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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 December 1983

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.492 — SMM & T
Exhibition Agreement)

(Only the English text is authentic)

(83/666/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the
European Economic Community,

I. THE FACTS

Having regard to Council Regulation No 17 of
6 February 1962, First Regulation implementing
Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended
by the Act of Accession of Greece, and in particular
Articles 6, 7 and 8 thereof,

Having regard to the application for negative clear-
ance and notification submitted on 25 June 1973 by
the Society of Motor Manufacturers and Traders
Ltd (SMM & T), London, of a standard Exhibition
Agreement entered into by member signatories and
concerning the display of motor vehicles, freight
containers and motor goods at exhibitions in the
United Kingdom, and in particular the rules govern-
ing the direct and indirect participation of exhibitors
at such exhibitions,

Having regard to the publication ⁽²⁾ of a summary of
the rules contained in the Exhibition Agreement,
pursuant to Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on
Restrictive Practices and Dominant Positions,

(1) The SMM & T which was founded in 1902 is
the principal trade association for the motor
industry in the United Kingdom. All English
manufacturers, importers and distributors may
be members of the Society. Actually, the
members represent the vast majority of the
sales of motor industry products in the United
Kingdom.

(2) The objectives of the Society are, amongst
others, to encourage and promote in the
United Kingdom and abroad the interests of
the motor industry. One of the specific pur-
poses for which the Society was founded is to
conduct, hold and promote shows, exhibi-
tions, competitions, races and trials of the
products of the motor industry and of assist-
ing therein.

The application for negative clearance and
the notification presented by the SMM & T
relate only to this specific objective and to
any measures adopted in pursuance thereof.

(3) The Society is divided into a number of rele-
vant trade sections (car manufacturers and
sales concessionaires, freight container manu-

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 216, 23. 8. 1980, p. 2.

facturers, etc). Each section is headed by a committee.

The competent bodies of the Society are the Council which is its highest authority and elects the members; the Executive Committee which has the general direction of the policy and outside activity of the Society; and the General Purposes Committee which runs, amongst others, the exhibition policy of the Society.

- (4) The SMM & T organizes a great number of exhibitions and shows of motor industry products every year throughout the United Kingdom, some of which are general motor exhibitions displaying a variety of motor goods and others are more specialized exhibitions relating to a particular sector of the motor industry like freight containers, caravans and trailers or accessories and components.

The major exhibition organized by the SMM & T is the International Motor Show which is held biennially in even-numbered years in Birmingham at the National Exhibition Centre. Until 1976 the International Motor Show had been held annually in October at Earls Court in London. The first International Motor Show in Birmingham was held in October 1978.

- (5) The Exhibition Agreement in the form in which it was notified to the Commission in 1973 was entered into by member signatories of the Society. It was a continuing arrangement although formally renewed every two years. However, members of the Society were under no obligation to become signatories to the Exhibition Agreement. Manufacturers, and concessionaires for motor vehicles, freight containers and motor goods as well as wholesalers of motor goods, but not mere distributors, could subscribe to the Exhibition Agreement of which the main points were as follows:

- the member signatories should not exhibit or assist in the exhibition of motor vehicles, freight containers or motor goods at any exhibition held within the United Kingdom other than such as are held by the Society, without the consent or approval of the Society,

- the approval of the Society would also be necessary in order to participate in, support, or publish the results of any competition, race or comparative test in the United Kingdom,

- the Society should make to the member signatories a preferential charge for space at exhibitions held by the Society which should be less than the space charge payable by non-signatories,

- upon breaches of the Exhibition Agreement member signatories would forfeit their right to a preferential space charge and they might at the discretion of the Society be excluded from exhibitions organized by the Society,

- any question or dispute that might arise as to the meaning and effect of the Exhibition Agreement should in the first instance be decided by the General Purposes Committee of the Society from whose decision appeal might be made to the Council of the Society. The Council's decision would be final and conclusive.

- (6) Every year the SMM & T would draw up a list of general and specialized exhibitions and fairs which had been approved for participation by member signatories of the SMM & T or for participation by member signatories belonging to certain sections of the Society. Upon application permission to participate at particular events might be given by the Committee of the relevant trade section with the eventual approval of the General Purposes Committee of the Society.

- (7) In August 1979 another British exhibition organizer, Earls Court and Olympia Ltd and its subsidiary Fernston Ltd (Earls Court), made an application to the Commission pursuant to Article 3 of Regulation No 17. In its complaint Earls Court alleged that the SMM & T Exhibition Agreement as applied by the Society and its members infringed Articles 85 and 86 of the Treaty.

- (8) When the SMM & T decided to move the International Motor Show to Birmingham, Earls Court decided to hold a limited motor exhibition in October in London, in the years where the SMM & T were not organizing their International Motor Show. It was accordingly decided to hold at Earls Court in October 1977, for the first time, a motor exhibition although with participation of dealers only.

The exhibition, known as 'Motorfair 1977' was approved under the Exhibition Agreement by the SMM & T for dealer participation only and with the exclusion of certain trade sections of the Society. The approval meant that manufacturers and importers were allowed to support the participation at 'Motorfair 1977' of their dealers who would in any event have been free to participate at their own expense, since they could not be signatories to the Exhibition Agreement.

(9) When Earls Court in 1978 sought the SMM & T's approval under the Exhibition Agreement for a 'Motorfair 1979' as a dealer exhibition the SMM & T refused such approval. This refusal eventually led Earls Court to cancel the planned 'Motorfair 1979' in September 1979 because the number of dealers who would participate without the support of their manufacturer or concessionaire had been so reduced that there was no longer scope for holding the exhibition.

(10) Having examined the complaint the Commission requested the SMM & T to change the Exhibition Agreement. The SMM & T has complied with the Commission's request and has amended the Exhibition Agreement substantially. The main points of the new modified Exhibition Agreement are as follows:

— in the years where the SMM & T organizes international motor vehicle exhibitions signatory members of the Society may participate directly or indirectly in the exhibition of motor products in the United Kingdom at exhibitions not organized by the SMM & T only to the extent permitted by the relevant sections of the Society which shall permit such participation in circumstances and to a degree which is not likely to prejudice the impact of the SMM & T's own international exhibitions organized in those years,

— in the years where there is no international motor vehicle exhibition organized by the SMM & T signatory members are free to participate directly or indirectly without restriction in exhibitions not organized by the Society,

— signatories to the Exhibition Agreement have preference over others in the allocation of space at any international exhibition of motor vehicles organized by the

SMM & T and also enjoy preferential charges (about 25 % less) for space at such exhibitions; the benefits of this clause shall cease to apply on any breach of the Agreement by the member,

— any question or dispute arising as to the meaning and effect of the Exhibition Agreement shall, at the request of any party affected by the said question or dispute, be subject to appeal to an independent arbitrator.

(11) Following the amendments made by the SMM & T to the Exhibition Agreement Earls Court withdrew its complaint.

(12) When amending the Exhibition Agreement the SMM & T originally proposed to insert a restriction on member signatories' participation at exhibitions of potential national importance in the years when the SMM & T does not organize international motor exhibitions. After discussions with the Commission's departments this clause was abandoned.

(13) The Commission has received no observations from third parties subsequent to the publication made pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1)

Article 85 (1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions of 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.

(14) The Exhibition Agreement is an agreement between undertakings on the one part and an association of undertakings on the other. Any measure or decision by the SMM & T taken in implementation of the Exhibition Agreement constitutes a decision by an association of undertakings.

The Exhibition Agreement in its present form has as its object or effect the restriction of competition within the common market in the following ways:

- (i) competition between manufacturers and importers of motor goods who are signatories to the Exhibition Agreement and between their dealers is restricted or distorted in that in the years where the SMM & T organizes international motor vehicle exhibitions they are hindered in or prevented from exhibiting and promoting their products to the trade and to the general public in competition with each other at such exhibitions as have not been organized or approved for participation by the SMM & T;
 - (ii) competition between organizers of exhibitions at which motor goods may be displayed is restricted or distorted since they are hindered in or prevented from obtaining the participation of manufacturers, importers and also effectively dealers in the years where the SMM & T organizes an international motor vehicle exhibition in the United Kingdom.
- (15) These restrictions of competition are liable to affect trade between Member States as follows:
- (i) in the years in which the SMM & T organizes international motor exhibitions importers of motor goods who are signatories to the Exhibition Agreement are prevented in whole or in part from displaying motor goods manufactured in other Member States at such exhibitions in the United Kingdom as are not held or approved by the SMM & T. This may have the result that only a limited or incomplete range of motor goods from other Member States may be displayed for inspection by the trade or the customers of these goods at such exhibitions;
 - (ii) organizers of exhibitions and fairs which have not been approved by the SMM & T are deprived of the opportunity of exhibiting in the United Kingdom motor goods manufactured in other Member States during the years mentioned under (i) above; this obstacle to trade in services by organizers of exhibitions operating between Member States is liable to jeopardize freedom of trade between such States in a manner contrary to the objective of creating a single market for all those States.

- (16) In view of the importance of the sales of motor goods which the signatories to the Exhibition Agreement represent, these effects upon trade between Member States are far from negligible.
- (17) Article 85 (1) consequently applies to the SMM & T Exhibition Agreement.

B. Applicability of Article 85 (3)

Under Article 85 (3) of the Treaty, the provisions of Article 85 (1) may be declared inapplicable in the case of any decision by an association of undertakings 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.
- (18) The Commission has, on a number of occasions ⁽¹⁾, confirmed that it is its policy in the field of exhibitions and fairs to accept agreements or arrangements — such as the SMM & T Exhibition Agreement — where they achieve rationalization and cost saving and also present advantages to the consumers which objectively outweigh the restrictive elements involved.
 - (19) The abovementioned advantages of rationalization and cost saving are achieved by the SMM & T Exhibition Agreement as follows:
 - (i) exhibitions of motor products in the United Kingdom are organized by the SMM & T at such intervals and in such a manner as to ensure the most effective

⁽¹⁾ Commission's Decisions in Cematex (OJ No L 227, 8. 10. 1971, p. 26), renewed on 24 May 1983 (OJ No L 140, 31. 5. 1983, p. 27); UNIDI (OJ No L 228, 29. 8. 1975, p. 17); BPICA (OJ No L 299, 23. 11. 1977, p. 18), renewed on 30 April 1982 (OJ No L 156, 7. 6. 1982, p. 16) and EMO (OJ No L 69, 20. 3. 1969, p. 13), renewed on 7 December 1978 (OJ No L 11, 17. 1. 1979, p. 16).

and high-prestige presentation of the widest possible range of the motor industry's products to potential customers, the general public and the media;

- (ii) the costs incurred by manufacturers and importers for participating at motor exhibitions in the United Kingdom are reduced since they are confined to such exhibitions, at which the widest obtainable variety of motor goods is exhibited, and which are the most effective from a marketing point of view.

It may therefore be concluded that the Exhibition Agreement contributes to improving the distribution of motor goods in the United Kingdom and also to promoting economic progress.

- (20) A fair share of this improvement in distribution and economic progress accrues to consumers. The periodic concentration of the exhibitions organized by the SMM & T enables consumers to gain a full picture of the range of products available and to be in a better position to make their choice without having to travel from one exhibition to another in order to see all available products.
- (21) The restrictions imposed upon manufacturers and importers on participation every second year at exhibitions which may prejudice the impact of the SMM & T's international motor exhibitions may be regarded as indispensable to the attainment of the benefit achieved through the rationalization of the display of motor goods at such events.
- (22) The Exhibition Agreement does not eliminate competition between manufacturers and importers of motor goods in the United Kingdom nor does it eliminate competition between organizers of exhibitions at which motor goods are or may be displayed.

Participation at exhibitions is not the only way for manufacturers and importers of motor goods to attract the interest of the trade or other potential customers. All the media are at the disposal of manufacturers and importers

for attracting customers. Furthermore, it must be borne in mind in this connection that their dealers, apart from having direct daily contact with the majority of potential customers, remain free to participate at any exhibition or fair they wish and their promotion activities will ultimately contribute to maintaining a high degree of competition between manufacturers and between importers.

As far as competition between organizers of exhibitions is concerned it is only moderately affected by the Exhibition Agreement. Any organizer who wishes to arrange an exhibition, in the years other than those of SMM & T exhibitions, is free to do so. Even in years when the SMM & T holds its own international exhibitions only organizers of exhibitions which are likely to prejudice the impact of the SMM & T's international events will be prevented from attracting the participation of manufacturers and importers. Finally, it should be borne in mind also in this connection that dealers remain free to participate on their own account at any exhibition and any time they wish, although they cannot count, in the years when the SMM & T organizes its international exhibitions, on economic support by the signatories of the Agreement.

- (23) Since all the requirements of Article 85 (3) are therefore satisfied, it is possible to grant an exemption to the Exhibition Agreement currently applied by the SMM & T.

C. Applicability of Articles 6, 7 and 8 of Regulation No 17

According to Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) is to be issued for a specific period and conditions and obligations may be attached thereto. In addition, under Article 8 (2) of the said Regulation the Commission has a duty to ensure that the requirements of Article 85 (3) continue to be satisfied.

- (24) The Exhibition Agreement which had been used by the SMM & T for a long time before 1 January 1973 when the United Kingdom became a member of the European Economic Community was notified to the Commission on 25 June 1973.

However, it was not until 1977 when the Exhibition Agreement influenced the 'Motorfair 1977' organized by Earls Court and 1979 when the application by the SMM & T of the Exhibition Agreement led to the cancellation of 'Motorfair 1979' that the full effect of the restrictive elements of the Exhibition Agreement in its original form became manifest and gave rise to a complaint, and to action on the part of the Commission.

- (25) Following intervention by the Commission the SMM & T in full cooperation with the Commission has modified the Exhibition Agreement in such a manner as to satisfy the requirements of Article 85 (3). The Commission therefore intends to apply Article 7 of Regulation No 17 and declare the provisions of Article 85 (1) inapplicable to the notified Exhibition Agreement from 1 January 1973 to 1 July 1980, the day on which the amended Exhibition Agreement was first submitted to the Commission.
- (26) In determining the duration of its Decision under Article 8 of Regulation No 17 the Commission must take account of the specific characteristics and needs of the motor industry as well as the frequency of the events covered by the Exhibition Agreement. It would therefore seem appropriate to grant exemption for the period from 1 July 1980 to 31 December 1994.
- (27) Pursuant to Article 8 (1) of Regulation No 17, obligations may be attached to the Decision enabling the Commission to ensure, during the period of exemption, that the requirements of Article 85 (3) continue to be satisfied.

The SMM & T should therefore be obliged to inform the Commission immediately of any changes in the Exhibition Agreement and of any alteration of the practical application of it.

Furthermore the SMM & T should immediately inform the Commission about any refusal of approval under the Exhibition Agreement of motor exhibitions organized in the United Kingdom by others than the Society.

Finally, the SMM & T should each year before the end of January submit to the Commission a calendar of international motor exhibitions organized by the Society in the United Kingdom during that year,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the EEC Treaty are, pursuant to Article 85 (3), hereby declared inapplicable to the SMM & T Exhibition Agreement. This Decision shall take effect as from 1 July 1980 and shall remain in force until 31 December 1994.

Article 2

The prohibition in Article 85 (1) of the Treaty is hereby declared inapplicable to the SMM & T Exhibition Agreement from 1 January 1973 to 30 June 1980, pursuant to Article 7 of Regulation No 17.

Article 3

The following obligations shall be attached to the Decision set out in Article 1:

- the SMM & T shall immediately inform the Commission of any changes in the Exhibition Agreement and any alteration of the practical application thereof,
- the SMM & T shall immediately inform the Commission about any refusal of approval under the Exhibition Agreement of motor exhibitions organized in the United Kingdom by others than the SMM & T itself,
- each year, before the end of January, the SMM & T shall submit to the Commission a calendar of its international motor exhibitions for that year.

Article 4

This Decision is addressed to the Society of Motor Manufacturers and Traders Ltd, Forbes House, Halkin Street, London SW1X 7DS, and to all signatories to the Exhibition Agreement, to whom the SMM & T is hereby required to forward the Decision.

Done at Brussels, 5 December 1983.

For the Commission
Frans ANDRIESEN
Member of the Commission

COMMISSION DECISION

of 5 December 1983

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.671 — IPTC Belgium)

(Only the French text is authentic)

(83/667/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 3 and 15 thereof,

Having regard to the Commission Decision of 20 September 1982 to open the proceeding,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

- (1) On 17 December 1981 the Commission adopted Decision 82/371/EEC ⁽³⁾, finding that certain provisions of the Agreement concerning the use of the NAVEWA-ANSEAU conformity label for washing machines and dishwashers (hereinafter referred to as the 'Agreement'), signed on 13 December 1978, constituted infringements of Article 85 (1) of the EEC Treaty, inasmuch as they prevented

importers of washing machines and dishwashers into Belgium who were not the official 'sole' importers of the brand of washing machines or dishwashers in question from obtaining certificates of conformity for the machines imported by them on the same terms as manufacturers and sole importers.

- (2) That Decision was addressed to the Association nationale des services d'eau (ANSEAU-NAVEWA), the Union des fournisseurs des artisans de l'alimentation (UFARAL-ULEVO) and the undertakings listed in Annexes I and II to the Decision which were parties to the Agreement. The two lists, which were compiled from information supplied to the Commission by the Communauté de l'Électricité (CEG), distinguished between firms that were associated in the drawing up of the Agreement (Annex I) and those which became parties to the Agreement after its signature (Annex II). Only the firms in the first category were fined.

