



EUROPEAN COMMISSION

Brussels, 22 IX. 1992
Registered with advice of delivery

SG(95) D/11872

Dear Sirs,

Subject: Case No IV/34.330 - PELIKAN / KYOCERA

1. I refer to your application made pursuant to Article 3(2) of Council Regulation No 17⁽¹⁾ in respect of certain business practices of Kyocera.
2. In your application, which was received on 27 May 1992, it is alleged that Kyocera has engaged in restrictive agreements contrary to Article 85 of the EC Treaty. In a later submission, dated 20 October 1993, you extended your argumentation to the effect that some of the alleged practices would also constitute an abuse of a dominant position contrary to Article 86 of the EC Treaty.
3. The Commission has examined in detail your application. Particular regard has been had to your comments dated 20 October 1993 on the letter sent to you by the Commission on 7 June 1993, your submissions on 29 April 1994, and to your comments dated 13 March 1995 in response to the Commission's letter dated 25 January 1995, pursuant to Article 6 of Regulation No 99/63/EEC⁽²⁾.
4. On the basis of the information in its possession, the Commission considers that there are insufficient grounds to grant your application, for the reasons set out below. In view of the analysis below, the Commission informs you that your application received by it on 27 May 1992, as amended, is hereby rejected.

An die Geschäftsleitung der
Pelikan Hardcopy (International) AG
Zugerstrasse 50
CH 6340 Baar

⁽¹⁾ OJ No 13, 21.2.1926, p. 204/62.

⁽²⁾ OJ No 127, 20.8.1963, p. 2268/63.

I. FACTS

1. The parties

5. The complainant is the PELIKAN INTERNATIONAL CORPORATION (now trading under the name PELIKAN HARDCOPY (INTERNATIONAL) AG), in Switzerland. It is a holding group with subsidiaries in Switzerland and Germany. The Pelikan group is active worldwide in the market for office equipment, and in particular in the so-called hardcopy market, i.e. the market for ink ribbons, toners and printing inks for printers and photocopiers, on which it is one of the major manufacturers not linked to any machine manufacturer. Its sales in 1992 amounted to 641 million ECU.

6. The Pelikan group was formerly controlled by the Pelikan Holding AG, Switzerland. In April 1995, the production units were taken over by NU-KOTE International Inc., a holding company in Delaware, USA. European production facilities for hard-copy consumables, i.e. ribbons, toners and ink, are located in Switzerland, Germany and the United Kingdom.

7. The complainee is the KYOCERA CORPORATION in Kyoto, Japan. The Kyocera group is active primarily in the markets for electronic tubes, semi-conductor devices and integrated circuits. The parent company reported sales of some 2.5 billion ECU for FY 1993. A subsidiary, Kyocera Electronics Equipment, manufactures general machinery and equipment for office work, as well as electrical machinery, apparatus, appliances and supplies. Sales amounted to 50 million ECU. In Europe, the Kyocera Electronics Europe GmbH distributes the products of the group via distributors (usually one per country) and a widespread dealer network (170 dealers in Germany alone). Sales in 1993 amounted to 165 million ECU.

2. The products

8. The case concerns machine equipment for laser and inkjet printing, sometimes also referred to as non-impact technology, as well as related consumables. The technologies are distinct from older, impact technologies such as typewriters which are increasingly substituted by non-impact products. The main consumables involved are toner or ink, drums and, in the case of inkjet printers, the inkheads.

2.1. Laser printers

9. The central components of a laser printer are the photoconductive drum and a charger which keeps the drum permanently electrically charged. Light is thrown on to the surface of the drum from a laser or a LED (light-emitting diode). This creates an invisible image in static electricity (the "latent image"), on the surface of the drum. The developer system transforms this into a visible image (the "developed image") by causing particles of toner to be attached to the latent image. The developed image thus formed from toner particles on the surface of the drum is transferred with the aid of a static electrical charge to the surface of the paper. The particles are then fixed on the paper by means of heat and pressure.

2.2. Inkjet printers

10. Inkjet printers come in two basic technologies - thermal liquid inkjet and solid ink. Thermal liquid inkjet uses heat to push drops of ink through nozzles onto paper or transparency material. They use the fact that water-based inks change their volume suddenly

if heated. Small heating elements cause steam bubbles by electrical impulses. Ink drops are then propelled through little nozzles and on to the paper surface. Inkjet technology is the least expensive technique for colour output and continues to hold the largest share of the market because it offers high quality at a low cost. The introduction of solid-ink printers in 1991 and improvements in liquid-inkjet printers have brought colour inkjet technology to the forefront of the colour-output market. Both the solid-ink printers and the liquid-inkjet printers deliver high-quality colour printing on plain paper less expensively, more quickly and more reliably than other technologies.

2.3 Toner and other consumables

11. The market for consumables can be divided into the "impact" segment (spooled ribbons and ink ribbon cassettes for typewriters and wire printers) and the "non-impact" segment (mainly toner for laser printers, and ink for inkjet printers). As in the market for machine equipment, non-impact technologies have substituted impact technologies in the recent years. Other consumables such as drums or inkheads need to be replaced on a regular basis, although not as frequently as toner or ink. They are generally distributed in the same way as toner or ink, i.e. they are supplied either to dealers or direct to end-users under an 'all-in' charge.

12. Laser machine manufacturers usually offer toner either as a refill or - as by Kyocera - in cartridges. Cartridges are very often adapted to the varying specifications of the primary equipment, both as to their form and their technical functions. Some consumables are available from independent sources as well as from the machine equipment suppliers. In the case of inkjet printers, for example, a number of "refillers" collect used inkheads in order to refill them with their own ink, among which are Berolina, Kores, Ortech, PMS, TBS (all Germany), Lama (France), Incas (Italy), Delacamp (Netherlands), Bemo, Farbox, Refilla (all Switzerland).

13. Laser engine manufacturers take two approaches to consumables. One design philosophy is that the various components wear out at different rates, so each deserves a separately replaceable cartridge. Printers based on this type of design put consumables in two or three cartridges such as, for example, a toner cartridge rated for 3,000 pages, a developer unit rated for 90,000 pages, and a drum rated for 12,000 pages. By doing so, each component can be designed for its maximum practical lifespan. Shorter-lived components will not force the customer to replace longer-lived components before they are expended themselves.

14. The other design philosophy, taken by manufacturers including Canon, Lexmark, and Minolta, is the "no-muss, no-fuss approach" which puts all consumable components in a single cartridge. This approach attempts to design the drum developer unit, other mechanical parts, and toner capacity in a way that everything wears out at approximately the same time. That may mean shortening the life of some components. It is easier to replace the consumables in printers that use single-cartridge engines. Some cartridges are designed so as to prevent any spill of toner. Printers with multiple cartridges are more difficult to handle because each cartridge has its own, different cycle time. Not only does the user have to keep a maintenance record to know when to replace each component, but also multiple-cartridge engines tend to use cartridges that spill toner.

