II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 1979

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.595 — Pioneer Hi-Fi Equipment)

(Only the Dutch, English, French and German texts are authentic)

(80/256/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 Article 3 thereof,

Having regard to the application made to the Commission by Mr B. Iffli, Managing Director of Ets. Iffli SA, Metz and Chairman of 'Connexion', a French hi-fi equipment purchasers' group, in his letter dated 28 February 1976 and his supplementary letter dated 16 March 1976, alleging infringements of competition rules by the exclusive distributors of Pioneer equipment for France and Germany,

Having decided on 19 July 1978 to initiate proceedings under Article 9 (3) of Regulation No 17,

Having heard the undertakings concerned in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC of 25 July 1963 [2],

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered on 30 October 1979 pursuant to Article 10 of Regulation No 17,

Whereas :

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

I. THE FACTS

The main facts of the case are the following :

A. THE DISTRIBUTION OF PIONEER EQUIPMENT IN THE FEDERAL REPUBLIC OF GERMANY, FRANCE AND THE UNITED KINGDOM

1. The Pioneer Group

(1) Pioneer Electronic Corporation, Tokyo (Japan), is one of the world's largest producers of hi-fi equipment. Its total turnover in 1976 was $ 530 million and in 1977 $ 843 million. It has more than 20 subsidiaries in various parts of the world.

(2) The majority of Pioneer equipment sold in Europe is imported by its subsidiary Pioneer Electronic (Europe) NV Antwerp (Belgium) (hereinafter called 'Pioneer'). Prior to 1971 Pioneer was registered in Zürich (Switzerland). In 1976 a European manufacturing subsidiary, Pioneer Electronics Manufacturing NV of Mere-Erpe (Belgium), was established mainly for the production of loudspeakers and ancillary equipment.

(3) In the financial year ending 30 September 1976 Pioneer's sales of hi-fi equipment to its exclusive

distributors in the three Member States concerned in this case were as follows (ex-Antwerp prices) :

Federal Republic of Germany (1)	Bfrs ...
France	Bfrs ...
United Kingdom	Bfrs ...

2. Pioneer's exclusive distribution relationships in the EEC

(4) Pioneer used to have, at the time the events in this case took place, independent sole distributors in seven of the EEC countries : Belgium, Denmark, the Federal Republic of Germany, France, Italy, the Netherlands and the United Kingdom. However, Pioneer seems to have started since 1978 a policy of establishing wholly-owned national marketing subsidiaries or joint-ventures in Europe. In fact the Danish, German and UK distributors are no longer independent.

Pioneer's exclusive distribution relationships in the Member States concerned in this case have been the following :

(5) (a) *Federal Republic of Germany :*

C. Melchers & Co., Bremen (hereinafter called 'Melchers') had entered on 1 January 1966 into an exclusive distribution agreement with Pioneer covering the Federal Republic of Germany and West Berlin. This agreement provided the following under Article 10 'Other terms and conditions :

...

c) Agent agrees not to sell, distribute or promote the sales of any other similar competitive line of goods made in Japan except for Sony products, and agrees not to solicit or accept orders for the purpose of selling or delivering the commodities outside of the territory.

d) Principal agrees not to sell the commodities to others for the purpose of distributing in the territory and agrees to exercise his best efforts to prevent the introduction by others of the commodities into the territory.'

(6) A new agreement was concluded on 18 July 1967 and provided the following under Article 12 'Other terms and conditions :

...

c) Agent may deliver Pioneer goods to other countries within the common market. He may not, however, outside of the area stipulated in this contract, solicit for orders.

d) Principal agrees not to sell the commodities to others for the purpose of distributing in the territory.

e) Principal will protect Agent by referring all enquiries received directly from parties in the territory to Agent' (2).

This agreement provides in addition a number of obligations including *inter alia* an obligation to comply with specified minimum purchase requirements (Article 5), an obligation to report market conditions and to submit regular sales programmes (Article 8), an obligation to provide repair and after-sales services to users of the products in the territory (Article 10) and an obligation to advertise (Article 11).

This new agreement dated 18 July 1967 indicates that Pioneer had the intention to comply with Community competition law and in particular with Regulation No 67/67/EEC (3).

(7) As from 1 January 1978 the distribution of Pioneer products was entrusted to Pioneer-Melchers GmbH, a new company, of which 40 % of the authorized capital was to be held by Pioneer and 60 % by Melchers. The latter continues trade activities in other branches.

(8) Melchers has built up a network of over 1 000 dealers and seven local representatives, including Mr D. Full (Karlsruhe), each taking care of contacts with the dealers in a defined area and fostering the sales of Pioneer products at the local level. Melchers' sales to wholesalers being exceptional, it dealt only with two wholesalers :

1. Brummelhaupt, Cologne, which Melchers started supplying as from 1970, and

2. Otto Gruoner KG, Rommelshausen (hereinafter called 'Gruoner'), to whom sales were made as from March 1976.

In 1975 Melchers also made some sales to EVB, Stuttgart (hereinafter called 'EVB'), a firm specialising in export trade, particularly to Turkey.

(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.

(2) Translated from the German.

(3) Commission Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (OJ No 57, 25. 3. 1967, p. 849/67).

(b) *France*

(9) Musique Diffusion Française, Vélizy-Villacoublay (hereinafter called 'MDF') — in existence since 1973 — has been Pioneer's exclusive distributor for France for a number of years, but no written agreement has been concluded between the two parties.

(c) *The United Kingdom*

(10) Shriro UK Ltd, Iver, Buckinghamshire, hereinafter called 'Shriro', was appointed sole distributor for the United Kingdom by letter dated 10 September 1969.

(11) A draft exclusive distribution agreement dated 11 September 1969 was submitted by Pioneer to Shriro providing the following under Article 9

'Exclusivity

...

Principal will protect Distribution referring to Distributor all enquiries for the commodities mentioned above received from the territory. Distributor will not solicit business for Principal's products from outside of the territory, and will refer to Principal all enquiries or orders received therefrom. Principal agrees not to sell the commodities to others for the purpose of selling and distributing in the territory. Principal will use due diligence to protect the territory covered by this agreement, but cannot guarantee to prevent the shipment of Principal's products into the territory by parties other than Principal and shall not be held responsible therefor. Distributor shall prevent (original text 'select') his dealers from selling outside the territory.'

According to Article 18 of this draft, the distributor should submit to Pioneer regular reports and information on the market situation, market tendencies, activities of Pioneer's competitors, etc., as well as on retail prices, dealers' prices and price construction. Shriro did not, however, sign this draft.

(12) Neither did it sign the revised draft sent by Pioneer on 3 August 1976 and providing the following under Article 10 :

'Pioneer will refer to Distributor all enquiries for the commodities mentioned in Article 4, received from the territory. In case Pioneer wishes to make direct contacts in the territory he should do it after having consulted and in cooperation with the distributor.

Distributor shall refer to Pioneer all enquiries or orders for Pioneer products received from outside the territory.'

The revised draft also contained a clause relating to the submission of reports and information by the distributor to Pioneer (Article 14). The draft was to 'come into effect from 1 October 1976 for three years which is common to all Pioneer Distributors in Europe. Each article has been examined carefully by Pioneer head office and by ourselves ...' (see letter dated 3 August 1976 from Pioneer to Shriro).

(13) Shriro built up a network of over 260 dealers including department stores, multiples, specialist audio shops, cash and carry and discount shops. There are approximately 480 retail outlets for Pioneer products. Two Pioneer dealers, Comet Radiovision Services Limited, Hull (hereinafter called 'Comet') and the Audiotronic Group (hereinafter called 'Audiotronic') had between them approximately 160 retail outlets and accounted for some ... % of Shriro's sales of Pioneer equipment.

