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Legislation

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 November 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.907 — Peroxygen products)

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

(85/74/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the Euro-
pean 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
9 September 1983 to open a proceeding on its own
initiative pursuant to Article 3 of Regulation No 17,

Having given the parties concerned the opportunity
to make known their views on the objections raised
by the Commission, pursuant to Article 19 (1) of
Regulation No 17 and 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 consulting the Advisory Committee on Re-
strictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The relevant products

- (1) The products which are the subject of this Decision are hydrogen peroxide and its derivatives sodium perborate and persulphates. Together with other products which are not the subject of this decision (organic and inorganic peroxides), these collectively form the 'peroxygen' sector. Hydrogen peroxide, the basic product, is a powerful oxidant and besides its important captive use (for the production of sodium perborate and other derivatives) it is used in the paper, textile and chemical industries as a bleach and for the treatment of waste. Sodium perborate, the principal downstream product, is used as a bleaching agent in synthetic detergents and washing powders. Persulphates are inorganic compounds used primarily as polymerization initiators in the plastics industry.

The parties

- (2) The undertakings which participated in the agreements and/or concerted practices concerned in the present decision are:
- Solvay et Cie, Brussels (Solvay),
 - Laporte Industries (Holdings) PLC, London (Laporte),

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

- Degussa AG, Frankfurt (Degussa),
- L'Air Liquide SA, Paris (L'Air Liquide),
- Produits Chimiques Ugine Kuhlmann (now Atochem), Paris (PCUK).

The worldwide interests of Solvay and Laporte in the peroxygen sector have since 1970 been coordinated and grouped in a series of jointly-owned companies under the name Interlox.

- (3) There is however no holding company, board of directors or chief executive for the Interlox activities. Overall policy is determined by a Committee drawn equally from senior directors of Solvay and Laporte which has no formal powers of management or control. Liaison between the various Interlox companies on marketing, financial and technical matters is effected by a staff known as Interlox Co-Ordination and based in the parent companies' offices in London and Brussels. At a day-to-day level the production and marketing activities of each Interlox company in the various Member States are carried out by the appropriate Solvay or Laporte subsidiary, the Interlox companies in the EEC generally having no working staff but paying for the services of employees of the parent companies.

In October 1983 PCUK was split up and its peroxygen business transferred to Atochem, part of the Elf-Aquitaine group.

L'Air Liquide and Atochem operate joint hydrogen peroxide production facilities (Oxy-synthese) but produce sodium perborate independently and have separate sales departments for both products.

Markets and prices

(a) HYDROGEN PEROXIDE

- (4) The market in the EEC and elsewhere is characterized by the particularly small number of producers.

The total third-party market (i.e. excluding captive use and sales to other producers) for hydrogen peroxide in the EEC is around 90 000 tonnes (worth some 75 million ECU in 1981).

The Interlox grouping holds over half this market, Degussa is in second place

with ... %⁽¹⁾ and the two French producers each account for some ... %.

In Western Europe the only other producers are Montedison, Eka-Bohus (Sweden) and Foret (Spain). The only other producers of any appreciable scale outside Europe are in the United States and Japan, and imports to the Community are minimal.

- (5) Prices for the product vary widely not only between the Member States but also inside each national market according to the sector of utilization: inside the same Member State the price paid by the smallest customers can be up to four times that charged to major users.

The chemical industry, which orders in bulk, tends to pay the lowest prices overall and can negotiate large discounts off list price. Inside each national market there is a very broad price spread with some large chemical customers paying only 40 % of the price paid by other large users. Moreover, price levels in one Member State can be up to twice those applicable in another: the average price in France is generally only half the level prevailing in neighbouring countries.

Details of prices obtained by the Commission show (for instance) that in the first quarter of 1982 the spread of prices for the five largest chemical customers in the United Kingdom was 915 to 1 435 ECU per tonne, and in France, 354 to 737 ECU.

In the paper and textile industries there are a large number of customers often with only small annual offtakes and prices are higher than in the chemical sector. The same phenomenon of substantial differences in average prices between Member States and wide price variations among individual customers is also apparent in these sectors.

The product is homogeneous and all the major producers in Europe employ the same process route (the 'AO' or auto-oxydation process) so that there is no great difference in their cost structures.

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

It is significant that in an internal Interlox memorandum the product is described as 'effectively a commodity product (0,5 m tpa) ... (selling) at specialty prices and markups' with a 'dauntingly high entrance fee in development costs for would-be producers'. Figures obtained by the Commission show gross profit margins in hydrogen peroxide of typically ... % of sales value.

(b) SODIUM PERBORATE

- (6) Western Europe accounts for the major part of world production and consumption of sodium perborate. Again the total number of manufacturers in the EEC is small: besides the hydrogen peroxide producers, which all have downstream production of sodium perborate, only two other chemical concerns manufacture the product and are dependent on bought-in feedstock.

The total EEC market in 1981 was around 450 000 tonnes (value 225 million ECU) of which the Interlox grouping had ... % Degussa ... % and the French producers ... % each.

Customers are relatively few in number and consist mainly of the multinational detergent and washing powder producers. Consequently price variations, though not insignificant, are less marked than in the case of hydrogen peroxide.

(c) PERSULPHATES

- (7) In the EEC persulphates market the main producer is the Interlox company Peroxid-Chemie. Other EEC producers are Degussa and L'Air Liquide. Interlox holds about two-thirds of the total market which is around 12 000 tonnes per annum.

Position of EEC producers

- (8) The European producers between them account for some three-quarters of world hydrogen peroxide output if their overseas operations are included: the Interlox grouping, Degussa and Oxysynthese are respectively the three largest world producers of hydrogen peroxide.

In sodium perborate the Western European producers account for some 80 % of world production, and the Interlox group is again the world's largest producer.

The European producers between them account for about half the world output of persulphates.

Summary of the infringements

- (9) The investigations carried out by the Commission under Article 14 (3) of Regulation No 17 on 9 and 10 December 1980 and subsequent enquiries under Article 11 of the Regulation showed that:
- (a) from at least 1961 the above-named producers have conducted their commercial operations in hydrogen peroxide and sodium perborate in the EEC on the basis of an agreement or understanding that each national market was to be reserved for those producers which manufacture inside the territory in question (the 'home market rule');
 - (b) on the basis of an agreement originally made in 1958 by which the market share of Solvay in France for both hydrogen peroxide and sodium perborate was to rise to and then remain at one-third of the total national market, the Solvay/Laporte Interlox group, L'Air Liquide and PCUK divided the French market between them in equal shares;
 - (c) on the basis of an agreement in writing made in or about 1969 between Solvay and Degussa, the business of major customers for hydrogen peroxide and sodium perborate in the Benelux was allocated between Degussa and the Solvay/Laporte Interlox group in agreed proportions and percentage quotas were fixed for the remaining business ('Benelux agreement');
 - (d) on the basis of an agreement in writing made in or about 1970 the market for hydrogen peroxide and sodium perborate in Germany was divided between Degussa and the Solvay/Laporte Interlox group in the respective proportions of 62 : 38 for hydrogen peroxide and 72 : 28 for sodium perborate and continuous contact took place to ensure that list prices were being respected ('Germany agreement');
 - (e) on the basis of an agreement made in 1973 the Solvay/Laporte Interlox group

and Degussa maintained their world-wide sales of persulphates in the agreed proportion of 70 : 30 and coordinated their pricing policy ('Persulphates agreement').

Details of the arrangements made by the parties to which the Commission takes objection are set out in the paragraphs which follow.

A. THE HOME MARKET RULE

Participants: Solvay, Laporte, Degussa, L'Air Liquide, PCUK (now Atochem)

Separation of national markets

- (10) The EEC markets for both hydrogen peroxide and sodium perborate are strictly divided on national lines. Each producer limits its sales to end-users in those Member States where it possesses production facilities.

Thus in Germany, Belgium, the Netherlands and Luxembourg, the Interlox group and Degussa are at the same time the only producers and the only suppliers of hydrogen peroxide. L'Air Liquide and Atochem (formerly PCUK) which manufacture in France only (Oxysynthese) do not sell any hydrogen peroxide whatever in these territories.

In France, Interlox, L'Air Liquide and Atochem, but not Degussa, operate hydrogen peroxide production plant. The market is equally divided between the first three but Degussa has never sold in France.

In the United Kingdom the Laporte side of Interlox is the only producer and enjoys a 100 % monopoly of supply.

The strict separation of the national markets and the absence of intra-Community exchanges is all the more remarkable given the very considerable price differences, particularly as between France and the neighbouring Member States.

- (11) A similar market division is apparent in sodium perborate, the only difference being that Degussa, while concentrating on the Benelux and German markets where it owns production facilities, does supply some minor

customers with small quantities (less than 1% of the market) in France, Italy and the United Kingdom.

There is also evidence that Interlox at least discourages trading across national borders by its customers. Traders in Belgium selling to the German market in 1975 and 1980 were required to cease this activity. The producers also have arrangements of long standing to limit imports of hydrogen peroxide into the EEC particularly from Austria where Alpine is the local producer. This small hydrogen peroxide manufacturer is required to declare to the major producers its EEC sales. It is supposed to limit sales to Belgium to 200 tonnes per annum. When sales by Alpine to France exceeded the 'forecast' it had given the other producers of 70 tonnes per month this resulted in complaints from L'Air Liquide. Interlox appears to have believed that this activity could be controlled by an approach to Alpine through Degussa.

The 'home market principle'

- (12) Documentation found at Solvay shows that as early as 1961 the producers accepted the principle of respect for 'home markets' as the basis for the organization of the European market.

In 1959 the major producers had formed an association known as 'Bitop' (Bureau International Technique de l'Eau Oxygénée et du Perborate de Soude). This body was supposedly concerned only with technical matters of common interest but it is apparent that it was considered the appropriate forum for reaching agreement on the division of the market between the producers. When Solvay planned in 1961 to expand outside its traditional 'home markets' of Belgium and the Netherlands by setting up new factories in France, Germany and Italy, the established producers in those territories wanted to be 'compensated' for accepting Solvay's presence. At the time Bitop was planning an export quota system for hydrogen peroxide and sodium perborate — to include 'exports' inside the EEC — and the proposal was made to compensate the producers who would have to make room for Solvay on their 'home markets' by giving them an increased share in the export cartel. Those producers who would not

be affected by Solvay's plans — i.e. those located in Austria, Switzerland and the United Kingdom — would give up a third of their exports outside their 'home markets' to those producers which were concerned by Solvay.

- (13) At the foundation of the adjusted export quota system, but independent of it, lay the principle of respect for home markets. The export quota system was thus described 'accessory to a geographical sharing (home markets)' (*accessoire d'une répartition géographique (home markets)*). The same document continues: 'The protection of home markets is applicable in all common market countries.' (*La protection des home-markets vaut pour tous les pays du marché commun*). It is apparent that there were only limited exceptions to the rule: the Austrian producer Alpine had been allocated a small quota for delivery to other European markets. The document observes: 'The Bitop proposal assumes that the home market rule is applied strictly on the Belgian H202 market. However by virtue of a bilateral arrangement between Solvay and Alpine, the latter retains a certain right to deliver in Belgium (200 t telles quelles)'.

The whole tenor of the documentation is that there already existed a consensus of opinion between the producers that the European market was to be organized on the basis of the protection of home markets.

- (14) In its reply to a request for information under Article 11 of Regulation No 17, Solvay described the home market rule as 'the old principle whereby it makes good sense for each producer to supply the major part of its output in the country where it produces... this "rule" existed well before Solvay made its entry into the business independently of the agreements to share export markets'. In their replies to the statement of objections however both Solvay and Laporte deny that Solvay had thereby impliedly admitted the existence of any understanding to this effect between the producers.

- (15) A sodium perborate export cartel was set up in 1962 but no details of how the quotas were calculated are available. In the same year Bitrop changed its name to 'CIPP' (*Centre d'Information de Peroxydes d'Hydrogène et de Perborate de Soude*).

While the manufacturers claim as far as the organization of markets was concerned that CIPP was involved only with quotas to non-

EEC countries it is apparent that the 'home market principle' continued to govern their relations with each other in the European market which accounted for 90 % of their business. In 1968 Degussa (which had hitherto manufactured only in Germany) planned to expand by building a new plant in Antwerp. Solvay's reaction to this proposed expansions was to boycott CIPP for 18 months: it clearly considered that Degussa was trespassing on its territory. Their differences were resolved with the conclusion of agreements on the division of both the Benelux and German markets in 1969/70 and Solvay returned to CIPP. In a memorandum of 23 March 1970 a Laporte executive observed: 'The home market principle emerged through this period more or less unscathed'. In a further comment it is made clear that the rôle of CIPP was not confined to third markets: 'it should be borne in mind that the observable activities of CIPP at plenary sessions, both formal and informal, are a very small part of actual achievements. The arguments surrounding and the heat generated on third markets is (sic) no more than a safety valve, tending to disguise the fact that they probably account for a mere 10 % of turnover and even less in terms of profitability'. The implication is that the more serious work of CIPP concerned the stability and organization of the European market.

- (16) The abolition of CIPP was already mooted in the memorandum which concluded by observing that as only three producers of any importance were left in Europe — Solvay/Laporte, Degussa, and L'Air Liquide/PCUK — 'there may therefore be scope for advocating the abolition of CIPP and the formation of a smaller but possibly more powerful arrangement consisting of the three producers'.

CIPP was indeed dissolved in 1972 but collaboration between the three major groups continued. An *ad hoc* committee met to administer quotas in third markets but there was also collusion on tendering for capital projects. Generally these would involve the construction of a turnkey plant in a non-EEC country to be operated under licence by a local producer or a joint company. An internal Laporte minute (of unknown date) reads: 'Meet in Paris to discuss common terms. Greece. We should withdraw. Degussa will not offer. Check with the French.' On the one known occasion when an opportunity arose inside

the EEC for a new capital project (for a major chemical producer in Germany in 1979) Degussa expected the 'home market' rule to apply and when told by Laporte that the French producers had been approached said it would like the French to 'protect' i.e. quote a deliberately uncompetitive price to allow Degussa as local producer to obtain the business. (The actual tenders submitted are difficult to compare but in the event the project was abandoned).

- (17) A Laporte memorandum dated 18 April 1979 of a meeting with Degussa indicates that the major groups at that time still had a precise understanding on how the European market was to be divided between them and in which countries each was to supply. (The memorandum was headed 'Strictly confidential — do not file' and marked 'RED' in capital letters across the first page. The term 'red note' was apparently used in Laporte to denote documents relating to market sharing agreements which were to be kept secret.) Degussa was planning to abandon production of the hydrogen peroxide substitute sodium peroxide, a product in which it had a monopoly in the EEC. It supplied customers not only in the Benelux and Germany but also in other countries such as France and the United Kingdom. Giving up production would mean that these customers would be in the market for an equivalent quantity of hydrogen peroxide. It is significant that the basic assumption on both sides was not that the producers would compete for the new business, or even that Degussa would in future supply its sodium peroxide customers with hydrogen peroxide, but that the business would normally fall to be divided up in each market in accordance with a pre-existing formula. Thus Degussa would be totally excluded from the United Kingdom and from France, where Interlox would gain 100 % and 33 % respectively of the new business. It is significant that the Interlox 'normal gain' in Germany and France corresponded with the quotas it had been given under the original market sharing agreements for those countries. Degussa wanted however to have half of all the new business in hydrogen peroxide that would arise, and it is apparent that both parties anticipated that without much difficulty the other producers (particularly the French) could be persuaded to give up some of the benefit they would have gained 'as a reward for the Interlox initiative'. It is also significant that Europe is divided into Germany on one hand and 'Interlox' markets on the other, and those where other producers are

present are referred to as 'those markets where there is sharing', and the producers are described as 'partners'. The assumption that in the United Kingdom Interlox's 'normal gain' would be 100 % of the business indicates that it was accepted by the producers that this market was normally reserved for Laporte. Again it is significant that Degussa, while eager to take part of any increased quota in the United Kingdom, assured Laporte that such supplies would be 'fully controllable'.

- (18) Laporte and Solvay claim the proposal was never implemented. Whether it was or not is irrelevant: the significance of the proposals is the underlying assumption that any new business would in the normal course of events have to be divided so as to maintain the status quo on each market.

The arguments of the producers

- (19) The producers all deny that there exists or existed a general understanding or arrangement between them regarding the division of the EEC market according to a 'home market' principle.

They all contend that the rigidity of the patents of trade and the confinement by each producer of its sales to particular markets is accounted for not by any agreement or understanding to that effect but by natural market forces. The establishment of the EEC (it is said) has not served to overcome invisible barriers to trade such as the desire of customers for security of supply, their preference for local suppliers, currency fluctuations and transport problems and costs.

- (20) It is argued by Solvay that on the demand side the market division results as far as Interlox is concerned from the geographical location of its production units and for the other producers from a variety of factors including production capacities and technical problems of transport. Solvay goes on to contend that the rules of competition do not compel a producer to follow an active policy of trade between Member States: restriction of sales to home markets is only unlawful if it

results from collusion which, it is argued, has not been proved. The phenomenon observed by the Commission is said to be the natural result of the oligopoly in hydrogen peroxide and sodium perborate: in such a market there is a natural tendency for prices to stabilize which involves a corresponding equilibrium in market shares.

Unless they enter into a counter-productive price war which will benefit no-one, the producers are thus — according to Solvay — obliged to accept such an equilibrium in the market. Nevertheless for its part Solvay says it adopted at specific moments a policy of attacking particular markets by installing new capacity: such was the case in 1956 when it expanded to France, Germany and Italy. The same situation arose at the end of the 1960's when Degussa set up its Antwerp plant. In order to achieve market penetration producers are obliged to set up plant in the market concerned which will give the other producers reason to fear a real 'war' unless they make room for the new arrival.

- (21) Degussa also recognizes that a 'home market' principle exists but claims it results not from collusion but from the independent commercial judgement of the producers in an oligopolistic market. The reason why the French producers did not enter the German market was fear of retaliation from Degussa in France. With regard to its own expansion to the Benelux in 1970 it did so without any prior arrangement with Solvay. Degussa however had assumed that no retaliation would occur because the main customer for its new plant was to be Henkel, its oldest client, to which Solvay could not object.

- (22) Laporte admits that the use of the terms 'home market rule' or 'home market principle' was not confined to the documents found by the Commission nor indeed that they were unknown outside Solvay and Laporte. However it argues that the specific references to the 'home market rule' are not inconsistent with the operation of natural market forces and says that the Commission has placed 'undue weight' on the documents and the prejudicial circumstances of their discovery.

Factual conclusions

- (23) The Commission does not accept that the strict market separation on national lines which is a characteristic of both the hydrogen peroxide and sodium perborate sectors in the EEC results from natural market forces or the independent commercial judgment of the producers.

It considers that the market separation is the result of an arrangement or understanding of long duration (from at least 1961) between the producers, originally based on an acceptance of the 'home market principle', i.e. that the national markets would be reserved for domestic producers. Where a producer did expand by installing or planning to install production facilities in a national market previously not within its sphere of operations (as Degussa did in 1968 to 1970) this would be regarded as a disloyal or hostile action: hence Solvay's boycott of CIPP for 18 months. Nevertheless the difference between the two groups concerned was resolved by the conclusion of a detailed market-sharing quota agreement between them on the division of the Benelux market and the maintenance of the status quo in Germany; hence the remark that the principle had emerged 'more or less unscathed'. There was also an agreement for sharing the French market equally between three producers. The Commission does not consider that these bilateral agreements were isolated or discrete arrangements: they formed part of a wider organization of the market based on the allocation of territories to each producer. The whole rationale of these agreements is that the available market is divided between certain producers and they would not have been practicable unless the participants had the certainty that their arrangements on the division of the business, the allocation of customers and on pricing would not be disturbed by incursions from other producers.

The 'red note' of 18 April 1979 shows not only that there were close contacts between Degussa, Interlox and the French producers but also that the EEC market was the subject of a detailed understanding on how business was to be divided between the producers. This document, together with the earlier references in 1961 and 1970 provides the necessary

evidence of collusion between the producers on the organization of the European market.

- (24) The opportunity for monitoring the maintenance of the agreed market divisions was provided for in Bitop, then in CIPP, and latterly in the *ad hoc* contacts between the producers. These meetings were clearly not concerned only with technical matters or even the export quotas for third markets as is made clear from the withdrawal of Solvay in protest at Degussa's Benelux expansion and the observations made by Laporte on their activities.

The expression 'home market rule' or 'home market principle' was used by the producers themselves in relation to the partitioning of the market and is not the creation of the Commission. Contrary to the argument of Laporte, it does not consider that it should overlook or ignore the implications of the documentation found at the premises of the producers and expressly referring to such a principle.

While it is correct that hydrogen peroxide (but not sodium perborate) requires special care in handling and shipping, such transport problems do not — as the manufacturers claimed — prevent the product from being supplied across national frontiers. Degussa for instance supplies a considerable part of the German market from its Antwerp site, while certain concentrations sold in France by Interlox are produced in Belgium. Even the English Channel is not a great obstacle, as is demonstrated by Degussa's expressed readiness to take part of any increased quota in the United Kingdom.