15. Pelikan has given the following estimate of cost as a percentage of total lifetime cost of equipment (Hardware, Software, Service)⁽³⁾:

(3) The following example may serve as illustration: The cartridges used in Canon's LBP-BX engine have been priced initially at \$189, but sell direct for \$169 to \$175. That is considered to be relatively high, but the BX cartridge is wider than traditional cartridges in order to handle larger pages and uses finer toner for higher resolution. Still, with a rated

	Equipment	Major Parts incl. Service cost	Consumables
Typewriters	60 %	20 % (typebar / small parts)	20 % (ink/daisy wheel)
Needle Printers	70 %	20 % (head/chain)	10 % ink ribbon
Copiers	50 %	30 % (fuser roller / photoconductor)	20 % toner / developer / fuser unit
Laser Printers	40 %	2 % (fuser roll)	58 % toner module
Inkjet Printers	30 %	0 %	70 % print head

3. The markets

16. Many of the major manufacturers, including Hewlett Packard, Brother and Apple, produce their engines under licence from Canon. A breakdown of the major printer manufacturers in Europe in 1993 (total: 9,032,000 units) were as follows (all Canon licensees being included in one group, since they all use the same engine type)⁽⁴⁾:

('000)	Laser	Inkjet	Matrix	Others	Total	%
HP/Apple/Canon/ Brother/Olivetti ⁽⁵⁾	1423	3269	0	0	4692	52
Epson	81	306	756	0	1143	13
OKI	81	0	378	0	459	5
Lexmark	41	63	0	0	104	1
Star	0	0	349	0	349	4
Panasonic	0	0	233	0	233	3
Citizen	0	0	203	0	203	2
Seikosha	0	0	174	0	174	2
Others	366	250	815	179	1675	18
Total	2057	3888	2908	179	9032	100

It is noteworthy that Kyocera does not figure among these manufacturers.

life of 6,000 pages (letter size with 4 percent toner coverage), price per page is only 2.9 cents based on a \$175 cartridge cost, and is expected even to decrease as BX cartridges become more of a commodity. But even at a relatively low 2.9 cents per page, the overall amount spent on toner cartridges could be over \$13,000 given Canon's 450,000-printengine-life rating.

(4) Data provided by Pelikan.

(5) Many statistics refer to all Canon licensees as one group. For the purpose of this case, it is not necessary to establish a further breakdown.

17. The IDC forecast for colour printers in Europe in 1995 is DM 2,131 million, of which 1,478.5 (69%) million falls on inkjet, 402.9 million (19%) on laser, 194 million (9%) on thermo and 55.6 (3%) million on others.⁽⁶⁾ Inkjet printers constituted 30 percent of 1993's printer shipments. It is estimated that in 1998, inkjet printers will represent 62 percent.⁽⁷⁾ World colour printer demand is expected to quadruple by 1997. At present, colour inkjet printer unit shipments are growing 50% per year, compared to printers overall at 10%.⁽⁸⁾

18. Price is the driving force in market development.⁽⁹⁾ With the explosion of PC purchases in the small-office/home-office market, people are bargain-hunting for an inexpensive printer. In the case of low volume, but high quality requirements, inkjet printers are often preferred. Recently, laser sales are being eroded. Despite its lower speed, inkjet has some technological advantage over laser because of the high 720-dpi (dot per inch) resolution, as compared with laser printing's 600 dpi. Market analysts believe that there is room for more price erosion, resulting in a price-driven segment and a feature-rich segment in inkjet.⁽¹⁰⁾ According to some analysts, there is a trend towards cheap and easy-to-use colour printers in the consumer market. For office printers there is a trend towards more colours in better quality.⁽¹¹⁾

19. Pelikan estimates that Canon leads the printer market (laser and inkjet combined) with a market share of between 50 and 70 %. The position of Kyocera in Europe is estimated by Pelikan at around 10 % for Europe, and as much as 15 - 20 % for Belgium. For example, in the 7-11 ppm (pages per minute) segment, Hewlett-Packard is said to have the lion's share with 46.3% (1992). Kyocera is said to be second with 7.2 %, closely followed by Apple, Brother, Canon, Lexmark, Oki, Xerox and others. As to the installed base market shares in Europe, i.e. the number of printers sold since market introduction, Kyocera is said to represent 7.2 % in 1992 of the 7-11 ppm market. As far as the 12-19 ppm market is concerned, Kyocera's total European market share with regard to 1992 sales is said to cover 8.1 % of sales and to be the second largest. The installed base market share in Europe in the same segment amounted to 18.1 % in 1992 (19.58 % in 1991).

20. The figures provided by Kyocera differ substantially from those provided by Pelikan, as the following charts show⁽¹²⁾:

	Total (units)	Kyocera (units)	Kyocera (market share)
Europe	1 602 959	65 147	4.1 %
Germany	374 765	31 519	8.4 %
Belgium	62 991	1 730	2.7 %

3.1. Laser printers

(6) Deutscher Drucker, 13.10.1994, p.Z-w27

(7) BIS report, Printer Market trends 1994

(8) Business Booms in Colour Printers For Home PCs, in Wall Street Journal, 16.9.94, p.B1

(9) BIS report, Printer Market trends 1994

(10) Computer Reseller-News, 5.9.1994, p.101

(11) Deutscher Drucker, 13.10.1994, p.Z-w27

(12) IDC (International Data Corporation), March 1993

21. The market shares for the laser printers (0-20 ppm) in Europe in 1993 (total: 2,057,000 units) were as follows (all Canon licensees included in one group)⁽¹³⁾:

('000)	0-6 ppm	7-12 ppm	13-20 ppm	Total	%
Canon/HP/Apple/Brother	972	723	73	1768	86
Epson	81	0	0	81	4
OKI	81	0	0	81	4
Kyocera	0	58	7	65	3
Lexmark	0	41	0	41	2
Xerox	21	0	0	21	1
Total	1155	822	80	2057	100

22. The above figures roughly match the situation in the US, where the biggest manufacturers in 1994 included Hewlett-Packard, Xerox, Apple, Canon, Torrance, Pennant (IBM), Okidata, Lexmark, and NEC. Only the 10th position was filled by Kyocera Electronics Inc., followed by Mobile, QMS and Panasonic.⁽¹⁴⁾ Other laser-printer vendors include Advanced Matrix Technology, Alps Electric, Brother, Epson, and Texas Instruments. The leader in the 7-15 ppm laser printer area in 1993 was Hewlett-Packard with a 59.3% market share vs 50.9% in 1992, while Apple Computer had a 6.1% market share in 1993 vs 9.3% in 1992. Okidata had a 3.7% market share in 1993 vs 7.5% in 1992.⁽¹⁵⁾

3.2. Inkjet printers

23. The market shares for inkjet printer engines in Europe in 1993 (total: 3,888,000 units) were as follows (all Canon licensees being included in one group)⁽¹⁶⁾:

('000)	Monochrome	Colour	Colour Capable	Total	%
HP	1057	598	435	2090	54
Canon/Apple/Olivetti	1322	67	0	1389	35
Epson	306	0	0	306	8
Lexmark	56	7	0	63	2
Xerox	40	0	0	40	1
Total	2781	672	435	3888	100

(13) Data provided by Pelikan.

