satisfied where the decision refers to the matters of fact and of law on which the legal justification for the measure is based and to the considerations which led to its adoption.

6. If the parties which took part in the drawing-up of an agreement were aware that the agreement as drafted, regard being had to its terms, to the legal and economic context in which it was concluded and to the conduct of the parties, had as its purpose to restrict parallel imports and that it was capable of affecting trade between Member States inasmuch as it was capable of making parallel imports more difficult, if not impossible, they acted deliberately by signing the agreement, whether or not they were aware that, in so doing, they were infringing the prohibition laid down by Article 85 (1) of the Treaty.

7. In assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market.

8. Where an infringement has been committed by a number of undertakings, the prior fixing of a maximum aggregate amount of the fine, fixed in relation to the seriousness of the danger which the agreement represented to competition and trade in the common market, is compatible with the individual fixing of the penalty.

9. The Commission is not obliged in calculating the amount of the fine to take account of the adverse financial situation of the undertaking concerned. Recognition of such an obligation would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.

In Joined Cases 96 to 102, 104, 105, 108 and 110/82,

NV IAZ INTERNATIONAL BELGIUM, having its registered office at 216 Steenweg op Bergen, 1520 Lembeek (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 96/82),

NV DISEM AND NV WERKHUIZEN GEBROEDERS ANDRIES, both having their registered office at 8 Eikestraat, 2800 Malines (Belgium), represented by Antoine Baetens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 97/82),

NV BAUKNECHT, having its registered office at 1 Nijverheidslaan, 1820 Grimbergen (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 98/82),

NV ARTSEL, having its registered office at 65 Boomsesteenweg, 2630 Aartselaar (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 99/82),

NV ZANKER, having its registered office at 94 Molenbeekstraat, 1020 Brussels (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 100/82),

NV ASOGEM, having its registered office at 65 Boomsesteenweg, 2630 Aartselaar (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 101/82),

NV ÉTS J. VAN ASSCHE & Co. having its registered office at 636-638 Schaarbeeklei, 1800 Vilvoorde (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 102/82),

ROBERT DESPAGNE, carrying on business as Ets Despagne, at 14-16 Rue des Carmes, 4000 Liège (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 104/82),

SA ATELIERS DE CONSTRUCTIONS ELECTRIQUES DE CHARLEROI (ACEC), having its registered office at 54 Chaussée de Charleroi, Saint-Gilles lez Bruxelles (Belgium), represented by André Linden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 105/82),

ASSOCIATION NATIONAL DES SERVICES D'EAU ASBL (ANSEAU), having its registered office at 255 Chaussée de Waterloo, Brussels, represented by Antoine Braun and Francis Herbert, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34, Rue Philippe-II (Case 108/82),

NV MIELE BELGIE, having its registered office at Industriepark, 1702 Asse (Mollem, Belgium), represented by Elizabeth Hoffmann and Bernard van de Walle de Ghelcke, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Gaston Stein, Advocate, 27, Place de Paris (Case 110/82),

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, 200, Rue de la Loi, Brussels, represented by Giuliano Marenco and Eugenio de March, members of its Legal Department, acting as Agents, assisted by Otto Grolig, Advocate, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for a declaration that the Commission Decision of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.995 — NAVEWA-ANSEAU) (Official Journal, L 167, p. 39) is void,

THE COURT

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

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

A — Background to the Agreement of 13 December 1978

1. The Association Nationale des Services d'Eau [National Association of Water Suppliers, hereinafter referred to as "ANSEAU"], Brussels, is a non-profit-making association composed of 31 water-supply undertakings in Belgium. Those undertakings are incorporated in various legal forms (joint local authority undertakings, utilities, associations of public authorities or mixed economy companies). They were set up by the public authorities with the aim of ensuring the regular supply and distribution of water under conditions which fully guarantee the protection of public health and they are, in particular, responsible, by virtue of two Royal Decrees of 24 April 1965 and 6 May 1966, for the quality of drinking water. It is the task of ANSEAU to safeguard the common interests of those undertakings.

The Communauté de l'Électricité [Electricity Board, hereinafter referred to as "the CEG"], Brussels, is a non-profit-making body which comprises undertakings which generate and supply electricity, manufacturers and importers of electrical appliances, trade associations and technical bodies concerned with the applications of electricity. Its object is to promote directly and indirectly the development of electricity in all its forms. Its members are divided into groups, including the two known as Laundry Care and Dishwashers.

The Fédération du Commerce de l'Appareillage Électrique (FCAE-FHEA) [Federation of Traders in Electrical Appliances, hereinafter referred to as "the FCAE"], Brussels, is a non-profit-making body comprising manufacturers, importers and distributors of domestic electrical appliances. Its object is to promote ethical and material improvements in the wholesale and the import and export trade in electrical appliances.

The Union des Fournisseurs des Artisans de l'Alimentation — Division Grandes Cuisines (UFARAL-ULEVO) [Union of Catering Suppliers — Industrial Catering Division, hereinafter referred to as "UFARAL"], Brussels, comprises manufacturers and importers of cookers and other equipment for use in canteens, restaurants and the like.

2. In 1965, ANSEAU drew up its General Rules on User's Equipment for the Kingdom of Belgium, in accordance with the terms of the Royal Decree of 24 April 1965, referred to above, which make distributors liable under criminal law for the quality of water. Those general rules provide, *inter alia*, that only appliances which are equipped with a device for preventing any flowback of foul water towards the drinking water pipe-lines and which are in conformity with the relevant Belgian standards may

be connected to the water-supply system. Those general rules were supplemented by special provisions relating to washing machines and dishwashers.

Checks that appliances which were to be connected to the water-supply system complied with the rules were initially carried out on the premises of consumers wishing to have an appliance connected. However, such checks proved costly, difficult to effect and inconvenient for consumers because the safety devices were incorporated in the appliances, which therefore had to be taken apart in accordance with the detailed plans of the water system.

In order to overcome that difficulty, ANSEAU subsequently introduced a procedure for checking conformity with the rules on the premises of the Belgian manufacturer or the importer and carrying out only a single check for each type or model of appliance. That system was based on the existence of a list of the machines acknowledged to be in conformity with the rules. Any machines not appearing on the list were however required to undergo an individual check on the consumer's premises, as described above. That procedure was naturally more flexible but none the less it still had certain drawbacks. The types or models of washing machines and dishwashers are however frequently modified, although the changes do not necessarily involve a modification of the water system. Every new type or model therefore had to undergo a conformity check, even though the safety device had remained unchanged.

In those circumstances, ANSEAU finally advocated recourse to a system of checks involving the use of conformity labels. That system was to consist in the transfer to the Belgian manufacturers and importers who had given the necessary undertakings of the task of checking the conformity of the models which they intended to market. Conformity was to be attested by the affixing to every appliance conforming to the rules of a conformity label obtainable by the manufacturers and importers, so as to confine ANSEAU's intervention merely to random checks designed to ascertain whether the conformity checks were being properly carried out by the undertakings themselves.

On 25 July 1978 a meeting was held between representatives of the CEG and the FCAE and those of ANSEAU at which the drawbacks of the system then in force were discussed. The FCAE pointed out, on that occasion, that certain parallel importers were also benefiting from the checks carried out by official importers without having to share in the costs involved.

On 19 September 1978, at a joint meeting of the two CEG groups, Laundry Care and Dishwashers, the chairmen of the two groups reviewed the negotiations which were being conducted with ANSEAU. They stated that one of the CEG's objectives was to obtain for its members "preferential treatment over non-members" (since appliances sold by non-members might not bear the authorization label, but might, of course, have their appliances authorized by ANSEAU). "The consequence would be that if a water company found a machine without a label connected to its supply system, it could go so far as to cut off the supply to the user concerned."

On 21 September 1978, ANSEAU's working party of legal experts submitted observations on a preliminary draft

agreement to be concluded between ANSEAU and the washing-machine and dishwasher distributors concerned. It found, in particular, that the proposed agreement would enable 90% of production to be checked and that in order to check the remaining 10% "the possibility might be considered of authorizing the distributors to establish the necessary contacts with those not party to the agreement, with a view to making the conformity labels available to them also, on condition that they provide the distributors who are parties to the agreement with the necessary guarantees and undertakings".

The text of the agreement was finally settled at meetings held on 10 and 13 October 1978 between the representatives of the CEG, the FCAE, UFARAL and ANSEAU. At those meetings the wording of Article 4 (1) of the agreement was amended in order to enable other parties to become signatories, provided that they were also manufacturers or sole importers, on the understanding that the CEG had sole power of decision in the matter and on condition, *inter alia*, that those other parties recognized the CEG as their representative.

On 23 October 1978 a joint meeting of the two CEG groups, Laundry Care and Dishwashers, was held, at which the FCAE and UFARAL were represented, in addition to all the plaintiffs except IAZ, Zanker, Despagne and ANSEAU.

At that meeting, the CEG observed that "ANSEAU will inform the general public of this label" (the conformity label) "*inter alia* through a press conference, leaflets inserted with statements of account and any other appropriate means of promotion" and that "ANSEAU will cease to publish the lists of authorized appliances which it has published hitherto and the label alone will certify that the appliance conforms to its rules".

The CEG also emphasized at the meeting that the proposed agreement "has the advantage of providing a weapon — albeit imperfect, but by no means negligible — against parallel imports: the CEG, which alone is authorized to issue conformity labels, will do so only to official sole importers". The draft agreement received overwhelming approval at the end of that meeting, with the exception of two undertakings (Indesit and Philips) which both had reservations.

The text of the agreement was adopted at a meeting on 26 October 1978 between the representatives of the CEG, the FCAE, UFARAL and ANSEAU. It was stressed at the meeting by the CEG that the new system would have the following advantage: "We are convinced that, thanks to the publicity campaign which both parties will undertake to recommend that customers, in their own interest, should buy henceforth only machines that conform to the rules (that is, those bearing the conformity label), the sales of other machines will drop, even if they fulfil the requirements of the ANSEAU rules."

B — The Agreement of 13 December 1978

The contested agreement (hereinafter referred to as "the Agreement") was signed on 13 December 1978 by the manufacturers and sole importers affiliated to one or more of the trade organizations concerned, namely the CEG, the FCAE and UFARAL (of the

first part) and ANSEAU (of the second part). The undertakings of the first part at the date of signature of the Agreement include all the applicant undertakings. Other manufacturers or sole importers became parties to the Agreement following its signature, in accordance with Article 4 (1) thereof. It is pointed out in the Agreement that UFARAL, although not an undertaking, is a party to the Agreement in its own right and not only through its members.

The purpose of the Agreement is "to prevent, in the interests of public health, any deterioration in the quality of the water supplied due to contamination or pollution, particularly when washing machines or dishwashers are connected to the drinking-water supply" (Article 1 of the Agreement). With that end in view, the Agreement "shall govern the use of the NAVEWA-ANSEAU conformity label for washing machines and dishwashers" (Article 2).

The Agreement also contains the following provisions:

It was to enter into force on 1 January 1979 and was concluded for a period of three years. It was to be automatically extended for a further period of three years at the end of each such period (Article 3).

For the purposes of the implementation of the Agreement, the CEG is to act as the representative of the undertakings of the first part. "Other parties may accede to this Agreement, provided that they are also manufacturers or sole importers, on the understanding that the CEG shall have sole power of decision in the matter, and subject to the express condition that such other parties shall also be bound by all the terms of this Agreement and shall recognize the CEG as their representative" (Article 4 (1)).

Conformity labels are to be distributed solely by the CEG which is to act as the representative of all the contracting parties for that purpose (Article 5). The CEG is to obtain the labels from ANSEAU at a charge of BFR 3.50 for each label issued (Annex II to the Agreement).

The contracting parties undertake to submit to ANSEAU through the CEG, prior to the placing on the Belgian market of new or modified machines, a complete technical file incorporating all the data needed for identification and a detailed technical plan of the complete water system of the machines (Article 6).

ANSEAU is to carry out random sampling checks of the market at regular intervals in order to determine whether the machines placed in commercial distribution bear the conformity label and, if so, whether they in fact meet the technical requirements regarding conformity laid down in the Special Rules. Where there are justifiable grounds for so doing, the CEG may also request ANSEAU to carry out special local checks (Article 8 (1)).

Where ANSEAU establishes, in the course of such checks, that a machine does not bear the conformity label, it must inform the dealer concerned, by registered letter, that the machine in question does not meet the requirements for the connection of washing machines and dishwashers to the water-supply system (Article 8 (2)).