(14) Pioneer acquired during the course of 1978 the whole share capital of Shriro (UK) Ltd from the then parent company Shriro (China) Ltd, Hong Kong, and changed at an extraordinary general meeting on 1 December 1978 the name of Shriro (UK) Ltd to Pioneer High Fidelity (GB) Ltd.

3. Pricing system of Pioneer, Melchers, MDF and Shriro

(15) Sales of Japanese equipment were invoiced by Pioneer in Yen. Pioneer stated that the prices they charged to the exclusive distributors in the Federal Republic of Germany, France and the United Kingdom were substantially the same. Whereas Melchers and Shriro paid similar prices, MDF paid somewhat higher prices. But the latter was granted longer payment terms (between ... and ... days) and received a larger advertising allowance from Pioneer (between ... and .... % in the form of a discount on turnover, paid on presentation of vouchers. However, Shriro and Melchers received an advertising allowance of up to an amount equivalent to ... % of their total yearly purchases from Pioneer.

(16) The exclusive distributors were free to fix their selling prices at their own discretion. From the clauses in the abovementioned exclusive distribution agreements, it appears, however, that Pioneer shows considerable interest in conditions and developments in the national markets including dealer and retail prices.

(17) As to the exclusive distributors' sales prices to the retail trade there was a considerable difference not only between the different countries, but also inside each country according to the type of customer and/or quantity purchased.

(18) As it appears from the following examples MDF's sales prices (exclusive of VAT) to the retail trade were in late 1975 considerably higher than the prices (exclusive of VAT) charged by Melchers and Shriro to their retail traders.

Item	MDF	Melchers	Shiro
SA 5300 (=cheapest amplifier in 1975)	100	80	55
SA 7500 (=best sold amplifier in 1975)	100	73	62
TX 7500 (=best sold tuner in 1975)	100	89	67

Such price differences made parallel import of 'Pioneer' equipment attractive.

(19) According to MDF this price difference was due to the different distribution system of the respective sole distributors. MDF's sales policy was said to be based on exceptional service, before and after sales. In the absence of an international guarantee from Pioneer, MDF gave its own five years' guarantee for equipment submitted to its prior quality control. MDF incurred extra expenses for the editing of the 'Livre Bleu de la Haute Fidélité'. These additional expenses cannot, however, fully explain the existing price difference at that time.

(20) Mr Setton, the chairman of MDF, stated at the hearing [1] that he reduced his retail prices when parallel imports started, by stopping the five years' guarantee and the full quality control. On different occasions when complaining about parallel imports into France, Mr Setton had been advised by the sole distributors to lower his prices. Throughout 1976, exchange rate changes made German prices unattractive to French purchasers, but the prices in the United Kingdom remained advantageous.

[1] 'Hearing' in this Decision means the hearing held on 21 November 1978 in accordance with Article 19 of Regulation No 17 of 6 February 1962 and with Regulation No 99/63/EEC of 25 July 1963.

4. The hi-fi market and the market share of Pioneer equipment in France, the United Kingdom and Germany

(21) (a) *The hi-fi market*

The market of hi-fi or high-fidelity equipment is a very specialized market for equipment designed to reproduce as accurately as possible original sound signals. Because of this specialization the hi-fi market is narrower than the general audio market, which includes all radios, cassette and radio-recorders, record players and music centres.

(22) Although there is no worldwide accepted standard defining the degree of accuracy required to qualify for the description of hi-fi, the German DIN 45·500 standard, although actually outdated, has often been used, even outside Western Germany, to indicate the minimum requirements for equipment claiming to be hi-fi. The market defined according to this criterion covers all separates, i.e. high quality components for stereo systems which are sold separately as well as a considerable part of the music centre sector, i.e. a combination of a tuner, tape deck, turntable and amplifier in one box sold with stereo speakers.

(23) Equipment corresponding to the above German standard, such as budget music centres, might fall short of more rigorous standards now applied by hi-fi experts. It is in this quality sector, called 'hi-fi' — as opposed to 'mid-fi' in which the majority of music centres fall — and distinguished by high performance, advanced design, specialist consumer appeal and high prices that the Japanese producers are the leaders. This sector consists of products based on separate audio components, i.e. cassette/tape/record deck, tuner or receiver, amplifier and loudspeaker units. European producers have, on hontrary, until recently tended to concentrate on music centres.

(24) Pioneer's range included two or three music centres, but its main efforts were devoted almost exclusively to hi-fi separates. Although Pioneer had budget models at the lower end of the separates range, such as the SA 5300 amplifier, even these models would be considered as part of the hi-fi sector. Pioneer can be considered as one of the largest specialist hi-fi producers. Its own advertisements frequently mention its number one position in hi-fi.

(25) (b) *Market shares of Pioneer equipment in France, the United Kingdom and Germany*

1. The Commission stated in its statement of objections that Pioneer had something in the region of a ... — ... % share of the French market and an ... — ... % share of the United Kingdom market. Its market share in the Federal Republic of Germany was estimated to be smaller.

2. In contrast, according to Pioneer's exclusive distributors the market shares were as follows :

2.1. MDF stated that for 1977 its own market share accounted for about ... % of the general audio market and that a ... — ... % share of such market came into France through parallel imports. Considering that the relevant market in this case is narrower than the general audio market, MDF's share of such relevant market must have been higher than ... %.

2.2 Shriro stated that its sales of Pioneer equipment accounted for only about half the market share estimated by the Commission. However, the Commisn cannot accept Shriro's statement for the following reasons :

(a) all equipment in the Pioneer range, except for car radios, falls within the hi-fi market ;

(b) the figures quoted from the Mackintosh Yearbook by Shriro in its written submission do not in fact relate at all to the relevant market, but included both 'audio and hi-fi' systems.

2.3. Melchers estimated the share of the hi-fi equipment market held by Pioneer products in Germany at ... %.

3. On the basis of the figures concerning the hi-fi market provided to the Commission's services ..... as well as on the basis of the turnover of Pioneer's exclusive distributors in Pioneer products, their market shares in 1976 were as follows :

Country	Hi-fi market		Turnover of Pioneer's exclusive distributors in Pioneer equipment (in millions of national currency)	Market share of Pioneer's exclusive distributors
	Notional ex-exclusive distributor to retail trade prices			
	in million $ US (1)	in millions of the national currency (2)		
F	...	FF ...	MDF FF ...	... %
UK	...	£ ...	Shriro £ ...	... %
D	...	DM ...	Melchers DM ...	... %

(1) Source : .....
(2) Conversion according to yearly average rate in Eurostat 4. 6. 1978.

Considering that these figures are even higher than the figures stated by the Commission in its statement of objections and that they do not even take into account the amount of parallel imports, the Commission maintains that the market shares of Pioneer equipment in 1976 were at least ... — ... % in France, ... — ... % in the United Kingdom and about ... % in Germany.

B. THE PREVENTION OF PARALLEL IMPORTS OF PIONEER EQUIPMENT INTO FRANCE

1. Source of parallel imports of Pioneer equipment in France

(26) The complainant, Mr B. Iffli, is the owner of a discount business, Iffli SA, (hereinafter called 'Iffli'), in Metz dealing in household electrical goods, television and hi-fi. The firm's premises are situated on the outskirts of the city and accupy 5 000 m² of selling space. Turnover of Iffli SA in the financial year ending June 1976 was FF ..., hi-fi accounting for one-third.

(27) Mr B. Iffli founded in 1975, in association with Mr M. Debard, Managing Director of Auditorium Debard SA, Le Havre, an undertaking called 'Connexion' with the object of pooling purchases of hi-fi equipment. This group, of which Mr B. Iffli was then chairman and Mr M. Debard the secretary, comprised 23 individual undertakings distributed throughout France, certain of which included extensive sales premises. In 1975/76 some ... % of member's hi-fi requirements were purchases through Connexion, rising to ... % in 1976/77.