(14) MARKET LEADERS: LASER PRINTERS, by J. BROWN and J. EDS...ROM, in Computer-Reseller-News, 23.5.1994, p.76

(15) IBM spin-off gears up to 'try harder', in PC-Week, 25.4.1994, p.135

(16) See note (5) supra

24. The respective figures for the US market for inkjet printers shipped in 1993 are as follows: Hewlett-Packard 59%, Canon 19%, Apple 12%, Epson 6%, Others 4% ⁽¹⁷⁾. Other sources state that, in 1993, Hewlett-Packard held about 55 % of the overall inkjet market and about 89 % of the colour inkjet market. Canon ranked second, with a 35 % share of the U.S. inkjet market, 14 points of which came from the company's OEM business for Apple Computer. Epson, which entered the inkjet market in 1993, ranked third with 6 %. Unlike most printer manufacturers, Hewlett-Packard, Canon and Epson all own inkjet print head technology - a significant advantage. ⁽¹⁸⁾

3.3. Toner, ink and other consumables

25. Toner, ink and other consumables are usually supplied to the customer by the machine manufacturers, either directly or via their dealer network. With respect to Kyocera consumables, Pelikan succeeded in accounting for as much as [54 %] of the total cartridge consumption in 1992 for one particular cartridge type (F 1010), whereas its share with respect to other models is significantly lower, varying between [3,3] and [0,2] %. Pelikan attributes the significant difference to Kyocera's new policy with regard to sales under other brand names than Kyocera combined with the warranty restrictions for Kyocera products.

4. The allegations of Pelikan

26. In its original complaint, Pelikan alleged that Kyocera consistently tried to exclude or limit the use of non-Kyocera toners for use with its laser and inkjet printers, by the following practices:

- (a) In 1988, Kyocera sent a letter to its dealers informing them that according to the terms of warranty any third-party replacement part may only be used after it has been tested, evaluated and approved by Kyocera. In the same letter, Kyocera instructed its dealers that it had so far not released approval for any third-party toners, nor other consumables, nor third-party spare parts. However, Kyocera never responded to requests made by Pelikan to obtain such approval. - According to Pelikan, similar incidents involving Belgian importers of Kyocera equipment followed. In 1990, L.C.I. Computer Import made warranty depending on the use of original toner from Kyocera. In 1992, Pelikan got hold of an unaddressed, undated, unsigned letter of Europdata Systems, again referring to an approval procedure for third party toner and spare parts.
- (b) After intervention by Pelikan's lawyers, Kyocera agreed to refrain from issuing instructions of the above kind but chose to inform its dealers that its warranty provisions do not cover damage caused by the use of non-Kyocera products. Pelikan argued that there is no objective reason for excluding non-Kyocera toners in Kyocera printers. Pelikan claimed that, in the absence of any objective justification, Kyocera's warranty restrictions were caught by Art. 85 (1).
- (c) Since 1990, Kyocera offers favourable price conditions for "bundled" consumables. According to Kyocera's price list of July 1990 submitted by Pelikan, a toner-kit is sold to the authorized dealers for 46 DM and a drum-kit for 272 DM. Kyocera offers a toner-drum set (4 x toner, 1 x drum) for 408 DM (cf. 456 DM for the same

(17) Colour Inkjets Take Off (Data quoted from Dataquest), in Information WEEK, 13.6.1994, p.40

(18) Inkjet market soars, defying predictions, in Computer-Retail-Week, 12.9.1994, p.31

items sold separately, = 11.5 % discount on the total purchase, or 26 % if all the discount is attributed to the toner). Kyocera also offers "Pac 403", consisting of 4 toner-drum sets, for 1580 DM (cf. 1824 DM / 13.4 % / 33.2 %). Pelikan considers these practices to constitute illegal bundling and/or tying practices.

27. During the course of the proceedings, Pelikan also alleged that Kyocera's practice of aggregated rebates were in violation of Article 86.⁽¹⁹⁾

5. The arguments of Kyocera⁽²⁰⁾

28. Kyocera submitted that the incident of 1988 was a single action of an employee. By a letter sent to Pelikan on 12 October 1988, Kyocera had declared it would refrain from making such statements in the future. The other instances concerning independent Belgian importers (L.C.I. Computer Import and Europdata Systems) did, according to Kyocera, not allow any conclusion as to Kyocera's own behaviour as regards its policy with respect to warranties.

29. Kyocera has drawn the Commission's attention to the fact that, according to its general sales conditions, the use of third-party toner as such does not lead to an invalidity of Kyocera's warranty. According to Kyocera, it does not have any influence whatsoever on the content of maintenance contracts concluded between the various dealers and the customers. However, legal disputes have arisen in the past between suppliers of third-party toner and Kyocera dealers. In several instances, national Courts in Germany have found it justifiable that a dealer refuses to cover the maintenance costs - albeit still under existing warranty contracts - when the printer was polluted by residues due to the use of non-original toner.

30. Kyocera stresses that there are technical grounds which cause purchasers of Kyocera products not to use third-party toner and/or dealers to issue warnings to that effect. Kyocera printers are used mainly in the office sector, and within that sector, they are said to be in the high end of that range of printing capacities, namely 8 to 18 ppm. Kyocera says that its printers require a complete interaction between the drum, the toner and the developer. To this end, a range of toners, consisting at present of four different formulas, is required for the different printer models. Kyocera has argued that a machine-specific diversification is necessary in order to avoid malfunctions due to confusion of various types of ink and to ensure a stable image quality. Its cartridges are protected by trademarks and industrial designs. Kyocera also supplies various different drums and different developers. The constituents of the various toners are formulated differently according to the characteristics of the various printers, especially their printing capacity.

(19) Submission of 20 October 1993.

(20) Submission of 11 May 1993.