ANSEAU is to advise its members to take account of the terms and purpose of the Agreement and to inform consumers thereof (Article 10 (1)).

The Agreement is supplemented by the "Special Rules" (Annex I) setting out the technical requirements regarding conformity which must be satisfied by the machines in question. The main provisions of those rules are as follows:

Washing machines and dishwashers are to be regarded as meeting the technical requirements regarding conformity where they completely fulfil the requirements of the General Rules on Users' Equipment, as supplemented by the Rules Concerning the Construction and Inspection of Washing Machines and Dishwashers (Article 1).

The Special Rules also provide that the contracting parties themselves are to be responsible for determining whether machines to be placed on the Belgian market meet the above-mentioned technical requirements regarding conformity. They may, however, obtain the technical assistance of ANSEAU for that purpose (Article 2 (1)).

Where it is found that the conformity label has been affixed to machines which do not meet the above-mentioned technical requirements, the labels concerned must be removed within 10 days, unless the machines are made to conform to the requirements within that period. The contracting party responsible must, in addition, make a flat-rate payment to ANSEAU of BFR 50 000. If the contracting party does not comply within the prescribed period with the penalties imposed, or if he repeats the offence within three years, he is to lose permanently the right to use the conformity label (Article 3).

The Special Rules also contain transitional measures to be applied until 31 December 1979 at the latest (Article 6).

C — Implementation of the Agreement

The implementation of the Agreement was accompanied by a publicity campaign undertaken by the manufacturers and sole importers constituting the subscribers of the first part to the Agreement and by ANSEAU. Advertisements warned consumers against purchasing machines which did not bear the conformity label.

The CEG, which alone was authorized under the Agreement to issue the conformity labels, applied the Agreement in such a way that in fact it sold the labels only to manufacturers and sole importers. In at least two cases, it replied to dealers who asked what procedure had to be followed in order to obtain the conformity labels by a letter containing the following passage:

"You are requested:

To confirm your status as *sole* importer for the Belgian market, specifying the brand(s) and type(s) of washing machines and/or dishwashers concerned;

To forward the certificate from your supplier(s) officially recognizing you as the sole importer, as referred to ... above."

For its part, ANSEAU monitored the implementation of the new system, in particular in shops and at exhibitions and trade fairs. In at least one case, it sent to a dealer displaying machines without a conformity label a registered letter listing the machines in question and pointing out that "these machines ... do not meet the requirements for connection to the

water-supply system ... Machines which bear the conformity label are certified as conforming to those requirements. In order to avoid any inconvenience to your customers, we would therefore advise you to request your supplier to remedy this situation without delay'.

Moreover, in at least one case, ANSEAU replied in the following terms to a foreign dealer who wished to know the technical requirements to be met before washing machines and dishwashers could be imported into Belgium:

"It is essential ... for one of the persons with whom you propose to conclude an agreement to be appointed by you as the sole importer for Belgium of your make of machines. The person so appointed will then take the necessary steps to satisfy the conditions for membership of the Communauté de l'Electricité (CEG) ..., which is a body acting on behalf of all the manufacturers and importers concerned."

Finally, checks were also carried out by the local water undertakings in the Brussels, Antwerp and Ghent conurbations to check, in several cases, on users' premises, whether the machines installed were on the list of machines conforming to the rules (in the case of machines manufactured before 31 January 1979) or were provided with a conformity label (in the case of machines manufactured after 31 January 1979). Where neither of those requirements was satisfied, the user was advised by letter that, within a certain period, he was to submit a detailed technical plan of the machine's complete water system and to permit the water undertaking to carry out the necessary checks on the machine, on the understanding that any dismantling of the machine would have to be carried out by the user himself.

D — Procedure prior to the adoption of the contested decision

On 14 November 1980 the Commission decided of its own motion to initiate a procedure under Article 9 (3) of Regulation No 17.

On 15 December 1980 it sent to the signatories of the Agreement a statement of objections indicating its intention to establish that the purpose and the effect of the Agreement "were to make impossible or at least more difficult parallel imports into Belgium of washing machines and dishwashers" and that those restrictions amounted to restrictions of competition within the meaning of Article 85 (1) of the EEC Treaty. The Agreement did not qualify for exemption and its effect was to nullify the exemption conferred by Regulation (EEC) No 67/67 on the exclusive dealing agreements in question. The Commission also indicated that it intended to require the parties to the Agreement to terminate the infringements forthwith and to impose fines on them pursuant to Article 15 (2) of Regulation No 17.

The applicants submitted written observations in reply to the statement of objections, in accordance with Article 3 of Regulation No 99/63/EEC.

The hearing provided for by Articles 7, 8 and 9 of Regulation No 99/63 took place on 11 March 1981. On that occasion, the parties concerned who were present offered to amend certain articles of the Agreement and transmitted a draft to the Commission accordingly.

On 24 April 1981 ANSEAU's governing body forwarded to the Commission a draft "Special Agreement Concerning

the Use of the ANSEAU-NAVEWA Conformity Label for Washing Machines and Dishwashers" which might be concluded between ANSEAU and any manufacturer or importer who failed to satisfy the conditions for becoming a party to the general Agreement. The draft Special Agreement, which was similar to the general Agreement, provided, unlike the latter, that the contracting parties were to obtain the conformity labels direct from ANSEAU at a price varying between BFR 3.50 and BFR 10 according to the number ordered, and that the contracting parties were to deposit with a bank a guarantee for a sum of BFR 50 000.

By letter of 19 May 1981 the Commission replied that those proposals "seem capable of terminating the restrictions of competition resulting from the present Agreement, in so far as importers who are not members of the CEG, UFARAL or the FCAE will be able to obtain authorization for their machines on conditions which are not discriminatory by comparison with those laid down for manufacturers and importers who are members of those organizations". However, in order to enable it to evaluate the matter, the Commission requested ANSEAU to clarify certain points within a specified period.

By letter of 15 June 1981 ANSEAU transmitted to the Commission a copy of the final draft of the Special Agreement in question and subsequently sent the text thereof to a number of importers other than sole importers who wished to import washing machines and dishwashers.

On 17 December 1981 the Commission adopted the decision forming the subject-matter of these proceedings (IV/29.995 — NAVEWA-ANSEAU and notified the addressees of its provisions. However, the full text of the decision was notified to ANSEAU only by letter of 20 January 1982.

E — The contested decision

1. Operative part

The contested decision (hereinafter referred to as "the Decision") is addressed, according to Article 5 thereof, to ANSEAU, UFARAL and the undertakings which are signatories of the Agreement and are listed in the annexes to the Decision. Those undertakings include the applicants.

Article 1 of the Decision provides that the provisions of the Agreement concluded on 13 December 1978 "excluding the possibility for importers other than sole importers to obtain a conformity check for the washing machines and dishwashers which they import into Belgium under conditions which are not discriminatory by comparison with those which apply to manufacturers and sole importers, constitute infringements of Article 85 (1) of the Treaty establishing the European Economic Community. This applies in particular to Articles 2, 4 (1), 5 and 6 of the said Agreement and to Article 6 of the Special Rules annexed to that Agreement."

Article 2 provides that the parties to the Agreement are to bring to an end forthwith the infringement established in Article 1 and are to inform the Commission within two months of the notification of the Decision of the measures taken in that regard.

Article 3 imposes fines on the undertakings listed therein, including the applicant undertakings and ANSEAU.

A fine of 9 500 ECU was imposed, *inter alios*, on ASOGEM (Case 101/82) and Despagne (Case 104/82).

A fine of 38 500 ECU was imposed, *inter alios*, on IAZ (Case 96/82), Disem-Andries (Case 97/82), Artsel (Case 99/82), Zanker (Case 100/82) and van Assche (Case 102/82).

A fine of 76 500 ECU was imposed, *inter alios*, on Bauknecht (Case 98/82), ACEC (Case 105/82), Miele (Case 110/82) and ANSEAU (Case 108/82).

2. Statement of reasons

In the statement of reasons on which the Decision is based, the Commission's findings are as follows:

(a) Article 85 (1) of the EEC Treaty

The Agreement constitutes an agreement between undertakings (the manufacturers and sole importers affiliated to the CEG, the FCAE and UFARAL) and an association of undertakings (ANSEAU) within the meaning of Article 85 (1) of the EEC Treaty.

As is clear from the case-law of the Court, that provision also applies to agreements between associations of undertakings. In its judgment of 19 March 1964 in Case 67/62 *SOREMA* [1964] ECR 151, the Court held that Article 65 of the ECSC Treaty, the terms of which were the same, as regards that point, as those of Article 85 of the EEC Treaty, applied to an agreement concluded by an association of undertakings. The Court reaffirmed that interpretation with regard to Article 85 of the EEC Treaty in the judgment of 15 May 1975 in Case 71/74 *Frubo* [1975] ECR 563, in which it held that Article 85 (1) applies to associations in so far as their own activity or that of their members tends to produce the effects referred to by that article (paragraphs 37 and 38).

In the present case, the Agreement, through ANSEAU, also binds its members. Although ANSEAU is not expressly empowered to impose rules on its members, none the less the Agreement is in fact binding on them. The Agreement abolished, in respect of machines manufactured after 31 January 1979, the old system for checking conformity based on a list of authorized appliances. The water-supply undertakings were thus obliged under the Agreement to recognize the NAVEWA-ANSEAU label as proof of conformity, otherwise they would have to carry out conformity checks on an individual basis on all washing machines and dishwashers sold in Belgium (paragraph 39).

It is clear from the text of the Agreement and from the manner in which it is implemented that the purpose of the Agreement is to prevent or restrict competition within the common market, within the meaning of Article 85 (1) of the Treaty (paragraph 41).

In that regard, the Commission observes that the NAVEWA-ANSEAU conformity label has replaced the earlier system for checking conformity, based

on lists of authorized appliances, for all appliances manufactured after 31 January 1979.

It is clear from Article 8 (2) of the Agreement, which covers checks carried out on the premises of all dealers, regardless of the origin of the machines, that the purpose of the Agreement is to eliminate any possibility of providing proof of conformity other than by the affixing of the label. As regards machines which do not bear a conformity label and are already installed on consumers' premises, the checks are carried out by the local water undertakings and, for those purposes, consumers are required to provide a technical plan of the water system and to undertake the partial dismantling of the machine (paragraphs 42, 44 and 46).

The dissuasive effect of those measures was strengthened by the publicity campaign conducted by ANSEAU and by the other parties to the Agreement to encourage consumers to buy only machines bearing the conformity label and to emphasize the disadvantages which might result from the purchase of machines not bearing the label (paragraph 47).

Moreover, Article 2 of the Agreement precludes anyone other than the parties to the Agreement, that is to say manufacturers or sole importers, from obtaining the said labels. The implementation of that provision is strictly controlled by the CEG which requires undertakings wishing to obtain conformity labels to confirm their status as sole importers and to forward a certificate to that effect from their supplier. Except for the specific instance of industrial catering equipment, dealers who were not manufacturers or sole importers could obtain the conformity label only through the manufacturer or sole importer (paragraphs 48, 49 and 52).

The restrictive purpose of the Agreement is, moreover, reinforced by the fact that the labels are distributed solely by the CEG acting as representative of all the contracting parties to the Agreement, including any new parties (Articles 4 (1) and 5). Although, as in the case of industrial catering equipment, the CEG has authorized UFARAL to distribute the labels, the CEG in any event is still able to check who has the labels. Accordingly, even if the clause excluding importers other than sole importers were deleted, they would still be able to obtain the conformity labels only through the CEG, which would enable an organization comprising only manufacturers and sole importers to check on the sales of importers who are not sole importers (paragraphs 53 and 54).

The Commission therefore concludes that the provisions of the Agreement precluding importers other than sole importers from obtaining a conformity check for the machines which they import into Belgium under conditions which are not discriminatory in comparison with those applying to sole importers and manufacturers constitute restrictions of competition within the meaning of Article 85 (1) of the Treaty. Those restrictions may affect trade between Member States since they strengthen the exclusivity granted to sole importers and tend to exclude the possibility of other patterns of trade in the relevant products by way of parallel

imports. They thus affect trade between the Member States in a manner which may be prejudicial to the attainment of the objectives of a single market (paragraphs 58 and 59).