- (25) The Commission therefore considers that the evidence shows:

- (i) the major part of the EEC market is partitioned on strict national lines with each producer supplying only in those territories where it has production facilities;
- (ii) this market division results from and is referable to an understanding or arrangement between the producers;
- (iii) the various market-sharing agreements (for Germany, the Benelux and France)

are not isolated or fragmented cases but constitute part of a general cartel formed by the producers by which the market is organized.

B. MARKET SHARING AGREEMENT IN FRANCE

Participants: Solvay, Laporte, L'Air Liquide, PCUK (now Atochem)

The 1958 agency agreement

- (26) In or about 1958 Solvay constructed a new plant for hydrogen peroxide and sodium perborate at Tavaux in France. At the same time the two French producers formed their joint subsidiary Oxysynthese to produce hydrogen peroxide.

By an agreement in writing made in 1958 (and reproduced in its essential terms by a second agreement in 1967) Solvay appointed the two French producers as agents for the sale and distribution of its peroxygen products in France. The contract provided that at the beginning of each year the parties would determine by mutual agreement the tonnage of each product to be sold on Solvay's behalf.

The producers however admit that at the same time the contract was signed the producers agreed that each producer would cover one-third of the French market in hydrogen peroxide and sodium perborate. The arrangement continued after the setting up of Interlox in 1970 and regular meetings were held to review the market situation and supervise the administration of the quotas.

- (27) In 1973 the chemical producer Rhône-Poulenc constructed a new hydroquinone plant at St-Fons with an annual requirement of several thousand tonnes of hydrogen peroxide. Solvay (Interlox) claimed that the market-sharing agreement entitled it to a one-third share of this new business but the French producers demurred and concluded a total requirements contract with Rhône-Poulenc for this new application. The three producers never reached agreement on the question of the division of the Rhône-Poulenc business. The St-Fons factory takes all its requirement from the French producers ($\pm 5\,000$ tpa).

At the beginning of the 1970's Solvay was setting up its own sales network in France and becoming less dependent on the agency arrangements. This agreement was terminated by notice to end on 1 January 1975 and from that date Interlox made its own arrangements for the sale and marketing of peroxygen products in France.

Continuation of the market-sharing arrangements

- (28) While the agency agreement was terminated according to the legal requirements the quota agreement was never formally cancelled and the participants have produced no documentation to show that it was brought to an end.

Solvay claims that the quota arrangements lapsed at the same time as the agency agreement. The evidence obtained however shows that not only did the quota arrangements continue to produce their effects — in the sense that the agreed division of the market into three was maintained — but also that this was referable to a continuing collusion between the three producers.

Maintenance of the agreed market division

- (29) The one-third market share allocated to Solvay for France has been maintained since the termination of the agency agreement in 1975. The Rhône-Poulenc requirement had not been contemplated by the parties when the original market share had been agreed and it is apparent from the documentation that it was treated as a new application quite separate from the general hydrogen peroxide market. Solvay appears to have tacitly accepted that Rhône-Poulenc St-Fons should be treated as a special case.

Excluding St-Fons, the average market shares of the three producers in hydrogen peroxide in France between 1975 and 1980 were in the proportion AL 32,3 %; PCUK 33,3 %; Interlox 34,4 %. The French hydrogen peroxide market in 1980 (excluding Rhône-Poulenc St-Fons) was some 15 000 tonnes.

In sodium perborate as well the same division into three almost equal parts also remained: over the same five years the average was AL

32 %; PCUK 34 %; Interlox 34 %. The market in 1980 was estimated at 83 000 tonnes.

Exchange of information on deliveries

- (30) The three producers which supplied the French market continued after 1975 to exchange detailed information on their respective production and sales figures of the same kind as they had done previously. Now however it was effected every month through a body known as the 'Chambre Syndicale de l'Eau Oxygénée et des Persels'. This body collects statistics from each of the producers and issues them with composite figures for the whole French market. The limited number of producers (effectively only two in hydrogen peroxide) means that each producer is automatically informed of the production and sales of the other group and can also check that its own market share remains at approximately one-third of the total.

In fact, besides the monthly statistics issued by the 'Chambre Syndicale' the producers exchanged further and more detailed information on matters not covered by the 'official' exchange. The data available through the Chambre Syndicale do not include details of sales to individual customers, nor can these be discovered by any analysis of the figures. The producers also deny exchanging any information other than via the 'official' association. Nevertheless documentation obtained from Solvay for 1978 to 1981 shows that it was precisely and correctly informed of the sales made by L'Air Liquide, PCUK and Oxy-synthese to individual customers.

- (31) Thus Solvay knew exactly to the tonne the quantity of hydrogen peroxide supplied in 1978, 1979 and 1980 by the producers to the two major chemical industry customers as well as the exact quantities sold by Oxy-synthese to Rhône-Poulenc for the hydroquinone plant at St-Fons. On this basis it was able to check its market share in each of the principal sectors (paper; chemical industry excluding Rhône-Poulenc hydroquinone; textiles). For 1979 and 1980 it was also aware of the precise tonnage supplied by the French producers to each customer in the chemical and the paper sectors, including those which were not its own customers (which indicates that it must have obtained the information from PCUK and/or L'Air Liquide). These documents also confirm that the producers

treat Rhône-Poulenc's St-Fons requirement for hydroquinone as a special case.

- (32) Similarly Solvay knew the exact sales of sodium perborate by the French producers to each of the four main detergent producers for 1978, 1979 and 1980, and could check that it had roughly one-third of the business of each; although the breakdown by customers is not apparent from the composite monthly figures from the *Chambre Syndicale*.

The Commission has under Article 11 of Regulation No 17 checked the sales of each producer to the major individual customers and the figures obtained confirm the accuracy of those recorded by Solvay: they were not therefore simply estimates but constituted correct information which could only have been obtained from the other suppliers.

From 1981, that is, following the investigations made by the Commission in December 1980, the documents no longer showed any information on individual customers.

Arguments of the producers

- (33) The producers all deny that the agreement dividing the market into thirds survived the termination of the agency agreement in 1975. They point to the variations from year to year in the relative percentage market shares of the three suppliers and claim that these are inconsistent with a system of fixed quotas. It is also argued that in relation to hydrogen peroxide it is illogical to exclude the supplies to Rhône-Poulenc St-Fons and that if these were included Interlox would only have around 25 % of the market.
- (34) They also argue that there is no evidence of collusion: the exchange via the '*Chambre Syndicale*' was not intended (they say) to provide a check on the maintenance of the three-part market division. Solvay claims that the documents showing detailed knowledge to the last tonne of the quantities supplied to each major customer — which cannot be discovered from the official '*Chambre Syndicale*' statistics — are not conclusive proof of any exchange of additional information. While the other producers can provide no explanation of how this information came into Solvay's possession Solvay claims that it could have come from customers who have an

interest in communicating their annual requirement to a potential supplier. It provided the Commission with reports of visits to customers which it claimed supported its contention.

Factual conclusions

- (35) The Commission considers that the arrangement to divide the French hydrogen peroxide and sodium perborate market equally between the three suppliers was independent of the formal agency agreement which was terminated in 1975 and continued in practice until at least the date of the Commission's investigations in December 1980.

Although it is correct that the shares of the producers relative to one another fluctuated, their average market shares for both products during the six years in which the Commission considers the sharing arrangement to have remained in force was almost exactly one-third each, the division which had originally been agreed. The argument that there is no reason for excluding Rhône-Poulenc St-Fons from the general third-party hydrogen peroxide market for France is disproved by the parties' own documentation: it is apparent that it is treated as a special case. In any event the argument does not apply to the sodium perborate sector where the equal sharing is also apparent.

- (36) The exchange of information went far beyond the official '*Chambre Syndicale*' scheme which even on its own permits the market behaviour and market share of individual producers to be identified. The detail and accuracy of the total sales made to individual customers by the French producers shown in the Interlox documents is such that it could only have been ascertained by contact between the suppliers themselves. The Commission does not accept that such detailed and accurate information on competitors' sales was obtained from consumers. The visit reports supplied by Solvay to support its argument that it may have obtained these details from customers generally do not even relate to the customers of whose consumption it was informed in precise detail and even where they do concern a customer listed in the documents give only general estimates of monthly or annual requirements which do not correspond with the precise figure as set out in the

tables on which the Commission relies. The Commission concludes that the producers systematically exchanged details of their sales to each major customer. By exchanging detailed figures each producer could not only check that its market share was being maintained at one-third but could also ascertain the source of any imbalance or deviation.

C. BENELUX AGREEMENT

Participants: Solvay, Laporte, Degussa

- (37) To accommodate the new production capacity of Degussa in Antwerp which was due to come on stream in 1970, an agreement was reached at the end of 1969 between Solvay and Degussa on the division of business and the allocation of major customers in both hydrogen peroxide and sodium perborate.

Degussa's plans had originally been resisted by Solvay which had reacted by boycotting CIPP meetings for 18 months.

In hydrogen peroxide, the Netherlands market was to be divided equally between the two producers. For Belgium, special arrangements were made for the business of the two major customers: UCB was allocated to Solvay and AKZO was to be shared equally between them. As regards the rest of the Belgian market Degussa was to be permitted to build up its share progressively to one-third.

In sodium perborate the Benelux was treated as a single unit to be divided between Solvay and Degussa in the proportion of 80:20, with the exception of Henkel, Degussa's oldest customer, where the proportions of the share were to be reversed (i.e. Degussa was to get 80 %).

- (38) These arrangements were summarized in writing in the form of so-called 'gentleman's agreements' which were still in existence and were being referred to in secret internal memoranda as late as April 1979. In spite of repeated requests made to both parties during the investigation and subsequently no copies have ever been provided to the Commission and it has had to rely on the account given in response to requests under Article 11 by Laporte.

After Solvay and Laporte set up the Interlox grouping the arrangement was continued. Meetings were held three times each year to review the operation in practice of the agreements and to correct deviations from the quotas. Imbalances would be corrected by the producer whose market share was below quota reducing his selling prices or offering special terms in order to increase his sales in the next quarter. There was also some telephone communication between the producers to ensure the agreement was being kept. Over the years the original agreement was subject to some modification and practices developed which had **not been envisaged** at the outset. Nevertheless as Solvay admits the parties met regularly until at least the end of 1980 and had reached a consensus on their respective positions in the market.

- (39) In 1978 a proposal was made (apparently by Degussa) to 'simplify' the Benelux agreement (and the 'Germany' agreement) and reduce contact to a minimum. There was however no intention on either side of altering the status quo as outlined in the agreements. The essential key to any successful simplification of the agreements was said to be the willingness of individuals 'at the highest level' to exert their influence on the national managements to ensure that **quotas were rigorously adhered to**, with any deviations to be the subject of criticism. The plan, which was agreed in a meeting between Degussa and Interlox on 17 April 1979 for submission to more senior company officials would involve central management informing the national managements (incorrectly) that **any detailed arrangements which may have existed between the two groups were being revoked** but that 'common sense' would prevail in the future. Contact was to be reduced to a **minimum** and was to take place only through certain named executives on each side.

Solvay and Laporte claim the proposal to 'simplify' the agreements was never implemented: if that is so, the arrangements must have continued as before.

Solvay, Laporte and Degussa admit their participation in the Benelux agreement until December 1980.

D. GERMANY AGREEMENT

Participants: Solvay, Laporte, Degussa

- (40) A related but separate agreement was reached in 1970 between Degussa and representatives

from Solvay and Laporte on the division of the German market. The purpose of this agreement, which was also made in writing, was to maintain the 'status quo' based on the respective average sales of the two groupings in Germany over the preceding three years in both hydrogen peroxide and sodium perborate.

This gave the Interlox grouping 38 % of the market in hydrogen peroxide to Degussa's 62 %. For sodium perborate the agreed percentage quotas were 28 to 72 %. The size of the market for these products in Germany in 1980 was respectively 23 000 and 130 000 tonnes. Copies of this agreement were provided to the various national managements but again the parties declined to provide copies.

Meetings took place three or four times each year to supervise the detailed execution of the quota agreement. In one document dating from 1974 and found at Solvay the 'Soll' (or quota) of the two producers is calculated to two decimal places: 38,64 % : 61,36 %. This document also indicates that particular arrangements, not disclosed by the producers, were made in respect of the division of the business of the major customers AKZO, Ciba Geigy and Henkel: the note of the 1979 Degussa-Interlox meeting also indicates that special quotas had been set for different customers.

It is not clear in what detail the original agreement covered the fixing of prices. In practice the two groups were in telephone contact several times each week to ensure that their list prices — which were identical — were being respected.

- (41) In 1979 the parties were also anxious to simplify the 'Germany' agreement which involved a far closer degree of contact — and hence a greater risk of discovery — than the Benelux agreement. It was agreed in principle that in future there should be less concern to check prices at individual customers provided there was no risk to maintaining the basic price structure. The quota arrangements for different customers or in different sectors were also to be simplified in such a way that the status quo was not disturbed. On price, if either side wished to apply below-list prices

for a new application, the initial contact was to be made via Interlox-coordination (i.e. Solvay or Laporte head office). These points were to be summarized in a draft annex to be attached to the original Germany agreement. Again it is claimed the proposed amendments were never implemented.

The parties have also admitted their participation in the Germany agreement until December 1980.

The claim however in relation to both the Germany and Benelux agreements that they were intended only to facilitate the maintenance of an 'equilibrium' already existing in fact by reason of the oligopolistic structure of the market.

E. PERSULPHATES AGREEMENT

Participants: Solvay, Laporte, Degussa

- (42) In 1979, following anti-trust proceedings in the United States in the persulphates sector, involving among others Solvay and Laporte, the Commission carried out an investigation into the possible extension of the alleged arrangements on the United States market to the EEC. The representatives of Laporte denied categorically that there had ever been any restrictive agreements concerning the European market and the enquiry was closed.

The evidence obtained during investigations in the present case shows however that in or about 1974 the Interlox grouping and Degussa agreed to fix their respective sales of persulphates on the world market (including the EEC) in the proportion of 70 : 30 based on their respective sales in the period 1971 to 1973.

Arrangements were also made between Peroxid-Chemie (the Interlox company primarily concerned with persulphates) and Degussa to share the new business which arose when the Dutch producer AKZO ceased production in 1977.

Total sales figures were periodically exchanged and steps taken to redress any imbalance in the quotas. The collaboration in the persulphates field also extended to discussions on the coordination of pricing policy.

II. LEGAL ASSESSMENT

A. ARTICLE 85 OF THE EEC TREATY

Article 85 (1)

(43) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or 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, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) ...
- (e) ...

Agreements and concerted practices

The general cartel: home market rule

(44) The Commission does not consider that the strict separation of the EEC market and the confinement by each producer of its activities to certain markets arose from natural market forces or the independent judgment of the producers. The documentation which was found for 1961 made frequent reference to a 'home market rule' which, as Solvay stated, already existed and was distinct from any accessory agreement on third market quotas. The evidence shows that the 'home market rule' was accepted by the producers on the basis of reciprocal cooperation on which the industry was organized. The 'home market principle' was again mentioned in 1970, being said to have 'emerged more or less unscathed' from the period of differences between Solvay and Degussa, which were resolved with the conclusion of status quo and quota agreements in Germany and the Benelux. The 1979 document ('red note') shows that the close

collaboration between the producers and a reciprocated community of interest continued at that time with the division of the EEC market forming the basis of a general consensus between all the producers.

(45) It is not necessary, for the establishment of a concerted practice, for the parties to have agreed a precise or detailed plan in advance. (Judgment of the Court of Justice in *Re the European Sugar Cartel: Suiker Unie and Others v. Commission*, Cases 40-48/73; 50/73; 54-56/73; 111/73; 113-114/73 Judgment of 16 December 1975⁽¹⁾, paragraphs 173 to 174.) The criteria of coordination and cooperation laid down in the case law of the Court must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, but it does strictly preclude any direct or indirect contact between them, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

The documents show that the decision by each producer of its markets and customers was not the subject of independent commercial judgment. The 'home market rule' is expressly and consistently mentioned as the basis on which they conducted their activities first in 'BITOP' and then in 'CIPP'. The 1979 'red note' of the Degussa-Interlox meeting shows that there was close contact, direct and indirect, between all the producers on their future conduct and plans as well as a general consensus on how any new business was to be divided between them on each national market.

(46) In the present case the evidence shows that:

- (a) the producers accepted and intended that their commercial conduct in the EEC should be governed by the principle of protection of traditional home markets,

⁽¹⁾ ECR 1975, p. 1663.

the restriction by each producer of sales to those territories where it possessed production facilities, and the division of business in those markets where several producers were present according to specific market sharing agreements;

- (b) in accordance with this rule they confined their activities to particular defined markets;
- (c) as a result the division of the EEC market on national lines was maintained.

The Commission therefore considers that the factual separation of national markets in the major part of the EEC results from and is referable, if not to an agreement properly so called, at least to a concerted practice between Solvay, Laporte (acting as Interlox), Degussa, L'Air Liquide and PCUK (now Atochem).

The Germany, Benelux and Persulphates agreements

- (47) The particular arrangements concluded in 1969/70 between Degussa and the Solvay-Laporte Interlox grouping setting up market sharing quotas and collusion on pricing for hydrogen peroxide and sodium perborate in Germany and the Benelux, as well as the 1974 'Persulphates' agreement covering the whole world including the EEC, constitute 'agreements' for the purposes of Article 85. The market division and the conduct of the producer groupings formed the subject of precise and detailed agreements between the parties which were reduced to writing and formed the basis for their market behaviour in those sectors.

Market sharing agreement in France

- (48) The original division of the French market in hydrogen peroxide and sodium perborate by which each producer took a one-third share constituted an 'agreement' in terms of Article 85.

The Commission considers that, contrary to the submission of the producers, the convergent behaviour of the parties and the maintenance after 1974 of their respective market

shares in the proportion originally agreed resulted from their continuing to act in collusion.

The mutual disclosure by the three producers of business details on their deliveries to major customers not only through the 'official' information exchange but also by further contacts must have been intended enable each to check that the agreed market division was maintained. This arrangement indicates that the producers were still united by an express or implied agreement to divide the market. The continuation of the agreed market division was therefore the result of an agreement or at least a concerted practice.

Undertakings

- (49) For the purpose of the present proceedings the Commission does not consider the Interlox grouping as an undertaking possessing an identity sufficiently distinct from that of its two parent companies so as to absolve Solvay and Laporte themselves (as opposed to Interlox) from liability under EEC competition rules. The Interlox operation is simply the framework in which the activities of Solvay and Laporte in the peroxygen sector are coordinated and profits shared and all major policy decisions are taken by the parent companies. The Interlox companies do not determine their market behaviour autonomously but in essentials follow directives issued by the parent companies.

The Commission in its statement of objections has expressly reserved the right to examine in future proceedings the applicability of Article 85 of the Treaty to the Interlox arrangements. Solvay and Laporte contend that Interlox is a separate undertaking constituting a merger falling outside Article 85 (1), but for the purpose of these proceedings have accepted that the parent companies are liable for any infringements referable to the Interlox operation.

The fact that L'Air Liquide and PCUK operated a joint manufacturing facility for hydrogen peroxide (Oxysynthese) does not affect their separate identity as undertakings.

At all relevant times, the other French supplier besides L'Air Liquide was PCUK, part of the Pechiney-Ugine-Kuhlmann conglomerate. In 1983 the French chemical industry was reorganized and the peroxygen business of PCUK was transferred to Atochem part of the Elf-Aquitaine group. The Commission considers that as the present owner of the business entity which was involved in the infringements, and having taken over the assets and adopted the economic objectives of PCUK in this sector, Atochem must be the addressee of any decision and responsible for the payment of any fines imposed in respect of the infringements committed by PCUK.

This decision is therefore addressed to Solvay, Laporte, Degussa, L'Air Liquide and Atochem.

Restriction upon competition

- (50) The overall market division and sharing arrangement, and the individual agreements covering particular geographical areas and products, together regulate almost all trade in the products concerned in a major part of the common market, and involved all the principal producers in the European market for a major industrial sector.

The 'home market' arrangement, enunciated in 1961 and later refined to accommodate Degussa's expansion plans to the Benelux in 1970, delineated the territories in which each producer was to supply and consolidated the established positions of those producers to the detriment of effective freedom of movement in the common market.

As regards the individual agreements (Benelux, Germany, France, 'Persulphates') these were intended to, and did, eliminate all effective competition between the parties on the markets and in the products concerned.

The argument made by the parties that the structure of the market, the position of the producers and the nature of the producers are such that conditions of competition would have been no different if they had not had the agreements, is irrelevant. Article 85 applies just as well to oligopolistic markets as to more fragmented markets. The very fact that the parties considered it necessary to enter into agreements which either maintained the status quo or limited the market penetration of a particular supplier to a given percentage, shows that market conditions might well have been different had the free play of competition been permitted.

Effect upon trade between Member States

- (51) The complex of arrangements made on a European (and world) level between the major producers of peroxygen products had the effect of excluding virtually all trade between Member States except through channels subject to control by restrictive agreement. The 'home market' rule involved producers refraining from supplying on the territory of others or confining their activities to particular markets where restrictive market sharing agreements had been made. The only movement of products between Member States thus occurred in the context of the agreed market organization or as coproducer deliveries.