- (3) The documentary evidence on the meetings that were held to prepare the Agreement shows that a firm called Allumalux was represented at the following two meetings of the CEG's 'Laundry Care' and 'Dishwashers' groups:

— the meeting held on 23 October 1978, where it was represented by a Mr Demeestere, and

— the meeting on 13 December 1978, where it was represented by a Mr Donnay.

On 19 September 1978 the members of the Laundry Care and Dishwashers groups had been told that one of the aims of the CEG was to obtain for its members preferential treatment over non-members, who would

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

⁽³⁾ OJ No L 167, 15. 6. 1982, p. 39.

have to have their machines individually tested by ANSEAU, whereas CEG members alone would be able to use the NAVEWA-ANSEAU certification mark or conformity label. At the 23 October 1978 meeting delegates were told that the Agreement would have the advantage of providing a weapon against parallel imports.

Allumalux also appeared on a list of firms concerned by the Agreement, dated 31 November 1978.

- (4) Moreover, before the Agreement was finally signed on 13 December 1978, Allumalux received a copy of the draft, to which it could suggest any amendments it might think necessary. Allumalux did not do so.
- (5) The lists communicated by the CEG after the signature of the Agreement, referred to 'Bosch, formerly Allumalux'. The Commission consequently sent the statement of objections in case IV/29.995 to Robert Bosch SA/NV ('Bosch'), Chaussée de Mons 128-130, 1070-Brussels, and not to Allumalux, and Bosch was included in the list of firms that had been associated in drawing up the Agreement.
- (6) Bosch never at any point before the Commission took its decision, either in its written reply to the statement of objections, at the oral hearing or at any other time, denied having been involved in drawing up the Agreement. The Commission therefore considered that Bosch had been involved and imposed on it a fine of 76 500 ECU (Bfrs 3 146 346).
- (7) After being served with the decision, Bosch objected that it had been included as a result of a substantive error in the list of firms fined, since it had only existed as a company since 19 May 1980 and had only been in sole charge of the distribution of the Bosch group's products in Belgium since 1 June 1980. Before that, Bosch group products had been distributed by the independent dealer, IPTC Belgium.
- (8) IPTC and Bosch had signed a contract on 22 May 1980, under which Bosch had acquired only part of IPTC's assets. IPTC had stopped distributing Bosch group products

from 1 June 1980, and as from that date it had also stopped selling washing machines and dishwashers and, therefore, applying the Agreement.

- (9) In reply to a request for information which the Commission sent to IPTC on 8 June 1982 under Article 11 of Regulation No 17, IPTC confirmed that it had imported and distributed Bosch group products in Belgium until 31 May 1980 and that at the time it had used the business name Allumalux. It also confirmed that it was a member of the CEG, had joined that body as an importer and distributor of electrical appliances, and had belonged to the Dishwashers and Laundry Care groups. Its present business was confined, however, to the distribution of air-conditioning equipment. Its most recent turnover figures were as follows ⁽¹⁾:

(Bfrs millions)

	Total	Household electrical appliances
1979	...	...
1980	...	...
1981	...	...
1982	...	...

- (10) On 4 November 1982 Commission Decision 82/777/EEC ⁽²⁾ amended Decision 82/371/EEC so as to transfer Bosch to the list of firms that had become parties to the Agreement after signature and cancel the fine imposed on the company.
- (11) In the statement of objections sent to IPTC on 24 November 1982, the Commission invited IPTC to reply to the case against it, which rested on the same facts as Decision 82/371/EEC finding that certain aspects of the Agreement infringed Article 85.

⁽¹⁾ In the published version of this 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⁾ OJ No L 325, 20. 11. 1982, p. 20.

II. LEGAL ASSESSMENT

A. Article 85 of the EEC Treaty

- (12) IPTC is an undertaking within the meaning of Article 85 of the EEC Treaty. It was involved in the drawing up of the Agreement and was a party to it from 1 January 1979 to 31 May 1980. It was a member of the CEG's Laundry Care and Dishwashers groups which drafted the Agreement; under the business name of Allumalux, it is listed among the firms represented at two of the meetings that were held to finalize the Agreement and is also on the list of the original parties to it. IPTC also applied the Agreement by purchasing NAVEWA-ANSEAU labels and affixing them to all the machines it sold.
- (13) On the grounds set out in Decision 82/371/EEC (paragraphs 37 to 67), which IPTC has produced no evidence to refute, a number of provisions of the Agreement constituted infringements of Article 85 of the EEC Treaty.

B. Article 15 (2) of Regulation No 17

- (14) Hence, it is established that IPTC acted in breach of Article 85 from 1 January 1979 until 31 May 1980 by participating in the preparation of, and subsequently applying, the NAVEWA-ANSEAU Agreement.
- (15) It is well known that business practices seeking to prevent parallel imports and to erect artificial trade barriers within the Community, and thus to undermine the unity of the common market, are regularly investigated and condemned by the Community authorities. In the present case, the restrictions on parallel imports, imposed by means of a contractual system for enforcing conformity with technical standards which was mandatory on third parties, constituted serious infringements of Article 85.
- (16) IPTC participated in the infringements deliberately because it was aware of the anti-competitive intent of the Agreement. The members of the CEG's Laundry Care and Dishwashers groups had been told that one of the aims of the CEG in setting up the new

approval system was to obtain preferential treatment for its members and that the Agreement would have the advantage of providing a weapon against parallel imports.

- (17) IPTC is not exonerated from responsibility for the infringement of the competition rules by the fact that its representatives at the meetings of the Laundry Care and Dishwashers groups had no authority to commit the company to anything. IPTC was sent a copy of the Agreement for comment before its final adoption. It was thus familiar with the text of the Agreement behind its obligation to affix NAVEWA-ANSEAU labels and had had an opportunity to propose amendments to it. Moreover, the persons representing IPTC did in fact commit the company, and IPTC proceeded to apply the Agreement by purchasing labels and affixing them to the machines it sold.
- (18) IPTC shares in the responsibility for the infringement because of its own involvement in drawing up the Agreement and because of its membership of the CEG, which took a leading part in drawing up and implementing the Agreement.
- (19) It is therefore appropriate to impose a fine on IPTC under Article 15 (2) of Regulation No 17, the size of the fine to be determined by the duration of the infringement, the particular circumstances in which it was committed and the position of the undertaking on the relevant market.

However, in view of the drastically reduced scale of IPTC's overall business, the fine should be lower than those imposed on the other firms that were involved in drawing up the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of the Agreement concerning the use of the NAVEWA-ANSEAU conformity label, signed in Brussels on 13 December 1978, which

prevented importers other than sole importers from obtaining certificates of conformity for the washing machines and dishwashers they imported into Belgium on the same terms as manufacturers and sole importers, constituted infringements of Article 85 (1) of the EEC Treaty during the period during which IPTC Belgium was a party to the Agreement. This applies in particular to Articles 2, 4.1, 5 and 6 of the said Agreement and to Article 6 of the special rules annexed to that Agreement.

Article 2

1. A fine of 5 000 (five thousand) ECU, that is Bfrs 229 502, is hereby imposed on IPTC Belgium.
2. The fine shall be paid to Banque Bruxelles-Lambert — Agence Européenne — account No

310-0231000-32 in the name of the Commission of the European Communities, within three months of the date of notification of this Decision.

Article 3

This Decision is addressed to IPTC Belgium SA, Chaussee de Mons 128-130, 1070-Brussels.

This Decision shall be enforceable in the manner provided for in Article 192 of the EEC Treaty.

Done at Brussels, 5 December 1983.

For the Commission
Frans ANDRIESSEN
Member of the Commission

COMMISSION DECISION
of 5 December 1983
relating to a proceeding under Article 85 of the EEC Treaty
(IV/29.329 — VW-MAN)
(Only the German text is authentic)
(83/668/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 4, 6 and 8 thereof,

Having regard to the notifications jointly made to the Commission by Volkswagenwerk AG, Wolfsburg, and Maschinenfabrik Augsburg-Nürnberg AG, Munich, on 4 November 1976 and 5 September 1977, concerning collaboration between them in the commercial vehicles sector,

Having decided on 10 December 1982 to open proceedings in the case,

Having published a summary of the notifications ⁽²⁾, in accordance with Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

- (1) On 25 August 1977 Volkswagenwerk AG (VW) and Maschinenfabrik Augsburg-Nürnberg (MAN) signed a Cooperation Agreement concerning commercial vehicles in the 6 to 9 tonnes weight range and components for commercial vehicles. On 5 September 1977 they notified the Agreement to the Commission under Article 4 of Regulation No 17, having already notified, on 4 November 1976, a preliminary memorandum of understanding signed on 14 October of the

same year. On 29 November 1982 the parties amended the Agreement so as to limit their cooperation in the distribution field and on 3 February 1983 informed the Commission of the amended Agreement.

The parties seek a declaration under Article 85 (3) of the Treaty that Article 85 (1) of the Treaty is inapplicable to the notified agreements.

- (2) The object of the cooperation, within the limits agreed on 29 November 1982, is to enable both VW and MAN to extend their respective product ranges to commercial vehicles in the 6 to 9 tonnes class. Hitherto VW's commercial vehicle range ('Transporter' vans and the LT series) had all been under this weight class, while MAN's had all been above it, in the 10 to 40 tonnes range.

Under the Agreement the parties undertake:

- to develop, manufacture and distribute a joint range of commercial vehicles of between 6 and 9 tonnes maximum gross weight, with each partner specializing,
- to supply each other with sub-assemblies, components and parts for fitting in the partners' own commercial vehicle ranges.

- (3) The joint range to be developed, manufactured and distributed by the parties on a work-sharing basis comprises a range of cab-over-engine truck models in the following weight classes:

- 6 to 6,5 tonnes with a four-cylinder MAN diesel engine,
- 7,5 to 8 tonnes with a four-cylinder MAN diesel engine,
- 7,5 to 8 tonnes with a six-cylinder MAN diesel engine, and
- 9 tonnes with a six-cylinder MAN diesel engine.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 337, 23. 12. 1982, p. 3.

Each party agrees to supply the other, and any other manufacturer who is granted manufacturing rights (see paragraph 10), with sub-assemblies, components and parts of his manufacture for building the joint range and as spare parts therefor.

- (4) Each party also agrees to supply the other, and any other manufacturer who is granted manufacturing rights (see paragraph 10), with sub-assemblies, components and parts of his manufacture for building the other's own commercial vehicle range and as spare parts therefor.
- (5) The development work for the joint range is to be divided between the partners as follows:
 - VW is to develop the cab, clutch, gearbox, rear axle, drive shafts, electrical systems and standard bodies;
 - MAN is to develop the engines, front axle, chassis, brakes, wheels and tyre type and special bodies including tippers.
- (6) The joint range is to be assembled by both parties in their respective works, with each partner supplying the other with the sub-assemblies, components and parts for whose manufacture or procurement he is responsible. Only sub-assemblies, components and parts manufactured or procured by the party responsible for the particular item in question may be used for the production of the joint range.
- (7) The vehicles of the joint range will bear both the 'VW' and 'MAN' trade marks.
- (8) The distribution is left to MAN, under the supervision of a cooperation committee jointly formed by the two partners. In Germany distribution of the joint range will be almost exclusively through the MAN sales organization.
- (9) Elsewhere the joint range will be distributed by the import companies MAN uses to market its own range in the country concerned. VW has the option of appointing the same importers to distribute its range as well. The importers generally have the name 'VW-MAN Truck

and Bus' or the equivalent in the local language. VW has small shareholdings in the companies (under 15 %). The remainder of the equity is held by MAN and other individuals and companies, including VW and MAN importers.

- (10) Both sides agree not to compete in any form, directly or indirectly, against the models in the joint range with other commercial vehicles in the 6 to 9 tonnes authorized weight class. They also accept restrictions on their use outside the cooperative venture of industrial property rights, manufacturing rights or know-how arising out of the joint development programme: the licensing of such rights and the transfer of such know-how to third parties require the consent of the other party where the third party is to use the rights or know-how for vehicles in the 6 to 9 tonnes range. This applies regardless of whether the industrial property rights existed before the collaboration began or were acquired later, whether individually or jointly.
- (11) Disputes arising out of the Agreement are subject to an arbitration clause, with the further possibility of reference to the courts. The Cooperation Agreement is concluded for an indefinite period, which can be terminated from the end of any year upon 36 months' notice, the first possible termination date being 31 December 1987.
- (12) In 1981 the parties held the following estimated shares of the Community market in terms of new vehicle registrations:

VW LT series:	10,8 %,
VW-MAN joint series:	4,5 %,
MAN trucks:	10,5 %.

The parties' main competitors are Daimler Benz, Ford, Iveco and Renault VI. All these hold bigger shares of the Community market than do VW and MAN.

The market is characterized by the extremely high market shares of some producers in their home markets. In Italy Iveco in 1981 had 77,5 % of the market (trucks upwards of 3,5 tonnes), in Germany Daimler Benz had 71,2 %

(trucks of between 6 and under 8 tonnes), in France Renault had 45 % (trucks over 5 tonnes) and Ford in Britain had over 35 % (trucks of between 3,5 and 7,5 tonnes). VW and MAN's market shares in Germany were much smaller than this. In 1981 they accounted for the following percentages of the new registrations:

VW LT series:	19,1 %,
VW-MAN joint series:	8,4 %,
MAN trucks:	23,1 %.

(13) No comments were received from third parties in response to the Commission's notice pursuant to Article 19 (3) of Regulation No 17.

(14) This Decision does not cover the parties' standard form agreements with importers, dealers and repairers appointed to handle the distribution and servicing of the joint range and the VW and MAN ranges of commercial vehicles, which the parties also notified to the Commission.

(15) The parties have stated that they no longer require a formal decision by the Commission under Article 85 (3) with respect to the period between 4 November 1976, the date of the first notification, and 3 February 1983.

II. LEGAL ASSESSMENT

(16) The agreements between the parties have as their object or effect a restriction of competition within the common market and may affect trade between Member States. However, the prohibition contained in Article 85 (1) can in this case be declared inapplicable by virtue of Article 85 (3).

(17) The restriction of competition within the meaning of Article 85 (1) arises from the provision of the Cooperation Agreement prohibiting either party from developing or producing commercial vehicles in the 6 to 9 tonnes weight class independently of the other party. Since both parties were, before embarking on the cooperation, already engaged in commercial vehicle production (VW of vehicles up to 5 tonnes and MAN of those of 10 tonnes and

over), both were potentially capable of expanding into the 6 to 9 tonnes range.

(18) The work-sharing in the development and production of components for the joint range has the object and effect of bringing about specialization by the parties. This may go beyond the joint range to affect the partners' own commercial vehicle ranges, leading to a gradual standardization of these ranges. It will usually turn out cheaper to use the standard components developed for the joint range than to carry out new independent development (see paragraph 4 above). As a result, the competition between VW and MAN on technical innovation will decrease and the consumer's range of choice between vehicles with different technical characteristics will be reduced.

(19) The ban on using, in the production of the joint VW-MAN range, any other sub-assemblies, components and parts than those manufactured or procured by the partner responsible for the particular item concerned limits the number of third parties awarded contracts to supply particular components. The resulting diminution of competition on the demand side will work to subcontractors' disadvantage.

(20) The common distribution arrangements for the joint VW-MAN range involve a restriction of competition on sales. Inside Germany the joint range will be marketed by MAN together with its own commercial vehicle range. Abroad the same applies except that in this case VW can also grant the same importers the distribution rights for the VW range. These arrangements will restrict competition between the parties' commercial vehicle ranges.

(21) Less-extensive restrictions of competition are also present at the dealership and servicing level. Within Germany, only a few dealers and repairers in the VW network sell the joint range as well as VW's own commercial vehicle range which goes up to 6 tonnes. Abroad, especially in countries where the parties have traditionally held only fairly small shares of the commercial vehicle market, it is more common for the same dealers and repairers to sell and service the VW range as well as the joint VW-MAN ranges.

(22) The restrictions accepted by the parties in relation to industrial property rights, manufacturing rights and know-how (paragraph 10) constitute a further restriction of competition.

However, these clauses restricting the use of rights and know-how are limited to the life of the Agreement. After its expiry, the parties can continue to use each other's inventions and industrial property rights in return for appropriate royalties and will also be able to claim, on reasonable terms, non-exclusive manufacturing rights for the sub-assemblies, components and parts developed and/or produced by the other party.

