

Official Journal

of the European Communities

ISSN 0378 – 6978

L 369

Volume 28

31 December 1985

English edition

Legislation

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II

(Act whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 November 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.846 – Ivoclar)

(Only the German text is authentic)

(85/559/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 4 thereof,

Having regard to the notification filed on 1 February 1983 by Ivoclar AG, Schaan, Liechtenstein, seeking exemption of its standard exclusive distribution agreement,

Having regard to the Commission Decision of 30 October 1984 to initiate proceedings in this case,

Having regard to the summary of the notification published ⁽²⁾ in accordance with Article 19 (3) of Regulation No 17,

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

Whereas:

I. FACTS

1. On 1 February 1983, Ivoclar AG, of Schaan (Liechtenstein), notified to the Commission a standard exclusive distribution agreement which it intends to apply in all EEC countries. Ivoclar initially

asked for a declaration that the agreement was exempted from Article 85 (1) of the EEC Treaty by Commission Regulation No 67/67/EEC ⁽³⁾. Later it made it clear that if necessary it also applied for exemption by way of individual decision under Article 85 (3) of the Treaty.

A. The undertaking

2. Ivoclar AG is a medium-sized firm which, with its subsidiaries, manufactures and sells dental supplies (in particular, artificial teeth made from resin or porcelain, materials for making veneers, prostheses, crowns, bridges and for taking impressions, and dental surgery and laboratory equipment). It supplies through national subsidiaries 25 distributors in the Federal Republic of Germany, 26 in France, a like number in Italy, one each in Belgium, Denmark, the United Kingdom, Ireland and the Netherlands, and two in Luxembourg. It intends to introduce the notified standard exclusive distribution agreement progressively in all EEC countries. It presently applies the notified agreement in the Federal Republic of Germany and in France.
3. Ivoclar claims that its manufacturing processes are based on especially close collaboration with centres of dental research and that its products are of very high quality. This is especially true of its main product line, artificial teeth. Unlike most other suppliers, Ivoclar does not produce its teeth to average patient specifications, but tailors the masticatory surfaces of the teeth and their position in the prosthesis to the individual patient. This involves the use of special

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 297, 8. 11. 1984, p. 14.

⁽³⁾ OJ No 57, 25. 3. 1967, p. 849/67.

precision instruments and requires a high standard of workmanship from the dental technician and dentist making and fitting the dentures. Through research Ivoclar has also developed special methods for the polymerization of plastics for dentures and for making bridges which yield cost savings and greater durability. To ensure that the products and methods it has developed are used correctly so as to maximize their advantages, Ivoclar has to provide intensive training and counselling both of distributors and of users (dentists and dental technicians). For this purpose it employs specially trained staff to give training courses at distribution depots, dentists, laboratories, colleges and universities and to carry out regular inspections of depots and generally look after them.

4. Ivoclar faces competition from a large number of other suppliers. Dentsply International Inc. of the USA (with subsidiaries in most Member States) is the market leader in the Community market for artificial teeth, with a market share of up to . . . ⁽¹⁾ (Federal Republic of Germany). Other significant competitors are Vita Zahnfabrik, Lindauer Zahnfabrik (a subsidiary of Bayer AG), Kulzer GmbH (a subsidiary of Degussa AG), Major SA and Candulor AG. Ivoclar is one of the leading common market suppliers of plastic artificial teeth. In 1984 its market share was around . . . in the Federal Republic of Germany, France, Italy, Benelux and Denmark. In other Member States, Ivoclar's share of the artificial teeth market varies between . . . (United Kingdom) and . . . (Greece). For other products concerned by the notified agreement Ivoclar's market share is generally below . . . in all Member States.

B. The notified agreement

5. The notified agreement sets out the conditions on which Ivoclar and its subsidiaries supply their distributors. It forms the basis of Ivoclar's distribution system in the EEC, consisting of a limited number of selected exclusive distributors designated as 'SR depots'. The main provisions of the agreement are as follows:
6. Each SR depot is allotted a main sales territory in which it must try to ensure the best possible distribution of Ivoclar products. The size of the territories is such that the potential volume of demand can be expected to generate a minimum turnover in Ivoclar products sufficient to sustain a properly staffed and equipped depot.

7. Within the allotted territory only the SR depot may set up further distribution points. Ivoclar may only supply a further SR depot or its distribution points in the territory of the sales of the original SR depot and its distribution points in any two calendar years should show a marked decline or fall short of the level to be expected in the prevailing market conditions because of inadequate exploitation of the territory.
8. An SR depot may do business outside its main territory but may not establish any branch in the territory of another SR depot.
9. The SR depots are selected for admission to the network on the following criteria (which are set out in detail in an Ivoclar circular):
 - (a) The distributor must have adequately qualified and trained staff capable of instructing, advising and generally looking after the purchasers of Ivoclar products (dentists, dental technicians, dental clinics, etc.).
 - (b) The distributor must maintain complete stocks of all Ivoclar products including a full range of teeth in all available colours and shapes and a stock of spare parts for Ivoclar appliances and equipment. The stocks must be large enough to enable all orders to be filled promptly.
 - (c) The distributor must be able to display a representative cross-section of Ivoclar products and to provide rooms and facilities for any demonstrations Ivoclar wishes to hold for dentists and dental technicians.
10. The SR depot accepts the following further obligations:
 - (a) To sell Ivoclar products only to dentists, dental technicians, laboratories, universities and hospitals. It may not supply dealers nor other dental depots. However, it is allowed to supply other authorized SR depots.
 - (b) To use its best endeavours to secure the widest possible distribution of Ivoclar products. In particular, it agrees to organize lectures and demonstrations for potential purchaser groups and to carry out sales promotion by visiting customers and sending out circulars and advertising material.
11. Ivoclar undertakes to give effective support to the sales efforts of SR depots by demonstrations, lectures, courses, training sessions for sales representatives, promotion through brochures and advertising and by the quality of the products it supplies.

⁽¹⁾ Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the *Official Journal of the European Communities*.

12. The distribution agreement has an initial term of three years and seven months, automatically renewable for further five-year periods unless terminated upon one year's notice. In the event of changes in the personal or legal circumstances liable to jeopardize the purpose of the agreement, Ivoclar is entitled to terminate the agreement from the end of any quarter upon six months' notice.
13. Where, in the territory of an SR depot which has served the territory for over 10 years Ivoclar supplies a different or an additional SR depot, the second SR depot must pay the first a compensation payment of 1 % of the first depot's sales of Ivoclar products over the past 10 years. This does not apply where the original SR depot is giving up its distributorship without Ivoclar having given it reasonable ground to do so or Ivoclar itself has terminated it because the original SR depot breached its obligations under the agreement.

C. Comments from third parties

14. No comments were received from third parties in response to publication of a summary of the notified agreement in accordance with Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

15. The notified standard exclusive distribution agreement which Ivoclar concludes with distributors in the EC has the object and effect of restricting competition within the common market.
 - (a) The authorized SR depots have virtual exclusive distribution rights for Ivoclar products in their main sales territories. Other SR depots are not allowed to establish branches there. Ivoclar may only supply other SR depots or their distribution points in the territory if the principal SR depot's sales of Ivoclar products in two consecutive calendar years fall short of the level that could reasonably be achieved by a distributor showing a proper degree of application in selling the products. The supply of a different or additional SR depot in the territory of an SR depot which has served the territory for over 10 years is subject to payment of a compensation payment to the original depot. Thus, Ivoclar's choice of the distributors supplied, the possibility of market entry for new depots and the spatial extent of the business activities of authorized SR depots are restricted.

(b) Authorized SR depots may supply Ivoclar products only to certain classes of customer. They are barred from supplying them to depots not authorized by Ivoclar or to dealers. This restricts the commercial independence of SR depots in relation to the resale of Ivoclar products.

(c) SR depots are not allowed to establish any branch for Ivoclar products outside their territories. This is a territorial restriction on the activities of SR depots.

16. Since the notified standard exclusive distribution agreement will govern the commercial relations between a manufacturing company and its subsidiaries and distributors in all EC countries, it is by its very nature likely to affect trade between Member States. Given Ivoclar's relatively strong position within the common market, the restrictions of competition and their effect on trade between Member States are likely to be appreciable.

B. Regulation No 67/67/EEC and Regulation (EEC) No 1983/83

17. Regulation No 67/67/EEC and Commission Regulation (EEC) No 1983/83⁽¹⁾ grant a block exemption from Article 85 (1) of the EEC Treaty for exclusive distribution agreements satisfying certain specified conditions. Article 7 of Regulation (EEC) No 1983/83 provides that agreements which were in force before 1 July 1983 and which satisfy the exemption conditions of Regulation 67/67 continue to be covered by that Regulation until 31 December 1986.
18. Ivoclar's exclusive distribution agreement does not satisfy all conditions of the above two Regulations. Its restriction on the classes of customer SR depots may supply (see 15 (b) above) goes beyond the restrictions permitted by Articles 1 and 2 of both Regulations and in recital 8 of the preamble to Regulation (EEC) No 1983/83 the Commission clearly states that obligations which limit the exclusive distributor's choice of customers are not exempted under the Regulation.
19. Article 2 (3) (c) of Regulation (EEC) No 1983/83, concerning sales promotion, allows the prohibition of sales to unsuitable dealers (see paragraph 20 of the Commission notice of 13 April 1984⁽²⁾ concerning Regulations (EEC) No 1983/83 and (EEC) No 1984/83). However, this position does not apply in

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 1.

⁽²⁾ OJ No C 101, 13. 4. 1984, p. 2.

the present case. SR depots are not only forbidden from selling to 'dealers' but also to other specialized dental depots, which have not been chosen by Ivoclar. This is so even where these other dental depots, in principle, fulfil the qualitative criteria for the sale of Ivoclar products, or at least would when their staff had received suitable training. Thus the Ivoclar distribution system combines elements of exclusive distribution with the selection of customers in accordance with qualitative and quantitative criteria. In so far as suitable clients will be unable to purchase or resell the products, the distribution system does not fulfil the condition for a block exemption under Regulations No 67/67/EEC and (EEC) No 1983/83.

C. Article 85 (3)

20. The notified exclusive distribution agreement contributes to a substantial improvement in the distribution of Ivoclar products.

(a) Ivoclar is able to concentrate its sales effort and particularly its training and education programme and advisory services on a manageable number of distribution outlets. The training and continuing education programme and advisory services provided by Ivoclar, at the cost of considerable expenditure on staff and resources, play an important role in its distribution system. Supplying a much larger number of distributors would be detrimental to its objective of ensuring competent distribution of its products and involve needless extra expense.

(b) The restriction of distribution to authorized SR depots meeting certain professional standards helps to ensure that Ivoclar products are used properly and to best effect having regard to their specific qualities and advantages. It also ensures that the users (dentists, dental technicians, etc.) can be supplied promptly in line with their own customers' (the patients') requirements and are adequately informed about the correct use of Ivoclar products. The prohibition of resales to unauthorized distributors has the same object.

(c) The restriction of distribution to the authorized SR depots also creates the conditions for the distributors to exploit the market intensively and to maximize the sales of Ivoclar products. The obligations on SR depots to maintain comprehensive stocks and to carry out sales promotion are a corollary of this restriction.

(d) The restriction of the SR depots' active business to their main sales territories encourages the depots to concentrate their sales effort on their allotted territories and hence to improve the distribution of Ivoclar products.

21. The advantages of Ivoclar's functional and appropriate distribution system outweigh the negative effects on competition of the extensive territorial protection enjoyed by the SR depots, the corresponding restriction on their doing business actively elsewhere and the restriction of the network to authorized SR depots. The network of depots ensures that orders for any Ivoclar product can be fulfilled promptly and efficiently.

22. The exclusive distribution agreement does not contain any restrictions that go beyond what is necessary to achieve these objectives.

(a) The extensive territorial protection given to SR depots (and its corollary, the ban on establishing branches in the main sales territory of another SR depot) is necessary because without it SR depots would hardly be willing to make the substantial commitments of staff and of resources tied up in stocks that are required of them or to engage in intensive and active sales promotion for Ivoclar products (including giving their own presentations). This sales commitment is also rewarded by the compensation payment which new SR depots have to pay the depot previously serving the territory in consideration of the work the original depot has done to penetrate the market. In the special circumstances, the compensation payment appears to be a justifiable protection of the old SR depot. The new SR depot takes over a clientele, that its predecessor has built up over more than 10 years of market development. Moreover, the amount of the compensation payment would appear an adequate recompense for the previous performance of the old SR depot, and represents no serious barrier to entry for the new SR depot.

(b) The restriction of distribution to SR depots and the associated restriction on the classes of customer to whom depots can sell is necessary for an efficient distribution of the products. The specific advantages of the products and processes (individual tailoring of teeth and prostheses to the patient, greater durability and cost savings with Ivoclar crowns and dentures) can only be fully realized if the distributor carries a full range (particularly of artificial teeth in all available colours and sizes), is fully informed about Ivoclar products and processes and is able to give the users of the products and processes (dentists, dental technicians, etc.) expert advice and instruction.

These requirements can only be met by authorized Ivoclar distribution depots, which are regularly serviced by Ivoclar with training and advice. Other distributors, which would be dependent on supplies from SR depots, would not be able to fulfil these requirements, especially the obligation to carry complete stocks, if only because of inadequate sales volume. The restriction of its distribution network to depots which must fulfil certain necessary requirements for the distribution of these products enables Ivoclar to guarantee a successful market penetration of its products, intensive exploitation of the market by the SR depots and the efficient operation of the network.