(b) Article 85 (3) of the EEC Treaty

The Commission contends that the Agreement cannot be granted exemption under Article 85 (3) of the Treaty on the ground that it was not notified to the Commission in accordance with Articles 4 (1) or 5 (1) of Regulation No 17. The Commission maintains in that regard that the Agreement is not exempt from the requirement of notification on the basis of Article 4 (2) of the said regulation since that provision applies only to agreements "where the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or exports between Member States". In its judgment of 3 February 1976 in Case 63/75 *Roubaix* [1976] ECR 111, the Court held that "this second condition must be interpreted with reference to the structure of Article 4 and its aim of simplifying administrative procedure, which it pursued by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85 (1), appear in general, by reason of their peculiar characteristics, to be less harmful from the point of view of the objectives of this provision and which are therefore very likely to be entitled to the benefit of Article 85 (3)". In the present case, the Agreement, which restricts the right to obtain the conformity labels to manufacturers and sole importers, relates to imports and exports between Member States within the meaning of Article 4 (2) of Regulation No 17 (paragraphs 61 and 62).

In any event, even if the Agreement had been notified, the exemption provided for in Article 85 (3) could not be granted since the barriers to parallel imports tend to isolate the Belgian market in a manner incompatible with the basic principles of the common market. Moreover, the provisions restricting competition are neither absolutely indispensable for guaranteeing the quality of the water, nor of any benefit to consumers (paragraph 63).

(c) Article 90 (2) of the EEC Treaty

The Commission acknowledges that the water-supply undertakings which are members of ANSEAU are undertakings entrusted with the operation of services of general economic interest, within the meaning of Article 90 (2) of the Treaty. However, they are exempt from the requirement of compliance with the rules on competition only in so far as the application of such rules would obstruct the performance, in law or in fact, of the particular task assigned to them. That is not so in the case in point since it would have been possible to make provision for importers other than sole importers to obtain conformity labels on non-discriminatory terms direct from ANSEAU without obstructing the performance of the task entrusted to the undertakings concerned (paragraphs 65, 66 and 67).

(d) Article 3 (1) of Regulation No 17

Since the parties to the Agreement have therefore infringed Article 85 of the Treaty and the infringements are still being committed, the parties must be compelled to bring them to an end forthwith, in accordance with Article 3 of Regulation No 17. The Commission

observes in that regard that the amendments to the Agreement which were proposed by the parties thereto after they had received the statement of objections have not been implemented (paragraphs 68 and 69).

(e) Article 15 (2) of Regulation No 17

It is appropriate in the Commission's view that fines should be imposed under Article 15 (2) of Regulation No 17 on the undertakings which took part in the drawing-up of the Agreement and on ANSEAU. The Commission considers that the restrictions on parallel imports, based on the contractual system described above, constitute serious infringements of Article 85 of the Treaty since the Agreement is binding upon third parties.

The undertakings which participated in the drawing-up of the Agreement committed those infringements deliberately, because they were aware that the object of the Agreement was detrimental to competition. All those undertakings bear the same responsibility, as a result of their participation in the drawing-up of the Agreement and of their status as CEG members. Moreover, the amount of the fines imposed must take into account the particular context in which the infringement was committed and the individual positions of those undertakings on the relevant market (paragraphs 70 to 73).

The Commission considers it justifiable to impose a fine on ANSEAU which is equal in amount to the highest fines imposed on the undertakings which took part in the drawing-up of the Agreement. To that end it relies on the following considerations:

ANSEAU bears most of the responsibility for the infringements since it presented the Agreement as mandatory and therefore binding on third parties, even though its working party of legal experts had drawn its attention to the fact that the Agreement made it possible to check 90 % of production and that a solution was needed to enable the conformity labels to be made available in respect of the remaining 10 %. ANSEAU was also aware of the fact that, as a result of the publicity campaign undertaken to encourage consumers to purchase only machines bearing the conformity label, sales of other machines would decline. ANSEAU therefore committed the infringements in question through gross negligence. A factor to be borne in mind in favour of ANSEAU is that it is a non-profit-making association (paragraphs 75 and 76).

There is no reason to impose fines on the undertakings which became parties to the Agreement following its signature since those undertakings did not take any initiative in the drawing-up of the Agreement and were practically forced to become parties to it (paragraph 74).

F — Procedure before the Court

Applications against the Decision were lodged at the Court Registry on 22 March 1982 in Cases 96 to 102, 104 and 105/82, and on 24 March 1982 in Cases 108 and 110/82.

By order of 5 May 1982 the 11 cases were joined for the purposes of the procedure and the judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicants in Cases 96 to 102, 104 and 105/82* claim that the Court should:

Declare that the Commission Decision of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.995 — NAVEWA-ANSEAU) is void;

In the alternative, declare that the Decision is void in so far as it imposes a fine on the applicants;

In the further alternative, reduce the amount of the fine thus imposed on the applicants by that Decision.

The *applicant in Case 108/82 (ANSEAU)* claims that the Court should:

Declare the action to be admissible and well founded;

Primarily, declare the Decision of 17 December 1981 (No IV/29.995) void on the ground that it infringes essential procedural requirements and the provisions of the EEC Treaty;

Alternatively, remit or at least reduce the fine imposed on the applicant.

The *applicant in Case 110/82 (Miele)* claims that the Court should:

Declare the action to be admissible and well founded;

Declare the Commission Decision of 17 December 1981 void, at least in so far as it imposes a fine on the applicant and, in the alternative, reduce the amount of the fine.

All the parties claim that the Commission should be ordered to pay the costs.

The *Commission* contends that the Court should:

Dismiss the applications as unfounded;

Order the applicants to pay the costs.

III — Submissions and arguments of the parties

A — Procedural submissions

1. Infringement of the rights of the defence and of essential procedural requirements (Articles 2 (1) and 4 of Regulation No 99/63)

That submission, which is relied on in whole or in part by all the applicants with the exception of Miele (Case 110/82) is based on the finding made in the Decision of discriminatory treatment of importers other than sole importers, whilst in its statement of objections the Commission refers only to a barrier to parallel imports.

(a) The applicants *IAZ* (Case 96/82), *Disem-Andries* (Case 97/82), *Bauknecht* (Case 98/82), *Artsel* (Case 99/82), *Zanker* (Case 100/82), *ASOGEM* (Case 101/82), *van Assche* (Case 102/82), *Despagne* (Case 104/82) and *ACEC* (Case 105/82) maintain that in its Decision the Commission attributes to the Agreement the aim of establishing discriminatory treatment of importers

other than sole importers as against manufacturers and sole importers established in Belgium as regards recognition of the conformity of washing-machines and dishwashers with the standards prescribed by ANSEAU. However, in its statement of objections the Commission merely ascribed to the Agreement the aim of preventing or restricting parallel imports. Accordingly, the Commission based its Decision on an objection not contained in the statement of objections and the applicants were not given an opportunity to express their views in that regard.

By adopting that approach, the Commission failed to comply with Article 2 (1) of Regulation No 99/63 which provides that: "The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them" and Article 4 of the regulation which provides that: "The Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views".

ANSEAU (Case 108/82) also contends that the Decision is in breach of Article 4 of Regulation No 99/63 inasmuch as it alters the legal classification of the objection. In the first place, the Decision no longer concerns anything but the restrictive purpose of the Agreement, whilst the statement of objections stated that the Agreement had a restrictive purpose and a restrictive effect. Secondly, that purpose is no longer defined as resulting from a partitioning of the Belgian market — whereby parallel imports are prevented altogether or rendered more difficult — but as creating discrimination to the detriment of parallel imports.

According to the case-law of the Court, Article 4 of Regulation No 99/63 requires the statement of objections in the Decisions to set out "clearly, albeit succinctly, the essential facts upon which the Commission relies" (judgment of 15 July 1970 in Case 41/69 *Chemiefarma* [1970] ECR 61; judgment of 14 July in Case 48/69 *Imperial Chemical Industries* [1972] ECR 619; judgment of 21 February 1973 in Case 6/72 *Europemballage and Continental Can* [1973] ECR 215; judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461). That requirement is not satisfied where, as in this case, the legal classification has been changed. In that regard, the Court held in its judgment of 13 February 1979 in the *Hoffmann-La Roche* case, cited above, that "in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission".

(b) The *Commission* raises the objection that all the applicants were given an opportunity, during the preliminary procedure, to express their views regarding the difference in treatment between sole importers and parallel importers. It considers that the legal classification of the applicants' conduct has not been changed by comparison with that adopted in the statement of objections. That is apparent, in particular, from paragraph 56 of the statement of the reasons on which the

Decision is based, according to which the provisions of the Agreement "thus enable sole importers to check parallel imports and to take any other restrictive measures to prevent them".

Since the discriminatory nature of the treatment accorded to parallel importers and the barriers to parallel imports are merely two aspects of the same practice, the Commission did not refer to any intrinsic discrimination but only to discrimination creating barriers to parallel imports. The Commission adds that the system established by the Agreement weakens the competitive position of parallel importers by exposing them to pressure exerted by manufacturers or sole importers.

2. Breach of the principles of good administration

This submission, relied upon by ANSEAU (Case 108/82), alleges that the Commission did not ascertain the extent to which the parties to the Agreement remedied the infringements complained of in the statement of objections and contends that the Commission made the Decision public before officially notifying it to the parties concerned.

(a) *ANSEAU* points out that the Commission was informed, by letter of 15 June 1981, of the terms of the proposed Special Agreement and that it was also informed, at the hearing on 11 March 1982, of the proposed amendments to the contested Agreement. In its letter of 19 May 1981 it created the impression that, if the proposed amendments were implemented, the outcome of the procedure might be favourable. In any event, the Commission should, in accordance with the rules of fair play, have stated that it was not satisfied with ANSEAU's reply to that letter.

That breach is aggravated by the Commission's failure to notify ANSEAU before 20 January 1982 of the definitive reasons on which the Decision was based. On 17 December 1981 the Commission did however issue a press release in which the Decision was mentioned. In consequence, ANSEAU and its members were referred to in the media as having committed a serious infringement of the Community rules on competition, although they lacked the means to defend themselves against that allegation and both ANSEAU and its members therefore suffered considerable damage.

(b) The *Commission* acknowledges the truth of the facts alleged by ANSEAU but denies having aroused, in any way whatsoever, a legitimate expectation that the proposed amendments might be acceptable without its assent. Not every proposal which is submitted to the Commission and contains amendments to an agreement contrary to Article 85 of the EEC Treaty must be accepted by it, otherwise no decision prohibiting the original Agreement could be adopted and the defendants could prolong the procedure by means of delaying tactics. In this case, ANSEAU's reply to the letter of 19 May 1981 did not meet the requirements laid down since it was clear from that reply in particular that ANSEAU wished to compel parallel importers to provide a guarantee of BFR 50 000.

As regards the notification and publication of the Decision, the Commission

observes that, as from 17 December 1981, it placed at the applicant's disposal a text of the Decision setting forth the reasons on which it was based. Moreover, the principle of good administration in fact requires the Commission to act swiftly once an infringement of the rules on competition has been established. In any event, acts subsequent to the adoption of the Decision cannot affect its validity.

B — Submissions concerning the application of Article 85 (1) of the EEC Treaty

ANSEAU (Case 108/82) and *Miele* (Case 110/82) contend that the Commission has infringed Article 85 (1) of the Treaty inasmuch as the Agreement does not satisfy the following conditions laid down by that article:

(1) Agreements between undertakings

(2) Purpose of restricting competition

(3) Appreciable restrictive effects on competition

(4) Appreciable effect on trade between Member States.

(1) Agreements between undertakings

(a) *ANSEAU* (Case 108/82) maintains that the Agreement was concluded between certain undertakings, on the one hand, and an association of undertakings which does not itself engage in any economic activity, on the other hand. Such an agreement is covered by Article 85 (1) only if the undertakings which are members of the association are legally bound thereby. In this case, ANSEAU is empowered, under its constitution, only to make recommendations to its members. For that reason Article 10 (1) of the Agreement provides that "ANSEAU shall advise its members to take account of the terms and of the purpose of this Agreement and to inform consumers thereof".

ANSEAU maintains that in law both the *Frubo* case, relied upon in the Decision (paragraphs 37 and 38), and the *FEDETAB* cases (judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *van Landewyck and Others* [1980] ECR 3125) differ from this case inasmuch as in those cases the associations concerned enforced their supervisory powers over their members by the imposition of penalties.

(b) In reply the *Commission* states that the Agreement is binding on ANSEAU's members since in practice it is only the presence of the conformity label on the machines which enables water-supply undertakings to maintain a check on the quality of the water. Article 10 of the Agreement, referred to above, in fact imposes an obligation on ANSEAU which may, where necessary, be legally enforced by the contracting parties.

