had independent exclusive distributors in

seven of the Member States. In the meantime, several of those distributors have become subsidiaries of Pioneer.

At that time the exclusive distributors in the Member States concerned in the present case were: in the Federal Republic of Germany, C. Melchers & Co., Bremen, hereinafter referred to as "Melchers"; in the United Kingdom, Shriro UK Ltd, hereinafter referred to as "Shriro"; and in France, Musique Diffusion Française, hereinafter referred to as "MDF".

Melchers had set up a network of over a thousand retailers and seven local representatives, who were given responsibility for maintaining contacts with the retailers in a particular area and promoting sales of Pioneer products locally.

As from 1 January 1978 the distribution of Pioneer products was entrusted to Pioneer-Melchers GmbH, a new company of which 40% of the authorized capital was to be held by Pioneer and 60% by Melchers. The latter company still pursues commercial activities in other fields.

Shriro had set up a network of over 260 retailers. There were approximately 480 sales outlets for Pioneer products in the United Kingdom. Two retailers, Comet and Audiotronic, had between them approximately 160 sales outlets and together achieved about 45% of the sales of Pioneer products supplied by Shriro.

In the course of 1978 Pioneer acquired the whole of the capital of Shriro and changed its name to Pioneer High Fidelity (GB) Limited, hereinafter referred to as "Pioneer GB".

3. The prices charged by Pioneer to its exclusive distributors in the Federal Republic of Germany, France and the United Kingdom were substantially the same. The exclusive distributors were free to fix their selling prices at their own discretion.

4. In the accounting year ending on 30 September 1976, Pioneer sold hi-fi products to its exclusive distributors in the three countries concerned with a total value of:

Federal Republic of Germany:
BFR 200 699 871
France: BFR 227 206 908
United Kingdom: BFR 305 964 158

II — The disputed decision

On 14 December 1979 the Commission adopted the decision at issue in the present cases (Official Journal L 60, 5. 3. 1980, p. 21), whereby it established that the concerted practice between MDF, Pioneer and Melchers consisting in the prevention, from the latter part of 1975 until February 1976, of imports of Pioneer equipment from the Federal Republic of Germany into France, and the concerted practice between MDF, Pioneer and Pioneer GB consisting in the prevention, from the latter part of 1975 until the latter part of 1977, of imports from the United Kingdom into France, constituted infringements of Article 85 (1) of the EEC Treaty.

The Commission imposed the following fines: 850 000 units of account on MDF, 4 350 000 units of account on Pioneer, 1 450 000 units of account on Melchers

and 300 000 units of account on Pioneer GB.

III — Procedure

1. Each of the four undertakings mentioned above commenced proceedings against that decision.

By order of 10 July 1981 the four cases were joined for the purposes of the procedure and judgment.

2. The Judge-Rapporteur and the Advocate General held preparatory meetings with the parties on 10 July and 3 December 1981.

On 18 September 1981 the Second Chamber of the Court heard witnesses in Case 101/80 *(Melchers).*

Following the preparatory meetings, the parties drew up lists of the relevant questions of fact and law. The parties also negotiated with a view to reaching agreement on certain questions of fact. They reached agreement on certain questions and clarified their views on others.

IV — Conclusions of the parties

1. The *applicants* claim that the decision should be declared void or, in the alternative, that the fines should be reduced and that the Commission should be ordered to pay the costs. MDF also claims, in the further alternative, that it should be allowed to pay the reduced fine by instalments of an acceptable amount.

2. The *Commission* contends that the actions should be dismissed and that the applicants should be ordered to pay the costs.

V — Case 101/80 — Melchers

Melcher's first submission is a denial that it prevented parallel imports into France from the Federal Republic of Germany.

A — The individuals involved

1. The individuals having the greatest involvement in the Melchers case are as follows: Mr Iffli, proprietor of the undertaking of the same name in Metz, which sells hi-fi equipment and other products at reduced prices, and general manager of the purchasing group Connexion, which purchases hi-fi equipment, *inter alia,* by means of parallel imports; Mr Weber, former manager of the undertaking Willi Jung of Saarbrücken, who, after the acquisition of Jung by the large German wholesaler, Gruoner of Rommelshausen, became manager of Gruoner's branch in Saarbrücken; Mr Schmidt, proprietor of Gruoner; Mr Hauser, purchasing manager of Gruoner; Mr Schreiber, a buyer at Gruoner; Mr Mackenthun, head of the hi-fi department at Melchers; Mr von Bonin, sales manager of Melchers' hi-fi department; Mr Full, Melchers' local representative for the Karlsruhe area; and Mr Setton, Chairman of MDF, Pioneer's distributor in France.

B — The facts not in dispute

The negotiations between Mr Schreiber and Mr Full

2. In November 1975 Mr Iffli was able to offer Pioneer equipment at between 26 and 31 % off normal retail prices in France by virtue of parallel imports

effected by Connexion from Belgium. Shortly afterwards, Mr Iffli approached Mr Schreiber through Mr Weber with a view to obtaining in the Federal Republic of Germany an alternative source for parallel imports for various products, including those of Pioneer. For that purpose, Mr Iffli went to Gruoner's head office in Rommelshausen on 12 December 1975 for discussions with Mr Hauser and Mr Schreiber. Mr Iffli was accompanied by Mr Weber. Mr Hauser prepared a memorandum regarding that meeting. Mr Schreiber in turn asked Melchers, by telex message of 15 December 1975 alluding only in general terms to Gruoner's intention to expand its business in the hi-fi sector, to send him a price list for Pioneer products. In reply Melchers referred Mr Schreiber to Mr Full.

During the last two weeks of December 1975, Mr Full visited Mr Schreiber. At the meeting, Mr Full described the terms granted by Melchers for retail business and handed Mr Schreiber Melchers' current price list, that is to say price list No 8/75. Mr Full met Mr Schreiber a second time in January 1976 and on that occasion referred to the new terms applied by Melchers as from February 1976 by virtue of price list No 1/76. The latter list contained *inter alia* a discount of 3% for wholesalers.

Mr Schreiber kept notes regarding the two meetings with Mr Full. The content of those notes was clarified by Mr Schreiber at the hearing of witnesses on 18 September 1981. The question whether Mr Full gave Mr Schreiber the impression that Melchers had accepted Gruoner as a customer is disputed by the parties (see below, paragraph 20).

Mr Iffli's order

3. Following the first discussions with Mr Full, Mr Schreiber made an offer to Mr Iffli on 31 December 1975, in particular for Pioneer equipment, at prices up to 30 % below those charged by MDF. On 12 and 14 January 1976 on the basis of the prices quoted by Mr Schreiber, Mr Iffli sent Mr Weber two orders worth together about DM 1 million, which were transmitted by telex on the same dates by Mr Weber to Gruoner. On 19 January 1976, Mr Weber wrote to Mr Iffli informing him that the delivery conditions for his order of Pioneer equipment would be indicated by the "Hamburg" importer on 19 January 1976. Mr Schreiber forwarded Mr Iffli's orders to Melchers by telex on 20 January 1976, after reducing the value thereof. The reasons for which Mr Schreiber made that reduction are disputed by the parties (see below, paragraph 21).

On the same day Mr Weber informed Mr Iffli by telephone that the major part of his order for Pioneer equipment had already been sent to Rommelshausen and he sent him a letter listing those of the articles ordered by Mr Iffli which he said Melchers had already dispatched to Gruoner, and also those which would be reserved for Mr Iffli at the importer's warehouse in Hamburg. The articles listed by Mr Weber as having already been dispatched to Rommelshausen or as having been reserved at Hamburg correspond to those ordered by Mr Schreiber on 20 January 1976.

Mr Schreiber stated at the hearing of witnesses of 18 September 1981 that he had informed Mr Weber of the

quantities of Pioneer equipment which he had ordered from Melchers on 20 January 1976. Mr Schreiber had not however informed Mr Weber that some of the goods ordered had already been dispatched by Melchers. According to Mr Schreiber, Mr Weber must have written his letter to Mr Iffli on 20 January 1976 in order not to lose the latter's order.

Mr Weber explained at the hearing of witnesses that the information regarding the delivery of Pioneer equipment which he had passed on to Mr Iffli in his letter of 20 January 1976 came from Mr Schreiber. Thinking that that information was correct, he had even prepared the export invoices and other documents relating to the transaction.

The meeting in Antwerp

4. Pioneer arranged a meeting at its offices in Antwerp on 19 and 20 January 1976 in which, amongst others, its general manager, Mr Ito, Mr Setton, Mr Mackenthun and representatives of the Pioneer distributors in the United Kingdom, the Netherlands and Switzerland took part. Before the Antwerp meeting Mr Setton had complained to Mr Ito on several occasions about parallel imports of Pioneer equipment into France. Pioneer forwarded Mr Setton's complaints to Melchers. Mr Setton reiterated his complaints at the meeting in Antwerp.

On 19 January 1976 Mr Iffli made an import declaration to the French customs authorities for Pioneer equipment on the basis of pro forma invoices and on 21 and 22 January 1976 he obtained import licences. Pioneer was advised of this by MDF and passed on the information to Melchers.

Melchers' stocks

5. After receiving the order from Gruoner on 20 January 1976, Melchers checked its stocks on 21 January 1976. The stock position was noted on the telex message from Gruoner of 20 January 1976 by a Melchers employee, Mr Stürken, who was then in charge of the warehouse. The parties are in dispute on the question whether it was possible to fulfil the order on the basis of those stocks (see below, paragraph 22). On 22 January Melchers learned by telephone, as a result of its own inquiries, that the insurance company Hermes Kreditversicherung, Hamburg, was prepared to cover Gruoner's order for DM 200 000, which was confirmed in writing on 27 January.

Melchers' alleged refusal to deliver

6. On 23 January 1976 Mr Schreiber sent a telex message to Melchers, stating as follows: "Please confirm our order and give us the name of the carrier who will deliver the goods here." Melchers replied as follows: "We hereby confirm your orders. The carrier who will deliver the goods is Gildemeister." The question whether that reply constituted acceptance of the order or a mere acknowledgement of receipt is in dispute (see below, paragraph 23).

7. On 28 January 1976 Mr Schreiber sent the following telex message to Mr Weber:

"Telephone conversation with Mr von Bonin, sales manager of Pioneer's agents in Germany, amounts to the following:

Pioneer's European head office in Antwerp already knows that a licence has been issued to import Pioneer equipment. The German representative was instructed not to supply Jung under

any circumstances. We can be supplied only if we undertake not to export.

Melchers consequently refuses to make delivery prior to any such undertaking."

In a letter dated 29 January 1976, Mr Weber informed Mr Iffli of the above-mentioned telephone conversation which is supposed to have taken place between Mr Schreiber and Mr von Bonin.

The question whether that conversation between Mr von Bonin and Mr Schreiber actually took place is disputed by the parties (see below, paragraph 23).

8. Mr Iffli then complained to Mr Weber and Mr Schreiber about Melchers' alleged refusal to deliver and threatened to take legal action against Gruoner. Mr Weber endorsed his complaints. In particular, he informed Mr Schmidt and Mr Hauser of Gruoner, by telex message of 6 February 1976, that he had in his possession evidence of the fact that Melchers had sold Pioneer equipment to a Brussels wholesaler, equipment which had then been re-exported to Mr Iffli, and that the undertaking EVB of Stuttgart had also delivered Pioneer products supplied by Melchers to an undertaking in Paris. On the telex message there are handwritten notes by Mr Schreiber which state, regarding the delivery via Brussels: "did not itself deliver, is known at Bremen. But not via Germany, Melchers denies it absolutely." As regards the delivery by EVB, the notes state: "Right, it was in November 1975, enormous trouble so careful now". Mr Schreiber explained his notes at the hearing of witnesses on 18 September 1981 (see below, last subparagraph of paragraph 20).

The meeting at Rommelshausen

9. On 11 February 1976 a meeting took place in Rommelshausen between Melchers and Gruoner. The purpose of the meeting is in dispute; the meeting was attended by Messrs Full, Mackenthun and von Bonin of Melchers and Messrs Schmidt and Schreiber of Gruoner. The content of the discussions which took place on that occasion, in particular the question whether Melchers asked Gruoner to undertake not to export, is disputed by the parties (see below, paragraph 24).

On 18 February 1976, Mr Schreiber sent Mr Weber the following telex message:

"The meeting with the management of Melchers in Bremen concerning the sale of Pioneer equipment has enabled the following matters to be clarified:

1. Melchers made deliveries in 1975 to undertakings which exported equipment to Belgium and France. EVB of Stuttgart made deliveries to France — the orders were for a relatively small amount; a fairly large retailer in the Ruhr made deliveries in Belgium. Some of the equipment came back into the Federal Republic and Melchers even has to repurchase some of it so as to avoid considerable problems.

2. Melchers firmly denies ever having made any exports itself. Any such activity is expressly ruled out by the agreements between Pioneer Head Office in Antwerp and the national distributors. It is perfectly legitimate to direct goods traffic through Antwerp, and Melchers would be endangering its position if it did not keep the distribution channels for Pioneer equipment under control in

such a way as to prevent large shipments from one country to another.

3. We are very interested in including Pioneer equipment in our sales programme.

We cannot make deliveries in sufficient quantities unless Melchers has an assurance that we supply the equipment delivered to the German retail trade.

4. There can be no talk of commercial pressure and that factor cannot unfortunately be changed overnight. Ultimately, it is decisive for European sales to maintain the level of prices.

..."

On 19 February 1976 Mr Schreiber wrote a memorandum regarding the Rommelshausen meeting in which he stated *inter alia:* "Following talks with C. Melchers & Co. ... any obstacles to cooperation between us have now been removed." The connection between the telex message and the meeting and the meaning of the memorandum are disputed by the parties (see below, paragraph 24).

The abandonment of Mr Iffli's order

10. On 20 February 1976 Mr Schreiber sent a telex message to Mr Iffli informing him that the prices which had been quoted to him on 31 December 1975 for Pioneer equipment and other products were no longer valid "on account of price developments". Thus Mr Iffli's order was definitively dropped and he never received the equipment ordered. The reason for the failure to fulfil Mr Iffli's order is disputed by the parties (see below, paragraph 25).

Gruoner placed a further order with Melchers in the following weeks. Gruoner became Melchers' most important single customer.

11. On 28 February 1976 Mr Iffli lodged a complaint with the Commission. The first meeting between the Commission and Melchers seems to have taken place on 12 and 13 April 1976.

Mr Full's offer to Mr Weber in 1977

12. On 27 May 1977 Mr Full offered Mr Weber 2 000 Pioneer turntables for re-sale to Mr Iffli. The transaction did not materialize because Mr Iffli found the price too high.

The undertaking EVB of Stuttgart

13. Pioneer products purchased from Melchers were exported to France in November 1975 by the undertaking EVB of Stuttgart in spite of the fact that the firm had confirmed in writing, at the request of Mr Full, that the goods in question were not to be re-sold within the common market. The reasons which led Mr Full to require that confirmation are disputed by the parties (see below, paragraph 26).

C — The conclusions which the Commission draws from the facts

14. If on 31 December 1975 Mr Schreiber quoted Mr Iffli prices up to 30% lower than MDF's prices, he did so, according to the Commission, because he obtained from his discussions with Mr Full at the end of December 1975 the impression that he would be able, as a wholesaler and by reason of

the volume of the orders, to obtain supplies from Melchers on terms which would enable him to make such an offer. It is said that before forwarding Mr Iffli's order to Melchers on 20 January 1976, Mr Schreiber reduced the order, believing that the nature and size of it would give Melchers the impression that the equipment ordered was to be exported to France. At first, Melchers reacted to that order in a perfectly normal manner: it checked its stocks, requested and obtained credit insurance and confirmed the order, indicating the forwarding agent. However, as a result of the complaints made by Mr Setton, the discussions at the meeting in Antwerp and the instructions given by Pioneer, Melchers changed its attitude and refused to supply the equipment ordered by Gruoner. That refusal was expressed in particular in the course of a telephone conversation which Mr Schreiber had with Mr von Bonin on or about 27 January 1976; in fact, Mr von Bonin said on that occasion that Melchers refused to deliver because it had not received the assurance that the equipment ordered would not be exported. At the meeting on 11 February 1976 in Rommelshausen Melchers' representatives repeated that they could not fulfil the order of 20 January 1976.

D — The conclusions which Melchers draws from the facts

15. According to Melchers, the discussions which Mr Full had with Mr Schreiber at the end of December 1975 and the beginning of January 1976 could be described only as "initial contacts". The order of 20 January 1976 was premature because the conditions concerning the future business relations between Gruoner and Melchers were not discussed until the meeting in Rommelshausen on 11 February 1976 and Gruoner did not accept those conditions until after that meeting. Since Melchers was accustomed, with one or two exceptions, to selling to retailers, not wholesalers, some time was in fact required in order to establish business relations with Gruoner. Melchers was therefore very surprised to receive an order from Gruoner on 20 January 1976 and a request for confirmation on 23 January 1976, that is to say at a time when none of the basic conditions referred to above had been determined. The telex message following the request for confirmation and the approach to Hermes Kreditversicherung were routine steps which did not show that the order had been accepted. Moreover, a large proportion of the goods ordered by Gruoner were not in stock.

16. In its reply, Melchers relies on new matters of fact which are said to have emerged as a result of visits which it made to Gruoner between the date on which the defence was lodged and the date on which the reply was lodged. During those visits Melchers examined Gruoner's documents relating to the present case and put questions to Mr Schreiber.

Melchers claims that it discovered on that occasion that Mr Schreiber had made a mistake in calculating the prices

which he had quoted to Mr Iffli on 31 December 1975. Mr Schreiber calculated those prices on the basis of Melcher's normal price lists. He deducted the standard discount (for retailers benefiting from the highest discounts) and 11 % in respect of German value-added tax, assuming incorrectly that the latter deduction could be made because the goods were intended for export. The Melchers price lists, from which he deducted the value-added tax, stated the net prices, excluding value-added tax. Melchers concludes that the reason why Mr Iffli's order was not performed is not that Melchers refused to deliver or that the prices quoted to Mr Iffli were no longer valid "on account of price developments", but merely that Mr Schreiber had become aware of his mistake in the calculation of the value-added tax, a mistake which, if Mr Iffli's order were to be performed on the basis of that quotation, would have compelled Mr Schreiber to sell at prices lower than those at which he could buy, which would have entailed a loss for Gruoner in excess of DM 80 000. Melchers concludes that it is Gruoner alone, and more precisely Mr Schreiber, who is responsible for the fact that Mr Iffli did not receive the goods which he had ordered.