23. Consumers are allowed a fair share of the benefit resulting from the improvement in the distribution of Ivoclar products. This applies equally to the immediate purchaser (dentist, dental technician etc.) and to the final consumer (patient). The distribution system ensures that the full range of Ivoclar products is available to users at short notice for their dental treatment and that the products are used properly so as to maximize their specific advantages for the patient.
24. The exclusive distribution agreement does not afford the possibility of eliminating competition for a substantial part of the products in question. Ivoclar faces stiff competition from other manufacturers, some of which are larger and have considerably more financial backing. These other manufacturers are not hindered in their dealings with distributors within the contract territory. Parallel imports and sales between distributors are not ruled out but only restricted to depots belonging to the distribution network. This is justified by the special characteristics of Ivoclar products. No absolute territorial protection is given. The Ivoclar distributors are further free in their price policy.

D. Article 8 (1) of Regulation No 17

25. Under Article 8 (1) of Regulation No 17, an exemption may be granted for a limited period only. In view of the term of the notified agreement and the scientific and technical development in the industry, a period of exemption of 10 years is appropriate. This period should begin from the date of formal notification of the exclusive distribution agreement, 1 February 1983,

HAS ADOPTED THIS DECISION:

Article 1

1. Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the standard exclusive distribution agreement dated 1 December 1982 of Ivoclar AG governing its supply of SR depots in the Community.
2. The exemption shall apply from 1 February 1983 until 31 January 1993.

Article 2

This Decision is addressed to Ivoclar AG, FL-9494 Schaan/Liechtenstein.

Done at Brussels, 27 November 1985.

For the Commission
Peter SUTHERLAND
Member of the Commission

COMMISSION DECISION

of 2 December 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.971 – BP/Kellogg)

(Only the English text is authentic)

(85/560/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 submitted on 1 June 1983 by BP International Limited and the MW Kellogg Company concerning the joint development of a design for the construction of ammonia-making plant,

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

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

Whereas:

I. FACTS

The notification

1. On 1 June 1983 the Commission was requested by BP International Limited and the MW Kellogg Company to exempt under Article 85 (3) certain of their arrangements.
2. These arrangements concern the joint development of a design for the construction of ammonia-making plant.

The parties

3. BP International Limited (BP) is a company within the BP group. The principal business of BP is oil production, refining and trading. In the context of this

business, BP has undertaken research and development into catalysts. BP is also a minor producer of ammonia. The MW Kellogg Company (MWK) is a substantial American process plant designer and contractor.

The product and the market

4. The goods or services affected by the arrangements are plant for the production of ammonia, designs for the construction of such plant know-how useful for the operation, construction, design and development of such plant, and catalyst for use in such plant.
5. Ammonia plant design is constantly evolving. There are a large number of designers of and contractors for such plant (at least 10 well-known names, among them MWK). MWK was responsible for the design of about 20 % of present capacity in western Europe.

The parties' interests in ammonia plant development

6. In the course of their R & D on catalysts for refining, BP discovered a catalyst possibly effective for the production of ammonia and have done a number of years further research on this. BP wish to exploit this both in plant operated by themselves and in plant to be sold to other ammonia producers. The catalyst cannot be used commercially until a process that will make use of it has been developed with the cooperation of BP's research and development staff. BP have no experience in the design, construction or commercial exploitation of designs for such a process. BP has, therefore, sought a partner. MWK has a small process plant development department which does not undertake research into catalysts, but which is willing to cooperate with BP's research and development staff in the development of such a process. They have, therefore, entered into the following arrangements.

The arrangements

7. BP and MWK will cooperate in the development of designs for the construction of ammonia plant using

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 224, 4. 9. 1985, p. 2.

BP's catalyst. A joint development agreement provides that each party shall remain the owner of their prior know-how, shall own severally (taking out patents as applicable) know-how developed by each individually, and shall own jointly any jointly developed know-how. Each has an irrevocable world-wide non-exclusive right to use and sub-license joint patents.

8. In pursuance of this agreement BP accepts the following restrictions:

8.1. not to disclose information about the catalyst for other development projects in the field of ammonia production;

8.2. not to supply the catalyst during the life of the joint development agreement (other than to MWK's customers for the new process, to companies in the BP group or to companies that might manufacture the catalyst) without MWK's consent (this restriction is the means by which BP gives MWK a limited exclusive right to exploit any new design);

8.3. to use its best endeavours, but not amounting to an absolute obligation to ensure that, if the first commercial plant using the new process for the production of ammonia is built for the BP Group, then the BP Group will use MWK as the design contractor.

9. MWK accepts the following restrictions:

9.1. not to carry out independently, or in cooperation with third parties, other research and development in the field of graphite-based ammonia synthesis catalysts;

9.2. not to spend more on developing other ammonia processes (with the exception of those using the traditional iron-based catalyst) without informing BP (this together with the next two restrictions constitutes the means by which BP is put on notice that it might wish to exercise its right to find another partner should MWK not promote the new process actively);

9.3. not to commercialize any new ammonia process using iron-based catalysts likely to be more commercially attractive than the process using BP's catalyst without informing BP;

9.4. not to bid for ammonia plants other than by way of offering the jointly-developed process without informing BP.

10. The joint development agreement contains the principles of a licensing agreement whereby MWK will exploit the process by licensing the right to use it to the owners or operators of plant, and pay BP a percentage of the fee it receives in respect of such licences. The joint development agreement contains provisions for MWK's fee to be fixed as a function of the cost saving that use of BP's catalyst is expected to make possible over existing designs of plant.

11. The duration foreseen for the joint development agreement is about six years – that is to say about a year after the first commercial plant using the catalyst becomes operational (the duration is defined as a fixed number of years following alternative stages in the development). There are provisions for earlier termination in a wide variety of circumstances, including project failure or if MWK develop a more attractive process. The licensing agreement is to last for 15 years, renewable.

The parties' submissions

12. The parties believe that the successful development of the process will represent a considerable technical advance making possible substantial energy savings which, in their turn, should be reflected in lower ammonia prices.

13. The parties submit that BP and MWK are not competitors and would be unlikely to become competitors.

14. They further submit that the development requires the commitment of substantial resources by both of them, and requires BP to divulge to MWK the fruits of many years of costly research effort. Restrictions, that otherwise would fall under the prohibition of Article 85 (1) of the Treaty, are necessary to bring these about. Without accepting the restriction at 9.1 above, MWK could not devote sufficient resources to the joint development nor ensure that any other firm with which it might cooperate did not benefit from the fruits of BP's earlier research. The restrictions at 9.2 to 9.4 above are the minimum necessary to allow BP to exercise its option to exploit the process without MWK should MWK not develop or market the new process actively. The restrictions at 8 above are the minimum necessary to allow MWK an adequate return from a successful development and follow earlier Commission precedents of what may be exempted in such cooperations.

Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17, the Commission received no comments from interested third parties.

II. LEGAL ASSESSMENT

15. (a) The restrictions listed at 8 and 9 above, and more particularly the restriction on the supply of the catalyst by BP and the restrictions on the development or sale of other processes by MWK fall under the prohibition of Article 85 (1) since their freedom of commercial decision is thus restricted; if the product is successfully developed, the restrictions could have an appreciable effect upon trade between Member States because ammonia is produced in the majority of those States;
- (b) The agreement is not exempted by virtue of Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements⁽¹⁾, since several of its clauses (see paragraphs 8.2, 9.3 and 9.4 above) go beyond the scope of the Regulation in so far as they give rise to restrictions on the exploitation of products and processes which have not been jointly developed by the parties to the agreement and which are not covered by Articles 4 and 5 of the Regulation.
- (c) The successful development of the process will promote technical and economic progress, particularly energy saving, from which consumers will benefit; the restrictions listed appear reasonable and necessary for this purpose for the reasons given in paragraph 14 above and the undertakings will still be faced with substantial competitors (see paragraph 5). A decision pursuant to Article 85 (3) may, therefore, be taken.
- (d) The foreseen duration of the joint development is about six years (see paragraph 11 above). The

arrangements were notified to the Commission on 1 June 1983. It appears appropriate, therefore, pursuant to Articles 6 (1) and 8 (1) of Regulation No 17, to adopt such a decision for a period of 7 years with effect from that date,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period from 1 June 1983 to 31 May 1990 to the joint development and related agreements for the construction of ammonia-making plant notified to the Commission on 1 June 1983 by the parties named in Article 2.

Article 2

This Decision is addressed to:

1. BP International Limited,
Britannic House,
Moor Lane,
UK-London EC2Y 9BU.
2. The MW Kellogg Company,
3 Greenway Plaza East,
Houston,
USA-Texas 77046.

Done at Brussels, 2 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

⁽¹⁾ OJ No L 53, 22. 2. 1985, p. 5.

COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.017 – Breeders' rights: roses)

(Only the French text is authentic)

(85/561/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, and 4 thereof,

Having regard to the complaint lodged with the Commission pursuant to Article 3 (1) of Regulation No 17 on 31 January 1980 by Mr René Royon,

Having regard to the Commission Decision of 9 December 1983 to initiate proceedings in this case,

Having regard to the application for negative clearance and the notification filed on 27 April 1985 by Mr Alain Meilland pursuant to Article 4 of Regulation No 17,

Having given the undertakings 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 to 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 Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

A. The parties

1. The parties to this case are active mainly in the ornamental plant sector; they specialize in roses, which constitute a specific market.
2. The general partnership Meilland et Cie, Antibes, exploits throughout the world varieties of rose bushes which are produced and distributed under the name Selection Meilland.

The partners are:

- Mr Alain Meilland,
- Mrs Marie-Louise Paolino, widow of Francis Meilland,
- Mr Raymond Richardier.

The activities of this undertaking include the breeding of new varieties of rose bush, the production of plants, the exploitation of such plants (so-called 'garden' exploitation) or of the flowers ('cut flower' exploitation) and their distribution both wholesale and retail through an international network of licensees and sub-licensees.

The private company Universal Plants, Le Cannet des Maures, specializes more particularly in the production of rose bushes. It is also the breeder of a number of varieties or holder of the rights in their exploitation. The partners are:

- Mr Alain Meilland,
- Mr Raymond Richardier, and
- Mrs Marie-Louise Paolino, referred to above, is the manager.

These two undertakings trade under the name Universal Rose Selection-Meilland (URS-M, hereinafter called 'Meilland').

Owing to the economic importance, from both the qualitative and quantitative points of view, of its varieties, which are sold in numerous countries, including the two biggest markets for ornamental plants, North America and Europe, Meilland has for the past 30 years been one of the world's leading breeders and producers of roses. Its current turnover is approximately 12 million ECU, two-thirds of which is from sales in the Community. This figure includes both earnings from its own production and the royalties charged for the exploitation of its varieties by third parties.

3. In France, Meilland has granted a licence for the commercial exploitation of its varieties to Mr and Mrs Francisque Richardier (hereinafter called 'Richardier'), who are related to Mr Raymond Richardier. They are exclusively authorized, under an agreement they concluded with Meilland on 30 September 1968, to produce and sell, or cause to be produced and sold, in that country rose bushes and cut flowers of the Selection Meilland varieties. They

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

trade on this basis under the name Universal Rose Selection-France (URS-F), at Tassin La Demi-Lune, in the capacity of general licensee, and grant sub-licences to French nurserymen and horticulturists wishing to exploit those varieties.

4. While he was employed by Meilland as Director entrusted with administrative and managerial functions and responsible for the international distribution of the Selection Meilland varieties, Mr R. Royon himself became in 1971, at the same time and on an independent basis and with Meilland's consent, one of Richardier's sub-licensees. In this capacity, he produced under glass, at his nursery 'Les Roses du Capitou' at Antibes, cut flowers from rose bushes of the Selection Meilland varieties, including the variety Sonia. In 1983, Mr Royon closed his business and sold his equipment.

B. The products and their distribution

5. The products in question which are the subject of the contract covered by this proceeding, are rose bushes and cut roses of the varieties Sweet Promise-Sonia Meilland and Pitica/Kyria, which are Selection Meilland varieties, the second being a natural mutation of the first, discovered in Mr Royon's glasshouses in 1971. Selection Meilland varieties are as a rule intended either for professional horticulturists specializing in the production of cut flowers sold as such to the consumer, or for amateur gardeners seeking rose bushes. Almost all these varieties are protected, usually by a plant breeder certificate, which is the case in all the Member States – except Greece and Luxembourg – and in certain non-Community countries, but sometimes by a patent; moreover, each one is distributed under a fancy name which has formed the subject matter of an international filing. In January 1980, the date of the complaint, about 150 Selection Meilland varieties were exploited with a production in excess of 1 000 or 2 000 plants. Of those varieties, 24, including Sonia, were distributed throughout the Community and in 25 non-member countries for sale as cut flowers. At the same time, a large number of other varieties are used to a limited extent by Meilland as selection material.

6. (a) The number of rose bushes sold to amateur gardeners each year in Europe is put at 150 million; approximately 20 million are derived from protected varieties, representing retail sales worth about 30 million ECU; two-thirds of these are 'supplied by four major breeders – the German breeders Kordes and Tantau, and the French breeders Meilland and Delbard – or their licensees in the various countries of the Community.
- (b) As to the cut flower trade, 90 % of which is in protected varieties, it is estimated that 200 million rose bushes are exploited by rose growers world-wide, two-thirds of whom are in Europe where they own 3 000 hectares of glasshouses, and

where 20 million such bushes worth about 25 million ECU are renewed on average each year: including imports from non-Community countries, close on 5 thousand million cut roses are sold each year to private individuals in the Community, approximately half of which are of varieties protected in the name of four major breeders – Meilland and Kordes, who remain on an equal footing from one year to the next, followed by the American breeder Hill, and the Dutch breeder de Ruiter.