The restrictive arrangements on the different national markets were designed to implement and reinforce the general market division between the producers and cannot be separated therefrom. However, even if they are considered individually, the market sharing arrangements for the Benelux, Germany and France have an appreciable effect upon trade between Member States.

The Benelux agreement covers trade in three Member States. In the case of the other arrangements, the agreements by dividing each national market between two or three producers effectively contribute to the preservation of barriers to trade. Further, both Degussa and the Interlox grouping are established in several Member States and product supplied on one national market under the terms of a market sharing arrangement may well have been produced in another Member State: for example, Interlox supplies certain products in France from its factory in Belgium.

The persulphates agreement fixed the respective shares of the two major producers in the whole of the EEC and by its very nature affected trade between Member States.

Conclusion

- (52) The Commission therefore considers that:
- (a) the agreement or concerted practice between all the producers by which the

EEC market was organized on the basis of the respect of home markets and the confinement by producers of their sales to particular territories;

- (b) the agreement dating from 1958 by which the French market in hydrogen peroxide and sodium perborate was to be equally divided between Solvay (later Interlox), L'Air Liquide and PCUK;
- (c) the 'Benelux' agreement of 1969 by which the respective shares of Solvay (later Interlox) and Degussa in Belgium, the Netherlands and Luxembourg for hydrogen peroxide and sodium perborate were fixed according to agreed quotas;
- (d) the 'Germany' agreement of 1970 by which the respective shares of Degussa and the Interlox grouping in the German hydrogen peroxide and sodium perborate markets were fixed on the basis of the status quo and continuous contact took place to ensure list prices were respected;
- (e) the 'Persulphates' agreement of 1974 by which the respective shares of Degussa and Interlox in the EEC persulphates market were fixed and their price policy coordinated;

constituted infringements of Article 85 (1) of the EEC Treaty.

Article 85 (3)

- (53) Under Article 85 (3) of the EEC Treaty, the Commission may on the fulfilment of certain conditions grant undertakings an exemption from the prohibition of Article 85 (1). In order for the Commission to consider any exemption, however, it is a necessary pre-requisite that the agreements or concerted practices in question be notified in proper form, which was not the case in the present proceedings.

Even if the agreements or concerted practices had been properly notified there would be no possibility of any exemption being granted. Market sharing and price fixing arrangements of the type under consideration in an important industrial sector where there are a limited number of producers, virtually all of which are involved, are fundamentally contrary to the basic objectives of the Treaty. The agreements cannot be said to improve the production or distribution of goods, and their result

is to eliminate any possibility of effective competition in respect of the products in question. Any benefit that could be said to result from the agreements (i.e. stability of market shares and high prices) accrue only to the participants.

B. REGULATION No 17

Fines

- (54) The Commission may, by Article 15 of Regulation No 17, impose fines of from 1 000 to 1 000 000 ECU, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where either intentionally or negligently, they infringe Article 85 (1) of the EEC Treaty. In fixing the fine, regard shall be had to both the gravity and the duration of the infringement.

In the present case the only view the Commission can take of the agreements and concerted practices is that they are of extreme gravity and were of long duration.

The gravity of the infringements lies in the fact that over a long period the producers of hydrogen peroxide, sodium perborate and persulphates effectively eliminated all possibility of effective competition in a market worth several hundred million ECU annually, and would no doubt have continued their secret arrangements indefinitely but for the discovery of the relevant evidence by the Commission.

The division of markets on national lines and the series of market sharing and quota agreements together constituted a cartel which jeopardized inter-State trade in a way which is contrary to one of the fundamental objectives of the EEC Treaty, namely the creation of a single market between the Member States.

The cartel involved deliberate and wide-ranging infringements of EEC competition law and was persisted in even after the Commission had carried out investigations concerning the persulphates sector in 1979 under Article 14 (2).

- (55) As regards duration, the 'home market' arrangement dated from almost the very establishment of the common market while in the case of the individual agreements these ran from 1958 for France, from 1969/70 for

the Benelux and Germany, and from 1974 in persulphates.

In so far as the 'home market' arrangement and the French market-sharing agreement were already in effect before Regulation No 17 came into force on 6 February 1962, the Commission will assess fines only in respect of their operation after that date. While the home market agreement was in operation from 1961, the Commission considers that for the purposes of Article 15 of Regulation No 17, its most serious aspects were manifested from about 1970 onwards with the formation of Interlox, the concentration of the producers effectively into only three major groupings, and the arrangements made to accommodate Degussa's expansion to the Benelux.

The parties claim that the infringements admitted were terminated immediately after the Commission's investigations in December 1980. Although there is no substantive evidence that this was in fact the case, the Commission will assess any fines on the assumption that the infringements were not continued after this date.

- (56) In assessing fines however, some distinction can be drawn between the respective responsibility of Solvay, Laporte and Degussa on the one hand and the French producers on the other. The Solvay-Laporte Interlox grouping and Degussa are the major world producers of the products in question and played a dominant role in the conception and operation of the cartel. Degussa is the second largest world producer and was involved in the detailed agreements for the Benelux and Germany: the reason it did not sell in France or the United Kingdom was the 'home market rule' of which it was a major beneficiary, Germany being the largest individual EEC market.

- (57) In 1980, the last year in which the cartel was definitely known to have been in operation, the turnover of the Interlox grouping in the products concerned in the EEC amounted to some ... million ECU.

Although after the formation of the Interlox grouping Solvay and Laporte as joint owners are both responsible for its activities, the Commission is imposing separate fines. In recognition of the fact that Solvay is the larger of the parent companies of Interlox, and the peroxide sector forms a far greater proportion of Laporte's total turnover than of Solvay's,

the Commission will make some distinction between them.

It also takes into account that Laporte's responsibility for the French and Benelux agreements dates from 1970 when the Interlox grouping was formed, both these agreements having originally been negotiated with the other participants by Solvay.

Degussa's EEC turnover for the products concerned in the year ending 30 September 1980 was ... million ECU.

The French producers had a somewhat lesser role which reflects their smaller part of the EEC market compared with Interlox and Degussa. While they were not participants in the Benelux or Germany agreements, their confinement of their activities to their domestic market however ensured the effectiveness of the restrictive arrangements on other markets between Interlox and Degussa, particularly as regards the maintenance of price differentials between the Member States.

In 1980 their EEC sales of hydrogen peroxide and sodium perborate to third parties (excluding co-producers) came to ... million ECU for L'Air Liquide and ... million for PCUK.

Termination of infringements

- (58) By Article 3 of Regulation No 17, the Commission may, on finding that there is an infringement of Articles 85 or 86 of the EEC Treaty, require the undertakings concerned to terminate the said infringement.

The Commission is not satisfied that the infringements have in fact ever been terminated. Even where Solvay and Laporte have admitted the existence of specific market-sharing agreements they state that these were not considered 'appropriate for formal termination'. Degussa for its part while admitting that employees 'may have participated' in such arrangements, denied that its senior management was aware of the existence of the agreements. The Commission does not consider that the French agreement lapsed at the end of 1974 as claimed by the participants. As a result, it is uncertain whether or not the parties have terminated all the infringements established in this decision. It is therefore necessary, pursuant to Article 3 of Regulation No 17, to require the parties to the agreements and concerted practices to bring them immediately to an end.

The parties must also be prohibited from any agreement or concerted practice having equivalent effect, in particular any exchange of price lists or of information, whether of composite figures or details of sales to particular customers, which will enable them to check that the market shares or allocation of customers as originally agreed are being maintained, or which will provide them, either directly or indirectly, with normally confidential information on such matters as the costs of other producers, their prices, investment and production plans or requests for tendering for capital projects received by them.

Inasmuch as any information exchange system provides the participants with such details, it will have to be modified or abandoned,

peroxide and sodium perborate in the Benelux was shared between Solvay (later the Interlox grouping) and Degussa according to agreed quotas and the business of particular major customers in the Benelux was allocated in agreed proportions.

4. Solvay et Cie, Laporte Industries (Holdings) plc and Degussa AG infringed Article 85 of the EEC Treaty by participating in agreements or concerted practices by which from 1970 until at least 13 December 1980 the market for hydrogen peroxide and sodium perborate in Germany was shared between the Interlox grouping and Degussa according to agreed quotas and continuous contact took place to ensure that their price lists (which were identical) were being respected.

5. Solvay et Cie, Laporte Industries (Holdings) plc and Degussa AG infringed Article 85 of the EEC Treaty by participating from 1974 until at least 13 December 1980 in an agreement by which the respective shares of the Interlox grouping and Degussa of the EEC persulphates market were agreed and their price policy coordinated.

HAS ADOPTED THIS DECISION:

Article 1

1. Solvay et Cie, Laporte Industries (Holdings) plc, Degussa AG, L'Air Liquide SA, and Produits Chimiques Ugine Kuhlmann infringed Article 85 of the EEC Treaty by participating until at least 13 December 1980 in an agreement or concerted practice dating from 1961 by which the producers confined their sales of hydrogen peroxide and sodium perborate to their home markets or to certain national markets where restrictive quota agreements were in force.

2. Solvay et Cie, Laporte Industries (Holdings) plc, L'Air Liquide SA, and Produits Chimiques Ugine Kuhlmann infringed Article 85 of the EEC Treaty by participating from 1958 (in the case of Laporte from after the formation of Interlox in 1970) in an agreement or concerted practice by which until at least 13 December 1980 the French market for hydrogen peroxide and sodium perborate was shared in three equal parts between Solvay (later the Interlox grouping), L'Air Liquide and PCUK.

3. Solvay et Cie, Laporte Industrie (Holdings) plc and Degussa AG infringed Article 85 of the EEC Treaty by participating from 1969 (in the case of Laporte from after the formation of Interlox in 1970) in agreements or concerted practices by which until at least 13 December 1980 the market for hydrogen

Article 2

Solvay et Cie, Laporte Industries (Holdings) plc, Degussa AG, L'Air Liquide SA and Atochem (as successor of PCUK) shall forthwith bring to an end the said infringements (if they have not already done so) and shall refrain from any agreement, concerted practice or measure which may have equivalent effect, including any organized exchange of price lists or of commercial information of the kind normally covered by trade secrecy and by which the participants are informed directly or indirectly, of individual data from other individual producers concerning quantities produced or sold, costs selling prices, discounts, tenders, or production or investment plans, or by which they might be able to monitor adherence to any market-sharing or price fixing agreement or arrangement covering the EEC or any national market thereof.

Article 3

The following fines are imposed on the undertakings named herein in respect of the infringements found in Article 1 in so far as they were applied after the coming into force of Regulation No 17:

(a) Solvay et Cie, Brussels, a fine of 3 000 000 ECU, that is Bfrs 134 775 300;

- (b) Laporte Industries (Holdings) plc, London, a fine of 2 000 000 ECU, that is £ 1 206 254;
- (c) Degussa AG, Frankfurt, a fine of 3 000 000 ECU, that is DM 6 687 120;
- (d) L'Air Liquide SA, Paris, a fine of 500 000 ECU, that is FF 3 418 005;
- (e) Atochem, Paris, (as successor of PCUK), a fine of 500 000 ECU, that is FF 3 418 005.

Article 4

The fines imposed under Article 3 shall be paid to the following bank accounts of the Commission within three months following the date of notification of this Decision:

- (a) Solvay: Banque Bruxelles-Lambert, Brussels, No 310.0231000-32;
- (b) Laporte: Lloyds Bank plc, London, No 108.63.41;
- (c) Degussa: Sal. Oppenheim & Cie, Cologne, No 260/00/64910;
- (d) and (e) L'Air Liquide and Atochem: Société Générale, Paris, No 5.770.006.5.

Article 5

This Decision is addressed to:

- Solvay et Cie,
33 Rue du Prince Albert,
1050 Brussels,
- Laporte Industries (Holdings) plc,
14 Hanover Square,
London W1R OBE,
- Degussa AG,
Weißfrauenstraße 9,
6000 Frankfurt-am-Main 11,
- L'Air Liquide SA,
75 Quai d'Orsay,
75131 Paris,
- Atochem,
La Défense 5,
92091 Paris-La Défense.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 23 November 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission

COMMISSION DECISION
of 5 December 1984
relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.307 — Fire insurance (D))

(Only the German text is authentic)

(85/75/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 EEC Treaty⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to the application for negative clearance or exemption filed, pursuant to Articles 2 and 4 of Regulation No 17, on 23 September 1982 by the Verband der Sachversicherer eV, Cologne, Federal Republic of Germany,

Having decided on 9 September 1983 to initiate proceedings in the case,

Having given the Verband der Sachversicherer eV an opportunity to reply to the objections raised by it, 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⁾,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

A. Facts

- (1) On 23 September 1982 the Verband der Sachversicherer eV, Cologne (Association of Property Insurers — 'VdS'), as a precautionary measure, filed an application for negative clearance or exemption pursuant to Articles 2 and 4 of Regulation No 17 for, among other things, a 'Prämienempfehlung zur Stabilisie-

rung und Sanierung des Geschäfts der industriellen Feuer- und Betriebsunterbrechungsversicherung' (Premium Recommendation to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business) issued in June 1980 (Annex I).

1. *Structure of the market and the undertakings involved*

- (2) 1.1. In the class of insurance that provides cover against industrial fire risks and consequential loss due to disruption of business activities, the common market is still split into several sub-markets corresponding to the territories of Member States in which premium rates vary considerably. One important reason for this is the continuing national regulation of insurance markets, which, despite all the progress that has been made towards integration, still plays a key role in a number of Member States. The situation has changed little since the restrictions on freedom of establishment for direct non-life insurance were removed under the Council Directive of 24 July 1973 (OJ No L 228, 16. 8. 1973, p. 20).
- (3) Even the confirmation by the European Court of Justice (for the first time in *van Binsbergen* — Case 33/74 of 3 December 1974) of the freedom of Community undertakings to provide services in a Member State without needing to be established there has not yet in practice resulted in the business of industrial fire and consequential loss insurance being carried on throughout the common market from an insurance company's head office. Instead, fire insurers that also do business outside their own country establish branch offices or local subsidiaries in other Member States, as they do in non-Community countries.
- (4) 1.2. In the Federal Republic of Germany 17 Community fire insurers having their head office in other Member States transact industrial fire insurance business through German

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

branch offices (without separate legal personality), which are treated as German companies under the *Versicherungsaufsichtsgesetz* (Insurance Supervision Act). The Community fire insurers are all members of the VdS. They hold only a small share of the market, put by the latest figures at under 3 % of annual gross premium income.

- (5) Altogether, 126 domestic and foreign fire insurers provide industrial fire and consequential loss insurance in Germany. Not all of these, however, operate as independent suppliers on this market, supplying all their capacity as leading or sole insurers. Especially the smaller ones transact all or a major part of their business as co-insurers, where the conditions and premium rates are negotiated by the leading insurer and the participating co-insurers must either accept them or forgo the business.

- (6) The Community fire insurers from other Member States that are represented in Germany by branch offices (without separate legal personality) are particularly dependent on this practice. Almost all of them transact the bulk of their industrial fire and consequential loss insurance business as co-insurers with a German leading insurer, so that the negotiation of the conditions and premium rates of the insurance contracts concluded by them is largely in the hands of the German insurers.

- (7) The annual gross premium income earned in the Federal Republic of Germany on industrial fire and consequential loss insurance contracts in respect of German risks (i.e., situated in Germany) amounts to about DM 2 400 million. Of this figure, the insurance company with the largest market share accounts for 12,74 %, while the three, five and 10 largest companies account for 36,67 %, 50,95 % and 73,80 % respectively.

- (8) 1.3. The Federal Republic can also be said to form a sub-market separate from the rest of the common market as far as the reinsurance

of industrial fire and consequential loss insurance business is concerned. Although reinsurance has legally been liberalized in Germany, as in other Member States, in accordance with the Council Directive of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession (OJ No 56, 4. 4. 1964, p. 878/64), foreign reinsurers are indirectly supervised by the German supervisory authorities when they monitor the way reinsurance is arranged by the primary insurers whom they directly supervise. If the regulatory authorities have misgivings about a reinsurer's financial capacity or on some other ground, they try to get the direct insurer to reduce the proportion of the risk ceded to the reinsurer or to terminate the contract. To a certain degree, therefore, features of the previous domestic market have been retained also in reinsurance and this goes some way towards explaining the strong position of German reinsurers in Germany.

- (9) 1.3.1. The domestic and foreign companies involved in reinsurance in Germany consist of both specialized reinsurers, which write reinsurance business almost exclusively and direct insurers which do so in addition to their direct business. Estimates of the volume of reinsurance business (gross premium income including incidental payments) transacted in respect of German industrial fire and consequential loss risks range from DM 1 200 million to DM 1 900 million a year, although mostly figures of between DM 1 700 million and DM 1 900 million are put forward. On the conservative market estimate of DM 1 700 million, the information obtained by the Commission indicates that the 26 German specialized reinsurers carrying on this class of insurance hold over two-thirds of the market.

- (10) 1.3.2. The German specialized reinsurers therefore collectively occupy an extremely strong position in the insurance of industrial fire and consequential loss risks situated in Germany. This is true in spite of the fact that they face some competition from foreign rein-

surers and that active competition is also quite common between German reinsurers (including the non-specialized ones who mainly transact direct insurance). The point is that the multiple business links between German specialized reinsurers as a result of their regular cooperation in reinsuring proportions of the same risks and their reciprocal reinsurance of one another (retrocession) allow them at any time to act in concert *vis-à-vis* their business partners, the direct insurers, in matters of vital importance.

2. *Background to and contents of the premium recommendation*

- (11) 2.1. The market in industrial fire and consequential loss insurance has always been subject to cyclical fluctuations in loss experience and premiums. For example, in Germany the loss ratio (losses to premium income) for this business rose from 72,1 % in 1978 to 93,4 % in 1979. Average premium rates, on the other hand, fell from 1,93 % in 1973 to 1,08 % in 1979, i.e. by 44 %, for industrial fire insurance and even more sharply, from 2,93 to 1,49 % over the same period, for consequential loss insurance. In the five years prior to implementation of the recommendation in Germany, the combined ratio (losses and expenses to premiums) invariably exceeded premium income (1976: 108,2 %; 1977: 113,4 %; 1978: 104,1 %; 1979: 125,4 %).
- (12) In 1979, the year before the recommendation was issued, the loss ratio of 93,4 % for industrial fire and consequential loss insurance was a record. In the years that followed, the ratio fell to 93 % (1980), 91,1 % (1981) and 86,8 % (1982), but according to the VdS in 1983 it rose again to 97 %.
- (13) 2.2. A similar decline in the performance of this class of insurance can be seen in other major industrialized countries such as the United States. Two main reasons are given as to why insurance companies have not re-

sponded by raising premium rates. First, the companies' investment income, which has been boosted by high interest rates, has enabled them to offset underwriting losses ('cash-flow underwriting'). Secondly, most fire insurers, as composites or through sister companies, are involved in several classes of commercial insurance at once and attempt to win substantial business in other classes by charging their commercial clients below-cost premiums for fire insurance. They have an incentive to do so if their other business with the customer is sufficiently profitable.

- (14) 2.3. On the basis of preliminary work by its Committee of Experts on Industrial Fire Insurance, the association of German property insurers, the VdS, to which almost all fire insurers operating in Germany belong, wrote to the Federal Supervisory Office for Insurance and to the Federal Cartel Office on 21 May 1980 notifying them, in accordance with paragraph 102 of the German Act against Restraints of Competition, of a planned 'Non-binding recommendation on measures to re-establish stable and viable conditions in the industrial fire insurance and consequential loss insurance business' (Annex 1). Sections I, IV and V of the recommendation came into effect in June 1980 and the remainder on 1 August 1980. The VdS claims that not all its members have complied with the recommendation as it would have wished.
- (15) The recommendation distinguished between measures to stabilize existing business (section I) and measures to put existing business back on to an economic footing (sections II and III). The latter involved increases in the premiums on contracts of a certain size that were shortly coming up for renewal.

On policies coming up for renewal between 31 December 1980 and 30 December 1981 and giving cover of DM 50 million or more, premiums were to be raised by at least 10 %. If the policy had had a claims ratio (claims to premiums paid) of more than 150 % over the preceding five years, the increase was to be at least 20 %.

On policies coming up for renewal between 31 December 1981 and 30 December 1982 and giving cover of DM 1 million or more, premiums were to be increased by at least 20 %. If the policy had had a claims ratio of more than 150 % over the preceding five insurance years, the increase was to be at least 30 %.

(16) Premiums on policies coming up for renewal after 31 December 1982 were to be brought into line with the new premium guidelines applicable with effect from that date ('Tarif "82"'). This part of the recommendation has thus now been superseded by the new tariff, which was notified to VdS members in a circular dated 25 June 1982 and came into effect on 1 January 1983. The tariff, which was notified to the Commission with the recommendation on 23 September 1982, is not covered by the present proceedings, however.

(17) 2.4. The German reinsurance companies, which are naturally as interested in charging economic premium rates as primary insurers, decided at the VdS's behest to back up the recommendation by including in reinsurance treaties from 1 January 1981 a special *Prämienberechnungsklausel* (premium calculation clause) (Annex 2). Under this clause, which had the approval of the German supervisory authorities, a risk that was not rated in line with the recommendation would, in the event of a claim, be treated as under-insured and the reinsurer's contribution reduced accordingly. Four reinsurers have told the Commission that they include this clause only in reinsurance treaties with German insurers and not in those with foreign insurers insuring German risks through a branch office.

