

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 6 January 1982

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.748—AEG-Telefunken)

(Only the German text is authentic)

(82/267/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 ⁽¹⁾, and in particular Articles 3 and 15 (2) thereof,

Having regard to the notification made to the Commission on 6 November 1973 by Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken, in accordance with Article 4 of Regulation No 17, concerning the distribution agreement for Telefunken branded products,

Having regard to the Commission Decision of 29 May 1980 to initiate the procedure under Article 9 (2) of Regulation No 17,

Having heard the undertaking concerned in accordance with Article 19 of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 ⁽²⁾,

Having regard to the opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions on 28 October 1981 in accordance with Article 10 of Regulation No 17,

Whereas:

THE FACTS

I. DISTRIBUTION STRUCTURE AND MARKET POSITION

- (1) The Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken (hereinafter referred to as 'AEG'), a limited company incorporated under German law and having its main establishment in Frankfurt am Main, is engaged, among other things, in developing, manufacturing and marketing consumer electronics (television sets, radios, tape recorders, record players and audio-visual equipment). Since 1 January 1970, this sector has been entrusted to the AEG subsidiary Telefunken Fernseh und Rundfunk GmbH (hereinafter referred to as 'TFR'), which has been an independent division of AEG since 1 June 1979. TFR manufactures and markets these products. In marketing them, it uses the AEG marketing organization, i.e. in Germany the AEG sales offices or branches and, in the other Community Member States, the AEG subsidiaries responsible for marketing. These subsidiaries concerned by this Decision are:

— in France:

AEG-Telefunken France SA, having its registered office in Clichy (hereinafter referred to as 'ATF'),

— in Belgium:

AEG-Telefunken SA Belge, having its registered office in Brussels (hereinafter referred to as 'ATBG').

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

These sales offices are controlled by and receive instructions from TFR.

Further down the line, AEG goods are distributed through wholesalers and retailers. Depending on their size, retailers are also supplied directly by the AEG sales offices, especially if their turnover is comparable to that of a wholesaler.

- (2) AEG's market position with respect to consumer electronics in the Community varies considerably depending on the region and product concerned. While its share of sales of colour television sets on the German market, which has accounted for almost half of all AEG television sets sold in the common market, currently stands at about ... % ⁽¹⁾, it varies between ... and ... % in France, Belgium and the Netherlands. Its market share of other products in the consumer electronics field stands at approximately ... % in Germany and between ... and ... % in France and the Benelux countries.
- (3) AEG's world sales in the 1980 financial year amounted to around DM 14 100 million, of which around DM 1 300 million were accounted for by consumer electronics (around DM 950 million in the European Community). The accounts showed a loss of DM 968 million in 1979 and a loss of DM 278 million in 1980.

II. DISTRIBUTION CONTRACT NOTIFIED

- (4) With a view to implementing TFR's five-point programme in the common market in the television, radio, tape recorder, phonographic and audio-visual fields, AEG notified the Commission on 6 November 1973 of the distribution agreement for Telefunken branded products (European Community Agreement). The legal basis of this distribution system consists of standard contracts with selected resellers at the various marketing stages. Until the end of 1978 AEG, acting at the same time on behalf of TFR, concluded distribution contracts with dealers. Under the new standard contracts, dealers are contracted to AEG-Telefunken Konsumgüter Aktiengesellschaft, Frankfurt am Main, acting on behalf and for the account of AEG and acting at the same time for TFR.

⁽¹⁾ In the published version of the Decision some figures have hereinafter been omitted pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

- (5) In 1981 AEG introduced a new distribution system in Germany based on 'partner contracts' between AEG and specialist retailers. These 'partner contracts' replace the former 'distribution contracts' in Germany, although the distribution agreement for Telefunken branded products (European Community Agreement) continues to exist in the other Member States. The 'partner contracts' are not the subject of this Decision.
- (6) According to the wording of the 'European Community Agreement' for wholesalers, wholesalers are selected from among dealers who regularly buy AEG equipment on their own account and supply retailers, keep full registers giving serial numbers of articles resold and do not infringe provisions of competition law. Retailers are selected, according to the wording of the European Community Agreement, on the basis of objective criteria of a qualitative nature relating to the professional qualifications of the retailer and his staff and to his technical suitability. Retailers must also keep full registers giving serial numbers of articles resold. Approved retailers and AEG are prohibited from supplying the relevant goods to dealers who are not subject to the distribution agreement. When notifying its distribution agreement, AEG pointed out that every specialist dealer who satisfies the conditions of the European Community Agreement is admitted to the AEG distribution system.

- (7) The Director-General for Competition informed AEG, by letter dated 17 May 1976, that at that time he had no objections under Article 85 (1) of the EEC Treaty to the wording of the 'European Community Agreement' submitted with a letter dated 16 March 1976.

Having regard to the knowledge now gained by the Commission it is intended to leave open the question as to whether the Commission will maintain this opinion in the future. This question does not arise for consideration in this Decision, which is concerned only with the practical application of the AEG distribution system.

III. ACTUAL IMPLEMENTATION OF THE DISTRIBUTION SYSTEM

The introductory phase

- (8) The actual introduction and implementation of the distribution system in the Community took several years.

A TFR memo dated 7 September 1973 states that the object of the distribution agreement is to ensure that the trade has a 'minimum profit margin'. It continues that there are two possible ways of ensuring this: 'Either the industry supplies these products at prices which guarantee the trade its margin or the industry makes sure that the goods do not flow into channels which do not need this high margin. These channels are cash-and-carry stores which disrupt price levels ...'.