7. As a rule, the varieties exploited are 'creations' in that they are obtained by trial and error from at least two existing varieties, being produced by more or less systematic cross-breeding using creative selection methods. In the breeders' establishments, as in nature, the 'choices' of crossing may also be made empirically by natural factors such as the wind or insects. However, certain varieties are the result of mutations. A distinction is drawn between natural mutations, which appear spontaneously, and mutations brought about artificially by applying more or less arbitrary scientific processes.

The mutation takes the form of a growth, commonly known as a 'mutation' or 'sport', appearing on a plant of an existing variety known as the 'parent variety'. Cuttings taken from this first growth enable it to be reproduced by grafting *ad infinitum* while retaining its characteristics. A natural mutation with sales potential is a relatively rare phenomenon which can, moreover, as a rule be observed knowingly only by the trained eye of a connoisseur. To qualify for protection as a 'new variety of plant', in France and in those countries which have introduced a system of protection derived from the International Convention for the Protection of New Varieties of Plants (Paris, 2 December 1961), the mutation must, like any new variety, first be examined to determine whether it has the features required by law. Both mutations and varieties resulting from selection work must undergo a series of examinations extending over several growth cycles, a lengthy process the outcome of which is uncertain; deciding whether or not to incur the necessary expense therefore calls for good judgment, which presupposes experience and knowledge, notably of the potential market.

8. Where, as in the case of the variety Pitica/Kyria, a natural mutation is discovered by a third party on a plant of a parent variety already protected in the name of an original breeder, the problem arises of determining the extent of the respective rights of each party – third party discoverer and original breeder – under the law, in the new variety resulting from that mutation. In the field of plant species, this question of principle is of considerable economic importance, particularly in the horticultural and floral sphere where any new variety – whether it be a mutation or a creation – can become a best-seller overnight and capture a market share as large as that held, for example, by Baccara in its day or Sonia at the present time.

Relations between the breeder of the parent variety which mutated naturally or of the variety which was used as the initial source of variation and the third party who discovered or created the new variety resulting from the original variety are governed by the following provisions of the French Plant Protection Law (Loi relative à la protection des obtentions végétales) (No 70 – 489) of 11 June 1970:

(a) Article 1 (1):

‘For the purposes of this law, new variety of plant means a new variety of plant that has been either created or discovered.’

(b) Article 3 (1):

‘Any new variety of plant may be covered by a “plant breeders’ certificate”, which confers on its holder an exclusive right to produce, import into the territory where this law is applicable, sell and offer for sale the whole or part of the plant or any reproduction or vegetative propagation material of the variety concerned and of the varieties which are obtained from it by hybridization where their reproduction requires the repeated use of the original variety.’

(c) Article 23 (2)

‘Subject to the provisions of Article 3, use of the protected variety as a source of initial variation with a view to obtaining a new variety shall not constitute an infringement of the rights of the holder of a breeders’ certificate.’

The French law is itself derived from the Paris Convention referred to above, of which, among other provisions, Article 5 (3) stipulates that:

‘Authorization by the breeder shall not be required either for the utilization of the new variety as an initial source of variation for the purpose of creating other new varieties or for the marketing of such varieties’

and that such authorization is required only

‘when the repeated use of the new variety is necessary for the commercial production of another variety’.

For the purposes of this case, suffice it to say that Article 1 (1) of the French law makes no distinction according to whether or not the parent variety on which a mutation was discovered was itself already protected in the name of an original breeder. The breeders’ right in respect of the new variety Pitica/Kyria discovered by Mr Royon therefore belonged to him if not exclusively, then at least to a large extent within the framework of an *ex lege* sharing of the rights attached to that new variety. On the basis of these provisions, Meilland claimed *ex lege*, in the course of the proceedings, not an exclusive right but a solution of the ‘joint proprietorship’ type concerning the variety Pitica/Kyria.

9. For the purposes of the exploitation of the Selection Meilland varieties in France, in respect of which he has been granted a licence, Richardier supplies freely to all horticulturists and nurserymen who so request three types of non-exclusive sub-licences, simultaneously if necessary, for each variety they wish to exploit:

- (a) the so-called ‘cut flower’ agreement, granting a sub-licence to produce only cut flowers and to sell them wholesale and retail;
- (b) the so-called ‘nurseryman cut flower’ agreement, granting a sub-licence to produce and sell only rose bushes, themselves intended to be sold wholesale to cut flower producing horticulturists (holders of a ‘cut flower’ agreement);
- (c) the so-called ‘garden agreement’, granting a sub-licence to produce only rose bushes and to sell them retail and wholesale to amateur gardeners.

As a result of the expansion of the Meilland network, and at a rate of one agreement per licensed variety, thousands of such similarly worded agreements have been concluded in France with about 900 of Richardier sub-licensees.

C. The agreements

10. The agreement to which this proceeding relates is the ‘cut flower’ sub-licensing agreement concluded between URS-F Richardier and Mr R. Royon on 28 October 1971 containing the following clause concerning mutations:

Article X: ‘The user undertakes to inform the distributor or his authorized agent, within 15 days, of the appearance of any mutation in the rose bushes of the variety referred to in this agreement, which he exploits for cutting. Such mutation shall remain the property of Universal Rose Selection-Meilland and shall be surrendered to it by the user in order that it might examine the mutation and judge whether it can be marketed. If it can be marketed, Universal Rose Selection-Meilland will remunerate the user according to the qualities exhibited by the new variety’.

As from 1974, this clause was replaced by the following:

New Article XII: ‘Mutations: the user undertakes to inform the distributor or his authorized agent within 15 days of the appearance of any mutation in the rose bushes of the variety referred to in Article 17, which he exploits for cutting. Such mutation shall be surrendered by the user to the distributor alone in order that he might examine it and judge whether it can be covered by a plant breeders’ certificate and be marketed.

The distributor shall inform the user of his decision within three years from the date of such surrender.

During that period, the user shall refrain from propagating the variety for commercial purposes.

If he decides to produce the mutation, the distributor shall so notify the user. Unless the parties agree otherwise, the user shall be paid at 15 % of the gross royalties collected throughout the period of exploitation of the new variety. All experimentation, protection and distribution costs shall be borne by the distributor. If the distributor does not announce his decision within a period of three years, he shall be deemed to have waived his rights over the mutation and shall return it to the user'.

An Article VIII entitled Guarantee was also added to the agreement as from 1974, worded as follows:

Article VIII: Guarantee: 'The distributor guarantees only the material existence of the patent, the application for a plant breeders' certificate or the plant breeders' certificate. The user undertakes not to challenge the validity of those documents.

If the application for a breeders' certificate is refused, or if the patent or breeders' certificate issued is invalidated at the request of a third party, the agreement shall be terminated as from the day on which those decisions become final, without any compensation being due to either party. The royalties paid to the distributor shall not be refundable and the royalties falling due up to the date of the final decision must be paid. No more royalties shall be payable by the user after that date.'

11. The provisions of the agreement in question concerning mutations were originally agreed between Richardier and Mr Royon along the lines of a basic licensing agreement drawn up on 30 September 1968 between URS-M (Meilland) and URS-F (Richardier), which itself contained the following clause:

Article IV-(5): 'Mr and Mrs Richardier shall inform URS-Meilland of the appearance of any new mutations of rose varieties which appear either on the rose bushes exploited by them or on those exploited by their licensees. Such mutations shall remain the property of URS-Meilland, which shall determine without appeal whether or not it is appropriate to market them'.

However, this agreement of 30 September 1968 was amended on 30 October 1972, the above wording being replaced by the following new wording:

New Article IV-(5): 'Mr and Mrs Richardier shall inform URS-Meilland of the appearance of any new mutations of rose varieties which appear either on the rose bushes exploited by them or on the rose bushes exploited by their licensees'.

This amendment to the basic licensing agreement did not give rise, in regard to mutations, to a corresponding amendment of the agreement concluded between Richardier and Mr Royon on 28 October 1971.

12. In the other Member States, Selection Meilland varieties are exploited either by exclusive licensees or by Meilland agents, who grant sub-licences to nearly 2 000 sub-licensees. Except in Germany, the latter are obliged not to challenge the breeder's property rights and to transfer to him the ownership in mutations. In the case of Germany, the following new provision concerning mutations has been incorporated in all agreements concluded by Meilland and its German licensee Strobel & Co. with sub-licensees since 1972:

'1) If, in the course of the vegetative propagation of the varieties to which this agreement relates, the licensee discovers mutations (sports), he shall inform the agent thereof. The latter or an authorized representative may come to take note of the mutation on the licensee's premises and examine it, without, however, being able to have any influence on the future use of the mutation.

As inventor of the mutation, the licensee may reserve the right to the new variety resulting from that sport save where the courts decide otherwise pursuant to paragraph 12 (2) of the law on plant breeder certificates. Where the licensee intends to sell the right in the sport accruing to him under paragraphs 1 and 2, or if he wishes to have the mutation licensed, the agent shall retain an option right.'

13. The thousands of similar contracts to the agreements in question concluded either by Meilland or by the other plant breeders in the EEC provide the economic context in which the present agreement may be considered.
14. The version as amended in 1974 of the 'cut flower' standard form agreement signed by Mr Royon (new Article XII concerning mutations, referred to above, and Article VIII entitled 'Guarantee' concerning the no-challenge clause, also referred to above) was notified by Meilland together with an application for negative clearance on 27 April 1985, that is to say more than nine months after the oral hearing of 4 July 1984.

D. The application in the case of Pitica/Kyria of Article X of the agreement between URS - F (Richardier) and R. Royon

15. Outstripping Baccara, which fell into the public domain in 1974 after having provided 25 million plants, Sonia is the rose which has been the biggest commercial success in the world (with about 40 million plants sold in 15 countries) since it was created in 1960, in front of Visa - about 15 million plants - and far ahead of all the others. In 1984, some 40 Selection Meilland varieties were exploited for cutting. In addition to the abovementioned varieties, 10 provided a total of between 1 and 5 million plants throughout the period of their exploitation, and the others less than 1 million, amongst which the variety

Pitica/Kyria was moderately successful with about 500 000 plants. These varieties had at that time, including Pitica, six natural mutations discovered by third parties at their own places of business, representing altogether nearly four million plants used for cutting in about 10 countries.

16. In 1971, Mr Royon reported the discovery of several natural mutations of the variety Sonia at his 'Les Roses du Capitou' nursery at Antibes. As stipulated in the abovementioned Article 10 of the agreement he concluded on 28 October 1971 with Richardier, he immediately sent grafts to Meilland for examination of the mutations. Since he had still not received any reply by the end of 1973, on 10 December 1973 he filed, by way of precaution, an application for a breeders' certificate in respect of one of them under the varietal name Pitica and informed Meilland of his action; in a letter dated 7 March 1974, he again stressed the importance he attached to this new variety. Meilland then announced its intention of exercising its rights over it, as can be seen from the following extract from a letter to Mr Royon dated 10 April 1974:

'This mutation, which you refer to as 'RR7', having been discovered in your plantations of 'Sweet Promise/Sonia Meilland' forming the subject matter of licensing agreement No 1442-2 signed on 28 October 1971 between Universal Rose Selection-France (Mr Francisque Richardier) and yourself, we are willing to agree as follows:

1. In the event of our reaching, before 31 March 1975, a favourable decision regarding production of the variety:
 - you will assign to us the claim to protection you have already considered necessary to file as a precaution;
 - we shall pay you, before 31 December of each year, 15 % of the gross royalties collected throughout the period of exploitation of the said variety in all countries and territories,
 - all expenses in connection with experimentation, protection (including those you have already incurred) and distribution will be borne by us.
 2. In the event of our reaching, before 31 March 1975, an unfavourable decision regarding production of the variety, we shall waive our rights over the mutation.'
17. A period of bargaining followed, during which Mr Royon expressed his dissatisfaction with Meilland's offer and his wish to protect and exploit Pitica himself in all countries in which Meilland decided to renounce its rights over it. On 18 November 1974, i. e. less than a month before the expiry of the one-year period, which started to run with the application for a certificate filed on 10 December 1973, for commencing the protection formalities in other countries, Meilland formally announced its intention:

- to protect the variety in all countries in which that was possible,
- to seek protection in those countries both for 'cut flower' exploitation and for 'garden' exploitation,
- not to increase the rate of remuneration payable to the discoverer under the sub-licensing agreement of 28 October 1971, as amended in 1974.

On this basis, a deed of assignment was drawn up on 23 November 1974, the main provisions of which were as follows:

- (a) by a separate instrument, Mr Royon assigns to Meilland (in the case in point, to Universal Plants Sarl) his application for a breeders' certificate in France, No 00730, concerning the variety Pitica, and his priority rights in other countries, and in general all his rights in the invention;
 - (b) Meilland reimburses all the expenses incurred by Mr Royon in registering Pitica and takes steps to obtain protection in all countries where that is possible (notably: the common market countries, Spain, the United States, Sweden, Morocco and Hungary) (Article 2, 3 and 4); any property rights subsequently relinquished by Meilland would then be reassigned free of charge to Mr Royon (Article 5); Meilland will give Pitica a commercial designation protected in all countries as a trademark, which Mr Royon may use freely (Article 6); in return for the assignment by Mr Royon of all his rights, he will receive a royalty of 15 % of the gross amount, before deduction of any discounts, of the royalties paid by licensees in respect of Pitica (Article 7); Mr Royon remains free to produce cut flowers of the variety Pitica at his nursery 'Les Roses du Capitou', and the propagation licences already granted by him to horticulturists will be confirmed; however, any other exploitation will be reserved exclusively for Meilland (Articles 8, 9 and 10); Meilland undertakes to distribute Pitica as widely as possible, but will alone be entitled to take decisions concerning its marketing; it undertakes also to offer this variety for sale in the same way as the other varieties in respect of which Universal Plants holds the exclusive production and distribution rights (Articles 11 and 12); Meilland undertakes to carry out all the necessary tests to determine Pitica's suitability for 'garden' exploitation, to inform Mr Royon of the results, and, if appropriate, to apply the provisions of this contract to 'garden' exploitation (Article 13).
18. In July 1977, Pitica was declared by Meilland, on the basis of tests carried out both by itself and by its agents or licensees in the Netherlands, Germany, the United States and Israel, to be unsuitable for 'garden' rose

bush exploitation. In August 1977, the protective rights over the variety in Hungary and Morocco were reassigned free of charge to Mr Royon, and protection was purely and simply abandoned for lack of interest in Sweden and Denmark. It was first marketed for cutting in 1978, when it was given the name Kyria, which formed the subject matter of an international filing in Meilland's name. At that time, there were 50 000 Pitica/Kyria plants in three countries. By the end of 1980, there was a total of 265 000 plants in several countries (France, Japan, the United States, Latin America and a few in new plantations in Italy and Switzerland). Having reached the 500 000 mark in 1984, it ranks 20th in importance compared with the 60 other Meilland varieties that have been cultivated for cutting since that company was formed.