(18) 2.5. The VdS recommendation was discussed by Commission and VdS representatives in Brussels on 10 February 1981. The discussions centred on whether the recommendation and the associated practices of the insurance companies concerned ought to be notified to the Commission under Article 4 of Regulation No 17. (A year earlier on 27 and

28 February 1980 Commission officials had met representatives of the VdS in Cologne and had advised them that it would be wise to notify existing and future premium recommendations or guidelines since it was possible they were caught by Article 85 (1).)

(19) Following the meeting in Brussels on 10 February 1981, the *Gesamtverband der Deutschen Versicherungswirtschaft eV* (General Association of the German Insurance Industry), also acting on behalf of the VdS, wrote to the Commission on 25 February 1981 rejecting its arguments regarding the applicability of Article 85 (1). The Association referred to a letter that the then Director-General for Competition had sent to the Secretary-General of the *Comité Européen des Assurances* (CEA) on 3 July 1962 (Annex 3) and on which it had published a statement in its Fifteenth Annual Report (1962/63, p. 108) (Annex 4). Throughout the proceedings the VdS consistently maintained the same position, that it was still, as it had always been, entitled to issue a recommendation like that of June 1980, regardless of Article 85.

(20) The Commission obtained information from a number of Community insurers about the application of the recommendation. In one case the company concerned refused to give the information and the Commission on 9 December 1981 took a decision requiring it to do so, giving as the reason the possibility that the recommendation and any resulting concerted practice between VdS members might constitute an infringement of Article 85 (1). The decision was not appealed and was published in the *Official Journal of the European Communities* (OJ No L 80, 26. 3. 1982, p. 36).

(21) The Commission asked the VdS for details of the figures on which it based its calculation of members' average expenses. The VdS sent a table of members' expenses ratios compiled from a 1980 survey (Annex 5), it pointed out that its calculation of required premium rates included 25 % for administrative costs/com-

mission, 5 % for fire protection tax and 3 % profit.

Competition 'within the common market' is still involved even if the demand for a particular good or service — here, for insurance of risks situated in Germany — is concentrated in one Member State.

**B. Applicability of Article 85 (1)
of the EEC Treaty**

(22) 3. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. As the Commission held in its Decision of 30 March 1984 in another case concerning the insurance sector (Case IV/30.804 — NUOVO CEGAM, OJ No L 99, 11. 4. 1984, p. 29), the agreements, decisions or concerted practices referred to in Article 85 can relate to either goods or services. It follows that Article 85 also applies to the insurance industry.

(23) 3.1. The VdS is an association of undertakings within the meaning of Article 85 (1) and, having legal capacity, is prohibited from taking decisions restrictive of competition of the kind referred to therein. The June 1980 recommendation was adopted by the competent body under the VdS's rules and duly brought by its executive to the notice of members as an official statement of the Association's policy. In spite of the fact, therefore, that the title of the recommendation describes it as being 'non-binding', the recommendation was in the nature of a 'decision' by an association of undertakings within the meaning of Article 85. It is sufficient for this purpose that the recommendation was brought to the notice of members as a statement of the association's policy provided for in, and issued in accordance with, its rules.

(24) 3.2. The recommendation had the object of restricting competition in industrial fire and consequential loss insurance within the common market. This conclusion is not invalidated by the fact that the recommendation related only to risks situated in Germany.

(25) 3.2.1. The intention to restrict competition is clear from the wording of the recommendation itself, calling as it does for increases in premium rates of 10, 20 or 30 % in specified circumstances. It is irrelevant for the purposes of Article 85 (1), according to its clear wording, whether the object of the recommendation was always achieved. It is sufficient that the VdS's decision, which was made in accordance with German filing requirements and was widely publicized, had the object of appreciably restricting competition. It should be borne in mind that the VdS's membership includes all 126 insurers involved in industrial fire insurance in Germany.

(26) 3.2.2. The restriction of competition was significantly reinforced by the inclusion by German reinsurers of the special 'premium calculation clause' (see paragraph 17 above) in their reinsurance treaties from 1 January 1981 to back up the recommendation. This view is supported by the strong market position of German specialized reinsurers discussed at 1.3 above (paragraphs 8 to 10). Only a strong market position can explain how the German reinsurers were able to adopt a practice such as the uniform introduction of the 'premium calculation clause' from 1 January 1981 without the support of the other companies engaged in the reinsurance market and without having to fear any permanent loss of market share.

(27) On account of their strong market position the German specialized reinsurers were able by uniformly introducing the special 'premium calculation clause' in reinsurance treaties from 1 January 1981 to exert pressure on the primary insurers to comply with the anti-competitive recommendation issued by the VdS.

This applied particularly to those insurers which, although they had not formally distanced themselves from the Association's decision to issue the recommendation, had for business reasons little interest in abiding by it in practice.

- (28) 3.2.3. The restriction of competition intended by the VdS's recommendation and reinforced by the conduct of the reinsurers cannot be justified on the ground that both the VdS decision to issue the recommendation and the reinsurers' decision to apply the 'premium calculation clause' was duly filed with the German supervisory authorities. An infringement of the EEC competition rules is not vindicated simply because national authorities, for reasons that may make sense from the point of view of the national interest, have sanctioned or tacitly approved the conduct of the undertakings involved. The argument that the Commission is obliged under the EEC Treaty and under Regulation No 17 (Article 10 (2)) to administer the competition rules in close and constant liaison with the competent authorities of the Member States does not alter this conclusion. The Commission, it is true, must endeavour in its interpretation and enforcement of the competition rules to avoid situations arising in which economic policy decisions of the national authorities are frustrated without valid reason. Where, however, as in the present case, there has been a clear breach of binding principles of EEC competition law, it is the settled case law of the European Court of Justice that in the event of conflict EEC law must prevail.

- (29) 3.3. The likelihood of the recommendation affecting trade between Member States derives first from the fact that it was also addressed to the Community fire insurers members of the VdS that have their head offices outside Germany. It is irrelevant whether the Community fire insurers concerned transact business in Germany as leading or sole insurers or as co-insurers. In the former case, they were the direct addressees of the recommendation and directly subject to its effects. In the latter case, the recommendation could indirectly affect the profitability of cross-frontier co-insurance business and the incentive of

Community insurers to participate in such business via its influence on the German leading insurers who largely took the decision whether or not to apply the recommended increase in premiums on renewed policies. The same would have applied if Community fire insurers having their head offices outside Germany and transacting German business entirely or predominantly as co-insurers had not belonged to the VdS.

- (30) 3.3.1. Community fire insurers doing business in the Federal Republic of Germany but having their head offices elsewhere are taking part in trade, that is to say cross-frontier exchange of goods and services, between Member States. This fact is not altered by the rules for the establishment of foreign insurance companies under the German Insurance Supervision Act, which the Commission in any case believes are inconsistent with the freedom to provide services under Article 59 of the EEC Treaty and has now challenged before the Court of Justice (Case 107/84). Under these rules EEC insurers may only operate in the Federal Republic of Germany, except in cases governed by the Council Co-insurance Directive of 30 May 1978 ⁽¹⁾, if they are represented there by a branch office (without separate legal personality). German legislation is entitled to treat such branches as independent domestic undertakings. However, this does not make them separate legal entities established in the Federal Republic for the purposes of Articles 85 *et seq.*
- (31) Nor is the objection valid that the service which forms the essence of an insurer's activities, namely the assumption of specified risks, is provided within the Federal Republic of Germany. It is true that the insurance contracts are signed within the country by the insurer's representative who has underwriting authority, that foreign insurers must provide within the country certain financial guarantees for the observance of their contractual obligations and that claims are often paid by the foreign insurer from financial resources within the country. Nevertheless, the crucial fact remains that the insurance contract — the acceptance of a specified risk in return for payment of the insurance premium — arises solely with and for the benefit and to the det-

⁽¹⁾ OJ No L 151, 7. 6. 1978, p. 25.

riment of the foreign insurer (through his representative in the country). Furthermore, from the point of view of competition a branch office is merely an extended arm of the foreign insurer.

In this respect it is significant that on several occasions in the course of the investigation branch offices initially replied to requests for information stating that they would first have to refer to their head office abroad.

- (32) Much more so than a subsidiary, a branch office is entirely dependent on the goodwill of the foreign insurer that has set it up. Branch offices are frequently required to arrange insurance cover for local subsidiaries of foreign companies insured with the branch owners and with which they have international insurance agreements. The management of the foreign insurance company not only lays down policy for the branch office but profits made on its operations also eventually accrue to the foreign insurer and in the event of persistent losses it is the foreign insurer that must replenish the branch office's local finances from its resources abroad. Lastly, and most importantly, national public law on insurance supervision does not prevent the foreign insurer as such deriving civil rights and obligations from the insurance contracts arranged by the branch office. In view of all these factors, it would be contrived to argue that insurance companies with branch offices in other Community countries did not take part in cross-frontier exchanges of services between those countries and the countries in which they have their head office.

- (33) 3.3.2. The recommendation issued by the VdS was likely to affect trade between Member States appreciably even though the share of the German market held by other EEC insurers is relatively small (less than 3 % of gross premium income). There is always likely to be an appreciable effect on trade between Member States when a restriction of competition applies to virtually all the inter-State trade in the goods or services concerned that is currently found or could, in the absence of

the restriction, develop in the foreseeable future.

- (34) The fact that, as a result of the business and legal environment which affects the volume of inter-State trade, only a small amount of inter-State trade is currently found or can be expected, as in the present case, does not mean that measures that seek to reduce competition within such trade as exists do not have an appreciable effect and are therefore permissible. The share of the German market held by the Community fire insurers belonging to the VdS is in these circumstances not very relevant, since this market share accounts for the entire extent of cross-frontier provision of industrial fire insurance between other Member States and the Federal Republic of Germany and there is no actual prospect of significant numbers of new competitors based in other Community countries entering this market in the foreseeable future.

- (35) 3.3.3. The VdS's premium recommendation, in conjunction with the German reinsurers' introduction of the 'premium calculation clause', was also likely to have the effect of helping to isolate national markets and of hindering the integration of the common market sought by the EEC Treaty. In this connection it must be made clear that the pressure exerted by German reinsurers through their introduction of the 'premium calculation clause' did also affect Community fire insurers doing business in the Federal Republic of Germany but based elsewhere. As stated at 1.2 above (paragraph 6), virtually all such insurers write the bulk of their industrial fire and consequential loss business as co-insurers with a German leading insurer. Under these circumstances they were affected by the application of the 'premium calculation clause', whether they arranged their own reinsurance with foreign reinsurers, say, in their own country, or with German reinsurers who did not insist on this clause in treaties with them (see above, paragraph 17). Although their reinsurance treaties did not include the German 'premium calculation clause', they were bound to feel its

restrictive effect through their German leading insurer who in most cases probably did place his reinsurance with German specialized reinsurers, in view of the particularly strong position held by German reinsurers on their own market.

- (36) In these circumstances, the likelihood of an isolation of national markets arose from the fact that other Community insurers, who for insuring major risks are dependent on cooperation with a German leading insurer, were prevented by their relationship with the German leading insurer from offering cheaper premium rates than their German competitors in order to strengthen their position on that market. Under the freedom to provide services in other Member States without being established there, a right which the Commission maintains already exists (hence Case 107/84, see paragraph 30 above), large EEC insurance companies from other Member States ought to be able to act as leading insurers, and so to offer such rates, in Germany. In practice, however, they cannot act as leading insurers there — even under the less stringent requirements of the co-insurance Directive of 30 May 1978 (paragraph 30 above) — without being subject to the restrictive establishment rules of the German Insurance Supervision Act which are still enforced.

C. Non-applicability of Article 85 (3) of the EEC Treaty

- (37) 4. Article 85 (3) provides that the provisions of Article 85 (1) may be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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

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

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

- (38) 4.1. Under the second sentence of Article 4 (1) of Regulation No 17, the Commission may not take a decision in application of Article 85 (3) until the agreements, decisions or concerted practices in question have been notified to it. The VdS is not released from the notification requirement by Article 4 (2) (1) of Regulation No 17 whereby agreements, decisions or concerted practices the only parties to which are undertakings from one Member State and which do not relate either to imports or to exports between Member States are dispensed from notification. Since the recommendation was issued as a decision by an association of undertakings to which Community fire insurers having their head offices in other Member States belong, the decision does not meet the conditions of Article 4 (2) (1). It is irrelevant that the Community insurers conduct their business in the Federal Republic of Germany through local branch offices (see section B 3.3, paragraphs 30 to 32).

- (39) 4.2. An exemption under Article 85 (3) cannot be granted in respect of the period after 23 September 1982, when the recommendation was notified, because the necessary conditions are not met. The recommendation could not contribute to an improvement in the services provided by the fire insurers.

4.2.1. The main argument adduced by VdS, viz. that the loss statistics which individual companies possess fall a long way short of what is needed for the proper rating of risks, is correct as such. It does not, however, follow that a decision by an association to recommend premium increases of 10, 20 or even 30 % necessarily improves the services provided by the insurance industry. It is not sufficient to prove that premium levels had been held down by 'excessive' competition

and that because of financial constraints all insurers urgently needed increased revenue. Commercial constraints of that sort are common to all industries, particularly in a recession, and cannot by themselves justify restrictions of competition.

- (40) 4.2.2. Nor is it a valid objection to argue that the purpose of insurance and the relevant statutory provisions require that the insurer must at all times be capable of meeting the obligations arising from insurance contracts while keeping the different classes of business separate. There must, of course, be adequate safeguards for policy-holders against commercial malpractice by insurers who behave irresponsibly. These are needed at least to the extent that policy-holders are not themselves in a position to choose financially sound undertakings to provide their insurance cover. This does not mean, however, that a collective increase in premiums is a means of improving insurance services that would justify an exemption from the competition rules under Article 85 (3).

- (41) 4.2.2.1. As the Court of Justice has held in *Grundig-Consten* (Joined Cases 56 and 58/64 [1966] ECR 299, at 348), not every measure that has beneficial effects on the activities of the undertakings involved is to be regarded as an improvement in economic processes within the meaning of Article 85 (3). Instead, the dangers for competition flowing from a particular measure have to be weighed against the improvements to which it leads. The measure must, in particular, bring appreciable objective advantages that are such as to offset the associated disadvantages for competition.

- (42) 4.2.2.2. This test is not met by the recommendation issued by the VdS. Calling as it does for across-the-board increases in premium levels, the recommendation goes far beyond what can be regarded as acceptable cooperation between insurers in collectively analyzing loss statistics and translating the results into practical guidance for writing policies. That the recommendation exceeded the bounds of acceptable cooperation is seen not only from the fact that across-the-board

increases of 10, 20 or 30 % fail to take into account the cost and revenue situations of individual insurers but also that the increases were based on gross premiums, i.e. premiums in which individual cost and revenue situations were ignored by providing for across-the-board supplements for expenses and profit as percentages of statistically determined claims (including contingencies).

- (43) A comparison between the expense components applied by the VdS in setting its gross premiums (see end of paragraph 21) and the expenses ratios given in Annex 5 (based on the last survey conducted by VdS in 1980) amply demonstrates that there are marked differences in the level of expenses from one company to another that ought to be reflected in the companies' tariffs. If varying tariffs based on collectively ascertained loss experience and individually calculated expenses are possible in other classes of property insurance, there is no reason why fire insurers too cannot focus their cooperation on loss experience.

- (44) 4.2.2.3. If individual insurance undertakings were to endanger their capacity at all times to meet the claims arising from their insurance business by failing to make responsible provision for expenses in spite of a deterioration in their overall profitability, then the powers of intervention of the supervisory authorities would probably be sufficient to remedy the situation. Such intervention would seem to be a lesser evil compared with a system whereby inefficient insurers were kept afloat against the public interest whilst the efficient ones earned inflated profits taking into account their investment income.

D. Applicability of Article 3 (1) of Regulation No 17

- (45) 5. For the reasons set out in sections B and C above, the Commission is obliged to find that the VdS's recommendation infringed

Article 85. Although the present recommendation was apparently only in effect from 1 June 1980 to 31 December 1982 (see paragraphs 14 to 16), in view of the legal view persistently taken by the VdS in this proceeding there can be no reasonable doubt that the association might in future issue similar recommendations unless it is made clear that the conduct objected to is incompatible with Article 85. It is therefore necessary to indicate the permissible limits under Article 85 of cooperation between insurance undertakings in the field to which the notification refers,

HAS ADOPTED THIS DECISION:

Article 1

The recommendation issued by the Verband der Sachversicherer eV to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business in June 1980 constitutes an

infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application for negative clearance under Article 2 of Regulation No 17 or exemption under Article 85 (3) of the EEC Treaty for the recommendation referred to in Article 1 is hereby refused.

Article 3

This Decision is addressed to the Verband der Sachversicherer eV, Cologne, Federal Republic of Germany, Riehler Straße 36.

Done at Brussels, 5 December 1984.

For the Commission

Frans ANDRIESEN

Member of the Commission

ANNEX 1

Non-binding recommendation to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business
(‘Unverbindliche Empfehlung zur Stabilisierung und Sanierung des FI- und FBU-Geschäfts’)
(June 1980)

I. Stabilization of existing business:

1. In the case of contracts to which the ‘Principles’ ⁽¹⁾ are applicable, the premium rate currently received will be changed only where this is necessary on account of objective changes in the rating characteristics.
2. Multi-year contracts will not be concluded and existing contracts will not be extended on a multi-year basis (point IV (2) of the ‘Principles’).

II. Restoration of existing business to an economic footing:

1. For contracts terminating between 31 December 1980 and 30 December 1981 in which the sum insured is at least DM 50 million, the premium rate received will be increased by at least 10 %. Where a contract has shown a claims ratio (claims to premiums received) of over 150 % over the last five insurance years, the increase will be at least 20 %.

Contracts may be concluded for a maximum term of two years.

2. For contracts terminating between 31 December 1981 and 30 December 1982 and having a sum insured of DM 1 million or more, the premium rate received will be increased by at least 20 %. Where a contract has shown a claims ratio (claims to premiums received) of over 150 % over the last five insurance years, the increase will be at least 30 %.

Contracts may not be renewed for more than one year.

3. Contracts terminating after 31 December 1982 will be brought into line with premium rates in the current premium guidelines.
4. Paragraphs 1 and 2 do not apply to contracts rated in accordance with the recommendations of the Rating Committee. Such contracts shall continue to be referred to the Rating Committee.
5. Additional insurance will be provided at the premium rate received under the main contract.

III. For the purpose of adjusting premiums as provided for in this recommendation, multi-year contracts will be cancelled where claims in any year exceed the annual premium or the claims ratio (claims to premium received) has exceeded 150 % over the last five insurance years.

IV. Except where otherwise provided in sections I to III, the ‘Principles’ and the relevant explanatory circulars (‘F-GR-Rundschreiben’) apply. This applies in particular to:

- new business (point III of the ‘Principles’): New business in which the sum insured exceeds DM 50 million is to be referred to the Rating Committee,
- all the other particulars of contracts (point IV of the ‘Principles’),
- the enquiry and investigation procedure (point VIII of the ‘Principles’),
- exchange of information between managements (point X of the ‘Principles’):

In co-insurance the leading insurer informs participating co-insurers of the intended measure and secures their agreement.

V. In case of doubt, this recommendation is to be interpreted in such a way as not to jeopardize the goal of re-establishing stable and viable conditions.

⁽¹⁾ Grundsätze für die Tarifierung der industriellen und großgewerblichen Feuer- und FBU-Risiken (Principles for the rating of industrial and large-scale commercial fire and consequential loss insurance risks, as amended on 3 February 1977).

*ANNEX 2***Premium calculation clause ('Prämienberechnungsklausel')**

1. The ceding insurer shall transact industrial fire and consequential loss insurance covered by the reinsurance contract (including facultative business) in respect of risks situated in Germany in accordance with the 'Premium guidelines for industrial fire and consequential loss insurance' and the 'Non-binding recommendation to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business' issued by the Verband der Sachversicherer e.V. in force at the relevant time.
2. The reinsurer will check that paragraph 1 has been observed whenever a loss occurs on a fire and/or consequential loss insurance policy which for 100 % of the policy amounts to DM 1 million or more.
3. Where the agreement as set out in paragraph 1 is departed from, the reinsurer shall treat the under-rating as under-insurance and shall correspondingly reduce his contribution to the claim. However, the maximum extra share of the loss borne by the ceding insurer on 100 % of obligatory insurance treaties shall be limited to the simple amount of his own retention under the cession in question. This additional loss layer may not be reinsured elsewhere.
4. In case of doubt as to the level of the premium to be charged in accordance with the agreement at paragraph 1, the matter shall be referred for arbitration to the Rating Committee of the VdS.
5. The implementation of the above provisions shall be negotiated when this reinsurance treaty is renewed on 1 January of each year.

ANNEX 3

Translation
Original French

European Economic Community,
Commission,
Directorate-General for Competition

To Mr Favre, Secretary-General

Dear Sir,

Your letter to Mr von der Groeben concerning Regulation No 17 has been brought to my attention.

Subject to a subsequent examination of the entire matter of the application of the competition rules in the insurance sector, I consider that the two questions put by you in your letter call for the following answers:

1. As regards agreements concluded between insurance undertakings with a view to pooling statistical experience, I feel that it must be recognized that such agreements do not generally have the object of restricting, distorting or preventing competition within the Community. Were the generalized dissemination of statistical data to lead to the acceptance of a uniform tariff, however, the view might be taken that the agreement even indirectly has as its object a restriction of competition between the insurance undertakings party to it.
2. Regarding the dispensation from notification under Article 4 (2) (1) of Regulation No 17, this dispensation is only granted where the sole parties to the agreement are undertakings from one Member State and the agreement does not relate either to imports or exports between Member States. In the insurance field, the supervisory rules generally require a foreign undertaking wishing to do business in the territory of a Member State to constitute itself as a company governed by national law or to appoint a representative who is a national of the country in which the insurance business will be carried on. Consequently, it appears that, within the territory of that country, different insurance undertakings rank as nationals, thereby permitting application of Article 4 (2) (1) of Regulation No 17.

(Complimentary ending)

The Director-General for Competition
P. VERLOREN VAN THEMAAT

ANNEX 4

Extract from the 15th Annual Report 1962/63 (p. 108) of the Gesamtverband der Deutschen Versicherungswirtschaft e.V. (General Association of the German Insurance Industry)**3. Resident status for branch offices of foreign companies**

The treatment of branch offices of foreign companies as 'residents' for the purposes of Article 4 (2) (1) of Regulation No 17 appears to have once again been questioned.

In our last Annual Report ⁽¹⁾ we reproduced the Commission's statement that for branch offices resident status and hence the application of Article 4 (2) (1) of Regulation No 17 can be assumed, so that agreements within a Member State are not deprived of that status and so lose the dispensation from notification where resident branch offices of foreign companies are party to them.

Consideration is now being given to limiting this approach to cases where the establishment has the form of a company specially incorporated in the country concerned (legally independent subsidiary), but not applying it in what is by far the commonest situation in Germany of appointment of a representative with underwriting authority. The sole reason for this is the contractual consideration that a representative acts as such and not on his own account and that the foreign undertaking he represents derives rights and obligations under the agreements entered into by him. The result would be that purely national agreements would in future rank as 'agreements between undertakings in several Member States' and hence be notifiable.

However this assessment ignores economic reality. The agreements are purely national agreements to which the foreign undertakings wish to be party only in respect of the national territory and can only become party through a representative since they cannot engage in any business in Germany directly. The conditions for branch offices in Germany require such a high degree of legal and financial independence that there is no distinction between a subsidiary and a branch office run by a representative with underwriting authority when it comes to participating in agreements.

⁽¹⁾ Annual Report 1961/62, p. 69.

ANNEX 5

Expenses ratios, from a 1980 survey
(including 5 % fire protection tax)

Expenses ratio (%)	Fire insurance		Consequential loss insurance	
	Number of undertakings	Market share	Number of undertakings	Market share
under 20	7	5,88	2	7,13
20 – under 22	4	0,30	1	0,19
22 – under 24	1	0,57	1	0,08
24 – under 26	6	5,99	1	0,02
26 – under 28	3	0,67	5	0,97
28 – under 30	4	3,05	9	7,39
30 – under 32	9	15,42	9	19,97
32 – under 34	19	15,59	11	5,88
34 – under 36	10	7,24	17	20,70
36 – under 38	11	3,90	9	3,41
38 – under 40	6	8,82	6	6,79
40 – under 42	5	2,82	6	7,55
42 – under 44	5	0,69	7	4,35
44 – under 46	5	0,19	3	0,57
46 and over	6	0,40	8	0,27
Total	101	71,53	95	85,27

COMMISSION DECISION

of 7 December 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.930 — Milchförderungsfonds)

(Only the German text is authentic)

(85/76/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 Article 3 thereof,

Having regard to Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products ⁽²⁾, as amended by Regulation No 49 ⁽³⁾, and in particular Articles 1 and 2 thereof,

Having regard to the Commission Decision of 22 June 1982 to initiate proceedings in this case,

Having heard the Milchförderungsfonds pursuant to Article 19 of Regulation No 17 and Commission Regulation No 99/63/EEC of July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 ⁽⁴⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

- (1) The Milchförderungsfonds (Milk Promotion Fund — 'MFF') was set up by decision of the Presidents of the German Farmers' Union (Deutscher Bauernverband) and the German Raiffeisen Association (Deutscher Raiffeisenverband) on 1 January 1955 with the task of promoting the quality and sales of milk and dairy products. It is administered by an asso-

ciation ('Gesellschaft bürgerlichen Rechts') formed by the German Farmers' Union and German Raiffeisen Association and their respective Land (State) associations and the Central Association of Private Dairies (Zentralverband der Privatmolkereien).

- (2) Under the Guidelines of 1 January 1955 on the Financing and Use of the MFF, as last amended on 7 February 1973 ⁽⁵⁾, its resources may be used for the following purposes:

- (a) the financing of measures to enhance the quality of dairy products, to carry out systematic advertising, to improve the supply of liquid milk and dairy products to the consumer, and otherwise to promote the quality and sale of milk and dairy products;
- (b) the financing of such stocks of dairy products as are deemed necessary to regulate the domestic market by the Board of the MFF in consultation with the Federal Minister for Food, Agriculture and Forestry.

- (3) The MFF is financed by a voluntary levy on each litre of milk delivered to dairies, which is collected with the producer's consent by the milk cooperatives and private dairies. The amount of the levy is determined by the MFF Board and may not exceed DM 0,005. The levy is currently DM 0,0005. The levies are paid in full into a trust account of the local Land Farmers' Union or Raiffeisen Association or branch of the Central Association of Private Dairies and from there are transferred

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 30, 20. 4. 1962, p. 993/62.

⁽³⁾ OJ No 53, 1. 7. 1962, p. 1571/62.

⁽⁴⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

⁽⁵⁾ The Guidelines form part of the decision of 1 January 1955 setting up the MFF.

to an account designated 'Special fund to promote the dairy industry' held with the German Cooperative Bank (Deutsche Genossenschaftskasse) in Frankfurt. Once they have been collected, the levies cease to be the disposable property of the milk producers and are administered by the association of the MFF as their trustee. As trustee the MFF association merely administers the funds and is bound as to the purpose for which they are used.

- (4) The MFF is governed by a Board of Trustees (Kuratorium) composed of the Presidents of the German Farmers' Union, the Federal Association of Raiffeisen Trading Cooperatives (Bundesverband der Raiffeisen-Waren-genossenschaften), the Land Farmers' Unions and Raiffeisen Associations, the Central Association of Private Dairies and the Dairy Industry Association (Milchindustrieverband).

As the principal governing body of the MFF, the Board of Trustees every six months issues binding guidelines for the use of the Fund in the ensuing period, laying down the types of promotional measures to be supported, the budget for each type, the period during which the measures may be mounted, and the rates of support available. The Board also takes decisions on the day-to-day administration of the Fund. Support is not automatic, but is granted at the discretion of the Board in the light of the resources available for the relevant period and the rates of support in force.

- (5) In recent years the bulk of the Fund's resources have been spent on promoting exports of milk and dairy products to relieve pressure on the domestic market. Between 1978 and 1980, the total support for export promotion rose from DM 4 651 558,24 to DM 14 915 577,58. The latter figure comprised DM 6 083 083,43 on promoting exports to other Community countries, DM 922 722,27 on promoting exports to Community and non-member countries, and the remainder on promoting exports purely to non-member countries.

In 1981 support for export promotion totalled DM 9 484 609,59, of which DM 3 621 137,90 was for exports to Community countries, DM 1 262 010,29 for exports to Community and non-member countries, and the remainder for exports purely to non-member countries.

- (6) The support is available for exports of butter, cheese and whole milk powder, and to a lesser extent condensed milk, baby milk, and pasteurized milk-based drinks, liquid milk and cream. The rate of support varies according to the product, the country of destination and the period for which it is granted. In 1981, it ranged from DM 5,00 to DM 20,00 per 100 kg for butter and cheese and from DM 3,00 to DM 5,00 per 100 kg for whole milk powder.

- (7) The periods for which support is granted are not always evenly spread over the calendar year but in many cases are of fairly short duration. The promotional measures also tend to be targeted at specific Community countries, so that the support, too, is concentrated on such countries. In 1980 the MFF's expenditure on support for export promotion was distributed as follows:

(8) Country of destination	Quantity exported (in kg)	Support (in DM)
<i>Butter</i>		
United Kingdom	10 684 750,00	3 038 089,00
Italy, France	9 324 580,94	783 915,62
Non-member countries	34 754 424,16	2 506 137,10
Total support for butter:		6 328 141,72
<i>Cheese</i>		
Italy	8 614 539,70	1 086 236,18
United Kingdom, Ireland, Denmark	10 299 406,10	1 163 940,63
Greece	109 020,00	10 902,00
Non-member countries	36 450 761,52	3 914 199,86
Community and non-member countries	5 253 812,90	892 401,62
Total support for cheese:		7 067 680,29
<i>Whole milk powder</i>		
Non-member countries	19 758 527,00	987 926,35
<i>Condensed milk</i>		
Non-member countries	20 000 964,00	300 013,45
<i>Baby milk</i>		
Non-member countries	1 249 920,00	124 992,00
<i>Milk-based drinks</i>		
Non-member countries	2 548 437,10	76 453,12

Country of destination	Quantity exported (in kg)	Support (in DM)
<i>Liquid milk and cream</i>		
Community and non-member countries	1 012 345,40	30 370,65
Grand total:		14 915 577,58

(9) The total of DM 14 915 577,58 spent on support for export promotion in 1980 was divided between 150 German dairies.

(10) In 1981 export support was distributed as follows:

Country of destination	Quantity exported (in kg)	Support (in DM)
<i>Butter</i>		
United Kingdom	9 847 907,00	1 388 761,85
France	3 049 329,00	304 932,90
Greece	497 201,80	74 580,27
Non-member countries	15 364 220,86	1 123 474,98
Marketing expenditure		20 000,00
Total support for butter:		2 911 750,00
<i>Cheese</i>		
Italy	8 267 970,02	826 797,00
United Kingdom, Ireland, Denmark	8 172 271,01	1 026 065,88
Community and non-member countries	8 129 140,06	1 105 977,63
Non-member countries	22 515 544,25	2 089 144,10
Total support for cheese:		5 047 984,61
<i>Long-life milk and cream</i>		
Community and non-member countries	3 120 651,84	156 032,66
Non-member countries	10 189 029,42	305 670,90
<i>Milk-based drinks</i>		
Non-member countries	1 197 587,18	35 927,14
<i>Whole milk powder</i>		
Non-member countries	22 383 862,00	1 025 600,88
<i>Condensed milk</i>	190 560,00	1 643,40
Total support for milk:		1 524 874,98
Grand total:		9 484 609,59

(11) The total of DM 9 484 609,59 spent on support for export promotion in 1981 was divided between 117 German dairies.

(12) The Guidelines for the use of the MFF issued on 23 November 1979 and 4 December 1980 contain the following provisions regarding measures to promote exports of butter to the United Kingdom:

'A total sum of DM 3 million is set aside for the active marketing of German butter in Great Britain in 1980 and a sum of DM 2 million for such measures in 1981.

Suppliers of German butter to the British market will again be assisted to keep up their sales by a marketing campaign tailored to British conditions'.

(13) The corresponding provisions in the Guidelines issued on 12 December 1978 contain the following clarification:

'The monies are to be made available for a marketing campaign tailored to British conditions, aimed at making up the considerable ground lost by sales of German butter in 1977 and 1978'.

(14) The support measures to promote exports of semi-hard cheese to Italy were intended to encourage and assist exporters to increase their sales promotion beyond the normal level. For this purpose the assisted exporters are said by the MFF to have carried out in 1980 targeted sales promotion campaigns, special promotions and customer recruitment drives, with brand advertising forming the bulk of this promotional expenditure.

(15) Compared with the expenditure on export promotion, the use of the MFF for measures on the domestic market, namely, measures to stabilize the market and to promote sales in Germany, has steadily declined over a number of years. The amount spent on such measures fell from DM 5 597 733,63 in 1971 to DM 356 181,38 in 1981 (for centralized delivery of butter to the intervention agency).

II. LEGAL ASSESSMENT

A. Article 2 of Regulation No 26

(16) The activity of the MFF consists in promoting in a private capacity the sale of agricultural products listed in Annex II to the Treaty ⁽¹⁾. These products fall under Articles 1 and 2 of Regulation No 26, Article 1 of which provides that Articles 85 to 90 of the Treaty apply to the products, whilst Article 2 provides for exceptions to the application of Article 85 to the products. The first sentence of Article 2 (1) states that Article 85 (1) of the Treaty does not apply to agreements, decisions and practices relating to trade in the products which form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. The second sentence of Article 2 (1) provides that, in particular, the said Article shall not apply to agreements, decisions and practices of farmers, farmers' associations or associations of such associations from a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

(17) The decisions of the MFF are not covered by the exception contained in the first sentence of Article 2 (1) of Regulation No 26 for the following reasons.

(18) They do not form an integral part of a national market organization, since no such organization exists for the dairy sector in the Federal Republic of Germany. The national market organizations which used to exist in this sector have been replaced by the common organization of the market, the rules for which are laid down in Council Regulation (EEC) No 804/68 ⁽²⁾.

(19) Nor are the decisions of the MFF necessary for attainment of objectives set out in Article 39 of the EEC Treaty. The third paragraph of the preamble to Regulation No 26 shows that this exception is applicable only in so far as application of Article 85 (1) of the Treaty would jeopardize attainment of the objectives of the common agricultural policy in the sector concerned. Secondly, the means which may be employed in the dairy sector in order to attain the objectives of the common agricultural policy set out in Article 39 of the Treaty are stated in Regulation (EEC) No 804/68. Aid to promote exports of specific products to other Member States are in direct conflict with the common organization of the market (see judgment in Case 177/78 *Pigs and Bacon*, Commission v. McCarren [1979] ECR 2161, ground 14). Article 24 (1) of Regulation No 804/68 expressly prohibits aid whose amount is fixed on the basis of the quantity of the products concerned. This Article, it is true, applies only to State aids; whereas the support granted by the MFF is private. Nevertheless, the latter are equally detrimental to the proper application of the means provided for in Regulation (EEC) No 804/68 of attaining the objectives of the common agricultural policy. Therefore, the decisions of the MFF cannot be regarded as being necessary for the attainment of the objectives of Article 39 of the Treaty.

(20) In fact, they are prejudicial to the attainment of those objectives since they militate against the stabilization of markets provided for in Article 39 (1) (c) of the Treaty, which aims at a balance between supply and demand in order to ensure that Community products can be sold at prices that are profitable and do not fluctuate unduly. To attain this objective in the dairy sector, Regulation (EEC) No 804/68 introduced common prices and uniform arrangements for external trade in order to stabilize prices on the Community market. This stability would be undermined by subsidies on exports from one Member State to another. For this reason, national aids the amount of which is, as in the present case, fixed on the basis of the quantity of the products concerned were expressly prohibited by Article 24 of Regulation (EEC) No 804/68.

(1) List referred to in Article 38 of the Treaty, Chapter 4.

(2) OJ No C 148, 28. 6. 1968, p. 13.

(21) Since the two conditions for the exception provided for in the first sentence of Article 2 (1) of Regulation No 26 are not satisfied, the exception provided for in the second sentence is not applicable, since it refers to one particular form of the arrangements covered by the first sentence and requires that the case satisfy one of the two conditions for the exception in the first sentence as well as having the features described in the first sentence ⁽¹⁾.

(22) However, even if the special circumstances described in the second sentence were intended to constitute a separate exception, this additional independent test would still not be met. The association formed by the German Farmers' Union and German Raiffeisen Association and their respective Land associations and the Central Association of Private Dairies to administer the MFF is an association of trade associations serving the common economic interests of its members. It is not, however, an association of farmers' associations within the meaning of the second sentence of Article 2 (1) which, like farmers' cooperatives, carry on on behalf of their members common commercial activities in the field of the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products.

(23) The MFF maintains that it is a form of self-help group formed by German milk producers and that the levies collected from them are administered by the Board of Trustees in a purely fiduciary capacity.

(24) It is true that the association of the Fund is only a trustee and as such is bound as to the use to which it puts the Fund. The relationship between the milk producers and the associations which together form the association running the fund can also be described as one of principal and agent, whereby the milk producers have appointed the associations to administer the Fund on their behalf and to

employ it for the purposes they determine. This relationship does not, however, alter the nature of the trade associations and does not make them farmers' associations.

By their nature, the associations concerned are therefore not associations within the meaning of the second sentence of Article 2 (1) of Regulation No 26.

(25) In any case, the exception provided for in the special circumstances described in that provision is not applicable since, as shown above, the MFF's activity jeopardizes the attainment of the objective specified in Article 39 (1) (c) of the Treaty, namely the stabilization of markets.

(26) Hence, the exceptions provided for in Article 2 of Regulation No 26 are not applicable in the present case and do not, therefore, preclude the application of Article 85 of the EEC Treaty.

B. Article 85 (1) of the EEC Treaty

(27) The promotional activities of the MFF are determined by binding decision of the Board of Trustees, its governing body. Since the founding associations of the MFF, the German Farmers' Union and German Raiffeisen Association and their respective Land associations and the Central Association of Private Dairies have formed an association to administer the MFF, the decisions of the MFF are decisions of an association of associations of undertakings. Although Article 85 (1) does not expressly refer to decisions of associations of associations of undertakings, they are nevertheless covered by it, since for Article 85 (1) to be applicable it is only necessary that the decisions of an association of undertakings are binding on its members, as is the case here.

(28) The applicability of Article 85 (1) to decisions of associations of associations of undertakings is also confirmed by the second sentence of Article 2 (1) of Regulation No 26, which declares decisions of associations of farmers'

⁽¹⁾ Second report on competition policy, point 75, and Case 71/74 Fruho, [1975] ECR 563 at 579-580, where only the conditions referred to in the first sentence are mentioned as the tests for exception provided for in Regulation No 26.

associations under certain conditions to be exempt from Article 85 (1), thus implying that normally such decisions do fall within the scope of the Article.

- (29) The decisions by the MFF have as their object and effect a distortion of competition within the common market in so far as the undertakings which benefit are directly enabled to reduce their selling prices. The support the Fund gives for exports to other Member States artificially strengthens the financial position of the German exporters receiving the support relative to their competitors in other Community countries who do not receive such payments. The support helps the exporters to promote sales of their products on export markets, i.e. to penetrate such markets or expand their sales there, in that they can offer their customers on those markets more favourable conditions of sale than they would be able to do if the support were not granted.
- (30) In so far as the support for sales promotion and advertising was applied to semi-hard cheese in Italy, the competitive position of the supported German exporters was also strengthened: these measures related to particular brands, and could be applied without passing the resulting costs indirectly on to the selling price.
- (31) In so far as they provide for support for exports to other Community countries, the decisions of the MFF are also likely to affect trade between Member States. The argument that the support helps expand trade between Member States does not rebut the presumption of an adverse effect on inter-State trade, since the EEC Treaty does not seek to bring about an increase in trade as an end in itself, but rather to create a system of undistorted competition.
- (32) The distortion of competition within the common market produced by the export support is appreciable. German exporters receive substantial amounts (DM 6 076 181,43 in 1980) which they are able to use to finance sales

promotion measures and to improve their conditions of sale on export markets in the Community.

- (33) That the amounts paid out by the MFF do, in fact, represent appreciable financial assistance to exporters is clear from a letter from the Central Association of the Private Dairy Industry (Zentralverband der Privaten Milchwirtschaft e.V.), Bonn, to the MFF on 25 April 1973, which expressly mentions that the export had significantly assisted and boosted exports and had helped to increase Germany's market share for certain products on foreign markets.
- (34) This is also borne out by the Guidelines for the use of the MFF issued on 12 December 1978, 23 November 1979 and 4 December 1980, which stated that the support for promoting butter exports to the United Kingdom, which was worth DM 3 038 089,00 in 1980, was intended for *active* marketing tailored to British conditions to help exporters of German butter to the British market to keep up their sales levels and make up the considerable ground they had lost in previous years.
- (35) In this connection the degree to which the export support strengthened the position of German butter on the British market is very revealing. Almost all exports of German butter to the United Kingdom in 1980 and all those in 1981 were supported (10 685 of 11 164 tonnes in 1980⁽¹⁾ and 9 847 tonnes compared with only 9 041 tonnes of recorded imports in 1981⁽²⁾). Once the MFF money for such support had run out and they no longer received any form of support, the German exporters were unable to sell butter on the UK market. In other words, without the export support Germany's share of the UK butter market would have been close to zero. In fact, German brands accounted for 4,1 and 3,2 % of the UK market in 1980 and 1981 respectively⁽³⁾. The export support thus can be said to have increased the share of German butter

⁽¹⁾ NIMEXE 1980.

⁽²⁾ NIMEXE 1981.

⁽³⁾ Source: Butterdane.

on the UK market by 4,1 and 3,2 % respectively. This confirms the presumption of an appreciable distortion of competition.

(36) The support for exports of butter to the United Kingdom, which can already be seen to have produced an appreciable distortion of competition within the common market, was only part of such support, which also covered other products and other Community countries. This other support accentuated the anti-competitive effect of the MFF's activity. Against the export support for butter of DM 3 038 089,00 in 1980 and DM 1 388 761,85 in 1981, other export support came to DM 3 034 092,43 in 1980 and DM 2 232 376,05 in 1981 (with support for cheese exports to Italy alone of DM 1 086 236,18 in 1980 and DM 826 797,00 in 1981). In addition, the MFF spent DM 428 856,26 in 1980 and DM 1 262 010,29 in 1981 on support for exports to Community and non-member countries, producing a further distortion of competition.

(37) The export support for German producers clearly must have appreciably reduced the sales outlets for their competitors who did not receive such support.

(38) The situation would be different were the export support to be used for advertising and sales promotion of a general nature that is not brand orientated. In such a case the promotion would benefit all competitors and there would not be an appreciable distortion of competition. However, the promotion would not have to seek to discourage the foreign consumer from buying dairy products not from Germany or to disparage such products in the eyes of the foreign consumer. Nor must it commend German dairy products to the foreign consumer simply on the basis of their national origin.

(39) Likewise, there would not be an appreciable restriction of competition if the advertising stressed the special features of the dairy products in question or used the special character-

istics of particular kinds of dairy product as a selling point, even if those kinds were typically German, since such advertising is too indefinite to have a practical effect on competition.

(40) It is the practice of the MFF to adjust the level of its support to changing market circumstances. It is possible therefore that, in some years, the MFF reduces its support for exports to other Community countries to such an extent that the actual repercussions of its activity on trade between Member States during the period are less substantial.

(41) Such reductions do not, however, alter the fundamental nature of the support system set up by the MFF. Although there may be fluctuations in the level of such support over time, the system is, as the Commission's findings for 1980 and 1981 show, intrinsically liable to affect competition and inter-State trade to an appreciable extent. The MFF's activity as it relates to the common market therefore constitutes an infringement of Article 85 (1) of the EEC Treaty.

C. Article 85 (3) of the EEC Treaty

(42) An exemption under Article 85 (3) of the Treaty cannot be granted, if only because the MFF's activity was not notified to the Commission in accordance with Article 4 (1) of Regulation No 17. Since decisions by the MFF relate to exports between Member States and more than two undertakings are party to them, they do not fall within Article 4 (2) (1) or (2) whereby under certain conditions an exemption can be granted without notification.

(43) Even if the MFF's activity had been notified, an exemption under Article 85 (3) of the EEC Treaty could not be granted, since at least one of the conditions for exemption is not satisfied: the MFF's activity contributes neither to improving the production or distribution of goods nor to promoting technical or economic progress.

- (44) Although the support for exports to other Community countries helps to increase the range and quantity of products on the markets of the countries to which they are exported by making it possible for German exporters receiving such support to sell their products on those export markets or to expand their sales there, this artificial increase in supply at the expense of the sales of competitors cannot be regarded as a genuine improvement in the distribution of goods within the meaning of Article 85 (3),

of the Milchförderungsfonds, there remains a possibility of the support being used by the recipient undertakings to reduce selling prices or for advertising and sales promotion measures

- which are brand-orientated,
- which seek to discourage the buying of dairy products not from Germany or to disparage such products in the eyes of the foreign consumer, or
- which commend the dairy products in question to the foreign consumer simply on the basis of their national origin.

HAS ADOPTED THIS DECISION:

Article 1

The decisions of the Milchförderungsfonds on the granting of support for exports within the common market constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The Milchförderungsfonds shall refrain in future from taking any decisions on the granting of support for exports within the common market, so long as, for want of appropriate precautions on the part

Article 3

This Decision is addressed to:

Milchförderungsfonds,
Andreas-Hermes-Haus,
Godesberger Allee 142-148,
D-5300 Bonn 2.

Done at Brussels, 7 December 1984.

For the Commission

Frans ANDRIESEN

Member of the Commission

COMMISSION DECISION

of 10 December 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.717 — Uniform Eurocheques)

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

(85/77/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 6 and 8 thereof,

Having regard to the notification on 7 July 1982, made pursuant to Article 4 of Regulation No 17 on behalf of the national bank organizations which make up the Eurocheque Assembly and the Eurocheque Working Group by the chairman of those two bodies, of the Package Deal arrangements concerning uniform Eurocheques made out abroad in local currency, which came into force on 1 May 1981,

Having regard to the summary of those arrangements published ⁽²⁾ pursuant to Article 19 (3) of Regulation No 17, which drew no observations from interested third parties,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

This proceeding concerns the Package Deal arrangements relating to uniform Eurocheques made out abroad in local currency, which were entered into on 31 October 1980 and put into effect from 1 May 1981 onwards by the banks, savings banks and other credit institutions participating in the Eurocheque

system. The term 'bank' as used in this Decision embraces the various institutions which are members of the system.

A. The Eurocheque system

- (1) The Eurocheque organization ('ec') was set up in 1968 on the private initiative of European financial institutions. Its aim is to meet the need for international payment systems resulting from the growth of tourism and business travel within Europe, by making available a means of payment which customers may use both in their country of origin and in other countries.
- (2) The Eurocheque system is open to all European credit institutions, and does not impose any formal legal framework on them. It is based on two instruments: the cheque and the cheque guarantee card. The drawee bank guarantees any payee bank reimbursement of a cheque presented with the corresponding card, up to a predetermined maximum amount.

B. The parties

- (3) The 'issuing' institutions supply their customers with cheque guarantee cards and issue cheques which may be used within the Eurocheque system.
- (4) In many countries the issuing institutions have gradually, since 1974, adopted a standardized appearance for the guarantee card and the guaranteed Eurocheque. Within the European Community, uniform instruments of this kind are issued in Belgium, Denmark, Germany, France (by the Crédit Mutuel and the Banques Populaires), Ireland, Luxembourg, the Netherlands and the United Kingdom.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 281, 18. 10. 1983, p. 2.

Non-uniform instruments are issued by banks in France and Italy; those still issued in Ireland will be entirely replaced by uniform instruments in 1985; their issue in the United Kingdom is declining.

- (5) 'Accepting' institutions do not issue guarantee cards or cheques which may be used within the Eurocheque system, but cash guaranteed cheques at their counters. Within the European Community, this system is applied in Greece.

- (6) The conditions of membership for Eurocheque payee banks include the following:

- no limitation on the number of cheques cashed at the same time or on the frequency of encashment may be imposed by the payee bank;
- maximum rates of commission must not be exceeded.

If exchange controls are in force in a country with issuing institutions any failure by the drawer of the cheque to observe them cannot provide grounds for refusing the guarantee to the foreign Eurocheque payee bank.

- (7) At the end of 1983, the Eurocheque system encompassed over 9 000 issuing institutions and some 6 000 accepting institutions situated in 39 European and Mediterranean countries, and numbered more than 26 million customers in possession of a uniform Eurocheque guarantee card. In the European Community alone, the number of cards issued was as follows:

— *Uniform Eurocheque cards*

— Belgium:	2 500 000
— Denmark:	113 400
— Germany (FR):	17 500 000
— France:	1 144 536
— Luxembourg:	92 000
— Netherlands:	2 267 000
— United Kingdom:	192 262
	<u>23 809 200</u>

— *Non-uniform cards*

— France:	2 740 000
(Carte Bleue)	
— Ireland:	629 202
(Cheque Card)	
— Italy:	895 000
(Carta Assegni)	
— United Kingdom	1 480 819
(Eurocheque Encashment Card)	
	<u>5 745 000</u>

- (8) In 1982, more than 15 million uniform Eurocheques issued by banks in six Member States were drawn in local currency in other Community Member States.

Uniform Eurocheques in 1982

Issued by in	Drawn in local currency	
	in B, DK, D, F, IRL, I, L, NL and UK	in other countries
Belgium	2 399 635	706 345
Denmark	247 620	149 015
Germany	8 200 395	9 100 928
France	1 137 106	576 549
Luxembourg	231 163	35 952
Netherlands	3 045 109	1 642 564
	<u>15 261 028</u>	<u>12 211 353</u>

Taking an average amount of between 91 and 92 ECU per cheque, the total number of uniform Eurocheques drawn in 1982 in one Member State on a bank in another Member State represented some 1 400 million ECU.

- (9) In 1983, some 28 million uniform Eurocheques were drawn abroad, 90 % of which were drawn by German, Dutch and Belgian customers (17,5, 4,8 and 2,9 million cheques respectively) and more than 57 % were cashed in Austria, France, Italy and Spain (4,6, 4,1, 3,9 and 3,5 million cheques respectively).

C. Eurocheque governing bodies

- (10) The ec Working Group is the decision-making and coordinating body on which the issuing institutions are represented, on a voluntary basis, by a maximum of four persons per country, with the exception of the country organizing the meeting, one of whose representatives is appointed chairman. Each country has only one vote. Decisions must be unanimous and are binding on all institutions participating in the Eurocheque scheme. The ec Working Group decides, among other things, the maximum amounts of commission which may be levied by the banks for encashing guaranteed cheques.

- (11) The ec Security Committee is a standing working party set up by the ec Working

Group to promote security within the Eurocheque system and act as a conciliation service in the case of disputes between member banks. Its decisions, other than conciliation recommendations, must be ratified by the ec Working Group before taking effect.

- (12) The Eurocheque Congress, comprising all the representatives from countries with issuing and accepting institutions, meets at the instigation of the ec Working Group. Between meetings of the Congress, the accepting institutions are kept informed of decisions taken by the ec Working Group via Eurocheque International.
- (13) Eurocheque International (International Eurocheque Secretariat) in Brussels is responsible, in cooperation with the chairman in office, for preparing the proceedings and executing the decisions of the ec Working Group.
- (14) The Eurocheque Community brings together the member institutions of the Eurocheque system which use the uniform Eurocheque and the uniform guarantee card. They are represented by their national organization or association. Only one organization per country is admitted as a member of the Eurocheque Community. The Eurocheque Assembly is the decision-making body of the Eurocheque Community. It appoints a Secretary-General who is responsible for the day-to-day running of the Eurocheque Community.

D. The package deal which came into force on 1 May 1981

- (15) The encashment by a bank of a cheque drawn on a foreign bank involves administrative costs and a cash drain, since the sum paid to the bearer of a foreign cheque is not reimbursed to the payee bank until some time afterwards. To remunerate that service, most of the payee banks initially charged a maximum commission of two Swiss francs (later increased to Sw F 2,50), or the equivalent, on Eurocheques presented to them. However, particularly in countries where banks cashed a large volume of Eurocheques drawn by foreign visitors, higher charges were often applied in the form of a commission in excess of the maximum, an unfavourable rate of exchange, extra costs (brokerage, charge on the cheque, etc.), or also, in the case of traders accepting foreign Eurocheques, 'encashment commissions', which were sometimes very high. Moreover, an increasing number of banks in countries with a large tourist trade were starting to refuse to cash foreign Eurocheques because of the costs involved.
- (16) At its meeting on 9 May 1980, the ec Working Group decided to introduce new arrangements concerning uniform Eurocheques, which were entered into on 31 October 1980 and came into force from 1 May 1981 onwards for a five-year period, renewable automatically from year to year.
- (17) At present the new provisions are applicable to the countries with issuing institutions; they may be extended to all countries with accepting members which would be willing to open up the trading sector to uniform Eurocheques. They include the following:
 - (a) the trading sector (shops, stores, petrol stations, hotels and restaurants) must be officially prepared to accept uniform Eurocheques and must be informed of the guarantee terms;
 - (b) the uniform Eurocheques must be made out in the currency of the foreign country visited;
 - (c) a commission of 1,25 % of the amount of the cheque, with no minimum, will be applied to all uniform Eurocheques made out abroad in local currency. This commission will no longer be charged by the cashier at the time of encashment or by the retailer when accepting the cheque, but will be paid when the cheque is reimbursed by the clearing centre (see, however, Point 22 below).
- (18) The use of uniform instruments in the trading sector of any country must be the subject of an agreement between a central organization of that country (banking association, for countries with accepting institutions or national Eurocheque liaison office, for countries with issuing institutions) and the Eurocheque Community. Specific matters (for instance concerning legislation on cheques) are
 - (a) *Opening-up of the non-banking sector*

dealt with by bilateral agreements between the members of the Eurocheque Community and the central organization in the country concerned.

- (19) The drawee bank guarantees payment, up to the maximum guaranteed amount, of uniform Eurocheques drawn on itself and presented in the trading sector in countries in the Eurocheque system, on condition that:

- the signature, the name of the bank and the account number shown on the cheque correspond to those on the guarantee card;
- the number of the guarantee card is written on the back of the cheque;
- the guarantee card is valid on the date the cheque is made out;
- a cheque drawn abroad is presented to the drawee bank within 20 days of the date it was drawn. This condition is met if the Eurocheque reaches the Eurocheque clearing centre of the drawee bank within that time.

- (20) The maximum guaranteed amounts are fixed by common agreement between the organizations concerned and the Eurocheque Assembly. Uniform Eurocheques presented in the trading sector must be made out in the currency of the foreign country visited.

- (21) The organization concerned undertakes to ensure that no commission is charged on Eurocheques presented for payment. If a national system of bank charges applies to the payment of cheques, the banks in the country concerned undertake to charge no special commission to persons accepting uniform Eurocheques.

- (22) Some institutions, however, apply the Eurocheque agreements only in part. In France, for instance, one regional branch of the Crédit Agricole still charges a 1 % commission when encashing foreign uniform Eurocheques, while the Groupement Carte Bleue banks have only opened their trader network to Eurocheques on an experimental basis and on the same terms as to Carte Bleue and VISA cardholders.

(b) *Clearing of uniform Eurocheques*

- (23) Clearing of uniform Eurocheques drawn abroad in local currency used to mean the charging of commission by the payee bank, conversion into the currency of the country of origin, the dispatch of cheques individually by the payee bank to the drawee bank, and transfer by the latter of the amount of the cheques cashed. In order to rationalize and simplify the clearing of uniform Eurocheques made out in the currency of a foreign country, all these cheques are now centralized. In each country the clearing centres, of which there are three in Belgium, 15 in Denmark, three in France, two in Ireland, 17 in Italy and five in Luxembourg, receive from the payee banks the Eurocheques drawn on foreign banks, send these Eurocheques to the corresponding centres of the drawee banks and, where applicable, receive from these centres the Eurocheques made out abroad by customers of their country's banks. Such international clearing represents between 5 % and 10 % of the overall Eurocheque clearing; Eurocheques drawn at the national level are integrated in the national clearing systems.

- (24) To be included in this centralized international clearing system, the cheque must be a uniform Eurocheque made out in the currency of the foreign country visited and must not exceed the maximum amount agreed upon for clearing. This amount and the maximum guaranteed amount are as follows for the countries in the European Community (as from 1 January 1985 as regards Germany, Greece, Ireland and Italy):

	Maximum amounts				Acceptance by trade
	for clearing		guaranteed		
Belgium/Luxembourg	Bfrs	12 000	Bfrs	7 000	(****)
Denmark	Dkr	2 100	Dkr	1 200	(***)
Germany (FR)	DM	600	DM	400	(****)
Greece	—		Dr	17 000	(*)
France	FF	1 700	FF	1 000	(**)
Ireland	£ Irl	200	£ Irl	100	(**)
Italy	Lit	400 000	Lit	250 000	(**)
Netherlands	Fl	500	Fl	300	(****)
United Kingdom	£	160	£	75	(**)

(*) In Greece and Cyprus the trading sector is not officially opened to Eurocheque holders.

(**) and (***) Good to excellent acceptance by traders.

(****) Eurocheques are used as a national payment system and are largely accepted by the trading sector.

If the amount of a uniform Eurocheque exceeds the maximum amount for clearing, the centre returns the cheque to the payee bank and asks it to forward the cheque to a correspondent in accordance with standard procedures.

(25) The clearing centre of the payee banks is authorized to debit the accounts which the clearing centres of other countries maintain with it (loro accounts), by a single entry, with the total amount of the corresponding consignment of uniform Eurocheques, plus 1,25 % for remuneration. An effective date of 'two working days after the date of dispatch' will be applied to these debits. In the case of consignments of cheques with an overall value of more than the equivalent of SwF 15 000, that effective date will apply only if these consignments are notified in advance by telex to the clearing centre of the country of the drawee banks, to ensure that it will have sufficient funds available.

(26) The conversion is made by the clearing centre of the drawee banks at the market rate. The customer's account is debited by clearing in the customary national way.

(27) The above provisions concern only the relations between the payee banks and their national clearing centres and between the clearing centres of the various countries themselves. They do not cover internal relations between the clearing centres and their country's drawee banks or between the drawee banks and their customers.

(28) The issuing institutions' clearing centres, when clearing Eurocheques drawn abroad in local currency, debit the drawee banks — and these debit their customers' accounts — with the 1,25 % commission for the foreign payee bank and, in some cases, with a supplementary commission to cover their own processing and clearing costs:

Commissions charged by clearing centres

— Belgium:

2,25 % (Eurocheques drawn in Denmark, Germany);

2,50 % (drawn in Ireland, Netherlands, United Kingdom);

2,75 % (drawn in France, Italy, etc.);

— Denmark:

Dkr 15 per Eurocheque, whatever the amount;

— Germany:

1,75 % with a minimum of DM 2,50 per Eurocheque;

— France:

2,25 % (Crédit Mutuel);

— Ireland:

1,25 % plus 23 pence per Eurocheque (7p stamp duty, 4 pence for the clearing centre and 12 pence for the drawee bank);

— Luxembourg:

1,25 % plus a commission of Lfrs 35 per cheque; if the cheque is drawn in Belgium, only the latter commission is charged;

Netherlands:

1,25 %;

United Kingdom:

1,25 % plus 28 pence per Eurocheque (Midland Bank).

In the countries outside the agreement (including Greece), the paying bank charges a direct commission equal to Sw F 2,5 in lieu of the 1,25 % commission.

II. LEGAL ASSESSMENT

A. Article 90 (2)

(29) The persons who made the notification claimed that Article 90 (2) applies. That provision is not applicable in this case. The Eurocheque system was set up on the initiative of private financial institutions (point 1). Neither those institutions, nor the association set up as a result of their initiative, were at any time entrusted with the operation of a service of general economic interest by a measure adopted by the public authorities⁽¹⁾. This view cannot be affected by the fact that the Eurocheque system operates with the knowledge, and indeed the express approval, of the competent authorities in the countries concerned, nor by the fact that in some countries there has been an explicit legal act in favour of the system or part of it.

(30) Even if the Eurocheque system and its issuing or accepting members had been entrusted by an international authority or a group of national public authorities with the provision of an international means of payment, creating paper money, the application of the Community's competition rules to such credit institutions could not in any way obstruct fulfilment of that hypothetical special assignment.

B. Article 85 (1)

(a) *Undertakings and associations of undertakings*

(31) As economic entities engaging in activities of an economic nature, banks and other credit institutions are undertakings within the meaning of Article 85 of the EEC Treaty. The Eurocheque system and its various governing bodies (points 10 to 14), to which belong a large number of such institutions and their associations within a common organization, constitute an association of undertakings within the meaning of Article 85.

(b) *Impact on intra-Community trade*

(32) The presentation of a cheque in a foreign country from the home country of the institution which issued the cheque. Any agreement or decision which aims to fix the price and conditions of such transfers covering substantial **international** and intra-Community transactions (ECU 1 400 million in 1982, point 8) is by its very nature apt to affect trade between Member States, the concept of 'trade' having a wide scope which includes monetary transactions (Züchner Judgment, paragraph 18).

(c) *Restriction of competition*

(33) The agreements and decisions within the Eurocheque system, which have as their object the fixing of the price of a service, represent restrictive practices explicitly caught by **the** general prohibition contained in Article 85 (1) of the EEC Treaty. They have as their effect the prevention of competition between the banks in any country and in particular in any Member State in the encashing of **uniform Eurocheques** drawn on banks in other countries. The ec Working Group decides in a direct and uniform manner on the amount of commission to be charged or received by banks for the encashment of guaranteed cheques drawn on foreign banks within the Eurocheque system (point 10). It was also the ec Working Group which

⁽¹⁾ See Judgment of the Court of Justice of the European Communities of 14 July 1981 in Case 172/80, Züchner v. Bayerische Vereinsbank, paragraph 7 [1981] ECR 2021 *et seq.*, p. 2030.

decided to introduce the new arrangements which came into force on 1 May 1981 (point 16) concerning, in particular, the fixed and uniform commissions to be paid to the payee banks for uniform Eurocheques drawn in local currency on a bank in a foreign country (points 17 (c) and 25).

- (34) Competition is also prevented between issuing banks in the same Member State as to the maximum guaranteed amount. No bank may offer its customers a guaranteed amount larger than that adopted by the national Eurocheque organization in agreement with the Eurocheque Assembly (point 20), which applies to all uniform Eurocheques drawn in that country (point 24).
- (35) In view of the increasing interpenetration of national markets within the common market and the volume and overall value of uniform Eurocheques drawn in each Member State by visitors from other Member States (points 8 and 9), a price agreement of this kind may appreciably affect competition on the currency exchange market between Member States.

C. Article 85 (3)

- (36) The four criteria for exemption under Article 83 (2) are met in this case, for the reasons set out below.

1. *Improvement of the payment system*

- (37) The Eurocheque system itself, and the agreements and decisions which came into force on 1 May 1981, contribute to improving payment facilities within the common market.
- (a) Cheques guaranteed under the Eurocheque system may be drawn outside the country of the institution which issued them and cashed at banks established in several foreign countries, including the Community Member States.
- (b) In their uniform format, adopted by the majority of issuing institutions, Eurocheques may be drawn in the local currencies of several countries, including the Community Member States. Under the

agreements and decisions in force since 1 May 1981, these uniform Eurocheques are, subject to certain exceptions (point 22) now paid in full, without deduction of any commission, by the payee banks (point 17 (c)), which makes them more acceptable to the trading sector. In the case of certain banks which only apply the agreements in part, bearers of Eurocheques are or will be informed, in any event, of the cost of encashing a foreign uniform Eurocheque.

- (c) Centralized clearing makes it easier for the payee banks to obtain reimbursement of the foreign uniform Eurocheques which they accept. This advantage is particularly important to credit institutions in countries with a heavy tourist trade.

2. *Benefit to users*

- (38) The users of the Eurocheque system obtain a fair share of the resulting benefit.
- (a) In practice all European currencies are made available to holders of Eurocheques. They may draw cash as needed from credit institutions in any foreign country they are visiting. For such transactions they enjoy the benefit of the guarantee provided by their own bank.
- (b) They also enjoy the benefit of a period of interest-free credit before the cheque drawn abroad is cleared.
- (c) Holders of uniform Eurocheques may also use them to pay their expenses direct in the trading sector of foreign countries. The Eurocheque will be honoured to the amount drawn in local currency, with no deduction made except in special cases (point 22). The drawer will, in principle, obtain a better rate of exchange since the conversion into his own currency is made at the market rate by the clearing centre in his country (point 26). In the case of certain banks which only apply the agreements in part, bearers of Eurocheques are or will be informed, in any event, of the cost of encashing a foreign uniform Eurocheque.

- (d) Traders who accept these cheques also benefit from the guarantee by the drawee bank. They also have the assurance that uniform Eurocheques will be reimbursed to them in full by banks in their country, without any commission being charged for cashing them (point 21) except in special cases (point 22 and (c) above). Their commercial activities are stimulated by the possibility of direct payment by Eurocheques.

3. *Indispensable restrictions*

- (39) The restrictions imposed on the issuing and accepting credit institutions, are indispensable to the proper functioning of the Eurocheque system.

- (a) The encashment in a foreign country of a cheque drawn on a particular bank is a service that the latter cannot provide unless it has branches or correspondents in that foreign country. By accepting cheques issued by banks situated abroad, the payee banks are providing to persons who are neither their own customers nor those of other banks in that country a service which is neither balanced nor compensated by an equivalent reciprocal service (see statistics at points 8 and 9). When such a service is provided collectively by all the banks in one country to the customers of banks in other countries, it is indispensable that the terms and conditions for accepting and clearing the cheques concerned be determined in common between the issuing and the accepting institutions of the various centres involved.

- (b) Within the framework of such an agreement, the common and uniform determination of the remuneration for this service, and for the drain of cash which it involves for the payee banks, is inherent in and ancillary to the cooperation between the banks and their national clearing centres and between the clearing centres, which enables the acceptance and international clearing of cheques drawn abroad. Variations in commissions from one bank to another would imply bilateral negotiations between the 15 000 banks which are parties to the scheme so that each accepting bank may agree with each

issuing bank the remuneration it wishes to receive. Any centralized clearing would thus be made impossible and the cost of processing Eurocheques would substantially increase.

- (c) The obligation of the accepting banks not to exceed the maximum rates of commission laid down (point 6) is essential in order to preclude the levying of additional charges or commissions, such as VAT, local tax, stamp duty, collection fee and the like.

- (d) The uniform fixing of the maximum guaranteed amount in a given country (points 20 and 24) is indispensable in order to avoid unnecessarily complicating the system and making centralized, simplified clearing virtually impossible. The system would be unworkable if every person accepting a uniform Eurocheque — in the banking sector and particularly in the non-banking sector — had to make sure each time that the specific maximum amount guaranteed by the issuing institution concerned had not been exceeded.

- (40) This Decision does not cover any national agreements between banks or decisions by national banking associations to fix the level of **commission** that individual issuing institutions in the country concerned should charge to **their** customers. National agreements or decisions of that type, which would eliminate residual competition between institutions issuing uniform Eurocheques (see also point 43 below), could not in any circumstances be regarded as indispensable within the meaning of Article 85 (3) (a) of the Treaty.

4. *Scope for competition*

- (41) The agreements and decisions concerned do not afford the credit institutions which issue uniform Eurocheques the possibility of eliminating competition in respect of a substantial part of international means of payment. Any person travelling to a foreign country generally has a choice between several means of payment, such as:

- cash in the currency of the country visited, the country of origin or other countries,

- travellers' cheques denominated in one or other of these currencies,
- postal payment orders,
- credit cards,
- cards for automatic teller machines, which can be used in more than one country, and
- Eurocheques.

(42) The agreements and decisions in question do not govern relations between the drawee banks and their customers. Scope for competition therefore remains in the relations between each issuing institution and its customers. The extent to which commissions are passed on to the customers is left to the discretion of the drawee bank (point 27). The amount of commission charged to the customer may thus, in theory at least, be lower than the commissions remunerating the services of the foreign payee bank and of the drawee bank's clearing centre.

(43) However, the above assessment applies only if the agreements and decisions in question are not supplemented by national agreements or decisions of associations governing relations between the banks and their customers on the question of commissions (see point 40 above). The customer must be free to approach the credit institution of his choice to open an account and obtain a cheque-book. This freedom of choice of the customer would be illusory if all credit institutions in the same country provided the same service at the same price.

D. Regulation No 17

(44) Pursuant to Article 6 (1) of Regulation No 17, this Decision shall take effect from 7 July 1982, the date of the notification.

(45) In accordance with Article 8 (1) of Regulation No 17, the exemption resulting from this Decision shall be granted for the initial duration of the Package Deal agreement (point 16), that is to say until 30 April 1986.

(46) In order to ensure transparency of the market and the customer's freedom of choice, it is necessary that customers be precisely

informed of the procedure for, and cost of, using uniform Eurocheques abroad.

In fact, the drawing of a uniform Eurocheque in local currency in a foreign country may be subject to a direct commission charged by certain accepting institutions which apply the agreement only in part (point 22). As a rule, it also involves, in addition to a 1.25 % commission paid to the accepting institution, other commissions charged by the national clearing centre and/or by the issuing institution itself, such as:

- a minimum commission for each uniform Eurocheque drawn,
- an exchange commission, levied by the clearing centre at the time of conversion into the drawer's currency,
- handling and clearing commissions, etc.

(47) Customers should be informed of these various components of the cost by the posting up of notices in banks, by the issuing of leaflets or by any other suitable method. Similarly, the statement sent to the customer when debiting his account with the operation should, in principle, clearly indicate

- the rate of exchange applied for converting the amount drawn in a foreign currency,
- the 1,25 % commission paid to the payee bank,
- the additional commissions charged by the clearing centre and/or the drawee bank.

(48) Accordingly, the national Eurocheque associations in the Community should be required, pursuant to Article 8 (1) of Regulation No 17, to order their members, in so far as they have not done so already, to inform their customers in exact detail

- as accepting institutions, of any cost which may be incurred for encashing uniform Eurocheques drawn in local currency on a foreign bank,
- as issuing establishments, of the particulars of the costs incurred in using uniform Eurocheques abroad.

The national associations concerned should forward to the Commission the text of the cir-

culars sent to their members pursuant to this Decision.

- (49) To enable the Commission to verify that the conditions for the exemption continue to be met throughout its duration, Eurocheque International should be required to bring to the immediate notice of the Commission any addition or amendment made to the agreements and decisions notified, together with any new agreements or decisions adopted by Eurocheque's governing bodies concerning uniform Eurocheques drawn abroad in local currency,

HAS ADOPTED THIS DECISION:

Article 1

In accordance with Article 85 (3) of the Treaty establishing the European Economic Community, the provisions of Article 85 (1) are hereby declared inapplicable for the period from 7 July 1982 to 30 April 1986 to the Package Deal agreement concerning uniform Eurocheques drawn abroad in local currency, which was entered into on 30 October 1980 and came into force on 1 May 1981, subject to the observance of the provisions of Article 2.

Article 2

1. The national associations in the European Economic Community to which this Decision is addressed, shall require their members, in so far as they have not already done so, to inform their customers in exact detail

- as accepting institutions, of any costs which may be incurred for encashing uniform Eurocheques drawn in local currency on a foreign bank,
- as issuing institutions, of the particulars of the costs incurred in using uniform Eurocheques abroad.

Those national associations shall forward to the Commission, within two months from notification of this Decision, the text of the circulars they have sent to their members for this purpose.

2. Eurocheque International shall inform the Commission forthwith of any addition or amendment to the agreements and decisions notified, and of any new agreements or decisions adopted by Eurocheque's governing bodies relating to uniform Eurocheques drawn abroad in local currency.

Article 3

This Decision is addressed to the following associations:

1. Eurocheque International, avenue des Arts 40, bte 3, B-1040 Bruxelles;
2. Association française des banques, 18, rue La Fayette, F-75009 Paris;
3. Associazione bancaria italiana, Piazza del Gesù 49, I-00186 Roma;
4. Bank Cheque Card Committee, 10 Lombard Street, UK-London EC3V 9AP;
5. Bundesverband deutscher Banken e.V., Mohrenstraße 35/41, D-5000 Köln 1;
6. Communauté belge Eurocheque, avenue des Arts 40, bte 2, B-1040 Bruxelles;
7. Communauté luxembourgeoise Eurocheque, Boîte postale 241, L-Luxembourg;
8. Den Danske Bankforening, Amaliegade 7, DK-1256 København K;
9. Irish Banks' Standing Committee, Nassau House, Nassau Street, IRL-Dublin 2;
10. Stichting Bevordering Chequeverkeer, Postbus 9120, NL-1006 CB Amsterdam;
11. Bundesverband der deutschen Volksbanken und Raiffeisenbanken, Heussallee 5, D-5300 Bonn 1;
12. Deutscher Sparkassen- und Giroverband e.V., Simrockstraße 6, D-5300 Bonn.

Article 4

This Decision shall be transmitted for information to the other national associations of issuing members of the Eurocheque system, on whose behalf also the notification was made:

13. Agrupacio Andorrana Eurocheque, Boite postale, 20 Correus Francesos, AND-Andorra La Vella;
14. Agrupación Española Eurocheque, Los Madrazo 28, E-28014 Madrid;

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| 15. Banco de Portugal,
Rua do Comércio 148,
P-1101 Lisboa; | 20. Udruzenje Banaka Jugoslavije,
Masarikova 5/IX,
YU-11000 Beograd ; |
| 16. Den Norske Bankforening,
Boks 1489, Vika,
N-Oslo 1; | 21. Verband Österreichischer Banken und Bankiers,
Börsegasse 11,
A-1013 Wien. |
| 17. Schweizerische Bankersvereinigung,
Postfach 4182,
CH-4002 Basel; | |
| 18. Suomen Pankkiyhdistys,
Fabianinkatu 8,
SF-00130 Helsinki 13; | Done at Brussels, 10 December 1984. |
| 19. Svenska Bankföreningen,
Box 7603,
S-102 94 Stockholm; | <i>For the Commission</i>
Frans ANDRIESEN
<i>Member of the Commission</i> |
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COMMISSION DECISION
of 12 December 1984
relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.666 — Mecaniver-PPG)

(Only the English and French texts are authentic)

(85/78/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 Article 2 thereof,

Having regard to the application made on 29 January 1982 under Article 2 of Regulation No 17 by BSN-Gervais Danone SA, Paris, Mecaniver SA, Brussels, Belgium, and PPG Industries Inc., Pittsburgh, Pennsylvania, USA, for negative clearance of an agreement signed on 17 December 1981 on the sale by Mecaniver SA to PPG Industries Inc. of approximately 67 % of the shares of Boussois SA and all Mecaniver's shareholdings in Glasexco SA, Brussels, Belgium, Vetrocom SpA, Milan, Italy, Cristal AG, Mollis, Switzerland, Glasexco UK Ltd, London, United Kingdom, Glasexco Norge A/S, Oslo, Norway, and Glasunit A/S and Glaskontoret A/S, Hellerup, Denmark,

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

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions.

Whereas:

I. THE FACTS

- (1) PPG Industries Inc. (PPG) is the largest glass producer in the USA, accounting for around 32 % of domestic production (followed by

LOF with about 24 %). PPG has an 80 %-owned production subsidiary in Europe, Vernante Pennitalia SpA of Cuneo, Italy, whose production capacity represents about 4 % of the total installed capacity in the EEC.

- (2) BSN-Gervais Danone, Paris (BSN), was formed by the merger of BSN Industries, which had long been one of the largest glass-making enterprises in the world, with Gervais-Danone, which has interests mainly in the food industry.
- (3) Mecaniver SA, Brussels (Mecaniver), is a Belgian holding company which is over 78 % owned by BSN. As part of the general corporate strategy of the BSN group, Mecaniver has been gradually withdrawing from BSN's traditional business in the flat-glass industry to concentrate on the group's food business. On 2 June 1980 it sold all its direct and indirect interests in the German flat glass producer Flachglas AG to the UK undertaking Pilkington Brothers Ltd.
- (4) In late 1981 when the agreement with which this Decision is concerned was signed, Mecaniver exercised control in Europe over Boussois SA and seven export sales companies: Glasexco over Boussois SA and seven export sales companies: Glasexco SA in Belgium, Vetrocol SpA in Italy, Cristal AG in Switzerland, Glasexco UK Ltd in the United Kingdom, Glasexco Norge A/S in Norway, and Glasunit A/S and Glaskontoret A/S in Denmark. It also retained 20 % shareholdings in the Belgian and Dutch flat-glass producers Glaverbel SA and Machinale Glasfabriek De Maas BV, the remaining 80 % of which it had sold to the Japanese company Asahi Glass Co. in June 1981. It later disposed of its residual shareholdings in these companies to allow Asahi to assume full control. Asahi

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 289, 25. 10. 1983, p. 2.

- (through Glaverbel) in September 1982 also purchased Mecaniver's controlling interests in the Spanish flat-glass producer Compañía Española Para la Fabricación Mecánica del Vidrio (Celo). However, Mecaniver still owns 20 % of the Spanish glassmaker Vidrierías de Llodio SA (Llodio). The majority and controlling interest in Llodio is held by Guardian Industries Corp. (an American flat-glass producer with interest in the EEC, namely Luxguard). Guardian has an option to purchase Mecaniver's remaining share in Llodio.
- (5) Boussois SA, Levallois-Perret, France (Boussois), which at the time the agreement was signed was a 99,9 % subsidiary of Mecaniver and thus part of the BSN group, has three glassmaking plants at Boussois, Aniche and Wingle in northern France, which account for about 7 % of installed capacity in the EEC. Boussois also owns other major interests in the glass industry.
- (6) Under a Share Purchase Agreement signed on 17 December 1981 BSN and Mecaniver agreed to sell to PPG 1 334 988 Boussois shares, accounting for about 67 % of that company's equity capital, and all Mecaniver's holdings in the seven export sales companies listed in paragraph 4. The agreement also provided for PPG to subscribe to an increase in Boussois's capital which would raise PPG's holding to 81 %. The completion of the share sale, on the 'closing date', was conditional on the fulfilment of a number of procedural and administrative formalities. These were duly fulfilled and the share sale took place on 23 April 1982.
- (7) The agreement also gave PPG an option of purchasing Mecaniver's remaining 19 % holding in Boussois during the period from two to four-and-a-half years after the closing date and, if PPG did not exercise the option, it gave Mecaniver the option in the six months following the expiry of PPG's option of obliging PPG to purchase its remaining shareholding.
- (8) The agreement of 17 December 1981 contained the following further clauses:
- (a) BSN and Mecaniver would not, without the consent of PPG, engage in any business which could be competitive with the business of the companies sold or their subsidiaries, including acting as an advisor to or acquiring (other than its current shareholdings in Glaverbel, De Maas and Llodio), for a period of three years after the closing date (i.e. until 22 April 1985).
 - (b) At PPG's request, BSN would allow two of its senior executives to continue to serve on the Boussois Board of Directors.
 - (c) BSN would maintain its long-term loans to Boussois and a number of guarantees which it had previously given on behalf of the company.
- (9) The market to which the agreement relates is that for flat glass in general.
- Flat glass can be divided into three categories according to the production process used:
- drawn glass, which is produced as colourless, transparent sheets and is normally used as window glass,
 - cast (or rolled) glass which is produced in laminated sheets with an uneven surface and is translucent but not transparent,
 - float glass, a type of glass produced with a process perfected by Pilkingtons which has been in use since the early 1960s. Because of its characteristics, quality and relatively low production costs, float glass has rapidly supplanted most other types of flat glass in all but certain very specific markets.
- In Europe 57 % of flat glass is used in the construction industry, 22 % in the motor industry and the remaining 21 % in various other industries.

- (10) Recent figures for the distribution of production capacity for flat glass in the EEC are:

	Beginning of 1981	Beginning of 1983
Saint-Gobain	40 %	40 %
Pilkington	32 %	32 %
Asahi	—	9 %
BSN	16 %	—
PPG	4 %	11 %
SIV (Italy)	5 %	5 %
Luxguard (Luxembourg)	3 %	3 %

- (11) The Commission did not receive any comments from third parties in reply to its notice under Article 19 (3) of Regulation No 17.

case to endow it with effective control, which rests with Guardian Industries Corp. Furthermore, having made the strategic decision to withdraw from this sector, BSN is unlikely to acquire new interests in other producers. Consequently there is no likelihood of BSN using any of its holdings in third companies to coordinate their competitive behaviour with Boussois's and Llodio's competitive behaviour.

In effect in 1980 the BSN-Mecaniver group decided to withdraw from the European flat-glass market. It first sold its German subsidiary Flachglass AG to the British company Pilkington Brothers Ltd, which was already a producer of float glass, and went on to sell the majority, and then the remainder of the shares of its Belgian, Dutch and Spanish subsidiaries Glaverbel SA, De Maas BV and Celo respectively to the Japanese company Asahi Glass Ltd, which thereby became a new competitor on the European market. BSN-Mecaniver's sale of the majority of its shares in Boussois to the American group PPG with the option for PPG to purchase the remainder has virtually completed this withdrawal.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (12) The Share Purchase Agreement and the ancillary agreements of 17 December 1981 between the companies of the BSN-Mecaniver group and PPG are agreements between undertakings.
- (13) The sale constituting the mere transfer of a business does not in itself and in the absence of any indications to the contrary give rise to any restrictions of competition and as such does not fall within the scope of Article 85 (1).
- (14) This conclusion that the sale does not involve any restrictions of competition is not weakened by the fact that BSN still has representatives on the Boussois Board of Directors, and still has a minority holding in both Boussois and Llodio. Mecaniver's participation in Boussois can in no way influence the latter's competitive behaviour because the agreement has transferred to PPG full control, both legally and in practice, over Boussois's affairs, particularly as regards investment and commercial policy. Moreover, BSN's holdings in Boussois appear to be a merely temporary stage before total cession. The shareholdings BSN retains in Llodio are too small in this

- (15) The commitment given by BSN-Mecaniver not to compete with PPG for a given period after the sale of Boussois (see paragraph 8 above) must be regarded as a legitimate means of ensuring the performance of the seller's obligation to transfer the full commercial value of the business, since the sale of the business involves the transfer not only of physical assets but also of commercial know-how and clientele.

Therefore even though BSN has virtually disappeared from the flat-glass market and is highly unlikely to re-enter this market as an effective competitor, in the foreseeable future, a period of non-competition merely guarantees the purchaser the legal certainty, which may be legitimately demanded by any purchaser, that the value of his purchase will not be eroded by competition from the seller.

Although each case must be judged in its specific context, the period of protection offered by the non-competition clause and its geographical extent cannot be said to be excessive, judged by the criteria which the Commission established in its Decisions 76/743/EEC

(Reuter/BASF) ⁽¹⁾, 83/670/EEC (Nutricia) ⁽²⁾ and 84/387/EEC ⁽³⁾. Considering on the one hand that technology as well as goodwill are being transferred, and on the other hand that PPG already has operating knowledge of the industry (and given that the technology in question is not exceptionally difficult to assimilate), three years non-competition does not give rise to the application of Article 85 (1). Similarly the geographical extent of the non-competition clause, covering the whole of the European market, does not give rise to the application of Article 85 (1) in this case as previously, before it commenced its strategic withdrawal, BSN-Mecaniver was an active competitor on the totality of the European market.

- (16) On the basis of the facts in the Commission's possession, there are therefore no grounds under Article 85 (1) of the Treaty for action on its part in respect of the agreements.

B. Article 86

- (17) Prior to the agreement PPG held about 4 % of the EEC market through its Italian subsidiary Vernante Pennitalia. The acquisition of Boussois has increased its market share to about 11 %. The transaction thus cannot be said to have strengthened a dominant position such that it could be regarded as an abuse within the meaning of Article 86 ⁽⁴⁾. BSN, whose market share prior to the transaction was only about 7 %, has not totally withdrawn from that market. PPG itself still faces competition not only from Asahi, but also from other flat-glass manufacturers with much larger market shares like Saint-Gobain and Pilkington.

- (18) It is concluded that, on the basis of the facts in the Commission's possession, there are no grounds under Article 86 of the Treaty for action on its part in respect of the agreements.

- (19) The application for negative clearance may therefore be granted,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in the Commission's possession, there are no grounds under Article 85 (1) or Article 86 of the EEC Treaty for action on its part in respect of the agreement signed on 17 December 1981 between BSN-Gervais Danone and Mecaniver SA, on the one hand, and PPG Industries Inc., on the other, on the sale to PPG of the majority of the shares of Boussois SA and all the shares held by Mecaniver in the export sales companies Glasunit A/S and Glaskontoret A/S in Denmark, Glasexco SA in Belgium, Vetrocom SpA in Italy, Cristal AG in Switzerland, Glasexco Norge A/S in Norway and Glasexco UK Ltd in the United Kingdom.

Article 2

This Decision is addressed to:

- PPG Industries Inc.,
One Gateway Center,
Pittsburgh, Pennsylvania 15222, USA;
- BSN-Gervais Danone,
7 rue de Téhéran,
F-75008 Paris, France;
- Mecaniver SA,
Chaussée de la Hulpe 166,
B-1170 Brussels, Belgium.

Done at Brussels, 12 December 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission

⁽¹⁾ OJ No L 254, 17. 9. 1976, p. 40.

⁽²⁾ OJ No L 376, 31. 12. 1983, p. 22.

⁽³⁾ OJ No L 212, 8. 8. 1984, p. 1.

⁽⁴⁾ See the judgment of the Court of Justice in Case 6/72, Continental 1973, ECR 215.

COMMISSION DECISION
of 14 December 1984
relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.809 — John Deere)

(Only the Danish, Dutch and English texts are authentic)

(85/79/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, 3 (1) and 15 (2) thereof,

Having regard to the complaint of 3 September 1982 filed with the Commission pursuant to Article 3 of the said Council Regulation by the National Farmers Union,

Having regard to the application of 12 November 1982 filed with the Commission pursuant to Article 2 of the said Council Regulation, concerning Article 13 of the General Conditions of Sale by John Deere Vertrieb Deutschland to its local dealers,

Having regard to the Commission Decision of 8 August 1983 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) and (2) of Regulation No 17 and 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

The parties

- (1) Deere and Company is incorporated under the law of the State of Delaware in the United States of America. Its registered office is at John Deere Road, Moline, Illinois, 61265 (USA). It has its European Office at Steubenstraße 36, Postfach 503, D-6800 Mannheim. It sells and distributes in some Member States of the Community through a number of branches or wholly owned subsidiary companies which appoint independent local dealers; in other Member States it appoints independent national dealers which, in their turn, themselves appoint independent local dealers.
- (2) Within the common market, Deere and Company trades under the following names:
 - (1) John Deere Export — the division (located in Moline) which manages its relations with independent national dealers;
 - (2) John Deere Vertrieb Deutschland — the German branch which deals with local dealers in Germany;
 - (3) John Deere Italiana — the similar Italian branch;
 - (4) John Deere SA — the subsidiary in France — which deals with local dealers in France;
 - (5) John Deere Ltd — the similar UK subsidiary.

John Deere Export reports to a Deere and Company Vice-President Export located in Moline and the other branches and subsidiaries report to a Vice-President Europe, Africa, Middle East located in Mannheim (both also responsible as their titles imply for operations outside the Community). These

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

two report to a Senior Vice-President and Managing Director — Overseas Operations, who is on Deere and Company's main board and located in Moline. In what follows the Deere group is referred to as Deere.

(3) The independent national dealers within the EEC involved in this case are:

(1) NV Cofabel,
Peperstraat 4A,
3071 Erps-Kwerps, Belgium;

(2) NV Louis Nagel & Co.,
PO box 76,
6500 AB Nijmegen, Netherlands;

and

(3) Dansk Oversøisk Motor Industri A/S (DOMI),
Sdr, Ringvej 35,
2600 Glostrup, Denmark.

There was also a national distributor in Greece — D. Avrassoglou SA — but it is understood that it has ceased trading.

The product and market

(4) The product involved is agricultural machinery. There is a wide variety of agricultural machinery, some manufactured by specialists. Some manufacturers, Deere among them, produce a wide range. In addition, some motor vehicle manufacturers, who otherwise have no interest in the sector, produce agricultural tractors. The product involved in this case is all the farm equipment including agricultural tractors sold by Deere.

(5) The markets principally concerned are those in which farmers or contractors buy agricultural machinery, usually from dealers at a retail level, in which retail dealers buy from manufacturers or from distributors at a wholesale level and in which distributors at a wholesale level buy from manufacturers or other distributors. The way in which Deere markets its products, described in paragraph 1 above, is typical.

The position of the parties

(6) Deere is a major manufacturer of agricultural machinery — for example it is the world's fourth largest tractor manufacturer, and second largest manufacturer of fodder machinery. It also manufactures industrial equipment. In 1983 its total turnover was \$ US 3 908 million, of which 3 314 were of farm equipment. Its turnover of agricultural machinery in the Community was ... ECU. Its market share varied from Member State to Member State, and for different types of farm equipment — for example, in 1983 it had ... % of the EEC market for combine harvesters (varying from ... % in Italy to ... % in Greece) and ... % for tractors (... % Italy — ... % Netherlands — all these figures are approximate, and there are differences in the statistical bases from State to State).

(7) Cofabel had a turnover of Bfrs ... in 1981, almost all consisting of farm equipment. Nagel's turnover, similarly, was Fl ... and DOMI's Dkr ... of which ... was of Deere equipment.

The proceedings

(8) On 3 September 1982, the National Farmers Union of the United Kingdom made a complaint concerning the alleged refusal of Cofabel to supply a tractor to a member. The member complained that Cofabel refused to supply him, even though he offered to pay in Belgian francs and take delivery in Belgium, because 'the John Deere factory in Germany forbids such' (original English).

(9) On 14 October 1982, inspectors in the Commission's service visited Cofabel's office in Erps-Kwerps, and on 18 and 19 November, Deere and Company's European Office. They took copies of about 150 documents relating to 'over the border sales'.

(10) On 12 November 1982, Deere, in the name of John Deere Vertrieb Deutschland, applied for negative clearance for the Article 13 of the general conditions of sale to be used from the

first day of that month as an annex to its local dealer's contracts within Germany. This Article read (original German):

- The article supplied is intended for sale at home.
- Should nevertheless resale abroad follow (direct or indirect, with or without modification), the orderer will in such event have no claim to annual bonus or participation in special sales promotion programmes.
- For the resale of articles in non-EEC countries the deliverer will debit an additional surcharge of 10 % — calculated on the deliverer's asking price for the articles.
- The deliverer reserves the right in such event to assert further claims, in particular the right summarily to cancel the contract'.

- (11) On 12 August 1983 the Commission sent a Statement of Objections to Deere and the independent national dealers listed in paragraph 3 above. On 31 August 1983 Deere and again on 29 September lawyers representing Deere exercised its right to inspect the Commission's files, as did Cofabel on 7 September.
- (12) On 12 October 1983 Cofabel, Domi and Nagel and on 18 October Deere replied to the Statement of Objections without asking for an oral hearing.
- (13) On 21 March 1984, the Commission submitted to Deere the quotations from the documents in its file on which it might base its decision, some of which had been referred to specifically in the Statement of Objections and some of which were added in response to Deere's reply.
- (14) On 27 April 1984 Deere, through its lawyers, commented on these quotations. It has not produced any material invalidating the Commission's evidence or reversing the Commission's interpretation of it.

Deere and Company's distribution policies and system

Parallel trading — its causes and effects

- (15) Deere has allowed its various branches a certain independence in marketing policy. Some

Deere branches or national dealers, observing conditions in their national markets, have quoted lower prices or offered higher discounts than the branches or dealers in other Member States. In addition, currency fluctuations, in particular of the pound sterling, and policies of national governments have, from time to time, caused prices in different Member States to differ. This has led some farmers in higher-price States to seek to import from States where prices were lower and some dealers with lower prices to seek export business where prices were higher — in other words, it has tended to make parallel trading profitable. Deere's reaction to the problems thus caused was to attempt to inhibit parallel trading. There is evidence of its policies, of the effects of these policies, and of its reaction to these effects throughout the documents copied by the Commission's inspectors.

The formal agreements

- (16) Some of the forms of contract used by Deere or by its independent national dealers contained clauses forbidding exports — see, for example:
 - (1) Article 1 (e) of John Deere Export's Dealer Agreement (the standard contract made with national dealers), which read: 'The Goods purchased from the company shall be sold to the Dealer exclusively for agricultural use, and only for use in, or to purchasers residing in, the Dealers Area of Responsibility' (original English) — Nagel signed its contract in this standard form on the 3 October 1967;
 - (2) Articles 3 and 5 of Cofabel NV's standard distribution contract with Cofabel's local dealers — these read 'Article 3. The distributor undertakes to sell the Company's goods only to customers established in the area which is conceded to him Article 5. It is forbidden for the distributor to sell machinery to clients situated outside the area conceded to him. Any inquiry or order emanating from such a client should be transmitted to the Company. If the distributor, in spite of this, effects sales of goods in an area conceded to another distributor, the Company reserves the right not to execute the order or reduce by from 3 % to 7 % the distributor's discount for the machines. The Company will choose which independently. For its part, the Company reserves the right to effect sales anywhere

in Belgian territory whenever the distributor does not wish or is not able to sell because of special circumstances.' (original French and Dutch);

- (3) Article 12 of the former (1972 to 1977) general sales conditions annexed to the contracts with their local dealers by John Deere Vertrieb Deutschland — this read: 'The purchaser undertakes, as far as no contrary legal regulation prevents not to resell articles supplied abroad with or without modification either directly or indirectly. By breach of this undertaking he loses, without prejudice to any claim of the deliverer and with effect from the date of the order, his right to every rebate and any other benefit' (original German). Article 13 of the conditions valid from 1977 to 1982 is similarly worded.
- (4) Article 13 of the German conditions of sale the subject of the application for negative clearance (paragraph 10 above).
- (17) Other contracts do not contain such clauses (see John Deere SA's standard local dealers' contract) or even contain words such as '... but does not constitute any territorial restriction' (see John Deere Ltd's contract — original English). These contracts do contain clauses such as one limiting John Deere SA's undertaking to accept orders to '... the extent that these are in relation with the needs of the concessionaire's area of influence' (original French) or a statement that '... the Dealer's performance will be evaluated exclusively on the activity carried out in the described Area of Responsibility', or making access to Deere credit conditional on unspecified '... standards or requirements of uniform application ...' (original English).

The implementation of the agreements and other practices

- (18) Deere has treated contracts whether or not containing an export ban as if they did.
- (19) From 15 October 1975 Deere has sought, using the terms of the contracts or other means, to persuade or constrain its dealers not to export — in other words, it has sought to persuade the affected dealers to accept an export ban as a concerted practice.

- (20) Deere's local dealers with such contracts have understood exports to be forbidden. Deere has told dealers that, in the context of its overall distribution system, parallel trading was undesirable or unfriendly. Deere has refused or threatened to refuse to supply goods known to be intended for export. Deere, according to the Manager of John Deere Vertrieb Deutschland, has cancelled the contracts of dealers who export. Deere has sought to supply with specifications difficult to export. Deere has instructed its staff to demand prompter payment for goods known to have been exported and refuse quantity or special discounts or other aids to selling. Finally, Deere has charged 5 % on exports. In its German contracts this last is due only for non-EEC exports — however, the Manager of John Deere Vertrieb Deutschland has said that the 5 % is collected also for deliveries into EC-countries wherever '... possible in order to make this kind of business even more difficult for dealers.' (original English). There is evidence of all these facts in the documents quoted in the Statement of Objections and in the letter to Deere on 21 March 1984 (see paragraph 13 above). As was said in the Statement of Objections, many other documents could be cited dating from 1974 until October 1982.

Deere's knowledge of the illegality of its conduct

- (21) Deere and Company knew that such conduct, and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel. Senior management of Deere and Company in Moline, including a member of the main board, was fully informed.

Effects of the agreements

- (22) All the national distributors mentioned in paragraph 3 above have been affected. All Member States except Italy, Ireland and Luxembourg are mentioned in the documents as being involved. These documents also comment on the substantial price differences being maintained between different Member States and on the effects of such differences.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (23) Article 85 (1) provides that all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention or distortion of competition within the common market shall be prohibited as incompatible with the common market.
- (24) Deere and the parties listed at paragraph 3 above, and their various local dealers, are undertakings within the meaning of Article 85 of the EEC Treaty, and the contracts between them are agreements within the meaning of that provision.
- (25) These agreements, and the concerted practices for their implementation, had among their objects the prevention of any trading in Deere products by any party other than Deere outside the Member State in which the party is situated. This has been clearly stated by Deere both in internal correspondence and in correspondence with its national distributors and its own local dealers. This has been understood and accepted by the national distributors and the local dealers, even though not always observed by them. This unlawful object is given effect to in some cases contractually and in others by a separate understanding backed by reprisals or threats of reprisals if the understanding is breached — contracts which do not contain explicit bans do contain clauses which make punitive measures possible (see paragraph 17).
- (26) Deere has argued that Deere staff claimed to have taken action when they had not, that instructions to penalize parallel trading were disobeyed and that its attempts to prevent parallel trading were ineffective. Instructions were, however, given with the object of preventing parallel trading, senior Deere staff did say that action had been taken and there were communications with dealers requesting them not to export and threatening various consequences if they did. The burden of proof is, therefore, on Deere to show that such instructions were never obeyed and such requests were always ignored in order to establish that they had no effect; and in the Commission's view, having regard to all the evidence, Deere has **not discharged** this burden. The Commission, therefore, concludes that these instructions and communications had effects.
- (27) Comment on the sales conditions applied in Germany from 1 November 1972 (paragraph 16 (3) above) is perhaps called for. The export ban contained in these sales conditions is qualified by the words '... as far as no contrary legal regulation prevents...'. However, the Commission holds that such an article constitutes an export ban in spite of this saving clause; the article is worded to read as if exporting is forbidden and imposed without explanation or negotiation by a company that ought to know the law on a multitude of small dealers; such dealers are less likely to know the law and unlikely, in the circumstances, to consult a lawyer; it is most unlikely, therefore, that the dealer would know that an export ban is contrary to Community law and could not in consequence of that fact be enforced against intra-Community exports. In other words, and in view of the fact that export bans are illegal within the common market, the drafting of this export ban constitutes a reversal of a general rule of Community law in respect of what should be only a derogation. Moreover, categorical interpretations of this clause by Deere to dealers, without any mention of the saving clause, are recorded. Deere's own in-house counsel expressed doubts as to the legitimacy of such a device.
- (28) Special mention should also be made of the Article 13 subject to Deere's application on 12 November 1982 for negative clearance (see paragraph 10). The object of this Article is to inhibit exports. The second indent provides a penalty for all exports. The third indent provides a penalty for exports outside the EEC; Deere staff say they apply this clause within the EEC when they can (see paragraph 20). The fourth indent contains the threat of a very severe penalty for exporting.
- (29) Thus Deere's contracts and conduct have, among other things, prohibited exports by its customers (and required national distributors

to prohibit exports by their local dealers). The Court of Justice said in the *Miller International Schallplatten GmbH* case, '... by its very nature a clause prohibiting exports constitutes a restriction on competition' (Case 19/77, Ground of Judgment 7, [1978] ECR 131). Deere has sought to prevent purchasers of Deere's products in the higher-priced Member States from benefiting from a unified market.

- (30) Deere's products have a significant part of the agricultural machinery market within the European Economic Community (see paragraph 6). Deere's own documents show that substantial differences in price for Deere products have existed between different Member States of the Community, that such differences have persisted and that, in consequence, there was persistent pressure for parallel trading (which Deere tried persistently, albeit often unsuccessfully, to prevent). Under these circumstances, the Commission is entitled to conclude that the restrictions in question are not of negligible effect, and have had a direct and actual influence on the pattern of trade between Member States.
- (31) Article 85 (1) of the Treaty does, therefore, apply to these agreements, including the sales conditions of the Article 13 treated at paragraph 27 above.

B. Article 85 (3)

- (32) Article 85 (1) of the Treaty may be declared inapplicable pursuant to Article 85 (3) in the case of agreements which contribute to the improvement of the production or distribution of goods while reserving to users a share in these benefits, provided they contain no restriction which is not indispensable to the achievement of the benefits and do not enable the parties to eliminate competition in respect of a substantial proportion of the goods concerned.
- (33) Deere has not notified any of these agreements, or any part of them, pursuant to Article 4 of Regulation 17, seeking application of Article 85 (3) of the Treaty, and, therefore, no decision in application of Article 85 (3) may be taken.
- (34) In any event, even had they been notified, the agreements could not have been declared exempt from the application of Article 85 (1) because the restriction of parallel trading does not appear to be indispensable to any

improvement of distribution to which a network of appointed dealers might give rise.

C. Article 15 (2) of Regulation No 17

- (35) Under Article 15 (2) of Regulation No 17, the Commission may impose fines of from 1 000 to 1 000 000 units of account or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the fine, regard shall be had both to the gravity and to the duration of the infringement.
- (36) Deere's infringement is very serious since it involves an export ban and, consequently, the prevention of competition between the dealers in Deere's products established in different Member States.
- (37) The infringement is of long duration. There has been a formal export ban since 1967. In fixing the fine the Commission has taken account of Deere's action in application of export bans since 1975 (see paragraphs 16, 19 and 20 above).
- (38) The application for negative clearance under Article 2 of Regulation No 17 of 12 November 1982 does not constitute a notification for the purpose of Article 15 (5) of that Regulation and, therefore, does not even protect from fines subsequent use of Article 13 of the German General Conditions of Sales, which was the subject of that application.
- (39) Deere acted intentionally. There was knowledge of the pressure for parallel trading, knowledge of its policy to prevent this trading and of the doubtful legality of many of the steps taken in order to prevent it throughout the Deere group within the Community (with the possible exception of John Deere Italiana) and among Deere and Company's top management in Moline, Illinois.
- (40) The Commission therefore considers that a fine should be imposed on Deere.
- (41) On the other hand, since receiving the Commission's Statement of Objections in August 1983, Deere and its national dealers have taken steps to remove export bans from their contracts, and Deere has begun to instruct its employees in Europe how to comply with the

Community's rules on competition. In addition, the agricultural machinery sector is depressed and Deere's profitability much reduced. The Commission has taken these into consideration in deciding on the amount of the fine.

- (42) Dealers which accept contracts containing export bans are also guilty of an infringement and, if the agreements are not notified, they also are liable for fines. However, the contractual export bans in this case are contained in preprinted standard contracts; clearly, therefore, the dealers had not taken the initiative to have the bans included in their contracts and had largely ignored them. Moreover, this is the first such case in the agricultural machinery sector. The Commission feels it appropriate, therefore, not to impose a fine on the dealers in this case.

D. Article 3 of Regulation 17

- (43) Under Article 3 (1) of Regulation No 17, the Commission may, if it finds that there has been an infringement of Article 85 of the Treaty, require by decision that the undertakings concerned bring such infringement to an end.
- (44) It appears necessary to require Deere and all its national distributors within the Community to remove all intra-Community territorial restrictions from their agreements and practice and to refrain from seeking to reimpose such restrictions by other means,

HAS ADOPTED THIS DECISION:

Article 1

The contracts entered into by Deere and Company with its national dealers within the common market, the various contracts containing export bans entered into by Deere and Company, its subsidiaries and national dealers with their local dealers, together with the practices with which contracts have been applied since 1975 so as to prohibit, discourage or penalize trading by dealers outside the Member State in which they are established constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

Article 1 applies to Article 13 of the General Conditions of Sale of John Deere Vertrieb Deutschland, the subject of its application pursuant to Article 2 of Regulation No 17. Negative clearance for this Article 13 is not granted.

Article 3

The undertakings concerned must bring the infringement referred to in Article 1 to an end immediately and shall refrain from taking any measure having the same object or effect.

Article 4

1. The following fine is imposed on Deere and Company: 2 000 000 (two million) ECU, that is DM 4 465 720.

2. This sum shall be paid, within three months of the date of notification of this Decision, to the following account(s) in the name of the Commission of the European Communities:

- account No 260/00/64910,
- Banking institution(s) Sal. Oppenheim & Cie, Untersachsenhausen 4, 5000 Köln 1.

Article 5

This Decision is addressed to:

- Deere and Company,
John Deere Road,
Moline,
USA-Illinois 61265.
- NV Louis Nagel and Co.,
PO box 76,
NL-6500 AB Nijmegen.
- Dansk Oversøisk Motor Industri A/S (DOMI),
Sdr. Ringvej 35,
DK-2600 Glostrup.
- NV Cofabel,
Peperstraat 4A,
B-3071 Erps-Kwerps.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 14 December 1984.

For the Commission

Frans ANDRIESEN

Member of the Commission