17. In support of its argument, Melchers also points out that there is a parallelism between Mr Schreiber's transactions with Pioneer and his transactions with National Panasonic, another Japanese producer of hi-fi equipment. In both cases Mr Weber (supposedly misled by Mr Schreiber) informed Mr Iffli that the goods ordered had been dispatched to Rommelshausen by the importer before the order had even been forwarded to the importer by Mr Schreiber. In both cases Mr Schreiber reduced the order placed by Mr Iffli; he asked the importer for confirmation of the would-be order, which, in the case of National Panasonic, was merely a request for reservation; he wrote to Mr Weber, who, in turn, informed Mr Iffli that the order could not be performed owing to the importer's refusal to deliver; on 20 February 1976 he withdrew the price quotation which he had given to Mr Iffli on 31 December 1975 on the ground of price developments.

E — Mr Schreiber's statements

18. Each of the parties seeks support for its version of the facts from the written statements made by Mr Schreiber. The Commission relies on the statement which Mr Schreiber made at the request of its inspectors on 18 May 1977. Melchers relies on the statement which Mr Schreiber made at its request on 5 September 1980. Mr Schreiber made two further statements: on 15 February 1980 he stated that Mr von Bonin's refusal to deliver referred perhaps to the Jung undertaking of Mainz; on 12 September 1980 he stated that he might have known of the VAT error since January 1976.

19. In his statement of 18 May 1977 Mr Schreiber said that:

He was acting on the basis of information supplied by Mr Full with regard to the prices and availability of Pioneer

equipment when he made his offer to Mr Iffli on 31 December 1975;

He reduced Mr Iffli's order in the belief that its composition would give Melchers the impression that it was intended for export to France;

Mr von Bonin told him that Gruoner could not be supplied unless it gave an undertaking not to export;

He invited Melchers to the Rommelshausen meeting in order to discuss the problems raised by the refusal to deliver;

Mr von Bonin said on that occasion that Melchers could deliver only for the specialist trade in Germany;

There was no longer any obstacle to business relations between Melchers and Gruoner after Mr Iffli's order had been discussed at the Rommelshausen meeting.

In his statement of 5 September 1980 Mr Schreiber said:

"1. The extremely low prices which we quoted to Iffli resulted from an idea which we had and which had not been settled with Melchers;

We wrongly supposed that the refund of VAT would entail a reduction in prices and not that it would have a neutral effect on prices...

...

4. When it became apparent to us that we could not keep our promise to supply Iffli, we were faced with the problem of finding a plausible explanation to Iffli. In the meantime, we had learned from Iffli that it had obtained a licence to import Pioneer products into France. Faced with that desperate situation, we said that Melchers could not deliver because Pioneer of Antwerp had intervened ... I gave that explanation to Mr Weber in writing so that he could pass it on to Iffli.

We did not want to tell Iffli the true reason, namely that we had made promises to Iffli before receiving confirmation of our order of 20 January, 1976, because we were afraid that might affect our new business relationship."

F — The essential differences between the two versions of the facts

The negotiations between Mr Schreiber and Mr Full

20. *Melchers* claims that Mr Full explained to Mr Schreiber that in general Melchers did not deal with wholesalers and further discussions would have to take place with Melchers' head office before Gruoner was accepted as a customer.

According to the *Commission*, Mr Schreiber did not obtain that impression from his discussions with Mr Full, because he sent an order to Melchers on 20 January 1976.

At the *hearing of witnesses* on 18 September 1981, *Mr Schreiber* explained that Melchers had not drawn up conditions for wholesalers at the time of his first meeting with Mr Full. The two wholesalers who were being supplied at the time by Melchers, namely Brömmelhaupt and Weide, benefited from the

most favourable terms applied to the retail trade. As regards the remark "bonus für GH" (bonus for wholesalers) appearing in his handwritten notes on the first meeting with Mr Full, Mr Schreiber stated: "A transitional solution had apparently been worked out for the wholesale trade; the practice was probably the same in the case of Brömmelhaupt." Mr Schreiber was unable to give further details on the meaning of his remark.

Mr Schreiber further explained that the second meeting had taken place between Mr Full and himself before he had forwarded his order to Melchers on 20 January 1976. Mr Schreiber finally explained that he had considered the information received from Mr Full to constitute an offer by Mr Full and that the offer he himself had made to Iffli was based solely on the information received at the first meeting, whilst the order placed with Melchers referred to the new 1976 prices, the existence of which had been notified to him at the second meeting.

Mr Full stated at the hearing of witnesses that he had told Mr Schreiber at their first meeting that Melchers had not drawn up conditions for wholesalers. Nor did such conditions exist at the time of the second meeting between Mr Schreiber and Mr Full, which took place, according to the latter, after the Gruoner order of 20 January 1976 (see below, paragraph 23).

Moreover, the parties are not in agreement about the remark "Parallel imports must be prevented. Belgium!", appearing in Mr Schreiber's handwritten notes.

According to the *Commission,* that remark shows that the question of parallel exports from Germany had already been raised during the discussions between Mr Full and Mr Schreiber.

Melchers points out that the wish to prevent parallel deliveries "may have been expressed by Mr Schreiber" with a view to preventing parallel imports into Germany from Belgium, which at that time was the principal source of parallel imports on the continent, in particular of equipment coming from Great Britain. According to Melchers, the same preoccupation may underlie the words "no reimportation" appearing in Mr Hauser's memorandum of 16 December 1975 concerning Mr Iffli's visit to Gruoner on 12 December 1975.

At the *hearing of witnesses, Mr Schreiber* confirmed the interpretation given by Melchers to the abovementioned phrase contained in his handwritten notes. As regards Mr Hauser's remark, Mr Schreiber stated that he assumed Mr Hauser meant that he had had discussions with Mr Iffli on the question whether goods purchased by the latter would actually be marketed in France or whether they might reappear on the German market.

Mr Schreiber also explained that on 6 February 1976, when Mr Weber sent a telex message to Messrs Schmidt and Hauser of Gruoner, he discussed with Mr Full the question of parallel imports into France of Pioneer products coming from Germany. It was Mr Full who had given him the information which he noted on Mr Weber's telex message (see above, paragraph 8, and below, paragraph 24).

Mr Full stated at the hearing of witnesses that it was unlikely that he had given that information to Mr Schreiber.

Mr Iffli's order

21. According to the *Commission,* Mr Schreiber reduced Mr Iffli's order because he thought that the nature and size of it would give Melchers the impression that the equipment ordered was intended for export to France.

In *Melchers'* view, it is difficult to believe that Mr Iffli's order was not acceptable whilst Mr Schreiber's reduced order was. Melchers prefers the view that the reasons for which Mr Schreiber reduced Mr Iffli's order are unclear.

In the *statement* which he made on 18 May 1977 to the Commission's inspectors, *Mr Schreiber* explained that he had reduced Mr Iffli's order in the belief that its composition would give Melchers the impression that it was intended for re-export to France, which might give rise to difficulties in relations with Melchers. At the *hearing of witnesses* on 18 September 1981, he adhered to that explanation, whilst at the same time asserting that he had reduced Mr Iffli's order because he was convinced that Melchers did not have the goods ordered by Iffli in stock.

Melchers' stocks

22. *Melchers* claims that, of the 41 models ordered by Gruoner on 20 January 1976, 13 were not in stock; for others, the quantities in stock were less than those ordered by Gruoner. Stock levels were very low as a result of Christmas sales. The stock levels of Pioneer in Antwerp were also very low; a large part of the stock had been sold in advance.

According to the *Commission,* all the products ordered by Gruoner could have been dispatched by 10 February 1976 at the latest; besides, Melchers could have obtained supplies not only from Pioneer in Antwerp but also from Japan.

Melchers' alleged refusal to deliver

23. According to Melchers, Mr Schreiber's telex message requesting confirmation was received by a student, Miss Hammer, who was on her second day at work. In "confirming" the order she was merely acknowledging receipt of the message. She made a written statement to Melchers on 6 March 1980 in which she confirms that version.

The *Commission* regards the telex message of 23 January 1976 as an acceptance of the order of 20 January. In its opinion it is unlikely that a student on her second day at work would have sent a telex message without having been told to do so. In any event, it is irrelevant whether or not Melchers was in breach of contract in the commercial sense; what is important is the fact that Melchers regarded Gruoner's telex message of 20 January as a normal order until 23 January but subsequently refused to deliver.

Mr Schreiber explained, at the hearing of witnesses on 18 September 1981, that he understood the telex message of 23

January 1976 as an acceptance of his order since that telex message went so far as to refer to the carrier.

Miss Hammer explained at the hearing of witnesses that she merely intended to acknowledge receipt of the telex message of 23 January 1976. She was unable to recall whether when the telex message from Mr Schreiber was given to her she had been asked to acknowledge receipt or whether she had done so on her own initiative. Miss Hammer further stated that she had not seen Mr Schreiber's order of 20 January 1976 before sending the telex message of 23 January 1976.

The *Commission* maintains that Mr von Bonin stated during a telephone conversation between him and Mr Schreiber on or about 27 January 1976 that Melchers was refusing to deliver because it had not received an assurance that the equipment ordered would not be exported. The Commission relies in particular on the telex message which Mr Schreiber sent to Mr Weber on 28 January 1976 (see above, paragraph 7). The Commission further recalls that Melchers' lawyer wrote, in his reply to the statement of objections: "Instead of contacting Mr Full, Mr Schreiber telephoned Mr von Bonin." Moreover, Melchers' lawyer recognized, at the hearing held at the Commission at Brussels on 21 November 1978, that Mr von Bonin had telephoned Gruoner, probably on 27 January 1976.

According to *Melchers,* Mr von Bonin spoke to Mr Schreiber for the first time at the meeting of 11 February 1976 at Rommelshausen. All contacts between Melchers and Gruoner before that meeting in fact took place solely through the intermediary of Mr Full.

Mr von Bonin confirmed the foregoing at the *hearing of witnesses.* After receiving the order, Mr Full was instructed to explain to Gruoner that it was not possible to fulfil such an order at that time.

Mr Schreiber explained on that occasion that he had lied when he told Mr Weber and the Commission inspectors that Mr von Bonin had told him that Melchers refused to deliver because it had not received an assurance that the Pioneer equipment would not be exported. He had invented that explanation after discovering that the prices quoted by him to Mr Iffli were too low and because Mr Iffli threatened to institute legal proceedings against Gruoner. On the other hand, Mr Schreiber maintained that he had called Mr von Bonin, but that the latter had merely explained during the conversation that Melchers had not yet even decided whether they wanted to supply Gruoner.

Mr Full explained in a written statement of 22 February 1980 that Mr von Bonin told him on 20 January 1976 that Gruoner's order: "... cannot be performed by reason of a shortage of stock. Even partial deliveries would lead to insurmountable difficulties for Melchers because the specialized retail trade which we supply would then have to wait. I have been instructed to contact Mr Schreiber and to explain the situation to him, drawing attention to the fact that no business relations yet exist." Mr Full declared that during a visit at the end of

January 1976 Mr Schreiber told him that his order was intended for France. Mr Full then declared, regarding the latter visit: "I tried to explain to Mr Schreiber that a delivery could not take place before a general policy decision (in principle to supply the wholesale trade) was adopted in Bremen and, secondly, that an order of that size could not be performed at short notice ... My warehouse at Karlsruhe ... was almost empty at that time ... Our warehouse at Bremen still had to deal with considerable delays on orders from our specialized German retailers. I told Mr Schreiber that partial deliveries could not be made either if the question whether or not to supply Gruoner was answered in the affirmative within a short period because of the shortage of goods at our disposal; we had to use them in the first place to supply the German market which interested us. We expected the same attitude on the part of Gruoner in the case of future transactions."

At the *hearing of witnesses* Mr Full explained the meaning of the latter phrase as follows: "I also expected therefore that Gruoner would supply the German market in accordance with our instructions. I did not write that we also expected Gruoner not to export ..."

The meeting in Rommelshausen

24. According to the Commission, Melchers' representatives repeated on that occasion that Melchers could not satisfy Gruoner's orders unless it was certain that Gruoner would use those products to supply specialist German retailers and unless Gruoner gave an undertaking not to export.

For its statement that the Gruoner order was discussed at the meeting in Rommelshausen, the Commission relies in particular on the telex message from Mr Schreiber to Mr Weber of 18 February 1976 in which Mr Schreiber summarizes "the meeting with the management of ... Melchers ..." and on the first sentence of Mr Schreiber's memorandum of 19 February 1976 regarding that meeting, which reads as follows: "Any obstacles to cooperation between us have now been removed." The Commission compares that sentence with Mr Schreiber's handwritten notes regarding the meetings with Mr Full and concludes that the principal question remaining to be settled between Melchers and Gruoner at the time of the Rommelshausen meeting was that of exports, since all other questions had been settled during their meetings. The Commission emphasizes that the execution of Gruoner's order in no way required the establishment of regular commercial relations between Melchers and Gruoner. It cannot therefore accept Melchers' argument that the word "obstacles" referred to the establishment of regular commercial relations. The Commission also refers to Melchers' reply to the statement of objections in which Melchers admits that Gruoner's order was discussed at the Rommelshausen meeting.

Melchers claims that the Rommelshausen meeting was not organized for the purpose of discussing Gruoner's order but solely in order to negotiate the basic conditions of the business relationship

between Gruoner and Melchers, which confirms that Gruoner's order was placed at a time when those conditions had not yet been established.

Melchers relies upon Mr Schreiber's memorandum of 19 February 1976. It is apparent from the first line thereof that the word "obstacles" referred to the obstacles arising from the fact that there was still no real agreement between the parties on prices, delivery, warranty etc. According to Melchers, Mr Schreiber's telex message of 18 February 1976 whereby he passed on to Mr Weber information apparently received from Melchers concerning re-exports to Germany does not support the Commission's view, since it was sent in response to a letter and to two telex messages from Mr Weber, of 3 and 6 February 1976, and does not refer specifically to the Rommelshausen meeting.

According to Mr Schreiber's explanations at the *hearing of witnesses* on 18 September 1981 his handwritten notes do not relate to the Rommelshausen metting. Mr Schreiber also said at that hearing that Mr Iffli's order was not discussed at the Rommelshausen meeting. He therefore admitted that the statement made by him on 18 March 1977 to the Commission's inspectors was not correct in so far as he stated with regard to the Rommelshausen meeting that he invited Melchers to Rommelshausen in order to discuss the latter's refusal to sell. Mr Schreiber also admitted that the information on sales by Melchers to undertakings which exported to France, given by him to Mr Weber in a telex message of 18 February 1976, did not originate from the Rommelshausen meeting but from a meeting between him and Mr Full on 6 February 1976, following the telex message from Mr Weber to Messrs Schmidt and Hauser of Gruoner of the same day (see above, paragraphs 8 and 20).

Mr von Bonin also stated at the *hearing of witnesses* that Mr Iffli's order was not discussed at the Rommelshausen meeting.

Mr Schreiber's alleged error regarding value-added tax

25. According to Melchers, Mr Schreiber made a mistake in calculating the prices which he quoted to Mr Iffli on 31 December 1975 inasmuch as he deducted from the Melchers price list, which contained net prices excluding value-added tax, not only the highest discounts granted to retailers but also 11% in respect of German value-added tax, wrongly assuming that the latter deduction could be made.

In support of that claim, Melchers relies upon the statement made by Mr Schreiber on 5 September 1980 to the effect that: "It is true that we did not have the price list of Melchers of Bremen, since at that time Melchers did not contemplate making deliveries to the wholesale trade and we therefore had no business relations with Melchers. We only had the Melchers price list for 1975, given to us by the representative Mr Full, and we knew from conversations with Mr Full what discounts applied to the retail trade. We wrongly assumed that

repayment of the VAT would entail a price reduction and would not, for example, have a neutral effect on prices."

Melchers attempted to reconstruct the calculation made by Mr Schreiber.

According to the *Commission*, it is unlikely that Mr Schreiber made the alleged VAT mistake.

It points out in that respect that the application to loudspeakers of the method of calculation which, according to Melchers, Mr Schreiber followed leads to the finding that he had not made any mistake in the case of loudspeakers. In the Commission's view, it is inconceivable that Mr Schreiber should have made a miscalculation regarding only some products and not all of them. The Commission adds that Mr Iffli would still have been interested in Pioneer equipment at prices 11% higher than those quoted by Gruoner, since they would still have been between 8.5% and 32% lower than those applied by MDF. Likewise, if Melchers had granted the additional discounts of 11% it would have secured a considerable profit on the transaction since its gross profit margin was between 41% and 74%. The method of calculation allegedly followed by Mr Schreiber was also strange in so far as it involved the deduction first of the discounts and then of value-added tax. The calculation of discounts and profit margins should in fact have been made on the net prices excluding value-added tax, otherwise the figure arrived at would include discounts on the tax itself, which would be absurd. Consequently, if Mr Schreiber really thought that value-added tax was included in the prices shown on Melcher's price list — which is very improbable in view of the fact that that list very clearly states at the bottom of page 2 that value-added tax is not included — he would first have deducted the 11% for value-added tax and only then would he have brought the discounts and profit margin into his calculation.

The deduction which, according to Melchers, was due to Mr Schreiber's alleged mistake is, according to the Commission, due to another discount. It refers in that respect to Mr Schreiber's handwritten notes from which it is apparent that Melchers offered bulk discounts and discounts for sales to wholesalers, which applied to all products, with the specific exception of loudspeakers and headphones.

Mr Schreiber confirmed at the *hearing of witnesses* on 18 September 1981 that he wrongly deducted 11% in respect of German value-added tax from the Melchers prices. When reconstructing his calculations before the Court, he did not however deduct 11% from Melcher's prices less the discounts, as Melchers did, but rather he deducted 11% from those prices without discount. Furthermore, he added a profit of 5.5%, in accordance with Mr Hauser's memorandum of 16 December 1975 (see above, subparagraph (a)), whereas Melchers worked on the basis of a profit of 6%. Nor did he deduct 4% in respect of annual bonus, as Melchers did. By following this procedure, he nevertheless did not arrive at the figure appearing in his quotation to Iffli. For the SA-5300 amplifier, he in fact arrived at the price of DM 236.20 (the price offered to Iffli was DM 234.90). For the CSE 220 loudspeakers, he arrived at the price of DM 81.79 (the

price quoted to Iffli was DM 84.30). He emphasized that he also made an error regarding value-added tax in the case of the loudspeakers.

In reply to a question put by the Court, Mr Schreiber was unable to explain why he deducted $^{11}/_{100}$ and not $^{11}/_{111}$, having regard to the fact that the rate of value-added tax, namely 11%, is to be calculated on the price net of value-added tax.

According to the explanations given by Mr Schreiber on 18 September 1981, the reason why Gruoner did not deliver the goods ordered by Iffli was that because of the VAT error it was no longer able to deliver at the prices quoted to Iffli on 31 December 1975.