II. LEGAL ASSESSMENT⁽²¹⁾

1. Article 85(1)

1.1. The first allegation

31. The first allegation, which is described under point I.4(a) above, concerns a letter sent by Kyocera to its dealers in 1988 informing them that according to the terms of its warranty parts manufactured by third parties could not be used unless they had been tested, evaluated and approved by Kyocera. After intervention by Pelikan's lawyers, Kyocera agreed in a letter dated 12 October 1988 to refrain from issuing instructions of this kind. Instead, Kyocera informed its dealers that its warranty provisions did not cover damage caused by the use of non-Kyocera products.

32. Pelikan stated in its Letter of 13 March 1995 that the past conduct of Kyocera clearly indicates a systematic policy of obstructing the use of non-Kyocera consumables on Kyocera printers. Pelikan submitted (i) that the use of the first letter of 1988 has been maintained at the time when the warranty restriction was also being used, (ii) that this establishes the link between the warranty restriction and the previous letter, and (iii) that the real purpose of the warranty restriction was exactly the same, i.e. preventing the use of non-Kyocera consumables whether or not such use entailed a substantial risk of damage to Kyocera printers.

33. For the reasons set out in section 1.2 below, the Commission does not accept Pelikan's argument that the limitation on the scope of Kyocera's warranty constitutes a continuation of the behaviour complained of in the first allegation. Furthermore, the Commission does not consider that it is possible to establish from the existence of an undated, unaddressed and unsigned document which Pelikan obtained from a company unconnected with Kyocera, that Kyocera was still continuing, at the material time, its previous strategy of informing dealers that there was an approval procedure for non-Kyocera products.

34. The other events referred to at I.4(a) above is an action by L.C.I. Computer Import Belgium, a supplier of Kyocera products. As was stated in a letter from the services of DG IV to Pelikan of 7 June 1993, Pelikan has not provided any evidence that this behaviour can be attributed to Kyocera, and the behaviour in question has ceased.

(21) The analysis below is supported and corroborated by additional evidence which can be derived from the findings made by the Monopolies and Mergers Commission (MMC) in a report of October 1991. Although the data for that study concerned the market for Indirect Electrostatic Photocopiers (IEP, also referred to as 'plain paper copier, or PPC), were collected in 1989 and cover only the United Kingdom, the Commission believes that a number of general findings and conclusions made by the MMC apply, *mutatis mutandis*, also to the market structure of laser and inkjet printers in the European Union at present. While the markets for photocopiers and printers differ with respect to shares, price ratios of components and some other technological aspects, the Commission takes the view that there are quite striking similarities between those two markets. In particular, the consumers, their patterns of purchasing behaviour and the distribution structures are very similar for printers and photocopiers. Also, some of the major players in the market for photocopiers are equally active in the printer market. The technical particularities of the industry are similar, as is the interdependence between supply of machine equipment, after-sales service, i.e. maintenance and supply of consumables such as drums and toner. The Commission therefore mentions the MMC report at various stages in its legal analysis in order to illustrate parallel developments and patterns of behaviour. Though not constituting evidence for this case, they serve as a factual basis from which reasonable inferences are possible to be made for the printer market, even where the Commission has not itself collected evidence as detailed as in the MMC report.

35. On the basis of so little evidence, the Commission does not consider that it would be in the Community interest for it to devote its scarce resources to investigate further whether such policy was in fact still being pursued.

1.2. The second allegation

36. Concerning the second allegation referred to under point I.4(b) above, Pelikan does not question Kyocera's right to refuse the warranty service if and when it is established that the use of non original toners is the cause of failure of the equipment. Pelikan thinks, however, that Kyocera is not entitled to "discourage", on a systematic and a priori basis, the use of non original toners with the threat of refusal of warranty.

37. Pelikan stated that the "necessary balancing of interests" could be achieved in less restrictive ways, for example

- Kyocera could provide Pelikan with the necessary specifications (cf IBM Undertaking);
- Kyocera could set up a system of specification testing and approval, e.g. by an independent body. The manufacturer Epson has set up such a release procedure for Pelikan ribbons;
- Kyocera and Pelikan could agree on a specific procedure to be followed for complaints relating to the use of Pelikan consumables. Pelikan has drawn the Commission's attention to similar agreements that it has concluded with Siemens and Rank Xerox.

38. Pelikan stressed in particular the importance of the D'Ieteren decision⁽²²⁾ in which the Commission granted a negative clearance to a circular letter sent by D'Ieteren, an exclusive importer for Belgium of Volkswagen vehicles, to its authorized vehicle dealers. This circular contained recommendations to use only motor oils which meet standards laid down by Volkswagen when repairing Volkswagen vehicles. Pelikan quoted the Commission's statement to the effect that the *"strong recommendation contained in the circular creates a de facto economic obligation of the dealer to conform to those recommendations, for two reasons. First, damage caused by the use of other oil is not covered by Volkswagen's warranty (emphasis added). Dealers have a clear interest in precluding possible claims from customers which may well outweigh any advantage which might be gained from the use of, for example, cheaper oil...."*

39. In Pelikan's view, the D'Ieteren decision allows the conclusion that a warranty exclusion would de facto result in an economic obligation for the dealer to conform to the recommendation. Pelikan argues that, in the D'Ieteren case, this was precisely *not* objectionable because the selection system used was totally transparent and based on objective technical specifications (cf. point 12): *"there is reason to consider that the recommendations described above as conditions of the exclusive and selective distribution system do not lead to a distortion or a restriction of competition within the meaning of Article 85(1), as they are based on objective criteria of a technical nature ... and are applied without undue discrimination, and they have no quantitative or other restrictive objects or effects incompatible with Article 85(1)."* The D'Ieteren decision states that *"furthermore the recommendations are not influenced by any commercial interest on the part of D'Ieteren or*

⁽²²⁾ Com. Dec. of 19.12.1990, OJ 1991 L 20/42, of 26 January 1991

of Volkswagen in the distribution of oil". Pelikan stresses that the fact that Kyocera is a competitor of Pelikan on the market of the consumables is one of the essential features of the present complaint.

40. The Commission takes the view that Kyocera cannot be compelled to accept any of the "remedies" sought by Pelikan, because the refusal to grant warranty as practised by Kyocera does not constitute an infringement of Article 85(1) since there is no restriction of competition.

41. The D'Ieteren decision is not pertinent to this complaint because the circular letter in question, recommending the use of motor oils meeting certain standards laid down by Volkswagen, was sent out to dealers who were part of an exclusive and selective distribution network which in itself fell within Article 85(1). A "strong recommendation" by a supplier to dealers may create *de facto* an economic obligation on the dealer to comply with that recommendation and may therefore become tantamount to a condition of the dealership agreement. It does not follow from the Commission's approval of the fact that the recommendations in D'Ieteren were based on objective criteria, that Kyocera's limitation on warranty to exclude damage caused by third party products, which is not made in the context of an agreement falling within Article 85(1), is itself a restriction of competition.

