OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 27 APRIL 1966[1]

Summary

1 — Translated from the German.

Mr President,
Members of the Court,

The case in which I am today delivering my opinion is the first to call in question a decision of the Commission applying the law of the European Economic Community on cartels to an individual case. As you know, the case is concerned with a refusal to grant exemption under Article 85 of the Treaty to an agreement concluded between the applicant parties.

Here, to begin with, are the main facts.

On 1 April 1957, Grundig-Verkaufs-GmbH (that is to say, Grundig's sales company) of Nuremberg concluded with the French company Établissements Consten, with its head office at Courbevoie in the Paris area, a contract of indefinite duration which granted to the latter exclusive rights in France, the Saar and Corsica for the sale of Grundig radio receivers, recorders, dictaphones and television sets, as well as their accessories and spare parts. Consten undertook to buy fixed minimum quantities, to order regularly in advance, to maintain a repair workshop with a stock of spare parts, to take over the guarantee and after-sales service and to refrain from selling similar competing products and from delivering directly or indirectly to the markets of other countries. The grant of the exclusive sales right to Consten meant that Grundig was obliged to surrender to Consten retail sales in the contract territory and to refrain from making deliveries, either directly or indirectly, to other persons established in the said territory. Prior to this, Grundig had already imposed on its German wholesalers and the concessionnaires which it had appointed in other countries the obligation to refrain from making deliveries from their contract territories to other contract territories.

On 3 October 1957, Consten registered in France under its own name the trade-mark GINT ('Grundig International'), which is the subject of an international registration in favour of Grundig. It is affixed to all Grundig appliances when they are made in Germany. In this respect, Consten on 13 January 1959 made a 'declaration' according to which the trade mark GINT would be used only for Grundig appliances; as soon as Consten ceased to be the sole distributor for Grundig, the French rights attached to the trade-mark would be transferred to the latter, or the registration would be cancelled.

Having found that since April 1961 another French commercial undertaking, the UNEF company of Paris, had been obtaining Grundig appliances from German wholesalers and importing them into France, Consten brought an action against it on the grounds of unfair competition and infringement of the trade-mark. The case went as far as the Cour d'Appel, Paris, but at that stage, since UNEF had applied to the Commission of the EEC on 5 March 1962 for a declaration that the agreement concluded between Consten and Grundig was contrary to the Treaty, proceedings were stayed until the Commission issued its decision.

On the ground, too, of unfair competition Consten brought an action in 1961 before the Tribunal de Grande Instance, Strasbourg, against a dealer in radio receivers (the company Leissner) which was established there and which was also obtaining Grundig appliances in Germany for resale in France, despite the exclusive rights of

Consten. In that case also there was a stay of proceedings (although Leissner did not complain to the Commission).

In accordance with the requirements of Regulation No 17/62 concerning cartels, Grundig notified to the Commission on 29 January 1963 the agreements which it had made with Consten and with its concessionnaires in other countries of the EEC. The procedures relating to cartels were inaugurated, the undertakings concerned were heard and national authorities intervened. This was the context of a decision which was issued on 23 September 1964 regarding the Grundig-Consten agreement, and which was notified to the undertakings concerned and published in the Official Journal for that year (p. 2545). It stated that the sole distributorship agreement of 1 April 1957 and the agreement on the registration and use of the GINT trademark constituted an infringement of the provisions of Article 85 (1) of the EEC Treaty, that the declaration of inapplicability under Article 85 (3) must be refused and that Grundig and Consten were required to refrain from any action which would prevent or impede third parties from obtaining, as they wished, the products covered by the contract from wholesalers or retailers established within the Community with a view to their resale in the contract territory.

Consten and Grundig brought separate actions against this decision for its complete annulment. On 29 June 1965 the Court ordered the two actions to be joined for the purposes of procedure and judgment, so that today it is for me to examine the whole of the arguments of Grundig and Consten. Finally, various applications to intervene have been received during the proceedings, with the result that the UNEF and Leissner companies mentioned above have intervened in the trial to support the Commission, whilst the point of view of the applicants is supported by the Italian and German Governments (mainly through legal arguments of a general nature).

Before embarking on an examination of the matters in dispute which have accumulated in this way and which have assumed exceptional proportions because of the economic and legal importance of the problems dealt with and the number of parties involved, it seems to me useful to indicate the broad outlines of the method of approach which I shall employ.

The admissibility of the applications has not been questioned and there are no grounds for the Court to raise the matter of its own motion, so that there is no need for me to dwell on that question. As regards the admissibility of certain submissions, which the Commission has decided to dispute, I shall speak of them as required before dealing with the relevant grounds of action.

At the very beginning of the examination three questions of a general nature should be broached. They concern problems of form relating to the decision as a whole and the point whether it was possible to apply Article 85 before a regulation had been promulgated on group exemptions.

My examination will then follow the order of the various articles of the operative part of the decision: it will bear in the first place on the interpretation and application of Article 85 (1) (Article 1 of the Decision); I must then review the manner in which the Commission used its power to grant exemptions under Article 85 (3) (Article 2 of the Decision); finally, I must concern myself with the injunctions addressed to the Grundig and Consten companies in Article 3 of the decision.

Legal consideration

A — Preliminary questions of a general nature

I — *The questions of form raised by Etablissements Consten*

First of all two questions of form raised by Consten may be disposed of quickly. They relate to the way in which the contested measure was described and to the extent of the obligation to state the reasons upon which it was based.

1. The description of the contested measure

Consten criticizes the fact that, in the French version published in the Official Journal, the contested measure bears the title 'directive', which indicates a measure which cannot be applied to undertakings.

This is of no importance however since (the Commission assures us with good reason) there is clearly a printing error. The applicant Consten should have realized that, even ignoring the German version, which is equally authentic and which contains the correct description: 'Entscheidung' (decision). In fact, in the copy sent to Consten, which was certified as correct by the Executive Secretary of the Commission and which, primarily, is authentic for the applicant, there appears the heading: 'Décision'. In addition, the content of the operative part clearly indicates that it is a decision.
Consequently, the error in the French edition of the Official Journal, which was in any case corrected later (even if only after the lodging of the application), is of no legal importance from any point of view, even with regard to the Court's decision on costs.

2. The obligation to state the reasons for the decision

In the second place, Consten complains that the contested decision does not mention all the essential arguments which it put forward, or its requests for the inquiry to be continued, and that the reasons given for the decision do not indicate why the Commission did not comply with these requests. On this point, too (I shall return later to other aspects of the inadequacy of the statement of reasons), it is not possible to follow the applicant. Decisions on the subject of cartels, such as the contested decision, are taken in the course of administrative proceedings and not of a kind of judicial procedure; it is therefore unquestionable that they constitute administrative decisions. In that respect, Community law on cartels agrees with the corresponding laws of most of the Member States, as the Commission has amply demonstrated. In consequence, only the general obligation to provide reasons within the meaning of administrative law applies to decisions taken with regard to cartels, at least when, as here, they do not contain any penal provisions. This means (following our unvarying case-law) that the obligation placed upon the Commission is limited to stating the factual and legal elements which are essential for an understanding of its reasoning. But the Commission is not required to expound its views on a contrary opinion of an applicant or on any other possible contrary opinions; neither these opinions nor the requests submitted by the parties during the proceedings have to be dealt with in the decision. So the inadequacies in the giving of reasons of the type raised by Consten are of no importance for us.

II — *The questions raised by Grundig*

In principle could the Commission resort to and apply Article 85 (1) whilst there was no regulation in existence concerning group exemptions? That is the question raised by Grundig in guarded terms in its reply (in other words, without precisely stating a complaint to this effect). In its opinion, the principles developed in Case 1/58 with regard to Article 65 of the ECSC Treaty may be applied by analogy so that it may be considered that the prohibiton on cartels laid down by Article 85 (1) can come into effect only after a comprehensive set of legal enactments for the application of Article 85 (3) have been issued, including the adoption of a regulation on group examinations.
The Commission first attacks that argument by means of Article 42 of our Rules of Procedure, whereby the introduction of fresh issues during the course of the proceedings is permitted only if they are induced by the arguments of the opposite party or where new facts come to light. It is true that these conditions are not met in the case before us. What is important in this respect is not the fact that Regulation No 19/65 was adopted on a date (2 March 1965) subsequent to the making of the application (11 December 1964). The decisive fact is rather that the idea that, in order to lay down regulations on group exemptions, the Commission needed a further authorization from the Council of Ministers was already discussed in an unequivocal manner long before this action was brought and finally resulted in the Commission's submitting to the Council a proposal to that effect (published in the *EEC Bulletin* of April 1964). Consequently, the submission in question, which was raised only in the reply, could have been

taken up in the application. Its late appearance is not justified.

But even apart from these procedural objections, the applicant's legal argument could not succeed. A first reason for rejecting it appears in the *Bosch* Judgment (Case 13/61) which states that, since the entry into force of Regulation No 17/62, Article 85 is applicable in its entirety, and consequently the refusal of the Commission to grant an exemption under Article 85 (3) involves the nullity of a cartel agreement which falls within Article 85 (1). But, in addition, the applicant's argument must inevitably be rejected even if it is thought that at the time of the *Bosch* Case the particular problems of group exemptions had not yet arisen, and therefore that the judgment in question cannot be an authority for the present case. On closer inspection it appears in particular that the principles developed in Case 1/58 with regard to Article 65 of the ECSC Treaty are based on a situation which was noticeably different from that existing in the present case. It is true (as the Court stated at the time) that it is pointless to bring into force a rule prohibiting cartels while for technical administrative reasons it is impossible to apply the exemptions allowed by the same provision as created the prohibition. But if possibilities of exemption exist, as is the case since the adoption of Regulation No 17/62, the absence of particular detailed rules of application (the adoption of regulations on group exemption) cannot obstruct the whole system. Until the establishment of such detailed rules of application (and I have emphasized on another occasion that this is highly desirable) it was possible in each case to take into account the interests of the parties to a sufficient degree. So the argument put forward by Grundig cannot be used by the applicants in the present case to argue a violation of their lawful interests. Nevertheless, this conclusion is not sufficient to enable it to be decided whether, in other respects, Regulation No 19/65 does not provide effective legal arguments in favour of the applicants. I shall return to that later. Now that the examination of these three preliminary questions of a general nature is finished, I can pass to that of the individual articles of the contested decision.

B — The individual articles of the contested decision

I — *Article 1*

The content of Article 1 is still fresh in our minds: it states that the sole distributorship contract made between Grundig and Consten, as well as the agreement on the registration and use of the GINT trademark, constitute an infringement of the prohibiton laid down in Article 85 (1). Accordingly it seems appropriate to divide my examination into two parts: first I shall deal with the sole distributorship agreement and then the agreement relating to the trademark.

But before that, an observation of a general nature should be made following a complaint made by the German Government which is an intervening party.

1. Article 1 seen as a statement of a finding

If I understand correctly, the German Government considers as inadmissible, or at least subject to criticism, the insertion in the operative part of the disputed decision of an article the content of which consists in a finding. Such a finding has no place in the system of European law on cartels because, according to Article 1 of Regulation No 17/62, the prohibition contained in Article 85 (1) has effect without a prior decision's being necessary, and because, according to Article 3 of the said regulation, the Commission has as its sole purpose to require, through decisions, that infringements of Article 85 (1) be terminated. Consequently, if the operative part of the decision contains a finding, that must result in uncertainty for the parties.