The undertaking EVB of Stuttgart

26. According to *Melchers,* the reason why Mr Full asked EVB to confirm that it would not sell the equipment within the Community, including the Federal Republic of Germany, or in various European non-member countries was that Melchers could in such cases be called upon to provide after-sales services by virtue of Article 10 of the distribution agreement which Melchers had concluded with Pioneer.

In the opinion of the *Commission,* that explanation cannot be correct in view of the fact that under its agreement with Pioneer Melchers was obliged to provide after-sales services only in Germany.

Mr Full explained at the *hearing of witnesses* that he took the initiative in asking EVB to confirm that it would not sell equipment in the Community, in order to ensure that EVB respected the oral undertaking which it had given him to export the goods to Turkey. Mr Full took that initiative because the re-importation into Germany of goods exported to other countries in the common market had in the past caused considerable problems for Melchers. It was unlikely that an exporter who had completed the formalities for importation into Turkey would have the goods brought back into the Community. Mr Full further stated that he had discussed the question of re-importations with Mr von Bonin. He did not recall having discussed that question with Mr Schreiber and thought that it was unlikely that he would have done so.

VI — Case 103/80, Pioneer GB

A — The facts not in dispute

1. Mr Todd, the managing director of Pioneer GB (Shriro), took part in the meeting in Antwerp on 19 and 20 January 1976 (see above, paragraph V.4). Mr Setton, the chairman of MDF, complained on that occasion of parallel imports of Pioneer products into France from Germany and the United Kingdom and he took to the meeting evidence of test purchases made by a French company in which he had a large holding in order to establish the existence in France of parallel imports from the United Kingdom (see below, paragraph VII.A.2).

2. On 28 and 29 January 1976, Mr Todd wrote two similar letters, one addressed to Mr Smith, the managing director of Audiotronic, and the other to Mr Hollingberry, the chairman of Comet, in which he asked them to

discontinue exporting Pioneer products. Audiotronic and Comet were Shriro's most important customers. In 1976, according to the decision (paragraphs 42 and 80), they accounted for 45 % of Shriro's sales. Audiotronic was the owner in the United Kingdom of the Laskys chain of shops, well-known in the field of hi-fi. Between 1975 and 1977, Audiotronic acquired a large holding of Allwave BV of Delft, which is a Netherlands chain of hi-fi shops, and also in Kings Music, which at that time was MDF's principal customer in France. Audiotronic has since withdrawn from King Music and Laskys. Comet was the principal chain of discount stores and cut-price retail stores in the United Kingdom, selling mainly electrical audio equipment and electrical household appliances. Comet and Audiotronic exported hi-fi products to various customers outside the United Kingdom. They sold Pioneer equipment *inter alia* to Euro-Electro of Brussels, which re-sold those products to Connexion in France, that is to say the purchasing group of which Mr Iffli was the general manager (see above, paragraph V.A.1 and B.2).

In the letter to Comet Mr Todd wrote *inter alia:*

"Of recent months the Pioneer distributor in France has been making strong complaints to Pioneer Electronic (Europe) NV in Antwerp, alleging that Pioneer equipment was arriving in France from the United Kingdom. Allegations of a similar nature have been made against us in the past and in the absence of proof I have rejected them out of hand.

...

Last week I was called to Antwerp to discuss whole question and rather had the ground cut from underneath my feet. To produce the proof that I had demanded, the French distributor had placed some small test orders with several of our larger dealers.

...

I am well aware of the EEC rules regarding parallel exports but quite frankly at times I am more concerned with justice than the law itself.

...

The obvious solution to the question of exports to France would be for me to put up my prices and for the French distributor to bring down his. Regretfully the obvious is not always possible in different economic climates.

...

I wonder if I can call on you to ask your assistance to help prevent a dog-eat-dog situation developing".

Mr Hollingberry of Comet wrote to Shriro on 30 January 1976 stating that his company would not deliberately export Pioneer products to customers outside the United Kingdom but that as several of its locations were in ports it could happen that foreign customers would wish to buy from it.

In response to a similar letter addressed to Audiotronic, Mr Smith replied on 2 February 1976 that he had no proof that Audiotronic had exported significant

quantities of Pioneer equipment but that he had nevertheless asked for that practice to be brought to an end.

B — The conclusions which the Commission draws from the facts

3. The Commission maintains that at the Antwerp meeting Mr Setton and Mr Todd concluded a gentlemen's agreement whereby Mr Todd was to take care to prevent his British customers from exporting Pioneer equipment. Mr Todd subsequently attempted to prevent his main customers from exporting. After receiving the letters from Mr Todd, Comet and Audiotronic agreed to stop exporting Pioneer equipment altogether. Comet's exports then ceased and Audiotronic took over from Comet in supplying Euro-Electro of Brussels, but only until May 1976. If Audiotronic had been free to export, it could have obtained much more business. Shriro took those measures in order to avoid any difficulties with MDF and Pioneer. The market share of Pioneer products in France and in the United Kingdom is sufficiently large for the conduct of the persons involved in the concerted practice to be able to affect trade between Member States appreciably.

C — The principle submissions relied on by Pioneer GB

The market share of Pioneer products

4. In the statement of objections the *Commission* stated that the market share of Pioneer products in 1976 was at least 7 to 10 % in France and 8 to 9% in the United Kingdom. MDF and Pioneer GB challenged those figures in their replies to the statement of objections.

The Commission then instructed Mackintosh Consultants Company of London to draw up a report on the volume of the hi-fi market in the Member States in question. On the basis of that report and of the two applicant's turnover in Pioneer products, the Commission estimated the French hi-fi market share in 1976 at 11.5% and the British market share at 10.5%. For that reason, the Commission adhered, in paragraph 25 of its decision, to the figures given in the statement of objections.

Part of the abovementioned report was made available to the applicants on 6 March 1980, that is to say after the adoption of the decision; the rest of the report was made available to Pioneer GB and MDF on 26 and 27 January 1982 respectively. They claim that because the report was disclosed to them at such a late stage their right to a proper hearing was infringed.

5. In their pleadings lodged at the Court *MDF* and *Pioneer GB* criticized the Commission for:

Excluding music centres from the hi-fi market, which gave a distorted picture of that market;

Basing its market assessment on the report of Mackintosh Consultants Company, in which the values shown correspond to the ex-factory prices (whereas the applicants' turnover figures represent their selling prices); further, the report excludes stereo music centres and other articles, such as headphones

and stereo car radios, whereas in paragraph 25 of the decision the figures from the report are compared with the total turnover figures of the applicants in Pioneer equipment, thus including not only all hi-fi products but also products not classifiable as such.

Pioneer GB considers that its share in the United Kingdom hi-fi market was 3.18 % in 1976. MDF considers that the share of Pioneer products in the French hi-fi market in 1976 was 3.38%, on the basis of the SIERE survey. According to the BREF survey, which relates to the French market in 1975, that share was 4.33%.

The report drawn up by Mackintosh Consultants Co., upon which the Commission relies, concerns the market for separate items of hi-fi equipment, namely loudspeakers, turntables, cassette recorders, tuners and amplifiers, expressed in terms of ex-factory prices. The report values that market in 1976 at UKL 70 million in the United Kingdom and FF 670 million in France.

As regards the turnover of Pioneer GB, the Commission takes into account the total turnover in Pioneer products in 1976, namely UKL 7.3 million.

For its part, Pioneer GB considers that there must be deducted from the above amount the turnover in products which are not hi-fi products, namely music centres, inexpensive units and car radios. On that basis, Pioneer puts its turnover in the United Kingdom in 1976 at UKL 3.3 million. To make those figures, which are calculated on the basis of the prices charged to retailers, comparable with the figures given by it for the total hi-fi market in the United Kingdom, expressed in terms of current selling prices, Pioneer GB increases them by 125 % and thus arrives at a turnover of UKL 4.13 million.

As regards the size of the hi-fi market, Pioneer GB relies upon the 1978 Mackintosh Yearbook of European Electronics Data, according to which the turnover in hi-fi equipment in the United Kingdom in 1976 was UKL 130 million. The Mackintosh Yearbook is based on current selling prices.

That figure relates to hi-fi units and tape-recorders. It includes complete units, plus amplifiers sold separately, tuners, amplifiers and the related furniture, but not car radios, batteries or radios, radio-recorders, radio-receivers or portable record-players. Pioneer GB admits that the figure quoted above includes some "mid-fi" products, but adds that the definition upon which it is based is the definition used in the published figures which is closest to that put forward by Pioneer GB in 1976.

As regards MDF's turnover, the *Commission* adopts the figure of FF 77 million.

MDF adopts the figure of FF 50 660 000, which, according to it, constitutes its turnover in Pioneer hi-fi products.

As regards the size of the French market in hi-fi equipment, MDF relies in the first place on the SIERE study, which valued that market at more than UKL 1 500 million in 1976. That figure includes the 20% of music centres which are capable of being classified as hi-fi. The SIERE survey includes within the hi-fi market the separate component

units (tuners, loudspeakers, turntables, cassette tape-recorders and reel-to-reel tape decks) and also stereo music centres, amplifiers and pre-amplifiers, and amplifier-tuners, provided that those units comply with DIN 45-500. MDF also relies on the BREF survey, which includes magnetic tapes, cassettes and music centres.

Pioneer also considers that the Commission over-estimated the market shares of Pioneer products. In its opinion, the fine should therefore be reduced.

6. *MDF and Pioneer GB* submit that, in accordance with the case-law of the Court and the Commission's notices concerning agreements of minor importance, their respective market shares are not sufficient for Article 85 (1) to be applicable.

7. The *Commission* concedes that it is very difficult, if not impossible, to define the hi-fi market but it stresses that the turnovers of the undertakings exceed the 50 million units of account mentioned in its notice of 19 December 1977 concerning agreements of minor importance (Official Journal C 313, 29. 12. 1977, p. 3) and that in any event the market share far exceeds the percentages held to be insignificant by the Court in its judgment of 9 July 1969 in Case 5/69 (*Völk* v *Vervaecke* [1969] ECR 295).

The effect of Mr Todd's letters to Comet and Audiotronic

8. According to the *Commission*, Comet exported more than ever in 1976 and 1977: goods to the value of UKL 1 066 000 and UKL 785 000 respectively, according to Comet's annual reports. Those exports comprised almost exclusively hi-fi equipment. After January 1976, none of those exports related to Pioneer products. In this regard the Commission relies on the reports of its inspectors after their visits to Comet and Euro-Electro, when Mr Lightowler, sales manager of Comet, and Mr Bossaert, of Euro-Electro, stated that Comet ceased exporting following the letter from Mr Todd: "Effectively Pioneer export business stopped after the letter from Mr Todd" (Report on the Comet visit, paragraph 3 (iii); "Since ... about the beginning of 1976 ... [Mr Bossaert] could not obtain supplies from Comet ...". One of the Commission's inspectors also examined all the invoices relating to Comet's exports from January 1976 until the date of his visit in April 1977 and he did not find any invoice relating to exports of Pioneer equipment. On 28 January 1982 the Commission sent to the Court copies of the invoices relating to Comet's sales in 1977 to its principal client abroad, Diaphon of Hamburg. Those invoices do not relate to Pioneer products. On the same date the Commission sent extracts from Comet's export records for the period in question, from which it appears, according to the Commission, that Comet's purchasers were essentially or exclusively retailers of hi-fi equipment. The Commission emphasizes that the export records make no distinction between Pioneer equipment and other equipment, nor between hi-fi and other products.

9. *Pioneer GB* points out that Comet's exports constituted only a very small percentage of its turnover and that during the period in question those exports dropped. Moreover, it is not possible to deduce from the figures upon which the Commission relied what portion of Comet's turnover related to the hi-fi sector. In the statement which he made to the Commission's inspectors, the manager of Comet, Mr Mason, also declared that Comet was able to export only to a very limited extent because of the combined effects of credit limits on its customers and available margins. Pioneer GB concludes that the alleged concerted practice could have had only an insignificant effect and that trade between Member States could not have been appreciably affected.

Pioneer (Europe) relies upon similar arguments to demonstrate that the concerted practice did not extend over the period alleged in the decision (see also paragraph IX.10, below).

Pioneer GB considers that its right to a proper hearing has been infringed because the Commission disclosed only a wholly irrelevant part of Mr Mason's statement before the adoption of the decision. In fact, by letter of 9 October 1978 the Commission disclosed paragraphs 1 and 2 of the statement and the signature. The relevant paragraphs, namely numbers 3, 4 and 5, were disclosed to Pioneer GB by Comet on or about 21 November 1978 (the date of the hearing at the Commission). The Commission disclosed the full text only in its letter to the Court of 6 April 1981.

Pioneer (Europe) relies upon the same argument.

Pioneer GB also considers that its right to a proper hearing has been infringed because the report which the Commission's inspector drew up regarding his visit to Comet and the other evidence, including Comet's invoices upon which the Commission relied for its statement that Comet had ceased to export following Mr Todd's letter, were not disclosed to it before the adoption of the decision.

According to the *Commission,* Mr Mason's remarks cannot be used to establish that the absence of Pioneer products in Comet's exports was attributable solely to commercial reasons because those reasons would have applied equally to the other brands of hi-fi equipment which Comet continued to export.

10. According to the *Commission,* Audiotronic replaced Comet as regards supplies to Euro-Electro, as soon as Comet had discontinued exporting Pioneer equipment. Audiotronic received orders worth more than UKL 150 000 in March 1976, but it actually executed orders only to a value of UKL 59 000 because Shriro had created difficulties. (The Commission acknowledged at the preparatory meeting on 3 December that the figure of UKL 55 000 contained in paragraph 50 of the decision should read UKL 59 000). After May 1976 Audiotronic no longer exported Pioneer products, except to its associate Allwave hi-fi in the Netherlands. In that respect the Commission relies upon the oral statements made to its inspectors by Mr

Keighley and Mr Smith of Audiotronic. One of the Commission's inspectors also checked Audiotronic's export invoices for the period in question.

11. The statements made by Mr Keighley and Mr Smith are reproduced in the final report of the Commission's inspectors in the following terms: "Audiotronic in fact only began supplying Euro-Electro after Mr Todd's letter was received. They sold some UKL 55 000 worth of Pioneer equipment to Euro-Electro over the next three months, the last consignment being sent in May 1976. The original Pioneer order from Euro-Electro to Audiotronic totalled some UKL 150 000 but the reason for the shortfall in delivery is not clear. Mr Keighley of Audiotronic said that the export department could have done far more business if they had not had to conceal their activities from Shriro and other distributors. Audiotronic continued supplying Allwave, its associated firm in the Netherlands, until September 1976, but by then (as we were informed by Mr Smith, the managing director), Shriro had become difficult on the question of exports and were prepared to supply for the home market only. (This is however denied by Mr Todd)."

12. *Pioneer GB* put in evidence invoices amounting to UKL 45 281 relating to exports made by Audiotronic in 1976 to undertakings other than Allwave. It added that those invoices merely represented certain examples of exports by Audiotronic in 1976.

According to the *Commission,* those are, with certain exceptions amounting to UKL 13 678, all the exports which Audiotronic made to undertakings other than Allwave.

The handwritten notes which the inspector in question took during his meeting with Messrs Smith and Keighley were disclosed for the first time in the Commission's letters to the Court dated 6 April 1981 and 11 June 1981.

Pioneer and *Pioneer GB* ask the Court to declare the statements of Messrs Smith and Keighley inadmissible as evidence since they did not make written statements, the inspector's notes were not disclosed until after service of the rejoinder and they are not dated, signed or approved by the person to whom they are attributed. In the event of the Court's considering that the notes in question are admissible as evidence, Pioneer submits that their content does not support the Commission's allegations referred to above.

The *Commission* considers that the statements of Messrs Smith and Keighley are admissible as evidence and that they support the conclusions drawn from them.

Pioneer GB also claims that its right to a proper hearing was infringed in so far as the abovementioned notes, the report of the Commission's inspector on his visit to Audiotronic and all the other evidence on which the Commission relies for its allegation that Audiotronic stopped exporting Pioneer equipment following Mr Todd's letter were not disclosed to it before the adoption of the decision.

Pioneer GB argues finally that its right to a proper hearing was infringed in so far as the information to the effect that Audiotronic received orders for UKL 150 000 but only executed orders for UKL 55 000 appears for the first time in the decision.

Concerted practice

13. According to *Pioneer GB*, the decision establishes neither the existence of an intention to act in a concerted manner nor the existence of any practices whatsoever designed to give effect to such an intention.

A large number of questions were discussed at the Antwerp meeting. Mr Setton reiterated his complaints concerning parallel imports into France. Mr Todd advised him to reduce his prices but there is nothing to suggest that there was any agreement between Pioneer, MDF and Pioneer GB on that occasion.

Mr Todd wrote his letters to Audiotronic and Comet in the hope that Mr Setton would leave him alone and not as a result of an agreement with Pioneer and MDF. Thus there was not the necessary interdependence between that act and the Antwerp meeting for there to have been a concerted practice within the meaning of Article 85 (1) of the Treaty.

14. According to the *Commission*, the fact that Mr Setton placed test orders shows that he knew that as soon as he had concrete proof he could rely on something being done and thus that an agreement existed even before the Antwerp meeting and that Mr Setton intended to prove that that agreement was being infringed. Whatever the case may be, to establish a concerted practice it suffices that the letters from Mr Todd were the result of his conversation with Mr Setton. The letters themselves indicate that that was the case. Moreover, Pioneer GB does not deny that Mr Todd and Mr Setton agreed on that occasion that Mr Todd would attempt to induce his British customers to cease exporting. Finally, Mr Todd stated at the hearing that he had given "considerable thought" to writing those letters. Besides, it is clear from the letters which Mr Todd sent to Comet and Audiotronic that a concerted practice already existed before the Antwerp meeting.

15. According to *Pioneer GB*, the fact that Mr Setton obtained evidence of parallel imports does not prove that an agreement already existed before the Antwerp meeting. Moreover, the letters from Mr Todd show that the previous discussion concerned parallel imports but not that a discussion took place with a view to imposing an export prohibition.

VII — Case 100/80, MDF

A — The facts not in dispute

1. Towards the end of 1975, the chairman of MDF, Mr Setton, telephoned Mr Ito, the manager of Pioneer (Europe) in order to complain about parallel imports of Pioneer products into France. Mr Setton asked Mr Ito to attempt to discover the origin of the products. Mr Setton telephoned

again to say that he had been able to establish that the parallel imports came from Germany. Mr Setton subsequently telephoned Pioneer several times on the same matter.

2. At the beginning of December 1975 Comet and Audiotronic (see above, paragraph VI.A.2), received from the Office pour le Développement de l'Acoustique Appliquée Sàrl, of Rungis, near Paris, a small order for Pioneer turntables. 95% of the capital of that company is held by MDF and 5% by Mr Setton. Mr Setton admitted that the orders were test purchases intended to prove the existence of parallel imports and that he took that evidence to the Antwerp meeting. On that occasion Mr Setton reiterated his complaints about parallel imports to France.