The other mutations discovered by third parties have been produced in a number of countries ranging from five (Privé) to four (Carinella) and three (Carlita), and have each produced a total of between 500 000 and 1 million plants depending on how well they have been received, firstly by the licensees, and secondly by the public. Generally speaking, the number and relative importance of the factors militating in favour of or against the success of a variety on a market are highly unpredictable and are not always directly dependent on the decisions taken or the resources employed by the breeder and his agents. Moreover, the exploitation of each variety within a collection of varieties is necessarily subject to the requirements of the exploitation of the collection as a whole. This is especially true in the case of Pitica, whose pale pink colour places it in the same colour scale as its parent variety Sonia, which is also a pink shade.

E. Mr Royon's complaint and the arguments raised by Meilland

19. Mr Royon lodged his complaint on 28 January 1980 against Article 10 of his agreement of 28 October 1971 with Richardier for infringement of the competition rules set out in the Treaty. He considers that the above clause obliged him to assign to Meilland his rights in the variety Pitica by the agreement of 23 November 1974, the underlying principle and terms of which, notably as regards payment, were dictated to him without any scope for discussion. He feels that, despite its worldwide production and distribution network, Meilland did not do all in its power to make the variety a commercial success. He believes that Article X, incorporated as it is in all the agreements with sub-licensees who use Selection Meilland roses, prevents those sub-licensees from setting up as international distributors of the new roses discovered by them, in such a way as to affect competition within the common market within the meaning of Article 85 (1).

The procedure which was opened on 9 December 1983 in response to this complaint was extended by

the Commission to include the no-challenge clause contained in the same standard form licensing agreement of URS-F Richardier (see above, point 10 at the end: Article VIII entitled 'Guarantee') which prohibits the sub-licensee from challenging the validity of the breeders' rights conferred on Meilland.

20. Meilland has advanced the following main arguments in its defence:

- (a) The Article X referred to in the complaint was not applied to Mr Royon since it was in his capacity as Director with Meilland until February 1972 that he surrendered to his then employer the Sonia mutations discovered in 1971. Moreover, for the same reason, he was not at that time free to carry on business as a plant breeder. Lastly, he himself stepped outside the bounds of the agreement he complains of, first of all by signing on 10 December 1973 an application for a plant breeders' certificate in respect of a variety which Meilland had not considered worthwhile adopting, then by not invoking expressly himself Article X of his agreement in the course of subsequent bargaining. Meilland had, moreover, never invoked Article X against its licensees or sub-licensees. Furthermore, since 1974, the new Article X of its agreements recognizes the discoverer's rights over mutations and confers on Meilland only a right of pre-emption, which it considers perfectly legitimate. In this respect, Meilland feels that the granting of a plant breeders' certificate for a mutation discovered on a bush of a parent variety already protected in the name of an original breeder differs fundamentally from the granting of a patent for the improvement of a protected industrial invention: the improvement patent implies an 'exploitation' of the main patent, itself involving an inventive 'effort' which is completely lacking in the case of the unexpected discovery of a mutation. In the present case, there are no grounds for granting Mr Royon, as it were, an improvement patent. Firstly, the 'power of mutation' is already intrinsically present in the genetic make-up of the parent variety, the credit for which belongs exclusively to the latter's creator. Secondly, the growth which represents the natural mutation of a rose, a non-sexually reproducing species, is already in itself a new variety which fulfils the conditions for protection owing to the fact that its characteristics are determined from the outset by nature in such a way as to satisfy the requirements of distinctiveness, uniformity and stability provided for by law without owing anything to the discoverer's intervention.

Meilland considers that the question of rights over the mutation is not expressly dealt with in the abovementioned French Plant Protection law and

that it is only natural, since the law is silent on this matter, that the parties to a licensing agreement relating to a new plant variety should settle it by common accord. On the whole, Meilland believes it has made the same sales promotion effort for the variety Pitica as for the others, bearing in mind all the requirements inherent in the management of the group, even if in 1971 a preliminary examination had in fact overlooked the intrinsic qualities of the new variety. At all events, the licensee-discoverer generally has neither the means nor the inclination to launch out into the exploitation of a mutation, preferring by far to surrender it – sometimes spontaneously – to Meilland, if only to take advantage of the latter's worldwide distribution capability.

- (b) As regards the clause prohibiting the licensee from challenging the breeders' rights held by Meilland, the latter points out first of all that no-one is obliged to contract; on the other hand, once they are agreed to, all the clauses of a contract must be complied with in good faith by both parties where they have freely given their consent; and a licensee must not be able both to reap the benefits of a licence based on an intellectual property right and to reserve the right to challenge that right as such. In the first place, under a licensing agreement, especially in the case of a man – Mr Royon – who is a former employee and therefore has inside knowledge both of the group and of its products and methods, the licensee possesses information which puts him in a particularly favourable position to create or exploit situations in which a challenge is possible. In the second place, and as a general rule, deletion of the clause would be a bonus to the bad payer, who could then lawfully continue to use the licence while refraining from paying royalties for the simple reason that he has initiated a challenge procedure, hence with, as it were, the support of the courts. Lastly, from a pragmatic point of view, settlements in actions for infringement would become impossible because they are based in most cases on the undertaking by the infringer to withdraw any petition for nullity of the complainant's rights, which clearly implies that he will no longer file such a petition.

Everything which would deprive the licensor of the benefits, thus detailed, of the clause would inevitably discourage in the long run an open licensing policy such as that pursued by Meilland. This would ultimately undermine the macro-economic advantages of such a policy, including the advantages from the point of view of competition.

- (c) The notification made on 27 April 1985 by Meilland contains nothing new in relation to the arguments and information already submitted in the course of the procedure, and at the oral hearing held on 4 July 1984.

II. LEGAL ASSESSMENT

A. Article 85 (1)

21. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings and decisions by associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.
22. The parties concerned are undertakings within the meaning of Article 85, carrying on at the time of the facts their main activity in the economic sector of ornamental flowers, and the agreements in question are agreements between undertakings within the meaning of that Article.
23. The following two provisions of those agreements have as their object and effect the restriction of competition within the common market:
 - (a) Article X of the agreement concluded on 28 October 1971 between URS-F (Richardier) and the sub-licensee Mr Royon obliging the latter to surrender to Meilland any mutations he might discover on rose bushes of the licensed variety Sonia:
 - The restrictive nature of this first provision lies in the fact that it obliges the licensee to relinquish completely rights he is justified in claiming in his discovery under the French law referred to above. Consequently, the agreement which deprives Mr Royon of all rights over mutations and reduces him to collecting a royalty has the effect of completely eliminating the licensee as a potential supplier of varieties resulting from mutations, both at the national level and on the markets of the other Member States. By and large, the restrictive effect of this obligation was not substantially modified by the changes made in this respect in 1974 to the standard form agreements in question (new Article XII), limiting to three years the period within which Meilland may require compliance with the said obligation by all its licensees or sub-licensees. In the present case, the letter sent on 10 April 1974 to Mr Royon by Meilland referred expressly to the latter's rights over the mutation Pitica, which occurred in 1971, and it is therefore on the basis of this prior contractual obligation that the agreement of 28 October 1971, the purpose of which was to lay down detailed rules for the assignment by Mr Royon of his own rights, was drawn up between Universal Plant Sarl and Mr Royon.

- The arguments put forward by Meilland in order to deny Mr Royon any property rights in the mutation of the parent variety Sonia cannot be accepted. Firstly, in so far as several mutations were discovered in Mr Royon's glasshouses in the context of the exploitation which he carried on under the production and selling licence granted by Richardier, all those discoveries must be considered to be independent of work done by Mr Royon directly connected with administrative responsibilities exercised by him in the management of the Meilland group. It is not contested between the parties, and it is borne out by the existence of the licensing agreement forming the subject matter of this procedure, that, despite his functions as Director within the Meilland group, Mr Royon at the same time and with Meilland's consent ran his business 'Les Roses du Capitou' on an independent basis. The fact, raised, moreover, by Meilland, that the rose is a non-sexually reproducing species and that its mutations are determined from the outset by nature with the qualities of varietal uniformity and stability required for protection itself tends to rule out breeding activities or work by Mr Royon incompatible with his obligations towards his then employer. Moreover, the very fact that there came into being a 'new variety' (the variety Pitica) within the meaning of the law in itself implies an inventive activity given tangible form in that new variety, which is incontestable both in its existence and in the degree of invention it expresses. Irrespective of the lack, if any, of an inventive 'effort', which Meilland also points to, an inventive 'activity' is not in itself, where it is involuntary or unexpected, sufficient to exclude the granting of property rights. Both the French law (in particular its Article 1 (1), referred to above) and the laws of the other Member States, and the International Convention for the Protection of New Varieties of Plants (referred to above), from which the former are derived, provide expressly that the discovery of a mutation may give rise to the grant of a plant breeders' certificate in the same way as the creation of a variety in the course of selection work. Moreover, Mr Royon's aptitude for correct observation of the existence and qualities of a natural mutation itself proceeded from an at least implicit prior inventive effort, and this is particularly attested to in the present case by the fact that an unfavourable preliminary examination of the same mutation by Meilland was subsequently to be proved wrong.
 - (b) The obligation on the licensee, contained in the same agreement in Article VIII entitled 'Guarantee', not to challenge the validity of the rights in the licensed variety:
 - The restrictive nature of this second provision lies in the fact that it denied the licensee the opportunity, open to any third party, of removing an obstacle to his economic activity by means of a petition for revocation. The importance of the restriction remains despite the prior examinations and official tests which precede the grant of a plant breeders' certificate for a new variety of plant, since those examinations do not entirely exclude the possibility of a wrongly conferred right or imply that firms must forgo in advance any opposition or action for infringement in which they might have an interest. Generally speaking, even where a licensee is able to challenge an intellectual property right only on the strength of information received from the licensor himself, the maintenance of free competition and, where appropriate, the revocation of an exclusive right which was conferred wrongly are in the public interest, and this overrides any consideration concerning the privileged relations between the parties to a licensing agreement.
24. The restrictions resulting from these two provisions are appreciable.
- (a) These restrictions have an appreciable effect on the market in the products in question in the EEC in view of the importance, both qualitative and quantitative, on that market of the rose varieties known as 'Selection Meilland'. This is all the more true as a single variety, possibly a mutation discovered by a licensee, may acquire a leading, or even dominant, position on the market. According to the case law of the Court of Justice of the European Communities of 12 December 1967 in Case 23/67 *Brasserie de Haecht*⁽¹⁾, the appreciable nature of the restrictions established in the present case stems *inter alia* from the cumulative effect due to the existence in France and in the other Member States of thousands of similar contracts obliging, in the case of each variety, licensees and sub-licensees to surrender to the licensor any mutations that are discovered and not to challenge the validity of the licensed rights, which confers on the restrictions taken as a whole even greater economic importance. The restrictions have the effect of concentrating in the licensor's hands alone all the varieties discovered by hundreds of licensees.
 - (b) The restrictions also appreciably affect trade between Member States in view notably of the cumulative effect described above. Firstly, the obligation on Mr Royon not to challenge the

⁽¹⁾ (1967) ECR 407.

validity of the licensed rights is imposed on all licensees and sub-licensees throughout the Community, and applies also to Meilland's rights in the other Member States. It thus enhances Meilland's position *vis-à-vis* its competitors throughout the common market. Secondly, the obligation on Mr Royon to relinquish all his rights in mutations is also imposed on all licensees and sub-licensees in the Community with the exception of Germany, and affects Mr Royon's rights not only in his own country but also in the other Member States. It thus eliminates him, and in general all other Meilland licensees, as an independent international supplier of this type of new variety throughout the world and, in particular, throughout the Community.

25. The conditions for the application of Article 85 (1) of the Treaty are therefore satisfied.

B. Article 85 (3)

26. Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

27. As regards the obligation on the licensee to waive completely his rights in future mutations:

- In the present case, this obligation imposed on Mr Royon did not concern his activities in respect of the production, propagation or distribution of the licensed variety Sonia or of the cut flowers which are the end product thereof. It was, on the contrary, extraneous to the conditions proper under which that product is produced or distributed, and to any concern for the promotion of technical or economic progress or to any such effect, even indirect,
- The only connection which can be established in the present context between the aforementioned obligation on the licensee and production, distribution or the promotion of technical or

economic progress is a negative connection in that the clause in question has had the effect of purely and simply depriving Mr Royon in advance of the new variety Pitica in respect of which he could have endeavoured to bring about such improvements. The only practical result of the clause is that, by thus completely eliminating this possibility, it also at the same time diminishes the licensee's interest in the qualities of the mutations he might observe.