42. The MMC stated that "(m)any warranties were found to contain conditions which tended to inhibit the use of other than the supplier's own toner, other consumables and spare parts."⁽²³⁾ The report of the MMC into the operations of a similar industry therefore indicates that these limits on warranties are normal commercial practice in the office equipment industry.

43. Pelikan has taken the view that the Commission's position is in total contradiction with the basic principles governing application of antitrust rules to contractual provisions which may result in a form of selection of either undertakings or products taking part in a competitive market. Pelikan has referred to the judgments in Windsurfing,⁽²⁴⁾ Hilti,⁽²⁵⁾ (no. 66),

(23) As to warranty terms, Canon said that "it offered dealers a four-month warranty on parts but did not make the warranty conditional on use of Canon consumables. The sole proviso was that the warranty did not apply to damage caused by the use of unsuitable non-Canon products. Such a proviso accorded with normal commercial practice. Canon, at the Commission's request, had analysed all the warranty claims it had received in its regional offices for the five months 1 January to 31 May 1991. - Of the total claims made, only about 15 per cent had been rejected. None of these rejections had been due to use by dealers of non-Canon-approved toner, consumables or spares." (MMC report, para. 6.64) - Kodak said that "(t)here was no express obligation on customers to buy Kodak toner, consumables or spare parts; but under the terms of the agreement, customers would lose the benefit of inclusive maintenance if the use of non-Kodak toner, consumables or parts caused a malfunction or if unauthorised maintenance did not meet Kodak's standards". (MMC report, para. 6.119) - Océ said that "the specification of its toner was complex, covering many physical and chemical properties. These included particle size, electrostatic and magnetic properties, melt temperature, and lubricant additives. Use of toner other than the one specifically designed for the relevant model would, in most cases, lead to degraded copy quality, increased pollution, lower machine reliability and possible reduction in the efficiency of ozone filters. These effects might take some time to become apparent, and were extremely difficult for a service technician to diagnose correctly" (MMC report, para. 6.189) - Toshiba said that "its warranty provisions, according to which the warranty could be invalidated if non-approved supplies were used, were designed solely to protect the company from the potential cost of warranty claims arising from damage which might be caused by the use of toners and spare parts of an unsuitable specification in IEPs supplied by Toshiba. They were in no way intended to restrict end-users to using toner, spare parts and other consumables supplied by Toshiba." (MMC report, para 6.281)

MMC concluded that these warranty restrictions were a justifiable commercial practice: "Conditions imposed in good faith on dealers in order to ensure this, and rendering warranties invalid if a problem is caused by the use of unsuitable products, are therefore unexceptional." (MMC report, para 9.118)

(24) Judgment of the Court of Justice of 25.2.86 (case 193/83, Windsurfing International v. Commission (1986) ECR, 611, 655); Com Dec. of 11.7.1983, 1983 O.J. L 229/1

(25) Case T 30/89 Hilti v Commission (1991) II ECR 1439

Hugin⁽³¹⁾, the opinion of Advocate General Mischo in Renault⁽³²⁾ (no. 48), the Oliofiat case⁽³³⁾ and a number of provisions from Regulation 123/85⁽³⁴⁾ and Regulation 4087/88.⁽³⁵⁾

44. According to Pelikan, in all cases where there is a selection of either distributors or providers of services or goods, the basic and fundamental principle is that such selection must be based on objective criteria, which should be made available to the interested parties in order to enable them to apply for selection.

45. In Pelikan's view, the Commission's view is in contradiction with Windsurfing with regard to quality controls relating to standards of quality and safety: "*such controls must be effected according to quality and safety criteria agreed upon in advance and on the basis of objectively verifiable criteria. If it were otherwise, the discretionary nature of those controls would in effect enable a licensor to impose his own selection of models upon the licensees, which would be contrary to Article 85*".

46. The Commission thinks that this comparison to an explicit tying agreement is invalid. In Windsurfing the Court found that restrictive clauses on quality and safety were not covered by the subject matter of the patent licence and therefore constituted a restriction of competition within the meaning of Article 85(1). Kyocera is not preventing dealers from selling other consumables. It has merely informed them that damage caused by third party consumables will not benefit from its warranty.

47. According to Pelikan, the Commission's view is also in contradiction with its own position taken in the Hilti case: "*The Commission concludes that by appointing itself sole arbiter of "Hilti compatibility" whilst simultaneously withholding the information necessary to allow third parties a sufficient opportunity to judge both the objective necessity of such standards and whether those standards are in fact met by nails produced by other suppliers, Hilti has clearly shown that its real interest lay in ensuring the maximum exclusion of competing products from the market*". Pelikan stresses that one of the types of conduct referred to in this connexion was "*the refusal by Hilti to honour its guarantee for the tools where these had been used with consumables of other than Hilti provenance*" (No. 27 of the judgment).

48. The Commission thinks, however, that the distinctive feature between Hilti and this case is the fact that Hilti made it "*known that guarantees on nail guns would not be honoured if non-Hilti nails were used (emphasis added)*". ie The guarantee would not be honoured regardless of the cause of the damage. This judgment, which in any event, was concerned with behaviour infringing Article 86, does not alter the view of the Commission that it is not an infringement of Article 85(1) to limit the scope of a warranty to exclude damage which has been caused by products supplied by third parties.

49. Finally Pelikan submits that the Commission's view is in contradiction with the constant emphasis put in EC competition law on the right for distributors freely to buy and sell spare parts that match the quality of those offered by the manufacturer. In this respect Pelikan refers to recital (8), the new recital (27) and the provisions of article 3, point 4 and article

(31) Judgment of 31.5.1979, (1979) ECR 1869

(32) Opinion of Advocate-General Mischo of 21.06.1988, (1988) ECR, II-6055, No 47 and 48

(33) 17th Competition report, nr. 84

(34) OJ L 15, 18.1.1985, p. 16

(35) OJ L 359, 28.12.1988, p. 46

4(1), points 6 and 7 of Regulation 123/85 containing the group exemption for motor vehicle distribution and service agreements.