- (23) The agreements between VW and MAN are also liable to affect trade between Member States, since both companies do business throughout the common market and their cooperation is likely to alter the position of firms from other Member States, whether other commercial vehicle suppliers — who will be affected on the German market as well as on their home territory — or makers and suppliers of components. The flow of trade between Member States will be diverted from the course it would otherwise have followed in the absence of the cooperation.
- (24) However, there are several grounds for supposing that the agreements fulfil the conditions of Article 85 (3).
- (25) The cooperation contributes to improving the production of goods. The new product which the parties are bringing on to the market to compete with the established ranges of other truck manufacturers is being manufactured under arrangements that provide for extensive specialization in the production of components.
- (26) The parties' agreement not to develop or produce vehicles in the same weight class, except in the context of the Cooperation Agreement, without the other party's consent or to fit sub-assemblies, components and parts in the joint range other than those produced or procured by the party responsible (paragraphs 17 to 19) will ensure longer production runs and increased productivity for each party, especially as the parties will use some of the same standardized sub-assemblies, components and parts for fitting in their own commercial vehicle ranges as well as for the joint VW-MAN range.
- (27) The pooling of general development work and the work-sharing in the development of individual components (paragraph 18) will cut development costs and make it easier for the partners to enter the market in the joint range weight class.
- (28) The distribution of the joint range together with MAN's commercial vehicle range (paragraphs 20 and 21) also contributes to improving the distribution of goods within the meaning of Article 85 (3). MAN has an established truck distribution network, whereas most of VW's network is not technically equipped for truck servicing. It would be uneconomic to set up a separate distribution network for the relatively small number of units of the joint range expected to be sold.
- (29) Although the cooperation involves restrictions of competition between VW and MAN that are of some importance given that they embrace not only components but also finished vehicles and distribution, on the credit side it holds substantial advantages which outweigh those restrictions of competition. For the most part the cooperation restricts only potential competition. In practice, competition between the parties prior to their cooperation was only on a small scale, since their commercial vehicle ranges were — and still are — only to a limited extent comparable.
- (30) The cooperation does not involve vehicles already being manufactured by either party but is intended to put on the market a new range of vehicles which will extend the parties' product ranges. It enables them to offer a full range of commercial vehicles. This is necessary. If they are to compete with the large truck manufacturers who have been selling a full range of commercial vehicles for many years and who dominate the market in some parts of the Community (see paragraph 12). The cooperation between VW and MAN on the joint range will improve the structure of supply and increase competition.
- (31) The restrictions of competition contained in the Cooperation Agreement (paragraphs 17 to 22 above) are indispensable for the success of the venture. This is true both of the ban on competition with the joint range and of the obligation to use in its production only components manufactured or procured by the party responsible (paragraphs 17 to 19, 22 and 26), since otherwise the parties could not be expected to concentrate their development and production efforts on the joint programme as they are likely to do with the

restrictions. The linking of distribution of the joint range to that of MAN products (paragraphs 20, 21 and 28) is also indispensable to the venture. The alternatives, the setting up of a separate distribution and servicing network for what is only a small segment of the truck market in the 6 to 9 tonnes range or parallel distribution of the joint range through both the VW and MAN networks, are either uneconomic or impossible on technical grounds.

- (32) The restrictions on the disposal of industrial property rights, manufacturing rights and know-how (paragraph 22) are designed to keep the results of the development work mainly for the cooperation itself and to keep them from third parties who are also in the 6 to 9 tonnes truck business. This action is an indispensable element in ensuring the success of the joint range in competition with the vehicles of other manufacturers. The restrictions prevent any competitive leads the parties may gain over their competitors because of new technical solutions found in developing or manufacturing the joint range being dissipated and hence lost by one party acting unilaterally.
- (33) These restrictions do not go further than is necessary, since each party is free to grant manufacturing rights and licences for parts developed or produced by him to other manufacturers who are to use them only in connection with vehicles outside the joint range weight class. The parties are also guaranteed the right to unrestricted use of know-how after expiry of the Agreement, since the rights of user are not subject to any time limit, the parties have options on each other's manufacturing rights and there is provision for the agreement of appropriate royalties and conditions in the event of the options being exercised.
- (34) Consumers are likely to be allowed a fair share of the resulting benefits, because the more intense competition that is generated will tend to ensure that part of these benefits is passed on to them.
- (35) The cooperation does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. In fact, it involves a new supplier entering the market for 6 to 9 tonne trucks. It is unlikely that VW and MAN could in the foreseeable future obtain market shares big

enough to oust competition in part of the truck market, in view of the strong positions held by other large manufacturers (see paragraph 12).

- (36) In accordance with Article 6 (1) of Regulation No 17, an exemption of the cooperation between VW and MAN from the application of Article 85 (1) should take effect from 3 February 1983, the date on which the parties informed the Commission of the amended Agreement under which they have abandoned the more extensive cooperation agreed originally (see paragraphs 1 and 15).
- (37) In accordance with Article 8 (1) of Regulation No 17 and with a view to the particular circumstances of the case, the exemption is granted for a period of 15 years, i.e. until 31 December 1998. New truck models take an extremely long time to develop and also tend to remain in production and on sale for a long time (long intervals between model changes). The substantial investment undertaken by the parties therefore requires a relatively long period before it will yield a satisfactory return on capital employed. A similarly long time-scale is involved in establishing the new product on the market against competition from the other big commercial vehicle makers. The parties must be able to count on the enforceability and continuance of the Agreement during this time. A period of 15 years appears therefore appropriate.
- (38) To enable the Commission to satisfy itself that the tests of Article 85 (3) continue to be fulfilled during the period of the exemption, it is necessary to impose on the parties under Article 8 (1) of Regulation No 17 the obligation to notify the Commission of any substantial amendment of the terms of the notified Agreement and of any extension of their collaboration such as, in particular, if VW were to appoint the importers who distribute the joint range and MAN's range of commercial vehicles in the common market to distribute the VW commercial vehicle range as well,

HAS ADOPTED THIS DECISION:

Article 1

- 1. The provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable, by virtue of

Article 85 (3) of the Treaty, to the Cooperation Agreement of 25 August 1977 between Volkswagenwerk AG and Maschinenfabrik Augsburg-Nürnberg AG, as amended by the Agreement of 29 November 1982.

2. The declaration of inapplicability in paragraph 1 shall apply from 3 February 1983 until 31 December 1998.

Article 2

The undertakings to which this Decision is addressed shall inform the Commission immediately in the event of:

1. any substantial amendment or addition being made to the notified Agreements;
2. Volkswagenwerk AG entering into an agreement with importers in the common market who distribute the commercial vehicles of the joint

range or of Maschinenfabrik Augsburg-Nürnberg AG to distribute VW commercial vehicles as well.

Article 3

This Decision is addressed to:

1. Volkswagenwerk Aktiengesellschaft, Postfach, D-3180 Wolfsburg 1;
2. Maschinenfabrik Augsburg-Nürnberg Aktiengesellschaft, Postfach 500620, D-8000 Munich 50.

Done at Brussels, 5 December 1983.

For the Commission

Frans ANDRIESSEN

Member of the Commission

COMMISSION DECISION
of 8 December 1983
relating to a proceeding under Article 85 of the EEC Treaty
(IV/29.955 — Carbon Gas Technologie)

(Only the German text is authentic)

(83/669/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 4, 6 and 8 thereof,

Having regard to the application for negative clearance submitted pursuant to Article 2 of Regulation No 17 by Deutsche BP Aktiengesellschaft, Hamburg (DBP) on 9 October 1979 and to the subsidiary notification pursuant to Article 4 (1) of the same Regulation concerning an Agreement between DBP, Carbon Gas Technologie GmbH, Ratingen (CGT), Deutsche Babcock Aktiengesellschaft (DB), Deutsche Babcock Beteiligungs GmbH, Oberhausen (DBB) and Projektierung Chemische Verfahrenstechnik GmbH, Ratingen (PCV),

Having regard to the publication of the summary of the notification pursuant to Article 19 (3) of Regulation No 17 ⁽²⁾,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The notified Agreement concerns cooperation between several undertakings in the field of coal gasification within the joint subsidiary CGT, and the planned participation of DBP.

The agreements on the activities of CGT and the cooperation between the parties can be summarized as follows:

- CGT is a joint subsidiary of DBB and PCV set up mainly for the purpose of developing to an industrial standard a combined pressure gasification process using run-of-mine coal which has been summarily upgraded, and of commercially exploiting this process (object of the cooperation).
- CGT has been set up for an indefinite period. No provision is made in the articles of association for dissolving the company. However, each shareholder may at any time transfer his entire holding to an associated company in which he has at least a 51 % interest or which has at least a 51 % interest in his equity capital. However, a transfer to British Petroleum Company Ltd, London, is not possible. In the event of a sale of shares in some other manner, the other shareholders have an option on them.
- DBP has a 33 1/3 % interest in CGT; the remaining shares are divided equally between DBB and PCV.
- The company has three executive directors, DBB, PCV and DBP appointing one each. It is represented either by two executive directors acting jointly or by one executive director together with one general agent. Matters falling outside the normal course of business such as financial planning, the acceptance of guarantees, the making of major investments, etc., are subject to the agreement of the general meeting. The latter has a quorum if two-thirds of the company's capital is represented, and its decisions require a unanimous vote.
- DBP, DB, DBB and PCV undertake to make available free of charge to CGT all their existing and future know-how which could be conducive to the attainment of the object of the cooperation. PCV has, in addition, contributed all its

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 220, 17. 8. 1983, p. 4.

know-how in the field of cooperation including its rights to valid patents relating to coal gasification.

- DBP, DB, DBB and PCV undertake both on their own behalf and on behalf of their associated companies, to refrain from competing with CGT in the field of cooperation during the period of their participation in the joint venture. Only DBP's parent company, British Petroleum Co. Ltd, London, is exempt from this obligation.
- DBP, DB, DBB and PCV undertake to refrain from using, for the purposes of their own companies or from divulging to third companies or associated companies within the meaning of Sections 17 to 19 of the Aktiengesetz (the German Companies Law, dealing here with parent and subsidiary companies, undertakings belonging to a group and companies with cross holdings), and confidential information relating to the object of the cooperation obtained during the currency of the Cooperation Agreement from other parties or from CGT.
- CGT's shareholders undertake, in the event of their withdrawal from CGT, to refrain for a five-year period from exploiting know-how belonging to CGT in the field of cooperation and from divulging it to third parties. A fixed penalty of DM 100 000 is payable in respect of each breach of this obligation. In the event of a dispute, it is for the shareholder who has withdrawn to show proof that it has neither exploited itself CGT's know-how in the field of cooperation, nor divulged it to third parties. The parties agree that this obligation is to be observed also by the shareholder's associated companies.
- The parties have agreed that Deutsche Babcock Aktiengesellschaft, DBB's parent company, will in due course receive from CGT a non-exclusive licence to build and market worldwide plant developed by CGT. DPB plans subsequently to acquire and operate the plant forming the object of CGT;

The first stage of CGT's operation consists of research and development as well as the operation of a pilot plant. Subsequently, the construction of a demonstration plant, which will not come on stream until the end of 1988, is planned. Up to then the aggregated cost could amount to between DM 400 and 500 million. This section of the project is partially financed by public aids. Following the period of development it is planned to conclude the agreement on the non-exclusive licence for DB. Further-

more, after the 'Research and Development' phase has come to an end, CGT will be involved in the marketing of the developed process in such a way as to ensure in particular, within the framework of the production and the running of pressurized coal gasification installations, the supply of the basic design package, the transfer of technology and accessory technical assistance.

Without exception, the parties were originally undertakings belonging to major groups active at Community and international level in industrial plant construction and in the energy sector: Gruppe Deutsche Babcock has a capital of DM 200 million, Gruppe Flick (PCV) DM 700 million, and British Petroleum Co. Ltd £ 500 million. In October 1982 the then chairman of PCV's managing board, Mr Manfred Nemitz, took over from Friedrich Flick Industrieverwaltung KGaA all of PCV's business interests.

Several coal gasification processes exist in various stages of development on the Community market. The leading competitors are Lurgi GmbH, Fried. Krupp GmbH, AGIP, Shell, Texaco, Ruhrkohle AG, Saarbergwerke AG and Rheinische Braunkohlenwerke AG.

No comments were received from third parties in response to the Commission's notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1) of the EEC Treaty

Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings 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.

The Agreement between DBP, CGT, DB, DBB and PVC is such an agreement, for the following reasons:

1. The Cooperation Agreement in a field which may prove of great importance in relation to energy supply, provides that the parties and all associated undertakings refrain from competing with the joint subsidiary in the field covered by the cooperation and hence that they will refrain

from competing with one another. Although, unlike the other two shareholders, British Petroleum Co. Ltd, is not expressly prohibited from competing with the joint subsidiary, experience has shown that it is unlikely to do so. Each of the parties has either directly or indirectly through participating interests in other undertakings, theoretical or practical experience of coal gasification or coal liquefaction, the end products of which (gas and oil) can, to a large extent, be substituted for each other. It is to be assumed therefore that, in view of their financial power, economic importance and the diversity of their principal activities, at least DBP and DB would be able to achieve, even independently, the object of the cooperation. Consequently, the prohibition on competition imposed on the parties by the Agreement or the improbability of competition between them resulting from the Agreement has as its object or effect a restriction of competition within the common market. In view of the industrial importance of the parties and the importance of the new technology to be developed in the field of energy, this restriction is also appreciable.

The same applies to the obligation on the parties to refrain, in the event of their withdrawal from CGT, for a five-year period from exploiting know-how belonging to CGT in the field of cooperation and from divulging it to third parties. This obligation prevents shareholders who decide to withdraw from exploiting know-how which they transferred to the joint subsidiary when it was set up and subsequently placed at its disposal free of charge. It reinforces the prohibition on competition imposed on the shareholders by making it more difficult for a shareholder to compete in the field of cooperation once it no longer participates in the joint subsidiary.

2. With the possible exception of PCV following the withdrawal of the Flick group as its equity owner, the parties belong to major industrial groups which have considerable material and financial resources and which are active in virtually every country in the Community. They are therefore in a position to exploit the technology developed by CGT in several Community countries. As a result of the anti-competitive agreements, the parties cease to be suppliers of technological know-how in the field of cooperation in cross-frontier trade within the common market. The agreements are such, therefore, as

to restrict trade between Member States. In view of the existing structure of gas supply in the Community, characterized as they are by extensive intra-Community trade, trade between Member States is affected on this count too.

B. Applicability of Article 85 (3) of the EEC Treaty

Under Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty may be declared inapplicable in the case of agreements between undertakings which contribute 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 do 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.

1. Since 1973, the importation of crude oil into the Community has, as regards availability and prices, been subject to recurrent or constant pressures. Even so, crude oil still accounts for almost 49 % of the Community's primary energy consumption. Under these circumstances, it is essential that the degree of dependence on this source of energy be reduced and the pattern of the Community's energy supplies diversified through the harnessing of alternative energy sources, and in particular those available in the Community itself.

In the search for greater diversification and self-sufficiency and hence greater stability of energy supplies in the Community, coal gasification in particular creates favourable conditions through improved exploitation of Community coal deposits. Moreover, using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal. Mastery of this technology may also open up for that industry in the Community significant marketing opportunities outside the Community. This being so, the competent bodies have repeatedly stressed the need for the Community to concern itself as a matter of urgency with the development of coal liquefaction and gasification processes. As far back as 1975, the Commission stated in its communication to the Council on 'Medium-term guidelines

for coal 1975 to 1985' ⁽¹⁾ that the process of coal gasification was an important factor in the Community's supply strategy in the energy sector. Subsequently, the Council, acting on proposals from the Commission, adopted two Regulations on the granting of financial support for projects to exploit alternative energy sources ⁽²⁾, primarily coal gasification and coal liquefaction. The European Council of 21 and 22 June 1979 in Strasbourg also called for an energy strategy aimed at reducing dependence on oil supplies and advocated the development of new methods for processing coal.

The Agreement contributes to the attainment of the above objectives. True, each of the groups to which the parties belong would be able on its own to achieve the object of the cooperation, but this assessment of the parties' competitive positions must take account of special circumstances conducive to the realization of the project within the framework of a joint subsidiary. Consideration must be given here to the main activity of the respective participating groups. In view of the object of the cooperation these activities are complementary, PCV (formerly Flick) being specialized in basic process technology, DB in the construction of large-scale industrial plant and British Petroleum in refining, a technology similar in nature to coal gasification. In view of this existing complementary specialization of the parties, their cooperation within the framework of a joint subsidiary creates, by ruling out competition between them, better conditions for the attainment of the object of the cooperation than if they were to compete with one another. The prohibition on competition under the joint venture compels the parties, moreover, to concentrate their resources on developing the new technology within the joint subsidiary. This should save both time and money. The cost of this development programme is put at roughly DM 500 million, but it is certain that, were they to try to attain the object of the cooperation individually, the parties which do possess the necessary resources would incur much higher costs because they would not have access to complementary technical know-how. It can therefore be assumed that the coordinated use within the joint subsidiary of the entrepreneurial skills available will

simplify and accelerate the transition of the desired coal gasification technology in question from the planning and research stage to that of large-scale industrial application. The prohibition on competition therefore contributes to promoting technical and economic progress.

2. By mitigating the potential difficulties which, in the light of experience gained in recent years, may arise in connection with the importation of hydrocarbons into the Community, coal gasification is such as to help create a pattern of energy supply which promises consumers greater stability in terms of quantities supplied and prices. The presence of strong competitors on this market will ensure that the parties will not be able to keep for themselves the benefit that can be expected to flow the joint subsidiary. From this point of view the Agreement is likely, therefore, to allow consumers a fair share of the benefit resulting from the cooperation.
3. The Agreement imposes no restrictions on the undertakings that are not indispensable to the attainment of the above objectives:
 - A mere agreement on the exchange or granting of licences or an agreement on specialization could not guarantee attainment of the object of the cooperation in the same way as complete pooling.
 - The clause prohibiting the parties from competing with the joint subsidiary is, under the circumstances, an indispensable part of the Agreement. The assumption must be that complete concentration of their efforts on the attainment of the object of the cooperation can be ensured only if any attempt to achieve an individual competitive edge is ruled out.
 - The obligation on the parties to refrain, in the event of their withdrawal from CGT, for a five-year period from exploiting know-how belonging to CGT in the field of cooperation and from divulging it to third parties is likewise to be regarded as a restriction indispensable to the attainment of the object of the cooperation. It affords a limited degree of protection against competition from a former shareholder or from

⁽¹⁾ OJ No C 22, 30. 1. 1975, p. 1.