(28) The bulk of the Connexion group's purchases were made from the exclusive distributors in France, but a considerable part of their requirements were parallel imports made through a

specially constituted company, Société Megaservice, Lesquin (hereinafter called 'Megaservice'). Between September 1976 and February 1977 the Connexion group bought hi-fi equipment to the value of FF ... of which parallel imports of various brands through Megaservice accounted for FF ... or about ... % of the group's total purchases.

(29) In November 1975 three of the group's members, Iffli, Debard and Pigache, were able to offer various items of Pioneer equipment at between 26 % and 31 % off normal retail prices, this being possible as a result of their parallel imports from, for instance, Euro Electro SPRL, Brussels (hereinafter called 'Euro Electro'), and accordingly they launched an advertising campaign for the Christmas period. MDF retaliated with large advertisements in appropriate regional papers warning hi-fi listeners that the unlimited 'Longue Fidélité' guarantee was valid only for equipment checked in the MDF laboratories and that a so-called 'garantie internationale Pioneer' was merely an advertising puff.

2. **Iffli's German order**

(30) Shortly after Connexion had placed its first order with Euro Electro in November 1975, Mr B. Iffli approached Mr Weber, Director of Willi Jung KG, Saarbrücken (hereinafter called 'Jung'), with which he had regular business contacts, with a view to obtaining an additional parallel import source. Jung had recently been taken over by Gruoner and it was the latter's policy that all large scale purchases were to be taken care of by the head office in Rommelshausen. Mr Iffli, interested in several brands including Pioneer, and Mr Weber, travelled, therefore, to Rommelshausen on 12 December 1975 for discussions with Gruoner's representatives including the chief buyer, Mr Schreiber.

(31) Gruoner, which had not previously dealt in Pioneer equipment, sent a telex to Melchers on 15 December 1975, asking for a speedy quotation to be sent back, also by telex. Melchers replied the same day, referring Gruoner to its Karlsruhe representative, Mr Full. After negotiations with the latter, Gruoner wrote to Iffli on 31 December 1975 that he was able to make a first offer for a part of the equipment, including Pioneer, mentioned at their meeting of 12 December. It was indicated that delivery was in general possible within a month upon receipt of the order. A number of price lists for different brands, including a Pioneer price list, were sent as annexes with the letter to Iffli. These prices were substantially below those offered by MDF (up to approximately 30 %) at the end of 1975 and were still appreciably cheaper than MDF's prices after reduction in January 1976.

(32) On the basis of the prices offered by Gruoner on 12 and 14 January 1976, Iffli placed two orders, worth together about DM 950 000 for Pioneer equipment with Jung. Jung passed these orders by telex on 12 and 14 January 1976 to Mr Schreiber, who cut the order down to DM 550 000 believing that the nature and the size of the order would create the impression at Melchers that the ordered equipment was to be exported to France. Mr Schreiber then forwarded on 20 January 1976 by two separate telexes the order of DM 550 000 to Melchers.

(33) On 19 January 1976 Iffli made import declarations for customs purposes supported by *pro forma* invoices for a total of DM 2 233 971 (= FF 3 797 752). The application for this amount, which was considerably higher than the actual order placed with Jung, has to be explained by Iffli's intention to place more orders in the following six months. On 21 and 22 January 1976 the 'Direction des Industries Electroniques et de l'Informatique, Relations Internationales' of the Ministry of Industry gave its 'avis favorable' for these imports. Pioneer learned of the grant of licences for the import of Pioneer equipment by Iffli from Germany.

(34) Meanwhile Jung announced to Iffli by letter dated 19 January 1976 that he would keep him informed about the exact date of delivery of his order and that the equipment would probably be delivered in various stages. According to Mr Iffli, Mr Weber told him the same day on the telephone that the greatest part of the order had already been dispatched to Rommelshausen, a fact which he confirmed in his letter dated 20 January to Iffli. Although at the hearing Mr Weber's version was contested and Melchers disputed its truthfulness, the Commission is of the opinion that these facts — although they remain without a proper explanation — are irrelevant.

(35) On 20 January 1976 Jung passed Iffli's order to Melchers, who had its stock checked. It is clear from an internal note from Melchers, and from the signed statement given on 6 June 1976 by Messrs von Bonin and Mackenthun to the Commission's inspectors, that Melchers was told by telephone on 22 January that Hermes Kreditversicherung AG, Hamburg, was prepared to cover the Gruoner order for DM 200 000. Although this commercial credit insurance was confirmed in writing by Hermes to Melchers only on 27 January, the Commission does not accept Melchers' version according to which it requested Hermes for insurance cover only on 23 January, the day on which its own temporary

secretary, confirmed — in answer to a telex inquiry from Gruoner — the order by telex and gave the name of Gildemeister, a Bremen transport firm, as forwarding agent.

(36) On 27 January 1976 Melchers sent a telex to Mr Schreiber referring to the Pioneer order and asking him to contact Mr Full. Instead of this Mr Schreiber telephoned the sales director of Melchers, Mr von Bonin, who, according to Mr Schreiber's statement to the Commission's inspectors, told him that Melchers had learnt through Pioneer in Antwerp that the delivery was to be exported, and that Melchers refused to supply Jung unless they received assurances that the Pioneer equipment would not be exported. The telex of 28 January from Mr Schreiber to Mr Weber and confirming that conversation reads as follows :

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

Pioneer's European head office in Antwerp already knows that a licence has been issued to import Pioneer equipment. The German representative was instructed not to supply Jung under any circumstances. We can be supplied only if we undertake not to export. Melchers consequently refuses to make delivery prior to any such undertaking.' (1)

(37) On 29 January Mr Weber wrote to Mr Iffli informing him that the order for a delivery of Pioneer equipment could not be carried out. He said Mr von Bonin had told him that Pioneer had learned from Paris of Iffli's import licence and that Melchers would deliver only if Jung entered into a prior written undertaking that none of the Pioneer equipment it supplied would be exported to France. During the conversation which took place at the end of January between Mr Debard and the sales manager of MDF, Mr Couadou, the latter said '... vous n'aurez pas la marchandise' (translation : 'you will not have the goods').

(38) Subsequently, Mr Iffli wrote on 30 January a letter to Jung threatening him with legal action for failure to perform the sales contract and wrote another letter on 3 February in which he told Jung that Pioneer products, bearing Melchers trade marks and imported from a Belgian wholesaler, were available on the French market and that Jung was therefore the victim of discrimination. Jung informed Melchers about Iffli's complaints. Mr Iffli also complained to Gruoner in a similar way as he did to Jung.

(1) Translated from the German.

(39) Some other equipment bought from Melchers had also been exported to France. About November 1975 EVB obtained a large order for Pioneer equipment for about DM ... from four firms in Paris. EVB contacted Mr Full for this order, but the latter requested him to confirm by telex to Melchers that the Pioneer equipment was not destined for resale in EEC countries. The justification for this restriction was that EVB received special low prices, which did not contain the usual allowance for technical service normally included in Melcher's prices. EVB did send such a confirmation to Melchers, after they had already informed. Melchers by telex that the goods were destined for Turkey. On the basis of this understanding, Melchers let EVB have the consignment, but EVB delivered to France, as its Turkish customer had cancelled a substantial part of the order.

(40) Following Iffli's complaint, Mr Schreiber invited Messrs Mackenthun, the managing director responsible for Melchers' Pioneer Division, and von Bonin to Rommelshausen for discussions. At this meeting on 17 February 1976, which Mr Full also attended, and of which Mr Schreiber has kept notes, the accusations were repeated. Melchers' representatives denied at the meeting that they had made any exports and repeated that Melchers could give Gruoner satisfactory service only if they received assurances that Gruoner would use the equipment to supply the German specialist retail trade. On 18 February 1976 Mr Schreiber sent a telex to Mr Weber with the summary of these talks.