50. The Commission takes the view that, although some valid arguments may be derived from analogies with neighbouring markets such as the market for photocopiers, this must be done with caution; and the more so the more the markets concerned are different from one another as regards structure and basic mechanisms, as the markets for the distribution of printers on the one hand and motor vehicles on the other certainly are. *In this respect, the MMC found that "(c)onsumables were fundamental to the copying process, and poor-quality consumables would immediately cause poor-quality copies. IEP consumables were unlike consumables for motor cars, such as lamps or exhausts, where they only had a secondary role".* (MMC report, para 8.4) But even when looking at possible analogies under this caveat, the Commission can not agree with Pelikan's views as to the degree of warranty restrictions permissible under the competition rules.

51. Regulations 123/85 and 4087/88 cannot be relied on in the way in which Pelikan seeks to do. These Regulations are concerned with the question of whether certain provisions can be acceptable in the context of an agreement which is itself a restriction of competition. The provisions cited by Pelikan are conditions imposed by the Commission in order to exempt by category exclusive distribution and franchise agreements which already fall within Article 85(1). This has no relevance to the question of whether a warranty limitation in itself falls within Article 85(1).

52. To ascribe a psychological effect of deterrence to the possible difficulties in establishing which of the manufacturers - the one supplying the original equipment or the one supplying consumables - is responsible for damage in an individual case and to derive from such hypothesis a duty upon manufacturers to agree to a general format of dispute settlement would clearly go beyond what competition law is meant to protect.

1.3. The third allegation

53. As to the third allegation referred to under point I.4(c) above, the Commission takes the view that Kyocera's rebate policy for the drum/toner kits and other products might be considered as an abuse under Article 86 if the price differences are not objectively justified, but is irrelevant under Article 85(1). In the absence of market dominance, the Commission takes the view that Kyocera is, in principle, free to set its prices, including rebates, autonomously and according to its own marketing policy.

The Commission does not agree with Pelikan's view that Kyocera's pricing policy is comparable to an aggregated rebate structure agreed upon by a number of competitors⁽³⁶⁾. The other parallel drawn by Pelikan, Article 5(1)(2)(c) of Regulation 123/85 is not pertinent either⁽³⁷⁾. First, the fact that certain agreements receive the benefit of a block exemption in return for the absence from them of certain, potentially restrictive clauses, does not imply that the existence of such a clause in a different type of agreement would automatically bring such an agreement under Article 85(1). Secondly the distinction between motor vehicles and spare parts for the calculation of discounts, as prescribed in the Regulation, is intended to counteract

(36) German Ceramic Tiles Discount Agreement, Com.Dec. of 29 Dec. 1970; 1971 OJ L 10/15.

(37) "Article 1(...) shall apply provided that (...) the supplier (...) shall, in any scheme for aggregating quantities or values of goods (...) for the purpose of calculating discounts, at least distinguish between supplies of motor vehicles (...), spare parts (...), and other goods.

the concentration of a dealer's demand on a car supplier so as to enable spare part suppliers to compete on equal terms with car suppliers. This distinction would therefore find its parallel in a distinction between printers and consumables, rather than different consumables.

2. Article 86

2.1. The relevant markets

2.1.1. Kyocera-compatible consumables

54. The Commission agrees with Pelikan's view that, for the purpose of this case, the market for supply of toners and/or other consumables for printers of a specific brand must be considered a separate market. Kyocera-compatible consumables are, according to the parties, not interchangeable with the consumables for the brands of other machine manufacturers. In some instances, there might even be separate markets for the various types of machine equipment of one and the same manufacturer.⁽³⁸⁾

55. There exists a specific structure of supply and demand for Kyocera consumables, independent of the market structure for the supply of the primary equipment. The demand consists of the installed base of all those users who have bought a Kyocera printer in the past, not the potential new entrants who are considering to buy a printer. Supply consists in this case not only of Kyocera itself, but also of Pelikan as an independent supplier. This separate demand and supply structure does not vanish due to the fact that a new customer will make his choice in a - greater or lesser - knowledge of the terms and conditions in the various aftermarkets.

56. This view is confirmed by the MMC report, where toners for different models of IEP are generally not perceived as interchangeable. In the report, Rank Xerox was quoted as saying that *"IEPs differed in respect of their photoreceptor design, development systems, toner dispenser systems, photoreceptor cleaning, and fusing systems. It was this variety of characteristics which, together with the level of copy quality required, dictated the design of the toner. Use of inappropriate toners in specific IEPs might lead to complete failure of the copying process if the toner was not compatible with the photoreceptor or the features of the machine described above. Even if failure was not immediate, longer-term reduction in machine reliability and copy quality could be expected."* (para 6.15) Canon said that *"(c)opy quality was a major selling point and manufacturers invested a great deal of money in this area. There were three principal factors determining the type of toner used. First, different photoreceptors required different toners. Secondly, toner particle size had a major effect on copy quality, and as smaller particle toners were developed, so the developer units in new models were engineered to take full advantage of those new toners. New toner would work satisfactorily in the older models but not vice versa. Thirdly, different copiers required different packaging of the toner. Some was sold in cartridges that were inserted into the copier and disposed of when empty. Other toners were sold in packages emptied into the toner tank. Further, the size of the toner container depended on the average copy volume of the copier; high-volume copiers, for example, needed large toner containers so that they could supply copies for between two and four weeks without replenishment."* (MMC report, para.6.57).

⁽³⁸⁾ of the judgement in *Hilti* (cited in note 25 above) where it was found that the aftermarket for a specific brand can be a separate market.

2.1.2 Printers

57. A second market which is of relevance in order to establish whether or not Kyocera can be held dominant in its own aftermarket, is the upstream market for printers. It is not necessary, for the purpose of the present case, to decide upon the exact limits of this market. Taking the overall laser and inkjet printer market as the relevant market, Kyocera could not be held to be dominant, having a market share of somewhere around 5 %. But even if the Commission were to choose the most narrow definition, i.e. the 7 to 12 ppm segment of laser printers in Belgium (based on the information provided by Pelikan), Kyocera would not have more than a 20 % market share, which would bring it nowhere close to a dominant position.

2.2. Dominance

58. Pelikan's allegations raise the fundamental competition issue whether Article 86 can be applied to an abuse on the consumables market where there is no dominance in the upstream market, i.e. the printer market. Pelikan referred to Eastman Kodak⁽³⁹⁾⁽⁴⁰⁾ and Virtual Maintenance⁽⁴¹⁾, two decisions of the US Supreme Court, and to a finding by the German Bundeskartellamt of 1989 in which Rank Xerox was considered to be in a dominant position on the market for servicing for Rank Xerox Laser printers and copiers as well as on the market for toners for Rank Xerox laser printers and copiers.⁽⁴²⁾

59. According to Pelikan, the commercial customer makes his choice - at the time of the purchase of the equipment - by analysing the cost of the equipment itself and eventually taking into account the cost of servicing and supplies but mainly, if not exclusively, by taking into account the cost of original supplies for each of the brands of equipment under examination. The price competition between Pelikan and the equipment manufacturers on the consumables market plays a role only at the later stage, once the equipment has been purchased. It is at this stage, according to Pelikan, that a real lock-in effect is apparent as is established by the fact that the larger part of the consumables for Kyocera equipment is Kyocera branded. Pelikan emphasises that there is also a non-professional customer market for lower-priced printers.