In principle, I do not share this point of view. on the application of Article 85 of the Treaty, it must begin by obtaining an idea whether the criteria fixed in paragraph (1) of that Article are met. If its inquiry leads it to believe that that is so, it should not be forbidden to state its opinion, in the form of a finding, in the operative part of its decision on cartels. In principle, that no more affects the legal situation of the undertakings concerned than if the operative part were limited to requiring that the infringements

be terminated, reserving to the preamble the explanation regarding the existence of the prerequisites for the application of Article 85 (1).
However this does no more than answer in broad principle the question which has been raised. More particularly, I shall at a later stage have to add a word on the question whether it is possible to consider the finding made in the case before us as *fully* in conformity with the law.

2. Does the sole distributorship agreement made between Grundig and Consten fall under Article 85 (1)?

(a) *General questions of interpretation*

In *Governement of the Italian Republic* v *Commission of the EEC* (Case 32/65) and in the case referred to us by the Cour d'Appel, Paris, (Case 56/65), I have already expressed a general opinion on the interpretation of the criteria laid down in Article 85 (1). I can today refer particularly to the examinations which I made in those cases, especially because in those cases I tried to take account not only of the arguments put forward by the parties, but also of arguments of principle which automatically called for consideration. I should like therefore just to recall the following conclusions:
— Article 85 applies also to what may be called vertical agreements, especially in so far as they contain export prohibitions. In that respect it is useful to refer to the judgment in the *Bosch* Case (13/61) because there the Court held that it is not possible to form a general opinion on the applicability of Article 85 (1) to export prohibitions, but that it is necessary to examine all the facts of the particular case. (In parentheses, let me say in this connexion that, contrary to the opinion of Consten, it was not possible to expect from the Commission a *theoretical justification* for that conclusion. Really, the obligation to give the reasons for decisions does not require the Commission to develop theories; the only thing it must do is to show that the criteria set out in Article 85 (1) are met in the particular case.)
— Sole distributorship contracts involving exclusive supply and purchase obligations can have the effect of limiting competition, especially when they are accompanied by absolute territorial protection, the existence of which in the present case is beyond dispute (the only thing that the applicants dispute is that the territorial protection originated in the sole distributorship contract itself).
— But I do not think that it is necessary to hold as a general rule that access to the market is impossible in the absence of a sole distributorship (which is equivalent to a reduction in competition) without the grant of absolute territorial protection, or that it cannot be expected that a concessionnaire would accept a sole distributorship unless absolute territorial protection were assured. Nor do I consider as entirely convincing the argument of Grundig that the grant of a sole distributorship in certain products to a concessionnaire does not produce changes in market conditions, because without that grant the producer would be the only 'offeror'. It is Grundig itself which has relied on the fact that it is impossible for producers to be present directly in all markets. It should further be considered that if absolute territorial protection were removed, parallel imports could lawfully take place into the contract territory, which shows that the sole concessionnaire too has potential competitors at his stage in the economic process. Finally, we have seen in other cases that it does not appear to be defensible to treat on a footing of equality as regards the law on cartels exclusive dealers, who work on their own account and at their own risk, and agents of a manufacturer (at least when the latter play only an ancillary part in distribution). In general, national laws distinguish clearly between the two concepts. The judgment of the Bundesgerichtshof in 1958[1] which the applicant Grundig cited does not supply a decisive argument to the contrary because, according to that judgment, it is justifiable to apply certain provisions, applicable to commercial agents, by analogy to sole distributors only when the latter are in an economically weak and dependent position, and when consequently they need the

1 — Entscheidungen des Bundesgerichtshofes, Zivilsachen, vol. 29, p. 83 et seq.

protection of social laws in their relationships with the other parties to their contracts.

— Sole distributorships contracts are, further, capable of affecting trade between Member States when they result in directing the flow of inter-State trade in an unfavourable manner. Generally speaking, there is no ground for maintaining, on this point either, that trade between Member States is possible only by virtue of sole distributorship contracts, and that in consequence their *absence* must have the consequence that trade between Member States is affected.

(b) *The particular problems of the present case*

It is clear, however, that the general propositions which I have just set out are not enough for an exhaustive judgment on a case involving the law on cartels. I have already put forward this view in *Société Technique Minière* v *Maschinenbau Ulm GmbH* (a reference for a preliminary ruling). So we need to consider, taking account of the particular circumstances of this case, whether the Commission proceeded correctly in its application of Article 85.

(aa) The critierion of adverse effect upon competition

The statement of the reasons for the decision and the observations made during the proceedings show us that the Commission was content to find that the agreement in question *has as its object* an adverse effect upon competition, because it has the aim of freeing Consten from the competition of other wholesalers in the sale of *Grundig equipment*. The statement that the agreement has such an objective would suffice for the application of Article 85; and it would not be necessary to take into consideration the concrete effects on the market.

I consider that there are several reasons why that point of view is invalid.

Let me say first that in this the Commission itself is clearly not being wholly consistent in its actions, since in other cases it has at least given the *impression* of renouncing the pure theory of objective purpose which attached importance only to the aim of the agreement, since it required that there should be '*perceptibly*' adverse effects upon competition. In my opinion, this concept implies, if regarded objectively, an examination of the effects on the market, and I do not understand how the Commission can at the same time maintain that it should not make quantitative inquiries (for example, on shares of the market), and that it is not required to look at the market *in concreto*.

Next, I have already indicated in another case that American law (the 'White Motor Case'[1]) requires for situations of the type before us a comprehensive examination of their economic repercussions. Clearly I do not mean to say that we should imitate in all respects the principles of American procedure in the field of cartels. This would not in fact be justified by reason of the essential differences between the systems (prohibition *per se* in American law; possibility of exemption under Article 85 (3) of the EEC Treaty). But such a reference is useful nevertheless in so far as it shows that in respect of Article 85 (1) also it is not possible to dispense with observing the market *in concreto*. It seems to me wrong to have regard to such observation only for the application of paragraph (3) of Article 85, because that paragraph requires an examination from other points of view which are special and different. But in particular (as is shown by *Société Technique Minière* v *Maschinenbau Ulm GmbH*) it would be artificial to apply Article 85 (1), on the basis of purely theoretical considerations, to situations which upon closer inspection would reveal no appreciable adverse effects on competition, in order then to grant exemption on the basis of Article 85 (3).

Properly understood, therefore, Article 85 (1) requires a comparison between two market situations: that which arises after the making of an agreement and that which would have arisen had there been no agreement. This concrete examination may show that it is not possible for a manufacturer to find an outlet in a particular part of the market unless he concentrates supply in the

1 — Cf. Beier in 'Gewerblicher Rechtsschutz und Urheberrecht' (Auslands und Internationaler Teil), 1964, p. 87.

hands of a sole concessionnaire. That would signify that in a given situation an exclusive distributorship agreement has effects which are likely only to *promote* competition. Such a situation can in particular appear when what is at issue is gaining access to an penetrating a market. It is clear that the Commssion did not take considerations of this type into account as regards the relationship between Grundig and Consten, although they must have come to the fore as regards the problem of gaining access to the market, in view of the fact that the measures for liberalization of the French import trade were taken only during the years 1960–1961. The possibility cannot be excluded that such an examination of the market might have led to a finding that in the Grundig-Consten case the *suppression* of the sole distributorship might involve a noticeable reduction in the supply of Grundig products on the French market and consequently an unfavourable influence on the conditions of competition existing there.

A second point is even more important. As we know, the Federal Government has above all insistently opposed the opinion that to be able to apply Article 85 (1) it suffices to find that the agreement excludes competition between various importers of *Grundig* products and that 'real possibilities of choice' exist for subsequent commercial stages only if there is internal competition among the Grundig products in the field of concessions. The Federal Government considers that, on the contrary, it is necessary to take account of the general situation of the market and also to take into account the competition between *similar* products of other manufacturers and importers.

This point of view is to be commended without reservation.[1] Doubtless it is undeniable that in a given market situation competition between several sellers of a single product can also take on great importance, that it may be indispensable for the normal play of competition on the market. But the Commission if wrong in taking account of this last-mentioned internal competitition exclusively and in neglecting completely in its considerations competition with similar products. In fact, it is perfectly possible that there exists between different products or rather between different producers such sharp competition that there remains no appreciable margin for what is called internal competition in a product (for example, in relation to price and servicing). The Commission considers that it does not have to take into consideration this competition between different manufacturers except for simple mass-produced articles. That does not seem to be correct, if it is desired to judge economic phenomena realistically. Even for very specialized instruments, like radio receivers, which are sold under a special mark and which are distinguished from one another by external and technical characteristics, genuine and perceptible competition is perfectly possible.[2] The objection that in such a case the purchasers are not really able to judge and compare for lack of sufficient knowledge cannot have any bearing in this case, for the simple reason that here competition is to be judged at the wholesale level in the face of which there are technically competent retailers. So in reality it was necessary to require from the Commission a judgment on the whole of the competitive conditions, such as Section 18 of the German Law against Restraint of Competition also requires in a general way for sole distributorship contracts when it speaks of a considerable interference caused to competition on the market of the *products in question or other products.* It is possible that such observation of the effects on the market (which, contrary to the opinion of Consten, need not necessarily be entrusted to an independent committee of experts under the Community law on cartels) would have led to a conclusion favourable to the appliants. It might have been so for example because of the fairly small share of the French market for tape-recorders and dictaphones held by Grundig (about 17%) (we know that the Commission did not make any inquiry in respect of other products) or because of the applicants' assertion that the market for television sets (in which for technical reasons there were no parallel imports of Grundig models) and the transistor market

1 — A similar view: Schapira in 'Journal du droit international', 1964, p. 512 et seq.

2 — Cf. section 16 of the German Law against Restraint of Competition (Gesetz gegen Wettbewerbsbeschränkungen).

were subject to such strong competition from various producers (some of whom were very powerful) in the Community and from third countries that the price of the Grundig models had to be reduced considerably several times.

Since an examination of the market of this kind did not take place because of the Commission's narrow view of the concept of 'restriction on competition', and as the Court of Justice cannot be required to carry out such an examination itself during the course of the proceedings, it only remains for me to say that the conclusions reached by the Commission in examining the criterion of 'adverse effect upon competition' must be considered as insufficiently based and consequently must be rejected.

(bb) The criterion of 'agreements... which may affect trade between Member States'

The manner in which the Commission has in principle understood and applied the criterion of 'agreements... which may affect trade between Member States' appears from the preamble to the decision (Title II, paragraph 2 (7)). In its opinion, it suffices that, following an agreement restricting competition, trade between Member States should develop *in other* ways than it would have done without a reciprocal commitment. When the applicants complain that this argument in practice leads to equating the criterion of 'adverse effect upon competition' with that of 'which may affect trade', in the case of transboarder agreements (that is to say, agreements other than those which have effect only on the market of a single Member State or on markets situated outside the Community), the Commission replies that in practice it is not possible to give the criterion 'which may affect trade' any other rôle than that of a *criterion of competence;* in other words: once it is found that agreements regarding competition concern several Member States, their legality should be judged according to Community law.

I am convinced that the wording of Article 85 (1) makes it impossible to justify that view. As I have shown in another connexion the criterion 'agreements which may affect trade' has a semantic difference from (adverse) effect upon competition which is so evident that it must be recognized as having its own meaning. Above all, it seems impossible to maintain that it is sufficient for an agreement on competition to exercise *some influence* on trade between Member States, because that would be to disregard the unequivocal wording of Article 85 in the Dutch, Italian and German versions, which require an *adverse influence*, a meaning which the French term 'affecter' often also bears.