B — The conclusions which the Commission draws from these facts

3. According to the *Commission,* Mr Setton's complaints incited Pioneer and Melchers to prevent parallel exports from Germany to France. At the Antwerp meeting Mr Setton made representations to Mr Todd of such a nature that Mr Todd undertook to dissuade his two main customers in Britain from exporting Pioneer products from the United Kingdom.

C — The principal submissions relied upon by MDF

The Commission combines the functions of prosecutor and judge

4. According to *MDF,* the decision is illegal because it was taken within the framework of a system which knows no separation between the functions of prosecutor and judge and is therefore contrary to Article 6 (1) of the European Convention on Human Rights.

The *Commission* refers to the judgment of 29 October 1980 in Joined Cases 209 and 215 and 218/78 *(Van Landewyck and Others* v *Commission* [1980] ECR 3125) in which the Court held that the Commission is not a tribunal within the meaning of the abovementioned article.

The non-disclosure of the opinion of the Advisory Committee

5. *MDF* considers that the fact that it is not able to present observations on that opinion constitutes an infringement of its right to a proper hearing. MDF stresses moreover that it had no such opportunity subsequent to the contested decision, even after it made an express request to the Commission. *Pioneer* (Europe) puts forward the same argument in order to demonstrate the unlawful and excessive nature of the fine.

The *Commission* replies that in refusing to disclose the aforesaid opinion it was merely applying Article 10 (6) of Regulation No 17, which provides that such an opinion "shall not be made public". The purpose of that provision is to ensure the impartiality and independence of the members of the committee.

The market share of Pioneer products

6. This submission, which is also pleaded by Pioneer GB, is summarized under heading IV.C.4—7.

The effect on the market (see also, paragraph IX.10—14, below)

7. According to *MDF,* trade between Member States could not be affected by

the alleged concerted practice in view of the insignificance of the transactions involved. MDF bases that submission on its weak market position and on the fact that parallel trade was of no interest in view of the development of prices in the countries concerned. In fact, the Commission made mistakes in calculating the differences between MDF's prices, on the one hand, and those of Shriro and Melchers, on the other. In that regard, MDF states as follows: Table I annexed to the statement of objections shows a large increase in the prices charged by Melchers for Model SA 5300 between December 1975 and January 1976, whereas Table 13 annexed to the Commission's defence shows a slight reduction in those prices in the same period.

Pioneer (Europe) puts forward the same argument.

MDF also submits that, in so far as the average MDF prices calculated by the Commission in the tables annexed to its defence are not weighted according to the volume of sales, the calculations are fundamentally distorted and that the Commission's figures concerning the differences between the prices quotes by Gruoner to Mr Iffli and MDF's prices do not take account either of the VAT and other charges affecting the German price or of the bulk discounts granted in certain cases by MDF.

Pioneer (Europe) also uses the latter argument. In the submissions lodged by Pioneer during the written procedure it expressed the view that the Commission wrongly took as a basis the unit prices invoiced by the distributors rather than the prices applicable to sales in large quantities. After the protracted exchange of pleadings which followed the preparatory meeting of 3 December 1981, Pioneer admitted that it is very difficult to evaluate the prices applicable to such sales on a comparable basis and that the trend remains the same in both cases.

Pioneer further points out that the tables drawn up by the Commission do not show the price changes for 1977, whereas both MDF and Shriro changed their prices during that period.

Finally, *MDF* points out that Shriro's prices were excessively low and could not therefore be regarded as a valid basis of comparison and that the French prices indicated by the Commission also included a profit margin for the sub-distributors, who very often sell at a price considerably lower than the catalogue price.

8. The *Commission* explains that the difference between the tables to which MDF refers is due to the fact that the table contained in Annex I to the statement of objections was prepared on the basis of an invoice issued by Melchers, which had at first denied having any price lists for 1975; Table No 13 annexed to the defence was, on the other hand, prepared after the Commission received those price lists; the prices of Melchers and Shriro were not "weighted according to the volume of sales", like those of MDF; none of the prices mentioned by the Commission

takes VAT into account since that is neutral at the stage of the transactions in question and MDF gives no indication of the other charges which might affect the German price. The Commission states that in its defence it compared the prices quoted by Gruoner to Iffli with the net price charged by MDF for a quantity of 20 items; the question whether Shriro's prices were realistic does not arise, in its opinion, since those prices were much lower than those of MDF with the consequence that Comet and Audiotronic could have made a substantial impact on the French market.

The Commission points out that the order for DM 550 000 which Melchers received from Gruoner represented 2.5% of Melchers' annual turnover in Pioneer products and was therefore large enough to warrant the view that the concerted practice had a direct influence on trade between Member States. The indirect and potential influence of the concerted practice on trade between Member States may be envisaged with a sufficient degree of probability, as indicated in the judgment of 9 July 1969 (already cited under VI.C.7); Mr Iffli obtained pro forma invoices from Jung for a further sum of DM 1 300 000 and he told the Commission's inspectors that if he had been able to obtain supplies freely at the prices quoted by Gruoner, he would within a few months have had a turnover in Pioneer equipment of approximately FF 5 million. Melchers offered Pioneer products to Gruoner at about 25% below its normal list prices.

9. *MDF* considers that its right to a proper hearing was infringed by reason of the fact that the figures quoted in the tables annexed to the Commission's defence were not disclosed before the adoption of the decision. *Pioneer* (Europe) shares that view.

The *Commission* relies upon the dicta of the Court in the judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461) and in the *Van Landewyck* judgment (cited in paragraph 4).

State of necessity, legitimate self-protection

10. *MDF* considers that if it committed an offence its conduct was justified by a state of necessity. MDF found itself in a situation in which it was legitimate for it to defend itself against the unfair competition which it was suffering from parallel importers. Those importers took advantage of the after-sales service and brand image created by MDF. In addition, the prices of the cut-price retailers were distorted. MDF also claims that unfair competition forced it to changes its sales policy and consequently to withdraw a number of exceptional services. According to the *Commission*, MDF's situation was a case neither of necessity nor of legitimate self-protection as defined in the judgments of the Court: judgment of 12 July 1962 in Case 16/61, *Acciaierie Ferriere e Fonderie Modena* v *High Authority of the ECSC* [1962] ECR 289; judgment of 18 March 1980 in Joined Cases 154, 205 and 206, 226 to 228/78, 31, 39, 83 and 85/79, *Ferriera Valsabbia and Others* v *Commission* [1980] ECR 907.

Article 85 (3)

11. *MDF* claims that the substantive conditions for an exemption under Article 85 (3) were fulfilled and that consequently, upon notification, it could have obtained an exemption. It did not therefore commit a breach of one of the principal objectives of the Treaty but merely an infringement of a rule of form, namely a failure to comply with the obligation to notify the agreement and obtain a formal exemption. That fact ought, at the very least, to result in a considerable reduction in the fine.

In reply the *Commission* states that notification constitutes a condition *sine qua non* for the applicability of the abovementioned provision. Moreover, exemption would not have been possible even if the practice had been notified.

VIII — Case 102/80, Pioneer (Europe)

A — The facts not in dispute

1. Pioneer passed on the complaints of the chairman of MDF, Mr Setton, to Melchers (with respect to those complaints, see the facts not in dispute in the MDF case, paragraph VII.A, above). Pioneer convened the Antwerp meeting (see above, paragraph V.4). At that meeting the following were present: the manager of Pioneer, Mr Ito, who chaired the meeting, Mr Setton, Mr Todd, the manager of Pioneer GB, and Mr Mackenthun, head of the hi-fi department of Melchers, and the Dutch and Swiss distributors of Pioneer products. It was not a scheduled meeting of the type that takes place two or three times a year but an *ad hoc* meeting of the type that is held whenever necessary. Mr Setton reiterated his complaints at that meeting and produced evidence of the existence of parallel imports (with respect to these purchases, see the facts not in dispute in the MDF case, paragraph VII.A, above). There is no written trace of that meeting in Pioneer's records. Pioneer subsequently informed Melchers that Iffli had obtained French import licences for Pioneer equipment (see above, paragraph V.B 4).

2. On 28 and 29 January 1976, Mr Todd wrote two similar letters to Audiotronic and Comet, his most important customers, in which he asked them, after explaining that he had been summoned to Antwerp to discuss the question of parallel imports, to cease exporting Pioneer products (regarding those letters, see the facts not in dispute in the Pioneer GB case, paragraph VI.A, above).

3. Mr Schreiber of Gruoner wrote to Mr Weber, the manager of the Gruoner branch in Saarbrücken (formerly the Willi Jung undertaking) on 28 January 1976 informing him that Mr von Bonin, the sales manager of the hi-fi department at Melchers, had told him in a telephone conversation that Pioneer had ordered him not to supply Jung. Mr Weber informed Mr Iffli, the complainant in the present cases, of that telephone conversation (see above, paragraph V.7).

B — The conclusions which the Commission draws from these facts

4. The Commission concludes that Pioneer participated in the concerted

practice between MDF, Pioneer GB and Melchers. It bases its view on the following facts in particular: Pioneer transmitted to Melchers Mr Setton's complaints and the information about the import licences obtained by Iffli; it organized the Antwerp meeting; the discussions on that occasion centred on the suppression of parallel imports and took place with the cooperation of the chairman of the meeting, Mr Ito; that is the only meeting of which there exists no written mention in Pioneer's records; the absence of any record is explained either by an unfortunate omission or by a deliberate decision not to keep any written document relating to that meeting; Mr von Bonin told Mr Schreiber that Melchers had refused to sell in accordance with instructions from Pioneer; the power which Pioneer has as a subsidiary of the producer to decide whether to continue the exclusive contracts of the distributors places a particular responsibility on it.

C — The principal submissions relied upon by Pioneer

5. *Pioneer* claims in particular that it did not participate in the alleged concerted practices.

The Antwerp meeting

6. *Pioneer* does not agree that the object of the Antwerp meeting was to discuss parallel imports. In that respect it relies upon:

The statement which Mr Setton made during the hearing at the Commission to the effect that the meeting had been organized in order to discuss music centres;

The reply given by Mr Setton, on the same occasion, to the question whether the meeting had been organized to discuss parallel imports: "That would show that they (Pioneer) gave me great importance ... if I had that sort of power over Pioneer, I would not deny it";

Mr Ito's statement that the purpose of the meeting was to consult Pioneer's main representatives on the new range of products;

Mr Todd's statement at the hearing: "In May 1977 I said that that was not the purpose of the meeting and I repeat it again today";

Mr Todd's written statement according to which he has never been subject to pressure from Pioneer.

The fact that Mr Todd wrote to Audiotronic and Comet stating that he had been summoned to Antwerp to discuss parallel imports (see above, paragraph VI.A.2) was intended only to reinforce his request.

If the Antwerp meeting had been convened in order to discuss parallel imports, the Italian distributor, who had also complained to Pioneer about such imports, and the Belgian distributor (Belgium was one of the main sources of

parallel imports into France) would have been invited, whilst the Swiss distributor, who had no interest in parallel imports, would not have been invited.

Pioneer and *Pioneer GB* also claim that the statement of objections did not indicate that the purpose of the Antwerp meeting was to discuss parallel imports or that Pioneer was invited to explain why there was no written mention of the Antwerp meeting in its records. According to Pioneer and Pioneer GB, that procedural irregularity ought to lead to the annulment of the decision.

The absence of written records is perfectly normal for *ad hoc* meetings of distributors, such as the one in question. For regular meetings, the participants receive a written invitation and a copy of the agenda; for *ad hoc* meetings they normally receive no written invitation and no agenda. Moreover, Pioneer does not keep minutes and does not retain notes concerning what it said at a meeting, whether it be regular or *ad hoc.*

7. The *Commission* states that one of its inspectors discovered in Pioneer's records invitations together with agendas for an *ad hoc* meeting concerning competition from Technics products.

Pioneer accounts for those documents by the fact that, although it is not usual to send invitations or agendas for *ad hoc* meetings, that procedure may have been followed on certain occasions. As regards the meeting concerning Technics, it was convened on the occasion of a regular meeting. Since a written invitation had been sent to the people invited to participate in the regular meeting and since it was understood that an *ad hoc* meeting would be held at the same time and place, it was quite normal for the invitation to that meeting also to be sent in writing. Moreover, each distributor had been given a task before that meeting, namely to monitor the activities of Technics on its territory.

Pioneer concludes that the circumstances surrounding the Antwerp meeting do not disclose any illegality. Indeed it cannot be maintained that the mere discussion of a problem is tantamount to an agreement that the problem shall be resolved by recourse to illegal means.

There exists no proof that at the time of the Antwerp meeting Pioneer did more than listen to Mr Setton's complaints and advise him to reduce his prices. In fact, all the participants in that meeting deny that concerted action was suggested by Pioneer, that Pioneer indicated its consent to such action, that it exerted pressure on distributors, or even that it requested their assistance for the purpose of restraining parallel imports.

There is nothing to prove that Pioneer contributed to the conclusion of the gentlemen's agreement between Mr Todd and Mr Setton (see above, paragraph VI.8).

Pioneer cannot agree with the Commission's statement concerning its

power to control the activities of its distributors. It points out that it is not even strong enough to compel its distributors in France and the United Kingdom to accept a written contract.

8. According to the *Commission*, the purpose of the Antwerp meeting was to discuss parallel imports. In its decision the Commission confined itself to stating that "the main item that was actually discussed was the prevention of parallel imports". The Commission relies in particular on the fact that Mr Todd wrote to Comet and to Audiotronic informing them that he had been invited to the Antwerp meeting to discuss that question (see also paragraph VI.A.2, above). The Commission also observes, in this regard, that Pioneer's distributors in the main countries from which parallel imports were being made into France were present and that Mr Setton produced evidence of the existence of parallel imports from the United Kingdom. Besides, Pioneer was not in a position to say what may have been the purpose of the meeting. The fact that the Italian distributor was not present does not prove that the purpose was otherwise; it merely shows that the concerted practice did not make it possible to isolate the French market totally. If the meeting had been convened to discuss new products all the distributors would have been present, a written record would have existed and Pioneer would have been able to tell the Court what products were involved.

As regards the question whether Pioneer's conduct constituted participation in a concerted practice, the Commission does not accept that Pioneer did no more than passively allow its distributors to talk to each other about parallel imports. Pioneer had the power to ensure that the distributors did everything they could to prevent parallel imports. It was in order to discuss that problem that Pioneer called the meeting and organized the discussions.

In the present case, the concertation, which is the first essential ingredient of a concerted practice, was the contract between the persons involved in the Antwerp meeting, the purpose of which was to influence the general behaviour of the participants. Pioneer took an active part in that meeting. The practical behaviour of the participants, which constitutes the second prerequisite for a concerted practice, is clear from the facts: the participants created conditions of competition which do not correspond to the normal market conditions. In support of its argument, the Commission cites the judgments of the Court of 14 February 1972 in Case 48/69 *(ICI* v *Commission* [1972] ECR 618, paragraphs 64 to 57) and of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/72 *(Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 26, 173 and 174).

Melchers' alleged refusal to sell

As regards imports into France from Germany, *Pioneer* claims that there was

no concerted practice designed to prevent them. Pioneer's arguments in that respect correspond in general terms to those of Melchers (see above, paragraph V).

9. In any case, Pioneer denies having participated in any concerted practice designed to prevent parallel imports into France from Germany. It denies having instructed Melchers to refuse to deliver to Gruoner. In its opinion, Mr Schreiber's telex message to Mr Weber of 28 January 1976, according to which Pioneer had given such instructions, must be regarded as the explanation for Gruoner's refusal to sell which the chief buyer of Gruoner was instructing his employee Mr Weber to give to a customer. Even if Mr Schreiber repeated that explanation in the written statement which he made to the Commission's inspectors of 18 May 1977, it should not be regarded as correct because even in 1977 Mr Schreiber had an obvious interest in giving the explanation which he gave: he was thus making another company responsible for the refusal to deliver. Moreover, Mr Schreiber had stated on 5 September 1980 that that explanation was intended to cover up his error of calculation by providing an excuse for not executing Mr Iffli's order. Finally, Pioneer states that there is no evidence that Gruoner ever gave a written assurance not to export, although the decision (paragraph 63.1.3) states that "the Commission believes that the goods would not have been delivered by Melchers unless Gruoner had given a prior written undertaking that the goods would not be exported".

10. The *Commission* observes that Gruoner did not refuse to sell. Consequently, it doubts that the object of the telex message which Mr Schreiber sent to Mr Weber on 28 January 1976 was to instruct Mr Weber to inform Iffli of Gruoner's refusal to sell. Besides, the telex message contained no instruction to write to Mr Iffli in those terms. According to the Commission, Mr Schreiber was not obliged to confirm in his statement of 18 May 1977 what he had said in his telex message of 28 January 1976; he did not need to invent an explanation for the Commission's inspectors because even if he had refused to sell that would not have been contrary to Community law *per se*; it is unlikely that Mr Schreiber had reason to fear that Mr Iffli would take action against him in May 1977; Mr Iffli's threats were made in a letter dated 30 January 1976 and therefore did not have any influence on the telex message which Mr Schreiber sent to Mr Weber on 28 January 1976 or on the letter which Mr Weber sent to Mr Iffli on 29 January 1976 (see above, paragraph V.B.7). Finally, even if Gruoner became Melchers' largest customer after 11 February 1976 without having to give a written undertaking not to export, that is irrelevant since Gruoner might have given an oral promise or Melchers might have decided that the changes in exchange rates made exports to France unprofitable.

The transmission by Pioneer to Melchers of Mr Setton's complaints and of the information about the import licences.

11. Whilst admitting that by reason of the circumstances, it would have been preferable for it not to pass on to Melchers information about Mr Setton's complaints and about Iffli's import licences, *Pioneer* submits that to do so does not constitute an infringement of Article 85 of the Treaty; the fact that a supplier gives to a distributor the information which he has received from a distributor in a neighbouring State does not constitute evidence of a concerted practice.

The duration of the alleged concerted practice

12. Nor does *Pioneer* agree that it is apparent from the facts, as they emerged at the Commission hearing, that the alleged concerted practice between Schreiber and MDF lasted for the period attributed to it in the decision. Pioneer's arguments in that respect, which are also put forward to demonstrate that the fine is excessive, are summarized in paragraph IX.9-10, below.

IX — The fines

General observations

1. The *Commission* states that it gradually formed the view that the time for making concessions on account of the relative novelty of Community law had come to an end as regards well-known and well-established infringements, such as export prohibitions.