Furthermore, Article 8 of the Agreement requires ANSEAU to determine whether the machines put on the market bear the conformity label and, where appropriate, to inform dealers that the appliance in question does not satisfy the requirements prescribed for connection to the water-supply system.

Moreover, account must be taken of the fact that under Article 5 of the Agreement, conformity labels are to be distributed solely by the CEG and that the undertakings given by ANSEAU

actually determined the conduct of at least some of its members, namely the water-supply undertakings in the built-up areas of Brussels, Antwerp and Ghent.

In contrast to the *Frubo* and *FEDETAB* cases, in this case the allegation of restricting competition was directed only at ANSEAU and not at its members as well. Accordingly, the Commission did not have to show that ANSEAU's members were bound by the Agreement but was able to confine itself to establishing that the purpose of ANSEAU's own activities was to restrict competition.

(2) Purpose of restricting competition

(a) *ANSEAU* (Case 108/82) and *Miele* (Case 110/82) contend that the Commission has failed to provide legal proof that the purpose of the Agreement was to restrict competition and, in particular, that such was the intention of the parties.

ANSEAU maintains in that regard that the restrictive purpose of an agreement, for the purposes of Article 85 (1) of the Treaty, presupposes an intention on the part of all the parties to the agreement to achieve that objective. No such intention is apparent either from the provisions of the Agreement or from the circumstances surrounding its implementation or from the economic context in which it was concluded.

The real purpose of the Agreement is to reduce the financial and administrative costs of carrying out checks by delegating to manufacturers and sole importers the task of checking the conformity of models placed on the market. ANSEAU and the water-supply undertakings have no special interest in ensuring that competition on the Belgian market in washing machines and dish-washers takes place through the intermediary of sole importers rather than through that of parallel importers.

Furthermore, the allegation of discrimination presupposes different treatment of identical or equivalent situations without objective justification. That is not the case here since the sole importer, unlike the parallel importer, is bound by contracts extending over several years and has a better knowledge of the product which he imports. In view of the exclusive link between him and the producer, the sole importer has, in the first place, all the more reason to carry out the necessary checks and, secondly, he is in a position to require the foreign manufacturer to ensure that the appliances conform to Belgian standards.

The cost of carrying out the checks (BFR 10 000), referred to by the Commission, represented, before the conclusion of the Agreement, the cost of authorizing not each individual appliance, but each type of appliance. That sum included BFR 2 500, representing travelling expenses, which were counted once only if the importer applied for authorization in respect of several types of appliances at the same time. The Court recognized in its judgment of 13 November 1975 in Case 26/75 *General Motors* [1975] ECR 1367 that the cost of carrying out a check may be assessed by reference to the service provided.

Miele shares the view that isolated statements by the parties are insufficient to establish that the purpose of the Agreement was to hinder parallel imports. The Agreement is only relative in nature, that is to say it establishes only

a system for checking conformity as between the contracting parties. In its judgment of 30 June 1966 in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 at p. 249, the Court held that interference with competition referred to in Article 85 (1) must result, in whole or in part, from the agreement itself.

In that connection, Miele points out, in particular, that the Agreement does not allow the CEG to check on sales by parallel importers, but, on the contrary, leaves ANSEAU complete freedom to provide parallel importers with an opportunity to have their appliances checked or to establish their conformity on the same footing as the undertakings covered by the system established by the Agreement. In any event, the allegation of discrimination between manufacturers and sole importers on the one hand and parallel importers on the other is groundless since those two groups exhibit characteristics which objectively distinguish them from one another.

(b) The *Commission* maintains that the purpose of the Agreeement is to restrict competition, since it seeks to pass on to the owners the substantial cost of checking machines imported as parallel imports. The cost of carrying out an individual check (BFR 10 000 per appliance) constitutes between one third and two thirds of the selling price.

The Commission acknowledges that the stated purpose of the Agreement is the protection of public health. However, that does not prevent the Agreement having the further objective of restricting competition, regard being had to the following circumstances:

The ANSEAU-NAVEWA conformity label replaced the earlier system for checking conformity which was based on lists of authorized appliances;

Only manufacturers or sole importers may obtain conformity labels;

The labels are distributed solely by the CEG which comprises in particular manufacturers and importers of electrical appliances.

In the Commission's view, the purpose of an agreement, decision or concerted practice must be inferred from the foreseeable implementation thereof, which follows logically from its terms, regard being had to the legal and economic context.

The intention of the parties and the actual consequences of the agreement, decision or concerted practice may also be relevant. However, the two parties need not have the intention of restricting competition (see the Court's judgment of 12 July 1979 in Joined Cases 32 and 36 to 82/78 *BMW Belgium* [1979] ECR 2435). As regards the CEG's statement to the effect that it would use the Agreement as a weapon against parallel imports, it should be observed that, although those statements are not in themselves sufficient to establish a restrictive purpose, they are capable of supporting, together with other factors, the conclusion that the Agreement had a restrictive purpose.

(3) Appreciable restrictive effects on competition

(a) *ANSEAU* (Case 108/82) and *Miele* (Case 110/82) contend that the Com-

mission has not adequately proved in law that the effect of the Agreement was to restrict competition or at least that its restrictive effects on competition were appreciable.

In that regard ANSEAU points out, in particular, that the Decision does not contain an adequate statement of the reasons on which it is based inasmuch as it fails to specify that the Agreement, in the Commission's opinion, also has a restrictive effect on competition.

Miele takes the view that the Commission has failed to show that the Agreement actually had the effect of restricting competition to an appreciable extent. The examples provided by the Commission, far from showing that a parallel importer was rebuffed, demonstrate on the contrary that the checks carried out by ANSEAU were confined to the built-up areas of Brussels, Antwerp and Ghent. It was therefore permissible for parallel importers to sell their machines and to have them marketed elsewhere. Furthermore, according to Miele, any difficulties encountered by importers are essentially attributable to the lack of uniformity of safety requirements in the various Member States.

(b) Against that, the *Commission* argues that the letters which were written by ANSEAU and by the CEG, and to which it refers in its Decision, were dispatched shortly after the entry into force of the Agreement and are perfectly consistent with it. Miele was aware of the CEG's intention to use the Agreement as a weapon against parallel imports. Although indeed the divergent rules of the various Member States do not favour parallel imports, any additional barrier to trade is all the more serious.

It follows, in the Commission's opinion, that there is sufficient evidence to show that the Agreement was capable of affecting competition to an appreciable extent by restricting parallel imports and that those restrictions of competition stem from the Agreement itself and not from ANSEAU's conduct viewed in isolation.

(4) Appreciable effect on trade between Member States

(a) *ANSEAU* (Case 108/82) contends that the Commission has not adequately demonstrated for legal purposes that the effect of the alleged restrictions of competition on trade between Member States was appreciable to the extent required by the Court in its case-law (judgment of 29 July 1969 in Case 5/69 *Völk* [1969] ECR 295; judgment of 6 May 1971 in Case 1/71 *Cadillon* [1971] ECR 351; and judgment of 25 November 1971 in Case 22/71 *Beguelin* [1971] ECR 949).

The Commission's view that the effect on intra-Community trade was appreciable was based, in the first place, on the nature of the restriction itself and, secondly, on the fact that the restriction applied to all the washing machines and dishwashers sold in Belgium, most of which are imported from other Member States. That view disregards the *Völk* judgment cited above, according to which there are no restrictions which are prohibited *per se*. Furthermore, the appreciable effect of the restriction must be established by reference to the market covered by the restriction, namely

parallel imports, and not to the market covered by the parties to the Agreement.

Accordingly, there is an appreciable restriction only where the consumer is prevented from benefiting from a sufficiently large share of the supplies which could be made available to him by the distributors. That presupposes the establishment in advance of both the size of the market available to the consumer and the share represented by parallel imports. The Commission failed to satisfy that requirement, in the first place, by omitting to determine the share represented by imports from non-member countries (which are not affected) and, secondly, by aggregating the figures for dishwashers and washing machines although they constitute two separate markets.

(b) The *Commission* maintains that it did establish, as a matter of fact, the share of imports into the Belgo-Luxembourg Economic Union from other Member States and from non-member countries, as regards both washing machines and dishwashers. It is clear from the figures given that the proportion of imports from other Member States as against the total number of appliances placed on the market was 86% in the case of washing machines and 88% in the case of dishwashers. In any event, it is clear from the minutes of the meeting held on 21 September 1978 by ANSEAU's working party of legal experts that the manufacturers and sole importers of washing machines and dishwashers control approximately 90% of the market.

From the legal point of view, the Commission considers that in order to assess the restriction on competition resulting from barriers to parallel imports, it is necessary to bear in mind that a parallel import also represents potential competition since it presupposes a substantial difference in prices between one Member State and another and particularly keen competition. Parallel imports exert an influence on the market inasmuch as they force a comparison between prices on protected markets and on other markets so that goods may be offered for sale on protected markets at lower prices even though parallel imports constitute only a very small proportion of the markets.

The Commission observes that, in order to establish that trade between Member States is affected, it is sufficient to establish that the agreement, decision or concerted practice is capable of having the effect in question. In this case, it is clear that the Agreement covers a considerable proportion of the market and that its purpose is to eliminate parallel imports. The effect of such an agreement on trade is appreciable, unless it is concluded between undertakings controlling only a negligible share of the market.

C — Submissions concerning the non-application of Article 85 (3) of the Treaty

This submission, which is relied upon by all the applicants, is based on the view that the Agreement was exempt from the requirement of notification under Article 4 (2) of Regulation No 17. In those circumstances the Commission could not have refused to apply Article 85(3) on the ground that the Agreement had not been notified in accordance with Article 4 (1) or 5 (1) of that regulation. The Decision also infringes Article 190 of the Treaty inasmuch as it does not state the

reasons for which the Agreement was incapable of qualifying for exemption under Article 85 (3) of the Treaty.

(a) *All the applicants* point out, in that regard, that the Agreement satisfies the two conditions laid down by Article 4 (2) of Regulation No 17 for exemption from the requirement of notification, namely that the only parties to the agreement must be undertakings from one Member State and that the agreement must not relate either to imports or to exports between Member States.

As regards the first condition, the applicants acknowledge that the subsidiary of a company incorporated under German law, namely the Belgian establishment BBC Hausgeräte GmbH, is also a party to the Agreement. However they contend that although that establishment has no legal personality of its own, it must be regarded as an undertaking, in view of the fact that it enjoys considerable autonomy from its German parent company. In any event the Commission itself treated it as an undertaking by referring to "BBC Hausgeräte GmbH (succ. belge)" when it notified both the statement of objections and the Decision to it.

In that connection the applicants observe that Article 4 (2) of Regulation No 17 is concerned not with the legal form selected but with the question whether or not a subsidiary constitutes an economic entity in its own right. The Court adopted that position in its judgment of 31 October 1974 in Case 15/74 *Centrafarm* [1974] ECR 1147 when it held that the undertakings covered by Article 85 of the EEC Treaty need not necessarily correspond to legal persons under national law.

As regards the condition that the Agreement must not relate either to imports or to exports between Member States, all the applicants contend essentially that the Agreement is a purely national agreement and is therefore exempt from the obligation regarding notification without there being any need to consider the applicability of the conditions prescribed by Article 85 (3).

More specifically, *IAZ* (Case 96/82), *Disem-Andries* (Case 97/82), *Bauknecht* (Case 98/82), *Artsel* (Case 99/82), *Zander* (Case 100/82), *ASOGEM* (Case 101/82), *van Assche* (Case 102/82), *Despagne* (Case 104/82) and *ACEC* (Case 105/82) consider that in its Decision the Commission is wrong to treat a strong likelihood of exemption under Article 85 (3) of the Treaty as a condition for exemption from the requirement of notification contained in Article 4 (2) of Regulation No 17. Such an interpretation would seriously undermine legal certainty since it would then be incumbent on the contracting parties themselves to assess whether and, if so, to what extent an agreement is likely to qualify for exemption.

The above-mentioned applicants add that even on the assumption that the Agreement affects trade between Member States by restricting the right to obtain the labels only to manufacturers and sole importers, it does not follow that it "relates either to imports or exports between Member States" within the meaning of Article 4 (2) of Regulation No 17. In any event, the Decision infringes Article 190 of the Treaty since it does not state in sufficient detail the reasons on which the Commission bases its view that the Agreement relates to imports or exports between Member States.