- Nor can it be maintained that the improvement effects listed in Article 85 (3) will be automatically assured because the said obligation transfers responsibility for any action in relation to the production and distribution of the new variety Pitica to the Meilland group, which has greater resources at its disposal than Mr Royon, the licensee. The exploitation both of the licensed parent variety and of its mutation has in that case to take place within the overall framework of the management requirements peculiar to Meilland and its collection of varieties and must therefore bend to those requirements. As a result, the mutation does not receive the undivided attention it would have been given by Mr Royon, who could have devoted his entire resources, his efforts and his detailed knowledge of the international market to making it a success. This assessment is borne out by the fact that, despite Mr Royon's exhortations, five years elapsed (1971 to 1976) between the discovery of the new variety Pitica and the time when Meilland started to market it.

It is therefore not an obligation capable of fulfilling the first condition of Article 85 (3). This rules out any benefit to consumers within the meaning of that Article. Lastly, this obligation on Mr Royon was not indispensable to the satisfactory exploitation of the variety Sonia which had been licensed to him.

28. As regards the obligation on the licensee not to challenge the validity of the rights licensed to him:

- The obligation not to challenge a breeder's right prevents both the licensee and any third parties interested in exploiting the same variety under licence from acting freely in the sphere of the descriptions and claims relating thereto, which constitutes an obstacle to technical progress.
- In the event of a breeder's right being conferred wrongly on Meilland, its licensee would nevertheless be obliged to pay royalties or purchase rose bushes in order to exploit the variety concerned and would therefore likewise not be free to sell that variety wherever he wished, not even in other countries where it would not be protected.

Consequently, this obligation, too, is not capable of fulfilling the first condition of Article 85 (3). This in itself also rules out both any benefit to consumers and the need for an examination in the light of the last two conditions laid down in that Article.

29. For the reasons set out above, the agreement in question does not satisfy all the conditions which must be met in order to qualify for exemption under Article 85 (3). Thus, it is not necessary to examine if the late notification, which arrived on 27 April 1983, could cover the contract in question, which expired in 1983, or if this contract falls in the categories exempted from the obligation of notification by Article 4 (2) of Regulation No 17.

III. ARTICLE 3 OF REGULATION No 17

30. Where the Commission finds that there is infringement of Articles 85 or 86 of the EEC Treaty, it may, under Article 3 of Regulation No 17, require the undertakings concerned to bring such infringement to an end. However, in the present case there is no longer any need to require the parties to bring the infringements established to an end since the agreement in question, which Mr Royon concluded with Richardier on 28 October 1971, was terminated when the former closed his business and sold the equipment of 'Les Roses du Capitou' in 1983.

There are nevertheless reasons for finding that infringements were committed in the past. The Commission's position, notably in the light of Article 85 (3), on all the agreements concerned or on similar agreements should be clarified for the benefit of the public. Moreover, the complainant has a manifest interest in the outcome,

HAS ADOPTED THIS DECISION:

Article 1

The following provisions of the licensing agreement concluded on 28 October 1971 and modified in 1974 between URS-F (Richardier) and Mr R. Royon for the exploitation of the rose bush variety Sonia Meilland ('cut flower' agreement) constituted infringements of Article 85 (1) of the EEC Treaty:

1. The obligation imposed on the licensee, Mr R. Royon, by Article X of the agreement to surrender to Meilland all mutations discovered on rose bushes of the licensed variety so that such mutations might remain the exclusive property of Meilland and so that the latter might decide unilaterally whether to exploit them commercially.
2. The obligation imposed in this respect on the licensee by the new version of the agreement, after the amendment incorporated in 1974 (new Article XII), which allows the plant breeder Meilland a period of three years from the date of surrender of a mutation by the licensee within which to impose its unilateral decision concerning the commercial exploitation of the mutation.
- 3.. The obligation imposed on the licensee in the new version of the agreement drawn up in 1974 (new Article VIII entitled 'Guarantee') not to challenge the validity of applications for plant breeders' certificates or of the plant breeders' certificates which are assigned to him under licence.

Article 2

The application for exemption under Article 85 (3) of the EEC Treaty for the provisions referred to in Article 1 is hereby refused.

Article 3

This Decision is addressed to:

1. SNC Meilland & Cie, 134 boulevard Francis Meilland, F-06600 Antibes;
2. Universal Plant Sarl, 134 boulevard Francis Meilland, F-06600 Antibes;
3. Universal Rose Sélection-France (Mr and Mrs Francisque Richardier), F-69160 Tassin-la-Demi-Lune;
4. Mr René Royon, 128, Les Bois de Font Merle, F-06250 Mougins.

Done at Brussels, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.570 etc. – Sole distribution agreements for whisky and gin)

(Only the English text is authentic)

(85/562/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European
Economic Community,

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

Having regard to the notification made by The Distillers
Company plc, Edinburgh, United Kingdom, seeking
exemption of several sole distribution agreements,

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

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 190, 30. 7. 1985, p. 8.

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

I. FACTS

A. The undertakings and the agreements

1. The Distillers Company plc, Edinburgh, the leading
producer of spirits in the EEC, has notified on behalf
of several subsidiaries 21 sole distribution agreements
concluded between those subsidiaries and various
companies in several Member States.

The product concerned is either whisky or gin.

2. The following agreements have been notified:

No.	Manufacturer	Sole Distributor	Territory	Product	Date of Notification	No of file
1	James Buchanan & Company Limited	Frans Verbunt & Co. BV	Netherlands	whisky	15. 2. 1982	IV/30.571
2	James Buchanan & Company Limited	Henkell & Co.	Germany	whisky	15. 2. 1982	IV/30.572
3	Bulloch Lade & Company Limited	Sarma Penney Limited	Belgium	whisky	15. 2. 1982	IV/30.574
4	John Dewar & Sons Limited	BV Im- en Export- maatschappij v/h Wilmerink & Muller	Netherlands	whisky	15. 2. 1982	IV/30.575
5	John Haig & Company Limited	SA Cinzano et Co.	Belgium and Luxembourg	whisky	15. 2. 1982 6. 12. 1982	IV/30.576
6	John Haig & Company Limited	De Danske Sprit- fabrikker	Denmark	whisky	15. 2. 1982	IV/30.577
7	John Haig & Company Limited	Pierre Rivière SA	France	whisky	15. 2. 1982	IV/30.578
8	W. P. Lowrie & Company Limited	J. A. Verbunt BV	Netherlands	whisky	15. 2. 1982	IV/30.579
9	Wm. Sanderson & Son Limited	Ets. Fourcroy SA	Belgium and Luxembourg	whisky	15. 2. 1982	IV/30.580
10	White Horse Distillers Ltd	Söhnlein Rheingold KG	Germany	whisky	22. 3. 1982	IV/30.612

No.	Manufacturer	Sole Distributor	Territory	Product	Date of Notification	No of file
11	Wm. Sanderson & Son Limited	Torben Anthon A/S	Denmark	whisky	6. 5. 1982	IV/30.646
12	The Distillers Agency Limited	Hans Just	Denmark	whisky	5. 5. 1982	IV/30.651
13	The Distillers Agency Limited	Taittinger SA	France	whisky	5. 5. 1982	IV/30.652
14	John Haig & Company Limited	Fratelli Aversa SpA	Italy	whisky	22. 6. 1982	IV/30.692
15	J. & W. Hardie Limited	Fratelli Rinaldi SpA	Italy	whisky	27. 2. 1985	IV/31.489
16	Wm. Sanderson & Son Limited	Gio Buton & Co. SpA	Italy	whisky	11. 4. 1982	IV/30.933
17	Tanqueray, Gordon & Company Limited	Ets Fourcroy SA	Belgium and Luxembourg	gin	15. 2. 1982	IV/30.581
18	Booth's Distilleries Limited	Martini & Rossi AG	Germany	gin	15. 2. 1982	IV/30.570
19	Tanqueray, Gordon & Company Ltd	Frans Verbunt & Co. BV	Netherlands	gin	15. 2. 1982	IV/30.582
20	White Horse Distillers Ltd	Corima SA	France	whisky	15. 2. 1982	IV/30.585
21	White Horse Distillers Ltd	Gilbeys of Ireland	Ireland	whisky	15. 2. 1982	IV/30.586

3. All agreements are non-reciprocal and similar as to the restrictions they impose on both parties. The brand-owning company invests the respective sole distributor with the exclusive right to market the product concerned in the allocated area and undertakes not to sell the goods for resale to other persons in that territory. The sole distributors are obliged not to act as agent or distributor for other companies as to the product in question and must not solicit orders, advertise the goods or hold stocks of the goods outside the territory.

4. The agreements listed above were in force before 1 July 1983. They have been notified by the Distillers Company in view of Articles 3 and 4 of Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements ⁽¹⁾, since it fears that the provisions contained in these Articles are likely to disentitle the parties to the benefit of the block exemption after 31 December 1986.

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 1.

B. The products and the market

5. The spirit industry is characterized by a large number of different product categories. The most important categories are ⁽²⁾:

- (i) Whisk(e)y, made from barley or rye or a mash of cereals and aged for three years or more, contains at least 40 % alcohol.
- (ii) Wine spirits and brandies, distilled from grape wine and aged from two to eight years, contain at least 38 % alcohol; this category includes also grape marc or marc spirits ⁽³⁾.

⁽²⁾ The following product classification is primarily based on the study 'Concentration, Competition and Competitiveness in the Beverages Industries of the European Community' submitted in 1984 by Christian Marfels on behalf of the Commission, p. 45. It also takes account of the classification submitted by the Commission in its proposal for a Council Regulation laying down general rules on the definitive description and preparation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with plants or other aromatic substances, OJ No C 189, 23. 7. 1982, p. 7.

⁽³⁾ This category includes the spirituous beverages defined in Article 1 (2) (i), (j), (k), (l), of the proposed Council Regulation.

(iii) Liqueurs (or cordials), made by flavouring brandy and other spirits with fruits and leaves, have alcoholic strengths from 20 to 60 %.

(iv) Grain spirit, corn-brandy ('Korn'), made from grain, not aged and with no colour or particular flavour, contains at least 32 % alcohol. To this category also akvavit and vodka can be added ⁽¹⁾.

(v) Juniper-flavoured spirituous beverages such as gin and genever contain at least 30 % alcohol.

(vi) Rum, made from the juice of sugar cane or molasses, contains at least 38 % alcohol.

(vii) Fruit spirits distilled from cherry, plum, mirabelle etc. ⁽²⁾

6. Within each product category there is a large number of competing brands. This is particularly true for whisk(e)y, the most important category, where numerous leading spirit firms are actively competing on the market ⁽³⁾. Overall concentration in the spirit industry at the Community level can be classified as moderate, the top 10 companies accounting for 58 % of total net sales ⁽⁴⁾.

⁽¹⁾ See Article 1 (2) (c), (d), (f) and (h) of the proposed Council Regulation.

⁽²⁾ Other categories exist for aniseed-flavoured spirits, cider or perry spirits, gentian spirits and advocaat, see Article 1 (2) (g), (n), (o) and (q) of the proposed Council Regulation.

⁽³⁾ Marfels, *op. cit.*, p. 54.

⁽⁴⁾ Data from 1980, Marfels, *op. cit.*, p. 54.

C. Facts related to Articles 3 and 4 of Regulation (EEC) No 1983/83

7. As to the application of these Articles, the following facts are of importance:

(a) Each party to the respective sole distribution agreements or the group (in the sense of Article 4 of Regulation (EEC) No 1983/83) to which it belongs attains a total annual turnover of more than 100 million ECU.

(b) In agreements 1 to 17 listed above the sole distributor or a member of the group to which it belongs produces spirituous beverages, but *not* of the same category (either whisk(e)y or juniper-flavoured spirits) as the product covered by the sole distribution agreement.

(c) In agreements 18 to 21 the sole distributor or a member of the group to which it belongs *does* produce a spirit of the category to which the sole distribution agreement refers, i.e. either whisk(e)y or a juniper-flavoured spirit.

8. As regards the agreements mentioned under (c) above, the aggregated market shares in the respective territories for the brands which are the subject of the exclusive agreements ('A') and the brands manufactured by the sole distributors or their groups ('B') (see the table below) are all lower than 5 %.

Notification No.	Product	Parties to the agreement	Territory	1. Brand(s) A 2. Brand(s) B
18	gin	Booth Martini Rossi	Germany	1. High & Dry 2. a) Bosford b) Fletan
19	gin	Tanqueray, Gordon & Co. Ltd Frans Verbunt & Co. BV	Netherlands	1. Gordon's Gin 2. Verhooven (Genever)
20	whisky	White Horse Corima SA	France	1. White Horse 2. Several brands of the Seagram group
21	whisky	White Horse Gilbeys of Ireland	Ireland	1. White Horse 2. Several brands of the Grand Metropolitan Hotel group

D. Comments from third parties

9. No comments were received from third parties in response to publication of a summary of the notified agreements in accordance with Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

10. The agreements to which this Decision refers have the object and effect of restricting competition in the common market. The manufacturer undertakes to supply the product for resale in the territory only to the sole distributor. The latter undertakes not to distribute goods which compete with the contract goods, to obtain the contract goods for resale only from the other party and to refrain outside the contract territory and in relation to the contract goods from seeking customers, from establishing any branch, and from maintaining any distribution depot. Since the parties to each agreement are located in different Member States, the agreements are likely to affect inter-state trade.