The Commission states that many undertakings persist with practices which they know without doubt to be contrary to Community law because they think that even if fines are imposed on them the profit which they will earn from their illegal conduct will be greater than the fine and that the conduct will therefore have been remunerative. Such attitudes can be discouraged only by the imposition of heavier fines than in the past, at least for recognized infringements. The Commission regards the present case as a decisive test case for the competition policy of the Community.

Among the most serious infringements of Community law are export and import prohibitions, since they deprive consumers of all the advantages which should normally result from the abolition of tariff barriers and quantitative restrictions on trade between Member States; they impede the integration of the economies of the Member States; they leave distributors and retailers in a state of subordination to producers. Heavier fines are particularly necessary when the principal purpose of the infringement is, as in the present case, to maintain higher prices for consumers.

2. According to the *applicants,* neither the nature of the cases nor the products in question, nor even the circumstances surrounding the cases, can justify the Commission's change of policy. The reference to such a change shows that the Commission did not base its action on the gravity and duration of the infringement. The criterion applied by the Commission tends to arbitrariness and is discriminatory. Moreover, the facts of the present cases occurred at the same time as the facts underlying other cases which the Commission had decided previously, imposing incomparably lower

fines. The highest fine which the Commission has imposed is therefore due to the fact that the present cases were taken up by the Commission at the time of its change of policy. In that regard, Pioneer expresses the opinion that "this is not jurisprudence, this is a judicial lottery".

The applicants also submit that the fines imposed on them are not in proportion to those imposed on other, larger undertakings for infringements which were more serious and of longer duration. In particular, they argue that the export prohibition imposed by Kawasaki (Commission Decision of 12 December 1978, Official Journal 1979 L 16, p. 9) was tighter, more general, more successful and more profitable to the offender than the export prohibition in which the applicants are alleged to have participated.

The relationship between the fines and the applicants' turnover

3. The *Commission* states that all the fines which it imposed in the past amounted to approximately 2%, or less, of the turnover in question. However, in the present cases it considered that it was appropriate to impose fines equivalent to around 4% of the turnover of MDF and Pioneer, 3% of the turnover of Shriro and 2.5% of the turnover of Melchers. The different percentages took sufficient account of the gravity and duration of the infringements established, the size of the undertakings and the aggravating circumstances mentioned in the decision.

The Commission points out that Article 15 (2) of Regulation No 17 and the decisions of the Court permit it to take into account the following factors when imposing fines: the gravity and duration of the infringements; the purpose of the fines, which is to bring to an end unlawful conduct and to prevent the re-emergence of such conduct; the number and size of the undertakings concerned; the extent of the harmful effects of the agreement or abuse; the market situation; the individual attitude of each undertaking and its degree of culpability (judgment of 15 July 1970 in Case 41/69, *Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 155 and 173; judgment of 15 July 1970 in Case 45/69, *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraph 53; judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 612 and 623; judgment of 1 February 1978 in Case 19/77, *Miller* v *Commission* [1978] ECR 131, paragraphs 20 and 21). The Commission adds that the Court has clearly accepted that the fine may be proportionate to the turnover of the undertaking (judgment of 12 July 1979 in Joined Cases 32 and 36 to 82/78, *BMW Belgium* v *Commission* [1979] ECR 2435, paragraph 47).

The Commission stresses that since there are so many unquantifiable criteria to be taken into consideration, no mathematical formula of general application is possible. Different approaches may be used in different cases. Even when it is possible to connect the size of the fine to a quantifiable criterion, such as turnover, the decision as to what must be the relationship between the fine and the criteria thus measured is a question of appraisal rather than simple calculation.

The Commission considers that it is appropriate to adopt an approach which takes into consideration the following factors: the gravity and duration of the infringement; the size of the undertakings concerned, so that, other things being equal, the largest undertakings suffer the heaviest fines; subjective factors, such as intention or negligence.

4. According to *Melchers,* it is inequitable to fix fines in proportion to the turnover of the undertakings. The 10% limit contained in Article 15 (2) of Regulation No 17 was prescribed solely for the protection of undertakings. The turnover does not give any indication of the profitability of the undertaking. Thus no indication as to an undertaking's ability to pay a fine can be deduced from turnover.

5. The fact that the fine was based on turnover caused Melchers to suffer the second largest fine even though, on the basis of the criteria of the gravity and duration of the infringement, as applied in the decision, it ought to have suffered the smallest fine of the four. In that regard, it should be noted that the Commission imposed the lowest fine on Melchers in percentage terms, namely 2.5%. If that fine, which was the smallest in percentage terms, did not result in the lowest fine in absolute terms, it is solely because the Commission calculated Melchers' fine on a considerably wider basis than those of the other applicants. Melchers' turnover, on the basis of which the Commission calculated Melchers' fine, is an aggregate turnover of which hi-fi products have at no time represented more than 10%, whereas in the case of the other applicants hi-fi products represent the major part if not the whole of their turnover. Melchers considers that, as a result of the method used by the Commission, its fine is disproportionate in comparison with those of the other applicants. Melchers therefore asks the Court, in any event, to reduce its fine to a lower level than that of Shriro.

6. According to *MDF, Melchers and Pioneer,* the size of the fine cannot be calculated on the basis of the total turnover of the undertaking since the subject-matter of the infringement represents only a part of that turnover.

Melchers points out that Pioneer products account for less than 10% of its turnover and that the fine which was imposed upon it represents 18% of its turnover in the hi-fi market in 1977 and thus exceeds the 10% limit laid down by Article 15 (2) of Regulation No 17.

Pioneer claims that the turnover adopted by the Commission includes, in addition to the sales of products other than hi-fi equipment, sales to countries other than France, the Federal Republic of Germany and the United Kingdom which are not relevant to these proceedings. If the Commission had taken into consideration the sales of hi-fi equipment in France, the Federal Republic of Germany and the United Kingdom in 1978, the fine would have been reduced by over BFR 142 800 000. To proceed otherwise is tantamount to an infringement of the principle of equality: the Commission imposed a fine

on the undertaking Johnson & Johnson based on the turnover in the product concerned in the infringement (decision of 25 November 1980, Official Journal 1980 L 377, p. 16).

The *Commission* replies that since the turnover provides a measure of the size of the undertaking, it is the total turnover of the undertaking which is to be taken into account. The limit imposed by Article 15 (2) of Regulation No 17/62 has not been exceeded: the figure of 10% represents a maximum fixed for the protection of the undertaking. It is therefore a question of 10% of the aggregate turnover of the company since only that turnover can give an indication of the maximum fine which the undertaking is able to pay.

7. *Pioneer* points out that, whereas in order to calculate the fines imposed on the other three applicants the Commission adopted the turnover achieved in 1978, in Pioneer's case it took account of the turnover achieved in the 1979 accounting year, which ended on 30 September 1979 (BFR 4 399 477 305). It follows that, on the basis of the rate of 4% applied by the Commission, the fine imposed on Pioneer was higher by BFR 45 404 566 than it would have been if the Commission had taken the turnover for the accounting year 1978, and by BFR 35 337 650 if the Commission had used as a basis the calendar year 1978. Pioneer points out that the Commission considered that MDF and Pioneer should be penalized on the basis of the same percentages of turnover (see above, paragraph 3), which does not occur if the fine is calculated on the basis of different turnovers.

The *Commission* considers that it is the latest available turnover which must be taken into account, since it is that turnover which best reflects the size of the undertaking at the time when the fine is to be imposed.

8. *MDF* points out that, because of a material error in the figures it sent to the Commission, the latter adopted as a basis of calculation its turnover for 1977, instead of 1978, which should bring about a reduction in the fine from FF 850 000 to FF 800 000.

The *Commission* contends that it noticed the error made by MDF and that consequently it worked out the true figures. The fine imposed on MDF corresponds to 4.3% of the correct turnover of that undertaking, which in view of the gravity of the infringement committed is the correct fine to impose on MDF.

The duration of the concerted practice

Commencement of the concerted practice

9. In its decision the *Commission* stated that the concerted practices commenced towards the end of 1975, that is to say at the time when Mr Setton began to complain about parallel imports.

According to *MDF* and *Pioneer*, the mere fact that MDF complained, which is a unilateral act, cannot constitute the beginning of a concerted practice, particularly since Pioneer replied to those complaints by saying that it could do nothing. Thus that practice could not have begun before 19 and 20 January 1976, on the occasion of the Antwerp meeting.

The *Commission* states in reply that MDF complained to Pioneer of the existence of parallel imports into France at the end of 1975 and that Pioneer acknowledges that it sent the information on parallel imports to Melchers at that time.

In addition, it is apparent from paragraphs 43 to 46 of the decision that at the beginning of December 1975, Office pour le Développement de l'Acoustique Appliquée Sàrl, of Rungis, near Paris, 95% of whose capital is held by MDF, carried out test purchases to prove the existence of parallel imports from the United Kingdom. That fact, which is not denied by Pioneer, shows that MDF and Pioneer had prior knowledge of the existence of parallel imports and that MDF had attempted to prevent them. It also shows that in 1975 there was already a concerted practice intended to prevent such imports and that MDF knew that as soon as it had proof that the imports had taken place it would be able to use that proof to force Shriro to act.

End of the concerted practice

10. According to the *Commission,* the concerted practice between MDF, Pioneer and Melchers ceased in February 1976. As regards the concerted practice between MDF, Pioneer and Shriro, since those undertakings took no effective action to bring it to an end and parallel imports were profitable in 1976 and 1977, the Commission took the view that it ceased only at the end of 1977. The Commission considers in fact that a concerted practice intended to prevent parallel imports continues until the parties decide to bring it to an end or until they no longer need it.

According to *Pioneer,* such a concerted practice designed to prevent parallel imports continues only for as long as the parties take measures to give effect to it.

Pioneer and *Melchers* point out that the alleged concerted practice between MDF, Pioneer and Melchers was perpetrated on 27 January 1976 when Mr von Bonin told Mr Schreiber that Melchers would not deliver the goods; it therefore lasted for a maximum of eight days.

In the event of the Court's accepting the Commission's view summarized in paragraph 10, Pioneer states that even after MDF increased its prices in April 1976 the difference between MDF's prices and those of Melchers was no more attractive than in January and, in any case, was insufficient to make parallel imports into France from Germany profitable (see also paragraphs 12 to 14 below and paragrph VII. 7, above).

The *Commission* states in that regard that if, for the purposes of Pioneer's calculation regarding April 1976, no account is taken of the three models for which MDF's prices were temporarily lower than those of Melchers, MDF's average prices for the remaining models were 13.33% higher than the corresponding prices of Melchers, which, according to the Commission, represents a sufficient difference to make parallel imports profitable.

Finally, the *applicants* claim that no proof exists that the alleged concerted practice between MDF, Shriro and Pioneer lasted

for two years (see above, paragraph VI.6.8—12). Pioneer adds that in August and September 1976, the price differences had fallen to the point where parallel imports were no longer profitable (see also paragraphs 12 to 14, below, and paragraph VII.7, above).

The applicants also allege that the Commission infringed Article 4 of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47), inasmuch as the duration of the infringements indicated in the statement of objections was shorter than that on which the decision is based.

The effects of the alleged concerted practice

11. According to the *applicants,* the effects of the alleged concerted practice were minimal. Consequently, the alleged infringement is less serious than the Commission claims and the fine should be reduced.

(a) Attractiveness of parallel imports

12. According to the *Commission,* the wholesale and retail prices for Pioneer products in France at the end of 1975 and the beginning of 1976 were considerably higher than those charged in the United Kingdom. Unrestricted parallel imports into France could, in its opinion, have brought retail prices in France down by at least 10%. French consumers could thus have saved more than FF 9 million. For some models prices would have fallen by 20% or more.

13. *Pioneer* stresses that the attractiveness of parallel imports must not be measured by reference to the difference between the prices but by reference to the difference between the profit which a trader can achieve by selling on the domestic market and the profit which he could achieve by exporting:

The profit which Audiotronic and Comet achieved on sales in the United Kingdom was higher than the profit which they would have achieved by selling to a French parallel importer;

For almost all Pioneer models the prices paid by consumers in the United Kingdom in May 1976 were higher than the list prices applied by MDF;

In evaluating the differences in prices it must be borne in mind that the list prices applied for retail sales in France included service and warranties, that MDF had advertising costs and that it was also necessary to take into account transport costs and the profit of the Belgian re-exporter.

MDF stresses in particular that the French purchasers of products deriving from parallel imports enjoyed certain benefits offered by it, MDF, which did not refuse them its after-sales service.

The *Commission* replies that, according to the information available to it, that is not true.

14. The *Commission* observes that the argument to the effect that the attractiveness of parallel imports depends on the profits which can be achieved on

the domestic market or on the export market assumes that dealers are not allowed to buy unlimited quantities of Pioneer products. The Commission stresses that in the hi-fi industry exports are normally made in large quantities and for cash; further, such sales are normally made ex-warehouse so that the seller has no handling expenses and the transaction is almost cost-free to him. The Commission concludes from this that if Comet and Audiotronic had been allowed to develop a regular business in Pioneer products they could have run it on a continuing and profitable basis, in addition to their domestic sales.

The Commission considers that the French consumers were entitled to choose to pay either a high price and thus benefit from service and warranties or a lower price and thus risk having to pay a little more for any service and repairs which might be necessary later.

The Commission also submits that transport costs are very low in relation to the value of hi-fi products and that the profit margin of the parallel importer in question, Euro-Electro, was minimal.

(b) The effectiveness of the alleged isolation of the French market

15. According to the *applicants,* there were never any effective measures designed to isolate the French market:

The volume of parallel imports from the United Kingdom did not change;

Both Audiotronic and Comet continued to export to France;

When Comet and Audiotronic ceased exporting that was not as a result of the letters from Mr Todd;

Nothing was done to put into effect the letters from Mr Todd;

Iffli and the Connexion group had no difficulty in obtaining all the Pioneer equipment they wanted from the Benelux countries; thus they did not suffer any damage as a result of the alleged concerted practice;

In 1976 parallel trade between Germany and France ceased to be attractive.

(c) Other arguments concerning the effects of the concerted practice

16. *Pioneer* stresses that the products in question are not products of the first necessity, that its market share was small and that export prohibitions imposed on distributors do not impede competition between brands.

In reply, the Commission states that prohibitions imposed on distributors also affect competition between brands.

17. Finally, *Pioneer, Melchers,* and *Pioneer GB* claim that they had nothing to gain from participating in the concerted practice.

The *Commission* replies that a distributor may wish to prevent exports in the expectation that he may later wish to prevent parallel imports himself, and that it is always beneficial for an undertaking to allow its distributors stable profit margins.

Disclosure by the Commission of the criteria on the basis of which the fines were calculated

18. *Melchers* submits that the Commission infringed its right to a proper hearing by failing to disclose to it in the course of the administrative proceedings, by means of an additional statement of objections if necessary, the criteria on the basis of which it intended to calculate the fine, not to mention the amount of the fine or even an approximation of that amount.

The Commission did not even disclose those criteria in the decision. Thus the decision is insufficiently reasoned.

19. The *Commission* replies that it is normally impossible to indicate in the statement of objections, even approximately, the amount of the fine likely to be imposed. The fixing of a fine involves consideration of too large a number of factors and these can be weighed up only after the undertaking has been heard. If Melchers' arguments were accepted it would be necessary, according to the Commission, to introduce an entirely new stage into the Commission's procedure in every case in which a fine was contemplated. None of the cases in which the Commission has issued a second or supplementary statement of objections concerned primarily the size of the fine.

Intention

20. *Melchers* submits that acts allegedly committed by employees, such as Mr Mackenthun and Mr von Bonin, who had received no instructions from the partners in the undertaking, cannot be used to impute a wrongful intention to the employer. In its opinion, the unlawful conduct of an employee can only render the undertaking liable to a fine if the undertaking planned that conduct or made it possible by negligence.

21. The *Commission* disputes the existence of such a principle in Community law.

22. *Pioneer* states that it could not have been aware that its conduct — which consisted of the passing from one distributor to another of information and complaints relating to parallel imports and the organization of a meeting at which those imports were discussed — was illegal. The cases dealt with by the Court and by the Commission relating to export prohibition clauses imposed by producers on their distributors do not in fact define any conduct similar to that of Pioneer. Since the Commission left open the question of intention, in paragraph 90 of the decision, it may not rely upon it in the proceedings before the Court. Likewise, the Commission may not reproach Pioneer for such behaviour since in the statement of objections it accused only Shriro of having acted intentionally.

The *Commission* alleges that Pioneer organized, facilitated and helped to enforce an export prohibition and that it must have known that what it was doing would restrict competition and be unlawful, whether or not there was a precedent in the decisions of the Court whereby that conduct was adjudged illegal.

The confiscatory nature of the fine; breach of the principle of proportionality

23. *Melchers* claims that the fine which was imposed on it was of a confiscatory nature. The mere imposition of the fine has endangered Melchers' credit position.

Moreover, payment of the fine would endanger its very existence. In particular, Melchers argues that the fine is equivalent to several years of profit for the firm and its partners.

24. For the *Commission*, it is not the profits of the undertaking which determine the amount of the fine but the gravity and duration of the infringement and the size and financial strength of the undertaking. The net equity of Melchers, calculated on the basis of its book value, shows that it is financially strong enough to bear the fine.

25. According to *MDF*, the fine is almost equal to the amount of its share capital and represents practically all the working capital of the undertaking and thus threatens to place it in a situation where it would be unable to honour its commitments. That constitutes a breach of the general principle of proportionality, the amount of the fine being disproportionate to MDF's economic capacity.

The *Commission* replies that there is absolutely no justification for MDF's claim that it is unable to pay the fine imposed on it and in any event it is inconceivable that the payment of such a fine could cause MDF to go out of business completely.

Infringement of Article 15 (5) of Regulation No 17

26. *Melchers* considers that the fine infringes the aforesaid provision inasmuch as it punishes conduct conforming with contractual commitments entered into by the undertaking and notified to the Commission. Melchers could not in fact have supplied the goods ordered by Gruoner without infringing its contractual obligation to keep the German market properly supplied.

27. The *Commission* replies that those statements are inconsistent with the evidence about Melchers' normal delivery periods and disregard the fact that Melchers could have obtained further supplies of Pioneer equipment from Antwerp or from Tokyo.

Overlapping of offences

28. According to *MDF*, there is reason to believe that the Commission has added two fines together. Since this was a case of overlapping offences, such a method of calculation is not permissible.

29. According to *Pioneer*, the Commission is not entitled to impose a single fine for two offences.

30. The *Commission* considers that it acted in accordance with the decisions of the Court.

The responsibility which the Commission bears in the present case

31. *Melchers* points out that the Commission authorized France to prohibit

parallel imports of Japanese hi-fi equipment, which is contrary to Article 30 of the Treaty. Thus it ill behoves the Commission to impose fines such as those imposed in this case when it has itself acted illegally.