⁽²⁾ OJ No L 158, 16. 6. 1978, p. 3; OJ No L 93, 12. 4. 1979, p. 5.

outside companies, without which the object of the cooperation cannot be attained.

4. Nor does the Agreement afford the shareholders the possibility of eliminating competition in respect of a substantial part of the product covered by the Agreement. Various gasification methods are already undergoing tests in the Community and elsewhere, and others are at the development stage. A number of leading firms in the Community are engaged in tapping this market. Their individual commercial success depends both on the quality and cost of their technology and on the coal they plan to use, its origin and its price. Under the circumstances, effective competition is guaranteed in this field.

C. Applicability of Article 85 (1) of Regulation No 17

Pursuant to Article 8 (1) of Regulation No 17, conditions and obligations may be attached to the exemption decision.

In the case at issue, the Commission must be given an opportunity to examine whether competition within the common market is not further restricted by measures which have their basis in the fact that the parties or undertakings making up the group to which each of them belongs carry on, or will carry on, directly or through interests in outside undertakings and independently of CGT, an activity in the field of coal gasification in the common market. For it is quite feasible that, under these circumstances, competing interests within groups of undertakings may conflict with one another and tendencies towards market sharing emerge. Accordingly, a condition needs to be imposed that will make it easier for the Commission to take steps against such practices.

Article 8 (1) of Regulation No 17 also stipulates that a Commission Decision in application of Article 85 (3) of the Treaty shall be issued for a specified period.

In view of the major investments planned by the shareholders, the period within which the object of the cooperation should be achieved cannot be too short. It should in the first place cover the period leading up to the commissioning of a demonstration plant. It is therefore appropriate to limit the period of validity of the exemption to 31 December 1989,

HAS ADOPTED THIS DECISION:

Article 1

Article 85 (1) of the EEC Treaty is, pursuant to Article 85 (3) thereof, hereby declared inapplicable to the Agreement concluded on 29 May 1979 between Deutsche BP of the one part and Carbon Gas Technologie GmbH together with its shareholders of the other part relating to Deutsche BP's interest in Carbon Gas Technologie GmbH, which was set up on 14 December 1977.

Article 2

The declaration of inapplicability in Article 1 shall be subject to the following condition:

CGT shall submit to the Commission for examination all licensing agreements entered into with its shareholders as soon as they have been concluded.

Article 3

This Decision shall apply with effect from 9 October 1979 and shall apply until 31 December 1989.

Article 4

This Decision is addressed to the following undertakings:

- Deutsche BP Aktiengesellschaft, Überseering 2, D-2000 Hamburg 60,
- Deutsche Babcock, Aktiengesellschaft, Duisburger Straße 375, D-4200 Oberhausen 1,
- Deutsche Babcock-Beteiligungs GmbH, Duisburger Straße 375, D-4200 Oberhausen 1,
- Projektierung Chemische Verfahrenstechnik GmbH, Ten Eicken 12, D-4030 Ratingen 1, Haus Hohbeck,
- Carbon Gas Technologie GmbH, Ten Eicken 12, D-4030 Ratingen 1, Haus Hohbeck.

Done at Brussels, 8 December 1983.

For the Commission

Frans ANDRIESEN

Member of the Commission

COMMISSION DECISION**of 12 December 1983****relating to a proceeding under Article 85 of the EEC Treaty (IV/30.389 — Nutricia/de Rooij and IV/30.408 — Nutricia/Zuid-Hollandse Conservenfabriek)****(Only the Dutch text is authentic)****(83/670/EEC)**

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the
European Economic Community,

Having regard to Council Regulation No 17 of
6 February 1962, First Regulation implementing
Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended
by the Act of Accession of Greece, and in particular
Articles 3 (1) and 6 thereof,

Having regard to the notifications made to the Com-
mission on 30 June and 17 July 1981 by NV Ver-
enigde Bedrijven Nutricia, Zoetermeer, in accord-
ance with Article 4 of Regulation No 17, of the
agreements it had signed with Drs F. A. de Rooij,
Amersfoort, on 31 August 1979 and with Zuid-Hol-
landse Conservenfabriek, Breda, on 6 June 1980,

Having regard to the applications submitted to the
Commission on the same dates by Nutricia for
exemption of the agreements under Article 85 (3) of
the EEC Treaty,

Having regard to the Commission Decision of
3 November 1982 to initiate proceedings in these
cases,

Having given the undertakings concerned the
opportunity of replying to the objections which the
Commission had raised against them, in accordance
with Article 19 (1) of Regulation No 17 and Com-
mission Regulation No 99/63/EEC of 25 July 1963
on the hearings provided for in Article 19 (1) and (2)
of Council Regulation No 17 ⁽²⁾,

After consultation with the Advisory Committee on
Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

- (1) The notifications concern non-competition clauses contained in agreements for the sale by NV Verenigde Bedrijven Nutricia, hereinafter called 'Nutricia', of two of its subsidiaries, Remia BV to Drs de Rooij and Luycks Producten BV to Zuid-Hollandse Conservenfabriek BV, hereinafter called 'Zuid'; (the undertakings sold will hereinafter be referred to as 'Remia' or 'New Remia', and 'Luycks' or 'Luycks-Zuid', depending upon whether the reference is to before or after the acquisitions notified to the Commission).
- (2) Nutricia, which produces health and baby foods, had bought the two subsidiaries in 1974. Remia, which had prior to 1974 belonged to the de Rooij family, made sauces, margarine and materials for the baking industry. Luycks also produced sauces as well as pickles and condiments, especially vinegar and mustard.
- (3) Upon the acquisition of Remia and Luycks, Nutricia centralized the sales functions while retaining initially the original production facilities. The sales functions were carried out on behalf of the Nutricia Group by four sales divisions, of which two were the Luycks sales division, which sold sauces, pickles and condiments and the Remia sales division which sold oils and fats and exported all the group's products.
- (4) After a few years of profitable operation, Luycks moved into loss in 1977 and Remia in 1978. Nutricia reorganized its production facilities upon the advice of consultants, by concentrating sauce production in Remia while leaving the production of pickles and condiments with Luycks (which also received the pickles production of another of Nutricia's subsidiaries). The reorganization was to

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/72.

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

be undertaken partly in the hope that Nutricia would the more readily find buyers for Remia and Luycks, since it wished to get back to its core business of health and baby food.

- (5) Remia was sold to Drs de Rooij on 31 August 1979 and Luycks on 6 June 1980 to Zuid. Zuid is a wholly-owned subsidiary in the Campbell Group, the largest North American producer of canned and packet soups. The group is of lesser stature in Europe but had decided to expand its European operations. Campbell has six wholly or partly owned subsidiaries in the EEC: in the United Kingdom, France, the Netherlands, Germany, Italy and Belgium.

The markets

- (6) Detailed and comparable statistics for the sauce and pickles markets are not readily available. Although often dominated by large companies, there are many small producers and the tendency in most EEC countries, including the Netherlands, towards concentration in the grocery trade has put a significant share of the trade into 'own brands', that is, products manufactured anonymously but carrying the brand name of the grocer rather than of the manufacturer. Manufacturers' market shares cannot therefore always be known with precision.
- (7) The products are not difficult to manufacture and the technology is well known. From a technical point of view, entry is easy. Not all sauces and not all pickles and condiments are substitutable one for the other and there are in addition wide regional differences in tastes and consumption patterns.
- (8) Leaving aside 'own brands' products, both sauces and pickles are distributed through two channels: the retail consumer market and the market for large consumers, that is to say, hotels, restaurants and hospitals.

The retail consumer market is characterized by packaging in small sizes and generally larger margins, to off-set higher promotion costs. The branded products rely upon consumer recognition and loyalty and upon stimulation

of consumer interest. Innovation is rare but when it occurs it is supported by extensive promotion. As a result, small firms are at a disadvantage in selling branded goods. Aggressive promotion of a brand can create an awareness of the product generally as well as of the promoted brand in particular, although its principal aim, in which it may succeed, is to change consumers' preferences and therefore market conditions.

The large consumer market is characterized by large-size packaging, keen purchasing (and hence lower margins) but low promotion costs.

- (9) Nutricia estimated in 1978 that Remia would have ... % ⁽¹⁾ of the Dutch large consumer market for sauces, while Luycks would have ... % of that market plus ... % of 'own brand' sales. If the 1977/78 marketing plan took account of eight competitors in that market, the four biggest suppliers have a combined share of 65 %. At that time, Luycks estimated that it had ... % by volume of the Dutch sales of silver onions, ... % of the gherkins, ... % of the mustard and ... % of vinegar sales. The estimated share of sales had not changed much by 1980/81 (after the sale to Zuid).

Trade between Member States

- (10) For the three principal products groups the Netherlands is responsible for a considerable proportion of the intra-Community trade, with imports in 1982 of 11 million ECU and exports of 37 million ECU (see Table). In 1977 and 1978, Luycks exported to Germany sauces valued at Fl ... (... ECU) and Fl ... (... ECU) respectively, a substantial increase of 65 %.

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

TABLE

Netherlands' share of intra-Community trade in sauces and pickles

(1982)

	Pickled gherkins and cucumbers		Tomato sauce		Other sauces and relishes	
	Volume (tonnes)	Value ('000 ECU)	Volume (tonnes)	Value ('000 ECU)	Volume (tonnes)	Value ('000 ECU)
Intra-EEC imports	27 661	18 352	38 840	33 031	49 666	78 450
Imports into the Netherlands from EEC	4 059	2 734	4 421	4 212	2 531	4 427
%	14,67	14,89	11,38	12,75	5,09	5,64
Intra-EEC exports	27 207	18 982	47 416	42 719	39 904	62 329
Exports from the Netherlands to EEC	11 685	7 561	13 400	12 878	10 823	16 903
%	42,94	39,83	28,26	30,14	27,12	27,11

Source: Statistical Office of the European Communities, NIMEXE.

The position of New Remia

- (11) Upon acquisition in 1979, New Remia had the potential advantage of established market shares, especially in the large consumer market and it was particularly strong in the retail consumer market for chip sauces. It lacked a sales force for the retail consumer market, for the sales forces had been centralized. New Remia did take over some of the existing Nutricia sales force and if it did not take over all, that appears to have been the choice of New Remia.
- (12) Established brand names are important and, as will be seen, New Remia was licensed to use the Luycks trade mark for a period, which it could use to retain those customers of Luycks loyal to the brand name while introducing a replacement brand name. The name New Remia chose as its replacement brand name was 'Macmillan', a mark used by Remia up to about 1977 as a 'B' (down-market) brand. Nutricia was of course unable to assign the mark 'Luycks' to New Remia because it wished to continue to use the mark on pickles and condiments. The Commission notes that New Remia abandoned the use of the 'Luycks' mark without a period of overlap with 'Macmillan', which could possibly have

assisted the clientèle to accept the substitution of one mark for another.

- (13) In 1981/82, New Remia had about ...% by tonnage of sales of chip sauce (including the retail consumer sector but excluding 'own brand') and its nearest competitors had according to the parties' own estimates about ... and ...% respectively. New Remia is either not, or only marginally, represented on the sub-markets for other types of sauces, namely salad cream, mayonnaise, tomato ketchup and other table sauces. Half the market for mayonnaise is held by two other firms and half that for salad cream by three.
- (14) New Remia appears to have kept Luycks' earlier market share in the 'own brand' market following the sale, but it has been less successful in retaining the Luycks market share in the branded consumer markets. Its sales appear to have been seriously affected by the need to change the trade mark over two years. New Remia appears to have failed to win over all Luycks' old customers to the 'Macmillan' brand.

The position of Luycks-Zuid

- (15) Little information was offered by Luycks-Zuid about its current position. Nutricia was advised by consultants before the sale to Zuid was decided upon, that the original pickles

and condiments line made and sold by Luycks was probably not viable unless other pickles could be added to the range. This advice may have been sound, because Luycks-Zuid now wishes to manufacture sauces. Until now Luycks-Zuid has not succeeded in increasing its market share (. . .).

The Agreement of 31 August 1979 selling Remia BV to Drs de Rooij ('the Sauce Agreement')

- (16) The Sauce Agreement provided in clauses 3 and 4 that from 1 October 1979 Nutricia would transfer its shares in Remia BV to Drs de Rooij, together with the exclusive right to sell consumer products manufactured by or on behalf of Remia and the exclusive right to sell in the Netherlands sauces manufactured by or on behalf of Luycks, whose compliance with the latter clause Nutricia guaranteed. The sauces referred to were sauce for chips, mayonnaise, salad dressing, garnishing sauce, paprika sauce, saté sauce, tomato ketchup, curry sauce, fricadelle sauce, barbecue sauce and blends of those sauces. Under clause 5 of the Sauce Agreement, Nutricia undertook not to engage, directly or indirectly, until 30 September 1989, in the production or sale of sauces on the Dutch market and to ensure that Luycks also complied with this restriction. There were certain transitional rights for Luycks to manufacture and sell sauces for export and on the Dutch market to a very limited extent, but these expired on 1 July 1980.
- (17) Under clause 6 of the Sauce Agreement, Drs de Rooij was given a non-exclusive right to use the trade mark 'Luycks' for the listed sauces for two years ending on 1 October 1981 in respect of sales to the hotel and catering trade.
- (18) According to New Remia, the non-competition clause was inserted in the Sauce Agreement mainly because of the special nature of the sales and marketing organization which existed at Nutricia at the time of the Agreement and which the sale of the business altered.

The Agreement of 6 June 1980 selling Luycks Producten BV to Zuid ('the Pickles Agreement')

- (19) The Pickles Agreement in fact contains two agreements: a Stock Purchase Agreement

whereby Nutricia sold the Luycks business to Zuid as from 4 July 1980 and a Joint Venture Agreement which transferred the centralized sales division from Nutricia to a joint venture company for one year to 1 June 1981.

- (20) As the Luycks company as a subsidiary of Nutricia had not had its own sales force, this arrangement enabled Luycks-Zuid to derive maximum benefit from the assets it had acquired. The non-exclusive distribution and sales activities of the joint venture concerned only the Dutch market and exports to Belgium and Germany. Zuid was to dispose of its interest in the joint subsidiary on 1 June 1981.
- (21) Clause IX.1 of the Stock Purchase Agreement required Nutricia not to engage, directly or indirectly, for five years in any production or sale of pickles or condiments in 'European countries', on pain of a penalty quantified in the Agreement. Nutricia retained the right to sell in bulk certain products, but this right specifically excluded the retail and large consumer markets. Clause V.1.f extended to Luycks-Zuid the restriction contained in clause 5 of the Sauce Agreement.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EEC Treaty

- (22) Article 85 (1) 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.
- (23) The Sauce and Pickles Agreements were between undertakings within the meaning of Article 85 (1). Drs de Rooij, who signed the Agreement on the sale of Remia as the future proprietor of that business, is also an undertaking within the meaning of that Article.

(24) Clause 5 of the Sauce Agreement, whereby Nutricia agreed not to engage in the production or sale of sauces on the Dutch market for 10 years and undertook to extend the same restriction to Luycks, prevents competition within the common market both between the parties and between the renouncing party and other competitors.

(25) Clause V.1.f of the Pickles Agreement which extended to Luycks-Zuid the restriction on Nutricia under the Sauce Agreement and Clause IX.1 thereof by which Nutricia undertook not to produce or sell pickles for five years in any 'European country' also prevent competition within the meaning of Article 85 (1).

Nevertheless, it is not every restriction of competition of this type which falls within Article 85 (1).

(26) The Commission has already, in its Decision 76/743/EEC Reuter/BASF⁽¹⁾, concluded that when the sale of a business involves the transfer not only of material assets but also of goodwill and clientèle, it may be necessary to impose contractual restrictions of competition on the seller. The contractual restriction upon competition by the seller is then a legitimate means of ensuring the performance of the seller's obligation to transfer the full commercial value of the business.

(27) However, the protection accorded to the purchaser cannot be unlimited. It must be kept to the minimum that is objectively necessary for the purchaser to assume, by active competitive behaviour, the place in the market previously occupied by the seller. If the objective minimum appears in any given case insufficient as a result of earlier management decisions on the part of the purchaser, that is not a reason for extending the period of protection; nor should the seller be prevented from re-entering the market after that period (whatever it may be) when he is no better off *vis-à-vis* the purchaser than any other newcomer.

(28) It is not possible to set any length of time as universally suitable as a period of protection. Each non-competition period must be judged in its context.

Relevant pointers as to the term which can be said to be objectively necessary for such clauses include:

- (a) the time it will take the purchaser of a business to build up a clientèle;
- (b) how frequently consumers in the relevant market change brands and type (in relation to the degree of brand loyalty shown by them);
- (c) how long it takes before new products entering the market or new trade marks are accepted by the consumer;
- (d) for how long, after the sale of the business, the seller, without a restrictive clause, would be able to make a successful comeback to the market and regain his old customers.

(29) The duration of accompanying arrangements such as the temporary right for the purchaser to use the seller's trade marks or sales forces may also constitute a useful pointer to the sort of period required for all the seller's goodwill and clientèle to be transferred to the purchaser.

(30) The geographical scope of a non-competition clause also has to be limited to the extent which is objectively necessary to achieve the abovementioned goal. As a rule, it should therefore only cover the markets where the products concerned were manufactured or sold at the time of the agreements.

The restrictions in the Sauce Agreement

(31) In the present case, the Commission also takes account of the fact that the products concerned do not involve high technology, and that there are no other barriers which would entitle the purchaser to particular protection. The parties obviously thought that two years would be long enough for New Remia to use the 'Luycks' trade mark while introducing its own mark and gaining customer loyalty. This new customer loyalty

⁽¹⁾ OJ No L 254, 17. 9. 1976, p. 40.

could nevertheless be readily undermined if Nutricia (Luycks-Zuid) had been able to come back on the market after a mere two-year absence using the 'Luycks' mark. A further two-year period would seem objectively necessary to enable New Remia to consolidate its hold on its new clientèle. In these circumstances, and having regard to the internal evidence of the parties' views at the time of the contract, four years would appear to be the upper limit. Certainly, a 10-year period is not objectively necessary and the provisions concerned in the Sauce Agreement in so far as fall within Article 85 (1). To the extent that the sales staff not transferred represented, with their trade connections, part of the goodwill that was being transferred, that part was renounced and protection cannot be claimed for it.

- (32) The extension to Luycks-Zuid of Nutricia's 10-year restriction cannot stand if the restriction cannot stand *vis-à-vis* Nutricia. It is correct that Nutricia had indicated an intention to leave the market, whereas Luycks-Zuid had an intention to enter the pickles market and the two are related. In addition, the extension of the clause could be said to protect a relatively small firm against the subsidiary of a large group. However, the Campbell Group is not anywhere prominent in the relevant sauce market, whereas New Remia has the largest single share of the Dutch market. An efficient new competitor might, in any case, be able to establish a viable position on the market.

The restrictions in the Pickles Agreement

- (33) The territory to which the non-competition clause in the Pickles Agreement applied was 'European countries'. This covers the whole of the European Community, although Luycks at the time of Agreement was operating in only three of the Member States. A restriction going beyond the territory in which the seller had operated is too wide and therefore unnecessary. Nutricia had no reputation in the

other Member States which would have made it unfair on the purchaser if the seller had started operating in those States.

- (34) The five-year term incorporated in the Pickles Agreement appears not to be objectively necessary. The sale involved a simple transfer of clientèle and goodwill. The parties recognized that Luycks-Zuid needed only one year to replace for itself the sales arrangements which Nutricia had provided to Luycks when Luycks was Nutricia's subsidiary. Taking into consideration the need for Luycks-Zuid to enjoy a supplementary period in order to consolidate its hold on the custom, but remarking also the stronger economic position of the Campbell Group, a period of protection of Luycks-Zuid from competition from Nutricia and New Remia of two years would appear sufficient.
- (35) The Commission therefore considers that the contractual restrictions on competition of the duration agreed in the Sauce and Pickles Agreements and of the geographical effect in the latter considerably exceed what is necessary to ensure the transfer of the full commercial value of the businesses sold to the purchasers and that the agreement of such contractual conditions in the present case constitutes to that extent a restriction on competition within the meaning of Article 85 (1).
- (36) The Sauce and Pickles Agreements affect or are likely to affect trade between Member States within the meaning of Article 85 (1).
- (37) In the circumstances, the undertakings by Nutricia and later by Luycks-Zuid not to engage in the production of sauces in the Netherlands had an effect upon intra-Community trade because it removed Luycks-Zuid from the cross-border sauce trade with Germany from 1 July 1980, when its transitional rights of manufacture and sale ended. That trade had been worth . . . ECU to it in 1978, which is not a negligible trade. Furthermore, the restriction upon sales of sauces by Luycks-Zuid in the Netherlands would prevent the Campbell Group, a new competitor, from using its subsidiary as an importer for

saucers made elsewhere in the EEC. The Campbell Group had clearly acquired Luycks as part of its plan to expand in the EEC and the restriction was likely to affect trade between Member States at the latest when the trade mark 'Luycks' again became exclusively available to Luycks-Zuid on 1 October 1981, in respect of saucers.

- (38) Prior to its acquisition by Zuid, Luycks had sold its pickles in Belgium, the Netherlands and Germany. Whatever Nutricia's current intentions, it had shown itself capable of undertaking an export trade in pickles and from 1 June 1981 it had, in the absence of further agreement, a sales force capable of selling pickles. The removal for a considerable length of time of a competitor who has the skills and market relationships to enter or re-enter intra-Community trade is likely to affect trade between Member States.

B. Article 85 (3) of the EEC Treaty

- (39) Article 85 (3) provides that Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving 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; nor (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (40) If the non-competition clauses go beyond what is objectively necessary for a transfer of the full commercial value of the business sold, an exemption can only be considered under special circumstances. In particular it must be shown that the clauses are indispensable to guarantee the attainment of objectives, other than the mere need of the purchaser further to consolidate his purchase, which may legitimately be pursued under Article 85 (3).
- (41) In the present case, the parties have failed to make out a case for applying Article 85 (3) to the two notified agreements. The Commis-

sion, too, fails to see what advantage inclusion of the two clauses restricting competition for a term and/or geographical area in excess of the maximum necessary for a transfer of the full commercial value of the businesses sold could have in terms of improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The two abovementioned major contractual restrictions of competition provide no appreciable objective advantages to offset the serious disadvantages for competition in the relevant markets. For these reasons, an exemption under Article 85 (3) cannot be considered.

C. Article 3 of Regulation No 17

- (42) Article 3 of Regulation No 17 empowers the Commission, where it finds that there is an infringement of Article 85 (1) of the Treaty, to require the undertakings concerned to bring that infringement to an end,

HAS ADOPTED THIS DECISION:

Article 1

The non-competition clause laid down in clause 5 of the Agreement of 31 August 1979 between NV Verenigde Bedrijven Nutricia and Drs F. A. de Rooij constitutes from 1 October 1983 an infringement of Article 85 (1) of the EEC Treaty.

Article 2

The non-competition clause laid down in clauses IX.1 and V.1.f of the Agreement of 6 June 1980 between NV Verenigde Bedrijven Nutricia and Zuid-Hollandse Conservenfabriek BV, constitutes from 4 July 1982 an infringement of Article 85 (1) of the EEC Treaty. The same clause constitutes from the date of its stipulation an infringement of

Article 85 (1) of the EEC Treaty in so far as it applies to a geographical area larger than the Belgian, Dutch and German markets.

Article 3

The applications for exemption under Article 85 (3) of the EEC Treaty in respect of the agreements referred to in Articles 1 and 2 are hereby refused.

Article 4

NV Verenigde Bedrijven Nutricia, Drs F. A. de Rooij, Remia BV, Zuid-Hollandse Conservenfabriek BV and Luycks Producten BV shall cease forthwith to apply the clauses referred to in Articles 1 and 2.

Article 5

This Decision is addressed to:

- NV Verenigde Bedrijven Nutricia, Zoetermeer,
- Drs F. A. de Rooij, Den Dolder,
- Remia BV, Den Dolder,
- Zuid-Hollandse Conservenfabriek BV, Zundert, and
- Luycks Producten BV, Diemen.

Done at Brussels, 12 December 1983.

For the Commission
Frans ANDRIESSEN
Member of the Commission

COMMISSION DECISION

of 12 December 1983

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.525 — International Energy Agency)

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

(83/671/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 4, 6 and 8 thereof,

Having regard to the notification and application for negative clearance submitted to the Commission on 5 January 1982 by the Chairman of the Industry Advisory Board of the International Energy Agency for the benefit of 32 oil companies which might be asked to participate in the carrying out of the International Energy Program in the event of its activation,

Having regard to the publication in the *Official Journal of the European Communities* ⁽²⁾ of the summary of the notification pursuant to Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

- (1) An agreement on an International Energy Program (hereinafter referred to as the IEP) was signed on 18 November 1974. Twenty-one countries, members of the OECD, now participate in the IEP. Nine Member States of the European Economic Community have signed the IEP, France being a non-signatory. The Community has not signed the IEP and the Commission has the status of observer with the International Energy Agency (here-

inafter referred to as the IEA) an autonomous agency of OECD, responsible for carrying out the IEP. The Community has adopted measures aimed at regulating oil supply shortfalls at the Community level, which complement those adopted by the IEA.

- (2) The objectives of the IEP as set out in its preamble are to take common effective measures to meet oil supply emergencies by developing an emergency self-sufficiency in oil supplies, restraining demand and allocating available oil among the participating countries on an equitable basis. A principle of solidarity has been established between the participating countries to ensure that the effects of supply cuts are evened out between them and that no country or group of countries will suffer disproportionately the consequences of supply disruptions, all as set out in the IEP.

- (3) The IEP provides that the allocation process may be activated when one or more participating countries, or all the participating countries as a group, sustain a reduction of 7 % or more in the expected daily rate of oil supplies. Any reduction in the daily rate of oil supplies is likely to affect the participating countries differently. Some countries possess a large refinery capacity and thus mainly import crude oil, while other countries mainly import refined products. Some countries import only from one source, others from various sources or even have indigenous production. A country might be the subject to some form of embargo which might hamper the usual flow of oil to that country.

Because of these differences it would be necessary to find out in what degree the participating countries are affected by the supply disruptions, in order to establish which would have oil and/or products to share with other countries, and which would be entitled to receive oil. Each country's supply rights under the IEP would have to be established.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 199, 26. 7. 1983, p. 2.

Each country's supply right is calculated mathematically by the IEA. These supply rights are compared with overall available supplies in order to determine whether a country has an allocation right or an allocation obligation. If the overall supplies available to each country:

- are less than the supply right, the country will have an allocation right, that is a right to receive an allocation from other countries' available supplies,
- exceed the supply right, the country will have an allocation obligation, that is an obligation to make its excess available to other participating countries.

The finding of the IEA Secretariat in regard to activation of the emergency allocation system is subject to review by the Governing Board of the IEA which consists of representatives of the governments of the participating countries. The allocation system has never been activated. It has, however, been tested at regular intervals.

(4) *The companies*

The IEP provides that an International Advisory Board (normally called the Industry Advisory Board or IAB) from the oil industry shall be convened to assist the IEA in ensuring the effective operation of emergency measures. The IEA shall consult with oil companies to obtain their views regarding the situation and the appropriate measures to be taken. The objective is to draw on the expertise of the oil companies and their general knowledge about the world oil supply situation. Generally it can be said that the emergency allocation measures cannot be carried out without the assistance of the oil companies.

- (5) The IAB has been established by the Governing Board of the IEA. The oil companies in the participating countries have been asked by the IEA and governments of participating countries to participate. At present, 16 oil companies and two associations of oil companies are members of the IAB. The oil companies are all members of the group of 'reporting companies' of which there are approximately 46. Reporting companies, designated by the IEA, are to submit oil supply data on imports, exports, indigenous production, inventories, etc. to the IEA and national governments during an emergency and cooperate, voluntarily, with the IEA in

allocation implementation. Their number is fixed from time to time and will be known when the emergency allocation system is activated. Non-reporting companies are asked by the participating countries to submit data to national governments, who transmit them to the IEA on an aggregated basis. Both reporting and non-reporting companies also assist in carrying out the allocation at a national level in accordance with national law. The exact number of non-reporting companies which might be asked to participate when the emergency allocation system is activated is not known in advance.

- (6) An *ad hoc* group of the IAB is the Industry Supply Advisory Group (hereinafter referred to as ISAG). The members of ISAG consist of oil company employees with oil supply expertise. They coordinate the voluntary arrangement of supplies by reporting companies and National Emergency Sharing Organizations to direct the supplies for purposes of balancing the allocation rights and allocation obligations of participating countries. ISAG members will work for the IEA at the IEA headquarters in Paris on an *ad hoc* basis in all phases of the activation and deactivation of the allocation process. Detailed descriptions of the allocation sharing system and the involvement of oil companies have been adopted by the Governing Board.
- (7) National Emergency Sharing Organizations (hereinafter referred to as NESOs), established on a stand-by basis in each participating country, are responsible for national oil emergency measures and for liaison with the IEA on matters of international allocation in an emergency. The structure of NESOs will differ from country to country, reflecting different oil supply and political structures, and may have differing involvement of oil industry personnel. Where necessary, NESOs combine governmental authority for national oil emergency management with operational coordination of the oil supply activities of companies operating nationally, both reporting and non-reporting. As regards non-reporting companies the NESO takes on certain operational functions *vis-à-vis* the IEA. NESOs submit to the IEA reporting company data on a disaggregated basis and, for the

most part, non-reporting company data on an aggregated basis. They also carry out national fair sharing.

(8) *The goods*

The goods are crude oil, all petroleum products, all refinery feedstock, all finished products produced in association with natural gas and crude oil, and possibly synthetic fuels.

(9) *The allocation process*

The allocation process takes place in monthly cycles for as long as the emergency allocation system is activated, and embraces three types of activities which may take place at the same time:

- *Type 1:* Reporting companies and non-reporting companies will voluntarily and independently of any requests by the IEA rearrange their own supply arrangements, including exchanges and other commercial transactions with other oil companies, in response to the emergency situation. In this type of activity, these companies may take into account participating countries' allocation rights and obligations, projected oil supplies by country of origin, and other data supplied by the IEA;
- *Type 2:* Reporting companies will voluntarily rearrange supplies — including transactions between companies — in response to IEA requests or solicitations to assist in balancing allocation rights and obligations of the participating countries. In so doing, they will be assisted by ISAG;
- *Type 3:* If, in spite of the best voluntary efforts of the industry, additional actions to meet countries' supply rights are required, participating countries will establish what further actions are required and how they will be implemented. Such further action might include direct instructions from individual governments or NESOs to companies.

The allocation process may necessitate other activities relating to production, refining, distribution or transportation.

- (10) Generally, Type 1 activities are normal commercial transactions between oil companies. Each company will establish its own independent emergency arrangements to share its available supplies with its affiliates and cust-

omers. On the whole this will merely reflect normal distribution patterns. However, when the companies concerned have taken account of allocation rights and obligations or other information supplied by the IEA in establishing and carrying out the transactions, this might present Type 2 characteristics.

- (11) Type 2 activities involve action by oil companies to remedy the remaining imbalances. ISAG will evaluate the voluntary offers put forward by the reporting companies, the non-reporting companies via NESOs and by NESOs and may solicit further offers. The voluntary offers may be 'closed-loop' offers where the companies involved in giving or receiving oil have been identified in advance. They mainly concern affiliated companies. Or the voluntary offers may be 'open' offers, either to receive oil or to supply it. All these offers are specific as to the kind of crudes or products offered or required.
- (12) The circumstances of any supply disruption cannot be foreseen precisely. Supply disruptions might affect participating countries differently. Not all countries use the same kind of crudes or products, and there are differences in refining capacities. Any embargoes might also affect countries differently. It is not possible before IEP activation to establish the amount of oil that will have to be reallocated under Type 2 or Type 3.
- (13) ISAG will evaluate the voluntary offers it receives. In so doing it will take into account the special needs of each participating country. If the offers do not meet the requirements necessary to carry out the allocation adequately, ISAG may solicit alternative offers. In matching the open offers intensive exchange of information may take place between ISAG members, between ISAG and reporting companies, between ISAG and NESOs, between reporting companies and between NESOs, on the origin, quality, tanker and refinery capacity, storage capacity, pricing of oil as appropriate and other issues which prove necessary to carry out the allocation process. The object is to fulfil allocation rights and obligations, that is, to direct oil and/or products from countries with a surplus to countries with a deficit.

- (14) The following is an example: Alpha Oil notifies ISAG that it has a part-cargo of 50 000 tons of Arabian Light crude oil, 34° API, three days out from North West Europe on open voluntary offer. The cargo was intended, before the crisis, for one of Alpha's United Kingdom refineries, but the United Kingdom has, in fact, after the activation of the allocation system, an allocation obligation. ISAG scrutinizes its detailed information about those countries in the system which have allocation rights and solicits voluntary buy offers until it finds a buyer needing crude of this particular quality, say Beta's refinery at Rotterdam, the Netherlands, a country having an allocation right. The offer is therefore matched, the Allocation Coordinator gives his approval, the price is arrived at between Alpha and Beta on commercial principles and the tanker carrying the crude delivers it to Beta at Rotterdam.
- (15) ISAG will not be involved in the fixing of commercial terms for the reallocated oil. Companies will fix such terms between themselves once the offers have been matched by ISAG. However, in the case of open offers companies may elect to advise ISAG of the commercial terms, including prices, in order for ISAG to be able to solicit acceptances of the offers.
- (16) When ISAG has made recommendations regarding the matching of the voluntary offers, the Allocation Coordinator, who is the Executive Director of the IEA, either approves or disapproves. The Allocation Coordinator is responsible to the Emergency Group of the Standing Group on Emergency Questions (hereinafter referred to as the SEQ Emergency Group) for the supervision and guidance of the allocation process. The SEQ Emergency Group is a body of government representatives responsible to ensure intergovernmental agreement and/or consensus as regards decisions taken in implementation of the IEP during an emergency.
- (17) If the Allocation Coordinator disapproves, ISAG will be asked to do a rematch. When the Allocation Coordinator approves the ISAG recommendation, ISAG will notify the reporting companies and governments accordingly. If ISAG is unable to match all offers because discrepancies of some kind persist, the Allocation Coordinator will take the matter to the SEQ Emergency Group and, if requested by the SEQ Emergency Group, the ISAG and the Allocation Coordinator will consult with the IAB. Governments then establish what action is required and how it will be implemented. Such action constitutes Type 3 activity.
- (18) The allocation process is deactivated when the shortfall of supplies has decreased or can reasonably be expected to decrease below 7 %. The Governing Board either approves of the IEA Secretariat finding on the subject matter, or decides to deactivate without such finding. Neither ISAG nor reporting companies or non-reporting companies will be asked to reallocate oil after deactivation.
- (19) Members of the oil industry will be involved to some extent before the activation or without the actual activation of the emergency sharing system. Article 19 (6) of the IEP provides that the IEA Secretariat shall consult with oil companies to obtain their views regarding the overall supply situation and the appropriateness of the measures to be taken. Such consultation before or without activation of the emergency allocation system is considered necessary in view of the oil companies' knowledge of the market. Article 19 (7) contemplates that the IAB will be convened to assist the IEA in emergency allocation and such assistance could begin before actual activation of emergency measures. Article 55 (3) of the IEP specifies that the SEQ may consult with oil companies on any matter within its competence, and this could include consultation before or without activation of the emergency allocation system. Oil companies will also, in the event of a supply disruption, submit data to the IEA and to national governments such as that on imports, exports, indigenous production and inventories, at the request of the Executive Director of the IEA.
- (20) The IEP emergency sharing system and the detailed rules adopted for its carrying out are tested by the IEA at regular intervals. Test runs involve company participation (both reporting and non-reporting companies, ISAG and NESOs) to the same extent as activated emergencies. The data base and other information so far used during test runs have been either historical or hypothetical and no real oil has been shared.
- (21) A Dispute Settlement Centre has been created by the Governing Board. The purpose of the Centre is to provide, for consenting parties,

facilities for arbitration of disputes between a seller and buyer of oil, or between the parties to an exchange of oil, arising out of an oil supply transaction during implementation of the IEP emergency allocation system. No award rendered by the Dispute Settlement Centre of the IEA, to which Article 85 may apply, is exempted by this Decision.

- (22) No comments were received from third parties in response to the Commission's notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EEC Treaty

- (23) Article 85 (1) 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. These provisions are applicable in this case.
- (24) The undertakings involved — reporting and non-reporting oil companies — are undertakings within the meaning of Article 85 (1).
- (25) The consent of the oil companies to cooperate with one another and the IEA in the framework of the IEP and in the operation of the IEA emergency oil allocation system is a concerted practice. The IEP contemplates the assistance of oil companies in carrying out its emergency oil allocation system. Governments have laid down rules for this assistance and adopted the framework for the involvement of the companies. The object of that involvement is to arrive at a specific result, that is, the redistribution of oil and/or products to fulfil the participating countries' allocation rights and obligations. For this purpose company representatives will be gathered together to achieve the object through common effort. An extensive exchange of information will take place on origin of oil, quality, tanker and refinery capacity, storage capacity and other matters and company representatives will be exposed to data and

information some of which is otherwise proprietary and confidential. This will be done under the assumption that all the participants will play their part to achieve the object of the IEP.

- (26) The concerted practice may have the effect of distorting competition. The main objective of the IEP emergency oil allocation system is to allocate oil and/or products among the participating countries on an equitable basis if a shortfall occurs. An obligation of solidarity has been established among the participating countries to prevent one country or a group of countries from suffering disproportionately the consequences of oil supply disruption. Each country's supply right will be compared with available supplies to determine which countries will have a right to receive oil and which countries an obligation to share oil. The concertation between the oil companies has the object and effect of taking into account, in the case of some Type 1 transactions, and balancing, in the case of Type 2 and Type 3 transactions, allocation rights and obligations. This means in some cases directing oil to destinations where it would not have gone had the IEA system not been activated. This implies that the usual market processes may be set aside in order to bring about results different from those which unrestricted competition would bring about in a supply shortfall. The concertation between the oil companies will lead to conditions of competition which do not correspond to the conditions of the market which would otherwise exist.

The oil companies concerned remain competitors in an oligopolistic market. The concertation during an emergency within the framework of the IEA will cover exchanges of information of confidential and proprietary data which would not otherwise be given to competitors. Such exchanges of information may affect the subsequent market conduct of competitors. Some uncertainty about supply sources, storage and refinery capacities, tanker capacity and other issues may be removed. The oil companies' behaviour in the light of this may, in view of the market structure, alter the market conditions from what they would be without such exchanges of information.

The possible effects of these restrictions on competition will be appreciable. The under-

takings start to concert on allocation actions only when a 7 % shortfall in oil supplies available to all IEA countries or to one of them has occurred or may reasonably be expected to occur. The monthly oil supply to the IEA as a whole is about 120 million tonnes. It is estimated that in case of activation between 10 and 15 million tonnes of oil will have to be redistributed each month. This would represent about 10 % of normal supplies. In case of some products or some countries the supply shortfall may be higher depending on the characteristics of the supply disruption. The entire market is concerned, as companies which will have to give up or receive oil will take their overall supply situation into account when forwarding offers and requests to ISAG.

- (27) The concerted practice will affect trade between Member States. Allocating oil among countries signatory to an international agreement involves direct transactions across frontiers. The obligation of international solidarity among participating countries laid down in the IEP implies that oil companies in each of the participating countries will be affected and asked for assistance in one way or another in case of activation. The usual flow of oil supplies will be modified in order to meet allocation rights and obligations. Such rights and obligations relate to the individual participating countries and not to the companies involved. The joint effort of the oil companies to redistribute available oil will have an appreciable effect on trade between Member States.

B. Article 85 (3) of the EEC Treaty

- (28) Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any concerted practice 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.

- (29) The concerted practice does contribute to improving the distribution of the relevant goods and to promoting economic progress.

The object of the concerted practice is to reallocate available oil supplies among the participating countries on an equitable basis as set out in the IEP. Because some countries might otherwise suffer more from supply disruptions than others it has been agreed to provide any country with a larger than average deficit with some degree of supply, taking normal supply and consumption patterns into account. This would not necessarily happen as a result of free market forces in a supply situation serious enough to activate the emergency oil allocation system. Only some kind of intervention in the market can secure this. This is the task of the oil companies. As a result of their concerted practice oil and/or oil products will be directed as far as is necessary to destinations where they might not otherwise have gone.

The restrictions on competition contained in the concerted practice of the oil companies are more likely than competition itself to achieve the aims of the IEP, namely a reduction of the inconvenience and a sharing of the difficulties.

- (30) The concerted practice allows the consumer a fair share of the resulting benefit.

Because supply cuts are likely to affect the participating countries differently they are also likely to affect consumers differently. Consumers will benefit from the emergency oil allocation process the aim of which is to share available supplies among the participating countries. The consumers may not obtain the equivalent of usual supplies, but they will be assured that their country has proportionally equal supplies. Furthermore, the concerted practice can be expected to minimize

the impact of the shortage on the general economy of the participating countries with immediate benefit to the consumers.

- (31) The concerted practice does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.

The concerted practice which takes place both before and after the activation of the emergency allocation system or without the actual activation of the system is aimed at matching participating countries' allocation rights and obligations and redirecting oil and/or products as far as necessary for that purpose. The actions concerned are: consultations with oil companies before the activation of the allocation sharing as provided for in the IEP, or without the actual activation; submission to the IEA and to national governments by the companies of data such as that on imports, exports, indigenous production and inventories; Type 1 transactions, to the extent to which Article 85 (1) may apply to them, when the companies concerned with such transactions have taken into account participating countries' allocation rights and obligations and have reported such transactions to the IEA and the Commission; Type 2 transactions and Type 3 transactions to the extent to which Article 85 (1) may apply to them.

The extent to which exchanges of specific data and information are needed to carry out the abovementioned transactions and the extent to which it will be necessary to redirect oil and/or products will depend upon the magnitude and characteristics of the supply disruption and vary from case to case. No behaviour which is not necessary to carry out the allocation system is exempted by this Decision. No exchange of price information will occur except what is necessary for individual supply transactions, including those in which ISAG may participate through solicitation of acceptance of offers. Any use of confidential or proprietary information obtained as a result of participation in the emergency allocations process is prohibited after the deactivation of that process.

Neither the rules laid down by governments on the handling of the allocation process nor the concertation between companies to achieve the allocation needed go beyond what is necessary for the fulfilment of the objectives of the IEP. The changes in patterns of trade will be the minimum found necessary in the circumstances.

- (32) The concerted practice does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In a situation of oil shortage, the usual market situation will change. Competitors will make efforts to secure their own supply arrangements using all available possibilities. The concerted practice which is intended to take care of the reallocation process is likely in practice to affect directly only about 10 % in total of normal supplies to the IEA countries. Although this percentage will depend on the nature of the supply disruption oil companies will take their overall supply situation into account when forwarding voluntary offers and requests to ISAG. Competition between the oil companies will continue in all other respects apart from their obligation to fulfil allocation rights and obligations. Even as far as Type 1 and Type 2 transactions are concerned the companies themselves will establish the commercial terms including prices of the oil and/or product to be delivered. Therefore the requirement of Article 85 (3) (b) is fulfilled.

- (33) All the requirements of Article 85 (3) are therefore satisfied in respect of the oil companies' concertation in the event of a supply disruption prior to or without the activation of the IEP emergency sharing system as provided for in Article 19 (6) and (7) and Article 55 (3) of the IEP, and in respect of submission to the IEA and to national governments of data such as that on imports, exports, indigenous production and inventories; and after activation in respect of continued consultation with the IEA and submission of data as well as their concertation with a view to implementing Types 1, 2 and 3 activities, both as to reporting and non-reporting companies, ISAG and NESOs, subject to the conditions and obligations of this Decision.

C. Article 8 of Regulation No 17

- (34) In accordance with Article 8 (1) of Regulation No 17, a Decision in application of Article 85 (3) shall be issued for a specific period and conditions and obligations may be attached thereto. In addition, under Article 8 (2) of the said Regulation, the Commission has a duty

to ensure that the requirements of Article 85 (3) continue to be satisfied.

- (35) The concerted practice as notified qualifies for exemption. A long-term protection of consumer interests is needed. The Decision should thus remain in force for any activation of the IEP emergency sharing system which might occur during a period of 10 years. At the end of that period the Decision will be reviewed.
- (36) Conditions on the oil market are constantly changing. The rules governing the participation of the oil companies in the allocation process are modified at regular intervals by the Governing Board to take account of that. Four test runs of these rules have taken place so far. Experience gained during those test runs also leads to modifications of the rules. It is important that the Commission be informed immediately of any such changes in order for it to assess whether the conditions for an Article 85 (3) Decision are still fulfilled.
- (37) The Commission must be informed about consultations with oil companies with a view to activation of the IEP, any activated emergency or any test run of the IEP emergency oil allocation system. It must have access for representatives of the Commission to allocation sharing or test runs, to all documents or other information available in connection with sharing procedures or test runs and to meetings attended by industry representatives relating to the emergency oil allocation system or test runs,

HAS ADOPTED THIS DECISION:

Article 1

1. The provisions of Article 85 (1) of the EEC Treaty are, pursuant to Article 85 (3), hereby declared inapplicable to all concerted practices between all oil companies, reporting and non-reporting, to which this Decision applies and which are necessary to carry out the emergency oil allocation system of the International Energy Program. In particular, Type 1 activities are hereby exempted, to the extent to which Article 85 (1) may apply to them, only where the companies which are parties to such activities take into account participating countries' allocation rights and obligations or other informa-

tion supplied by the International Energy Agency and report such activities to the International Energy Agency and the Commission. All Type 2 activities are exempted. Type 3 activities are exempted to the extent to which Article 85 (1) may apply to them.

2. The provisions of Article 85 (1) are, pursuant to Article 85 (3), hereby declared inapplicable to all concerted practices between all oil companies, reporting and non-reporting, to which this Decision applies and which are necessary for the purposes of:

- (a) consultations with oil companies prior to or without activation of the system provided for in Article 19 (6) and (7) and Article 55 (3) of the International Energy Program; or
- (b) submission to the International Energy Agency and to national governments by the companies of data such as that on imports, exports, indigenous production and inventories, at the request of the Executive Director of the International Energy Agency in connection with the consultations referred to in point (a) or in the event of a supply disruption; or
- (c) test runs of the emergency oil allocation system or test runs of the emergency data system organized by the International Energy Agency.

3. The exemption hereby granted shall apply to the concerted practices of the Industry Supply Advisory Group and its subgroups, and of reporting and non-reporting oil companies, including their participation and that of their employees in the work of National Emergency Sharing Organizations, in so far as such concertation may be necessary to carry out the emergency oil allocation system of the International Energy Program. The exemption shall apply to concertation during meetings of the Industry Advisory Board and subcommittees for the purposes of the pre-emergency consultations provided for in Article 19 (6) and (7), and Article 55 (3) of the International Energy Program and to meetings of any of the foregoing during an emergency and during test runs of the emergency oil allocation system or of the emergency data system.

Article 2

The exemption hereby granted shall not apply to:

- 1. Any exchange of price information, except in so far as necessary for negotiation of individual bilateral transactions;

2. Concerted practices which are not necessary to carry out the emergency oil allocation system of the International Energy Program;
3. Concerted practices at a time when the emergency oil allocation system is not in operation, with the exception of the consultations held prior to or without activation of the system and provided for in Article 19 (6) and (7) and Article 55 (3) of the International Energy Program, submission to the International Energy Agency and to national governments by the companies of data such as that on imports, exports, indigenous production and inventories, and concerted practices for the purpose of test runs of the said system or test runs of the emergency data system.

Article 3

The exemption shall be granted subject to the obligation that the Commission be informed at the earliest possible moment by the oil companies to which this Decision is addressed or by any representative nominated by the Industry Advisory Board of:

1. Any changes adopted by the Governing Board or National Emergency Sharing Organizations to the rules governing the emergency oil allocation system and the participation of oil companies therein;
2. Any consultations with oil companies provided for in Article 19 (6) and (7) or Article 55 (3) of the International Energy Program or submission by the companies to the International Energy Agency or national governments pursuant to the foregoing rules of data such as that on imports, exports, indigenous production and inventories;
3. The declaration of the beginning of any emergency;
4. Any proposals or arrangements for a test run of the emergency oil allocation system or of the data system.

The exemption shall be granted subject to the obligation that the Commission shall have access for its representatives to any consultations with oil companies provided for in Article 19 (6) and (7) or Article 55 (3) of the International Energy Program which may take place, and to any meetings of the Industry Supply Advisory Group or its subgroups or of the Industry Advisory Board or its subcommittees which may take place when the emergency oil allocation system is being implemented or when test

runs are being carried out. The Commission's representatives shall have made available to them upon request all documents and other information in connection with such consultations, meetings and test runs in the possession or under the control of any company to which this Decision applies, and all documents and other information in such possession or control in connection with Type 2 and Type 3 activities and with Type 1 activities that are reported to the Commission.

Article 4

This Decision shall apply to the oil companies to which it is addressed. It shall also apply to any oil company which may be asked by the International Energy Agency or by any government or National Emergency Sharing Organization to participate in the emergency oil allocation system, in any consultations provided for by Article 19 (6) and (7) and Article 55 (3) of the International Energy Program, or in any test run of the emergency oil allocation system, or the emergency data system, or to provide any information for the purpose of the emergency oil allocation system or of any such consultation or test run, and to any company under the control of any such company, or which controls any such company, or which is under the same control as such company.

Article 5

This Decision shall apply with effect from 5 January 1982 until 31 December 1993.

This Decision is addressed to the following oil companies:

Atlantic Richfield Company,
Arco Petroleum Products Company,
515 South Flower Street,
Los Angeles, CA 90071, USA

The British National Oil Corporation,
29 Bolton Street,
London W1Y 8BN, England

British Petroleum Company PLC,
Britannic House,
Moor Lane,
London EC2Y 9BU, England

Cities Service Company,
110 West Seventh Street,
PO box 300,
Tulsa, OK 74102, USA

Conoco Inc.,
1007 Market Street,
Wilmington, DE 19898, USA

Daikyo Oil Co., Ltd,
Jyowa-Yaesu Building,
4-1 Yaesu, 2-Chome,
Chuo-ku,
Tokyo 104, Japan

Exxon Corporation,
1251 Avenue of the Americas,
New York, NY 10020, USA

Gulf Oil Corporation,
Gulf Trading & Transportation Co.,
PO box 3726,
Houston, TX 77001, USA

Hispanica de Petroleos, SA (Hispanoil),
Pez Volador, 2,
Madrid 30, Spain

Idemitsu Kosan Co., Ltd,
1-1, 3-Chome, Marunouchi,
Chiyoda-ku,
Tokyo 100, Japan

Mabanaft GmbH,
Kattrepelsbrücke 1,
D-2000 Hamburg 1,
Federal Republic of Germany

Maruzen Oil Co., Ltd,
6-1-20, Akasaka,
Minato-ku,
Tokyo 107, Japan

Mobil Oil Corporation,
150 East 42nd Street,
New York, NY 10017, USA

Murphy Oil Company,
200 Jefferson Avenue,
El Dorado, AR 71730, USA

Nippon Mining Co., Ltd,
10-1, Toranomom, 2-Chome,
Minato-ku,
Tokyo 107, Japan

Occidental Petroleum Corp.,
PO box 1183,
Houston, TX 77001, USA

Petrofina SA,
33, rue de la Loi,
B-1040 Brussels, Belgium

Petroleos de Portugal, EP (Petrogal),
Avenue Fontes Pereira de Melo 6-2,
1000 Lisboa, Portugal

Phillips Petroleum,
252 Phillips Building Annex,
Bartlesville, OK 74004, USA

Saarbergwerke AG,
Hafenstraße 25,
6600 Saarbrücken,
Federal Republic of Germany

Shell International Petroleum Co., Ltd,
Shell Centre,
London SE1 7NA, England

Standard Oil Company of California,
225 Bush Street,
San Francisco, CA 94104, USA

Standard Oil Company (Indiana),
200 East Randolph Drive,
PO box 5910A,
Chicago, IL 60680, USA

Standard Oil Company of Ohio,
Sohio Supply Company,
1000 Midland Building,
Cleveland, OH 44115, USA

Statoil,
Breidablikkveien 3,
Mariero,
PO box 300,
N-4001 Stavanger, Norway

Sun Company,
100 Matsonford Road,
Radnor, PA 19087, USA

Svenska Petroleum AB,
Wahrendorffsgatan 4,
Box 16101,
S-103 23 Stockholm, Sweden

Texaco Inc.,
2000 Westchester Avenue,
White Plains, NY 10650, USA

Union Rheinische Braunkohlen Kraftstoff AG,
5047 Wessling, Postfach 8,
Federal Republic of Germany

Union Oil Company of California,
Union Oil Center,
461 South Boylston Street,
PO box 7600,
Los Angeles, CA 90051, USA

Veba Öl AG,
Pawikerstraße 30,
D-4660 Gelsenkirchen-Buer,
Federal Republic of Germany

Wintershall AG,
Friedrich-Ebert-Straße 160,
3500 Kassel,
Postfach 10 40 20,
Federal Republic of Germany

Done at Brussels, 12 December 1983.

For the Commission
Frans ANDRIESSEN
Member of the Commission

COMMISSION DECISION
of 21 December 1983
concerning a proceeding under Article 85 of the EEC Treaty
(IV/29.598 — SABA's EEC distribution system)

(Only the German text is authentic)

(83/672/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 2, 6 and 8 thereof,

Having regard to Commission Decision 76/159/EEC ⁽²⁾ applying Article 85 (3) of the Treaty to the distribution system operated by SABA GmbH, Villingen-Schwenningen, Germany, until 21 July 1980,

Having regard to SABA's request by letter dated 2 July 1979 for an extension of the said Decision,

Having published a summary ⁽³⁾ of the agreements in question, in accordance with Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. SABA's distribution arrangements and market position

SABA GmbH, Villingen-Schwenningen, Federal Republic of Germany ('SABA'), which since August 1980 has been a subsidiary of the French Thomson-Brandt group, sells consumer electronic equipment including radios and televisions, video and hi-fi equipment and tape recorders. In the Federal Republic of Germany, including West Berlin, its

products are distributed by specialist wholesalers and retailers, with wholesalers handling over 50 % of total sales. SABA also has several sales branches of its own at wholesale level. In Denmark, the Benelux countries, France, Italy, Greece and the United Kingdom, its products are distributed by sole distributors supplying specialist retailers. The Italian and United Kingdom sole distributors are subsidiaries of SABA.

SABA's position on the Community consumer electronics market varies greatly according to area and product. For colour televisions, easily its top-selling product line, SABA's market share in 1982 was 8,3 % in Germany and 7,4 % in Italy. By contrast, in the Benelux countries and the United Kingdom it only held a share of between 0,2 and 2,7 %.

Its market share for other consumer electronic product lines is smaller. For audio equipment, for example, its share of the German market in 1979 was about 1,9 %.

SABA's total turnover from the Community countries in 1982 was DM 682 million.

B. The SABA distribution system

By Decision 76/159/EEC the agreements making up SABA's EEC distribution system were exempted by the Commission from the application of Article 85 (1) of the EEC Treaty until 21 July 1980. By a letter dated 2 July 1979 SABA requested an extension of the exemption.

In the meantime, the distribution agreements have undergone many changes.

The present set of agreements on which SABA's distribution of its products in the EEC is based comprises the following:

- the SABA EEC Dealership Agreement with Specialist Wholesalers,
- the SABA Cooperation Agreement,

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No L 28, 3. 2. 1976, p. 19.

⁽³⁾ OJ No C 140, 28. 5. 1983, p. 3.

- the SABA EEC Dealership Agreement with Specialist Retailers, and
- the SABA Fair Service Agreement.

The main terms of these agreements are as follows:

1. (a) Under the SABA EEC Dealership Agreement with Specialist Wholesalers, SABA admits to its network as a wholesaler any wholesaler who *inter alia*:

- carries on a specialist wholesale business, i.e. one which achieves over 50 % of its turnover from sales of consumer electronics equipment, or has within his business a department specializing in the wholesaling of consumer electronics equipment which is comparable to such a specialist wholesale business,
- carries on such business exclusively as a wholesaler, i.e. supplying exclusively to specialist dealers or business users, and not also to private consumers, and performs all the functions customarily performed by a specialist wholesaler,
- maintains a trained salesforce capable of marketing SABA's products in a competent manner,
- recognizes the SABA Fair Service system, is able to provide expert advice to SABA retailers through trained staff and is willing to allow such staff to undergo regular training with SABA,
- has the necessary facilities and resources for holding stocks and prompt delivery of his customers, carries as far as possible the whole SABA range and holds stocks commensurate with his sales of SABA products, and
- signs the SABA EEC Dealership Agreement with Specialist Wholesalers and — if he is to be supplied direct — the SABA Cooperation Agreement.

If SABA fails to process a wholesaler's application for admission to the network within four weeks, the wholesaler is deemed admitted and SABA undertakes to sign a dealership agreement with him immediately.

- (b) SABA wholesalers undertake the following obligations *inter alia*:

- to supply SABA products for resale in the common market only to other SABA dealers or SABA sole distributors and before supplying a customer to check with the trustee whether he is a member of the network,
- to sell SABA products to consumers only where they carry on a business, purchase the goods for use in that business, and furnish objectively verifiable evidence of this by signing a special undertaking,
- to keep records of all SABA products sold so that they can if necessary be traced by their serial numbers, and to preserve such records for at least three years,
- to observe the appropriate national law against unfair competition, and
- to assist SABA in proceeding against breaches of the dealership agreements.

- (c) SABA wholesalers are empowered to admit to the SABA dealer network any retailer who satisfies the selection criteria laid down in the SABA EEC Dealership Agreement with Specialist Retailers. The procedure is as follows: after satisfying himself by means of a test questionnaire that the dealer meets the criteria, the wholesaler invites the retailer to sign the SABA EEC Dealership Agreement with Specialist Retailers and signs it himself on SABA's behalf. Once the agreement has been signed by both parties, the wholesaler may deem the retailer a member of the network and begin supplying him with SABA products. After admitting the retailer, the wholesaler immediately sends SABA its copy of the agreement together with the test report.

- (d) The SABA EEC Dealership Agreement with Specialist Wholesalers also expressly provides that they are free to supply or take supplies from any SABA dealer anywhere in the common market and to set their own resale prices.

(e) SABA undertakes *inter alia* to guarantee the integrity of its EEC selective distribution system, only to admit to it and supply dealers satisfying the selection criteria, and to keep a list of all SABA dealers. An up-to-date copy of this list will also be lodged with a trustee, who will be responsible for immediately answering written enquiries from SABA dealers as to whether another dealer is a member of the network.

(f) Where a SABA wholesaler is found not, or no longer, to satisfy the admission criteria or to have breached the terms of the dealership in a manner which places the distribution system in jeopardy, SABA may terminate the wholesaler's dealership forthwith, specifying in writing its reasons for so doing, and cut off his supplies. Where the breach involves an infringement of the law against unfair competition, SABA may apply this sanction only if the infringement is not denied or has been proved in a court of law. A power of ordinary termination, i.e. subject to notice, is enjoyed by SABA only in the event of its abandoning its EEC distribution system.

The SABA EEC Dealership Agreement with Specialist Wholesalers is also signed by the independent sole distributors appointed by SABA for various Member States.

2. SABA wholesalers in the Federal Republic of Germany, who are supplied direct by SABA, also sign the SABA Cooperation Agreement. Under this agreement the wholesaler is obliged *inter alia* to carry as a rule the full SABA range and to agree an annual sales contract with SABA at the beginning of each year. This contract lays down a sales target for the year in German marks, by type and number of units, which is binding on both parties. Sales contracts on similar lines but going into more detail on products and dates are also agreed with SABA in January, April and August. Wholesalers achieving their three-monthly sales targets are paid a bonus at an agreed rate. For its part, SABA undertakes to involve the wholesalers in constant, close consultations on the future development and structure of its product range and to provide training courses for them or their

staff on new technological developments in its products, marketing problems, etc.

3. (a) Under the SABA EEC Dealership Agreement with Specialist Retailers, a retailer must satisfy the following criteria to be admitted to the SABA network as a specialist retailer. He must:

- carry on a specialist retail business, i.e. one which achieves over 50 % of its turnover from sales of consumer electronic equipment, or alternatively,
- have within his business a department specializing in the sale of consumer electronics products which is comparable to a specialist consumer electronics retail business, and in which specialist staff exclusively employed to advise customers on, and to demonstrate and sell, consumer electronics products are constantly in attendance during opening hours, and also
- carry on his business from, or have his specialist department in, premises which are recognizable from outside as those of a specialist consumer electronics dealer or department, and which inside have a reputable and smart appearance in keeping with the prestige of the SABA brand and are adequate for displaying and demonstrating in a technically satisfactory manner major parts of the SABA range,
- refrain from describing himself as a wholesaler or wholesaler-cum-retailer or from acting in both capacities at once,
- be able and willing to
 - take supplies of and sell SABA products on a regular basis,
 - carry as far as possible the full current SABA range and display it to best advantage,
 - keep sufficient stocks of SABA products to be able to supply customers promptly,
 - advise, service and supply customers in a competent manner with professionally trained staff possess-

ing the requisite technical knowledge,

- provide competent technical after-sales service and warranty services,
- have signed the SABA Fair Service Agreement, and
- have signed the SABA EEC Dealership Agreement with Specialist Retailers.

To be considered capable of providing competent technical after-sales service the retailer must have a suitably equipped repair workshop or have contractual arrangements with such a workshop. He is obliged to provide warranty services even to customers who did not purchase the relevant SABA product from him. He is not permitted to charge the customer separately for after-sales service, offer him a discount if he waives the right to it, or exclude it from his conditions of sale.

SABA will admit to its network any retailer fulfilling the selection criteria. SABA wholesalers can also admit retailers under the procedure described above. Applications to SABA will be deemed to have been accepted if SABA fails to process them within four weeks, in which case SABA undertakes to sign the dealership agreement with the retailer immediately. After admission the retailer is put on the SABA dealer list.

In view of the fact that the dealership agreement is standard throughout the common market, SABA has discretion to waive individual admission conditions in so far and as long as they are not usually met by consumer electronics retail outlets in the areas concerned. However, it insists on the requirements that dealers be specialists, order and sell SABA products regularly, as far as possible carry the full SABA range and keep adequate stocks, and provide after-sales and warranty services.

(b) SABA retailers undertake the following obligations *inter alia*:

- to supply SABA products for resale in the common market only to other

SABA dealers or SABA sole distributors and before supplying a trade customer to check with the trustee that it is a member of the SABA network,

- to keep records of all SABA products sold to trade customers so that the products can if necessary be traced by their serial numbers and to preserve such records for at least three years,
- to observe the appropriate national law against unfair competition,
- to assist SABA in proceeding against breaches of the dealership agreements.

The SABA EEC Dealership Agreement with Specialist Retailers expressly provides that they are free to supply or take supplies from any SABA dealer anywhere in the common market and to set their own resale prices.

- (c) SABA's obligations to guarantee the integrity of the distribution system and to appoint a trustee, and the rules governing ordinary termination and termination for breach of contract, are as for wholesalers (see B 1 (e) and (f) above).

4. The SABA Fair Service Agreement which SABA concludes with its specialist retailers specifies the nature and scope of the service back-up SABA provides to its retailers. In particular, it lays down the principles governing SABA's contribution to the cost of repairing products under warranty and gives details of the spare-parts service and the constant technical assistance to retailers through technical literature and instruction manuals, field technicians and the SABA training system.

In return, the retailer undertakes to maintain a competent repair workshop and to observe the relevant technical regulations, or to contract with such a workshop for the carrying out of repairs and ensure that this workshop observes the technical regulations.

C. Comments by third parties

In response to publication of a summary of the SABA agreements the Commission received comments from a number of third parties. In most cases the following general objections were raised to exemption of SABA's distribution system:

- the system was said to impede parallel trade in SABA products within the Community,
- it tended to lead to resale price maintenance in distribution,
- its effects would be all the more damaging in view of the precedent which exemption of the SABA system would set for the similar distribution arrangements established by many other manufacturers in this business.

Among individual clauses of the dealership agreements that were criticized was the new provision under which wholesalers were delegated power to examine retailers' applications for a dealership and to admit them to the network. It was argued that this released the manufacturer from his absolute responsibility for keeping the distribution system intact and was likely to undermine it. Criticism was also made of two clauses in the retail dealership, namely the obligation in a specialist department within a larger outlet to employ specialist staff working only in that department and the requirement upon retailers generally to advise and service their customers with 'technically trained staff'. On the latter point SABA has since changed the wording of this clause (see B 3 (a)) to make it clear that it does not imply that only trained radio and television technicians can be employed in sales, but any specialist sales staff possessing the necessary professional and technical knowledge to serve customers. The other objections are not considered valid by the Commission for reasons that will be explained in this Decision.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1) of the EEC Treaty

1. The agreements SABA has concluded or proposes to conclude with the wholesalers and retailers of its products are agreements between undertakings which have as their object or effect the restriction of competition within the common market and which may affect trade between Member States.

2. Under its EEC Dealership Agreements with Specialist Wholesalers and Retailers, SABA undertakes not to supply dealers who do not belong to its distribution network. SABA dealers, for their part, are forbidden to supply dealers who have not been admitted to the network by SABA or a SABA wholesaler.

In the present case these obligations constitute a restriction of competition because in order to be admitted to the network dealers must not only satisfy certain general professional criteria but must also be prepared to meet other special requirements pertaining to sales promotion and performance.

- (a) The Court of Justice has held (judgment of 25 October 1977 in Case 26/76 Metro [1977] ECR 1875) that selective distribution systems constitute an aspect of competition which accords with Article 85 (1), provided that the resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (so-called 'simple selective distribution').
- (b) With regard to such 'qualitative criteria', in Case 31/80 L'Oreal ([1980] ECR 3775) the Court stated that it should also be considered whether the criteria that were laid down did not go beyond what was necessary for a competent distribution of the products concerned.

SABA's requirements regarding the professional qualifications of dealers, the specialist knowledge of their sales staff, and the quality of their trading premises, after-sales service and — in the case of wholesalers — storage facilities are no more onerous than is necessary in a selective distribution system based on high quality standards for goods as technically sophisticated as consumer electronic products. These are exactly the type of valuable consumer durables the Court had in mind in the Metro case when it found that selective distribution systems based on quality standards could be legitimate. The fast pace of innovation that is characteristic of this industry means that

existing products are rapidly improved and technologically new products are regularly appearing on the market (like the recently developed videodisc and compact disc systems). This continues to demand the setting of qualitative selection criteria for dealers. The same general criteria must apply to specialist outlets and to specialist departments of stores. Therefore, the requirement in the retail dealership agreement that sales staff should be in constant attendance even in a specialist department is justified. In a specialist shop it is taken for granted that there will always be staff on duty.

The only dealers that are excluded by the criteria are those unwilling or unable to ensure that the products will be sold by trained staff from premises in which they can be properly displayed and demonstrated and to guarantee the provision of after-sales and warranty services either themselves or by others.

The SABA dealership agreements therefore do not fall within Article 85 (1) in so far as they impose qualitative requirements.

- (c) However, the situation is different where selective distribution agreements contain obligations upon the undertakings concerned and selection criteria which go beyond the limits indicated above. They then fall under Article 85 (1), but can in appropriate cases be exempted under Article 85 (3) (judgment of the Court of Justice of 10 July 1980 in the 'Perfumes' cases, Case 99/79 [1980] ECR 2511).

SABA's agreements do impose special obligations of this nature.

Retailers must be willing and able to order and sell SABA products regularly, to carry as far as possible the whole SABA range and to keep sufficient stocks to ensure prompt delivery to customers. Wholesalers not supplied direct by SABA are likewise required to carry as far as possible the whole SABA range. Wholesalers in the Federal Republic of Germany supplied direct by SABA who sign the SABA Cooperation Agreement are required, under that agreement, to carry the whole SABA range and

also to agree an annual sales contract with SABA at the beginning of every year containing binding sales targets by product and number of units.

The obligations go beyond the requirements regarding the professional qualifications of dealers and their sales staff and the suitability of their trading premises which are necessary for proper distribution of technically-sophisticated products such as those of the consumer electronics industry. There are additional obligations concerning the dealer's sales effort, with which SABA hopes to boost sales of its products. These obligations are likely to keep many dealers who, though fulfilling the qualitative selection criteria, are unable or unwilling to assume the additional obligations, out of the distribution of SABA products.

3. These obligations in terms of sales effort also restrict dealers who join the network in their competitive behaviour. By forcing them to make a special effort to promote SABA products, they restrict the dealers' freedom to pursue their own sales policy *vis-à-vis* their retailer or consumer customers, taking advantage of competition between different manufacturers.
4. The policing obligations laid upon dealers when selling to other dealers (to record serial numbers and check whether the customer is listed) are designed to enable SABA to keep its distribution system under surveillance. Provided they do not exceed the requirements of a proper surveillance, such obligations are simply the corollary of the principal obligation which they seek to underpin and have the same status in law (Metro judgment, ground 27). Since the ban on SABA dealers supplying dealers outside the network has been shown to be a restriction of competition, this is also the case with the obligations concerning the policing and enforcement of this ban. However, such obligations do not have an independent anti-competitive character because they remain within the limits of what is strictly necessary:

— Number recording is essential for the manufacturer if he is to be able to trace breaches

of the dealership agreement and to keep the system intact. Exercise of the right to inspect a dealer's records is expressly limited by the agreement to cases of reasonable suspicion of breach of contract by the dealer or by another customer.

- The rule requiring a dealer to check whether another dealer is (still) on the SABA approved dealer list before supplying him has been amended by comparison with the old rule so as to allow such enquiries to be addressed to a trustee appointed by SABA as well as to SABA itself. This makes it possible for one dealer to supply another without SABA's knowledge.

5. SABA's distribution system covers the whole Community. Given its anti-competitive character, it is therefore inherently likely to affect trade between Member States. As regards the appreciability of this effect, the Court has held, in its judgment of 1 February 1978 in *Miller* (1978) ECR 131, that an undertaking which supplies some 5 % of the market concerned is in principle able to affect inter-State trade by its behaviour. This percentage is exceeded by SABA in the Federal Republic of Germany and in Italy; so that at least as regards those two countries it can be considered that the relevant restrictions of competition inevitably have an appreciable effect upon competition.

6. The other clauses of the agreements are unlikely to bar suitably qualified dealers from the distribution of SABA products in an anti-competitive manner or to restrict the selected dealers in their competitive behaviour.

(a) The SABA Fair Service Agreement

The SABA Fair Service Agreement merely spells out the professional standards required of SABA dealers under the dealership agreement, in addition to giving details of the arrangements for SABA's reimbursement of warranty costs, supply of spare parts and provision of technical training

and advice to retailers. Thus, it does not contain any obligations that have the effect of barring suitable dealers from distributing SABA products or lead to a restriction of competition within the meaning of Article 85 (1). The Commission can therefore grant negative clearance under Article 2 of Regulation No 17 for this agreement.

(b) Admission procedure

In their present form, the rules of the procedure for admitting suitable dealers to the SABA network are not excessive in relation to the aims of ensuring that all dealers satisfy the selection criteria and of keeping the system intact.

Under the original admission procedure, only SABA could decide whether or not a dealer fulfilled the criteria and the company was not subject to any time limit in making its decision.

On past experience of such systems, the Commission considers that a system giving the manufacturer the sole and unrestricted right of admission opens the door to discriminatory application of the admission criteria. A manufacturer can, for example, refuse to admit a dealer to the network who, although perfectly well qualified, is objectionable to the manufacturer because of his pricing or marketing policy, on the pretext that he does not comply with particular clauses of the dealership agreement, or at least the manufacturer can delay the dealer's admission on this ground. In this way the decision on admission can be coloured by extraneous factors which have nothing to do with the selection criteria themselves — the only considerations relevant to the issue — and which are anti-competitive. This danger of discriminatory application of the selection criteria, against which the Court of Justice warned, chiefly arises in relation to the retail trade, because of the large number of dealers at this level. It is largely eliminated by the new admission procedure. This involves the following changes from the earlier rules:

- SABA undertakes to take a decision within four weeks on each application from a wholesaler or a retailer, irrespective of the Member State in which the

applicant is established. If it fails to do so, the dealer in question is deemed admitted to the network and SABA is obliged to conclude a dealership agreement with him immediately. In this way any unreasonable delay in the admission procedure is avoided. SABA's commitment to admit any dealer satisfying the conditions also helps to clarify the legal position of a dealer whose application is refused within the time limit should he wish to sue SABA to secure admission.

- All SABA wholesalers are also entitled to admit dealers satisfying the selection criteria to the network. After satisfying himself that the criteria are fulfilled, the wholesaler can sign the dealership agreement with the retailer on SABA's behalf and begin supplying him. Once admitted, the retailer can also obtain supplies from any other official SABA dealer. The wholesalers, who handle about 50 % of SABA's sales and even under the old system had authority to check whether potential local customers met the criteria, are now able to decide on applications themselves and can use this power whenever required.

As wholesalers are obliged to send SABA the test report and SABA's copy of the dealership agreement immediately they have admitted a retailer, SABA is able to carry out a subsequent check and if necessary expel a retailer who has been admitted in error by terminating his contract, in accordance with the procedure and conditions to be described below. This solution both prevents discrimination and ensures uniform application of the selection criteria.

- At wholesaler level, the system whereby SABA alone decides on applications — which it is now required to do within four weeks — can stay. The number of

wholesalers in the consumer electronics trade who are potentially interested in dealing in SABA products remains within manageable proportions, so that SABA's obligation to make its decision within the stated time, and the wholesaler's ability to submit any negative decision for review under national regulations in the light of the principles here laid down, make it sufficiently certain that abuses in connection with the exclusive right of admission may be ruled out.

(c) Expulsion of dealers from the network

The provisions in SABA's dealership agreements regarding the exclusion of dealers from the network (termination of contract) and the cutting off of a dealer's supplies (i.e., ordering all official dealers to stop supplying him) are not, in their present form, objectionable on the grounds that they are open to abuse.

- A power of unconditional ordinary termination such as was provided for in the old version of the agreement would be inconsistent with the essential requirement of a legitimate selective distribution system that it should treat equally and in a non-discriminatory fashion all dealers meeting the selection criteria. Such termination is now possible only in the event of a complete change of the distribution system involving the termination of *all* dealership agreements.
- Termination for a serious reason and cutting off of supplies is provided for in the event of a dealer's failing to meet the selection criteria (for example, where an unqualified dealer has been admitted in error by a wholesaler or sole distributor), or ceasing to do so, or a dealer's breaching the terms of the dealership agreement in a manner which places the distribution system in jeopardy. The contract can be terminated without notice, but reasons must always be given. If the dealer disputes the allegations, forcing SABA to prove

them, final expulsion is only possible after a decision by a court.

- A breach of the law against unfair competition, for example by 'loss-leader' selling, does not place the distribution system in jeopardy. In such a case, therefore, SABA can only terminate the dealership and cut off supplies if the allegations are either not denied or, if denied, have been proven in a court of law. In this way the danger of a subjective finding of a breach of the law against unfair competition and of arbitrary expulsion from the network is eliminated. Furthermore, the reference to the applicability of the appropriate national competition law ensures that a dealer can only be penalized on account of actions which are considered unfair under national regulations.

B. Applicability of Article 85 (3) of the EEC Treaty

The agreements making up SABA's EEC distribution system, in their amended form, also continue to fulfil the conditions of Article 85 (3).

1. Improvement of the production and distribution of goods

Admission to SABA's distribution network is restricted to dealers meeting specified professional standards who are also prepared to make a particular effort to sell the contract goods.

The professional standards ensure that all SABA's dealers have adequate knowledge and facilities for advising and selling to customers and providing after-sales service. The special sales effort required of dealers is likely to lead to the following further improvements in the production and distribution of the contract goods.

The obligation upon wholesalers supplied direct to agree annual and four-monthly sales contracts specifying types of product and numbers of units and to take delivery of the goods ordered at the agreed time allows detailed production and sales planning and so makes for continuity of supplies, as well as

rationalizing production and distribution. These arrangements cover both directly supplied wholesalers in the Federal Republic of Germany and SABA's sole distributors, who also sign the SABA wholesale dealership agreement. In return for this cooperation SABA undertakes to offer its wholesalers and sole distributors a keenly-priced, competitive product range, and to engage them in constant close consultations about its development. The possibility of involvement in future product planning and development — a role for which the wholesalers and sole distributors are eminently well qualified because of their nearness to the market-place — ensures that the wholesalers and sole distributors get products from SABA that are fashionable and what the consumer wants.

By comparison with these advantages, it is only a minor disadvantage that during the period of their sales contracts wholesalers are unable to allocate any of SABA's share of their overall sales targets to other manufacturers. Most wholesalers' planning and ordering is on a yearly basis in any case. Once they have freely selected which of the many makes of equipment they are going to sell that year, they are bound in any case to concentrate their sales effort on the selected makes and automatically lose for that year the chance of selling other makes they have not selected. Thus, the wholesalers are not unduly restricted in their freedom of action by their annual sales contracts with SABA.

The obligation accepted by wholesalers under their dealership agreement that they will, as far as possible, carry the whole SABA range and keep adequate stocks, the corresponding unqualified obligation accepted by directly supplied wholesalers under the Cooperation Agreement, and the obligation accepted by retailers to order and sell SABA products regularly, carry as far as possible the full range and keep stocks sufficient to ensure prompt delivery of customers, all make for an uninterrupted and improved supply of SABA products to customers. Thanks to these obligations, the range and stocks of SABA products available at wholesalers and retailers are increased so that their customers can always gain a good idea of at least the main items in the

SABA range and can usually be sure of having their orders supplied quickly out of stock.

All in all, these advantages considerably outweigh the disadvantage resulting from the fact that dealerships are not open to all professionally qualified dealers but only to those prepared to accept a commitment in terms of sales effort. Together with the selection criteria which bar the non-specialist, these restrictions ensure that SABA products are distributed only to dealers who meet certain professional standards and make a special effort to promote the sales of this particular manufacturer. They therefore encourage competition between SABA and other brands, without impairing competition between individual SABA dealers.

2. Benefit to the consumer

The abovementioned advantages for distribution, in the form of efficient after-sales service and the availability of a wider range and faster delivery from wholesalers and retailers, are of immediate benefit to consumers.

The benefits SABA receives in terms of rationalization of its production and sales are likely to be passed on, in view of the fierce competition in the consumer electronics business and the fact that all its wholesalers and retailers can sell competing goods.

Competition at the subsequent distribution levels is also such that SABA wholesalers/sole distributors and retailers will be induced to pass on, both these and the rationalization benefits accruing at their own level of distribution, to consumers. After all, SABA retailers and consumers can buy SABA products from any SABA dealer in the Community; and the right of SABA dealers to supply any fellow dealer and freely to determine their prices is expressly enshrined in the dealership agreements.

3. Indispensability of the restriction of competition

SABA's distribution system contains no restrictions that are not indispensable for the attainment of the above advantages.

A restriction such as that whereby SABA products may not be supplied to dealers who have not pre-

viously been authorized to deal in them by SABA or by a SABA wholesaler is a necessary ingredient of any selective distribution system (Metro judgment, ground 27). Without this restriction, there would be a considerable amount of dealing in SABA products by dealers who were not bound by the obligations carried by membership of the distribution system. Official SABA dealers could then no longer be expected to discharge their obligations, and the selective distribution system with all its advantages would no longer be sustainable.

The commitments in terms of sales effort required of SABA wholesalers and retailers are equally indispensable to attainment of the said advantages. Without the rules on regular ordering of the major parts of the SABA range and keeping of stocks it would not be possible to guarantee reliable and fast deliveries of SABA products* to customers. The further obligations imposed on directly supplied wholesalers under the Cooperation Agreement whereby they must agree annual and four-monthly sales contracts by product are necessary for production and sales planning.

4. Elimination of competition

The agreements making up the SABA distribution system do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

In the common market there are a larger number of undertakings producing consumer electronics products in effective competition with SABA. SABA's market position in most Member States is comparatively weak.

Within the SABA network itself dealers throughout the Community, at both wholesale and retail levels, can compete with one another, and they can also take advantage of the most favourable source of supply in the particular circumstances since there are no restrictions at all on dealers within the network supplying one another.

The consumer electronics market is intensely competitive, largely due to the large number of manufacturers, the fast pace of technological advance and the varied distribution structure. Therefore, despite the fact that a number of other major consumer electronics manufacturers also have EEC-wide systems of dealership agreements, some of which, however,

only involve simple selective distribution, the Commission was unable to find any evidence that the widespread use of such systems leads to rigidity in the price structure.

Nor has the Commission found that as a result of the spread of selective distribution systems in the consumer electronics sector, particular types of outlet such as 'cash-and-carry' stores or self-service wholesale and retail supermarkets are systematically excluded from selling such products. The selection criteria for SABA dealerships are not such as to be incapable in principle of fulfilment by such types or outlet, although this might involve some changes in their selling methods.

The Commission can therefore again grant an exemption to the SABA EEC distribution agreements.

C. Applicability of Articles 6 and 8 of Regulation No 17

SABA applied by a letter dated 2 July 1979 for the exemption of its distribution system to be extended beyond 21 July 1980. On hearing of the Commission's doubts as to the further exemptability of particular clauses in the dealership agreements, SABA immediately amended the agreement to accommodate the objections raised. It is therefore appropriate that the date set for the Article 85 (3) declaration to take effect under Article 6 of Regulation No 17 should be 22 July 1980.

It is desirable to fix the period of validity of the Decision, under Article 8 (1) of Regulation No 17, at eight years including the time that has elapsed since expiry of the original exemption. The Commission will then be able to look at the effects of SABA's distribution system again after a relatively short period.

Certain conditions must be attached to the Decision to enable the Commission to check that SABA does not act in a discriminatory fashion in refusing admission to or excluding wholesalers or retailers. SABA must therefore be required to send the Commission every year reports on every case in which it has refused to admit a wholesaler to its network or withdrawn his dealership or has withdrawn a retailer's dealership or cut off his supplies after he had been admitted by a wholesaler, or has demanded to inspect a dealer's records of the serial numbers of equipment passing through his hands.

This part of the Decision is based on Article 8 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission hereby finds that there are no grounds under Article 85 (1) of the EEC Treaty for action on its part in respect of the SABA Fair Service Agreement.

Article 2

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to:

- the SABA EEC Dealership Agreement with Specialist Wholesalers,
- the SABA Cooperation Agreement, and
- the SABA EEC Dealership Agreement with Specialist Retailers.

This declaration of inapplicability shall apply from 22 July 1980 until 21 July 1988.

Article 3

SABA shall submit annual reports to the Commission, the first of them by 31 December 1984, setting out all cases in which it has:

- refused or withdrawn a wholesaler's or a retailer's admission as a 'SABA dealer', or has cut off supplies to one,
- exercised its right to inspect a dealer's records of serial numbers.

Article 4

This Decision is addressed to SABA GmbH, D-7730 Villingen-Schwenningen.

Done at Brussels, 21 December 1983.

For the Commission
Frans ANDRIESEN
Member of the Commission

THIRTY YEARS OF COMMUNITY LAW

More than 30 years have elapsed since Robert Schuman's declaration of 9 May 1950 and the signature on 18 April 1951 of the Treaty of Paris establishing the European Coal and Steel Community. The time has come for the European Community to take stock. Both as a unique economic and human experiment, and as a reality endowed with powerful legal instruments, this singular phenomenon needs to be examined from the standpoint of history.

The establishment of the Community was completed with the conclusion of the Treaties of Rome creating the European Economic Community and the European Atomic Energy Community. Its institutions have undergone several stages of development, including the merger of the executives, the creation of own resources, the extension of Parliament's budgetary powers and the creation of a Court of Auditors. At the same time the Community was putting into effect the fundamental principles of free movement of goods, persons, services and capital, and developing the common policies which are laid down in the Treaties or which proved necessary in order to attain, in the course of the operation of the common market, one of the objectives of the Community. On two occasions it has been enlarged by the accession of further European States, first Denmark, Ireland and the United Kingdom, and subsequently Greece. It has also commenced negotiations with a view to the admission of Spain and Portugal.

The progress made by the Community is reflected in a vast range of legislation binding on Member States, firms and individuals, and in the body of case-law built up by the Court of Justice in Luxembourg.

The Commission wished to provide a work of reference for lawyers which did not assume any familiarity with questions of Community law. It asked eminent specialists in the subject from the various Member States to make individual contributions to *Thirty years of Community law* so as to trace the development of the Community, summarize the progress achieved in the various sectors and examine the difficulties which the Community has had to face. Each author was allowed the fullest freedom of expression. Neither the Commission nor readers will necessarily share all the points of view expressed, but they will at least have the benefit of a full and frank discussion.

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