It is thus not enough, as the Commission believes on the basis of its erroneous point of view, to find that there exists a structuring of trade between Member States, that there is an influence on trade patterns, and to fail, in the case of agreements involving absolute territorial protection, to stress the fact that trade between Member States *is affected.* On the contrary, when evaluating this criterion too, account must be taken of any possible and reasonably foreseeable repercussions on the market (and that is so even though the Commission must be held to be correct when it states that proof of an *increase* in international trade is not enough in itself to show that trade has not been 'affected').

Thus for example (as I have stated on another occasion), it is possible that, without supply's being concentrated in a single pair of hands, that is to say, in the absence of a planned and centralized outlet, a given undertaking has no hope of being able to obtain a footing on a foreign market. Competing supplies relating to the same product may lead to a considerable reduction in sales and even, in a particular market situation, to a cessation of sales, and it would certainly be artificial not to take account of the adverse effect upon trade which is thus to be feared, except on the occasion of considering the requirements for exemption under Article 85 (3). It is equally possible that, in the case of dispersal of supply, there may be ground to fear repercussions on a reasonable production programme which fosters price development favourable to international trade. Finally, it is precisely the abolition of sole distributorship which may stand in the way of the integration of the various national markets, because it may lead to the possible consequence that foreign markets are worked over a smaller field and

with less intensity (for example, in respect of after-sales service) than the national market which is more readily available to the producer.

In the present case, a reference to the size of Consten's turnover does not suffice to set aside this argument because it furnishes no information on what this turnover represents in comparison with that of the other French importers, dealers and producers. A comparison (which moreover is made only by way of illustration) between the price of Grundig equipment on the French market and on the German market is unhelpful, since at the present stage of integration market conditions are still extremely unequal.

Consequently, as concerns the second criterion of Article 85 (1), there are grounds for criticizing the Commission for an inadequate evaluation of the economic situation; and it cannot escape such criticism by pointing out that the applicants *have not proved* that sales conditions would have been less favourable in France without the exclusive distributorship, for it is required to make an examination on its own initiative.

These considerations as a whole would be sufficient in themselves to annul Article 1 of the contested decision, and this would be so as regards not only the sole distributorship agreement with which that article is concerned, but also the agreement on the GINT trade-mark, since that has as its sole object to guarantee the absolute territorial protection of which I have already taken account in my argument up to now.

However, I would like to continue my examination of Article 1 of the decision by examining certain other legal arguments which were submitted to us during the course of the proceedings, and which seem to me to be of importance as matters of principle.

(c) The extent of the finding made in article 1

Article 1 of the contested decision declares that the sole distributorship contract of 1 April 1957 *as a whole* is incompatible with Article 85 (1) (I shall return later to the agreement on the GINT trade-mark). This is so although the Commission has examined and found contrary to the Treaty only certain clauses of the contract, in particular the undertaking by Grundig to supply Consten exclusively (including the grant of absolute territorial protection which that implies) as well as the prohibition against exporting which was imposed on Consten. But the statement of the reasons for the decision says nothing concerning the undertaking to purchase on the part of Consten, and is silent in respect of the numerous other clauses of the contract bearing on the conditions of sale, supply, payment, reservation of proprietory rights, guarantee, assumption of risks, the law applicable and agreement on jurisdiction.

In explanation of its action, the Commission stated that Article 85 speaks of agreements and not of clauses in an agreement (it is a distinction made, for instance, by Regulation No 19/65). If it should transpire, says the Commission, that certain parts of an agreement meet the requirements for the application of Article 85 (1), then it would be entitled to declare simply that the agreement is incompatible with the Treaty. In addition it would often be extremely difficult to delimit precisely those provisions of a contract which are important from the point of view of competition law and those which are neutral in that respect, for instance, when the adverse effect on competition results only from the combination of several clauses. To impose on the Commission the duty of conducting an exhaustive examination of every agreement would involve long delays in the administrative procedure. Finally, the finding made on the administrative level that a contract is incompatible with Article 85 (1) does not prejudge the validity or nullity in civil law of certain clauses with regard to which the Commission has expressed no views.

The applicants and the German Government consider this point of view incorrect because it leads to an intolerable legal uncertainty for those concerned. Article 1 of the decision, which is couched in wide general terms, should consequently be annulled for violation of the principle of proportionality (that is to say, the limitation of intervention by the administration to what is strictly necessary), a principle to which Community proceedings concerning cartels must also conform.

There thus arises an important question for the law on cartels and, to resolve it satisfactorily, it is not enough to resort to a literal interpretation of the wording of the Treaty. It is, to begin with, possible to object to the textual arguments of the Commission that Article 85 (1) uses the same expression 'agreement' as Article 85 (2), which deals with nullity in civil law of agreements in competition matters. This appears to show that Article 85 (1) forbids only those parts of the agreement which are of importance from the point of view of competition because it is only for those, and this is also the Commission's opinion, that the nullity in civil law under paragraph (2) is to be taken into account. In any case, the Commission has not been able to propose to us a satisfactory solution for the problems posed by its point of view that, even if the prohibition of a cartel under public law should extend to all its clauses, nullity in civil law applies only to those parts which concern competition law. I do not see what type of validity those parts of an agreement can have which, although prohibited, are not void in civil law. But apart from that, the following considerations must be taken into account.

When the Commission declares that an agreement is wholly incompatible with Article 85 (1), even though it 'has considered only certain clauses of an agreement in the statement of the reasons for its decision', the question arises for the undertakings concerned what view is to be taken of the other parts of the agreement which have not been examined. This question may arise in a civil case before a national court, which according to the Commission's argument should not regard the agreement as being wholly void. The national court may then try to form its own judgment on the applicability of Article 85 (1) to those parts of an agreement which have not been examined. This involves not only the risk of divergences in the development of Community law but also the risk that a national court may consider as falling under Article 85 (1) a clause in a contract which Article 6 of Regulation No 17/62 forbids it to exempt. It may also consider staying proceedings and referring a question to the European Court of Justice, which will to a certain extent elucidate the points of doubt (although, necessarily, with less precision than in the case where the law is being applied). But then such a reference would lead to the delay which the Commission wished to avoid by not examining exhaustively all the clauses of the agreement on competition.

There exists another possibility: that the undertakings concerned should seek in what way they could to amend the agreement which the Commission considers incompatible with Article 85 (1) in order to remove objections from the point of view of the law on cartels. In that case, in the Commission's opinion, they are required, in order to avoid all risk, to initiate the notification procedure a second time. Not only does that involve delay (apart from the fact that in such a case the retroactive effect of the exemption would be limited), but those concerned could not expect even then, if the Commission persists in its present practiee, to obtain all the clear guidance they require, with reference to Article 85 (1), on all the parts of their agreements.

All these considerations show that in fact the opinion maintained by the Commission leads to intolerable legal uncertainty and the disregard of fundamental interests of undertakings participating in economic activities. I think that right at the outset of the development of Community law in the field of cartels it is desirable that clarity should be obtained as quicly as possible on as many controversial questions as possible. Thus it should not be regarded as acceptable for the Commission to declare that an agreement falls wholly under Article 85 (1), without stating precisely those parts of it which are important from the point of view of the rules on competition laid down by the Treaty, and those which are not. That is true in any case when it is not certain that without the clauses which have been expressly considered the parties will give up the agreement as to the remainder. It is not asking too much that the Commission should make that differentiation, even if consequences detrimental to competition arise only from the combined effect of several clauses of the contract. The Commission must in every case work out for itself which are the clause of a contract which may be of importance from the point of view of competition law. It should not

have insurmountable difficulties in expressing its views.

To be consistent it will be necessary also to require the Commission to give an accurate statement of the reasons for its conclusion. In this connexion it may indeed be that in certain circumstances the obligation to give reasons is satisfied by the fact that the general context of the decision provides sufficient information concerning the Commission's opinion (at least in so far as certain clauses of the agreement do not require a special statement of reasons because of their own individual character.

Consequently, Article 1 of the disputed decision would appear to be illegal (in a way which this Court cannot correct on its own initiative), even if the Commission had not committed the errors of interpretation which I have already mentioned by applying the criteria of 'adverse effect upon competition' and 'agreements ... which may affect trade'.

(d) *The finding that the prohibiton against exporting imposed on Consten falls under Article 85 (1)*

Some particular observations should be made also with regard to the evaluation made by the Commission of the export prohibition imposed on Consten, which the statement of the reasons for the decision expressly states to be incompatible with Article 85 (1).

Several aspects must be distinguished here. In this respect, however, I shall not concern myself with the question whether the Commission was right in interpreting the export prohibition as involving for Consten *inter alia* the obligation to ensure that its purchasers do not export to territories covered by other contracts. Likewise, I shall not examine the fact that Article 3 of the decision does not contain any particular orders relating to the export prohibition imposed on Consten, although that fact, in conjunction with the finding that the prohibition falls under Article 85 (1), might lead to uncertainties for the company in question.

Here, too, it must first of all be said that the Commission came to its conclusion on the export prohibition after considering only its abstract aim, without examining its concrete repercussions on the market. In so doing, in my opinipn, it did not apply Article 85 (1) correctly, as I have shown in detail. It is precisely in that respect that Consten rightly relies upon the Court's judgment in the *Bosch* Case, from which it is possible to deduce that purely theoretical and abstract considerations on the compatibility of an export prohibition with Article 85 (1) are not defensible.

The Commission then declared the prohibition on exports, as a whole, to be contrary to the Treaty (even in so far as it aims to protect markets situated outside the Community). This approach is open to criticism because in principle it is not within the Commission's competence to decide upon what happens in markets situated outside the Community, unless it is proved that this has repercussions on the conditions of competition within the Common Market. To be correct, the Commission should at least have limited its finding (for example, by using the expression 'in so far as'). There is nothing unacceptable in dealing with only a part of a clause in a contract. On the contrary, it would correspond to the attitude which the Commission adopted in Article 3 of its decision and which one also meets in national laws on cartels (cf. Section 1 of the German Law on the Restraint of Competition).

Lastly inasmuch as the finding made by the Commission with regard to the incompatibility of the export prohibition with the Treaty concerns the markets of the Member States, the criticism has been made that there was no *hearing* of the dealers protected by the export prohibition.

Contrary to the opinion of the Commission, that complaint may be taken into account during the judicial proceedings, although it is not a matter of hearing the applicants. Even if proof of a special interest can generally be required in order to make it possible to put forward certain arguments, that principle could well not apply to the complaint of infringement of an essential procedural requirement, which the Court examines of its own motion. In addition, the Federal Government, as intervener, also put forward this complaint.

But the problem is whether it is well founded.

If one looks for guidance solely to the regulations implementing Community law on cartels, the answer presents no difficulties, because they clearly envisage only the hearing of persons who are parties to an agreement. I am, however, of the opinion that, far from having to limit our examination in that way, we must ask ourselves what are in reality the principles to be applied as regards the obligation to give a hearing in the field of the law on cartels.

A study of the national laws on cartels shows that they do not provide clear grounds for interpretation on this point. In general, in accordance with those systems, only undertakings directly concerned by a decision must be heard and one finds that with regard to the possibility of giving a hearing *on request* (which exists also in Community law), the prevailing concern is to keep within narrow limits the class of persons to be heard (Cf. Müller-Henneberg and Schwartz, 'Gesetz gegen Wettbewerbsbeschränkun- und Europäisches Kartellrecht', 2nd edition, p. 950).