(39) Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 1992-1 Trade Cas (CCH) ¶69,839. While the dissenting opinion stated that because Kodak had no horizontal power, its vertical behaviour is per se legal because it must be motivated by efficiency considerations, the majority stated that a lack of market power in the primary market (printers) does not preclude market power in an aftermarket (services). In the majority's opinion therefore, a rule of reason approach is deemed most suitable in order to determine, on a case by case basis, whether consumers are locked-in once they buy a manufacturer's system such that they can be exploited even though the manufacturer lacks horizontal market power.

(40) Pelikan quotes a passage in which the Supreme Court insists on the complexity for the customer to engage in accurate "lifecycle pricing" of complex, durable equipment: "in order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "down-time" and losses incurred from down-time. Much of this information is difficult - some of it impossible - to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition the information is likely to be customer-specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and cost of downtime." (* 287).

(41) Virtual Maintenance, Inc. v. Prime Computer, Inc., 995 F.2d 1324 (6th Cir. 1993)

(42) Judgment of 5.10.1988, (1988) ECR 6039

60. In the view of Pelikan one very specific reason why a customer for the equipment will not include the cost of consumables offered by independent manufacturers in this hypothetical lifecycle-pricing evaluation is precisely related to the warranty restrictions that are commonly used in the sector. Pelikan also stressed the fact that it is not an equipment manufacturer, and that competition in the upstream market for machine equipment does not seem to have any bearing on the competition between manufacturers of consumables. According to Pelikan, even if a customer would choose to switch equipment because the cost of use, he would again compare not with the price of equipment A and consumables B but - because of the warranty and other restrictions - with the price of equipment and consumables of a competing equipment manufacturer.

61. The Commission considers these arguments irrelevant to the extent that a customer (i) can make an informed choice including lifecycle-pricing, knowing of the warranty restrictions of the various manufacturers, that he (ii) is likely to make such choice accordingly, and that, in case of an apparent policy of exploitation being pursued in one specific aftermarket, a (iii) sufficient number of customers would adapt their purchasing behaviour at the level of the primary market (iv) within a reasonable time. These four criteria are considered below. All references to customers in this discussion apply equally to commercial and non-professional customers.

62. The Commission has examined in detail whether the circumstances of the present case allow the assumption of a lock-in effect, i.e. the possibility of consumers being exploited in the aftermarket. The answer is negative. Most importantly, markets for supplies of consumables for equipment manufacturers can be larger than the market for the sale of the printers themselves. As Pelikan has pointed out, in the case of inkjet printers, the cost of supplies (i.e. toner and inks) can amount to as much as 70% of the total cost of ownership of the equipment, including initial purchase, servicing and supplies. Given that price ratio, it would seem difficult to assume that a potential customer, either commercial or non-professional, would not carefully examine the entirety of costs which he will incur prior to the choice of that equipment.

63. Generally speaking, when choosing a printer, the criteria most commonly used by customers are, apart from the price for the equipment, features such as resolution and output quality, speed, PC portability, paper requirement, per copy price as well as convenience and costs with respect to consumables. Some of the criteria may be relevant only for sophisticated customers, mainly in the graphics and publishing industries, but also in textile design, cartography, defense and industrial design. Other criteria apply to all customers alike.⁽⁴³⁾

64. As for the price, it is not only the price of the primary equipment but the cost per page which is usually taken into account. While this figure may sometimes be difficult to gauge, most customers make reference to comparable criteria, e.g., by dividing the price of each cartridge by its rated page life to get a cost per page. For multiple-cartridge systems, all the per-page costs have to be added for a total per-page cost. Toner life is usually calculated for letter-size pages printed with a toner coverage of 4 or 5 percent. Sometimes two manufacturers use different percentages, so that the cartridge life needs to be adjusted to allow for comparisons. This type of cost information is routinely provided by printer manufacturers in their own publicity material and is presented by the specialist press, including that aimed at

(43) see, for example, PC-Sources, vol.4, N.1, Jan. 1993, p.180; MacUser, vol.9, N.9, Sept.1993, p.140; MacWeek, vol.7, N.41, 18.Oct. 1993.

non-professional users of computers and is therefore available to both professional and non-professional users.⁽⁴⁴⁾

65. As to the role of the consumables for the overall purchase decision, the replacement of the one or more cartridges containing the consumables does not present any difficulty to a user so the only cost to be taken into account is that of the cartridges themselves. Since a printer uses different consumables at a different rate (for example a print head should last longer than a cartridge load of toner) splitting the consumables into separate cartridges should save on overall consumption. However using more than one type of cartridge in a printer increases the amount of work the user has to do, and hence the users costs, and manufacturers often opt not to do this.

66. The Commission is not aware of significant possibilities for price discrimination between old and new customers in this market. Since users of old printers can usually use toner for newer models (see II.2.1.1 above), there seems to be no reason why they should be exposed to an exploitative pricing policy of the manufacturer with regard to toner for old models. Moreover, a 'lock-in' effect with respect to the installed base is unlikely due to the relatively high proportion of consumables in the overall lifetime-price and to the absence of any specific training requirements and/or system compatibility considerations which would prevent such customers from switching to another printer manufacturer's brand.

67. When considering the likelihood that a sufficient number of customers would switch to other manufacturers' products, should exploitation occur in a given aftermarket, the commission considers that not only the installed base be taken into account, but also the new users. If it is true that - in the absence of significant possibilities of customer discrimination - the installed base is protected from exploitative behaviour by the "attentive eye" of the new customer, then it should suffice to establish that there is a sufficient number of potential new customers to fulfil this regulative function. In this respect, the ratio between the large number of potential new customers compared to the small number of installed Kyocera-users (see the market share indications in I.3.1 and I.3.2 above) seems to support the Commission's findings.

68. The same is true for the reasonable time criteria where, again, the installed base is not the decisive customer group to be taken into account. To the extent that they have already made their investment, it would be unrealistic to expect them to change within a time which the Commission would normally consider sufficient under substitutability standards. Rather, it is decisive whether, should Kyocera start raising prices for its consumables today, such behaviour would trigger an adaptation in the purchasing pattern of new customers. In this respect, the Commission has not been made aware of any facts, which would put into doubt the existence of sufficient price transparency.

69. These findings with respect to the market for printer consumables are supported by the findings of the MMC in its detailed study of the photocopier market and associated aftermarkets. The printer related markets can reasonably be expected to follow similar dynamics to the copier related markets. The two sets of markets have most of their suppliers in common, serve a very similar population of potential customers and concern products produced with very similar technology.

MMC Findings on Copier Market

⁽⁴⁴⁾ see note (43)

(i) The MMC described the competitive situation in the IEP market as follows : *Price is only one of the forms of competition. We were told that end-users are concerned with overall value for money and, therefore, suppliers have to compete not only on price but also on such factors as product features and reliability and the quality of service and support. The importance attached to these various forms of competition varies both between suppliers and between market segments. The IEP suppliers have adopted different approaches to competing in the market; for example, some suppliers told us that their aim was to compete mainly on the basis of product features or reliability whilst others placed greater emphasis on the quality of service offered to end-users. IEP suppliers, other than those supplying only direct to end-users, also compete in the supply of IEPs to dealers. We were told that IEP suppliers compete not only on the basis of the quality and price of the IEP products they offer but also on the technical, marketing and other support which they offer to dealers.*" (MMC report, para 4.117 - 4.118)

(ii) In the MMC report, the Association of the Electronics, Telecommunications and Business Equipment Industries (EEA) was quoted as saying that *"the IEP market was highly competitive, both at dealer and manufacturer levels, and offered purchasers a variety of deals. Most purchasers were buying a service rather than a machine. Competition centered on price per copy (emphasis added). Customers demanded a high-quality service and were not primarily concerned with who had manufactured spares or consumables, or indeed the machine, provided it was of good quality.*" (MMC report, para 8.2)

(iii) As far as brand loyalty is concerned, the MMC found that *"there is only little brand loyalty amongst large end-users. (...) Most of the end-users (...) had a range of IEP brands installed. Price, machine features and reliability and level of service were the most important factors in their choice of IEP brands. A large proportion of end-users had switched brands over the last five years. Other evidence we received suggested that brand loyalty may be more important amongst smaller end-users but that price, reliability and service are the most important factors in determining smaller end-users' choice of IEP brand. Some IEP suppliers said that they had developed some brand loyalty amongst their end-users; this had been achieved by the quality and reliability of the products they sold and the level of service provided by themselves or their dealers."* (MMC report, paras 4.125 and 4.126).

(iv) The MMC also considered whether, given the state of competition in the primary market for IEPs, it is possible for anti-competitive practices to have an adverse effect on the public interest in the secondary market for consumables and spare parts. It concluded that most of the large end-users *"were satisfied with the current arrangements for the supply of toner and other consumables and would not be interested in obtaining toner separately, although a few said that they were considering, or had considered in the past, obtaining toner separately. End-users commented that while toner purchased separately might be cheaper, the cost savings might be offset by operational and administrative factors, including problems in determining whether any faults arising were attributable to the toner. (...) (T)he larger end-users generally require IEP suppliers to quote prices for a complete package, including both the machine and the maintenance, expressed in terms of an overall cost per copy. (...) (T)he package as a whole has to be competitive (...)." (MMC report, para. 9.121 - 9.123)*

(v) The MMC found the situation to be more varied with respect to dealers. It believes that there are a number of reasons why independent suppliers have not taken a bigger share of the dealer market : *"First, because toner is specific to a given model or group of models, the market is not big enough to attract independent suppliers unless the IEPs concerned are selling, or are expected to sell, in sizeable quantities. Secondly, the turnover in models is fairly rapid, so that the IEP supplier can usually rely on being the sole source of toner*

supplies for a new model for a time until the independents can develop their own compatible toner (...) Thirdly, (...) some end-users ask their dealers to supply OEM toner. Fourthly, the formal restrictions which IEP suppliers impose on their dealers, and the informal pressures which are sometimes applied, discourage some dealers from obtaining toner (and other consumables and spare parts) from independent suppliers either at all or on a substantial scale." (MMC report, para 9.125)

(vi) The MMC also considered whether the IEP suppliers are collectively able to exercise market power so as to keep independent suppliers out of the market and to keep prices higher than they would be if there were no such restrictions. The MMC believes that "(...) since the market for the supply of IEPs themselves is so competitive, the scope for achieving any such aims is severely limited, even if attempted." The MMC refers to the lively competition among dealers, "(...) which extends to the supply of maintenance as well as machines. As with direct sales to end-users, therefore, the pricing of toner is subject to competitive forces. (...) Any supplier which attempted to charge its dealers high prices for toner would cause them either to look to other sources of toner or to lose sales of IEPs. Some suppliers told us that they found it impossible to stop their dealers from using independent suppliers, and recognised that the obtaining of cheaper toner from independents could help their dealers to increase sales of IEPs. We have very little evidence that end-users generally are dissatisfied with the situation or would wish to buy toner separately." (MMC report, para 9.126)

(vii) The MMC concluded that "the supply of toner, other consumables and spare parts is subject to market forces not only as a result of the extent and vigour of competition among suppliers of IEPs and dealers, but also to some extent from independent suppliers of the ancillary items. The great majority of end-users now see consumables and spare parts as part of an overall (...) service and do not wish to buy them from parties other than the supplier of the IEP itself. There is little evidence that end-users are either dissatisfied with or disadvantaged by the suppliers' practices in relation to the supply of toner, other consumables and spare parts (...)." (MMC report, para 9.127)

70. For these reasons and given Kyocera's relatively low market share in the market for printers, the Commission must assume that horizontal competition in the printer market constitutes effective discipline in the vertical market. Therefore, the Commission does not hold Kyocera to be dominant in the market for toner and/or other consumables which are compatible with its proprietary system in the market for printers.

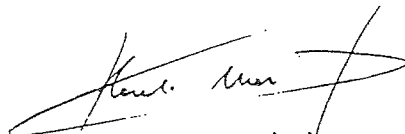
2.4. Abuse

71. Even if Kyocera's could be held to be dominant, its policy with respect to warranties in question would not constitute an abuse in the sense of Article 86, for the same reasons as they can not be considered restrictive practices under Article 85(1). As to Kyocera's pricing policy (see I.4(c) above), there is no evidence that Kyocera's pricing of drum-kits, toner-kits and drum-toner-sets lack objective justification, e.g. savings made through economies of scale, nor has it been alleged that this pricing policy could amount to tying or predatory pricing.

III. CONCLUSION

72. In view of the above analysis, the Commission informs you that your application received by it on 27 May 1992, as later supplemented and amended, is hereby rejected.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'Karel Van Miert', with a large, sweeping flourish at the end.

For the Commission

Karel VAN MIERT

Member of the Commission