32. The *Commission* replies that the fact that public authorities have imposed certain restrictions cannot justify individuals' giving effect to concerted practices designed to restrain competition still further.

Breach of the principle that the accused is presumed innocent

33. *MDF* observes that according to the Commission the difference in prices in 1976 and 1977 made parallel imports profitable. Again according to the Commission, parallel imports gave rise to a gentlemen's agreement, which lasted throughout the period in which the prices were lower in the United Kingdom than in France. In the opinion of MDF, the necessary link thus recognized by the Commission between parallel imports and the gentlemen's agreement is established by no element of fact. On the contrary, the increase in parallel imports from the United Kingdom may be explained by a reduction in, or even a complete absence of, pressure exerted on the exporters, that is to say a discontinuance of the alleged concerted practice. Yet the Commission did not even consider that possibility, even though it was put forward by the parties. The whole of the Commission's reasoning is based on a conclusion which is unfavourable to the applicant and which ignores the principle that the accused is presumed innocent.

At the sitting of the Court on 30 November 1982 oral argument was presented by the following: R. Collin and L. De Gryse, Advocates, for Musique Diffusion Française SA; I. Van Bael and J. F. Bellis for C. Melchers & Co.; M. Waelbroeck, Advocate, for Pioneer Electronic (Europe) NV; J. E. Rayner-James for Pioneer High Fidelity (GB) Limited; and M.-J. Jonczy (in Case 100/80) and J. Temple-Lang (in Cases 101 to 103/80), acting as Agents, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 8 February 1983.

Decision

1 By applications registered at the Court on 21, 24 and 25 March 1980, the four undertakings Musique Diffusion Française SA, C. Melchers & Co., Pioneer Electronic (Europe) NV and Pioneer High Fidelity (GB) Limited brought actions, pursuant to the second paragraph of Article 173 of the EEC Treaty, for a declaration that Commission Decision No 80/256 of 14 December 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.595 — Pioneer Hi-fi Equipment), published in Official Journal 1980 L 60, is void.

2 The four applicants form part of the European distribution network for high-fidelity sound-reproduction equipment manufactured by the Pioneer Electronic Corporation of Tokyo. Most of the Pioneer products sold in Europe are imported by the subsidiary, Pioneer Electronic (Europe) NV (hereinafter referred to as "Pioneer"), whose registered office is in Antwerp. At the time when the events occurred on which the contested decision is based, three independent undertakings, namely Musique Diffusion Française SA, (hereinafter referred to as "MDF"), C. Melchers & Co. (hereinafter referred to as "Melchers") and Shriro UK Limited (hereinafter referred to as "Shriro"), enjoyed exclusive distribution rights in France, the Federal Republic of Germany and the United Kingdom respectively. In the meantime Shriro has become a subsidiary of Pioneer and has changed its name to Pioneer High Fidelity (GB) Limited (hereinafter referred to as "Pioneer GB").

3 In the contested decision the Commission found that the four applicant undertakings had taken part in concerted practices, contrary to Articles 85 (1) of the Treaty, consisting in the prevention of imports of Pioneer equipment from the Federal Republic of Germany and the United Kingdom into France for the purpose of maintaining a higher level of prices in France. The Commission also found that Article 85 (3) was inapplicable to those practices and it imposed a fine of 850 000 European units of account on MDF, 4 350 000 units of account on Pioneer, 1 450 000 units of account on Melchers and 300 000 units of account on Pioneer GB.

4 The decision stated that the concerted practice between MDF, Pioneer and Melchers preventing imports from the Federal Republic of Germany consisted in a refusal on the part of Melchers to fulfil an order placed on 20 January 1976 by a German wholesaler, Otto Gruoner KG (hereinafter referred to as "Gruoner"), for Pioneer equipment having a value of approximately DM 550 000, which was to be delivered by that wholesaler to a French purchasing group the general manager of which was B. Iffli of Metz. The concerted practice between MDF, Pioneer and Shriro preventing imports from the United Kingdom manifested itself, according to the decision, in particular in two letters of 28 and 29 January 1976 which the director of Shriro, Mr Todd, sent to the general manager of the Audiotronic

Group (hereinafter referred to as "Audiotronic") and to the chairman of Comet Radiovision Services Limited (hereinafter referred to as "Comet"), those two undertakings being the main customers of Shriro, inviting them to cease exporting Pioneer products.

5 The submissions which the applicants put forward against the decision may in essence be grouped together as follows:

A — Infringement of essential procedural requirements, inasmuch as:

(a) The Commission combines the functions of judge and prosecutor;

(b) The statement of objections did not mention all the objections set out in the decision or the criteria on the basis of which the Commission intended to calculate the fines;

(c) In spite of requests by the applicants to that effect, the Commission did not disclose in due time all the documents on which the decision is based;

(d) The opinion of the Advisory Committee was not communicated to the applicants.

B — Wrongful assessment and classification of the facts on the basis of which the Commission found that there had been infringements of Article 85 (1) as regards:

(a) Melchers' alleged refusal to sell;

(b) The effects of the letters sent by Mr Todd;

(c) The duration of the alleged concerted practices;

(d) Pioneer's participation in those practices;

(e) The hi-fi market shares held by the applicants in France and the United Kingdom and therefore the effect of the concerted practices on trade between Member States.

C — Failure to take into account circumstances precluding the imposition of fines:

(a) Legitimate self-protection and necessity, as regards MDF;

(b) The possibility of exempting the concerted practices under Article 85 (3);

(c) The fact that Melchers' conduct was in conformity with its contractual obligations notified to the Commission;

(d) The alleged principle according to which acts committed by employees who have not received instructions from the partners in the undertaking may not be attributed to the undertaking;

(e) The Commission's joint responsibility for partitioning the French market by authorizing the French Government to prohibit parallel imports.

D — Failure to take into account circumstances justifying the imposition of lower fines

(a) Erroneous assessment of the gravity of the infringements in fixing the general level of the fines and breach of the principle of equal treatment, inasmuch as the fines are much greater than those imposed on other undertakings for similar infringements committed during the same period;

(b) Absence of intention on the part of Pioneer;

(c) Erroneous basis of calculation on the grounds that the fines are proportionate to the total turnover of the undertakings, that in the case of Melchers the fine exceeds 10 % of the relevant turnover and that, in the cases of MDF and Pioneer, the turnover used relates to a different financial year from that used in the case of the other applicants;

(d) Erroneous appraisal of the duration of the concerted practices;

(e) As regards MDF and Pioneer, breach of the alleged principle that a single fine cannot be imposed by combining several fines for separate infringements;

(f) Confiscatory nature of the fine imposed on Melchers and breach of the principle of proportionality inasmuch as the fine imposed on MDF exceeds the economic capacities of the undertaking.

A — The submissions relating to an infringement of essential procedural requirements

(a) The combination of the functions of judge and prosecutor

MDF maintains that the contested decision is unlawful by the mere fact that it was adopted under a system in which the Commission combines the functions of prosecutor and judge, which is contrary to Article 6 (1) of the European Convention for the Protection of Human Rights.

7 That argument is without relevance. As the Court held in its judgments of 29 October 1980 in Cases 209 to 215 and 218/78 *(van Landewyck* v *Commission* [1980] ECR 3125), the Commission cannot be described as a "tribunal" within the meaning of Article 6 of the European Convention for the Protection of Human Rights.

8 It should however be added, as the Court held in the aforementioned judgment, that during the administrative procedure before the Commission, the Commission is bound to observe the procedural safeguards provided for by Community law.

9 Thus Article 19 (1) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62 p. 87) requires the Commission, before taking a decision, to give the parties concerned the opportunity of being heard on the matters to which the Commission has taken objection and the Commission, in its Regulation No 99/63 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 1963-64, p. 47), instituted a procedure of an adversary nature. Under that procedure the Commission must notify its objections to the undertakings concerned, which may then reply in writing within a stated period. Where appropriate, and particularly in cases where the Commission proposes to impose fines, the undertakings may be afforded an oral hearing. Under the terms of Article 4 of Regulation No 99/63 the Commission may, in its decisions, deal only with those objections raised against undertakings in respect of which they have been afforded the opportunity of making known their views.

10 As the Court recalled in its judgment of 13 February 1979 in Case 85/76 *(Hoffmann-La Roche* v *Commission* [1979] ECR 461), the abovementioned

provisions are an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even those of an administrative nature, and lays down in particular that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.

11 It follows that, although the general submission put forward by MDF must be rejected as being based on a misunderstanding of the nature of the procedure before the Commission, Community law contains all the means necessary for examining and, in an appropriate case, upholding the following submissions based on alleged breaches of the applicants' right to a fair hearing.

(b) The failure to disclose in the statement of objections certain matters mentioned in the decision

12 First, the applicants claim that the Commission, in Articles 1 and 2 of its decision, found that the two concerted practices had begun at the end of 1975, that the concerted practice between MDF, Pioneer and Melchers had ceased in February 1976 and the concerted practice between MDF and Shriro had continued until the end of 1977, whereas, in its statement of objections, the Commission was proposing to find that the two infringements had only subsisted during the period "late January/early February 1976".

13 The Commission maintains that it was on the basis of the information contained in the replies to the statement of objections and the replies given during the hearing that it concluded, in its decision, that the infringements were of longer duration than it had considered when drawing up the statement of objections.

14 It is clear from previous decisions of the Court that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. That may be done summarily and the decision is not necessarily required to be a replica of the

Commission's statement of objections. The Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains, provided however that it relies only on facts on which the parties concerned have had an opportunity to make known their views and provided that, in the course of the administrative procedure, it has made available to the undertakings concerned the information necessary for their defence.

15 Since, in accordance with the last subparagraph of Article 15 (2) of Regulation No 17, the duration of the infringement is one of the factors to be taken into consideration when fixing the fine, it is clear from those decisions of the Court that the Commission, particularly when it proposes to impose fines, must state, as an essential factor, the duration established by it on the basis of the information available to it at the time when it formulates the statement of objections. The Commission may extend the period thus stated if supplementary information obtained during the administrative procedure so justifies, provided that the undertakings have had an opportunity to make their views known in that respect.

16 In the present cases it is not disputed that the Commission did not indicate to the applicants its intention to establish the existence of infringements of a longer duration than was mentioned in the statement of objections and that the undertakings had no opportunity of making known their views as regards periods which were not mentioned therein.

17 In those circumstances, in assessing the duration of the infringements found by the contested decision, regard must be had only to the period "late January/early February 1976".

18 Secondly, the applicants claim that the contested decision mentions certain facts which were not mentioned in the statement of objections. In particular, Pioneer and Pioneer GB refer to the account given in the two documents of the meeting which was held at Pioneer's headquarters in Antwerp on 19 and 20 January. Only in the decision (paragraphs (52) and (62)) did the

Commission mention that there was no written trace of that meeting, from which it inferred that its purpose was, in part at least, to discuss parallel imports.

19 As regards the meeting in Antwerp, the statement of objections itself indicates that one of the essential points of that meeting was the discussion of parallel imports into France and it sets out all the information obtained by the Commission on that matter from the participants. Moreover, it appears from the transcript of the hearing before the Commission that the purpose of the meeting was the subject of thorough discussion on that occasion. It follows that the applicants had every possibility of making their views known and of adducing evidence in that regard. The same finding must be made as regards the other facts mentioned by the applicants and that part of the submission must therefore be rejected.

20 Finally, the applicants claim that the Commission infringed their right to a fair hearing by not stating, during the administrative procedure, if necessary in a supplementary statement of objections, the criteria on the basis of which it was proposing to calculate the fine, not to mention the amount or even the approximate size of it. That infringement is said to be all the more serious in the present case since the fines imposed were considerably higher than those imposed in the past and since they were calculated by applying a formula linked to the turnover of the undertakings in question. Moreover, Pioneer claims that it was not open to the Commission to impose on it a fine based on the assumption that the infringement was intentional when, in the statement of objections, it did not describe Pioneer's conduct in that way.

21 That part of the submission cannot be upheld either. In its statement of objections, the Commission expressly stated that it would consider whether it was appropriate to impose fines on the undertakings and it also indicated the main factual and legal criteria capable of attracting a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed "intentionally or negligently". In doing so the Commission fulfilled its obligations on this point inasmuch as it gave the undertakings the

necessary details to enable them to defend themselves not merely against the finding of an infringement but also against the imposition of fines. To give indications as regards the level of the fines envisaged, before the undertakings have been invited to submit their observations on the allegations against them, would be to anticipate the Commission's decision and would thus be inappropriate.

22 Nor was the Commission bound to mention, in the statement of objections, the possibility of a change in its policy as regards the general level of fines, a possibility which depended on general considerations of competition policy having no direct relationship with the particular circumstances of these cases.

23 Finally, as regards turnover, by requesting the undertakings to supply it with information concerning their turnover during the last financial year, the Commission gave the undertakings the opportunity of making their views known on that point and of adding any further information which they considered to be useful in that respect.

(c) The failure to disclose documents

24 First, Pioneer and Pioneer GB maintain that, despite their requests to that effect, the Commission did not transmit to them, in due time, the documents on which it based its findings as regards the effects of the letters sent by Mr Todd of Shriro to the directors of Comet and Audiotronic.

25 On that point the Commission asserts, in paragraph (50) of its decision, that it was established that, as a result of Shriro's intervention, Comet ceased to export Pioneer equipment for resale. According to the decision, Audiotronic replaced Comet in supplying one of its customers, Euro-Electro in Brussels; in March 1976 Audiotronic received large orders but was able to carry out only a part of them owing to difficulties caused by Shriro.

26 Since the period to be taken into consideration in assessing the duration of the infringements must, as has been stated above, be confined to late January and early February 1976 and since the Commission's findings relating to the effects on Audiotronic's exports relate specifically to a later period, the Court's examination of this part of the submission may be restricted to Comet's situation.

27 As far as the latter undertaking is concerned, the Commission relied essentially on a written statement by Mr Mason, a director of Comet, and on the reports of its inspectors on visits to Comet and Euro-Electro and on accounting documents relating to Comet.

28 Mr Mason's statement was communicated to the applicants by the Commission on 9 October 1978, but only in part. The Commission refused to divulge the pertinent points of the statement, invoking their confidential nature, which did not however prevent Mr Mason himself from sending to the applicants, at their request, a complete copy of the statement.

29 Although, as a result of their own diligence, the applicants thus gained knowledge of the whole of the statement made by Mr Mason just before the hearing, it is not disputed that they were not acquainted or were only partially acquainted with the other documents mentioned above before the Commission adopted its decision. Therefore they did not have the opportunity, in due time, of making known their views on the contents and the scope of those documents or of obtaining and putting forward, where appropriate, evidence to the contrary. It follows that the Commission was wrong to base its decision on the contents of those documents.

30 Since the findings which the Commission based on those documents, which did not come to the applicants' notice, relate to matters which are of purely secondary importance in relation to the infringements found to have been committed in Articles 1 and 2 of the decision, that breach of the right to a fair hearing cannot affect the validity of the whole of the decision. Instead, it is appropriate for the Court to disregard the contents of those documents when considering the substantive validity of the decision.

31 Secondly, MDF, Pioneer and Pioneer GB maintain that they did not have notice of the report by Mackintosh Consultants Company Limited, London, on which the Commission relied in paragraph (25) of the decision for the purpose of determining the hi-fi markets in France, the United Kingdom and the Federal Republic of Germany. They emphasize in particular that knowledge of the definition of hi-fi equipment on which that report based its estimates was indispensable for the applicants' defence as regards their market shares as stated by the Commission in its decision.

32 In the statement of objections the Commission stated that the market share of Pioneer products for 1976 was at least 7 to 10% in France and 8 to 9% in the United Kingdom. MDF and Pioneer GB disputed those figures in their replies to the statement of objections. The Commission then instructed Mackintosh Consultants Company Limited to draw up a report on the volume of the hi-fi markets in the Member States in question. On the basis of that report and the turnover of the two applicants in Pioneer products, the Commission evaluated the share of the French hi-fi market held by Pioneer products in 1976 at 11.5% and the share of the United Kingdom market at 10.5%.

33 However, in paragraph (25) of its decision, the Commission adhered to the figures which it had given in the statement of objections. It did not therefore base its decision on the volume of those markets as estimated in the report. That report was requested solely in order to verify the Commission's initial estimates, on which the applicants had cast doubts during the administrative procedure. That part of the submission cannot therefore be accepted.

(d) The non-disclosure of the opinion of the Advisory Committee

34 MDF and Pioneer argue that Article 10 (6) of Regulation No 17, which states that the opinion of the Advisory Committee shall not be made public, should be construed in such a way as to allow the opinion to be disclosed confidentially to "the undertakings directly concerned". It is argued that if such a construction is not accepted the aforesaid provision is invalid because it offends against the principle of the right to a fair hearing.

35 Article 10 (6) of Regulation No 17 cannot be construed in the way suggested by the applicants. It is clear from that article that the consultation of the Advisory Committee represents the final stage of the procedure before the adoption of the decision and the opinion is given on the basis of a draft of the decision. To give the undertakings the opportunity of making their views known on that opinion and, therefore, on the draft decision would amount to reopening the previous stage of the procedure, which would be contrary to the system intended by the regulation.

36 The failure to disclose the opinion is not contrary to the principle of the right to a fair hearing. As was reiterated above, that principle means that the Commission must, during the administrative procedure, divulge to the undertakings in question all the facts, circumstances or documents on which it relies, so as to enable them usefully to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its allegations. Whatever may be the committee's opinion, the Commission may base its decision only on facts on which the undertakings have had the opportunity of making known their views. Consequently, this submission must be rejected.

B — The assessment and classification of the facts on the basis of which the Commission found that there had been infringements of Article 85 (1)

(a) Melchers' alleged refusal to sell

37 It is clear from the evidence before the Court that in November 1975 shops belonging to the purchasing group of which Mr Iffli was the general manager were in a position to offer for sale Pioneer equipment from Belgium at prices 26 to 31% lower than the retail prices prevailing in France. In order to find an alternative source for Pioneer products *inter alia,* Mr Iffli applied to Gruoner through the intermediary of Mr Weber, the manager of the undertaking Willi Jung, Saarbrücken, which at that time had become a branch of Gruoner.

38 Following a discussion with Mr Iffli on 12 December 1975 at Gruoner's head office in Rommelshausen, the chief buyer for that company, Mr Schreiber, sent a telex message to Melchers, amongst others, on 15 December 1975 requesting it to send price lists. Melchers referred him to its local representative, who visited Gruoner. On the basis of the information thus obtained, including the latest price list for 1975, Mr Schreiber, on 31 December 1975 sent an offer to Mr Iffli for equipment, including Pioneer equipment, at prices up to 30% below those quoted by MDF at that time.