But in the final analysis, what seems to me to essential in the present case is, contrary to the statement of the Commission, that the export prohibition in question does not merely create a factual protection for the other concessionnaires but establishes these undertakings in a genuine legal situation. Let us not forget that we are dealing with an international *system* of sole distributorship contracts, involving reciprocal export prohibitions and other obligations from which it is impossible to eliminate one important element without legal consequences.

Thus I am inclined to the view that the finding made by the Commission with regard to the export prohibition imposed on Consten must be regarded as a direct interference with the legally protected situation of the other concessionnaires and that no such finding can be made without hearing these concessionnaires beforehand. In view of the small number of persons concerned, it would not involve a totally unreasonable prolongation of the cartel proceedings to interpret in this way the obligation to give a hearing. In any case, better the slight delay which would result than a disregard of the interests of the economic circles concerned. Since such a hearing did not take place, the finding made by the Commission on the export prohibition imposed on Consten would appear to be illegal on this ground too, as well as by reason of the other considerations which I have put forward.

3. The agreement on the GINT trade-mark

Hitherto I have examined only the sole distributorship agreement mentioned in Article 1 of the decision; I should now like to say a few words concerning the agreement on the registration and use of the GINT trademark, which is also mentioned in Article 1. This is so even though (as I have already indicated) observations on this point are superfluous, for what I have already said of the wrong application of the concepts of 'adverse effects upon competition' and 'agreements ... which may affect trade' applies equally to the trade-mark agreement, which has the sole aim of guaranteeing absolute territorial protection. But given the particular importance of the arguments on the subject of trade-mark law, I do not think that it would be right to pass in silence over the problems which arise in this connexion.

Let us remember that the operative part of the contested decision finds that the agreement concluded between Grundig and Consten on the registration and use of the GINT trade-mark constitutes an infringement of the provisions of Article 85 (1). On this subject, the applicants raised in the first place the question which agreement did the Commission have in mind. If the Commission was thinking only of the declaration made by Consten on 13 January 1959, which I mentioned when dealing with the facts, its finding would hardly have any meaning, as the applicants submit, because Consten did no more than give an assurance that as soon as it ceased to be Grundig's sole distributor it would retransfer the rights attached to the GINT trade-mark to the latter or have the registration cancelled. It is clear that such a declaration cannot have any influence on the conditions of competition on the French market.

But no closer inspection it appears that the interpretation which seems to emerge at first sight from the disputed decision is in need of correction. In fact, the statement of

facts shows that the registration of the GINT trade-mark is based on an agreement *partially* set out in writing on 13 January 1959: that indicates that apart from the declaration of 13 January 1959 there must exist with regard to the trade-mark supplementary verbal and perhaps also merely implied agreements. This impression is reinforced by the reference made, in the reasons for the decision, to the origin of the GINT trade-mark. Thus the Commission is really thinking of an agreement under which the Grundig company, in whose favour the GINT trade-mark is registered internationally, renounces its rights in France and does not oppose the registration of the trade-mark for the benefit of Consten and the exercise by the latter of the rights attached to the trade-mark. It is certain that such an agreement may be of interest in the context of competition law. Unless I am mistaken, it has not seriously been disputed that there existed between the parties an agreement to such effect, because only if it does exist can any meaning be given to the declaration made on 13 January 1959 by Consten on the re-transfer of the trade-mark or the cancellation of its registration.

The second question which arises is whether such an agreement can be brought under Article 85 (1). The applicants think not, because that agreement does not have the ject of restricting the freedom of action of the contracting parties and because it is not the agreement which affects competition but only the registration of the trade-mark in accordance with French law, which gives rise to an original right in the trade-mark, from which flows absolute protection for the holder under national law.

This opinion nevertheless does not seem to convincing. First of all, it is certain that the decisive element in relation to Article 85 (1) is not merely the limitation of the freedom of action of the parties to an agreement, but also the repercussions of such an agreement on the situation of third parties on the market. Then, it is undeniable that *concerted* action by Grundig and Consten was indispensable to give rise to the rights in the trade-mark, because since the GINT trade-mark was the object of an international registration in favour of the Grundig company it would not have been possible to register it freely in France in the name of Consten without Grundig's agreement. As the Commission rightly emphasizes, what matters for the purposes of Article 85 is not only the intended effects of agreements upon competition, but also those effects which they alone actually produce. Likewise, it is necessary not merely to bear in mind the direct consequences of the agreement, but it is enough that its reasonably foreseeable effects may cause a restriction on competition. Consequently, there is nothing which in principle prevents agreements relating to trade-marks from being considered with reference to Article 85.

Now I come to the other argument of the applicants: without doubt the acquisition of the GINT trade-mark by Consten originated in an agreement with Grundig which resembles the grant of a licence; but that could only be of importance in competition law if, on that occasion, commitments going beyond the law on property rights had been given. The Commission, however, could have no objection to the mere use of a national law of this kind, for otherwise it would render itself guilty of intervening in national system of property ownership. That would be contrary to Article 222 of the Treaty (according to which the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership), to Article 36 (which contains a guarantee to uphold industrial property rights) or Article 234 of the Treaty (according to which rights and obligations resulting from agreements concluded before the Treaty entered into force between a Member State and third States shall not be affected).

Let us see what we are to make of each aspect of this point of view.

First, as regards the last reference (to Article 234 of the Treaty) which is not to be found in the reply, it is clear that it can have no significance in the present case. As the Commission correctly points out, Article 234 has solely the aim of safeguarding the rights of *third* States: the latter are clearly not involved here. Furthermore, the Convention of the Paris Union and the Madrid Arrangement relating to international registration of trade-marks, to which the applicants are clearly referring, do not con-

tain any provision on the content of industrial property rights and leave their implementation to national legal systems. Doubtless Article 36 of the Treaty authorizes prohibitions on imports, exports or transit with a view to protecting industrial property, in derogation of the provisions of Articles 30 to 34, by which quantitative restrictions on imports and exports must be eliminated. But one may wonder whether this provision is intended to introduce into the Treaty an absolute and general guarantee of the maintenance of industrial property rights or whether, on the contrary, Article 36 can be applicable only within the context of the liberalization provisions laid down by the Treaty. It would in any case be possible to object to the argument of an absolute guarantee on the ground that Article 36 too contains a reservation in respect of certain types of abuse.

As for Article 222 of the Treaty, I have already stressed on another occasion that clearly its object is solely to guarantee in a general manner the freedom of the Member States to organize their own systems of property but not to provide a guarantee that the Community institutions may not in any way intervene in subjective rights of property. The concept of property being extremely wide in the national legal systems, any other argument would result finally in the paralysis of the powers of the Community. The Commission has demonstrated this to us by pointing to the application of Article 92 (rules governing the withdrawal of state aids) and the safeguard clauses in the regulations on the agricultural market and by referring to Article 86, the application of which to industrial property rights is moreover not regarded even by the applicant Consten and the intervening Italian Government as unlawful. It is consequently certain that the Treaty is not intended to exclude certain interventions in national subjective rights guaranteed by national laws. But in addition, in the case before us, it seems that there is no question of interference with rights which need protection. Numerous facts indicate that the Commission had only in view a judicious interpretation and application of national industrial property laws and that it is on this basis that it drafted its decision with regard to the law on cartels. In referring to the fact that trade-mark licences constitute in themselves an exceptional phenomenon,[1] the Commission is trying to prove in the present case the existence of an abuse of national industrial property laws with a view to evading the provisions of the law on cartels. It showed in a manner which appeared convincing to me that according to French law the GINT trade-mark does not play an independent part in trade-mark law, that is to say, that it is not used as an indication of origin. The indication of the origin of the equipment sold is already provided by the 'Grundig' trade-mark affixed to all the products manufactured by that company. The GINT trade-mark cannot operate as a dealer's mark ('Händlermarke') either, when it is being used by Consten, because such marks must be used to prove that the dealer has exercised a certain choice among products. So a dealer's mark has no meaning when the products of a *single* manufacturer are being sold. Finally, the GINT trade-mark cannot serve to distinguish sales circuits either, that is to say, to show that the products on which it is placed have not reached France through the channel of other dealers, because in reality this mark has in principle the aim of excluding parallel imports so that it is impossible for it to play a distinctive rôle on the market.

But if it thus appears that in effect the sole aim of the GINT trade-mark consists in circumventing legal provisions on cartels (and that is also shown by the history of the origin of the mark following a judgment of the Hoge Raad of 14 December 1956), the Commission may certainly take this situation into account without being guilty of unwarranted interference in trade-mark law. In acting thus, it is following the line of German law on cartels, as it has shown by citing Fikentscher, 'Die Warenzeichenlizenz', pp. 422, 423, 453, a line which is to be found also in French law, as is proved by a judgment of the Cour de Cassation of 1961[2] cited by the Leissner company.

1 — Cf. Fikentscher in 'Die Warenzeichenlizenz' (1963), pp. 417 and 454.

2 — Dalloz 1961, p. 525.

It is thus clear from the foregoing that it was not necessary for the Commission to appeal to the harmonization provisions of Articles 100 et seq. of the EEC Treaty, as the applicants recommend. In reality, such resource is necessary only when the Commission has no powers which allow it to deal immediately with a factual situation.

Furthermore the Commission could not regard as conclusive the consideration that possibly the trade-mark situation would be no different if the Grundig company put itself forward as the owner of the GINT trade-mark in France. The determinative factor for the purposes of Article 85 is the finding of *agreed* behaviour and the intention to achieve a stronger protection for the sole distributorship, by dividing up the rights attached to the trade-mark (an objective which *a priori* it does not appear impossible to attain if account is taken of the relevant Italian and Dutch[1] case-law on this subject).

Finally, there is nothing to object to in the fact that the Commission did not think it necessary to draw the inference that the trade-mark should be re-assigned to the Grundig company, but merely forbade Consten to use it with the sole intention of preventing or impeding parallel imports. There was no necessity to do anything more in order to deal with the matter within the context of the law on cartels.

Consequently, in principle, I raise no objection from the point of view of trade-mark law against the behaviour of the Commission. Let me, however, recall that the finding made by the Commission with regard to the agreement on the trade-mark in Article 1 of the decision is not beyond criticism, for the other reasons I have already given. It is only for the sake of completeness that I add that it lays itself open to further criticism, because here too it is the *whole* of the agreement which is referred to, including the declaration of January 1959, which has not the least importance from the point of view of competition law.

4. To summarize, Article 1 of the disputed decision must consequently be annulled because of substantial legal defects. Since the other provisions of the decision are based upon Article 1, as a matter of strict logic it would appear to be unnecessary to consider them separately. I shall, however, not draw that conclusion and shall proceed to a *subsidiary* examination of Articles 2 and 3 of the decision.

II — *Article 2 of the contested decision*

Article 2 holds that the declaration of inapplicability under Article 85 (3) must be refused to the agreements mentioned in Article 1. It might indeed be provisionally accepted that the agreements contribute to improving distribution and production (albeit within certain limits), but it would not be possible to find that consumers are allowed a fair share of the resulting benefit (and in this respect the Commission refers to a comparison between the French and German prices); and especially it is not proved that the absolute territorial protection which was agreed in avour of Consten is indispensable to obtain these improvements.