Miele (Case 101/82) is also of the opinion that the meaning of the expression "do not relate either to imports or to exports between Member States" is narrower than that of the expression "affect trade between Member States". That position was adopted by the Court in its judgment of 18 March 1970 in Case 43/69 *Bilger* [1970] ECR 127.

Miele rejects the Commission's argument to the effect that Article 83 (3) of the Treaty is inapplicable on the ground that the Agreement tends to isolate the Belgian market. That provision, in its view, is applicable in this case on the basis of the following considerations:

By establishing an efficient system for checking conformity, the Agreement contributes to improving production and distribution of goods and to promoting economic progress;

The conformity checks introduced by the Agreement are beneficial to consumers inasmuch as they enable them to avoid the disadvantages inherent in expensive individual checks and therefore represent a considerable improvement for the contracting undertakings and for consumers;

The Agreement does not contain any provision which is not essential to the attainment of the objectives pursued;

Competition is not eliminated since conformity checks have only a negligible effect on parallel imports.

ANSEAU (Case 108/82) refers to the Court's judgment of 3 February 1976 in Case 63/75 *Roubaix-Wattrelos* [1976] ECR 111. According to that judgment, agreements which envisage the marketing of goods solely within the territory of the Member State to whose law the undertakings are subject are exempted from the requirement of notification, even if the goods in question have at a former stage been imported from another Member State.

ANSEAU adds that the purpose of Article 4 (2) of Regulation No 17 is to provide the undertakings concerned with clear and precise criteria by means of which they may easily ascertain whether or not an agreement must be notified. It follows that the expression "do not relate either to imports or to exports between Member States" must be interpreted as referring to a direct and obvious connection with the imports or exports.

(b) The *Commission* observes in the first place that the Agreement was not exempt from the requirement of notification contained in Article 4 (2) of Regulation No 17 on the grounds that it relates to imports between Member States and that undertakings from different Member States are parties to it.

The phrase "do not relate either to imports or to exports between Member States" must be interpreted by reference to the purpose of the above-mentioned provision, namely the simplification of administrative formalities in the case of agreements, decisions and concerted practices of a less harmful nature. The Agreement does not satisfy that criterion since its aim is to eliminate parallel imports. It therefore constitutes a serious infringement of Article 85 (1) of the Treaty and cannot be regarded as qualifying for exemption from the prohibition on the basis of Article 85 (3) of the Treaty.

Nor does the Agreement satisfy the criterion that all the undertakings which are parties to an agreement must be from one Member State, since one of the

parties is BBC Hausgeräte GmbH, a company incorporated under German law. The Commission observes, in that regard, that the concept of legal personality is implicit in the concept of "an undertaking"; if it were otherwise, no undertaking could enter into an agreement. More specifically, under Belgian law a subsidiary without legal personality cannot enter into an agreement without thereby committing the company in its entirety. The applicant's interpretation of the *Centrafarm* judgment is incorrect since the Court stated quite unequivocally in that judgment that a parent company and a subsidiary are separate undertakings, even if they form an economic unit.

As regards the non-application of Article 85 (3) of the Treaty the Commission points out that the conditions for exemption prescribed by that provision have not been satisfied. The Agreement tends to isolate the Belgian market in a manner which is incompatible with the fundamental principles of the common market and it does not therefore contribute to improving the production or distribution of goods or to promoting technical or economic progress. Furthermore, it does not allow consumers a fair share of the resulting benefit but, on the contrary, helps to maintain a situation in which competition is eliminated in respect of a substantial part of the products in question.

D — Submissions concerning the imposition of fines

The applicants challenge the imposition of fines under the following three headings:

(1) Prohibition of the imposition of a fine in respect of agreements exempt from the requirement of notification

(2) Absence of intent or negligence

(3) Incorrect calculation of the amount of the fine.

(1) Prohibition of the imposition of a fine in respect of agreements exempt from the requirement of notification

(a) *All the applicants with the exception of Miele* (Case 110/82) contend that an agreement which, according to their aforementioned argument, is exempt from the obligation regarding notification cannot give rise to the imposition of fine. Alternatively, the applicants claim that they had a fully legitimate expectation that the Commission would not impose a fine on them in this case.

In that regard all the applicants, with the exception of Miele, maintain that Article 15 (5) of Regulation No 17 protects new agreements against the imposition of fines from the date of their notification. Logically, that protection should also extend to agreements which Article 4 (2) of Regulation No 17 exempts from the requirement of notification — even where it subsequently becomes apparent that they cannot qualify for exemption under Article 85 (3) of the Treaty — since, generally speaking, satisfaction of the conditions prescribed by that provision constitutes an indication that the agreements in question are less harmful from the point of view of the objectives of the Treaty.

The above-mentioned applicants add that their interpretation is also consistent with the principle of legal certainty and with the underlying objectives of Article 4 (2) of Regulation No 17 which are aimed at the simplification of administrative formalities; were it not so, undertakings wishing to ensure legal certainty would be obliged to resort systematically to optional notification.

(b) The *Commission* emphasizes, in the first place, that contrary to the view expressed by the applicants, the Agreement is not exempt from the requirement of notification. Accordingly, this is merely a secondary submission.

The Commisision subsequently puts forward the argument that a fine for the infringement of Article 85 (1) of the Treaty may be imposed in the case of a agreement which has not been notified but which is exempt from that formality, if the conditions prescribed by Article 85 (3) are not satisfied.

In that connection, it relies on the scheme of Regulation No 17. The extension by analogy of the exception contained in Article 15 (5) to agreements exempt from the requirement of notification is contrary to the scheme of the regulation. Immunity from fines is granted in respect of agreements which have been notified because notification involves a serious risk for the parties who bring their agreement to the Commission's notice and thus lay themselves open to the possibility of a decision prohibiting the agreement. However, in the case of an agreement which is exempt from the requirement of notification and which is not in fact noticed, the parties do not lay themselves open to the same risk.

In that regard, the Commission refers to the last part of Article 4 of Regulation No 17 which provides for optional notification of agreements which are exempt from the requirement of notification. Notification may be seen as having two objectives, in the first place, that of enabling the parties to obtain exemption under Article 85 (3) and, secondly, that of conferring immunity from fines. However, in the case of optional notification, only the second objective is relevant. It follows that an agreement which has not been notified under the last part of Article 4 is not entitled to immunity from fines.

That conclusion is supported by Article 15 (6) of Regulation No 17, according to which immunity from fines conferred on an agreement referred to in paragraph (5) of that article may be withdrawn by an interim decision. However, the Commission is unable to withdraw immunity in the case of agreements which have not been notified since such agreements are not referred to in paragraph (5) and the Commission can take formal note of their existence only in exceptional circumstances.

Furthermore, that applicants cannot rely on the contention that they acted in good faith in order to obtain immunity from a fine since the Commission has always maintained the attitude set out above and has never given the impression that agreements exempt from notification cannot attract fines.

(c) The applicants *IAZ, Disem-Andries, Bauknecht, Artsel, Zanker, ASOGEM, van Assche, Despagne* and *ACEC* challenge the Commission's argument to the effect that Article 15 (6) of Regulation No 17 must be interpreted as empowering the Commission to withdraw immunity from fines by an interim decision also in the case of agreements which are exempt from notification, on the ground that such agreements must be assimilated to agreements which have been notified. The Commission's argument to the effect that it cannot take cognizance of an agreement which has not been notified is not relevant since virtually every such agreement is brought to its notice by persons claiming that it is prejudicial to them.

(2) Absence of intent or negligence

(a) *All the applicants* contend that, in the absence of intent or negligence, as provided for by Article 15 (2) of Regu-

lation No 17, no fine may be imposed or, at the very least, the amount thereof must be reduced.

IAZ (Case 96/82), *Disem-Andries* (Case 97/82), *Zanker* (Case 100/82), *Despagne* (Case 104/82) and *ACEC* (Case 105/82) maintain that they were unaware that the purpose or the effect of the Agreement was detrimental to competition and that they did not take any initiative as regards the drawing-up thereof but were virtually compelled to become parties thereto in order to prevent ANSEAU from making difficulties for their customers. The above-mentioned applicants should therefore have been assimilated to the undertakings which became parties to the Agreement after it was signed and which were not fined by the Commission.

More specifically IAZ, Zanker and Despagne observe that they did not attend any of the meetings at which the Agreement was drawn up, in particular those on 25 July, 19 September, 23 October and 26 October 1978. ACEC claims to have been represented only at the meeting held on 23 Ocotober, whilst Disem-Andries maintains that at the meetings held on 19 September and 23 October 1978 it was represented only by "commercial delegates".

Despagne and ACEC add that there are no parallel imports into Belgium of the products sold by them. Despagne points out that it imports appliances of the French brand Thomson which represents only roughly 1% of the market. ACEC observes that the machines which it sells under its own brand are also marketed by third parties under other brands.

Disem-Andries points out that it markets two ranges of products, in the first place, products which are manufactured abroad and delivered to it under its own brand SAM and which cannot therefore be the subject of parallel imports under that brand and, secondly, products of the Brandt brand. It affixed labels to products of the second brand only where it was compelled to do so a result of ANSEAU's intervention.

Miele (Case 110/82) claims not to have acted deliberately but, at most, negligently, since it played a merely passive role in the negotiations which took place. Moreover, it was legitimately entitled to assume that the Agreement, which had been examined by ANSEAU's legal experts, would not be in breach of the rules on competition. Finally, the unilateral declarations made by other contracting parties cannot be attributed to Miele. In that regard, the applicant refers to the Court's judgment of 12 July 1979 in Joined Cases 32 and 36 to 82/78 *BMW Belgium* [1979] ECR 2435 which shows that the intention to commit an infringement must be clearly apparent from the terms of the agreement.

ANSEAU (Case 108/82) denies that there was any gross negligence on its part. Contrary to the Commission's allegations it did not present the Agreement either as mandatory or as binding on third parties. Moreover, it never adopted any measure designed to hinder parallel imports.

Nor can gross negligence on the part of ANSEAU be assumed on account of its failure to take account of the conclusions reached by its working party of legal experts. On the contrary, the working party based its approach on the need for strict checks on production as a whole in

order to prevent non-members, including parallel importers, from importing the goods in question under conditions less strict than those applicable to sole importers. ANSEAU's attendance at the meeting held on 26 October 1978 was not an indication of gross negligence either, since the statements made by the representatives of the parties of the first part to the Agreement cannot be attributed to ANSEAU.

(b) In reply the *Commission* states that, according to the case-law of the Court, barriers to parallel imports considerably restrict trade between Member States and therefore constitute serious infringements of Article 85 of the Treaty. The infringements were committed either intentionally or negligently, within the meaning of Article 15 (2) of Regulation No 17.

The applicants other than ANSEAU acted deliberately, that is to say they were fully aware that the purpose of the Agreement was to restrict competition. As early as the meeting held on 19 September 1978 they were able to learn that the CEG's intention was to obtain preferential treatment for its members over non-members and that the penalty provided for failure to affix the conformity label consisted in disconnection of the appliances from the water-supply system.

It is clear, moreover, from the statement made by the CEG on 23 October 1978 that the Agreement constitutes a weapon against parallel imports. Even if some of the applicants did not attend that meeting, they were able to take note of what had been agreed at the latest on reading the minutes of the meeting. From that moment therefore, they were aware, or at least should have been aware, of the restrictive purpose of the Agreement. In failing to object to the implementation of the Agreement and in signing it, they acted deliberately.

The Commission observes *ex abundanti cautela* that it is of no importance whether or not the applicants were aware of committing an infringement since the Agreement, having regard to its purpose, to the legal and factual context in which it was concluded and to the conduct of the parties, clearly expresses an intention to hinder parallel imports. That is sufficient to establish that the applicants deliberately hindered parallel imports (see the Court's above-mentioned judgment of 12 July 1979 at paragraph 44).

ANSEAU was guilty of gross negligence in concluding the Agreement only with manufacturers and sole importers affiliated to the CEG, the FCAE or UFARAL, although it was fully aware of the intentions of the other contracting parties and although its legal advisers had informed it that an effort must be made to adopt rules for non-members.

The Commission challenges ANSEAU's contention to the effect that the Agreement was not binding on third parties. On the contrary, in its view, it is quite clear that third parties encountered difficulties as a result of the implementation of the Agreement, in view of the fact that ANSEAU undertook to restrict the benefits of the Agreement to manufacturers and sole importers and the supply of conformity labels to the CEG which, for its part, made it clear that it would pass them

on only to manufacturers and sole importers. That conclusion is confirmed by the fact that ANSEAU itself wrote to certain dealers to inform them that appliances imported as parallel imports could not be connected to the water-supply system.