39 On 12 and 14 January 1976, Mr Iffli placed two orders with Mr Weber for a total value of approximately DM 1 000 000. Mr Weber immediately forwarded those orders to Gruoner but it was not until 20 January 1976, that is to say the day on which Mr Weber assured Mr Iffli that part of the goods were already on their way to Rommelshausen, that Mr Schreiber ordered by telex from Melchers goods corresponding to the orders placed by Mr Iffli but having a value of only DM 550 000. According to Mr Schreiber's explanations he had in the meantime had fresh discussions with the local representative of Melchers and had obtained a new price list applicable as from February 1976.

40 On 21 and 22 January 1976 Mr Iffli obtained the necessary import licences from the French authorities. On the same dates, Melchers, for its part, checked its stocks in relation to Gruoner's order and obtained an undertaking from an insurance company that it was prepared to cover Gruoner's order for DM 200 000. On 23 January 1976, in reply to a further telex message from Mr Schreiber, Melchers confirmed the order and gave the name of the carrier who was to deliver the goods. According to Melchers' explanations, that telex message was sent in error.

41 On 28 January 1976 Mr Schreiber sent a telex message in German to Mr Weber informing him that the following had transpired from a telephone conversation with Melchers' sales manager:

"Pioneer's European head office in Antwerp already knows that a licence has been issued to import Pioneer equipment. The German representative was

instructed not to supply Jung under any circumstances. We can be supplied only if we undertake not to export."

42 Mr Iffli, having been informed by Mr Weber, complained to Mr Weber and to Gruoner. By a telex message dated 6 February 1976, Mr Weber informed Gruoner that he could prove that Pioneer equipment sold by Melchers had previously been imported into France, partly through the intermediary of a wholesaler in Brussels and partly by the undertaking EVB of Stuttgart. The original telex message bears handwritten notes by Mr Schreiber which state, regarding the delivery via Brussels: "Did not itself deliver, is known at Bremen. But not via Germany, Melchers denies it absolutely". As regards the delivery by EVB, the notes state: "Right, it was in November 1975, enormous trouble so careful now".

43 On 11 February 1976 a meeting took place at Rommelshausen between Gruoner and the directors of Melchers' hi-fi division. Before the Court, the participants in that meeting denied that the subject of exports to France was broached on that occasion.

44 In a telex message dated 18 February 1976, Mr Schreiber, referring to "the meeting with the management of Melchers", gave Mr Weber information identical to that contained in his handwritten notes on the telex message of 6 February. The telex message of 18 February continues as follows:

"3. We are very interested in including Pioneer equipment in our sales programme. We cannot make deliveries in sufficient quantities unless Melchers has an assurance that we supply the equipment delivered to the German retail trade.

4. There can be no talk of commercial pressure and that factor cannot unfortunately be changed overnight. Ultimately, it is decisive for European sales to maintain the level of prices."

45 In a memorandum dated 19 February 1976 regarding the meeting in Rommelshausen on 11 February, Mr Schreiber stated, *inter alia,* that

"Following talks with C. Melchers and Co. . . . any obstacles to cooperation between us have now been removed."

46 On 20 February 1976 Mr Schreiber sent a telex message to Mr Iffli informing him that the prices which had been quoted to him on 31 December 1975 for Pioneer equipment and other products were no longer valid "on account of price developments". Thus, Mr Iffli's order was definitively abandoned.

47 In the contested decision the Commission draws the conclusion that the refusal to carry out Mr Iffli's order was due to the fact that Melchers had required an assurance from Gruoner that the goods would not be exported. Apart from the facts set out above, it relies on a written statement of 18 May 1977 in which Mr Schreiber confirmed the events which he had described in his telex messages to Mr Weber and stated that, at the meeting in Rommelshausen, the management of Melchers had repeated that Melchers could deliver only to the specialist trade in Germany.

48 For its part, Melchers states that its failure to perform the order placed by Gruoner was due solely to the fact that, on the one hand, Melchers' stock levels did not enable the goods ordered to be delivered and that, on the other hand, the order was premature because the discussions between Mr Schreiber and the local representative were merely an "initial contact" which was not sufficient for Melchers, which was accustomed to selling almost exclusively to retailers, to establish business relations with Gruoner. It is those facts, rather than any refusal to deliver goods intended for export, which Melchers' staff communicated to Mr Schreiber before the latter sent his telex message of 28 January 1976 to Mr Weber.

49 Again according to Melchers, the reason why the goods were not delivered after business relations between the two undertakings were finally established at the meeting in Rommelshausen on 11 February 1976 was that Gruoner had lost all interest in performing the contract entered into with Mr Iffli. Mr Schreiber had in fact discovered that he had made a mistake in calculating the prices which he had quoted to Mr Iffli on 31 December 1975. Apart from

the various standard discounts mentioned by the local representative, he had deducted 11% in respect of German value-added tax whereas the basic prices did not include value-added tax.

50 In that regard, Melchers relies on a mathematical formula written by hand by Mr Schreiber on a price list for products other than Pioneer equipment which Melchers' lawyers found during a visit to Gruoner's premises and also on a written statement of 5 September 1980 in which Mr Schreiber admitted having invented the story of Melchers' refusal to sell so as to conceal the mistake which he had made in his calculations. That statement was confirmed in essence by Mr Schreiber at the hearing of witnesses before the Court.

51 In view of the opposing arguments of the parties and the contradictory statements of Mr Schreiber, it must be seen whether the other evidence is capable of confirming one or other of those arguments.

52 As regards the Commission's argument, it should be borne in mind that the telex message sent by Mr Schreiber to Mr Weber on 28 January 1976 stated that "Pioneer's European head office in Antwerp already knows that a licence has been issued to import Pioneer equipment." In fact it is not disputed that MDF informed Pioneer of the licences issued to Mr Iffli on 21 and 22 January 1976 and that Pioneer forwarded that information to Melchers. In those circumstances, the explanation given by Mr Schreiber in his statement of 5 September 1980 to the effect that it was Mr Iffli who informed him of the grant of the licences is unconvincing.

53 In that connection, regard must also be had to the specific information on earlier exports to France which Mr Schreiber noted on the telex message from Mr Weber of 6 February 1976 and which he communicated to Mr Weber by telex on 18 February. The accuracy of that information has not been disputed and it could only have come from Melchers' employees.

54 It is therefore evident that the subject of exports to France was broached during the discussions between Mr Schreiber and the employees of Melchers and the information supplied by those employees is of such a nature as to indicate the existence of a refusal to sell goods destined for that country.

55 As regards the applicant's argument, the description of the discussions between Mr Schreiber and the local representative as merely being an initial contact does not accord with the notes taken by Mr Schreiber during those two discussions. Those handwritten notes, the contents of which were explained by Mr Schreiber before the Court, describe in detail the conditions of sale and delivery, including the various rebates and bonuses offered to retailers of different sizes and even to the single wholesaler previously supplied by Melchers. It is possible that Gruoner, as a large wholesaler, might have hoped to obtain more by prolonged negotiations but it is impossible to understand why Melchers was not prepared to supply the goods ordered on terms which according to it were the normal terms at that time. Save for the period of payment, it is moreover difficult to detect any difference between the terms stated in the handwritten notes regarding the last discussion with the local representative and those stated in the memorandum of 19 February 1976 regarding the meeting in Rommelshausen.

56 On the other hand, the delivery difficulties pleaded by Melchers are confirmed by the notes which Melchers' warehouseman wrote on the order transmitted by telex on 20 January 1976. Those notes show that certain models ordered were not in stock, that the stocks of other models were not sufficient and that, in any event, it was a very large order in relation to stock levels at that time, just after the Christmas sales. However, since it is not disputed that Melchers could have delivered a large part of the goods ordered at once without really jeopardizing its stocks and since Melchers had sent a telex message to Gruoner which Gruoner could justifiably regard as constituting an unqualified acceptance, the Court cannot understand why Melchers made no offer to make partial deliveries and did not contact Pioneer concerning the possibility of obtaining the rest of the goods ordered. The level of stocks cannot therefore be accepted as an adequate explanation of the failure to perform the order.

57 As far as the alleged error relating to value-added tax is concerned, it is true that, in respect of most of the models, the discounts indicated by a fixed percentage in Mr Schreiber's handwritten notes do not by themselves explain the low prices offered by Mr Schreiber to Mr Iffli on 31 December 1975, whereas an application of the formula indicated by Melchers makes it possible, provided certain of those percentages are inserted, to arrive at the exact prices offered. As the Commission has emphasized, the price lists which formed the basis of Mr Schreiber's calculations clearly stated that the prices were quoted exclusive of value-added tax; the method indicated by the formula is not the one to be used to deduct value-added tax at the rate of 11% and the alleged error was not in any event made in respect of the prices for loudspeakers. Moreover, when the witnesses were heard before the Court, Mr Schreiber was unable to explain how he could have made such an error and was unable to demonstrate his calculations in that respect. So, even if the precise level of most of the prices offered to Mr Iffli thus remains unexplained, the explanation proposed by Melchers cannot be accepted.

58 Finally, it is impossible to disregard the chronological sequence of events or the fact that they are contemporaneous with those relating to parallel imports from the United Kingdom. Gruoner's order was in fact treated in a perfectly normal manner by Melchers until the time when it may reasonably be supposed that Melchers received knowledge of the grant of the licences to Iffli. That moment was in the week following Melchers' participation in the meeting of 19 and 20 January 1976 at Pioneer's headquarters in Antwerp. At that meeting MDF complained of parallel imports into France and, following the meeting, Shriro's managing director requested his main customers, by letters of 28 and 29 January 1976, to cease exporting.

59 Moreover, the telex message which Mr Schreiber sent to Mr Weber on 18 February 1976 seems to be closely connected, by its contents as much as by its date, with the Rommelshausen meeting of 11 February and with Mr Schreiber's memorandum of 19 February regarding that meeting. The same may be said of the telex message of 20 February in which Mr Schreiber

definitively withdrew his offer to Mr Iffli. Finally, the keen interest in the establishment of business relations with Melchers, which is demonstrated by the telex message of 18 February, accords with the subsequent development of those relations and suffices to explain Gruoner's lack of insistence as regards the goods intended for Mr Iffli. Although that chronological sequence is not in itself decisive, it none the less supports the Commission's argument.

60 The foregoing considerations suffice for a finding that the Commission has satisfactorily shown that Melchers refused to perform Gruoner's order on account of the destination of the goods, without its being necessary to come to a decision on the question of the credence to be given to the successive statements by Mr Schreiber or the question of Mr Schreiber's conduct in transactions involving hi-fi equipment of other makes, which, according to the applicants, was similar to his conduct in the present case.

(b) The effects of the letters sent by Mr Todd

61 Pioneer and Pioneer GB dispute the findings in the contested decision relating to the effects of the two letters which Shriro's managing director, Mr Todd, sent on 28 and 29 January 1976 to the general manager of Audiotronic and to the chairman of Comet. They maintain that those letters produced wholly insignificant effects.

62 In that respect it should first be emphasized that it is not disputed that those letters followed increasingly insistent appeals from Mr Setton, the owner of MDF, who had even made some test purchases with Audiotronic and Comet, the results of which he produced at the Antwerp meeting on 19 and 20 January 1976. The letters contain unequivocal requests to cease exporting Pioneer equipment. They were sent to the two main customers, which together accounted for some 45% of sales of Pioneer equipment supplied by Shriro. In those circumstances, the two letters constitute, by themselves, proof of a concerted practice between MDF and Shriro which had as its object the restriction of competition within the common market. Subject to

the shares held by MDF and Shriro in the markets concerned, a question which is dealt with below in section (e), that practice was also capable of affecting trade between Member States. The submission put forward by the two applicants does not therefore relate to the existence of an infringement of Article 85 (1) of the Treaty but merely to the effect of that infringement and, consequently, to its gravity.

63 As regards Audiotronic, the Commission admits that the letter sent to that undertaking had no immediate effects. On the contrary, according to paragraph (50) of the contested decision, Audiotronic even replaced Comet in supplying Euro-Electro in Brussels as soon as Comet ceased exporting Pioneer equipment. According to the Commission, it was only as from March 1976 that the concerted practice had any effect as regards Audiotronic. Since the submissions relating to procedural defects result in the period to be taken into consideration being restricted to late January and early February 1976, those statements are immaterial.

64 As regards Comet, the Commission, in essence, states in paragraphs (41), (50), (82) and (98) of its decision, that that undertaking exported large quantities of Pioneer equipment before receiving Mr Todd's letter but that those exports ceased following the letter, whereas exports of other makes continued.

65 Those findings by the Commission are based on a written statement made on 3 June 1977 by a director of Comet, Mr Mason, on the reports of its inspectors relating to visits to Comet and Euro-Electro and on documents relating to Comet's accounts. Of those documents, only Mr Mason's statement was known to the applicants before the adoption of the contested decision. As stated above in part A (c), the information contained in the other documents must therefore be disregarded.

66 At point 3 of his statement, Mr Mason declares that, in about 1974, Comet commenced an export business, mainly in hi-fi equipment, to other EEC countries. However, until December 1975, those exports included only small

amounts of Pioneer equipment. On the other hand, in the period from 19 December 1975 to 16 January 1976, the date of the last consignment, Comet sold to Euro-Electro in Brussels Pioneer equipment worth in total more than UKL 33 000. In respect of the period prior to receipt of Mr Todd's letter, the statement thus supports the findings of the Commission.

67 At point 5 Mr Mason states:

"On 30 January 1976 a letter was received by the company addressed to the Chairman from the Managing Director of Shriro (UK) Ltd. The company was anxious to preserve its good relations with Shriro and to be able to continue obtaining satisfactory supplies. A placatory letter was therefore sent to Shriro. Following this correspondence the matter has been discussed with Shriro, but nothing additional to what is set out in the letter of 30 January 1976 has been said. . . . Since January 1976 we have received various requests for Pioneer equipment from abroad, but because of the combined effects of credit limits on our customers and available margins, we have so far only been able to meet these requests to a very limited extent, though the company has now made it clear to Shriro (UK) Ltd it must be free to trade in accordance with EEC laws."

68 The applicants maintain that, although that statement in fact confirms that no large quantities of Pioneer equipment were exported after receipt of Mr Todd's letter, it indicates on the other hand that that was due not to the letter but to circumstances of a commercial nature.

69 In that regard it must however be remembered that at the period in question Comet, far from stating that it must be able to trade freely, stated in reply to Mr Todd's letter that it "will not deliberately export Pioneer products to trade customers outside the United Kingdom". It follows that the last sentence of Mr Mason's statement relates to a period which, in any event, is later than the period "late January/early February 1976".

70 On that point it must therefore be concluded that the Commission was entitled to find that Comet had exported large quantities of Pioneer equipment before receiving Mr Todd's letter but that those exports ceased following that letter.

(c) The duration of the concerted practices

71 Regard being had to the considerations set forth above as regards the period to be taken into consideration for determining the duration of the infringements, it is no longer necessary to examine this submission, which does not relate to that period.

(d) Pioneer's participation in the concerted practices

72 In the contested decision the Commission found that Pioneer had participated both in the concerted practice between Melchers and MDF and in the concerted practice between MDF and Shriro. It based that finding, in particular, on Pioneer's general position with regard to national distributors, on the course and results of the meeting in Antwerp on 19 and 20 January 1976 and on the transmission by Pioneer to Melchers of complaints and information from MDF relating to parallel imports.

73 Pioneer disputes that its conduct may be described in such a way. It maintains that it was in no position to have any control over the conduct of Shriro or Melchers. The purpose of the Antwerp meeting was not to discuss parallel imports. On that occasion, as on many others, Pioneer's representatives merely listened to the complaints made by Mr Setton of MDF and advised him to lower his prices. The forwarding of information on parallel imports merely forms part of the normal exchange of information between supplier and distributor concerning the market situation.

74 In this regard, it should be remembered that the purpose of Pioneer, which is a wholly-owned subsidiary of the parent company in Japan, is to import

Pioneer equipment into Europe and to organize sales of such equipment. To that end, it attempts to find a distributor in each of the Member States in question, offers it an exclusive distributorship agreement, divides the products imported amongst the national distributors and seeks to coordinate their sales efforts, *inter alia* by holding regular meetings.

75 Even if those activities do not necessarily confer on Pioneer a decisive influence on the conduct of each of the distributors, that does not alter the fact that, on account of its central position, it was obliged to display particular vigilance in order to prevent concerted efforts of that kind from giving rise to practices contrary to the competition rules.

76 As far as Melchers' conduct is concerned, it is not disputed that Pioneer forwarded to that distributor not merely Mr Setton's complaints but also information concerning the import licences obtained by Mr Iffli from the French authorities. In those circumstances such a communication appears to have been an implied incitement to Melchers to try to discover the source of those imports and to put a stop to them.

77 As regards the Antwerp meeting there is no written record of it except the letters sent by Mr Todd of Shriro to its two main customers and those taking part in the meeting were unable to give a consistent explanation of its purpose.

78 In his letters of 28 and 29 January 1976, Mr Todd explained to his two customers that he was called to Antwerp to discuss complaints by the French distributor against parallel imports; he explained how he was confronted with the results of the test purchases made by MDF with the two customers and he regretted that they "have caused my principals to look on me with a certain amount of disfavour". Even if such language may, as Mr Todd maintained during the administrative procedure, have been exaggerated to a

certain extent in order to impress his customers, it accords with other factors which tend to prove that parallel imports constituted an important subject of discussion at the meeting.

79 Thus it is not disputed that Mr Setton did indeed bring to the meeting the results of three test purchases which undertakings managed by him had made from British customers of Shriro and that he insisted on the need to put a stop to parallel imports to France. Moreover, it is not disputed that Mr Todd's letters to his customers were a direct consequence of that meeting and not of later contacts with Mr Setton. In those circumstances, Pioneer, which had called the meeting and presided over it, must accept responsibility for that consequence, regard being had to the position which it occupies in relation to its national distributors, as described above.

80 It must therefore be concluded that the Commission was justified in finding that Pioneer had participated in two concerted practices.

(e) The market shares held by the applicants and the effect on trade between Member States

81 In paragraph (3) of its decision, the Commission estimates the total value of hi-fi products sold by Pioneer to its distributors in the three Member States concerned during the financial year 1975/76 at BFR 735 000 000. Furthermore, it states in paragraph (25) that in 1976 MDF's turnover in Pioneer products was FF 77 000 000, Shriro's was UKL 7 300 000 and Melchers' was DM 19 000 000. On the basis of an estimate of the hi-fi markets in the three Member States it arrives at the conclusion that the share of the market held by Pioneer products in 1976 was at least 7 to 10% in France, 8 to 9% in the United Kingdom and approximately 2% in the Federal Republic of Germany. It finds in paragraphs (75) and (82) that those market shares were sufficiently large for the behaviour of the undertakings to be, in principle, capable of appreciably affecting trade between Member States.