B. Regulation No 67/67/EEC

11. However, Article 85 (1) of the Treaty does not apply to the agreements until 31 December 1986, since they are still covered by Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreement⁽¹⁾ until that date. Although that Regulation has been replaced by Regulation (EEC) No 1983/83 and (EEC) No 1984/83⁽²⁾ with effect from 1 July 1983, Article 7 and 15 (1) respectively of the new Regulations provide that from 1 July 1983 to 31 December 1986, Article 85 (1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.
12. All the agreements listed above were already in force on 1 July 1983 and none contains any restriction which exceeds the limits set by Regulation No 67/67/EEC.
13. Notwithstanding this transition period, the parties have shown a legitimate legal interest in learning now whether the agreements will also be covered by the new Regulation or can be individually exempted from the application of Article 85 (1) after 31 December 1986.

⁽¹⁾ OJ No 57, 25. 3. 1967, p. 849/67.

⁽²⁾ OJ No L 173, 30. 6. 1983, p. 5.

C. Regulation (EEC) No 1983/83

14. According to Article 3 (b) of Regulation (EEC) No 1983/83, the benefit of block exemption does not apply where 'manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods unless at least one of them has a total annual turnover of no more than 100 million ECU'.
15. Article 4 (1) of that Regulation extends this provision to agreements where the goods in question are manufactured by an undertaking 'connected' (as defined in paragraph 2) with a party to the agreement. Finally, Article 5 (3) provides that for the purpose of calculating total turnover within the meaning of Article 3 (b), there shall be added together the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties.
16. All parties to the agreements listed above achieve – alone or together with the undertakings connected with them – an annual turnover which exceeds 100 million ECU.

Agreements Nos 1 to 17

17. In agreements 1 to 17 Regulation (EEC) No 1983/83 applies, since the parties to the agreements are not to be considered as manufacturers of equivalent goods in the sense of Article 3 (b).
18. Article 3 (b) indicates that the question of equivalence between certain goods has to be judged from the point of view of the user and of their characteristics, price and intended use. In certain cases differences as to only one of those features can lead to the formation of separate product markets, especially where consumer preferences have developed⁽³⁾.
19. Moreover, when defining the relevant market in application of Article 3 (b), account must be taken of the purpose of that provision in the context of the aim of the whole Regulation⁽⁴⁾. It follows in particular that the definition of the relevant market under this

⁽³⁾ Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements of 13 April 1984, OJ No C 101, p. 4, point 21.

⁽⁴⁾ See point 2 of the Commission notice referred to above.

provision need not be the same as that used in other areas of Community law where different goals are to be achieved.

20. It is the purpose of Article 3 (b) to refuse the benefit of group exemption to agreements under which a manufacturer entrusts the distribution of his goods to another manufacturer of competing goods, because the requirements of Article 85 (3) of the Treaty might not then be fulfilled ⁽¹⁾. It may be doubted whether a sole distributor would be sufficiently prepared to promote the sale of a certain product if he produces a competing product the market position of which might be weakened by such an effort. This conflict of interests could impede the stimulation of competition between products of different manufacturers which Regulation (EEC) No 1983/83 assumes normally to result from exclusive distributorship (see recital 6 of the preamble). It may also be imagined that such an agreement could involve an arrangement between the two manufacturers to maintain their respective market shares and not to intensify competition between them.

21. As has been shown above (see point 6), the overall market of spirituous beverages comprises a multitude of different product categories. The beverages in these categories differ as to their primary products, distillation and manufacturing process as well as in their typical flavour and intended use (aperitif, digestif, long drink basis, etc.), although certain categories might overlap to some extent in one or other of the above features.

22. As regards in particular the two sorts of spirits the above agreements refer to, one can define the relevant market in the sense of Article 3 (b) as follows:

23. Gin is derived from maize and flavoured with certain aromatics and spices, in particular with juniper. It usually serves as a basis for cocktails and long drinks. Gin belongs to the category of juniper-flavoured spirits which also includes 'Genever', 'Wacholder' and the like. Although spirits from that category and in particular gin might have some similarities with other 'clear spirits' like corn, akvavit and vodka, such as the clear colour and the degree of alcohol, the latter can not be regarded as interchangeable with the juniper-flavoured spirits, since they do not have such a typical and distinct flavour as gin and other juniper-flavoured spirits. Consequently, for the purpose of Article 3 (b) of Regulation (EEC) No 1983/83 the juniper-flavoured spirits form a separate sub-market within the overall spirit market.

24. Whisk(e)y is usually distilled from maize, barley or rye. The most important types of whisk(e)y, Scotch,

Irish, Bourbon and Canadian, vary in certain respects but they have in common a cereal as primary product and the very typical flavour, irrespective of all differences arising from the type, specialities of the brands and the age of the whisk(e)y. These characteristics distinguish whisk(e)y from all other spirit categories, in particular from all kinds of wine spirits or brandies such as Cognac, Armagnac, Weinbrand etc., most of which are derived from wine and have themselves a very typical trend of flavour which can be clearly distinguished from the whisk(e)y flavour. As a result, for the purpose of Article 3 (b) of Regulation (EEC) No 1983/83 whisk(e)y, in all its varieties, forms a market of its own.

25. For these reasons, a consumer looking for whisk(e)y or gin will not readily buy a spirit from another category, if no product belonging to the desired category is available. Furthermore it is in particular in view of the above-described purpose of Article 3 (b) of Regulation (EEC) No 1983/83 that the definition of separate sub-markets within the overall spirits market in the EEC is justified, since the latter has a very fragmented character with a multitude of manufacturers competing on it. Individual brands have only minimal shares of this overall market. Therefore, it is not likely that a sole distributor which manufactures only spirits belonging to other categories would on that account lessen its endeavours to promote the product in question, nor is there any danger of market-sharing arrangements. Finally, the prohibition clause concerning the resale of competing products in each of the agreements in question only refers to the respective product, i.e. whisky or gin. This demonstrates that in the view of the parties themselves there is no competitive relationship to other categories of spirit.

26. It follows that the parties to the agreements listed under Nos 1 to 17 above are not to be considered as manufacturers of equivalent goods under Article 3 (b) of Regulation (EEC) No 1983/83. The Commission can therefore declare that this Regulation applies to those agreements after 31 December 1986. In view of the importance which, it is believed, the industry concerned will attach to the interpretation of Article 3 (b) of the said Regulation, the Commission has found it appropriate to make this declaration in Article 1 of the operative part hereunder in spite of the absence of any legal obligation to do so.

Agreements Nos 18 to 21

27. In cases 18 to 21 listed above, the parties to each sole distribution agreement are mutual competitors, since both manufacture alcoholic beverages in the category to which the sole distribution agreement refers.

⁽¹⁾ See recital 10 of the Regulation.

According to Article 3 (b), read together with Article 4, Regulation (EEC) No 1983/83 therefore does not apply.

D. Article 85 (3)

28. However, the sole distribution agreements listed above in Nos 18 to 21 can benefit from individual exemptions pursuant to Article 85 (3), since the requirements of that provision are fulfilled.
29. In view of the competitive situation on the markets for whisk(e)y and gin, a case-by-case examination as provided for in recital 10 of Regulation (EEC) No 1983/83 permits the conclusion that the sole distribution agreements in question will lead to adequate improvements in distribution, even taking into account the fact that a competing spirit is being produced by the sole distributor or another company of the group to which it belongs. The respective manufacturers are able to concentrate their sales efforts on one dealer, who is familiar with the economic and legal situation in his territory. This leads to a more intensive marketing of the products and to a rationalization in distribution, since the manufacturers are not compelled to maintain business relations with a large number of dealers. It can also be expected that the consumers in the territories concerned obtain a fair share of the resulting benefit in that their supply position is improved, as they can obtain products manufactured in other countries more quickly and more easily. As the restrictions do not exceed the limits set up by Regulation (EEC) No 1983/83 they can be regarded as indispensable to the attainment of the above improvements of distribution as explained in detail in recital 8 of that Regulation. Finally there is no risk of 'eliminating competition...', given the small size of the aggregated market shares of the undertakings in question, so that all the requirements of Article 85 (3) are fulfilled.
30. The Commission can therefore grant individual exemptions for the sole distribution agreements listed above under Nos 18 to 21.

E. Duration of the exemption

31. Pursuant to Article 8 (1) of Regulation No 17, a Commission Decision in application of Article 85 (3) of the Treaty shall be issued for a specified period. Since the agreements in question were in force on 1 July 1983 and satisfy the conditions of exemption of Regulation No 67/67/EEC, Article 85 (1) of the Treaty shall not apply to them until 31 December

1986 (Article 7 of Regulation (EEC) No 1983/83). Consequently, the individual exemptions granted by this Decision shall come into force only upon expiry of that period, namely on 1 January 1987. The restrictions contained in the agreements in question are not far-reaching. Furthermore, a significant change in the structure of the markets concerned is unlikely to occur in the near future. It therefore appears justified to grant individual exemptions for a period of 10 years, beginning on 1 January 1987,

HAS ADOPTED THIS DECISION:

Article 1

It is hereby declared that the agreements listed under Nos 1 to 17 above comply with Regulation (EEC) No 1983/83.

Article 2

Pursuant to Article 85 (3) the provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable for the period 1 January 1987 to 31 December 1996 to the following sole distribution agreements (name of the parties, territory, date of agreement, product concerned):

1. Booth's Distilleries Ltd and Martini & Rossi AG, Germany, 19 August 1980, 'High & Dry' gin.
2. Tanqueray, Gordon & Company Ltd and Frans Verbunt & Co. BV, The Netherlands, 27 October 1981, six versions of 'Gordon's', gin.
3. White Horse Distillers Ltd and Corima SA, France, 3 March 1970, 'White Horse' and 'Logan' whiskies.
4. White Horse Distillers Ltd and Gilbeys of Ireland, Ireland, 29 April 1980, 'White Horse', 'Logan de Luxe', 'Glen Elgin' and 'Lagavulin' whiskies.

Article 3

This Decision is addressed to the following undertaking:

The Distillers Company plc
12, Torphichen Street
UK-Edinburgh EH3 84T
Scotland

Done at Brussels, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/27.590 – London Sugar Futures Market Limited)

(Only the English text is authentic)

(85/563/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 notification and application for negative clearance submitted on 29 June 1973 and on 20 May 1985 by the London Sugar Futures Market concerning the Rules and Regulations of the Association,

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

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

I. FACTS

The London Sugar Futures Market (LSFM) is one of many commodity markets established in London. The commodity markets are self-regulatory organizations run by Committees of Management selected by members from amongst themselves, aided by secretariats, and using powers given to them by their members in market rule books. Although the markets are self-regulating, there is an element of supervision by the Bank of England.

The object of the LSFM is to set up and to administer a futures market in London for sugar. A terminal market or a futures market provides organized facilities for concluding contracts for the purchase and sale of a commodity to be delivered at named future dates. Futures markets have been developed primarily to enable persons involved in commodity trading to protect themselves from the risks of adverse price movements.

The LSFM provides a market floor for trading and price-making, determines various technical questions such as allowable delivery months and the standard contract terms and procures the provision of clearing and settlement facilities. Trading is done on the floor of the market where dealers face each other with bids and offers being made by the system known as 'open outcry'.

There are two basic contracts currently traded under the rules of the LSFM:

- (a) The first contract is for a white beet or cane crystal sugar or refined sugar of any origin, of the crop or season current at the time of delivery, of a quality defined in detail in the contract rules. The contract price is free on board and stowed in hold at one of the following ports: Antwerp, Bremen, Calais, Copenhagen, Dunkirk, Dublin, Elmhaven, Hamburg, Hull, Immingham, Le Havre, Rotterdam, Rouen or Vlissingen.
- (b) The second contract is for raw cane sugar of a quality defined in detail in the rules and originating in certain specified countries. The contract price is free on board and stowed in hold at a United Kingdom port.

Both contracts are for lots of 50 tonnes (or any multiple of 50 tonnes). Trading is up to 15 months forward in the delivery months: March, May, August, October and December.

All contracts traded on the London Sugar Futures Market must be registered with International Commodities Clearing House Limited ('ICCH'), an independent service company which provides clearing and settlement facilities for the LSFM. ICCH has a substantial capital and reserves and is wholly owned by six clearing banks. The principal functions of ICCH are to maintain and organize 'daily clearing' of all trades and provide a guarantee for due fulfilment of contracts, in accordance with the rules of the LSFM, to clearing members in whose names such contracts are registered.

There are two main classes of membership, Full Membership and non-voting Membership. The first class is limited to 35 Full Members. The non-voting Membership is sub-divided into two classes: Overseas Affiliated Members and Associate

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 204, 13. 8. 1985, p. 5.

Members. There is no limit to the number in the class of Associate Members. The number of Overseas Affiliated Members is limited to 10 but may be increased.

Applicants for membership may be of any nationality but must satisfy certain minimum capital requirements laid down from time to time by the Committee of Management. They must furthermore be carrying on business in the sugar trade and must have done so prior to membership for a period of time also to be laid down from time to time by the Committee. Applicants for full membership must trade from an office in London established for that purpose. A detailed statement of the criteria for membership in force at any time may be obtained from the Association upon application. Membership may be transferred to another firm or company provided that other also meets the criteria for membership.

All Full Members must be members ('clearing members') of the ICCH and must register their contracts with the ICCH which, in return for its fee, guarantees the performance of the contracts.

An appeal procedure applies if the Committee of Management refuses an application for membership, refuses to grant permission for a transfer of a member's membership or refuses a change in the control or nature of the member's firm or company. The procedure also applies if a member is expelled or suspended and the member is dissatisfied with the Committee's decision. The candidate or member can ask the Committee to reconsider its decision, making such representations and supplying such information as it considers relevant.

Business concluded on the floor of the market between Full Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members but rates of commission are freely negotiable. The exemption from the obligation for Full Members to charge 'a' commission is explained by their ownership of the Market. This causes a variety of extra costs that the other categories of members do not bear because they have no ownership in the Market.