Paragraph 2 of this telex reads as follows :

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

Following these negotiations Melchers entered into long-term supply arrangements with Gruoner. A Gruoner internal memo dated 19 February 1976 states the following :

'Following talks with C. Melchers & Co. ... any obstacles to cooperation between us have now been removed.' (1)

The Iffli order was dropped and Iffli never received any goods. Gruoner placed its first new order with Melchers a few weeks later. Gruoner became Melchers' largest single customer with purchases for the remainder of 1976 of over DM ...

3. The prevention by Shriro of parallel exports from the United Kingdom to France

(41) Comet was the largest chain of discount warehouses and low cost retail outlets selling mainly electro-acoustic equipment and electrical household goods in the United Kingdom. In 1976 the firm's turnover was some £ ..., approximately ... % of which was accounted for by hi-fi equipment; out of this ... % about ... concerned Pioneer equipment. Comet had been exporting hi-fi equipment to various customers in other European countries, and in particular the Federal Republic of Germany, since 1974, but not in large quantities until December 1975. However, between 19 December 1975 and 16 January 1976 it sold £ ... worth of Pioneer equipment to Euro Electro. Although Comet was one of Shriro's main customers, it did not inform the latter of its export activities.

(42) Audiotronic owned the well-known Laskys hi-fi chain in the United Kingdom. Between 1975 and 1977 Audiotronic acquired a substantial interest in Allwave BV, Delft, a Dutch hi-fi chain, as well as in King Musique, at that time MDF's most important customer in France. (Audiotronic has since divested itself of King Musique and Laskys).

From February 1976 onwards, Audiotronic sold, over a three months period, Pioneer equipment to the value of some £ ... to Euro Electro. Until the end of 1978 Auditoronic had an export department with a turnover in excess of £ ... Its main export activity was, however, with Allwave. A considerable part of the equipment bought by Euro Electro from Comet and Audiotronic was resold to the Connexion group. Audiotronic was another major customer of Shriro, and together with Comet it accounted in 1976 for approximately ... % of Shriro's sales of Pioneer equipment.

(43) In early December 1975, some days before the first order from Euro Electro, Comet's export manager received an order by telephone for 50 Pioneer turntables from the Office pour le Développement de l'Acoustique Appliquée Sarl, Rungis (hereinafter called 'ODA'), which was unknown to him. ODA's capital of FF 20 000 is held as to 95 % by MDF itself and as to 5 % by Mr J. Setton, the chairman of MDF. Comet believed it was a bona fide order and, considering the order was said to be urgent, Comet dispatched the goods by air freight to Orly.

(44) At about the same time Audiotronic also received an order from ODA for 10 of the same turntables, which it likewise dispatched by air freight.

(45) A third order was placed by ODA at almost the same time with the Lindair-Henry's (UK) group, which has since been wound up.

(46) The ODA orders were test purchases to prove the existence of parallel imports. Mr Setton admitted at the hearing that he was absolutely opposed to parallel imports and that these orders were made to prove that the merchandise was coming from England or Germany to France. Mr Setton also admitted that he brought this evidence to the Antwerp meeting of 19 and 20 January 1976 (see paragraphs 51 and following) concerning Pioneer products and parallel imports, and showed it to Pioneer representatives and to Mr Todd from Shriro.

(47) According to Mr Todd's statement given in writing to the Commission's inspectors on 4 May 1977 'it was agreed between Mr Setton and myself that I would try to get my UK customers to refrain from exporting Pioneer equipment ... I should point out that neither Mr Setton nor Pioneer put pressure on me. We considered this to be a gentlemen's agreement in the interests of orderly marketing.' Mr Todd stated however at the hearing that he took these steps 'in order to get Mr Setton off his back' and in his letters to Audiotronic and Comet (see paragraphs 48 and 49) he wrote that '(our) principals (=Pioneer) were looking on us with a certain amount of disfavour'.

(48) On 28 January 1976 Mr Todd wrote to Mr D. Smith, then Managing Director of Audiotronic, as follows :

'...

I was recently called to the Pioneer offices in Antwerp to discuss the complaint of their French distributor that Pioneer equipment was arriving into France from the UK. You have previously advised us that you were not exporting, as have our other major dealers, and I denied the allegations.

To prove that it was possible to have Pioneer equipment exported to France, the distributor placed small test orders on several of our dealers and I was confronted with the 'Proof' — Lasky invoice LX05319 for 10 PL 12 D/2 at a price of

£ ... and Emery Air Freight air waybill No LON 15761. The goods were shipped against letter of credit No 375140.

I am well aware of EEC rules regarding parallel imports but nevertheless find it distressing that although we have worked together closely for many years you, albeit not alone, have caused my principals to look on me with a certain amount of disfavour.

As a distributor yourself of a well-known Japanese product I am sure you can appreciate my feelings. I am well aware that the solution would probably be for me to put up my prices and for the French distributor to bring his prices down. Unfortunately economic conditions sometimes prevent applying the obvious.'

On 2 February 1976 Mr Smith wrote back to Shriro as follows :

'...

Regarding the problems of exports, I would like you to accept my apologies for the embarrassment caused to you but to put things into perspective, I have no evidence that we have ever exported any large quantites of Pioneer and from our experience, Pioneer products can be bought equally as cheap in other European countries. Nevertheless, I will request that this practice is now stopped...'

(49) On 29 January 1976 Mr Todd sent a letter to Mr Hollingberry, Chairman of Comet. This letter reads as follows :

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

On being made aware of the current allegations I made enquiries of our larger dealers and although I was aware that your company had made a sale of Pioneer amplifiers to Holland I was assured that this was an isolated shipment. Having had assurances from our other large dealers I again rejected the allegation.

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

In the case of Comet I was given a copy of your invoice 0945/Export dated 10 December 1975 for 50 Pioneer PL 12D Mark II turntables at a unit price of £ ..., a packing list and an exchange of telex messages between your Mr Jose Ripolles and a Mr G. Fagueret.

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

I think I am correct in saying that we were the first distributor of true hi-fi equipment to sell to Comet and this was a decision we reached not without certain criticism. The decision was made of course not in your interest alone. I felt that the attention you placed on after sales service, your expansion plans and the possibility of making available to the man in the street true hi-fi equipment at reasonable prices would enable Pioneer, a late starter in the United Kingdom, to come quickly to a predominant position. I think I can honestly say that Pioneer now has the number one position in true hi-fi in the UK and I am appreciative of the part played by your company in bringing us to this position. It, therefore, saddens me that your company, albeit not alone, has been the cause of our principal's looking on us with a certain amount of disfavour.

Over the years our company has assisted your company in every possible way. Of late we have allowed you to buy at old prices after the introduction of new price lists. We have allowed extra periods of credit and we have even taken back stock when the market had not taken off as you anticipated.

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

The French distributor is a young man who like ourselves has spent considerable sums of money in building up the name of Pioneer and offering tremendous after sales serivice.

You too have spent considerable sums of money for the same objects with Comet and I wonder if I can call on you to ask your assistance to help prevent a dog-eat-dog situation developing.'

On 30 January 1976 Mr Hollingberry wrote to Shriro the following letter :

'...

Following our telephone conversation this afternoon I wish to confirm in writing that my company will not deliberately export Pioneer products to trade customers outside the United Kingdom.

Quite naturally, you will understand that since several of our locations are ports there will be individual customers who will wish to come to the United Kingdom to buy from us and I think you will agree that we should continue to supply those people.'

Mr Todd did not write to Lindair, since the firm had already discontinued business.