82 MDF and Pioneer GB dispute those calculations. On the one hand, the Commission included, in the turnover figures stated, products other than Pioneer hi-fi equipment; on the other hand, it defined the hi-fi market too narrowly. The two applicants consider that their market shares in 1976 were 3.38% in France and 3.18% in the United Kingdom. They maintain that such market shares are not sufficient for their conduct to be regarded as capable of affecting trade between Member States within the meaning of Article 85 (1) of the Treaty.

83 It cannot be denied that there is no generally recognized definition of the term "hi-fi products" and the different market studies on which the parties rely vary considerably in this respect. It seems that none of those studies corresponds exactly to the types of products envisaged by the parties when they stated the turnover of the two undertakings. However, an examination of those questions of fact, which are highly technical and difficult, may be superfluous if the market shares indicated by the applicants are themselves sufficient for the purposes of Article 85 (1).

84 In that connection it should be remembered that, as the Court has held in several judgments, including that of 9 July 1969 in Case 5/69 *(Völk* v *Vervaecke* [1969] ECR 295), if an agreement is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States. The same criterion must be applied as regards the concerted practices in issue in this case.

85 In the same judgment the Court acknowledged that an exclusive dealing agreement, even with absolute territorial protection, may escape the prohibition laid down in Article 85 where it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question.

86 That is not the position of the applicants in the present case. The studies produced by MDF and Pioneer GB show that the market in hi-fi products in

France and the United Kingdom is very large but that it is markedly divided between a very great number of brands, so that the percentages stated by the applicants exceed those of most of their competitors. If regard is had solely to imported brands, it even seems that the two applicants were amongst the largest suppliers of the two markets. In those circumstances, regard being had to their absolute turnover figures, it cannot be denied that conduct by those undertakings seeking to restrain parallel imports and therefore to partition national markets was capable of exercising an influence on the pattern of trade between Member States in a way capable of hindering the attainment of the objectives of a single market.

87 It must therefore be concluded that the Commission was justified in finding that the applicants' conduct was capable of appreciably affecting trade between Member States.

C — Submissions based on a failure to take into account circumstances precluding the imposition of fines

(a) Legitimate self-protection and necessity

88 MDF maintains that, if it did commit an infringement, it was justified in so doing by necessity. The situation in which it found itself justified it in resorting to legitimate self-protection against the unfair competition which it was suffering from parallel importers.

89 As regards the submission based on legitimate self-protection, it must be pointed out that, as the Court held in its judgments of 25 November 1971 in Case 22/71 *(Béguelin* [1971] ECR 949) and of 22 January 1981 in Case 58/80 *(Dansk Supermarked* [1981] ECR 181), the mere fact of the importation of goods which have been lawfully marketed in another Member State cannot be considered an unfair commercial practice. Parallel imports from other Member States cannot therefore, by themselves, give rise to a situation of legitimate self-protection.

90 It is not necessary to examine the possible consequences of a state of necessity, it being sufficient to state that the applicant has not demonstrated

the existence of such a situation. MDF has not proved that its existence was threatened or that its alleged financial difficulties were due to parallel imports or, *a fortiori*, that an infringement of Article 85 (1) was the only means of ensuring its survial.

91 It follows that those submissions must be rejected.

(b) Article 85 (3) of the Treaty

92 MDF claims that the substantive conditions for an exemption under Article 85 (3) were satisfied and that therefore it could have obtained an exemption by means of notification. The infringement therefore consisted not in a breach of one of the principal objects of the Treaty but merely in a breach of a procedural rule, namely the failure to satisfy the requirements of notification and obtaining a formal exemption.

93 That submission cannot be upheld. Notification is not a formality imposed on undertakings but an indispensable condition for obtaining certain benefits. Under the terms of Article 15 (5) (a) of Regulation No 17 no fine may be imposed in respect of acts taking place after notification, provided they fall within the limits of the activity described in the notification. That advantage enjoyed by an undertaking which notifies an agreement or a concerted practice is the counterpart of the risk incurred by the undertaking in itself reporting the agreement or concerted practice. That undertaking in fact takes the risk not only of having the agreement or practice found to be in breach of Article 85 (1) and of having the application of subparagraph (3) refused but also of being punished by a fine for acts prior to notification. *A fortiori*, an undertaking which did not wish to run that risk cannot claim, on being fined for an infringement in respect of an agreement which was not notified, that there was a hypothetical possibility that notification might have led to an exemption.

(c) Conformity of Melchers' conduct with its contractual obligations notified to the Commission

94 Melchers considers that the fine imposed on it is in breach of Article 15 (5) of Regulation No 17 inasmuch as it punishes conduct which is in conformity with its distribution agreement with Pioneer, which was notified to the Commission. Melchers could not have supplied the goods ordered by Gruoner without being in breach of the obligation contained in that agreement to ensure that the German market remained properly supplied.

95 In rejecting that submission it is sufficient to refer to the appraisal made by the Court, in part B (a) above, of Melchers' stock levels at the material time and of the absence of any attempt on its part to obtain the necessary goods.

(d) The absence of instructions from the partners

96 In Melchers' view, an undertaking may not be fined unless it is established that the infringement is attributable to the undertaking itself, that is to say, in the present case, to the general partners in Melchers. It is argued that the Commission has not shown that the partners intended to commit the alleged infringement or that they acted negligently.

97 It must be emphasized, in that respect, that Article 15 (1) and (2) of Regulation No 17 empowers the Commission to impose on undertakings or associations of undertakings fines where, intentionally or negligently, they have been guilty of infringements. For that provision to apply it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices.

98 The applicant has not shown that the managers of the hi-fi division of Melchers exceeded the powers which the partners conferred on them by employing them in those posts. As far as the local representative is concerned, the applicant even maintained that he always acted in his

relations with Gruoner in accordance with the direct instructions of those managers. This submission must therefore be rejected.

(e) The Commission's joint responsibility in these cases

99 Melchers maintains that the Commission authorized the French Republic, under Article 115 of the Treaty, to exclude from Community treatment certain hi-fi products originating in Japan and placed in free circulation in other Member States. That is said to constitute a factor justifying the cancellation of the fine or, at least, a substantial reduction in the amount thereof.

100 In this connection the Commission rightly points out that restrictions imposed by public authorities cannot justify the implementation, by private persons, of concerted practices intended to restrict competition. The submission must therefore be rejected.

D — Submissions relating to the size of the fines

(a) The general level of the fines

101 The applicants maintain that, in fixing the amounts of the fines, the Commission failed to observe the last subparagraph of Article 15 (2) of Regulation No 17, which provides that regard shall be had both to the gravity and to the duration of the infringement. According to the applicants, the Commission did not base itself on the gravity of their conduct nor on its duration. They say that it took advantage of these cases in order to introduce a new policy intended to increase the general level of fines for certain infringements of Community law although such a change in policy was justified neither by the nature of the infringements in question nor by the particular circumstances of the case. The imposition of such large fines in the present cases is solely due to the fact that the cases came before the Commission at a time when it was changing its policy, which is not only contrary to the provisions of the regulations but in fact leads to arbitrariness.

102 Moreover, the method thus described is manifestly discriminatory. The facts of the present cases arose at the same time as those of other cases in which the Commission adopted a decision before the decision in the present case, imposing significantly lower fines.

103 The Commission admits that the present cases are the first in which it has imposed a level of fines considerably higher than in the past. Before the adoption of the contested decision it had not imposed fines exceeding 2% of the total turnover of the undertaking, even for serious infringements. In these cases the fines range from 2 to 4% of turnover.

104 According to the Commission, however, such a level is fully justified by the nature of the infringements. After 20 years of Community competition policy an appreciable increase in the level of fines is necessary, in its view, at least for types of infringement which have long been well defined and are known to those concerned, such as prohibitions on exports and imports. In fact those constitute the most serious infringements since they deprive consumers of all the benefits resulting from the elimination of customs duties and quantitative restrictions; they hinder the integration of the economies of the Member States and leave distributors and retailers in a position of subordination towards producers. Heavier fines are particularly necessary where, as in the present case, the principal aim of the infringement is to maintain a higher level of prices for consumers. The Commission states that many undertakings carry on conduct which they know to be contrary to Community law because the profit which they derive from their unlawful conduct exceeds the fines imposed hitherto. Conduct of that kind can only be deterred by fines which are heavier than in the past.

105 In that connection it must be remembered that the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Articles 85 (1) or 86 of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it

also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.

106 It follows that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community.

107 From that point of view, the Commission was right to classify as very serious infringements prohibitions on exports and imports seeking artificially to maintain price differences between the markets of the various Member States. Such prohibitions jeopardize the freedom of intra-Community trade, which is a fundamental principle of the Treaty, and they prevent the attainment of one of its objectives, namely the creation of a single market.

108 It was also open to the Commission to have regard to the fact that practices of this nature, although they were established as being unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them and, consequently, it was open to the Commission to consider that it was appropriate to raise the level of fines so as to reinforce their deterrent effect.

109 For the same reasons, the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.

110 The submission must therefore be rejected.

(b) The alleged absence of intention on the part of Pioneer

111 Pioneer argues that it did not act intentionally since it could not know that its conduct was unlawful.

112 On the basis of the assessment, carried out above in part B (d), of the evidence adduced as regards Pioneer's conduct, the Court finds that Pioneer must have been fully aware that its conduct was of such a nature as to encourage restrictions on competition. That is sufficient for a finding that that undertaking acted intentionally. This submission must therefore be rejected.

(c) The use of turnover as the basis for calculating the fines

113 Melchers claims that it is unlawful to fix the fines in proportion to the undertaking's turnover, as the Commission has done in the present cases. It argues that turnover in fact gives no indication of the profitability of the undertaking or of its ability to pay a fine.

114 In any event, Melchers, MDF and Pioneer claim that the fine cannot be calculated, as the Commission has done in the present case, on the basis of the total turnover of the undertaking, since the goods in respect of which the infringement was committed represent only a part of that turnover.

115 Pioneer argues that the fine imposed on it must be reduced because the turnover on which the Commission based its calculations also related to sales of hi-fi equipment to countries not affected by the infringement.

116 According to Melchers, the Commission ought to have taken into consideration the fact that only about 10% of its turnover related to hi-fi products, whilst in the case of the other applicants those products accounted for the whole of their turnover. Melchers adds that, in fixing the ceiling for fines at 10% of the turnover, Article 15 (2) of Regulation No 17 refers to

the turnover in the sector in which the infringement was committed. Because the Commission did not observe this method of calculation, the fine imposed on Melchers amounts to 18% of its turnover on the hi-fi market, thus exceeding the limit fixed by the aforementioned provision.

117 The Commission replies that only the total turnover of an undertaking can give an indication of the maximum fine which the undertaking is capable of paying. For that reason, the limit laid down in Article 15 (2) of Regulation No 17 must, in its view, be understood as referring to the total turnover. Likewise in all the other cases in which, in the Commission's view, regard must be had to turnover in order to fix the amount of a fine, it is the total turnover which is relevant and not the turnover resulting from the transactions concerned by the infringement. It stresses however that, owing to the large number of unquantifiable criteria to be taken into consideration in fixing a fine, no mathematical formula of general application is possible.

118 Under the terms of Article 15 (2) of Regulation No 17, the Commission may impose fines of from 1 000 to 1 000 000 units of account or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. Article 15 (2) provides that in fixing the amount of the fine within those limits the gravity and the duration of the infringement are to be taken into consideration.

119 Thus the only express reference to the turnover of the undertaking concerns the upper limit of a fine exceeding 1 000 000 units of account. In such a case the limit seeks to prevent fines from being disproportionate in relation to the size of the undertaking and, since only the total turnover can effectively give an approximate indication of that size, the aforementioned percentage must, as the Commission has argued, be understood as referring to the total turnover. It follows that the Commission did not exceed the limit laid down in Article 15 of the regulation.

120 In assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the

type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market.

121 It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure. It is appropriate for the Court to bear in mind those considerations in its assessment, by virtue of its powers of unlimited jurisdiction, of the gravity of the infringements in question.

122 To the extent to which reliance is to be placed on the turnover of undertakings involved in the same infringement for the purpose of determining the proportions between the fines to be imposed, the period to be taken into consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible. The submissions put forward in this respect by MDF and Pioneer are not of such a nature as to influence appreciably the assessment made by the Court. Therefore it is not necessary to examine those submissions in detail.

(d) The duration of the concerted practices

123 According to MDF and Pioneer, the concerted practices could only have commenced on 19 and 20 January 1976 at the time of the Antwerp meeting. Pioneer and Melchers observe that the concerted practice between MDF,

Pioneer and Melchers was consummated on 27 January 1976 when the employees of Melchers told Mr Schreiber that the goods would not be delivered. Lastly, the applicants maintain that there is no evidence that the concerted practice between MDF, Pioneer and Shriro continued for two years. It is argued that, as the duration of the infringement is one of the factors to be taken into account in fixing a fine, it is appropriate to reduce the fines considerably on that ground.

124 As a result of the finding that the infringements committed were confined to the period "late January/early February" and in view of the findings relating to Melcher's refusal to sell, it is no longer necessary to deal with these submissions. The duration of the concerted practices established by the Court will enter into the general assessment to be made by it within the framework of its powers of unlimited jurisdiction.

(e) The imposition of a single fine for two concerted practices

125 According to MDF, there is reason to believe that the Commission considered that the two concerted practices in which MDF participated constitute two distinct infringements. By combining the fines calculated for each of those two infringements into a single fine, the Commission infringed the general principle concerning the overlapping of offences.

126 Pioneer, for its part, claims that the Commission infringed its right to a fair hearing by imposing on it a single fine for two infringements. In the absence of a specific fine for each infringement, it is not possible to know how the Commission assessed the gravity of each infringement or whether the criteria applied in considering each infringement were proper.

127 In that connection, it suffices to observe that the Commission maintains that, in the case of MDF and Pioneer, it treated the infringements as a single offence and therefore imposed a single fine on each undertaking. In fact, there is nothing to indicate that the Commission did not follow that procedure, which is justified in the present case since MDF and Pioneer participated in two concerted practices which were both designed to prevent parallel imports to a particular country of goods produced by the same firm. These submissions must therefore be rejected, without it being necessary to express a view on the possible existence of principles of Community law relating to the overlapping of fines imposed for several separate infringements.

E — Conclusion

The claim for a declaration of nullity

128 As stated above in part A (b), the finding relating to the duration of the infringements must be confined to the period "late January/early February 1976". The decision must therefore be declared void to the extent to which it finds that the concerted practices exceeded that period. For the rest, the claim for a declaration of nullity must be dismissed.

The claim for a reduction of the fines

129 In fixing the amount of the fines regard must be had to the duration of the infringements established and to all the factors capable of affecting the assessment of the gravity of the infringements, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the Community.

130 In relation to the criteria used by the Commission in fixing the fines, regard must be had in particular, in the case of all the undertakings, to the shorter duration of the infringements resulting from the partial nullity of the contested decision and to the considerations set out above in part D (c)

concerning the relationship between the total turnover of the undertakings and the other factors to be taken into account for the purpose of determining the gravity of the infringements.

131 On the basis of all those considerations and regard being had to the particular circumstances of each of the undertakings, the fines should be fixed as follows.

132 As regards Pioneer, regard must be had particularly to the central position which that undertaking occupies in the distribution network of the products in question, which enabled it to play the role of intermediary in exerting considerable influence on the conduct of national distributors. In respect of that undertaking the fine should be fixed at 2 000 000 units of account, that is to say BFR 80 679 000.

133 In the case of MDF, which was the instigator and essential beneficiary of the two concerted practices, a fine of 600 000 units of account, that is to say FF 3 488 892, should be imposed.

134 As a result of the partial nullity of the contested decision there is no difference between the duration of the two concerted practices in which Melchers and Shriro (now Pioneer GB) were involved. To establish the relationship between the fines to be imposed on those two undertakings regard must be had in particular to the fact that Shriro was entirely dependent on Pioneer in the pursuit of its activities, whereas Melchers, as a result of the diversity of its activities, of which the sale of Pioneer products constituted only a small part, could more easily have resisted the pressure exerted upon it. Regard being had also to all the other circumstances of the cases, the fine to be imposed on Melchers should be fixed at 400 000 units of account, that is to say DM 992 184, and the fine to be imposed on Pioneer GB should be fixed at 200 000 units of account, that is to say UKL 129 950.

135 In view of the reduction of the fines decided above and the fact that since the date of the contested decision the undertakings have had the use of the sums in question without having to arrange a guarantee or pay interest, the submissions put forward by MDF and Melchers regarding the difficulties

which payment of the fines would entail for them must be rejected. That applies equally to MDF's claim to be allowed to pay the fine in several instalments. It is for the Commission to decide, in an appropriate case and having regard to the current financial situation of the undertakings, whether it is desirable to allow payment to be deferred or effected in instalments.

Costs

136 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, under paragraph (3) of that article the Court may order the parties to bear their own costs in whole or in part where each party succeeds on some and fails on other heads or where the circumstances are exceptional.

137 Since each party has failed on certain heads, each must bear its own costs.

On those grounds,

THE COURT,

hereby:

1. **Declares Commission Decision No 80/256 of 14 December 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/ 29.595 — Pioneer Hi-fi equipment) void to the extent to which it finds that the concerted practices exceeded the period late January/ early February 1976;**

2. **Fixes the fines imposed on the applicants as follows:**

   In the case of MDF (Case 100/80), 600 000 units of account, that is to say FF 3 488 892;

   In the case of Melchers (Case 101/80), 400 000 units of account, that is to say DM 992 184;

In the case of Pioneer (Case 102/80), 2 000 000 units of account, that is to say BFR 80 679 000;

In the case of Pioneer GB (Case 103/80), 200 000 units of account, that is to say UKL 129 950;

3. **Dismisses the applications for the rest;**

4. **Orders each party to bear its own costs.**

Mertens de Wilmars Pescatore O'Keeffe Everling

Bosco Koopmans Due Bahlmann Galmot

Delivered in open court in Luxembourg on 7 June 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 8 FEBRUARY 1983

My Lords,

Introductory

(a) The Decision

In these four cases, joined by Order dated 10 July 1981, the applicants ask the Court to annul, wholly or in part, Commission Decision No 80/256/EEC of 14 December 1979 (Official Journal 1980 L 60/21, hereinafter called "the Decision") or at least to reduce the fines imposed thereby. In the Decision the Commission found two concerted practices contrary to Article 85 (1) of the EEC Treaty to have been established. The first was said to be a practice between the applicants in the first case, Musique Diffusion Française of Vélizy-Villacoublay ("MDF"), the applicants in