For administrative purposes and on behalf of its members, ICCH may collect a sum on account of any commission payable on any contract registrable with it. For this purpose, ICCH may, from time to time, notify its members of the rates of commission to be applied by ICCH to contracts which are registrable with it.

The international futures markets in London are the principal markets used in international commodity merchandising and they contribute to the stability and smooth operation of world trade and to world pricing mechanisms. They are also very large. As for sugar the figures below show the relative size of the LSFM compared with its two most important competitors, i.e. the futures markets for sugar in Paris and New York.

**Annual volumes of trade (lots traded)
1979 – 1984 ⁽¹⁾**

Year	London	New York	Paris
1979	885 223	1 792 723	90 907
1980	2 537 015	3 576 662	315 204
1981	1 717 636	2 470 327	218 606
1982	912 984	2 037 020	257 586
1983	1 097 356	3 201 968	336 600
1984	663 750	2 449 549	344 022

⁽¹⁾ One lot is currently 50 tonnes.

II. LEGAL ASSESSMENT

1. The notified Rules and Regulations of the LSFM are to be considered as agreements within the meaning of Article 85 of the EEC Treaty.
2. The Rules and Regulations as originally notified specified the minimum net rates of commission which could be charged by a member. The Committee had powers to suspend or expel offending members. The minimum commission rates varied according to who was paying and who was receiving the commission. The rates were cheaper for clearing clients, where the contract was registered in the client's own name with ICCH, than in the case of non-clearing clients, and where a member was the payer rather than a non-member. Full Members have the right to deal free of commission with other Full Members but when dealing for Overseas, Affiliated or Associate Members or for non-members, they had in the past to charge the minimum rates of commission specified. Associate Members, who may not deal directly with each other but must pass business through a Full Member or Affiliated Member, had in the past to pay the appropriate minimum rate of commission to the Full or Affiliated Member. Where an Associate Member dealt for his own account with a non-member he had in the past to charge the non-member at least the specified rate of commission. The Commission considered the above described system of specified minimum commission rates as a form of price-fixing that violated Article 85 (1) of the EEC Treaty. The LSFM was requested to abandon the system of fixed minimum rates. The system has now been abolished as such. References to the system in the Rules and Regulations have been deleted. The rules now provide that business concluded on the floor of the market between Full Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members. The Commission believes that this obligation is not appreciably restrictive of competition because it only entails the obligation to charge 'a' commission without any reference to the rate. It follows that complete freedom exists to negotiate the commission rates.

3. Furthermore, as a result of the representations by the Commission, other amendments were also made to the rules concerning membership so that it is now made clear on the face of the Articles that membership is open and the criteria by which applications for membership are judged are objective (see Facts, eighth paragraph, above). The Committee of Management is now required to give reasons when it takes decisions affecting the members' rights of membership. To protect the rights of actual or potential members an appeal procedure has been introduced. As an ultimate resort an appellant would have recourse to the ordinary courts under English law.

4. The publication in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 did not bring in any representations.

5. The notified Articles of Association and Rules and Regulations, in their amended form, no longer contain any clauses which constitute appreciable restrictions on competition within the common market. Therefore, the Commission, on the basis of the facts in its possession, has no grounds for action

under Article 85 (1). Consequently, the Commission is able to issue a negative clearance pursuant to Article 2 of Regulation 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Article 85 (1) of the EEC Treaty in respect of the Rules and Regulations of the London Sugar Futures Market as last notified on 20 May 1985.

Article 2

This Decision is addressed to the London Sugar Futures Market Limited whose registered office is at Cereal House, 58 Mark Lane, London EC3, United Kingdom.

Done at Brussels, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/27.591 – London Cocoa Terminal Market Association Limited)

(Only the English text is authentic)

(85/564/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 notification and application for negative clearance submitted on 29 June 1973 and 20 May 1985 by the London Cocoa Terminal Market Association concerning the Rules and Regulations of the Association,

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

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

Whereas:

I. FACTS

The London Cocoa Terminal Market Association (LCTMA) is one of many commodity markets established in London. The commodity markets are self-regulatory organizations run by Committees of Management selected by members from amongst themselves, aided by secretariats, and using powers given to them by their members in market rule books. Although the markets are self-regulating, there is an element of supervision by the Bank of England.

The object of the LCTMA is to set up and to administer a terminal market in London for cocoa. A terminal market or a futures market provides organized facilities for concluding contracts for the purchase and sale of a commodity to be delivered at named future dates. Futures markets have been

developed primarily to enable persons involved in commodity trading to protect themselves from the risks of adverse price movements.

The LCTMA provides a market floor for trading and price-making, determines various technical questions such as allowable delivery months and the standard contract terms and procures the provision of clearing and settlement facilities. Trading is done on the floor of the market where dealers face each other with bids and offers being made by the system known as 'open outcry'.

The contract currently traded on the Cocoa Market is for 10 tonnes, or a multiple of 10 tonnes, of cocoa beans of a growth and quality defined in detail in Section 4 of the Rules of the LCTMA, delivered at contract price ex-warehouse approved by the LCTMA in the United Kingdom or delivered in approved warehouses in Amsterdam, Antwerp, Hamburg or Rotterdam. Dealing is up to 15 months forward in the delivery months: March, May, July, September and December.

All contracts traded on the London Cocoa Terminal Market must be registered with International Commodities Clearing House Limited ('ICCH'), an independent service company which provides clearing and settlement facilities for the LCTMA. ICCH has substantial capital and reserves and is wholly owned by six clearing banks. The principal functions of ICCH are to maintain and organize a 'daily clearing' of all trades and provide a guarantee for due fulfilment of contracts, in accordance with the rules of the LCTMA, to Clearing Members in whose names such contracts are registered.

There are four classes of membership of the LCTMA. The first two classes of voting members are Broker Members and Home Members who are allowed to trade on the floor of the market. The rules allow a maximum of 18 Broker Members and 36 Home Members. The second two classes are (non-voting) Trade and Non-Trade Members. Their number is not limited.

The criteria specified in the Articles for Broker and Home Membership are broadly similar and require an applicant for membership to meet certain financial requirements. A detailed statement of the criteria in force at the time of application may be obtained from the Secretary. The Broker Members are individuals whereas the Home Members are companies or firms. To become a Broker Member, the

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 204, 13. 8. 1985, p. 7.

applicant must satisfy the Committee that he is carrying on business in the cocoa trade in London. To become a Home Member the candidate must be a Trade Member (or satisfy the criteria for trade membership currently in force).

All Voting Members must be members of the ICCH and must register their contracts with the ICCH which in return for its fee guarantees the performance of the contracts. Voting membership may be transferred provided that the transferee shall be elected in accordance with the Articles. Non-voting membership is not transferable. Trade Members are required to be companies, firms or individuals who in the opinion of the Committee have a *bona fide* and continuing interest in the production or manufacture of or trading in cocoa beans or cocoa products. Non-Trade Members must be companies, firms or individuals who are not eligible for Trade Membership but who are in the opinion of the Committee regular users of the London Cocoa Terminal Market.

An appeal procedure applies if the Committee of Management refuses an application for membership, refuses to grant permission for a transfer of a member's membership or refuses a change in the control or nature of the member's firm or company. The procedure also applies if a member is expelled or suspended and the member is dissatisfied with the Committee's decision. The candidate or member can ask the Committee to reconsider its decision, making such representations and supplying such information as it considers relevant.

Business concluded on the floor of the market between Broker and Home Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members but rates of commission are freely negotiable. The exemption from the obligation for Broker and Home Members to charge 'a' commission is explained by their ownership of the Market. This causes a variety of extra costs that the other categories of members do not bear because they have no ownership in the Market. Provision is made for an additional commission (equal to the original commission charged on the sale) where cocoa is tendered in fulfilment of a contract by a deliverer who is not a clearing member of ICCH in whose name the contract is registered. This extra commission is paid to the clearing member in whose name the contract is registered with ICCH. In the case of contracts open and closed on the same day, no commission is charged on the closing transaction. For administrative purposes and on behalf of its members, ICCH may collect a sum on account of any commission payable on any contract registrable with it. For this purpose, ICCH may, from time to time, notify its members of the rates of commission to be applied by ICCH to contracts which are registrable with it.

The international futures markets in London are the principal markets used in international commodity merchandising and they contribute to the stability and

smooth operation of world trade and to world pricing mechanisms. They are also very large. As for cocoa, the figures below show the relative size of the LCTMA compared with its two most important competitors, i.e. the futures markets for cocoa in Paris and New York.

Annual volumes of trade (lots traded)
1979 - 1984 ⁽¹⁾

Year	London	New York	Paris
1979	839 751	265	18 327
1980	647 307	201 662	4 623
1981	818 979	562 651	7 224
1982	626 693	607 964	7 780
1983	1 336 545	1 162 540	34 125
1984	1 317 706	1 127 752	39 180

⁽¹⁾ One lot is currently 10 tonnes.

II. LEGAL ASSESSMENT

1. The notified Rules and Regulations of the LCTMA are to be considered as agreements within the meaning of Article 85 of the EEC Treaty.
2. The Rules and Regulations as originally notified specified the minimum net rates of commission which could be charged by a member. The Committee had powers to suspend or expel offending members. The rules specified rates of commission which varied according to who was paying and who was receiving the commission, and whether or not the contract was registered in the client's own name. The rates were cheaper if the contract was registered in the client's own name with ICCH, and where a Trade Member or Non-Trade Member was the payer rather than a non-member. The rates were still lower if a Home Member was the payer, and cheapest of all for Broker Members and a sub-class of Home Members called 'City Home Members'. Broker Members have the right to deal free of commission but when dealing for Home, Trade, Non-Trade or non-members, they had in the past to charge the minimum rates of commission specified. If the broker did not trade on the floor of the market but did business through another Broker Member, he had to pay that Broker Member the stated minimum rates of commission. Home Members may deal free of commission on the floor but cannot do business for each other. These may nominate employees to act as their market representatives. If they do not operate on the floor the business must go through a Broker and they had in the past to pay the Broker the appropriate minimum rate of commission. Trade and Non-Trade Members could only deal with each other at or above the stipulated minimum rate of commission. The rules provided that Trade and

Non-Trade Members could be registered as agents who could give orders on behalf of Trade and Non-Trade Members to Broker and Home Members and the latter were permitted to return part of the commission to the agent on certain conditions. The rules provided for a sub-class of Home Member called a City Home Member who could deal through a Broker Member at a reduced rate of commission. The Commission considered the above described system of specified minimum commission rates as a form of price-fixing that violated Article 85 (1) of the EEC Treaty. The LCTMA was requested to abandon the system of fixed minimum rates. The system has now been abolished as such. References to the system in the Rules and Regulations have been deleted. The rules now provide that business concluded on the floor of the market between Broker and Home Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members. The Commission believes that this obligation is not appreciably restrictive of competition because it only entails the obligation to charge 'a' commission without any reference to the note. It follows that complete freedom exists to negotiate the actual commission rates.

3. Furthermore, as a result of the representations by the Commission, other amendments were also made to the rules concerning membership so that it is now made clear on the face of the Articles that membership is open and the criteria by which applications for membership are judged are objective (see Facts, seventh paragraph, above). The Committee of Management is now required to give reasons when it takes decisions affecting the members' rights of membership. To protect the rights of actual or potential members an appeal procedure has been introduced. As an ultimate resort an appellant would have recourse to the ordinary courts under English law.

4. The publication in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 did not bring in any representations.
5. The notified Articles of Association and Rules and Regulations, in their amended form, no longer contain any clauses which constitute appreciable restrictions on competition within the common market. Therefore, the Commission, on the basis of the facts in its possession, has no grounds for action under Article 85 (1). Consequently, the Commission is able to issue a negative clearance pursuant to Article 2 of Regulation 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Article 85 (1) of the EEC Treaty in respect of the Rules and Regulations of the London Cocoa Terminal Market Association as last notified on 20 May 1985.

Article 2

This Decision is addressed to the London Cocoa Terminal Market Association Limited whose registered office is at Cereal House, 58 Mark Lane, London EC3, United Kingdom.

Done at Brussels, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/27.592 – Coffee Terminal Market Association of London Limited)

(Only the English text is authentic)

(85/565/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 notification and application for negative clearance submitted on 29 June 1973 and on 20 May 1985 by the Coffee Terminal Market Association of London concerning the Rules and Regulations of the Association,

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

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

I. FACTS

The Coffee Terminal Market Association of London (CTMAL) is one of many commodity markets established in London. The commodity markets are self-regulatory organizations run by Committees of Management selected by members from amongst themselves, aided by secretariats, and using powers given to them by their members in market rule books. Although the markets are self-regulating, there is an element of supervision by the Bank of England.

The object of the CTMAL is to set up and to administer a terminal market in London for coffee. A terminal market or a futures market provides organized facilities for concluding contracts for the purchase and sale of a commodity to be delivered at named future dates. Futures markets have been developed primarily to enable persons involved in commodity trading to protect themselves from the risks of adverse price movements.

The CTMAL provides a market floor for trading and price-making, determines various technical questions such as allowable delivery months and the standard contract terms

and procures the provision of clearing and settlement facilities. Trading is done on the floor of the market where dealers face each other with bids and offers being made by the system known as 'open outcry'.

The contract currently traded on the Coffee Market is for 5 tonnes, or a multiple of 5 tonnes, of Sound Robusta CTMAL Standard (i.e. a quality defined in detail in Section 5 of the Rules of the CTMAL) and stored in a warehouse nominated by the CTMAL.