Furthermore, ANSEAU is also guilty of gross negligence in view of its failure to take into account the conclusions reached by its working party of legal experts which pointed out that it was also necessary to take steps to enable non-members to obtain the conformity labels.

It follows that ANSEAU was aware of the need to adopt rules which would not adversely affect parallel imports and that it was also aware that the other contracting parties had no intention of introducing any such rules. In those circumstances ANSEAU was guilty of gross negligence in becoming a party to the Agreement, particularly since its function is to act in the public interest and since the implementation of the proposed rules depended on its cooperation.

(3) Incorrect calculation of the amount of the fine

(a) *All the applicants with the exception of Miele* (Case 110/82) contend that the Commission has not sufficiently adjusted the fines to the individual applicants' economic circumstances.

More specifically, *IAZ* (Case 96/82), *Disem-Andries* (Case 97/82), *Artsel* (Case 99/82), *Zanker* (Case 100/82), *ASOGEM* (Case 101/82), *van Assche* (Case 102/82), *Despagne* (Case 104/82) and *ACEC* (Case 105/82) maintain that the Commission incorrectly applied the criterion which it selected itself for determining the amount of the fine, namely the individual positions of the various undertakings on the relevant market. The fines imposed on them are higher in proportion than those imposed on certain large-scale undertakings.

In that regard, the applicants in question refer to the following figures:

Total sales by members of the CEG in 1980:

Washing machines: 250 103 machines
Dishwashers: 44 485 machines

Market share of the "large-scale undertakings" on which a fine of 76 500 ECU (BFR 3 146 346) was imposed:

Miele
Washing machines: 13.6%
Dishwashers: 17.1%
Total: 15.35%

Philips
Washing machines: 11.9%
Dishwashers: 8.4%
Total: 10.15%

Bosch
Washing machines: 3.5%
Dishwashers: 12.1%
Total: 7.8%

AEG
Washing machines: 6.4%
Dishwashers: 8.4%
Total: 7.4%

IAZ (Case 96/82)

Fine imposed: 38 500 ECU (BFR 1 583 455)

Turnover in 1980:

Total turnover: BFR 800 899 756

Washing machines (21 441 machines): BFR 175 990 255

Dishwashers (2 791 machines): BFR 22 140 717

Applicant's share of CEG members' market:

Washing machines: 8.57%

Dishwashers: 6.29%

Total: 7.43%

Applicant's share of the market, based on the penetration of of the consumer market by the various brands:

Washing machines:

Castor: 1.6%

Zanussi: 2.4%

Zoppas: 1.2%

Dishwashers: not given and therefore negligible.

In conclusion, IAZ contends that the fine imposed upon it is more than 50% of the fines imposed on the large-scale undertakings whose share of the market is from 1.4 to 3 times larger than the applicant's.

Disem-Andries (Case 97/82)

Fine imposed: 38 500 ECU (BFR 1 583 455)

Turnover in 1980:

Total turnover: BFR 446 682 044

Washing machines:

SAM: BFR 54 732 388 (5 532 machines)

Brandt: BFR 20 569 873 (1 532 machines)

Total: BFR 75 302 261 (7 064 machines)

Dishwashers:

SAM: BFR 1 971 528 (160 machines)

Brandt: BFR 5 019 900 (491 machines)

Total: BFR 6 991 428 (651 machines)

Applicant's share of the CEG members' market:

Washing machines: 2.82%

Dishwashers: 1.46%

Applicant's share of the market, based on the penetration of the consumer market by the various brands:

Washing machines (SAM): 1.1%

Diswashers (Brandt): 1.1%

Total: 1.1%

In conclusion, Disem-Andries contends that the fine imposed upon it is more than 50% of the fines imposed on the large-scale undertakings whose share of the market is 8.5 to 14 times larger than the applicant's.

Artsel (Case 99/82)

Fine imposed: 38 500 ECU (BFR 1 583 445)

Turnover in 1980:

Total turnover: BFR 159 520 307

Washing machines:

Candy:	4 196 machines
Fagor:	210 machines
	4 406 machines

Diswashers:

Candy:	210 machines
Fagor	55 machines
	265 machines

Applicant's share of the CEG members' market:

Washing machines: 1.76%

Dishwashers: 0.60%

Applicant's share of the market, based on the penetration of the consumer market by the various brands:

Washing machines:

Candy: 1.3%

Fagor: not given and therefore negligible

Dishwashers:

Candy: 1.1%

Fagor: not given

Total: 1.2%

In conclusion, Artsel contends that fine imposed upon it is more than 50% of the fines imposed on the large-scale undertakings whose share of the market is 6.16 to 12.8 larger than the applicant's.

Zanker (Case 100/82)

Fine imposed: 38 500 ECU (BFR 1 583 455)

Turnover in 1980:

Total turnover: BFR 446 682 044

Washing machines:

of Italian manufacture: BFR 39 045 066 (5 726 machines)

of German manufacture: BFR 103 733 498 (8 686 machines)

Dishwashers: BFR 18 128 378 (1 986 machines)

Applicant's share of the CEG member's market:

Washing machines: 5.76%

Dishwashers: 4.46%

Applicant's share of the market, based on the penetration of the consumer market by the various brands:

Washing machines: 2.1%

Dishwashers: 2.2%

Total: 2.15%

In conclusion, Zanker contends that the fine imposed upon it is more than 50% of the fines imposed on the large-scale undertakings whose share of the market is 1.4 to 3 times larger than the applicant's.

ASOGEM (Case 101/82)

Fine imposed: 9 500 ECU (BFR 390 723)

Turnover in 1980:

Total turnover: BFR 446 682 044

Washing machines:

Zerowatt:	733 machines
Smeg:	114 machines
Aspes:	135 machines
	982 machines

Dishwashers:

Zerowatt:	50 machines
Smeg:	662 machines
Aspes:	20 machines
Sauter:	76 machines
	808 machines

Applicant's share of the CEG members' market:

Washing machines: 0.39%

Dishwashers: 1.80%

Applicant's share of the market, based on the penetration of the consumer market by the various brands: not given and therefore negligible.

In conclusion, ASOGEM contends that the fine imposed upon it is more than one-eighth of the fines imposed on Miele and Philips whose share of the market is 10 to 15 times larger than the applicant's.

van Assche (Case 102/82)

Fine imposed: 38 500 ECU (BFR 1 583 455)

Turnover in 1980:

Total turnover: BFR 183 407 531

Washing machines: BFR 36 441 000 (2 596 machines)

Dishwashers: BFR 13 041 000 (1 195 machines)

Applicant's share of the CEG members' market:

Washing machines: 1.0%

Dishwashers: 2.7%

Applicant's share of the market, based on the penetration of the consumer market by the various brands:

Washing machines:

Constructa: 1.3%

Dishwashers:

Constructa: 1.5%

General Electric: 1.3%

Total: 2.0%

In conclusion, van Assche contends that the fine imposed upon it is more than 50% of the fines imposed on the large undertakings whose share of the market is 3.5 to 7.7 times larger than the applicant's.

Despagne (Case 104/82)

Fine imposed: 9 500 ECU (BFR 390 723)

Turnover in 1980:

Total turnover: BFR 61 199 402

Washing machines: BFR 6 268 847

Dishwashers: BFR 2 760 500

Despagne's share of imports:

As a percentage of total imports of the products in question: 0.29%

As a percentage of imports from other Member States: 0.30%

In conclusion, Despagne contends that the fine imposed upon it is more than one-eighth of the fines imposed on Miele and Philips whose share of the market is 8.4 to 13.6 times larger than that of the applicant's.

ACEC (Case 105/82)

Fine imposed: 76 500 ECU (BFR 3 146 346)

Turnover in 1980:

Washing machines: BFR 66 294 925 (9 437 machines)

Dishwashers: BFR 6 354 600 (534 machines)

Applicant's share of the CEG members' market:

Washing machines: 3.77%

Dishwashers: 1.2%

Total: 2.49%

Applicant's share of the market, based on the penetration of the consumer market by the various brands:

Washing machines: 2.5%

Dishwashers: 2.5%

In conclusion ACEC contends that the fine imposed upon it is equal in amount to the fines imposed on Miele and Philips whose share of the market is at least 4 to 6.5 times larger than the applicant's.

IAZ, Disem-Andries, Bauknecht, Artsel, Zanker, ASOGEM, van Assche, Despagne and *ACEC* point out, moreover, that the Agreement has not so far had an appreciable effect on trade between Member States but is, at most, capable of affecting trade in the future, in the event of a future increase in parallel imports from other Member States. For the calculation of the amount of the fine,

account should be taken of the state of the market in the period in which the infringement was committed.

Disem-Andries adds that the Commission should also have taken account of the undertakings' financial position. As it happened, Disem and Andries incurred considerable losses. The obligation to pay the fine jeopardizes their existence.

ANSEAU (Case 108/82) observes, in addition, that the Commission was wrong to impose a fine upon it equal in amount to the highest fines imposed on the undertakings which took part in the drawing-up of the Agreement. In imposing such a fine, the Commission did not take account of the fact that ANSEAU is a non-profit-making association which does not carry on any economic activity of its own and which has derived no financial benefit under the Agreement. The Commission has also failed to take into account the legislative and economic context in which ANSEAU proposes that the Agreement should be concluded, namely the need to ensure continuity in the provision of a service of general economic interest, subject to compliance with statutory provisions and on satisfactory financial terms.

Finally, the Commission wrongly takes the view that the infringements have not been terminated. In fact ANSEAU remedied the infringement complained of by the Commission as soon as it received the latter's statement of objections by proposing to amend the general Agreement and by perfecting a Special Agreement which was to be concluded with importers not wishing to become parties to the general Agreement.

(b) The *Commission* challenges that argument on the ground that Article 15 (2) of Regulation No 17 requires it to take account only of the gravity and the duration of the infringement in order to determine the amount of the fine. However, it took the following factors into consideration:

The infringement established is particularly serious since barriers to parallel imports are contrary to the fundamental principles of the common market. Moreover, the Agreement controls the major part of the relevant market, all the applicants who entered into the Agreement were fully informed that its object was to restrict competition and the Agreement was implemented.

As far as ANSEAU is concerned, a fine was imposed on it which was equal in amount to the highest fines imposed on the undertakings concerned, on the ground, first of all, that ANSEAU bears most of the responsibility and, secondly, that it is a non-profit-making association. The following considerations were also taken into account: that ANSEAU cooperated in the drawing-up of an agreement counter to the public interest, although ANSEAU's task is precisely to further the public interest, that ANSEAU gave effect to the restrictive purpose of the Agreement and that it derived an operating profit (BFR 1 268 798 in 1981) from the implementation thereof, including BFR 1 007 833 in 1981 from the sale of labels alone.

ANSEAU's contention that the infringement has been terminated is not relevant since the restrictive provisions of

the Agreement entered into force on 1 January 1979 and had still not been revoked when the Decision was adopted.

The Commission observes that in view of the fact that all the applicants other than ANSEAU bear the same degree of responsibility, it would have been justifiable to impose identical fines on them. However, the Commission also took account of the foreseeable consequences of the Agreement for the applicants and divided them into three groups on the basis of their individual position on the market and of the extent to which they expected to benefit under the Agreement. In that regard it ensured a close correlation between an undertaking's share of the market and the amount of the fine, as is clear even from the statistics relied upon by the applicants.

However, the Commission points out that it does not regard itself as having been bound to effect such a subdivision and that it is by no means required to impose fines which are in direct proportion to the undertakings' share of the market. It did not take account of the undertakings' financial circumstances since that would have conferred an unjustified competitive advantage on undertakings less suited to the conditions of the market and would induce them to strengthen their slim chances of survival by conduct detrimental to competition.

(c) ANSEAU challenges the relevance of the figures put forward by the Commission relating to the excess of income over expenditure resulting from its activities and to the proceeds from the sale of conformity labels. In view of the costs involved in carrying out conformity checks, the sale of the labels produced in 1981 a net income of only BFR 59 128. However, net income for the financial year (BFR 1 339 892 in 1981) represents only a notional figure for accounting purposes because ANSEAU is a non-profit-making association. The budget figures for 1982 show, moreover, a deficit of BFR 683 500.

IV — Answer to a question put by the Court

At the Court's request, the *Commission* outlined in greater detail the criteria applied for the calculation of the fines, amounting to 9 500 ECU, 38 500 ECU and 76 500 ECU.

In the first place, it calculated the total amount of the fine to be imposed on all the undertakings which took part in the drawing-up of the Agreement. The total amount was fixed at 1.5% of the value (67 500 000 ECU) of imports into Belgium of washing machines and dishwashers from other Member States of the Community in 1980, namely 1 015 000 ECU.

The amount of the individual fines was adjusted according to the position of the undertakings on the relevant market and according to the benefits which they expected to derive under the Agreement. In the circumstances, the criteria adopted for the purposes of that adjustment was the number of ANSEAU labels ordered by the undertakings for the whole of 1979 and 1980. In that regard, the Commission divided the undertakings into three groups, according to whether in the material period they ordered:

(a) fewer than 10 000 labels;

(b) between 10 000 and 50 000 labels;

(c) more than 50 000 labels.

ANSEAU was classified with the undertaking of the third category.

The Commission then calculated the fines so as to ensure that the (rounded-off) amounts of the fines imposed on the undertakings in the second and third groups were four and eight times greater respectively than the (rounded-off) amounts of the fine imposed on each of the undertakings of the first group.

V — Oral procedure

Oral argument was presented by the parties at the sitting on 3 May 1983.

The Advocate General delivered his opinion at the sitting on 29 June 1983.

Decision

1 By applications lodged at the Court Registry on 22 and 24 March 1982 the applicants brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission Decision of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty (No IV/29.995 — NAVEWA-ANSEAU) (Official Journal, L 167, p. 39) (hereinafter referred to as "the Decision") was void.

2 The contested Decision relates to the "Agreement concerning the Use of the NAVEWA-ANSEAU Conformity Label for Washing Machines and Dishwashers" (hereinafter referred to as "the Agreement") concluded on 13 December 1978 between manufacturers and sole importers affiliated to certain trade organizations in Belgium, namely the Communauté de l'Électricité [Electricity Board, hereinafter referred to as "the CEG"], the Fédération du Commerce de l'Appareillage Électrique [Federation of Traders in Electrical Appliances, hereinafter referred to as "the FCAE"] and the Union des Fournisseurs des Artisans de l'Alimentation [Union of Catering Suppliers, hereinafter referred to as "UFARAL"] on the one hand, and the Association Nationale des Services d'Eau [National Association of Water Supplies, hereinafter referred to as "ANSEAU"], a non-profit-making association composed of 31 water-supply undertakings, on the other hand.

3 The purpose of the Agreement is to monitor the conformity of washing machines and dishwashers with the technical requirements prescribed for the preservation of the quality of drinking water by the Royal Decrees of 24 April 1965 and 6 May 1966. Those decrees provide that only appliances which are equipped with certain devices and which satisfy the relevant

Belgian standards may be connected to the water-supply system. The water-supply undertakings whose common interests are represented by ANSEAU are responsible for ensuring compliance with those rules.

4 The Agreement, which replaced a system of checks based on lists setting out the types of appliances recognized as conforming to the requirements of the aforesaid decrees, provides for checks to be carried out on appliances by the use of conformity labels. Under the Agreement, conformity labels are to be distributed by the CEG which, for those purposes, acts as the representative of all the contracting parties. For its part, ANSEAU is required by the Agreement to ensure that the machines placed in commercial distribution bear the conformity label. Where ANSEAU establishes that a machine does not bear the conformity label, it must inform the dealer in question that the machine does not satisfy the requirements for connection to the water-supply system. ANSEAU is also bound to advise its members to take account of the terms and purpose of the Agreement and to inform consumers thereof. Others may become parties to the Agreement, provided that they are also manufacturers or sole importers.

5 The Agreement was implemented in such a way that the CEG, which alone was authorized to issue the labels, supplied them only to official manufacturers and importers and requested dealers wishing to obtain the labels either to produce proof of their status as sole importers or to appoint a sole importer in Belgium. For its part, ANSEAU played an active part in supervising the affixing of labels and drew the attention of dealers and consumers to the possible consequences of failure to affix them. ANSEAU also provided technical assistance for the carrying out of conformity checks on machines not bearing the labels on conditions which were far less favourable to non-members than to the parties to the Agreement.

6 On 15 December 1980 the Commission sent a statement of objections to the parties to the Agreement indicating its intention to establish that the purpose and effect of the Agreement "were to make impossible or at least more difficult parallel imports into Belgium of washing machines and dishwashers".

7 On 17 December 1981 the Commission adopted the Decision which is the subject-matter of these proceedings. That Decision declares that certain provisions of the Agreement of 13 December 1978

"excluding the possibility for importers other than sole importers to obtain a conformity check for the washing-machines and dishwashers which they import into Belgium under conditions which are not discriminatory by comparison with those which apply to manufacturers and sole importers, constitute infringements of Article 85 (1) of the Treaty".

It provides that the parties to the Agreement are to bring to an end the infringements established and imposes penalties on those parties which took part in the drawing-up of the Agreement. The fines imposed on the applicants are as follows: 9 500 ECU in the case of ASOGEM (Case 101/82) and Despagne (Case 104/82); 38 500 ECU in the case of IAZ (Case 96/82), Disem-Andries (Case 97/82), Artsel (Case 99/82), Zanker (Case 100/82) and van Assche (Case 102/82); and 76 500 ECU in the case of Bauknecht (Case 105/82), ACEC (Case 105/82), ANSEAU (Case 108/82) and Miele (Case 110/82).

8 In support of their applications, the applicants rely on a number of partially concurrent submissions which are grouped together below for consideration.

Infringement of the rights of the defence and of essential procedural requirements

9 All the applicants except Miele (Case 110/82) contend first of all that the Commission infringed the rights of the defence and essential procedural requirements, in particular Article 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-64, p. 47) which provides that, in its decisions, the Commission is to deal only with those objections raised against the addressees in respect of which they have been afforded an opportunity of making known their views.

10 In support of this submission, the applicants contend that in its statement of objections the Commission attributed to the Agreement the purpose and effect of preventing or restricting parallel imports, whilst in its Decision it referred solely to the purpose of the Agreement as being to establish discriminatory treatment of importers other than sole importers as against manufacturers and sole importers. Therefore the Decision was, it is alleged, based on an objection which was not contained in the statement of objections and in respect of which the applicants consequently were not afforded an opportunity of making known their views.

11 This submission must be dismissed. A detailed examination of the statement of objections reveals clearly that its purpose is to demonstrate the discriminatory treatment of parallel importers as against sole importers. In examining the applicants' conduct in the light of Article 85 of the EEC Treaty, the Commission expressly states, in concluding that the Agreement restricts competition, that it also has as its purpose to prevent or restrict parallel imports of washing machines and dishwashers. Accordingly, there is no conflict between the statement of objections and the Decision.

Breach of the principles of good administration

12 ANSEAU (Case 108/82) contends in the first place that the Commission did not ascertain the extent to which the parties to the Agreement remedied the infringements complained of in the statement of objections and, secondly, that it made the decision public before officially notifying it to the parties concerned.

13 As regards the first contention, ANSEAU points out that, at the beginning of 1981, it sent the Commission draft amendments to the Agreement and a draft "Special Agreement". The latter agreement would also have enabled importers who were not parties to the contested Agreement to obtain conformity labels on condition *inter alia* that they paid a given amount by way of guarantee. The final draft of the "Special Agreement" was sent to the Commission by letter of 15 June 1981 but the Commission adopted the contested Decision six months later without replying to the letter.

14 The Commission, whilst acknowledging the truth of the facts alleged by ANSEAU, considers that it was justified in not following up the letter of 15 June 1981 since it had reason to doubt whether ANSEAU genuinely intended to amend the Agreement. By letter of 19 May 1981 the Commission raised certain objections to the draft "Special Agreement" which were not taken into account in the final version of the draft. In any event, the Special Agreement entered into force only after the adoption of the Decision.

15 In that regard, it must in the first place be observed that the purpose of the preliminary administrative procedure is to prepare the way for the Commission's decision concerning the infringement of the competition rules although that procedure also provides the undertakings concerned with an opportunity to bring the practices complained of into line with the rules of the Treaty. Admittedly, it is regrettable and inconsistent with the requirements of good administration that the Commission did not react to the draft "Special Agreement" which was submitted to it precisely for the purpose of effecting such an alignment. However, it is common ground that the draft did not take account of all the Commission's objections. In those circumstances, the fact that the Commission did not at that stage continue the correspondence with the applicant cannot be regarded as a procedural defect vitiating the legality of the Decison.

16 As regards the applicant's complaint that the Commission made the Decision public before notifying it to the addressees, it must be stated that, however regrettable such conduct might be, the Decision had already been adopted and its validity cannot be affected by acts subsequent to its adoption.

17 Therefore that submission also must be dismissed.

Applicability of Article 85 (1) of the Treaty

18 ANSEAU (Case 108/82) and Miele (Case 110/82) contend, moreover, that the Agreement does not exhibit the characteristics constituting an infringement of Article 85 (1) of the Treaty.

19 In the first place, ANSEAU observes that there can be no question of an "agreement between undertakings" within the meaning of the above-mentioned provision. ANSEAU is an association of undertakings which does not itself carry on any economic activity. Article 85 (1) of the Treaty is therefore applicable to it only in so far as its member undertakings are legally bound by the Agreement. In fact they are not since, under both the Agreement and the statutes of ANSEAU, the latter is empowered only to make recommendations.

20 As the Court has already held, in its judgments of 15 May 1975 in Case 71/74 *(Frubo* [1975] ECR 563) and of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *van Landewyck* [1980] ECR 3125, Article 85 (1) of the Treaty applies also to associations of undertakings in so far as their own activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. It is clear particularly from the latter judgment that a recommendation, even if it has no binding effect, cannot escape Article 85 (1) where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question.

21 In the light of that case-law, it must be emphasized, as the Commission has pertinently stated, that the recommendations made by ANSEAU under the Agreement to the effect that its member undertakings were to take account of the terms and of the purpose of the Agreement and were to inform consumers thereof, in fact produced a situation in which the water-supply undertakings in the built-up areas of Brussels, Antwerp and Ghent carried out checks on consumers' premises to determine whether machines connected to the water-supply system were provided with a conformity label. Those recommendations therefore determined the conduct of a large number of ANSEAU's members and consequently exerted an appreciable influence on competition.

22 Moreover, ANSEAU and Miele contend that in its Decision the Commission has not provided adequate legal proof that the purpose of the Agreement was to restrict competition. In that regard they maintain first that the true purpose of the Agreement was to ensure that conformity checks were carried out and to reduce the administrative costs involved and secondly that not all the parties intended to restrict competition.

23 As regards the first part of the applicant's argument, it must be stated that the Agreement, regard being had to its content, its origin and the circumstances in which it was implemented, clearly expresses the intention of treating parallel imports less favourably than official imports with a view to hindering the former.

24 That conclusion stems, in the first place, from the fact that the Agreement is based on a single system of checks involving the use of conformity labels which replaced an earlier system of checks based on lists of authorized appliances, and that only manufacturers and sole importers may obtain those labels. That conclusion is also based on certain statements made by the CEG and by the FCAE at the preliminary meetings. During those meetings, the CEG stated that it wished to obtain for its members preferential treatment as against non-members and that it regarded the proposed Agreement as a "weapon" against parallel imports. Moreover, the FCAE emphasized that the disadvantage of the system of listing authorized appliances was that parallel importers also benefited from the verification obtained by the official importer without having to share in the costs. Finally, the intention of hindering parallel imports is also apparent from the steps taken by the CEG and ANSEAU after the conclusion of the Agreement in order to put dealers and consumers on their guard against the sale and purchase respectively of appliances not bearing a conformity label.

25 Therefore, the purpose of the Agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties, is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks. That finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the Agreement to restrict competition.

26 ANSEAU and Miele also contend that, contrary to the findings set out in the Decision, the Agreements had no restrictive effect on competition.

27 It is clear from the foregoing considerations that the Agreement is of such a kind as to make parallel imports of washing machines and dishwashers more difficult, if not impossible, and that it is therefore capable of affecting trade between Member States. In view of the fact that, according to the observations submitted in these proceedings, signatory undertakings' share of the market is approximately 90% and is therefore very considerable, the conclusion must be drawn that the Agreement had a restrictive effect on competition.

28 It also follows from those considerations that, contrary to the objections raised by ANSEAU, the Agreement affects intra-Community trade to an extent which must be regarded as appreciable.

29 This group of submissions must therefore also be dismissed.

Non-application of Article 85 (3) of the Treaty

30 All the applicants contend that the Commission was not entitled to refuse to apply Article 85 (3) of the Treaty on the ground that the Agreement had not been notified in accordance with Article 4 (1) of Regulation No 17. In support of that submission, they claim that the Agreement was exempt from the requirement of notification, pursuant to Article 4 (2) of that regulation, on the ground that it was purely a national agreement to which only undertakings from one Member State were parties and which, furthermore, did not relate either to imports or to exports between Member States.

31 In the Commission's view, the last-mentioned condition must be interpreted by reference to the purpose of the provision in question, namely the simplification of administrative formalities in the case of agreements, decisions and concerted practices which are less harmful from the point of view of the objectives of Article 85 of the Treaty. That does not apply in the case of the Agreement since its purpose is to eliminate parallel imports. Furthermore, the Commission denies that the Agreement is exclusively national in character, in view of the fact that one of the parties thereto is a company incorporated under German law, BBC Hausgeräte GmbH, which has only one dependent subsidiary in Belgium.

32 It must be stated that, according to Article 4 (1) of Regulation No 17, agreements which come into existence after the entry into force of the regu-

lation and in respect of which the parties seek to rely on the provisions of Article 85 (3) must be notified to the Commission failing which no decision in application of that article may be taken. However, Article 4 (2) of the regulation exempts agreements from the requirement of notification where the only parties thereto are undertakings from one Member State and the agreements do not relate either to imports or to exports between Member States.

33 It is necessary in the first place therefore, to ascertain whether the two conditions for the application of Article 4 (2) of Regulation No 17 are met, since, if either of those conditions is not satisfied, the Agreement cannot qualify for exemption under Article 85 (3) unless it has been notified in accordance with Article 4 (1) of the said regulation.

34 In that regard it is sufficient to state that the Agreement does not satisfy the condition that it must not relate either to imports or to exports between Member States. As the Court held in its judgment of 3 February 1976 in Case 63/75 *Fonderies Roubaix-Wattrelos* [1976] ECR 111, that condition must be interpreted with reference to the structure of Article 4 and its aim of simplifying administrative procedure, which it pursues by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85 (1), appear in general, by reason of their special characteristics, to be less harmful from the point of view of the objectives of that provision.

35 In this case, the purpose of the Agreement is, as has been established above, appreciably to restrict parallel imports into Belgium of washing machines and dishwashers and it thus tends to isolate the Belgian market in a manner which is incompatible with the fundamental principles of the common market. The Agreement therefore concerns imports to an extent which cannot be regarded as negligible. Accordingly, it cannot be granted exemption from the requirement of notification prescribed by Article 4 (2) of Regulation No 17 and cannot, in default of notification in conformity with Article 4 (1), qualify for exemption under Article 85 (3) of the Treaty.

36 In that connection the applicants also maintain that the Decision is in breach of Article 190 of the Treaty, inasmuch as it does not state in sufficient detail to comply with the law the reasons for the Commission's refusal to apply Article 85 (3) of the Treaty.

37 That submission cannot be accepted either. According to the established case-law of the Court, the requirement that a decision adversely affecting a person should state the reasons on which it is based, laid down by Article 190 of the EEC Treaty, is intended to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by a defect which will allow its legality to be contested. Accordingly, as the Court held in its judgment of 29 October 1980 in the *van Landewyck* case, cited above, that requirement is satisfied where the decision refers to the matters of fact and of law on which the legal justification for the measure is based and to the considerations which led to its adoption.

38 That requirement is satisfied in the present case. It is clear from the reasons stated in the Decision that Article 85 (3) could not be applied since the Agreement, which was subject to the requirement of notification for the reasons set out above, had not been notified in accordance with Article 4 (1) of Regulation No 17 and that, in any event, the conditions prescribed by Article 85 (3) itself were not satisfied.

39 These submissions must therefore also be rejected.

The fines

40 As regards the fines imposed, all the applicants contend in the first place that an agreement which is exempt from the requirement of notification by virtue of Article 4 (2) of Regulation No 17 cannot give rise to the imposition of fines. At the very least, it is claimed, the principle of the protection of legitimate expectation precludes the imposition of fines in this case, since it was the Commission itself which gave the impression that no fines could be imposed in respect of agreements exempt from the requirement of notification.

41 In that regard, it is sufficient to recall that, as has been stated above, the Agreement was not exempt from the requirement of notification.

42 Secondly, the applicants claim that a fine should not have been imposed on them or, at the very least, that the amount of the fine should be reduced since, contrary to the findings contained in the Decision, the infringement

was not committed either deliberately or through gross negligence. More specifically, the applicants other than ANSEAU claim not to have acted deliberately, contrary to the view stated in the decision, since they were unaware that the purpose of the Agreement was detrimental to competition and, moreover, they played a merely passive role or took no part whatsoever in the drawing-up of the Agreement. For its part, ANSEAU denies that it was guilty of gross negligence, as stated in the Decision, since the purpose of the Agreement, to restrain competition, does not stem from the Agreement itself and ANSEAU was unaware of the intentions of the other contracting parties.

43 In reply the Commission states that the applicants were aware, or at least should have been aware, that the purpose of the Agreement was to restrict competition, since they took or should have taken note of the statements made, amongst others, by the CEG during the preliminary meetings, at the latest on reading the minutes of those meetings.

44 It must be pointed out that, under Article 15 (2) of Regulation No 17, the Commission may by decision impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe the rules on competition contained in the Treaty.

45 In this case, it is clear from the foregoing considerations that all the parties which took part in the drawing-up of the Agreement were aware that the Agreement as drafted, regard being had to its terms, to the legal and economic context in which it was concluded and to the conduct of the parties, had as its purpose to restrict parallel imports and that it was capable of affecting trade between Member States, inasmuch as it was actually capable of making parallel imports more difficult, if not impossible. By signing the Agreement in full knowledge of those circumstances, they therefore acted deliberately, whether or not they were aware that, in so doing, they were infringing the prohibition laid down by Article 85 (1) of the Treaty.

46 That conclusion cannot be invalidated by the argument, relied upon by certain of the applicants, that they did not attend all of the negotiations

which resulted in the conclusion of the Agreement, since the essential content of those negotiations was clearly apparent from the records of the negotiations which were available to all the parties.

47 In those circumstances, the argument advanced by the applicants to the effect that the infringement was not committed deliberately or at least through gross negligence, cannot be accepted, with the result that this submission too must be dismissed.

48 Thirdly, all the applicants with the exception of Miele contend that the amount of the fine was incorrectly calculated.

49 More specifically, all the applicants other than ANSEAU contend that the Commission's assessment of the gravity of the infringement was incorrect as regards both the harmfulness of the Agreement and the share of responsibility borne by each of the undertakings concerned. In support of that argument, they rely, in the first place, on a substantial divergence between the amount of the fine and the market shares of the individual undertakings and, secondly, on the assertion that the Agreement has not so far had an appreciable effect on trade between Member States.

50 It is clear from the statement of reasons contained in the Decision that the Commission, in calculating the amount of the fines, considered first of all that the infringement committed was a serious one inasmuch as it created barriers to parallel imports and thereby established artificial barriers within the Community. In fixing the individual fines at 9 500 ECU, 38 500 ECU and 76 500 ECU, the Commission took as a basis, according to the reasons stated in the Decision, the individual positions of the undertakings on the relevant market, proceeding on the assumption that all the undertakings which took part in the drawing-up of the Agreement bore the same degree of responsibility precisely because of their participation in the Agreement.

51 In the proceedings before the Court, the Commission pointed out that, for the calculation of the amount of the fines, it initially determined the total amount of the fines to be imposed as a whole on the undertakings to be fined applying a rate of 1.5% to the value of imports into Belgium of washing machines and dishwashers from other Member States. The total

amount was subsequently shared amongst the undertakings concerned which, for those purpose, were divided into three groups, according to the number of conformity labels which they had orderd from ANSEAU.

52 As the Court has held in its judgment of 7 June 1983 in Joined Cases 100 to 103/80 *Pioneer and Others* [1983] ECR 1825, in assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market. In its judgment of 15 July 1970 in Case 45/69 *Boehringer Mannheim* [1970] ECR 769, the Court also held that the prior fixing of a maximum aggregate amount for the fine, fixed in relation to the seriousness of the danger which the agreement represented to competition and trade in the common market, was not incompatible with the individual fixing of the penalty.

53 In the light of that case-law, the Commission cannot be criticized, regard being had to the harmfulness of the Agreement, for first calculating the total amount of the fines to be imposed by applying the percentage selected for those purposes to the value of the imports in question. The Commission was also justified in subsequently apportioning the total amount amongst the undertakings to be fined by subdividing them into groups according to the number of labels which they had ordered. The arguments to the effect that the Commission's assessment of the gravity of the infringement was incorrect must therefore be rejected.

54 Furthermore, Disem-Andries maintains that the Commission made a mistake in its assessment inasmuch as, in calculating the amount of the fine imposed on it, it did not take account of its adverse financial situation.

55 That argument cannot be accepted either. As the Commission has rightly observed, recognition of such an obligation would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.

56 For its part, ANSEAU contends that no account was taken in the Decision of the fact that it does not carry on any economic activity of its own, that it did not derive any financial benefit from the implementation of the Agreement and, moreover, that the infringement established was terminated by the date on which the decision was adopted.

57 In that regard it is clear from the statement of reasons contained in the Decision that the fine imposed on ANSEAU, being equal in amount to the highest fines imposed on the undertakings which were parties to the Agreement, was fixed by reference to the fact that on the one hand ANSEAU bore most of the responsibility, but that on the other it was necessary to take account of the fact that it was a non-profit-making association.

58 That approach must be regarded as justified, notwithstanding the fact that ANSEAU is a non-profit-making association, particularly in view of the fundamental role which it played in the drawing-up and implementation of the Agreement.

59 Finally, as regards the argument to the effect that, contrary to the findings contained in the Decision, the infringement had ceased by the date on which the Decision was adopted, it is sufficient to recall that no amendment to the Agreement which would have been capable of remedying the infringement was implemented prior to the adoption of the decision.

60 That submission also must therefore be rejected.

61 Since the applicants have not been successful in any of their submissions, all the applications must be dismissed as unfounded.

Costs

62 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, where there are several unsuccessful parties the Court may decide how the costs are to be shared.

63 As the applicants have failed in their submissions, they must be ordered to pay the costs. Each applicant shall bear a share of the Commission's costs corresponding to the amount of the fine imposed upon it expressed as a percentage of the total amount of the fines imposed upon the applicants as whole.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to pay the costs in such a way that each applicant shall bear a share of the Commission's costs corresponding to the amount of the fine imposed upon it expressed as a percentage of the total amount of the fines imposed upon the applicants as a whole.**

Mertens de Wilmars Koopmans Bahlmann

Pescatore Mackenzie Stuart O'Keeffe

Bosco Due Everling Kakouris

Delivered in open court in Luxembourg on 8 November 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

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Facts and Issues

Decision

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 29 JUNE 1983 [1]

Mr President,
Members of the Court,

In the 11 applications now before the Court, the applicants seek a declaration that the Commission Decision of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal, 1982, L 167, p. 39) (hereinafter referred to as "the Decision") is void. In their applications against that Decision, the applicants rely on eight submissions, each of which I intend to consider in turn below. Before I do so, I shall briefly summarize the main facts of the case.

1. The principal facts

The Nationale Vereniging der Waterleidingsbedrijven [National Association of Water Suppliers, hereinafter referred to as "NAVEWA"], which has its registered office in Brussels, is a non-profit-making association consisting of 31 water-supply undertakings. Under Royal Decrees of 1965 and 1966, those undertakings were entrusted with responsibility for the quality of the water supplied by them. Their common interests are safeguarded by NAVEWA which, with that end in view, amongst other things, also carries out conformity checks to determine whether washing machines and dishwashers which are to be connected to the water-supply network satisfy the requirements for the prevention of contamination of drinking water which are prescribed for those appliances by the Royal Decrees just mentioned.

Those checks were developed in three stages after 1965. Originally, they were carried out on the premises of the consumer who had purchased the appliances. Subsequently, they were transferred to the manufacturer's or the importer's premises and effected by the use of conformity lists setting out the authorized types of appliances. Later, that method too came to be regarded as unwieldy, which prompted NAVEWA to introduce a system of conformity labels. Under that system, the conformity check was to be carried out by the manufacturer or the importer, and the labels supplied by NAVEWA were affixed to the appliances as proof of conformity. NAVEWA was to confine itself to

1 — Translated from the Dutch.