- (9) In a letter dated 22 September 1975 from the Münster sales office to TFR it was pointed out that the distribution agreement was being used to try 'to exclude the customers in question ⁽¹⁾', and this despite the further statement that 'there seems to be a trend towards specialized departments even in discount stores'.

- (10) A TFR internal memo dated 5 July 1976 concerning future AEG marketing policy describes the 'current distribution policy' as one in which the goods covered by the distribution agreement 'are sold only through the traditional specialist wholesale and retail trade ⁽²⁾'.

- (11) In the 'guidelines on the distribution agreement' (TFR special memo No 44), which were issued on 8 October 1973 and which the AEG submitted to the Commission in connection with this proceeding, it is pointed out that in the case of chain stores 'some branches of chain stores may (carry out) all the required specialist trade functions, but not the whole undertaking'. The guidelines go on to say that 'supplies (should) theoretically be refused even here'. It is further stated that 'where the sales office (considers it) appropriate to supply the specialist departments of these firms with goods covered by the distribution agreement', negotiations may be carried out 'only by prior agreement' with TFR.

Practical implementation

A. Discrimination against dealers

1. Non-approval of dealers in Germany

(a) General distribution policy

- (12) A TFR minute dated 25 May 1976 concerning a sales manager conference reflects the concern felt by sales managers about any relaxation of the distribution agreement in the case of discount stores which meet the specialist trade conditions. The sales managers agreed 'to avoid too inflexible an attitude towards discount stores'. It was also agreed '(to lay down) qualitative criteria for discount stores' and 'to inform the principal specialist dealer groups ... of the action taken (with regard to discount stores). If the talks to be held show a lack of agreement on the part of the groups' — the minute continues — 'legal action will have to be brought to protect the distribution agreement ...'.
- (13) This shows that the specialist dealer groups enjoyed a 'right to say its opinion' regarding the approval of discount stores, even where these satisfied the specialist trade criteria.

(b) Individual cases

Ratio store in Kassel

- (14) At the beginning of May 1976 the firm Terfloth & Snoek GmbH, which owned a chain of retail shops called 'Ratio', opened a Ratio store in Kassel. It applied for this store to be admitted into the AEG distribution system. Talks were subsequently held with AEG. By memo dated 6 April 1976 the Münster sales office reported to TFR on these talks as follows: 'Market pricing was discussed, although no agreement was reached. Market pricing will depend on the discussions in Kassel'.

In the view of the AEG sales offices in Münster, this Ratio store broadly satisfied the specialist trade criteria, as is also made clear in this memo.

At the end of May 1976 AEG field salesmen visited the Ratio store. During their visit, they made the following criticisms: there was no central place within the hi-fi department for issuing guarantee cards, the department did not give the impression of a self-contained specialist department and products in their original packing were stored in the department. Ratio, on the other hand, maintained that it was a typical, self-contained specialist department.

By letter dated 29 June 1976 the Münster sales office informed the Ratio head office that TFR had in the meantime examined a commentary on Article 85 of the EEC Treaty and its implications for the distribution agreement.

⁽¹⁾ This term covers large supermarkets or discount stores with several branches.

⁽²⁾ The 'traditional specialist trade' does not include discount stores.

After weighing up all the questions involved, it had been decided that products covered by the distribution agreement could not be supplied.

Although Ratio again wrote to AEG on 22 December 1976 to request supplies and offered 'to observe scrupulously every condition of the distribution agreement', it has not yet been admitted to the AEG distribution system.

- (15) The Ratio head office has produced documents to show that the consumer electronics department of the Ratio store in Kassel employed qualified sales staff in 1976. Further documents produced by Ratio show that, although this department, like many such departments in discount stores, was spacious, it had not been separated from other departments by dividing walls.
- (16) It must be concluded from the letter of refusal of 29 June 1976, and from TFR's silence in response to Ratio's readiness to meet all the conditions of the European Community Agreement, that the refusal to accept Ratio was not due to the alleged absence of a specialist department, but to the fact that Ratio was a discount store.

Harder in Villingen

- (17) The formerly approved wholesaler Harder (Villingen), which had been banned from the distribution network for infringing the distribution agreement but whose custom the AEG sales office in Freiburg did not wish to lose, was required, as an additional condition of its reacceptance into the network, to make an express declaration that it would 'not supply discount stores or similar undertakings with AEG products' and would not export these products to other Community countries (report dated 15 December 1976 from the Freiburg sales office to TFR).

2. Non-approval of dealers in France

- (18) An ATF internal memo dated 7 July 1977 reports that ATF had requested a customer (the firm Sedif) not to supply the discount stores Hyper, Carrefour and Conforama with Telefunken products. The ATF circular letter dated 13 September 1977 calls on ATF field

salesmen to impress on customers that ATF 'intends to protect them through the distribution agreement (correct profit margin)'.

- (19) This intention was also understood in the trade. An ATF internal memo dated 30 June 1978 states that a dealer with whom ATF was negotiating with a view to inclusion in the distribution network was aware of 'Telefunken's trading policy, which succeeds in keeping retail prices stable and thus in maintaining an appropriate profit margin for retailers'.
- (20) In a record dated 5 January 1978, of a conversation between ATF and TFR, specific reference is made to the 'favourable effects' of this marketing policy. This record further states that, in 1977, discount stores, which had a market share of 7 %, accounted for only 0.7 % of the TFR trading structure. As a result of this extremely low share, it had so far been possible for ATF 'to maintain a uniformly high price level for Telefunken products, which is viewed favourably by the specialist trade' (a higher profit margin than on competing products). The record goes on to state that, despite increasingly determined inquiries from the discount stores, their requests had so far been turned down. It further states that 'cooperation must under all circumstances again be avoided in 1978' (profit margin with the specialist trade, lower returns with discount stores).
- (21) A TFR internal memo dated 1 September 1978 concerning the French market states that 'out and out discounters have so far deliberately not been supplied for reasons of pricing policy'.
- (22) On 12 January 1979 the ATF sales manager wrote to TFR to inform it that ATF now planned in the medium term to gradually relax its policy towards modern sales outlets. This letter further states that 'we must decide whether we should sign distribution contracts with such potential sales outlets as Conforama, Carrefour, etc.'. This letter also reveals that 'Telefunken products are between FF 570 and 770 dearer than comparable competing products'. It goes on to state that 'we realize that the problems of the high price policy are connected with those of sales outlets (discount stores)'.