(50) Although Shriro's counsel stated at the hearing that Comet continued to export after this date through the Channel Islands and to EEC nationals who came to the United Kingdom for purchases for delivery abroad, it was established by visits of the Commission's inspectors to Comet and to its main export customer, Euro Electro, that export business of Pioneer equipment in trade quantities was stopped as a result of the intervention of Shriro. This is also confirmed by the firm's records. Audiotronic in fact took over from Comet in supplying Euro Electro, when Comet stopped exporting. Audiotronic received in March 1976 orders worth over £ ..., but achieved only £ ... According to Audiotronic's statement, Shriro made it difficult for them and, had they been free to export, they could have done much more business.

4. The Antwerp meeting of 19 and 20 January 1976

(51) Meetings for European distributors of Pioneer products are held about two or three times a year in Antwerp. The purpose of these meetings is to exchange views and information on matters relating to the distribution of Pioneer products in Europe, including the introduction of new products, sales objectives and marketing strategy. According to Mr Setton there are three kinds of meetings : first, the proper hi-fi meeting, second, the car stereo meeting and third, the music centre meeting. Pioneer usually informs the distributors 15 days in advance. Pioneer submitted a list of meetings which did not mention the meeting of 19 and 20 January 1976. In general, records are kept of these meetings, at least of the invitations to the participants and of the agenda.

(52) However, of the meeting held on 19 and 20 January 1976, at which, amongst others, Messrs Setton, Todd and Mackenthun were called by Pioneer, no single document, record or even personal notes were kept. From the statements made by Pioneer and the sole distributors, it does not appear whether this meeting was a regular or a special meeting. What is sure is that various matters were discussed including parallel imports. The Commission notes that Pioneer's Dutch sole distributor was also present at the Antwerp meeting of 19 and 20 January 1976, but does not allege that the Dutch distributor took part in the concerted practices.

(53) According to Mr Ito, Managing Director of Pioneer, Mr Setton from MDF first brought up the question of parallel imports in a telephone conversation towards the end of 1975, and again in subsequent telephone conversations in the course of which he claimed that he knew the name of the importing firm and also that he knew the export origin of the equipment was the Federal Republic of Germany ; he insisted that Mr Ito should take steps to prevent these imports. Pioneer admitted that it transmitted MDF's complaints to Melchers.

(54) At the meeting of 19 and 20 January 1976 organized by Pioneer and held under the presidency of Mr Ito, Mr Setton complained that such parallel imports were ruining the French market and produced some evidence that the exports originated in the United Kingdom (see under 43 to 49). According to Mr Mackenthun, he also complained about deliveries from Germany to France.

(55) Pioneer and Melchers deny ever having taken any action as a result of these discussions in Antwerp.

Mr Collinot, MDF's accountant, declared to the Commission's inspectors that the representatives of Pioneer, upon Mr Setton's requests to take steps to prevent parallel imports 'replied that there was nothing they could do in such a matter' (original in French : 'ont répondu qu'ils ne pouvaient rien faire en ce domaine').

Messrs Mackenthun and von Bonin declared to the Commission's inspectors : 'Pioneer Electronic (Europe) NV has not given any recommendation or instruction to C. Melchers & Co, Bremen, nor has it tried to do so' (original in German : 'Pioneer Electronic (Europe) NV hat keine

Empfehlung oder Anweisung an C. Melchers & Co, Bremen, erteilt und hat dies auch nicht versucht').

(56) It should be stressed that Melchers received Gruoner's order on 20 January 1976, the date on which Mr Mackenthun was at the Antwerp meeting where parallel imports were discussed. Around 27 January 1976 Melchers learned through Pioneer in Antwerp that the Iffli order was to be exported and refused to supply Jung unless the latter gave written assurances that the 'Pioneer' equipment would not be exported.

(57) At the meeting in Antwerp it was agreed between Mr Todd and Mr Setton that the former would try to get his UK customers to refrain from exporting Pioneer equipment (see above paragraph 47). Although Mr Todd declared to the Commission's inspectors that 'neither Mr Setton nor Pioneer put pressure on me', he stated at the hearing that 'Mr Setton had been on my back for years'. About a week after the meeting Mr Todd wrote to Comet and Audiotronic 'in the hope that Mr Setton would get off my back'.

II. LEGAL ASSESSMENT

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

(58) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. The prevention of parallel imports from the Federal Republic of Germany to France

(59) MDF, Pioneer and Melchers are undertakings within the meaning of Article 85 (1).

(60) The prevention of parallel imports from the Federal Republic of Germany to France was the result of a concerted practice between MDF, Pioneer and Melchers.

(61) 1.1. *The conduct of MDF*

MDF complained to Pioneer and Melchers, incited them to prevent parallel imports from Germany to France and pestered them for that purpose. MDF was the main beneficiary of the results of the action taken by Pioneer and Melchers. Its concern was to maintain its sales prices at a considerably higher level than sales prices for 'Pioneer' equipment in other Member States.

1.1.1. MDF stepped up its publicity campaign against parallel imports into France since December 1975.

1.1.2. Mr Setton had repeatedly telephoned Mr Ito of Pioneer on the subject of parallel imports before the meeting in Antwerp and had asked him to intervene.

1.1.3. Mr Setton complained at the meeting of 19 and 20 January 1976 in Antwerp about deliveries from the United Kingdom and Germany to France.

1.1.4. Mr Setton stated bluntly at the hearing that he was absolutely opposed to parallel imports and that he never hid the fact that he did his utmost to try to limit parallel imports.

1.1.5. The Commission infers from the fact that both Pioneer and MDF (see paragraph 37 — statement by Mr Couadou) disposed of the information relating to the administrative approval from the 'Direction des Industries Electroniques et de l'Informatique, Relations Internationales' on 21 and 22 January 1976 for the importation of the goods ordered by Mr Iffli into France, that MDF passed this information to Pioneer.

(62) 1.2. *The conduct of Pioneer*

It was said in Pioneer's defence that Pioneer was not involved in the arrangements made by its distributors and merely acted as a conduit for complaints between one distributor and another. This is not accepted by the Commission for the reasons stated hereinafter. Nor does the initiative taken at the hearing, at least by Mr Setton of MDF and Mr Todd of Shriro, to take off the responsibility from Pioneer, discharge Pioneer from its liability.

1.2.1. The transmission by Pioneer to Melchers prior to the meeting of 19 and 20 January of Mr Setton's complaints and the later transmission of information concerning the destination of the goods ordered by Mr Iffli must be taken in the context of Pioneer's position as the manufacturer's representative in Europe and as a company whose interest — as can be seen from the draft distributor contracts it sent out — in Pioneer goods did not stop once it had invoiced them, and in the context of the surrounding events.

Thus, far from being a message switching device waiting to be activated, Pioneer's transmission of information to Melchers can only be satisfactorily explained as an active attempt to prevent parallel imports into France.

1.2.2. It was Pioneer's habit to organize sales and marketing meetings in Antwerp and Pioneer organized the meeting of 19 and 20 January 1976. The chairman of the meeting was Pioneer's then managing director. All the evidence confirms that, whatever else was discussed at that meeting (and only Mr Setton could remember the ostensible purpose of that meeting, although the others concerned could remember the subjects for discussion at other meetings held in Antwerp) the main item that was actually discussed was the prevention of parallel imports. Such discussions — which undoubtedly took place — occurred with the cooperation (at the very least) of the chairman of the meeting. Mr Todd stated in his letters dated 28 and 29 January 1976 to Audiotronics and Comet (see paragraphs 48 and 49) that he had been called to the Pioneer offices in Antwerp to discuss the complaints on parallel imports.

1.2.3. No agenda or record was kept of the meeting of 19 and 20 January 1976. At the hearing it was stated by Pioneer that no written record of any of these meetings was ever kept. This is incorrect. A Commission inspector on one visit saw copies of agendas or notices calling meetings on Pioneer's files and it was only the meeting of 19 and 20 January 1976 of which all trace was missing. It was also stated for Pioneer at the hearing that it was a very efficient Japanese company which did not 'lose time in paperwork'. Both contentions were at variance with the provision by Pioneer to the Commission, as part of its defence, of a list of sales/marketing meetings which had taken place. The absence of any trace of the meeting in Pioneer's files indicates either an extraordinarily unlucky omission by Pioneer in the circumstances, or a deliberate decision not to keep any documentary evidence relating to the meeting.

1.2.4. Although Pioneer is said not to have exerted pressure on Melchers, it is clear from the telex dated 28 January 1976, which the Commission considers to be an exact description of the telephone conversation between Messrs von Bonin and Schreiber, that Melchers refused to sell or deliver to Gruoner on instructions from Pioneer.

1.2.5. Although the reference in the telex dated 18 February 1976 to the terms of the agreements governing the Pioneer distribution system does not correspond exactly to the terms of the agreement between Pioneer and Melchers, it sets out the representations which has been made during the conversation between Gruoner and Melchers as to the way in which the agreement actually operated to keep the different national markets separated from each other.

1.2.6. Pioneer was aware of the requirements of Community law in this field, as can be seen by a comparison of the first and second contracts which Melchers notified to the Commission. The first was clearly territorially restrictive while the second represented an attempt to comply with the terms of Regulation No 67/67/EEC. Both had been submitted by Pioneer to Melchers. In arrangements for the exclusive distribution of branded goods, the status of distributor is often the major business asset possessed by the distributor. Certainly that was the case here with Melchers and Shriro. The manufacturer's power to decide upon the continuance or otherwise of a distribution contract often puts the balance of power in his hands and that was the case with Pioneer (which represented the manufacturer in Europe). The evidence is clear that Pioneer's intervention is consistent with the fact that other distributors had earlier advised Mr Setton to reduce his prices and coincides with the start of effective measures to isolate the French market.

1.2.7. The presence of the Dutch sole distributor of Pioneer equipment does not prove that the meeting had nothing to do with parallel imports, since he was also concerned about such imports into his territory.

(63) 1.3. *The conduct of Melchers*

Following Mr Setton's complaints about parallel imports from Germany into France and Mr Mackenthun's participation at the Antwerp meeting, where parallel imports — although not the Iffli order — were discussed, as well as Pioneer's instructions, Melchers refused to deliver the goods ordered by Gruoner although they had accepted and confirmed the order. Even if it could be considered that the confirmation was made by mistake, the Commission believes that the goods would not have been delivered by Melchers unless Gruoner had given a prior written undertaking that the goods would not be exported.

During the investigations by the Commission's inspectors at Melcher's premises, in the written submissions in reply to the statement of objections as well as during the hearing, Melcher's representatives have stated the following in relation to the above facts :

(64) 1. Melchers never accepted Gruoner's order and therefore there was no refusal to deliver :

(a) after reception of the order, Melchers' inventory was checked and it was found out that there were not sufficient goods in stock in order to meet Gruoner's order ;

(b) Melchers' request for Hermes' coverage was only one of the pre-requisites for the acceptance of the order ;

(c) the acceptance of the order by telex on 23 January 1976 by a temporary employee, without having received instructions, was a mistake.

(65) 2. It is denied that Melchers inquired after the destination of the ordered goods and that it was said by Melchers that the goods would not be delivered unless Gruoner gave them a prior written undertaking that the goods would not be exported.

(66) 3. If there was a refusal to sell to France or a preference to sell to the German market, such a decision was the consequence of normal business considerations and contractual necessities.

(67) 4. Further to the meeting between Melchers and Gruoner, the latter placed on 11 March 1976 a modified version of the order filed on 20 January 1976.

However, in reply to these arguments, the Commission would point out that :

(68) 1. (a) Melchers, upon finding that there were not sufficient goods in stock, did not try either to obtain the balance of the order from Pioneer, where plenty of goods were available, or to start negotiations for a reduced order ;

(b) the Commission did not infer in the statement of objections, and does not do so in this Decision, from the request for Hermes' coverage that the order was accepted by Melchers ; the order was nonetheless confirmed on the day after Melchers received orally notice of Hermes' coverage ;

(c) it is surprising that, if the temporary employee made a mistake by confirming the order without having received instructions, such a mistake had not been pointed out at that time to Gruoner.

(69) 2. (a) The evidence shows (see paragraphs 36, 37 and 40) that Melchers was informed about the destination of the goods and that Gruoner was asked by Melchers to promise not to export them ;

(b) there was no obvious reason for Mr Schreiber to misrepresent the truth in internal company memos or notes ;

(c) the statement by Mr Schreiber, who is now Melchers' biggest customer, is more likely to be true, as it was given by him while being against his interest, whereas Mr von Bonin could only find advantage in presenting after the event a different interpretation of the facts.

(70) 3. (a) Melchers had on another occasion demanded a declaration from EVB (see paragraph 39) to the effect that it would not export to the Pioneer countries and amongst others to EEC countries ;

(b) Melchers' refusal came only about a week after the meeting of 19 and 20 January in Antwerp, where a number of European sole distributors of Pioneer equipment were present, including Messrs Mackenthun and Setton and during which parallel imports were discussed.

(71) 4. A comparison of the size of the orders placed by the Gruoner group in March 1976 with the size of the order placed on 20 January 1976 shows that there is no relation between both and that there cannot be question of a so called 'modified order'. The goods ordered in March 1976 were not delivered to Mr Iffli.

(72) Therefore, the Commission is of the opinion that Melchers dealt at the outset with the order from Gruoner in a way which was consistent with the behaviour of a company receiving an important order from a new client, but that Melchers changed its conduct the moment it received the information concerning the destination of the goods ordered by Gruoner. The Commission cannot accept Melchers' argument that it was because of its temporary employee's mistake that the order had been erroneously accepted and therefore did not need to be carried out. Such argument does not fit in the logical and chronological order of the facts as they have been established by the Commission.

(73) The conduct of the above undertakings cannot be explained in a reasonable way as being the consequence of normal business considerations or contractual necessities nor can the conduct of each of the undertakings be considered as isolated facts. On the contrary, the conduct of each of these undertakings is part of the concerted practice. The conduct of each of these undertakings constitutes an essential element which together form a concerted practice. Indeed, as the European Court of Justice held in joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 in Suiker Unie and Others v. Commission, ECR 1975, ground No 283: 'If an economic operator accepts the complaints made to him by another operator in connection with the competition to which the products manufactured by the former operator expose the latter, the conduct of the operators concerned amounts to a concerted practice.' In the present case Melchers accepted the complaints made by MDF in connection with the competition in Pioneer equipment. The conduct of Melchers and MDF is narrowly linked with the conduct of Pioneer as stated above in paragraph 62 and in particular with the transmission of MDF's complaints and the information concerning the goods ordered by Gruoner as well as with the instruction given to Melchers not to deliver to France.

(74) The participants in the concerted practice intended and succeeded in preventing exports from the Federal Republic of Germany to France in order to isolate the French market so that the relatively high prices on this market would be protected against foreign competition. This conduct is by its very nature a restriction of competition since it tends to isolate a part of the market just as an explicit export prohibition does. Thus the reasoning of the Court of Justice (see case 19/77 Miller International v. Commission, ECR 1978, ground No 7) can be applied to this kind of behaviour. It is not the form of the conduct which is relevant but its object and effect. The object and effect of the concerted practice between MDF, Pioneer and Melchers was the restriction of competition within the common market.