The applicants have attacked various aspects of this provision too. This gives rise to a multitude of disputed questions of fact, which do not exactly simplify my examination. Here is the plan which I propose to follow in this chapter:

— I shall first deal with certain preliminary general questions.

— Then I shall examine from the points of view of law and of fact the criteria of Article 85 (3) dealt with in the decision, and shall do so in the order adopted by the Commission (although, according to the latter's statements, only the criterion of the 'indispensable' nature of the restrictions was of any essential importance in refusing the exemption).

— Finally, I shall tackle the problem whether, acception the point of view adopted by the Commission on absolute territorial protection, there whould not have been granted at least partial or conditional exemption of the remainder of the sole distributorship agreement.

1 — Cf. references in the rejoinder in Case 58/64, p. 32.

1. Preliminary questions of a general nature

(a) *Infringement of the right to be fully heard*

With regard to the application of Article 85 (3) Consten also complains of an infringement of the right to be fully heard in that the applicants did not receive all the documents relating to the numerous questions of fact raised although they were submitted to the Commission by national authorities and other parties concerned.

It is clear that this is so, as appears from the arguments of the Commission during the proceedings.

But I am not convinced that this is enough to establish an infringement of the right to be fully heard. I have already stated at the beginning of my opinion that cartel proceedings far from being judicial proceedings are rather essentially in the nature of administrative proceedings, in so far as they lead to decisions of the type now before us. In administrative procedures (as the Commission has shown by detailed references to national law) the only principle to be applied is that it is only permissible to raise against those concerned facts upon which they are able to give their views within a reasonable time. That does not require physical or textual communication of all the documents which are the basis of the decision: a clear summary of their contents, which allows those concerned to learn without difficulty the essential lines of the opinion of the third parties concerned, is enough. These are also the principles which govern the procedure before the Bundeskartellamt. (Cf. Müller-Henneberg and Schwartz, 'Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht', 2nd ed., p. 959). There is no need to stress that in this respect it is necessary to proceed with great caution and exercise discretionary powers in a very conscientious manner.

As regards the present case, in which the Commission has in principle communicated only a summary of the content of the documents produced by third parties, I have not had the impression (without examining all the factual details) that there have been any grave lacunae in the information supplied to the applicants. Thus the reasons given by Consten do not allow us to hold that the Commission has infringed the right to be fully heard.

(b) *Does the absolute territorial protection originate in the sole distributorship agreement between Grundig and Consten?*

The second preliminary question has its origin in the fact that, in the present case, exemption under Article 85 (3) has been refused particularly because of the absolute territorial protection granted to Consten. In that respect, Grundig alleges that in fact the absolute territorial protection is not a result of the sole distributorship agreement but of agreements concluded with its concessionnaires in other Member States, upon whom it has imposed export prohibitions. It is not these agreements which were the subjects of proceedings; in that respect the Commission made no finding under Article 85 (1). Consequently, the sole distributorship contract as such should have been exempted, since the Commission does not appear to have any criticism to make of it on the basis of Article 85 (3).

This point of view is extremely attractive but I do not think that there are any valid reasons for upholding it.

I can be brief on this subject, because I have already shown elsewhere that the agreement on the GINT trade-mark mentioned in Article 1 of the decision, which has the aim of providing a guarantee of absolute territorial protection, also constitutes a part of the agreements concluded between Consten and Grundig, and because on any reasonable view it can be taken into consideration in connexion with the law on cartels.

But the point of view of the Grundig company calls for further observations.

Thus in my opinion the provisions of the sole distributorship taken as a whole and together with the circumstances which existed when it was made and which were considered to be essential must necessarily be interpreted as meaning that Grundig is obliged to guarantee absolute territorial protection to Consten. This appears from Articles I (1) and IV (1) of the contract, which emphasize the exclusive nature of the

activity of Consten in the contract territory; this is the meaning which, because of all the circumstances of the case, must be given to the undertaking by Grundig not to make deliveries indirectly in Consten's territory under the contract. In any case it has not itself contradicted this interpretation in its objections to the decision, and it was only during the judicial proceedings that it submitted that the said prohibition had the sole purpose of prohibiting deliveries through men of straw or subsidiary companies. On the other hand it is not possible to object that the aim of the territorial protection is attained only by means of export prohibitions imposed on the other concessionnaires, because in order to be able to apply Article 85 (1) it is enough that the agreement had a given objective, just as it is enough that there should be a merely *indirect* adverse effect upon competition. Nor is it possible to base a decisive argument on the fact that within the framework of a system of price maintenance, the export prohibitions imposed on the other concessionnaires had been in force since 1953, that is to say, before the conclusion of the disputed sole distributorship agreement, since it appears that subsequently the applicants considered them as one of the essential constituent elements of the business basis upon which the sole distributorship agreement with Consten was founded.

Finally, in this respect, we can again refer to the principles developed in French case-law relating to 'opposabilité aux tiers' which, contrary to what Grundig believes, do not apply only as a defence to an action for 'refusal to sell' in French economic law[1] but constitute an independent ground of action in the law of unfair competition. It is clear, if one follows the case-law of the highest courts, that in this field French law (as opposed to other legal systems) goes extremely far when it permits proceedings under the heading of unfair competition against third parties who, while having knowledge of the existence of a sole distributorship system, obtain supplies of the products in order to sell them in the contract territory by circumventing the appointed concessionnaires. Consequently, in French law, the sole distributorship contract itself offers, if accompanied by sufficient publicity, sufficient opportunities of imposing territorial protection, and in fact the applicants in the present case have made use of this several times with success.

Consequently, we must reject the argument that an assurance of absolute territorial protection does not arise out of the sole distributorship contract between Grundig and Consten.

2. The individual criteria of Article 85 (3)

Since the treatment of these preliminary questions is now concluded we can turn to the arguments concerning the detailed application of Article 85 (3). The following are the basic observations which should be taken into account especially in this respect (as a guide-line both for the interpretation and application of that provision).

I have already emphasized in another connexion that, by their nature, sole distributorship contracts involve only relatively harmless effects on competition. That is why in one of the strictest European systems of law on cartels (in the German Law against Restraint of Competition (Gesetz gegen Wettbewerbsbeschränkungen), section 18, which follows earlier provisions of decartellization)[1] they are in principle permitted, and they may only be pronounced invalid by the Bundeskartellamt when they involve an unjust limitation of access to the market for other undertakings or when they constitute a *serious* restraint on competition. My colleague Mr Advocate-General Lagrange, also, in his opinion in the *Bosch* Case,[3] states that in applying Article 85 (3) it is justifiable to take account of the special features of cases of this type. We should therefore adhere to the principle that, in evaluating the difficult criteria of Article 85 (3) and their application to sole distributorship contracts, a flexible approach should

1 — Article 37 of Ordonnance 45–1483 of 30 June 1945.

2 — Military Government Law No 56 of the US zone of Germany; Military Government Ordinance No 78 of the British zone of Germany.

3 — [1962] E.C.R. 56.

in general be adopted[1] because it must be considered that as a general rule competition between *similar* products of different manufacturers constitutes a sufficient regulator of the market.

My next observation relates to the Commission's argument on principle as it appears in various pleadings. The Commission submits that the important principle is that in the cartel law of the Community Article 85 (1) constitues the rule, whilst Article 85 (3) constitutes the exception, with the result in particular that it falls upon the undertakings which are seeking exemption to show and prove that the criteria of Article 85 (3) are met. This attitude gives rise to objections when it becomes tantamount to prevarication by the Commission, as regards the application of Article 85 (3), in the face of the arguments of the undertakings concerned. It cannot be sufficiently emphasized that even as regards Article 85 (3) the Commission must play a much more active and positive role, especially when it finds that certain agreements result in improvements for the whole economy. In such a case, it has a far-reaching duty to seek clarification: it must raise questions on its own initiative and make conscientious inquiries together with the undertakings concerned. Precisely because we are at the beginning of the development of a new law on cartels, it would be better for the Commission to do too much than too little in this field, so long as there exists no established practice or sufficiently defined principles. This is particularly so as far as the question of review by the Court is concerned as this would be rendered much more difficult or even impossible, with the undesirable consequence that the case would have to be returned to the Commission, thus delaying a settlement. We shall see later whether, in the present proceedings, the Commission has fulfilled its role in accordance with the requirements which I have just described or whether it has made the mistake of putting limits to its examination for the undesirable reason that the undertakings concerned had not provided a sufficient account of the relevant favourable effects of their cartel agreement.

(a) *Improvement in distribution and production*

As concerns the first criterion established by Article 85 (3), the Commission implied that the agreement made between Grundig and Consten could lead to an improvement in distribution and production. It would not be necessary therefore to make any particular observations on this subject had the Commission not made a reservation which may also be of importance in the examination of the criterion of the 'indispensable' nature of the restrictions. Doubtless it must be recognized, says the Commission, that an improvement may result from the supply of the after-sales services and the guarantee service undertaken in the agreement by Consten, as well as its obligation to make forecasts concerning the French market. But it is not possible to take into account the fact that Consten took charge of publicity.

If that meant, as Consten appears to think, that no favourable effects result from the fact that *Consten* organizes the publicity in France, but that it could have been done equally successfully by Grundig or by using specialized agencies, it is quite obvious that the argument must be rejected as untrue. But that is not how the view of the Commission is to be understood. In reality the only question which interests us is whether it is correct to assume that the fact that Consten has to bear the *cost* of publicity did not lead to an improvement which is relevant as regards Article 85.

But it appears that in respect of this the opinion of the Commission is not sufficiently well founded.

The applicants rightly argue that there should have been an examination into whether Grundig was in a position to take over the costs of publicity, a question which of course would have to be answered not only for the French market but also for all its foreign markets. One may legitimately doubt it. It is therefore conceivable that, if the Commission's views were put into effect (that is to say, by transferring the burden of advertising costs to Grundig), the scale of advertising would diminish, which might

1 — Cf. Beier, Kartellrechtliche Beurteilung von Alleinvertriebsverträgen im Gemeinsamen Markt und den USA, in Gewerblicher Rechtsschutz und Urheberrecht [1964] (Ausl.) 84, 87; Schapira in the Journal du Droit International, p. 507.

lead to certain repercussions on sales (that is to say, on the improvement of distribution and production). Nor is it possible simply to brush these objections aside by referring to the fact that in the Federal Republic it is Grundig itself which bears the costs of advertising, for those borne by Consten are clearly compensated for, at least in part, by the fact that the technical modifications which it is necessary to make to the Grundig models for the French market are specially accounted for. Neither can these objections be dismissed by the observation, which rests solely on the rise in Consten's turnover, that the phase of opening the French market has obviously been completed, which would justify the manufacturer's taking over publicity costs. In my opinion, aggregate and isolated figures are not suitable for the purpose of giving a reliable answer to the question of opening of the market. What is necessary here is to consider the figures separately and compare them with the figures of competing undertakings. Furthermore, research should have been done in particular on the assertion by Consten that the opening of the French market can still not be considered as ended, at least for certain remote regions.

I think therefore that it is not possible to accept the Commission's opinion on this point in dispute without more explanation and I consider consequently that the improvement resulting from the publicity carried out by Consten cannot just be ignored in the application of Article 85 (3)

(b) *Consumers' share in the benefit*

The second criterion which the Commission examined under Article 85 (3) (the question of a fair share for consumers in the resulting benefit) is not fulfilled, according to the Commission, because there are differences in the retail prices of Grundig appliances in France and the Federal Republic which noticeably exceed the particular burdens imposed on Consten, even if account is taken on French taxes. The Commission emphasizes, however, that it examined this criterion only by way of precaution and its decision to reject is based principally on the finding that the restrictions on competition which were agreed are not indispensable for attaining the improvement which is provisionally accepted. But that must not prevent us from examining now the question of a share in the benefit.

It is obvious that we are faced here with a criterion which is particularly difficult and elusive since it is unlikely that there is a sufficient share in the benefit, by virtue of the fact that the consumers share in the improvement as such (in the form of an increase in their range of choice or the fact that buying is made easier), because that interpretation would deprive the criterion of 'share in the benefit' of any meaning of its own. So perhaps consideration of prices must not be excluded altogether. Neither do I consider justified Consten's view that it is reasonable to examine the problems raised by the sole distributorship agreement only on the expiry of the transitional period, because it is only then that equality between economic conditions in the various Member States will come about. But is must certainly be recognized that at the present stage of integration the differences in economic conditions do not yet allow one to speak of a single common market with practically uniform characteristics, which makes a comparison of the prices in one Member State with those in another very risky.

That is why I consider that the point of view of the Federal Government is particularly attractive on this question. It considers that it suffices to find whether or not there exists lively competition between the products of various manufacturers on a given market, in spite of the existence of an agreement on competition. If that is so, that guarantees at the same time that the consumers have a fair share in the benefit because the latter need pay only the price which develops on the market under the influence of effective competition. That is what the Treaty would regard as the optimum measure of share in the benefit to be given to the consumers. In this connexion, further examination should be made as to what effects of a nature *to promote* competition are produced by the sole distributorship agreement on the market, because it is possible that such an agreement may have the effect of lowering the prices of other similar products and it may thus also in that way give consumers a share in the benefit. It is clear that the

Commission did not make such examinations, especially as regards the last-mentioned (although in relation to Article 85 (1) it emphasized that the effects of an agreement which were favourable to competition should be taken into account under Article 85 (3)). For all these reasons it would thus be possible to declare that its views on the criterion the sharing of the benefit are unacceptable and mistaken.

But if it were considered necessary to compare prices (in spite of the difficulties which that presents), I do not see how the point of view adopted by the Commission could be justified.

First, the question arises whether it was correct to compare the *retail prices* or should the comparison not rather have been of *gross margins* applied by Consten as compared with those of the German wholesalers? In that respect, it clearly cannot be decisive to know the point of view of the applicants during the administrative proceddings; what are decisive are the objective necessities. I must say that on this question I do not share the opinion of the Commission. As we must take account of a restriction on competition at the wholesale level, there must be a comparison of gross margins at that level, all the more so since Consten says that it can have no influence on decisions concerning retail prices in the absence of an agreement on price maintenance. But according to the statements of the applicants, taking account of all the burdens which Consten has to bear on importation, a comparison of the margins results in the same percentage for France as for Germany (42%) (and that percentage is not excessive). Consequently, by applying in principle the methods used by the Commission but by limiting them to the gross margins, one cannot deny that there exists a fair share in the benefit in this case, or at least it must be stated that further clarification should be sought on this matter (since the Commission disputes the accuracy of the information supplied by the applicants as to the gross margins).

If, however, it were considered necessary to compare retail prices, the situation would hardly be more favourable for the Commission.

To be sure, that does not apply to the complaint of the inadequacy of the statement of reasons for the decision which may be regarded as unfounded (there is no need to adduce further evidence to justify this), even though the decision contains only mere indications of percentage; but it does apply as regards the necessary basic elements for the said comparison. We are faced with the fact that the parties are in disagreement on practically all the factors, whether they concern the details on prices supplied by the Leissner company or the price calculations made by the Commission. Thus there is disagreement over the situation regarding labour costs, the percentage of the necessary costs of financing, the costs of publicity and the guarantee service, the costs of warehousing and transport (all of which Consten must bear) and also over the question whether, as regards the German prices, it was permissible to take into account, and to what extent, the discounts which the retailers are said to grant for example on the sale of a given type of recorder, despite Grundig's assertion to the contrary. The facts which are available to us do not allow us to clarify with certainty all these disputed questions, which taken as a whole are of considerable importance, to such an extent that it would be necessary to make an order for an expert's report if it were not possible, as I think it is, to arrive at a decision on other grounds.

Thus, for example, it does not seem to be disputed that retail prices are equally high in France for Grundig equipment, whether they are supplied by Consten or by parallel importers. Consequently, the parallel imports, which the Commission considers necessary, do not lead to more favourable prices to the consumer; they even have the result that the consumers are less well served, if, as Consten asserts, it is true (which would have to be proved) that it supplies better benefits through a good guarantee and after-sales service, a comprehensive stock and the provision of supplies to the whole of the French market. It is even possible that if parallel imports were to increase, that is to say, if the market were exploited in a less well organized and less intensive manner than it is by Consten, the development of sales would deteriorate, with corresponding repercussions on the

conditions of production and the structuring of the manufacturer's prices.

But even apart from that, I consider that two other complaints made by the applicants are important. They complain that the Commission in essence based its conclusions as to a share in the benefit on inquiries relating to a recorder (TK 14) which represents an insignificant percentage of Consten's total turnover (1.9%). The Commission's inquiries, it is alleged, had in essence as their basis a brief note from the German Bundeskartellamt as well as a memorandum from the French Minister for Economic Affairs, which mentions expressly that it was prepared in haste with the resulting gaps in the findings. The only other facts used in the proceedings consist of some information from Consten on another recorder (TK 46), a battery receiver and a radio-gramophone, information upon which Grundig claims it has not been heard.

This does appear to be too limited a basis for an inquiry. Consequently the applicants rightly sought during the proceedings before the Commission to have the field of inquiry widened, calling attention in particular to the market conditions for television sets and battery receivers, where there is particularly intense competition. That did not take place, and we are bound to regard it as an error. The Commission cannot justify itself on this point by referring to the fact that Grundig itself stated that the TK 14 recorder was an absolute 'best-seller' and that, according to the information of the Bundeskartellamt, that instrument was *the most popular*, because that amounts precisely to saying that it occupies a particular place on the market. Nor can the reference to the statement of the French Ministry for Economic Affairs be of any assistance to the Commission, because the observation in that statement that 'it goes without saying that the percentages revealed apply for all types of instrument' does not permit the conclusion to be drawn that the instrument in question is in fact *representative* of the whole of Grundig's production.

This justifiable criticism gives rise to another complaint. It must indeed seem strange that the Commission bases its judgment on information which was two years old when decision was issued. It must not be overlooked that in cartel proceedings the Commission must give a decision which applies equally for the future, that is to say, that it must try to make a forecast; and for that purpose it must clearly try to pursue the actual economic development of the market which it has examined to a point in time closer to its decision than the information in fact taken into consideration in this instance. The Commission cannot object that its opinion is also of importance for the outcome of two French actions, in which it is the situation existing when the actions were brought which matters, for it is not primarily concerned with assisting national courts to decide their cases. At least, if it does so, it must not ignore the legitimate interests of the undertakings which are parties to an agreement and that may perhaps lead it to vary its decision. The complaint of the applicants is not to be set aside by the explanation that it is clear that the general economic situation and the structure of the sector examined have not altered since the time of the inquiry. It appears that in fact, in the context of a general tendency towards lower prices for Grundig appliances, there have been continual price reductions, which could show the question of a *fair* share of the benefit in another light (even from the Commission's point of view), and even if the latter believes that it can find that there would still have been (in 1964) considerable price differences as compared with the situation in Germany (this time, for the TK 46 recorder). If, on the other hand, the Commission thinks that these price reductions cannot be attributed to the sole distributorship contract and Consten's activity, its statement, in that general form, certainly cannot be accepted. It is quite conceivable that the concentration of the supply in one pair of hands, the intensive exploitation of the market by Consten, including the advance orders which the sole distributorship contract required it to give, had repercussions on the conditions of production and consequently also on the structuring of Grundig's prices. In that respect, the Commission should at least, where it had doubts, have followed the request of the applicants to make an economic inquiry. It could not refuse to do so on the ground that the evolution of prices was attributable

above all to the influence of the parallel importer UNEF, because clearly price reductions had already begun before its arrival on the French market, and because they principally affected appliances (television sets) which, because of their particular technical construction, were sold only by Consten. Apart from that, it is impossible that the influence of UNEF on the formation of prices can have been great: a comparison of the turnover figures shows that clearly. Finally, the Commission was not entitled to content itself with stating that the development of prices of which I have spoken was negligible, on the ground that it believed it to be of a temporary character, because it thought that the parties had the intention of behaving in an accommodating manner on the market during the administrative proceedings. This statement would have had to be used on a precise assessment of the market situation. In addition, the law on cartels gave the Commission adequate menas of dealing with any possible fears which it might have had.

Consequently in the context of the criterion of 'share of the benefit' also it must be stated that the Commission has been guilty of a series of important errors or omissions which must certainly be taken into account in considering the decision in dispute (in so far as anything turns on the application of Article 85 (3)).

(c) *The criterion of indispensabllity*

The principal reason why the Commission refused to grant the exemption permitted by Article 85 (3) was that the restrictions flowing from the sole distributorship contract, or more precisely the guarantee of absolute territorial protection, were not *indispensable* the purpose of attaining the improvements resulting from the agreement.

Let us examine more closely both that argument and the deductions intended to support it.

First, as the Federal Government has pointed out, it must be recognized that the Commission began by posing the question badly, that is to say, that it interpreted inaccurately the criterion of 'indispensability'. In the statement of the reasons for the decision it is said that it has to be asked whether Consten, even without absolute territorial protection, would be in a position to *exploit* the French market *intensively*. This in fact suggests that the Commission was satisfied with its finding that in the absence of territorial protection it would be possible to obtain at least *certain* improvements in distribution and production. Against this one must stress, and the Federal Government does so, that the only question which can be decisive is whether without the agreement on territorial protection it is possible precisely to obtain in the same way, to the same extent and with the same intensity those improvements which the agreement renders attainable and which are recognized as useful for the whole of the economy and deserving of protection. The wording of the decision makes it possible to complain that the Commission had an inaccurate concept of the application of Article 85 (3) and that would be sufficient to hold that this part of the decision is unlawful too.

But we shall not stop at this criticism, admittedly important, but shall pursue the detailed examination of the Commission's reasons which, in the end, will enable us to determine if its evaluation is correct.

The Commission recognized that the following factors could contribute to improving distribution and production: the undertaking by Consten to give advance orders, its guarantee service and its after-sales service. Let us therefore consider whether these factors can produce improvements even in the absence of territorial protection.

(aa) The advance orders

There is no doubt that the advance orders, that is to say, the firm orders for fixed quantities made on an agreed date before delivery, are calculated to improve production, because they make possible a sound production programme and a rational arrangement of production resources. In that way, thanks to the decrease in costs, they also have a favourable effect on prices. But the idea that the advance orders would be possible to the same extent and with the same efficacy even in the absence of absolute territorial protection is a matter for doubt in several respects.

First of all, it is not possible to accept auto-

matically as decisive upon this point the comparison with the situation in other countries, which the Commission puts forward. As regards the *German* maket, the applicants firmly dispute that advance orders are given there in the absence of territorial protection. According to their explanation, in the Federal Republic only the branches of the Grundig company are required to give advance orders in the proper sense of the term. Each of them is allotted a territory, the limits of which are respected. They are protected from outside influences by export prohibitions imposed on the foreign concessionnaires. The letter which Grundig sent on 23 April 1964 to the Commission does not permit any other conclusion to be drawn because it is concerned only, in respect of the activities of German *wholesalers*, with current orders ('Dispositionen') in the normal commercial meaning. Consequently, it is in fact not possible to admit, without going further, that the reference made by the Commission to the situation in Germany amounts to a decisive argument.

The same applies, in my opinion, to the vague reference which it made to experience in other countries of the Community. The Commission has not supplied us with any details on this subject; further, it has not proved, as was necessary, that the situation of the market was comparable.

If, apart from these important objections, one asks what would happen to advance orders of a sole concessionnaire where parallel imports were admitted (and the latter could well increase and intensify in comparison to the present situation), there can be no doubt that the sole concessionnaire would be forced to exercise great prudence. It is already very difficult for it to make a forecast on the development of the market by reason of the mere existence of similar competing products and variations in the preferences of consumers; these difficulties would increase considerably if there were parallel importers even if there were not among them undertakings always ready to change from one brand to another. Uncertainty and prudence in advance ordering inevitably influence the production programme and it is possible that thereby they exercise an influence on prices and distribution.

It is clear that the producer is not completely compensated for these disadvantages by the orders place by other wholesalers, from whom the parallel importers are supplied, because up to a certain point this class of business relations is always characterized by a lack of stability which will prevent the wholesaler concerned from placing steady orders. I do not see either how a discount granted by the producer could cause the sole concessionnaire to maintain his advance orders at their original level (besides, it is not certain that such a discount can be granted, in view of the fact that certain costs arising out of the technical equipment of the appliances intended for the French market are not taken into account) since the assessment of the size of the advance orders depends solely on a judgment of the conditions of the market. Even after allowing for a discount, these are characterized by the instability due to parallel imports. Likewise, the risks of giving advance orders must not be minimized by arguing that in case of error in the orders given for a period (for example, an accounting year) the sole concessionnaire could obtain compensation by reducing firm purchasse in the next season, because such compensation is not the rule; it is often impossible, because the presentation of the product has been improved or altered so that purchasers regard the products which were delivered earlier as out of date. Finally, it is not possible in this sphere seriously to envisage the possibility of avoiding the risk of parallel imports by a reduction of the price charged by the sole concessionnaire, because unsettling factors will remain following every change of price. In addition, we do not know how far reductions in price having the effect which I have just described can go without endangering other services (guarantee and after-sales service), which are included in Consten's prices, that is to say, a factor which (in the Commission's opinion) may also produce an improvement.

Consequently, I find that the views of the Commission with regard to the problem of advance orders are not convincing or at

least require further clarification on certain points.

(bb) The guarantee and after-sales services

Likewise, as regards the guarantee and after-sales services, the Commission considers that it is possible to carry these out satisfactorily even if parallel imports are permitted; or to put it another way, that the reputation attached to the trade name, and consequently the sale of products bearing that name, must not suffer as a result.

In so far as it refers in this connexion to the after-sales service and guarantee service supplied by a parallel importer already active on the market at the present time, the dispute is not only confined to whether these services are equivalent to those given by Consten (the applicants deny it energetically), but it is possible to glean from the document from the French Ministry indications that, as regards the extent of the guarantee, repair centres and stocks of spare parts, this parallel importer (which also sells the products of other manufacturers) lags behind Consten in these matters to such an extent as to be a matter of some concern as regards the reputation of the Grundig name. That might apply with all the more force in the case of parallel importers on a lesser scale which represent several brands.

Thus the only question can be whether it is permissible to require a sole concessionnaire to supply a proper after-sales service, and a satisfactory guarantee service in the interest of the brand even for appliances which do not go through its sales channels. Clearly, the Commission considers that to be possible, on condition that Grundig bears the costs of the guarantee service, whereas for the after-sales services for which payment is made it considers that this is a normal commercial activity which is performed as a matter of course even in respect of appliances from other sources.

But it seems to me doubtful whether this point of view can be justified. Here, too, it is first of all necessary to consider the objective possibilities of Grundig's undertaking extra costs, and with regard not only to French buyers but to all foreign buyers. The Commission's purely hypothetical reasoning, which is not based on economic calculations, cannot be used here to replace the system of relations between the two applicants, based on calculations of business economy. A second important problem then arises: is it permissible to require the Grundig company to supply free guarantee services for products in respect of which it cannot in any way control the sales channels, and which thus perhaps have been dealt with incompetently because of the intervention of several non-specialized dealers? Finally, as regards the remunerated after-sales service which the Commission simply defines as 'a normal commercial activity', not only must it be verified whether, in fact, it is already fully developed (for example, in the outlying regions of the French market as well) but it must also be asked whether in fact, where there is an increase in parallel imports, that is to say, a falling-off in its own sales, a sole concessionnaire will remain disposed to undertake on the same terms the business, which is of little interest to him, of a repair service for appliances which have not been purchased from him.

I find thus that, also as regards the problem of the indispensability of territorial protection, substantial objections arise as to the factors examined by the Commission.

(cc) The additional fact that the Commission's considerations are incomplete

In respect of the obligation of Consten to undertake and finance publicity, I have already indicated that it is possible that this problem is important in this connexion too. Once that question is put, there is no doubt that the interest of a sole concessionnaire in carrying out effective publicity will decrease when it sees that its efforts are also working for the benefit of parallel importers who have incurred no special expenditure of their own.

Furthermore, it is necessary to give some thought to the problems of the *observation and opening of the market*, even though the applicants have not raised them in the administrative cartel proceedings; in fact these problems are, so to speak, obvious economic considerations.

As regards market observations, there can be no doubt that because of its technical character it influences the organization of production, that is to say, it effects an improvement within the meaning of Article 85 (3). Special organizations cannot do this in such a reliable way and at such low cost as the sales network of a sole concessionnaire. It is hardly possible to imagine that market observation would not suffer from the admission of parallel imports. A parallel importer will not perform this function so well. Whether the sole concessionnaire will continue to make the same effort despite declining sales is very much open to doubt.
Finally, as regards the problem of opening the market, as I have already said, it is necessary to begin by ascertaining whether it is in fact already completed over the whole of the concessionnaire's contract territory. It must not be forgotten that the Consten's turnover increased to a considerable extent only after the liberalization of imports in the years 1961 to 1962 and that, according to the information supplied during the proceedings, it was only from then that intensive and costly publicity was undertaken. Of course it is often the case that the producer cannot itself undertake such a task in a large market. But a sole concessionnaire will decide to shoulder the heavy costs which that involves only if it sees a real likelihood of amortizing them (that is a proposition which, for instance, is expressed clearly in Article 3 (f) of the ECSC Treaty). At least for a certain transitional period (but not in the long run, as the Commission supposes) effective protection of the sole concessionnaire might thus also be justified from this point of view. The file gives no information in this connexion, so that we cannot make any other findings. But it is not impossible that the applicants' complaint may also be justified with regard to this problem.

(d) *Provisional conclusion*

To sum up, it is not possible to accept entirely the viewpoint of the Commission concerning any of the criteria of Article 85 (3) which are dealt with in the decision. That means that the results of my examination up to now are enough alone to establish also the illegality of Article 2 of the contested decision.

3. Should the Commission have considered a partial or conditional exemption or an exemption to which an obligation is attached?

If one assumes, as a pure hypothesis I hasten to stress, that it was not possible to grant an exemption because of the absolute territorial protection stipulated in the agreement, the question arises whether, in so far as the Commission found that the conditions for the application of Article 85 (1) were met, it should not have considered an exemption which was either partial or subject to conditions or obligations (cf. Article 8 of the Regulation No 17/62) for the remainder of the contents of the agreement.
I find in this connexion that the decision did not examine either the commitments to buy and sell contained in the sole distributorship agreement, or the export prohibition imposed on Consten, in the light of Article 85 (3), and that might warrant the conclusion that the Commission did not consider that there was anything to criticize in that respect (at least as regards the commitments to buy and sell).

(a) *Inadequacy of the statement of reasons*

The first question one might ask regarding this problem is whether the decision does not suffer from a formal defect since it in fact says nothing about the idea of a partial exemption. I am inclined to answer that question in the affirmative, whether one considers that there is an absolute duty to grant partial exemptions or recognizes that the Commission has a discretionary power in this field. It is precisely for the exercise of its discretion that it is interesting to learn what are the considerations which motivated the Commission so that there may be an examination of whether these were properly applied.

(b) *Were there imperative reasons for the Commission to consider a partial exemption or an exemption subject to obligations or conditions?*

The substantive aspects of the problem are indeed more important than its formal aspect.

First, as regards the *export prohibition* imposed on Consten, the Commission merely stated that it was not aware of anything which would lead it to believe that, in other Member States whose markets came under the prohibition, there existed any circumstances which would have necessitated a conclusion different from that required by the situation of the French market. But it is certainly not possible to follow it on this ground, because in my opinion it was not permissible for it to conclude that the situation was comparable on all the European markets, without having carried out any special examination and without having sought any clarification.

Similarly we should not accept the Commission's argument that, because of various cases before national courts for which its opinion was of importance, it was not required to consider a partial exemption of the sole distributorship agreement. Of course it had to take into account the fact that pending its decision proceedings had been stayed in certain cases before national courts. But, if need be, what it should have done in those circumstances was to make distinctions in its opinion. In any case it could not, because of the proceedings before national courts, simply ignore the legitimate interests of the undertakings which were parties to the sole distributorship agreement.

Indeed, it must still be proved that these interests existed. On that point, the Commission is of the opinion that during the proceedings the parties concerned did not make it sufficiently clear that they had an interest in the partial acceptance of the sole distributorship agreement, but that on the contrary they always emphasized their essential interest in keeping intact the whole of the agreement, especially the clauses conferring absolute territorial protection.

But this finding is not sufficient. In particular, it is unimportant that the applicants did not put forward alternative submissions for a partial exemption. We are at the very beginning of the development of a Community law on certals, in which the formalities of procedure have yet to be developed in full. It is necessary to wait until administrative practice is sufficiently developed, to be able possibly to draw decisive conclusions from the absence of alternative submissions.

Furthermore, the Commission was not entitled to draw conclusions to the detriment of the applicants from the fact they inisisted during the administrative proceedings on the necesisity for absolute territorial protection, in other words, that they defended the whole of the agreement concluded between them. It is understandable that the most favourable state of an agreement should be defended, precisely because of the requirements of Article 85 (3) under which it is necessary for the restrictions on competition to be *indispensable* to the attainment of a given improvement. But the attitude of the applicants during the administrative proceedings did not necessarily signify that they were in no case prepared to agree to the Commission's accepting the agreement in a modified form, or that they were not in a position to do so. One important fact in particular prevents such an assumption: that is Article IX (2) of the sole distributorship agreement whereby the parties undertake to keep the agreement in force even if certain of its clauses are declared void.

Thus *the attitude of the applicants* did not entitle the Commission to assume that it would be unnecessary to consider the possibility of granting exemption to a limited extent.

That being admitted, before we ask what *positive* factor could have led the Commission to consider a partial exemption or one subject to conditions or obligations, we should first refer to the necessity to proceed cautiously and prudently in applying the law on cartels which is in its infancy. As regards the law on cartels under the EEC Treaty, this necessity is reinforced by the possibility of retroactive exemption where notification has been made in due time. For what it is convenient to call old cartel agreements, that retroactive effect can reach back prior to the date of notification. But when exemption is refused and if, subsequently, an amended agreement is submitted to the Commission for a new examination, the retroactive effect cannot operate to the same extent. To that should be added the fact that this case is concerned with a sole distributorship agreement, that is to say, a type of agreement

which the new Regulation No 19/65 allows in a general way to be exempted from the application of Article 85 (1) if it fulfils certain conditions. That exemption can, too, be granted with retroactive effect if the agreement is notified in due time. Group exemption can apply even to agreements which do not fulfil the specific conditions laid down for the exemption, on the sole condition that they are adapted with a certain time-limit to the conditions laid down by the Commission. (Cf. Article 4 (1) of Regulation No 19/65). By reason of this factual and legal situation, it is necessary in effect to accept that the total refusal of an individual exemption for their agreement is unjustly detrimental to the applicants.

The Commission cannot object that it did not wish to impose on the parties concerned the necessity of modifying their contract. In fact, there can be no question of it, at least in the case of conditional exemption, which leaves to the parties freedom to execute the contract or not in its limited form. Neither can the Commission justify itself by relying on the fact that during the administrative cartel proceedings the parties were informed clearly enough that they could not hope for an exemption for the territorial protection. The statements to which reference is made exclusively from officials and thus did not constitute a communication coming from the Commission itself and binding upon it. In my opinion, it is not permissible to require the parties to renounce, merely on the basis of such information, a type of contract which is considered useful and necessary and which is used in numerous countries. As the Federal Government has stated, that would result in the end in reducing legal protection, because in accordance with the concept of the Commission the sole choice open to the parties would consist either in adeopting the suggestions of the Commission's departments (and thus renouncing the possibility of learning whether their contract falls under Article 85 if it is not modified), or forcing the Commission to take a decision and running the risk of seeing exemption refused for the whole contract, whereas only certain of its features are open to criticism from the point of view of the law of competition. Finally, the Commission cannot, in this connexion, refer to other public pronouncements (its communication relating to certain 'sole distributorship agreements of 9 November 1962: its suggestion regarding Regulation No 19/65), from which it must be deduced that it had itself long considered the absolute territorial protection provided for in sole distributorship contracts to be incompatible with the Treaty. Here we have only general declarations which, in part, have no binding force, and it has not been possible for individual undertakings to have their accuracy tested by the courts. In addition, they do not exclude the possibility that the Commission may disavow its opinion on questions of principle at the time of judging this or that particular case.

Consequently, I consider that, even admitting that there is not in all cases an obligation to grant partial exemptions or exemptions subject to obligations or conditions, the attitude of the Commission in this case cannot be accepted, because it did not even consider the possibility of saving the sole distributorship contract which it had to examine by upholding at least some of its parts.

This complaint is additional to the other complaints discussed in relation to Article 2 of the decision, and it reinforces my opinion that this provision must also be annulled.

III — *Article 3 of the contested decision*

Finally, it is necessary to deal, as a subsidiary matter (that is to say, in case Article 85 (1) could at all be held to apply to the present case), with Article 3 of the decision by which the Commission has issued certain orders relating to the future conduct of the Applicants. As we know, they are to refrain from any measure 'likely to obstruct or impede the acquisition by third parties, in the exercise of their free choice, from wholesalers or retailers established in the European Economic Community, of the products set out in the contract, with a view to their resale in the contract territory'.

This order, also, has given rise to complaints by the applicants, and the interveners which support their submissions, and they make them from several points of view.

1. It is necessary first of all to consider the

content of the Commission's power, under Article 3 of Regulation No 17/62, to require the undertakings concerned, by means of the decisions, to terminate infringements of Article 85 which it has found to exist. The applicants clearly believe that only the *act of concluding* an agreement constitutes an infringement within the meaning of that provision and that, consequently, terminating the infringement can consist only in re-establishing the parties' freedom of action. But it is clear that this would be to give too narrow a meaning to the provision. It would in fact ultimately be deprived of its own meaning, since the re-establishment of freedom of action already results from the finding that there has been an infringement of the provisions of Article 85 (1), the latter involving nullity in civil law under Article 85 (2). The exemple of concerted practices shows that Article 3 of Regulation No 17/62 goes further: they do not involve any legal commitments and consequently there can be no question of re-establishing legal freedom of action. The problem relating to trade-mark law raised by the present case also show that the mere annulment of an obligation does not suffice to meet the requirements of the law on cartels. Properly understood, Article 3 of Regulation No 17 therefore permits the issue of an order to refrain from anything which serves to *implement* an agreement which is incompatible with Article 85, because, if it were not possible to issue such orders, the law on cartels would be incomplete. It is in that perspective that the penal provision laid down by Article 15 of Regulation No 17 must be understood to mean that not only the conclusion of an agreement but all the acts which, in spite of the Commission's order, are carried out with the intention of implementing an agreement which has been declared contrary to the Treaty are to be regarded as an infringement of the provisions of Article 85.

2. While starting from such an interpretation, we must ask ourselves whether *in concreto* the order made in this case by Article 3 *of the decision* stays within the limits set by the objective determined by the law on cartels. The applicants consider that it does not and that, on the contrary, the Commission should be criticized for a certain excess because its order is concerned only with the effect and the result of certain acts and because thereby (just like a legislature) it established rules for the future *individual* market behaviour of those concerned. If, in fact, it is necessary to refrain from all action which prevents or merely impedes imports into France by third undertakings, the wording of the decision gives reason to fear that it applies also to behaviour of the parties which is unconnected with the object of the agreements under examination from the point of view of the law on cartels. The Federal Government has in particular provided us with examples of behaviour to which the order might apply (control of sales after the agreement has come to an end; transfer of the right of sale to branches or commercial representatives of the Grundig company; levy of execution on goods, justified exclusively by financial reasons; use of its trade-mark by the Grundig company on the basis of the 'Grundig' trade-mark; price reductions to combat parallel imports; alteration of the distribution system by employing only specialized dealers, etc.). But the Commission is entitled to prohibit such measures only on the basis of Article 86, where there is a dominant position on the market.

It is in fact undeniable that the wording of the *operative part* of the decision allows of such a wide interpretation. Neither can it be disputed that Article 85 does not give the Commission such a wide power to give orders concerning the independent behaviour of undertakings on the market (it admits this itself). It expressly states that it simply intended to prohibit acts performed on the basis of the agreement in question and which were intended to implement it. The reasons given for the decision, which are limited to criticizing the absolute territorial protection clause and the steps intended to ensure that protection, should be understood in this sense. There is certainly no reason to doubt the sincerity of these assertions and the intentions which they express. It remains, nevertheless, that, given the categoric wording of Article 3 of the *operative part* of the decision, it is not easy to arrive through its *statement of reasons* at the interpretation which the Commission considers to be obvious. In any case, the

resulting uncertainty for the undertakings concerned is such that the drafting of the operative part calls for criticism. Because of the penalities provided for in Article 15 of Regulation No 17/62, which are equally to be feared in the case of infringements of the orders made by the Commission in the matter of cartels, they are not solely complaints which, after clarification by the Commission, ought to have been regarded as settled; on the contrary, be reason of the principle of legal certainty which the parties in proceedings concerning cartels are entitled to have observed, I am bound to say that Article 3 of the decision is illegal for the reasons which I have given.

In this connexion, the following further considerations must still be taken into account. Article 3 of the decision prohibits the Grundig company from ensuring compliance with the export prohibitions imposed on its concessionnaires established in the other Member States and in third States. In that respect, the applicant alleges that the Commission cannot require it to refrain from applying agreements which were not the subject of the proceedings and which the Commission has not found to infringe the provisions of Article 85 of the Treaty.

If the applicant were relying only on a violation of its own right to be fully heard, it would not be possible to accept its point since it is clear in fact that the absolute territorial protection which the export prohibitions are intended to safeguard has been the subject of the proceedings and consequently of a hearing. But its criticism does not seem groundless when it is based upon a violation of substantive law and of the right to a prior hearing of other persons concerned to be fully heard, which is especially the case for the German wholesalers who are practically the only ones of whom account has to be taken. In fact it fact it must be a matter for criticism from the point of view of the law on cartels that the Commission refrains from ascertaining whether certain agreements are compatible with Article 85, but nonetheless orders that they should not be executed or brought into operation, and thereby interferes with the substance of those agreements. In my opinion, that requires at least that the concessionnaires concerned should take part in the proceedings and be heard. The Commission cannot reply by alleging that to prohibit the observance of export prohibitions amounts only, for the concessionnaires established in other Member States, to a release from a burden, and thus does not constitute an attack on their rights. As I have already said on another occasion, we must not lose sight of the fact that the agreements containing an export prohibition are essential elements in a comprehensive sales system, and that the removal of one of its essential elements may have repercussions on the existence of all the agreements. Since the Commission did not give them a hearing in this instance (a factor which should be considered not only on the submission of the applicants but also of the Court's own motion), the adoption of Article 3 of the contested decision also suffers from a serious procedural defect.

A final complaint is linked to the preceding one: it consists of Consten's argument founded on the existence of a prohibited discrimination in so far as it was ordered not to prevent the imports into France by other undertakings, whereas that obligation does not apply to the concessionnaires established in other countries which also benefit from absolute territorial protection and which consequently retain their power to prevent Consten from importing into their own contractual territories. The principle of freedom of trade between Member States is thus applied in a unilateral manner to the detriment of Consten. It is in fact possible that the concessionnaires established in other Member States, and whose agreements with Grundig, although notified, have not been examined by the Commission, can rely upon those agreements to prevent sales by Consten in other Member States. Consequently the manner in which the Grundig-Consten sole distributorship contract has been handled has a discriminatory effect. This shows that, to act properly, when it considers a sole distributorship system, the Commission must not proceed by stages but must investigate whether the whole of the system is compatible with Article 85 (in any case in so far as it applies the Member States of the Community). In the interests of respect for the principle of equality of treatment the delay which that

involves must be accepted; in any case, it is doubtful whether it would be great.
In consequence Article 3 of the contested decision also discloses defects of form and substance which call for its annulment.

C — Summary and conclusion

This then is my opinion: the applications of the Grundig and Consten companies against the Commission of the European Economic Community are admissible and well founded. For the reasons which I have given, the contested decision must be annulled *in toto* and the case referred back to the Commission for a fresh examination.

Since the applicants have succeeded on the main part of their argument, the Commission must bear their costs. The costs incurred by the applicants following the intervention of the UNEF and Leissner companies which supported the Commission must be borne by those companies. In view of the course taken by the proceedings, it seems proper to divide the costs of the applicants between the Commission and the two intervening parties in the approximate proportion of eight to two. I consider that the Commission alone should bear the costs of the Italian and German Governments, which intervened in support of the submissions of the applicants, because there was no particular dispute between these intervening parties and the UNEF and Leissner companies, which intervened in support of the submissions of the Commission.

ORDER OF THE COURT
10 JUNE 1965[1]

In Case 56/64

SOCIÉTÉ CONSTEN, the registered office of which is at Courbevoie (Seine), France,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

defendant,

Facts

Whereas by application made on 6 April 1965 by Willy Leissner, SA, whose registered office is at Strasbourg has sought leave to intervene in Case 56/64 in support of the conclusions of the defendant;
Whereas the applicant in the main action

1 — Language of the Case: French.