(b) Individual cases

Auchan

- (23) An ATF memo dated 21 March 1978 states that Auchan is one of the keenest discounters whose orders ATF has hitherto ignored. Now, however, ATF had received a formal request for supplies from Auchan so that ATF was faced for the first time with the problem of refusing to sell. This memo further states that 'the supplying of Telefunken equipment to Auchan would be extremely dangerous and would jeopardize our whole year's work'.

- (24) Owing to the pressure exerted by Auchan on ATF, talks were held on 18 October 1978 concerning Auchan's inclusion in the distribution network. An ATF memo dated 20 October 1978 states that '(Auchan) would be willing ... in exchange for our deliveries ... to withdraw all press advertisements featuring our television sets and to adhere to our recommended prices, on condition that in the town where the products are sold no shop of a similar kind charges lower prices ...'. Auchan was subsequently admitted to the AEG distribution network on 3 November 1978.

Auchan's undertaking to adhere to the TFR price recommendations was clearly sufficient for it to be supplied with products covered by the agreement. By August 1980 TFR had sold some 700 television sets to Auchan.

Mammouth (Toulouse)

- (25) An ATF internal memo dated 20 October 1978 reports in similar fashion on negotiations over the commencement of supplies to Mammouth: 'If, as promised, Mr ... (the manager of Mammouth) were prepared to adhere to the price levels generally applied in Toulouse we could supply him'.

Iffli/Darty

- (26) In the course of negotiations over the commencement of supplies to the price-cutting retailer Iffli (Metz), the latter had to undertake to adhere to the retail prices laid down by ATF. An ATF memo dated 30 June 1978 actually states: 'Mr Iffli undertakes to adhere to our prices ...'.

The memo then turns to the difficulties caused by the acceptance of further dealers and then continues as follows: 'We thought it would be better to arrange a fixed price policy agreement

for Metz between Le roi de la télé, Iffli and Darty ⁽¹⁾ rather than leave Iffli on the sidelines. The latter would in any case manage to obtain Telefunken equipment and we would then no longer be able to ensure compliance with our price policy'.

- (27) This stated intention in the memo to reach an agreement on retail prices in Metz was translated into fact. During further discussions with Iffli, ATF stated that it hoped that Iffli would abandon its competitive price policy with Telefunken products. If it did this, ATF would endeavour to ensure that Iffli's acceptance was endorsed by Darty and Le roi de la télé, which, moreover, were in complete agreement with this marketing policy.

- (28) According to Iffli, ATF cited the example of the Paris region and other areas in France in which retailers had agreed among themselves on the trading margin for Telefunken products, thereby avoiding any price competition. According to Iffli, ATF saw this as a model for the 'healthy marketing' of Telefunken equipment.

(c) Territorial protection

- (29) ATF provided certain authorized dealers in France with territorial protection in order to reduce or eliminate altogether price competition from other dealers involving Telefunken products. ATF allocated to each of the dealers it had recruited to sell Telefunken products a specified sales territory, thereby ensuring that these dealers would face no competition as regards Telefunken products within the area allocated. If other dealers from this area applied to be accepted into the distribution network, ATF refused to admit them.

Le roi de la télé

- (30) The retailer Le roi de la télé enjoyed ATF's territorial protection in Metz. When, at the end of 1977, another dealer (Mr Iffli) in Metz began to sell Telefunken products obtained from an AEG dealer in Paris, Le roi de la télé

⁽¹⁾ Retailers in Metz.

complained to ATF. ATF replied by letter dated 3 January 1978 as follows: 'We assure you that it is our wish to protect your position in Metz, as our actions have shown until now'.

- (31) An ATF letter dated 11 October 1978 to Le roi de la télé states: 'After numerous discussions among ourselves and after obtaining the advice of our lawyers, both in Paris and at our headquarters in Germany, we consider that we are compelled to establish official contact with both Iffli and various other retailers who have been pressing us for some time. Our head office in Frankfurt has ordered us not to limit our customer network too much so as to ensure that our distribution contract has maximum credibility. We have reached this decision in the face of pressure from various quarters and after lengthy consideration and we can assure you that we shall do our utmost to avoid anarchy in our distribution network It is in our common interest to cushion the attacks made on us by coordinating and adapting our approach to any given set of circumstances'.

- (32) When Iffli attempted to obtain supplies of AEG products, ATF was very reluctant to withdraw the territorial protection which Le roi de la télé in Metz enjoyed and to admit Iffli. Furthermore, Mr Iffli was approved only after he had undertaken to adhere to the prices laid down by ATF and not to engage in a price war with Le roi de la télé, which had hitherto enjoyed territorial protection (point 26 above).

Radio du Centre

- (33) On 2 March 1978 ATF wrote to the wholesaler Radio du Centre, Cournun, as follows: 'Further to the discussions you had last Thursday with our area representative (commercial inspector), we confirm that our commercial objectives in the colour television and radio-electroacoustics sector for 1978 oblige us to reconsider our 1977 agreements as far as the allocation of your area of activity for our brand is concerned. With regard to the Puy-de-Dôme department, we think ... that the proposal made by our employee is justified, namely a joint operation by your company and SNER, your fellow distributor in Roanne. Consequently, we modify below the departmental list set out in our letter of 20

October 1977. You are aware of our concern to maintain a policy of fixed prices. You may rest assured that we shall follow the same course in future'.

Lama

- (34) An ATF letter dated 23 October 1978 to the wholesaler Lama, Paris, reads as follows: 'Although certain chain stores, such as CART/Expert in France, have a network of retailers, the latter are merely resellers who enjoy peace of mind only in respect of a very small sales area. In the case of wholesalers, however, it is quite normal that we should grant them actual exclusive rights, although this is becoming illegal in the light of Scrivener circular'.

Schadroff

- (35) After the wholesaler Schadroff, Bourg St Andéol, had complained that other dealers in the sales area allocated it were receiving supplies of Telefunken products, ATF replied as follows on 13 April 1979: 'We have already made a move in this matter, since Mr Watier ... has asked the Marseilles wholesaler to stop making such offers in your sales area. We would assure you once more that you enjoy the best conditions we can offer, with the added advantage of having *de facto* exclusive rights over a given territory — rights which we have always defended, as we have proved on numerous occasions'.

3. Non-approval of dealers in Belgium

Diederichs (Zutendaal)

- (36) The Belgian wholesaler Diederichs had specialized in importing consumer electronics equipment from Germany and reselling it to specialist dealers in Belgium. A TFR memo dated 29 September 1977 reads as follows: 'For years Diederichs has been a disruptive element in Western Europe, as it has built up business activities centred on Belgium and Luxembourg, by-passing the respective national agencies The disruption results from the fact that Diederichs purchases our equipment from German wholesalers at rock-bottom prices and offers it by mail, with a relatively small mark-up, below ATBG's selling prices to 2 800 dealers throughout Belgium'.

A letter from ATBG to TFR dated 24 October 1977 begins by stating that the firm Grundig has signed a distribution contract with

Diederichs. The letter then continues as follows: 'Such an agreement would also be possible for Telefunken. The talks indicate, however, that Diederichs is unwilling to accept a pricing arrangement that would make his activities compatible with ours His ability always to undercut the opposition is, in fact, his only weapon. Consequently, if we supply him, he will inevitably cause prices to fall throughout the market We are therefore afraid that this would seriously affect our annual sales figure'.

- (37) Although he was prepared to accept all the other obligations arising out of the distribution agreement, the refusal by Diederichs to undertake to adhere to the price levels recommended or applied caused the negotiations between ATBG and Diederichs to break down. A TFR memo dated 28 October 1977 on a conversation with ATBG reads as follows: 'ATBG has in the meantime held further talks with Diederichs. It now emerges that Mr Diederichs is not prepared to observe any price level recommended by ATBG for Belgian retailers, not even in the case of cable television sets purchased from ATBG. AEG-Brussels therefore fears there might be considerable price unrest throughout the Belgian market if Diederichs is supplied with cable television sets and is therefore opposed to the inclusion of Diederichs in the interests of distribution policy'.

B. *Influence brought to bear on prices*

1. *Direct influence on prices*

(a) *Fixing and implementation of a market price in Belgium*

- (38) In an ATBG minute dated 19 December 1978 concerning a discussion between ATBG and TFR, it is first stated that it is harmful to allow retail prices to fluctuate freely. The minute then goes on as follows: 'It is not our intention to fix a single market price (which is against the law) but to ensure, by establishing average market prices, that prices do not fluctuate by more than Bfrs 1 000'. The minute further states that ATBG might, for example, establish a market price of Bfrs 34 450, while actually allowing prices of between Bfrs 33 990 and 34 990.

- (39) According to the Belgian retailer Verbinnen in Lubbeek, ATBG requested it, in January/February 1980, to increase the price of a Telefunken television set by Bfrs 3 000 in order to bring this up to the retail price level in that part of Belgium. However, Verbinnen did not comply with this request.

(b) *Influence brought to bear on prices in Germany*

SUMA (Munich)

- (40) A memo by the AEG sales office in Munich dated 20 April 1977 describes a conversation with the SUMA discount store (Munich). According to this memo it had been made clear to SUMA, in the course of a conversation on the implementation of a new price system introduced by TFR and on the marketing of Telefunken products covered by the distribution agreement, how important the market prices in the SUMA shops were for TFR. During this conversation, SUMA promised the sales office 'not to act as a price leader but, at most, to take the lowest price on the market and, if possible, to adopt a position somewhere between average shop prices and the lowest prices . . . '.

Holder (Günzburg)

- (41) In the case of the retailer Holder (Günzburg), the influencing of prices took the form of the Munich sales office explaining 'in detail the pricing policy' to be adopted by Holder (Munich sales office memo dated 30 November 1976).

(c) *Influence brought to bear on prices in France*

Darty

- (42) Following the intervention by ATF, the retail group Darty undertook, on 24 May 1978, to increase its retail prices for Telefunken products to the levels agreed with TFR (ATF letter dated 26 May 1978).

Dealers in Paris

- (43) An ATF internal memo dated 5 June 1978 further reveals that all the retailers in Paris supplied by ATF had agreed with ATF to increase their prices as from the evening of 2 June 1978. Only Darty and FNAC still made difficulties. The memo instructs an ATF

employee to get in touch with FNAC and Darty about this price increase.

Camif

- (44) A further ATF memo dated 5 June 1978 reports that certain retailers regard Camif mail order agents as normal competitors and are therefore inclined to adjust their prices to those charged by Camif. The memo goes on to state that ATF has therefore contacted Camif to persuade it to increase the resale prices in its 1978 winter catalogue.

FNAC

- (45) A further agreement on retail prices emerges from an ATF letter, dated 13 October 1978, which discloses that ATF had agreed with Darty, FNAC and Grands Magasins that these Paris retailers should apply the prices agreed with ATF as from 2 November 1978.

CART

- (46) ATF sent letters to CART on 4 November 1977 and 21 July 1978 asking it to increase its final consumer prices. Each of these letters refers to the agreement concluded between ATF and CART, whereby CART had had to agree its final consumer prices with ATF.

Capoform

- (47) Finally, an ATF internal memo dated 3 April 1979 reveals that the retail groups Capoform/Darty have given an undertaking to ATF that a special premium granted to them would not be used to reduce the retail price of a particular Telefunken product covered by the distribution agreement.

2. Indirect influence on prices

(a) Good conduct bonus

- (48) In a proposal put by the AEG Munich sales office to TFR on 22 December 1976, concerning the approach to be taken to marketing, pricing and conditions, it is first suggested that behaviour and prices which conform to market trends and a ban on cross supplies should be made a precondition of the approval of wholesalers and secondly that big customers should be granted an annual bonus of 2 %, with payment made dependent upon

price behaviour which conforms to market trends. It is further stated that 'it would be possible to control market conduct by means of the annual bonus'.

- (49) Although these are only suggestions, control over pricing has also been translated into fact: during the talks with the firm SUMA (see point 40 above), the AEG sales office in Munich granted SUMA a 'good conduct bonus' of 2 % on sales. This bonus was to be paid at the end of the year (memo dated 20 April 1977). It was granted to SUMA for 'good conduct as regards prices' after 'it had been brought to its attention how important market pricing was in its shops'.

(b) Other cases

- (50) When in July 1976 the retailer P. Wilhelm (Saarbrücken) advertised low prices, TFR wrote to the Saarbrücken sales office as follows: '... The advertising department has shown me an advertisement ... by P. Wilhelm with very disturbing prices. Why is this happening again?'
- (51) On 8 September 1977 the Cologne sales office held a 'frank and at times heated discussion' with the retailer Schlembach concerning the latter's newspaper advertising of Telefunken products (TFR memo dated 9 September 1977). The AEG sales office made it clear to Schlembach 'that a repetition of the advertisements would lead to a considerable worsening of relations'. The memo continues: 'This conversation probably reduced to a considerable extent the likelihood of a renewed aggressive advertising campaign'. A memo from the Dortmund sales office dated 30 September 1977 reports on the disturbing prices charged by the firm Schlembach in the Rhine-Ruhr area. The memo asks TFR whether there is no neat, unusual way of 'keeping the customer in check'.
- (52) In a situation report from the Mannheim sales office, dated 31 October 1978, the prices quoted by the wholesalers Gruoner and Südschall and the retailers Massa-Märkte, Kaufhof (Kassel) and Hertie (Frankfurt) are described as 'disrupting the market'. The report further states that 'considerable efforts were needed before order could be restored'.

LEGAL ASSESSMENT

I. APPLICABILITY OF ARTICLE 85 (1) OF THE EEC TREATY

1. Decisions of the Court of Justice concerning selective distribution systems

- (53) Selective distribution systems may constitute an aspect of competition, which accords with Article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises, and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (judgment of the European Court of Justice of 25 October 1977 in Case 26/76, Metro (1977) ECR, page 1875). It follows, as the Court stated in its judgment of 10 July 1980 in Case 99/79, Lancôme (1980) ECR, page 2511, and in its judgment of 16 June 1981 in Case 126/80, newspaper distributors (1981) ECR (not yet published) that agreements laying down a system of selective distribution based on criteria for admission which go beyond a simple objective selection of a qualitative nature are in principle caught by the prohibition in Article 85 (1), particularly where they are based on quantitative selection criteria. These judgments further make clear that it is important for the appreciation of selective distribution systems whether these agreements, either individually or together with others, in the economic and legal context in which they are concluded and on the basis of a body of objective features of law and fact, are capable of affecting trade between Member States and have, as either their object or effect, the prevention, restriction or distortion of competition (judgment of the European Court of Justice of 11 December 1980 in Case 31/80, L'Oréal (1980) ECR, page 3775).

- (54) The above decisions of the Court show that the distribution system applied by AEG can escape the prohibition provided for in Article 85 (1) only if it is clear from the economic and legal context within which the distribution agreement is operated and from all the attendant circumstances:

- that all resellers who meet the technical qualifications necessary for selling the products covered by the distribution agreement have, in principle, access to the goods,
- that dealers are not automatically excluded from the distribution network because they might jeopardize the pricing policy pursued by AEG, and
- that authorized contracted dealers are free to set their resale prices on their own initiative without direct or indirect interference from AEG.

Furthermore, the Commission has already pointed out, in its Decision of 15 December 1975 (IV/847, SABA (OJ No L 28, 3. 2. 1976, p. 19)) that, in the case of selective distribution systems, competition must be ensured by allowing authorized dealers to determine their selling prices at their own discretion.

2. The overall connection between distribution contract and practical application

- (55) These conditions, under which a selective distribution system may be deemed not to fall under Article 85 (1), are not met by the AEG distribution agreement as actually applied.
- (56) AEG has in fact applied a distribution system completely different from the wording of the notified standard agreement: for certain sales outlets and certain dealers, access to the distribution system was made impossible, difficult or subject to additional conditions, although these dealers met the required qualitative criteria laid down in the standard contract. In addition, AEG brought considerable influence to bear, both directly and indirectly, on dealers' resale prices.
- (57) The non-authorization of certain dealers and the fixing of selling prices occurred as the distribution agreement was implemented and were directly and intrinsically connected with it.
- Discrimination arose when certain dealers were refused access to the system; under the terms of the distribution agreement these dealers were not allowed to be supplied with AEG products.

- (58) The influence brought to bear on prices was also included in the actual application of the distribution agreement by AEG-Telefunken. The fact that AEG was entitled under the terms of the standard contract to impose a ban on supplies and to claim compensation in the event of default or damage — and so actually exclude dealers from the distribution network — provided it with the means of persuading dealers to toe the line on prices. This means was also used by AEG. It induced dealers to agree arrangements concerning selling prices. Where, with regard to prices, dealers behaved or seemed likely to behave in a manner calculated to 'disrupt the market', AEG, in discussions over supplies 'clearly brought to attention how important market pricing was' (point 49 above), explained pricing policy 'in detail' (point 41 above), 'induced' dealers to increase their prices (point 43 above), 'made it clear' that further cut-price advertising 'would lead to a considerable worsening of relations' or sought a 'neat, unusual way of keeping the customer in check' (point 51 above).
- (59) An appraisal of the economic context and of all the actual circumstances therefore shows that these measures are closely connected with the distribution agreement. Without them, it would have been impossible or difficult for AEG to influence prices. In particular, the relatively close and intended permanent contractual relationship between manufacturer and dealer through the distribution agreement enabled AEG to establish direct contact with its dealers. Furthermore, the distribution agreement frequently led dealers, because of their confidence in regular supplies, to invest financially in the Telefunken brand name. Generally speaking, therefore, exclusion from the distribution network would have entailed considerable disadvantages for dealers. Those dealers bound by the distribution agreement were therefore all the more inclined to comply with AEG's wishes concerning price discipline.
- (60) The refusal to admit dealers to the system and the influence brought to bear on prices are thus not isolated measures but are directly connected with the distribution agreement.
3. **The application of the distribution system in detail**
- (a) *Discrimination with respect to admission to the distribution system*
- (aa) Subjective criteria for admitting dealers to the distribution system
- (61) AEG, when actually implementing the distribution agreement, saw the agreement as a means of generally preventing from the outset new sales outlets (discount stores, self-service supermarkets, cash-and-carry stores) from gaining access to the distribution system. The deciding factor for AEG was not whether these sales outlets possessed the necessary technical expertise or suitable premises (qualification) for selling AEG products, but whether they might endanger the high-price policy pursued by AEG. Of particular relevance in this respect are the TFR internal memo dated 7 September 1973 (point 8 above) and the guidelines on the distribution agreement dated 8 October 1973 (point 11 above), which prove that AEG was at any time unwilling to make the authorization of dealers subject solely to objective technical criteria.
- (62) In Germany this distribution policy is shown by the minute dated 25 May 1976 concerning the sales manager meeting (point 12 above) and by the cases of Ratio and Harder. After negotiations with the dealer Ratio on retail prices had broken down, this case was clearly treated by AEG according to the 'guidelines on the distribution agreement', whereby chain stores, even if they fulfilled the conditions for authorization, were not to be authorized. Despite Ratio's assurance that it wished to fulfil all the conditions of the distribution agreement, AEG did not consider it necessary to give Ratio the opportunity to be accepted by informing it of the conditions which it had allegedly failed to meet. The case of Harder, with the absolute ban on supplying discount stores, once again shows that AEG was concerned at this time to exclude all such types of sales outlet.
- (63) In France evidence that the same sales policy is pursued in implementing the distribution agreement is provided by the fact that new forms of sales outlet are again generally to be

excluded from the distribution system (points 18 to 22 above). Here again AEG, in violation of the wording of the distribution agreement, pursued a marketing policy which was deliberately designed to exclude discount stores in order to keep prices artificially high, even where such dealers met the specialist trade conditions. This is shown by the minute dated 5 January 1978 (point 20 above) and the TFR memo dated 1 September 1978 (point 21 above). Not until January 1979 did TFR consider 'gradually relaxing its policy' towards modern sales outlets; even then, it envisaged problems owing to its 'high-price policy' (point 22 above). The documents mentioned in points 23 and 24 above show that ATF was initially altogether unwilling to admit Auchan to the distribution system. Only when Auchan undertook to adhere to the prices recommended by ATF and to stop advertising Telefunken products was it accepted into the system. ATF behaved in a similar fashion towards Mammouth (point 25 above) and towards Iffli (point 26 above). The latter firm was persuaded by ATF to come to a price arrangement with other local AEG dealers.

- (64) In Belgium the case of Diederichs shows that, when it came to authorizing dealers, ATBG too was not primarily concerned with technical criteria, but with the dealer's pricing policy and his attitude towards parallel imports. ATBG's letter to TFR dated 24 October 1977 (point 36 above) demonstrates that ATBG would have been prepared, like Grundig AG, to approve Diederichs as a specialist dealer if it had agreed to align its pricing policy on that of ATBG. However, it was feared that if Diederichs, which was always attempting to undercut its rivals, were supplied, this would cause prices to fall throughout the market and it was therefore decided, after several discussions, that it should not be admitted to the distribution system.

(bb) Quantitative selection

- (65) Further evidence of the discriminatory application of the distribution agreement is provided by the fact that in France authorized dealers were granted *de facto* territorial protection by the refusal to admit other dealers. AEG thus carried out a quantitative selection of dealers, which means that a distribution system is prohibited under Article 85 (1). This

territorial protection is proved by the cases involving 'Le roi de la télé' (point 30 above), Radio du Centre (point 33 above), Lama (point 34 above) and Schadroff (point 35 above). ATF was also prepared to exert pressure on other dealers to refrain from advertising in another 'allocated' area (case of Schadroff in point 35 above). Such restrictions on business activity were 'quite normal' for ATF, even though, as admitted in the ATF letter dated 23 October 1978, 'illegal' (point 34 above).

(b) *Influence brought to bear on prices in connection with the distribution agreement*

- (66) In Belgium one of the means used to influence dealers' selling prices was the fixing of a market price by ATBG, to which contracted dealers had to align themselves when selling AEG products and which allowed deviations only between an upper and a lower price limit (point 38 above).

The fact that this method of fixing a market price was actually implemented in Belgium is proved by the cases of Diederichs (point 36 above) and Verbinen (point 39 above).

- (67) In Germany similar direct influence was brought to bear on prices in the cases of Ratio, SUMA and Holder (points 14 and 40 to 41 above) and, in France, in the cases of Darty and the AEG dealers in Paris, Camif, FNAC, CART and Capoform (points 42 to 47 above). The good conduct bonus in Germany and the action taken by TFR against dealers who failed to adhere to the price level laid down by TFR and so caused 'price unrest' (cases of SUMA, P. Wilhelm, Schlembach, Gruoner, Südschall, Massa-Märkte, Kaufhof and Hertie (points 48 to 52 above)) demonstrate the great efforts which TFR made to maintain the retail price level it desired. The threat to dealers that further price competition would 'lead to a considerable worsening of relations' and the search for 'neat ways' of 'keeping dealers in check' (point 51 above) can only be interpreted as indicating that the distribution agreement was used and was meant to be used as a means of disciplining price-cutting dealers.

4. Assessment in the light of competition law conclusions

- (68) The above description of AEG's conduct and its marketing organizations shows that, in order to implement as high a price level as possible — itself describes this as a 'high-price policy' — AEG generally denied price-cutting dealers access to its distribution system or required such dealers, before they were admitted to the system, to make an additional undertaking to adhere to the AEG price recommendations and/or not to enter into price competition with other local AEG dealers (discrimination against certain dealers). In addition, AEG has taken direct and indirect measures to restrict the freedom of authorized dealers to determine their pricing policy. AEG did this by requiring dealers to agree arrangements about prices, and to refrain from price competition, by offering dealers inducements to refrain from price competition or by threatening to break off relations with dealers if they continued to engage in price competition (direct and indirect fixing of selling prices).
- (69) AEG was not primarily concerned that dealers wishing to market their goods should possess the necessary specialist qualifications. The sole determining factor was whether the acceptance of dealers might jeopardize the price level laid down by AEG (the market price). If a dealer was not prepared to align his pricing policy on the minimum selling price laid down by AEG he was refused access to the system. If, however, the dealer agreed arrangements concerning prices with AEG or the other local AEG dealers, he stood a better chance of being accepted. Furthermore, this discrimination and fixing of selling prices were not isolated mistakes made by over-zealous field salesmen, but were deliberately and systematically planned. This emerges from the records of the respective marketing managements of TFR, ATF and ATBG. These documents show that no new sales outlets were generally to be supplied if this might jeopardize AEG's high-price policy.

5. Restrictions of competition

- (70) As the actual and decisive reasons for discrimination against certain dealers could not be openly admitted, AEG pretended, in contrast to the true position, that the dealer had failed

to fulfil the requirements for admission or had infringed competition law. This happened either generally and without further substantiation or by using the specialist trade criterion which appeared to be the most appropriate. Suitable dealers were thus prevented from marketing AEG products in the proper way and were eliminated as potential competitors within the common market. They were not themselves in a position to purchase Telefunken equipment, and authorized, contracted dealers were prevented from supplying them. By influencing the resale prices of recognized dealers AEG largely prevented undesirable cut-price offers to the detriment of consumers. This meant that the AEG distribution agreement, as actually applied, led to a restriction of competition within the common market.

- (71) In view of the many cases in which restriction of competition was detected — and in particular the fact that in the Community certain forms of sales outlet were generally denied access to Telefunken equipment and pricing arrangements were made — these restrictions of competition can also be said to have been considerable. Furthermore, AEG is a major firm in the consumer electronics field and enjoys a significant share of the market in such equipment. The retailer Auchan, for example, after becoming an authorized AEG dealer, sold 700 Telefunken colour television sets between October 1979 and July 1980 alone. This sort of expansion of business had been denied Auchan prior to its authorization and is still being denied other dealers (for example Ratio) through AEG's refusal to approve them.

6. Impact on trade between Member States

- (72) Owing to the Community-wide validity and application of the distribution agreement, it was likely to affect trade between Member States. The distribution system was applied uniformly throughout the Community and thus governed trade between various Member States. On AEG's own admission, not inconsiderable quantities of Telefunken products have been and still are traded between Member States at both wholesale and retail levels. Such trade benefits retailers in particular because it enables them to exploit the many price differences between Member States and frequently makes it possible for them, through 'parallel imports', to acquire new or more

advanced Telefunken products much earlier than they would otherwise have done. For example, technically more advanced Telefunken equipment was on sale on the German market up six months earlier than on the Belgian market. High-turnover retailers who had either already shown that they imported consumer electronics equipment (e.g. Diederichs) or of whom this could automatically be assumed (Auchan, Darty, FNAC, Conforama, Ratio and Harder) were not accepted into the distribution system or were accepted only after satisfying additional conditions and thus after considerable delay. As only those dealers who belonged to the distribution system could legally engage in inter-State trade in Telefunken products, such trade, which would otherwise have developed, was considerably affected by the discrimination practised against whole trading groups or high-turnover dealers.

products within the common market. AEG must also bear the blame for this discriminatory selection and influencing of prices, it being immaterial that these infringements were largely committed by its subsidiaries. Until the end of 1978 AEG concluded contracts directly with dealers. Since 1 January 1979 distribution contracts have been concluded by TFR or marketing firms in other Member States on behalf and for the account of AEG. The distribution agreement was applied in the interests of AEG which, in the final analysis, was itself responsible for introducing and implementing it. AEG used its subsidiaries to market its products as described above and even, in individual cases, played a direct part by giving instructions to its subsidiaries. AEG is therefore responsible for the infringements committed by the divisions and subsidiaries which it used to conclude the distribution contracts.

II. NON-APPLICABILITY OF ARTICLE 85 (3) OF THE EEC TREATY

- (73) AEG has implemented its distribution agreement in a manner which goes far beyond the content of the notification and which even completely contradicts it. No notification has been given of the distribution agreement actually implemented, so that this alone is sufficient reason for not exempting this agreement. Furthermore, no exemption could be granted for a distribution system under which certain dealers applying for admission are discriminated against and under which influence is brought to bear on prices. These restrictions **are not indispensable** to the orderly marketing of the products in question and there are no apparent advantages for consumers.

III. APPLICABILITY OF ARTICLE 15 (2) (a) OF REGULATION No 17

1. Infringements committed

- (74) AEG has intentionally infringed Article 85 (1). It has knowingly and deliberately applied a distribution system under which suitable applicant retailers were not authorized or were authorized only after satisfying additional conditions not evident from the distribution contract, and under which authorized dealers were prevented from determining their resale prices freely and without interference from AEG or other dealers. In so doing, AEG intended to obstruct competition involving its

2. Effect of notification

- (75) The imposition of a fine in the present case is not precluded by the fact that AEG notified the Commission of its distribution agreement. Under Article 15 (5) (a) of Regulation No 17, notification affords protection against a fine only where the acts taking place after notification to the Commission and before its Decision in application of Article 85 (3) of the EEG Treaty fall within the limits of the activity described in the notification. As already stated, however, that is not the case. The anti-competitive application of the distribution agreement by AEG (i.e. the whole distribution system) has not been notified and cannot therefore be covered by the notification of the European Communities' distribution agreement.

3. Duration of infringement

- (76) Evidence of the discrimination against certain dealers was provided for the first time in May 1976 and for the influence on prices in July 1976. These infringements therefore began in May 1976 and lasted until February 1980 at least (point 38 above), i.e. for some three-and-a-half years.

4. Gravity of infringement

- (77) AEG has, firstly, directly and indirectly fixed resale prices, which is specifically prohibited in Article 85 (1). Secondly, in view of the

Commission's SABA Decision of 15 December 1975 and the judgment of the Court of Justice of 25 October 1977 in *Metro*, AEG must have been aware that discrimination against dealers on the basis of its distribution agreement constituted an infringement of the competition rules in the EEC Treaty. It is difficult to gauge precisely the direct economic consequences of these infringements. However, high-turnover retailers who were capable of selling consumer electronics equipment were excluded completely or for a time from the distribution system. It can also be assumed that other retailers, who knew of AEG's marketing policy and discriminatory selection of dealers, made not attempt at all to gain access to the distribution system. In all probability this discrimination had an impact on local, regional and inter-State price levels, because major trading chains and importing retailers were prevented from obtaining Telefunken products from the cheapest possible source in the Community and from passing these advantages on to consumers. Particularly in thickly populated areas of the Community (Paris, Metz, the Ruhr area and Munich) or even within a Member State (Belgium), consumers were prevented from purchasing Telefunken products at lower prices.

- (78) This is the first case in which the Commission has decided that a selective distribution system against which it had voiced no objections originally has been applied in an anti-competitive fashion. In several cases the discrimination and the influence brought to bear on prices were initiated only by approved dealers. Finally the Commission has taken the size of the undertaking into account.

IV. APPLICABILITY OF ARTICLE 3 OF REGULATION No 17

- (79) Where the Commission finds that there is infringement of Article 85 or 86 of the EEC Treaty it may, under Article 3 of Regulation No 17, require the undertakings concerned to bring such infringement to an end. AEG must therefore be required to refrain from applying its distribution agreement in an anti-competitive manner by engaging in a discriminatory selection of dealers and by influencing directly or indirectly dealers' resale prices,

HAS ADOPTED THIS DECISION:

Article 1

Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken has infringed Article 85 (1) of the Treaty establishing the European Economic Community by applying the distribution agreement for Telefunken products, which was introduced in the European Community on 1 November 1973, in such a way that:

- (a) dealers, although satisfying the conditions for authorization, could not obtain the contract goods; and
- (b) the selling prices of contracted dealers were directly or indirectly determined by AEG.

Article 2

AEG is hereby required to terminate the infringements found without delay.

Article 3

A fine of 1 000 000 (one million) ECU, or DM 2 445 780 (two million, four hundred and forty-five thousand, seven hundred and eighty Deutsch Marks) is hereby imposed on AEG. This amount must be paid within three months of notification of this Decision, to account No 000.0064910 of the Commission of the European Communities at Sal. Oppenheim, Köln.

Article 4

This Decision shall be enforceable in accordance with Article 192 of the Treaty establishing the European Economic Community.

Article 5

This Decision is addressed to Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken, AEG-Hochhaus, D-6000 Frankfurt am Main 70.

Done at Brussels, 6 January 1982.

For the Commission

Frans ANDRIESEN

Member of the Commission