(75) The market shares of the Pioneer products in France and Germany were of a sufficiently important size for the behaviour of the undertakings participating in this concerted practice to be, in principle, capable of appreciably affecting trade between Member States. The size of the one order which Melchers refused to deliver for export to France shows already that appreciable trade in Pioneer equipment could have developed between France and Germany. Thus, as a result of the concerted practice, the flow of inter-State trade in the products in question developed differently from the way it would have done without the restriction resulting from the concerted practice. That trade between Member States could have been even more appreciably affected, follows from the fact that Iffli had already obtained from Jung *pro forma* invoices for another DM 1·3 million to cover possible repeat orders.

2. The prevention of parallel imports from the United Kingdom to France

(76) MDF, Pioneer and Shriro are undertakings in the sense of Article 85 (1).

(77) The prevention of parallel imports from the United Kingdom to France and other EEC countries was the result of a concerted practice between MDF, Pioneer and Shriro.

(78) 2.1. *The conduct of MDF*

2.1.1. The role played by MDF in relation to the prevention of parallel imports from the United Kingdom was similar to that played by it with regard to such imports from the Federal Republic of Germany (see paragraph 61, subsections 1.1.1 to 1.1.4).

2.1.2. In addition, Mr Setton brought evidence of the test orders placed by ODA, a company in which he owned a major interest, to the meeting in Antwerp and showed them to Mr Todd in order to prove parallel importation from the United Kingdom.

2.1.3. At the Antwerp meeting of 19 and 20 January 1976, chaired by Pioneer, Mr Setton made such representations to Mr Todd that Mr Todd sought to discourage his two major UK customers from exporting from the United Kingdom.

2.1.4. Mr Todd stated at the hearing that Mr Setton had been on his back for years and that he wrote to his main customers in the hope that it would get him off his back.

(79) 2.2. *The conduct of Pioneer*

2.2.1. Pioneer organized the meeting in Antwerp on 19 and 20 January 1976, held under the

presidency of Pioneer's then managing director and at which parallel imports was a main item of discussion (see paragraph 62, point 1.2.2).

2.2.2. No agenda or record was kept of the meeting of 19 and 20 January 1976 (see paragraph 62, point 1.2.3).

2.2.3. Pioneer was aware of the requirements of Community competition law (see paragraph 62, point 1.2.6).

(80) 2.3. *The conduct of Shriro*

2.3.1. Following Mr Setton's complaints about parallel imports from the United Kingdom, Mr Todd tried, after the Antwerp meeting of 19 and 20 January 1976, to prevent his major customers from exporting to France. A short time after this Antwerp meeting Mr Todd exchanged letters with Shriro's main customers, Comet and Audiotronics. Following receipt of Mr Todd's letters, both companies agreed to stop exports of Pioneer equipment.

2.3.2. Shriro took these steps *vis-à-vis* its two customers, accounting for ... % of Shriro's business in Pioneer equipment, in order to avoid any difficulties with MDF and Pioneer (see paragraph 47).

(81) The concerted practice between MDF, Pioneer and Shriro — including the 'gentlemen's agreement' between MDF and Shriro — had for the same reasons as the concerted practice between MDF, Pioneer and Melchers as object and effect the restriction of competition within the common market (see above paragraph 74).

(82) The market shares of Pioneer products in France and the United Kingdom were of a sufficiently important size for the behaviour of the undertakings participating in this concerted practice to be, in principle, capable of appreciably affecting trade between Member States. As a result of this concerted practice, Comet did also in fact stop exporting Pioneer equipment in trade quantities to other Member States. The quantities of goods exported by Comet to France before Shriro's intervention and the size of the exports made by Audiotronic after the exchange of letters show that considerable trade was capable of being affected. Thus, as a result of the concerted practice, the flow of inter-State trade in the products in question developed differently from the way in which it would have done without the restriction resulting from the concerted practice.

B. INAPPLICABILITY OF ARTICLE 85 (3) OF THE EEC TREATY

(83) By virtue of Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) may be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings;

— any decision or category of decisions by associations of undertakings;

— any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(84) For the benefit of exemption under Article 85 (3) to apply, however, such a concerted practice must first have been notified to the Commission in accordance with the provisions of either Articles 4 (1) or 5 (1) of Regulation No 17, except where the requirement to make such notification is removed by the terms of Articles 4 (2) or 5 (2) of that Regulation.

(85) Neither the concerted practice between MDF, Pioneer and Melchers nor that between MDF, Pioneer and Shriro were notified to the Commission. Neither of these concerted practices fall within the exceptions provided for under Articles 4 (2) and 5 (2) of Regulation No 17.

(86) Melchers notified on 19 December 1966 an exclusive dealing agreement with Pioneer and on 2 July 1967 submitted an amended version. Clause 12 (c) of this notified amendment contains permission to deliver to other common market countries. In disregard of this provision, Melchers, in concert with MDF and Pioneer, prevented its customers from exporting to EEC countries. This concerted practice was not notified to the Commission.

(87) Even if these concerted practices had been properly notified, none of them would have qualified for exemption under Article 85 (3), as export prohibitions lead to a system of market-sharing

which is in conflict with the basic principles of a common market. Although some improvement in the distribution of goods may result from exclusive dealing agreements, the prohibition of export to other EEC countries is not indispensable for its attainment. Nor is there any evidence of how consumers may benefit from measures which serve to maintain price differentials.

C. APPLICABILITY OF ARTICLE 15 (2) OF REGULATION No 17

(88) Under Article 15 (2) the Commission may by decision impose on undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the fine, regard shall be had both to the gravity and to duration of the infringement.

(89) The Commission is of the opinion that substantial fines must be imposed on the undertakings which took part in the concerted practices which resulted in the prevention of parallel imports from the Federal Republic of Germany and the United Kingdom to France.

(90) All the undertakings participating in the concerted practices which are the subject of this case infringed intentionally, or at least negligently, Article 85 (1). All the undertakings knew or ought to have known that the prevention of parallel imports is a serious breach of Article 85 (1), as has been established by a series of judgments of the Court of Justice of the EEC and decisions of the Commission. By participating in these concerted practices, the undertakings involved in this case sought to obstruct in respect of the distribution of Pioneer equipment one of the principal aims of the EEC Treaty, namely the creation of a single market between Member States, or their conduct had at least the effect of such obstruction.

(91) In order to prevent parallel imports of Pioneer equipment into France, MDF took special measures in order to discover parallel imports, complained to Pioneer, Melchers and Shriro about them, and entered into a 'gentlemen's agreement' with the latter, while simultaneously charging the highest prices for Pioneer equipment in Europe.

(92) Melchers deliberately refused to deliver the goods ordered by a German wholesaler for delivery to France unless assurances were given that the goods would not be exported.

(93) Mr Todd, from Shriro, who knew he ought to comply with Community competition law (see Shriro's letters of 28 and 29 January 1976, and particularly the following excerpt from the latter : 'I am well aware of EEC rules regarding parallel exports but quite honestly at times I am more concerned with justice than with the law itself'), did not do so. He also admitted having entered into a 'gentlemen's agreement' with MDF and having taken measures in order to prevent his main customers from exporting Pioneer equipment from the United Kingdom.

(94) While Pioneer apparently did not initiate the unlawful partitioning of the market, it passed on MDF's complaints as well as the information concerning the destination of goods ordered for Iffli and gave instructions (see paragraph 36, telex of 28 January 1976) to at least one sole distributor. A corporation established in or trading into the Community must respect the law of the Community, and Pioneer, instead of using its influence to prevent the partitioning of the market, chose actively to participate ; this behaviour in concert with that of certain of its distributors, was unlawful.

(95) As to the gravity of the infringements, it is clear that the undertakings sought to obstruct, in respect of the distribution of Pioneer equipment, one of the principal aims of the Treaty, namely the creation of a single market. All undertakings concerned were conscious of what they were doing. As far as Pioneer is concerned, the infringement is the more grave in that it was the dominant economic partner, able to insist in its distribution contracts upon a surveillance of its distributors which removed or could remove from these distributors much of their independance in marketing Pioneer goods. The Commission doubts whether Shriro and Melchers would have cooperated to the extent they did with MDF if Pioneer had not actively taken part.

MDF started the unlawful activity and campaigned hard for its success. This persistent pursuit of a course of action directly contrary to one of the principal aims of the Treaty was done consciously and this adds to the gravity of the infringements as far as MDF is concerned.

(96) The insulation of the French market resulted in the maintenance of consumer prices for Pioneer

equipment in France at a level considerably higher than prices in some other Member States. This was very much to the detriment of French consumers.

(97) The refusal by Melchers to deliver the goods ordered by Gruoner led to a loss of sales by Connexion of goods to the value of over FF ... (including TVA) and to a significant loss of profit. It also prevented French consumers from buying a considerable amount of Pioneer equipment at more advantageous prices.

(98) The amount of sales lost by Comet, since it stopped exporting Pioneer equipment in trade quantities, while continuing the export of other brands, cannot precisely be determined. As a matter of reference it can be noted that Audiotronic supplied Euro Electro for resale purposes in France until 1976 and that Euro Electro sold to members of the Connexion group in 1976 Pioneer equipment for almost FF ..., the majority of which came from the United Kingdom.

(99) As to the duration of the infringements, the beginning of the effective period of both concerted practices must be situated towards the end of 1975. Because of special import regulations [1], parallel imports of Pioneer equipment from the Member States into France were not possible before mid-1975, while it would appear from the evidence available to the Commission that MDF started complaining about parallel imports only towards the end of 1975.

(100) As to the termination of the concerted practice between MDF, Pioneer and Melchers it has not been possible to determine whether this infringement continued after Melchers' refusal to execute Gruoner's order. Moreover, the evolution of prices in the Federal Republic of Germany and in France during 1976 has reduced and even taken away any interest which could have been gained from parallel trading of these products between these two countries. Therefore this infringement could not have lasted for a long time.

(101) As to termination of the concerted practice between MDF, Pioneer and Shriro, the undertakings concerned took no steps as far as the Commission can tell, to put an end to their 'arrangements' which hindered parallel imports of Pioneer equipment from the United Kingdom. Moreover, these parallel imports were attractive for a long period and certainly during 1976 and 1977, since prices remained constantly lower in the United Kingdom than in France. The fact that an important parallel exporter virtually had to stop his export activities at a particular moment because his exclusive distributor was becoming stricter concerning the destination of his sales does not mean that parallel trading could not have been undertaken by third parties in favourable conditions. The length of this infringement may accordingly be estimated at two years.

(102) As to the amount of the fines, the Court has stated in ground 58 of the Judgment of 15 July 1970 (case 45/69 Boehringer Manheim v. Commission) that 'the serious and conscious nature of the infringements therefore justifies a large fine'. The Advocate-General, J. P. Warner in his opinion in case 19/77 — Miller International Schallplatten GmbH v. Commission (ECR [1978]-2, p. 161) — stated 'a fine of 10 % of turnover may be taken to be appropriate to an intentional infringement of the gravest kind and of considerable duration. At the other end of the scale a fine of less than 1 % is appropriate for a merely negligent infringement of the most trivial kind and continuing only for a short period of time, in a case where nonetheless, the circumstances warrant the imposition of some fine.'

(103) It has been shown in paragraphs 91 to 94 that all the parties concerned in the present case knew that they were acting in order to present parallel imports with a view to restricting competition.

(104) Having regard to the above considerations and in particular to those referring to the deliberate nature and to the gravity of the infringements, adequate fines must be imposed on the undertakings which took part in the concerted practices described above. However it is necessary to differentiate between the amounts of fines imposed on each undertaking, in order to take into account the distinctive role each one played as demonstrated in paragraphs 91 to 94 above. Moreover, account must be taken of the duration of the concerted practices, and of the fact that the estimated duration of the concerted practice between MDF, Pioneer and Melchers was shorter than that between MDF, Pioneer and Shriro.

[1] See Commission Decision of 12 May 1971 (OJ No L 121, 3 June 1971, reprinted in English in the Special Edition of the Official Journal, December 1972, p. 343) empowering Member States to take interim protective measures with regard to the importation of certain products originating in third countries and put into free circulation in other Member States.

HAS ADOPTED THIS DECISION :

Article 1

The concerted practice between Musique Diffusion Française, Pioneer Electronic Europe NV and C. Melchers and Co. consisting in the prevention, from the latter part of 1975 until February 1976, of imports of Pioneer equipment from the Federal Republic of Germany to France constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The concerted practice between Musique Diffusion Française, Pioneer Electronic Europe NV and Pioneer High Fidelity (GB) Ltd (formerly Shriro (UK) Ltd) consisting in the prevention, from the latter part of 1975 until the latter part of 1977 of imports from the United Kingdom to France constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 3

1. A fine of 850 000 (eight hundred and fifty thousand) European units of account, that is FF 4 942 597 (four million, nine hundred and forty two thousand, five hundred and ninety seven French francs), is imposed on Musique Diffusion Française. This fine must be paid into the Société Général Paris, account No 5.770.006.5, in the name of the Commission of the European Communities within three months from the date of notification of this Decision to Musique Diffusion Française.

2. A fine of 4 350 000 (four million, three hundred and fifty thousand) European units of account, that is Bfrs 175 476 825 (one hundred and seventy five million, four hundred and seventy six thousand, eight hundred and twenty five Belgian francs), is imposed on Pioneer Electronic Europe NV. This fine must be paid into the Kredietbank, account No 426.4403001-52, in the name of the Commission of the European Communities within three months from the date of notification of this Decision to Pioneer Electronic Europe NV.

3. A fine of 1 450 000 (one million, four hundred and fifty thousand) European units of account, that is DM 3 596 667 (three million, five hundred and ninety six thousand, six hundred and sixty seven Deutsche marks), is imposed on C. Melchers & Co. This fine must be paid into the Deutsche Bank Saar, account No 04099-79, in the name of the Commission of the European Communities within three months from the date of notification of this Decision to C. Melchers & Co.

4. A fine of 300 000 (three hundred thousand) European units of account, that is £ 194 925 (one hundred and ninety four thousand, nine hundred and twenty five pounds sterling, is imposed on Pioneer High Fidelity (GB) Ltd (formerly Shriro (UK) Ltd). This fine must be paid into Lloyd's Bank Ltd Overseas Department, PO Box 19, 6 East Cheap London EC-3-P3AB, account No 108.63.41, in the name of the Commission of the European Communities within three months from the date of notification of this Decision to Pioneer High Fidelity (GB) Ltd.

Article 4

Musique Diffusion Française, Pioneer Electronic Europe NV, C. Melchers & Co. and Pioneer High Fidelity (GB) Ltd (formerly Shriro (UK) Ltd) shall forthwith, in so far as they have not already done so, bring to an end the concerted practices described in Articles 1 and 2, and all actions having as their object or effect the compartmentalization of national markets in the EEC. Furthermore, they are prohibited from undertaking in the future any action having the same object or effect as the concerted practices described in Articles 1 and 2.

Article 5

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

Article 6

This Decision is addressed to :

— Musique Diffusion Française, Vélizy-Villacoublay (France),

— Pioneer Electronic Europe NV, Antwerp (Belgium),

— C. Melchers & Co., Bremen (Federal Republic of Germany) and

— Pioneer High Fidelity (GB) Ltd (formerly Shriro (UK) Ltd), Iver, Buckinghamshire (United Kingdom).

Done at Brussels, 14 December 1979.

For the Commission

Raymond VOUEL

Member of the Commission