All contracts traded on the London Coffee Terminal Market must be registered with International Commodities Clearing House Limited ('ICCH'), an independent service company which provides clearing and settlement facilities for the CTMAL. ICCH has substantial capital and reserves and is wholly owned by six clearing banks. The principal functions of ICCH are to maintain and organize a 'daily clearing' of all trades and provide a guarantee for due fulfilment of contracts, in accordance with the rules of the CTMAL, to clearing members in whose names such contracts are registered.

The number of Floor Members of the CTMAL, the only category of members permitted to trade on the floor of the market, is limited to 35, although this number may be increased by the Association in General Meeting. There are two other classes of membership: Home Associate Members and Overseas Associate Members. Their number is unlimited. Associate Members do not have the right to attend or vote at general meetings of the CTMAL.

Applicants for membership may be of any nationality but must satisfy certain minimum capital requirements laid down from time to time by the Committee of Management. They must furthermore be carrying on business in the coffee trade and must have done so prior to membership for a period of time also to be laid down from time to time by the Committee. Applicants for floor membership must trade from an office in London established for that purpose. A detailed statement of the criteria for membership in force at any time may be obtained from the Association upon application. Membership may be transferred to another firm or company provided that other also meets the criteria for membership.

All Floor Members must be members ('clearing members') of the ICCH and must register their contracts with the ICCH which in return for its fee guarantees the performance of the contracts.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 204, 13. 8. 1985, p. 8.

An appeal procedure applies if the Committee of Management refuses an application for membership, refuses to grant permission for a transfer of a member's membership or refuses a change in the control or nature of the member's firm or company. The procedure also applies if a member is expelled or suspended and the member is dissatisfied with the Committee's decision. The candidate or member can ask the Committee to reconsider its decision, making such representations and supplying such information as it considers relevant.

Business concluded on the floor of the market between Floor Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members but rates of commission are freely negotiable. The exemption from the obligation for Floor Members to charge 'a' commission is explained by their ownership of the Markets. This causes a variety of extra costs that the other categories of members do not bear because they have no ownership in the Market. Provision is made for an additional commission (equal to the original commission charged on the sale) where coffee is tendered in fulfilment of a contract by a deliverer who is not a clearing member of ICCH in whose name the contract is registered). This extra commission is paid to the clearing member in whose name the contract is registered with ICCH. In the case of contracts open and closed on the same day, no commission is charged on the closing transaction.

For administrative purposes and on behalf of its members, ICCH may collect a sum on account of any commission payable on any contract registrable with it. For this purpose, ICCH may, from time to time, notify its members of the rates of commission to be applied by ICCH to contracts which are registrable with it.

The international futures markets in London are the principal markets used in international commodity merchandising and they contribute to the stability and smooth operation of world trade and to world pricing mechanisms. They are also very large. As for coffee, the figures below show the relative size of the CTMAL, compared with its two most important competitors, i.e. the futures markets for coffee in Paris and New York.

Annual volumes of trade (lots traded)
1979 - 1984 ⁽¹⁾

Year	London	New York	Paris
1979	1 368 052	449 799	30 569
1980	1 104 739	906 944	13 116
1981	902 531	515 302	38 130
1982	976 373	556 435	34 566
1983	836 789	427 441	9 713
1984	948 117	499 133	12 266

⁽¹⁾ One lot in London is currently 5 tonnes;
one lot in New York is currently 37 500 lb = 17 tonnes;
one lot in Paris is currently 10 tonnes.

II. LEGAL ASSESSMENT

1. The notified Rules and Regulations of the CTMAL are to be considered as agreements within the meaning of Article 85 of the EEC Treaty.
2. The Rules and Regulations as originally notified specified the minimum net rates of commission which could be charged by a member. The Committee had powers to suspend or expel offending members. The minimum commission rates varied according to who was paying and who was receiving the commission and whether or not the contract was registered in the client's own name (as opposed to non-clearing clients). The rates were cheaper if the contract was registered in the client's own name with ICCH, and where a Home Associate Member or Overseas Associate was the payer rather than a non-member. The rates were still lower if a Floor Member was the payer.

Floor Members have the right to deal free of commission but when dealing for House Associate or Overseas Associate Members or for non-members, they had in the past to charge the minimum rates of commission specified. A Floor Member unable at any time to operate on the floor himself, had to place any business he wished to transact through another Floor Member and pay the appropriate minimum rate of Commission laid down in the Regulations. Home Associate and Overseas Associate Members could only deal with each other at or above the stipulated minimum rate of commission. The Commission considered the above described system of specified minimum commission rates as a form of price-fixing that violates Article 85 (1) of the EEC Treaty. The CTMAL was requested to abandon the system of fixed minimum rates. The system has now been abolished as such. References to the system in the Rules and Regulations have been deleted. The rules now provide that business concluded on the floor of the market between Floor Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members. The Commission believes that this obligation is not appreciably restrictive of competition because it only entails the obligation to charge 'a' commission without any reference to the rate. It follows that complete freedom exists to negotiate the actual commission rates.

3. Furthermore, as a result of the representations by the Commission, other amendments were also made to the rules concerning membership so that it is now made clear on the face of the Articles that membership is open and the criteria by which applications for membership are judged are objective (see Facts, seventh paragraph, above). The Committee of Management is now required to give reasons when it takes decisions affecting the members' rights of membership. To protect the rights of actual or

potential members an appeal procedure has been introduced. As an ultimate resort an appellant would have recourse to the ordinary courts under English law.

4. The publication in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 did not bring in any representations.
5. The notified Articles of Association and Rules and Regulations, in their amended form, no longer contain any clauses which constitute appreciable restrictions on competition within the common market. Therefore, the Commission, on the basis of the facts in its possession, has no grounds for action under Article 85 (1), Consequently, the Commission is able to issue a negative clearance pursuant to Article 2 of Regulation 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Article 85 (1) of the EEC Treaty in respect of the Rules and Regulations of the Coffee Terminal Association of London as last notified on 20 May 1985.

Article 2

This Decision is addressed to The Coffee Terminal Market Association of London Limited whose registered office is at Cereal House, 58 Mark Lane, London EC3, United Kingdom.

Done at Brussels, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.593 – London Rubber Terminal Market Association Limited)

(Only the English text is authentic)

(89/566/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 notification and application for negative clearance submitted on 29 June 1973 and 20 May 1985 by the London Rubber Terminal Market Association concerning the Rules and Regulations of the Association,

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

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

Whereas:

I. FACTS

The London Rubber Terminal Market Association (LRTMA) is one of many commodity markets established in London. The commodity markets are self-regulatory organizations run by Committees of Management selected by members from amongst themselves, aided by secretariats, and using powers given to them by their members in market rule books. Although the markets are self-regulating, there is an element of supervision by the Bank of England.

The object of the LRTMA is to set up and to administer a terminal market in London for rubber. A terminal market or a futures market provides organized facilities for concluding contracts for the purchase and sale of a commodity to be delivered at named future dates. Futures markets have been developed primarily to enable persons involved in commodity trading to protect themselves from the risks of adverse price movements.

The LRTMA provides a market floor for trading and price-making, determines various technical questions such as allowable delivery months and the standard contract terms and procures the provision of clearing and settlement facilities. Trading is done on the floor of the market where dealers face each other with bids and offers being made by the system known as 'open outcry'.

The contract currently traded on the Rubber Market is for 5-tonne lots (where delivery is in a single month) or 15-tonne lots (where delivery is in a calendar quarter) (or multiples thereof) of Hevea Brasiliensis Plantation Rubber Rubbed Smoked Sheet. Rubber deliverable against the contract must be of a certified quality and the contracts are for delivery at a warehouse approved by the Rubber Trade Association of London in the United Kingdom, the Netherlands, or West Germany at the sellers' option.

All contracts traded on the London Rubber Terminal Market must be registered with International Commodities Clearing House Limited ('ICCH'), an independent service company which provides clearing and settlement facilities for the LRTMA. ICCH has substantial capital and reserves and is wholly owned by six clearing banks. The principal functions of ICCH are to maintain and organize a 'daily clearing' of all trades and provide a guarantee for due fulfilment of contracts, in accordance with the rules of the LRTMA, to clearing members in whose names such contracts are registered.

There are four classes of membership. The first two classes are voting members known as Floor Members and consist of Broker Members and Dealer Members. Their number is limited by the Committee to the practical maximum for the orderly conduct of the business. The present number is 10 Broker Members and 23 Dealer Members. The second two classes are non-voting members: Trade Associate Members and several types of Associate Members. Their number is not limited.

Applicants for membership may be of any nationality but must satisfy certain minimum capital requirements laid down from time to time by the Committee of Management. They must furthermore be carrying on business in the rubber trade and must have done so prior to membership for a period of time also to be laid down from time to time by the Committee. Applicants for Floor Membership must trade from an office in London established for that purpose. A detailed statement of the criteria for membership in force at any time may be obtained from the Association upon application. Membership may be transferred to another firm or company

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 204, 13. 8. 1985, p. 9.

provided that other also meets the criteria for membership.

All Floor Members must be members ('clearing members') of the ICCH and must register their contracts with the ICCH which, in return for its fee, guarantees the performance of the contracts.

An appeal procedure applies if the Committee of Management refuses an application for membership, refuses to grant permission for a transfer of member's membership or refuses a change in the control or nature of the member's firm or company. The procedure also applies if a member is expelled or suspended and the member is dissatisfied with the Committee's decision. The candidate or member can ask the Committee to reconsider its decision, making such representations and supplying such information as it considers relevant.

Business concluded on the floor of the market between Floor Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members but rates of commission are freely negotiable. The exemption from the obligation for Floor Members to charge 'a' commission is explained by their ownership of the Market. This causes a variety of extra costs that the other categories of members do not bear because they have no ownership in the Market. Provision is made for an additional commission (equal to the original commission charged on the sale) where rubber is tendered in fulfilment of a contract by a deliverer who is not a clearing member of ICCH in whose name the contract is registered. This extra commission is paid to the clearing member in whose name the contract is registered with ICCH.

For administrative purposes and on behalf of its members, ICCH may collect a sum on account of any commission payable on any contract registrable with it. For this purpose, ICCH may, from time to time, notify its members of the rates of commission to be applied by ICCH to contracts which are registrable with it.

The international futures markets are the principal markets used in international commodity merchandising and they contribute to the stability and smooth operation of world trade and to world pricing mechanisms. They are also very large. However, as for rubber the volumes of trade are now very small. There is a significant market in Malaysia for rubber. The figures below show the relative size of the LRTMA compared with the futures market in Kuala Lumpur that opened in 1983.

Annual volumes of trade 1980 to 1984

(in tonnes)

Year	London	Kuala Lumpur
1980	2 307 405	—
1981	1 241 325	—
1982	1 412 600	—
1983	897 205	43 100
1984	151 910	316 875

II. LEGAL ASSESSMENT

1. The notified Rules and Regulations of the LRTMA are to be considered as agreements within the meaning of Article 85 of the EEC Treaty.
2. The Rules and Regulations as originally notified specified the minimum net rates of commission which could be charged by a member. The Committee had powers to suspend or expel offending members. The minimum commission rates varied according to who was paying and who was receiving the commission. The rates were cheaper for clearing clients, where the contract was registered in the client's own name with ICCH, than in the case of non-clearing clients, and where a Trade Member was the payer rather than a non-member. The rates were cheapest for Broker Members. Broker Members have the right to deal free of commission but when dealing on behalf of Broker, Dealer or Associate Members, they had in the past to charge at least the minimum rates of commission specified. Broker Members could not trade for their own account. Dealer Members may deal free of commission on the floor but cannot do business for another Floor Member. When dealing on behalf of Associate and non-members, Dealer Members had in the past to charge the relevant minimum rate of Commission. Associate Members may deal direct with each other but must pass all contracts through a Broker or Dealer Member and had in the past to pay the relevant minimum commission. They also had to charge non-members the appropriate minimum commission. The minimum rate of commission charged on all Terminal Contracts traded in a single month of the first delivery quarter was one-third of the usual rate, charged per 5-tonne lot. Subject to certain conditions, a Floor Member could return certain specified sums to any agent who gave orders on behalf of a client. The Commission considered the above-described system of specified minimum commission rates as a form of price-fixing that violated Article 85 (1) of the EEC Treaty. The LRTMA was requested to abandon the system of fixed minimum rates. The system has now been abolished as such. References to the system in the Rules and Regulations have been deleted. The rules now provide that business concluded on the floor of the market between Floor Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members. The Commission believes that this obligation is not appreciably restrictive of competition because it only entails the obligation to charge 'a' commission without any reference to the rate. It follows that complete freedom exists to negotiate the actual commission rates.
3. Furthermore, as a result of the representations by the Commission, other amendments were also made to the rules concerning membership so that it is now made clear on the face of the Articles that membership is open and the criteria by which applications for

membership are judged are objective (see Facts, seventh paragraph, above). The Committee of Management is now required to give reasons when it takes decisions affecting the members' rights of membership. To protect the rights of actual or potential members an appeal procedure has been introduced. As an ultimate resort an appellant would have recourse to the ordinary courts under English law.

4. The publication in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 did not bring in any representations.
5. The notified Articles of Association and Rules and Regulations, in their amended form, no longer contain any clauses which constitute appreciable restrictions on competition within the common market. Therefore, the Commission, on the basis of the facts in its possession, has no grounds for action under Article 85 (1). Consequently, the Commission is able to issue a negative clearance pursuant to Article 2 of Regulation 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Article 85 (1) of the EEC Treaty in respect of the Rules and Regulations of the London Rubber Terminal Market Association as last notified on 20 May 1985.

Article 2

This Decision is addressed to The London Rubber Terminal Market Association Limited whose registered office is at Cereal House, 58 Mark Lane, London EC3, United Kingdom.

Done at Brussels, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission